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The History of the Civil Procedure Course: A Study in Evolving Pedagogy

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THE HISTORY OF THE CIVIL PROCEDURE COURSE: A Study In Evolving Pedagogy

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"Plus ça change, plus c'est la même chose."[†]

"Those who do not remember the past are condemned to relive it."[‡]

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[†] The more things change, the more they stay the same. ALPHONSE KARR, *LES GUÊPES* (1849), *reprinted in* JOHN BARTLETT, *FAMILIAR QUOTATIONS* 443 (Justin Kaplan ed., 16th ed. Little, Brown & Co. 1992).

[‡] GEORGE SANTAYANA, *THE LIFE OF REASON* (1905-06), *reprinted in* RHODA THOMAS TRIPP, *THE INTERNATIONAL THESAURUS OF QUOTATIONS* 459 (1970).

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INTRODUCTION¹

When then-Professor Karen Nelson Moore² asked me to research the history of the Civil Procedure course for the most recent Association of American Law Schools Conference on Civil Procedure, I was a bit surprised at the topic. Despite what my students seem to think nowadays, I was a law student in what I consider to be the “modern” era and did not know much about the procedure courses of earlier times.³ Upon reflection, however, I was glad of the assignment, because exploring our roots is often rewarding. In addition, at the time Judge Moore spoke to me, I was chair of my law school’s Curriculum Committee. We were undertaking a thorough review of our curriculum. One part of the committee’s work was to determine why we required the courses we did. Research on my assigned topic for the AALS conference dovetailed with my committee work to uncover answers to that question. I found, for instance, that the basic configuration of our first-year curriculum had been heralded as Harvard’s new curriculum—in 1938.⁴

My law school is hardly unique in following the tried and true methods of the Harvard Law School. Harvard has dominated the curriculum of

1. I delivered a summary of the preliminary research for this article at the AALS Conference on Civil Procedure in Washington, D.C., on June 17, 1995.

2. Karen Nelson Moore was on the faculty of Case Western Reserve University Law School from 1977 until 1995, *see* THE AALS DIRECTORY OF LAW TEACHERS 1994-95, 669, when she was appointed to the U.S. Circuit Court of Appeals for the Sixth Circuit, *see* 63 U.S.L.W. 2608 (1995). Judge, then-Professor, Moore was chair of the planning committee for the 1995 AALS Conference on Civil Procedure. *See* Flyer, AALS Conference on Civil Procedure, June 14-17, 1995, Washington, D.C.

3. I received my J.D. in 1980.

4. The “new” Harvard curriculum of 1938 required the following course of study in the first year:

First Half Year	Second Half Year
Judicial Remedies (3 hours)	Judicial Remedies (2 hours)
Criminal Law (2 hours)	Agency (3 hours)
Torts (3 hours)	Torts (2 hours)
Contracts I (2 hours)	Contracts I (3 hours)
Property I (3 hours)	Property I (3 hours)

See Sidney Post Simpson, *The New Curriculum of the Harvard Law School*, 51 HARV. L. REV. 965, 975-77 (1938). Until 1995, the Widener first year was the same with a few minor alterations. The students were given an extra hour of Contracts in the fall and an extra hour of Civil Procedure (Judicial Remedies) in the spring. Agency was replaced by Criminal Procedure. In addition, the students were given two hours a semester of Legal Methods. *See* 1994-95 WIDENER UNIVERSITY SCHOOL OF LAW STUDENT HANDBOOK § 201. In 1938, Harvard had not thought this last subject worthy of academic attention. *See* Simpson, *supra*, at 982-83.

American law schools since the time of Dean Langdell.⁵ In fact, this dominance has been such that schools failed to follow Harvard's lead at their peril. For example, the University of Virginia Law School rejected the Socratic method—for the most part—until the 1930s.⁶ A history of that school notes that this rejection “had an adverse effect on the prestige and reputation of the University of Virginia Law School in law school circles. Virginia was thought by the faculties of a number of law schools to be out of step with recent developments and advances in legal education.”⁷

American courses in Pleading and Practice—precursors to the modern Civil Procedure course—likewise reflected the dominance of Harvard. Unfortunately, although Harvard's Socratic method was new, the content of its procedure course before the modern era was not. As Charles E. Clark, dean of that *other* law school—the one in New Haven⁸—noted in 1939, “the general field of civil pleading and procedure is the one field which the Harvard Law School over the years has failed to treat in the grand manner, and . . . this omission has had profound effects in making our law administration—until recently—technical, particularistic, and backward.”⁹

5. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 39 (1983); Lee C. Bollinger, *The Mind in the Major American Law School*, 91 MICH. L. REV. 2167, 2173 (1993); Peter Charles Hoffer, *Text, Translation, Context, Conversation, Preliminary Notes for Decoding the Deliberations of the Advisory Committee that Wrote the Federal Rules of Civil Procedure*, 37 AM. J. LEGAL HIST. 409, 421 (1993); James P. Rowles, *Toward Balancing the Goals of Legal Education*, 31 J. LEGAL EDUC. 375, 378 (1981). Harvard's influence actually predates Langdell. See *infra* notes 49-53 and accompanying text.

6. See JOHN RITCHIE, *THE FIRST HUNDRED YEARS* 56 (1978).

7. *Id.*; see Albert Coates, *A Century of Legal Education*, 24 N.C. L. REV. 307, 355 (1946) (noting pressure felt by North Carolina to bring its school in line with “leading law schools”). “Prestigious” law firms may have helped create this pressure:

At about the turn of the century, a number of the new corporate partnerships became convinced that Harvard Law School provided the most effective preparation for their type of practice. As a result, Harvard Law graduates initially received higher salaries than graduates of other law schools. . . . Law schools desirous of preparing their graduates to serve in the best-paying firms were inclined to follow Harvard's lead.

JOEL SELIGMAN, *THE HIGH CITADEL* 44 (1978). See generally WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 79-109 (1994).

8. Charles E. Clark was dean of the Yale Law School from 1929 until 1939, when he was appointed to the U.S. Circuit Court of Appeals for the Second Circuit. See 30 WHO'S WHO IN AMERICA 515 (1958).

9. Charles E. Clark, Book Review, 8 FORDHAM L. REV. 293, 293 (1939). The Federal Rules of Civil Procedure were promulgated just the year before. Dean Clark had been the architect of those rules and was the Reporter of the Advisory Committee, which drafted them. For an in-depth discussion of the drafting of the Federal Rules of Civil Procedure and Dean Clark's role in that process, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). See also Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example*

The story of the American course in civil procedure is very much the story of Harvard's approach to the subject. If we are to understand how Harvard developed its course, however, we need to start at the beginning. In Part I of the Article, I describe the pre-Langdellian law school and its procedure course, showing that it was very practical and extremely useful to the new lawyer. In Part II, I detail the changes wrought by Langdell and his new faculty. Here, I reveal the irony in Langdell's reforms: he revolutionized the teaching of law, yet left in place an out-moded procedure course, Pleading. Thus, by the turn of the twentieth century, the introductory course on procedure had been transformed from a practical course to one that was of little use to a practitioner.

Then in Part III, I discuss the efforts in the twentieth century to revise the procedure course, ending in 1953, when the modern era began. Proceduralists made two major strides forward in this century that took the course from the old Pleading course to the one we teach today. First, several pathbreakers added more subjects to the course, turning it into Civil Procedure. Second, in 1953, Richard H. Field and Benjamin Kaplan federalized the course, which included adding such topics as federal jurisdiction and the *Erie* doctrine to it. That course has been with us from that day to this. Finally, I conclude the Article with some reflections on the future of the Civil Procedure course. These reflections are not meant to end the debate on the appropriate shape of the course, but rather to pose questions raised by my findings and suggest new avenues of inquiry for future work.¹⁰

One final note before I begin: this Article tells the story of the evolution of the modern Civil Procedure course. As such, the Article does not detail what every law school was doing at every moment to teach procedure. I have only given the account of the direct ancestors of the course we teach today. Given the rather hierarchical nature of our legal community, it should not be surprising, therefore, that the focus is primarily on what was done at the so-called "leading" law schools.

of the *Unexamined Faith in Federal Rules of Civil Procedure 1*, 75 B.U. L. REV. 1325, 1331-46 (1995) (detailing the role of Dean Clark and the Advisory Committee in the drafting of Rule 1).

10. One line of inquiry left, for example, is to examine the change in the contemporary conceptualization of litigation or education behind the major shifts in the focus of the course. That knowledge, in turn, will help us recognize if and when a shift in focus should next occur.

I. THE EARLIEST AMERICAN COURSE IN CIVIL PROCEDURE

A. *The Practice Origins of Early American Law Schools*

Despite the current position of most American law schools within the academic community, the original law schools were trade schools, not affiliated with universities. There were courses in law at early American colleges, but they did not, in general, provide a route to the practice of law. In the late eighteenth century, a number of colleges in the new Republic instituted professorships of law, as opposed to separate law schools.¹¹ The course of study under most—but not all—of these teachers, however, was about “the theory rather than the practice of law.”¹² Such study was meant “to furnish a rational and useful entertainment to gentlemen of all professions,”¹³ not to train practitioners.¹⁴ Although, for example, Transylvania University’s Law department was “intended for other than under graduates,”¹⁵ in the early years

11. George Wythe, the first American law professor, was appointed Professor of Law and Police at the College of William and Mary in 1779. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 320 (2d ed. 1985); STEVENS, *supra* note 5, at 4; Paul D. Carrington, *The Missionary Diocese of Chicago*, 44 J. LEGAL EDUC. 467, 470 (1994); Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.-KENT L. REV. 429, 441-42 (1981). Other early professorships of law were instituted at the College of Philadelphia (the University of Pennsylvania) (1790), Brown College (1790), King’s College (Columbia College) (1793), Princeton (1795), the University of Transylvania (c. 1799), Yale College (c. 1801), Middlebury (1806), the University of Maryland (c. 1812), Harvard (1815), and the University of Virginia (1825). See FRIEDMAN, *supra*, at 320; STEVENS, *supra* note 5, at 4-5, 11-12 n.15, 17 n.50; Stein, *supra*, at 442. For a more detailed discussion of early professorships, see ALBERT J. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 23-28 (1953), and CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 341-65 (1913).

12. Stein, *supra* note 11, at 442.

13. FRIEDMAN, *supra* note 11, at 320 (quoting James Wilson, who projected a series of lectures at the University of Pennsylvania). One historian concluded:

Some [of these early professors] followed the academic model that President Ezra Stiles of Yale had set out in 1777 in justification of teaching law in the colleges: “It is scarcely possible to enslave a Republic where the Body of the People are Civilians, well instructed in their Laws, Rights and Liberties.”

STEVENS, *supra* note 5, at 4 (citation omitted).

14. See FRIEDMAN, *supra* note 11, at 320-21; STEVENS, *supra* note 5, at 4-5; Stein, *supra* note 11, at 442. There were exceptions. The law courses at William and Mary and the University of Transylvania were more practical. See Stein, *supra* note 11, at 442. In addition, “James Kent’s approach at Columbia . . . was more professional in content,” and the instruction given by Harvard’s first law professor was “vocational.” STEVENS, *supra* note 5, at 4. For a very interesting discussion of the approach of early American law teachers, see Carrington, *supra* note 11, at 469-72.

15. Charles Kerr, *Transylvania University’s Law Department*, 31 AMERICANA 7, 7 (1937).

of the American Republic, young men¹⁶ generally entered the practice of law after a period of apprenticeship.¹⁷ In turn, legal historians have found that “[f]ormalized apprenticeship . . . led to the establishment of private law schools. [These schools] were generally outgrowths of the law offices of practitioners who had shown themselves to be particularly skilled, or popular, as teachers.”¹⁸

16. Although there had been a woman lawyer in the colonies, no woman was admitted to the bar of one of the states until 1869. See Karen Berger Morello, *Women's Entry into the Legal Profession*, 32 AM. U. L. REV. 623, 624 (1983). In that year, Iowa first admitted a woman, Arabella Mansfield, to its bar. See *id.*; Christine M. Wiseman, *The Legal Education of Women: From "Treason Against Nature" to Sounding a "Different Voice,"* 74 MARQ. L. REV. 325, 329 (1991). Missouri soon followed suit, admitting Lemma Barkeloo in 1870. See *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 682 (1993). The first female law school graduates were Ada H. Kepley (Chicago's Union College of Law, now Northwestern University Law School, 1870), Pheobe Couzins (University Law School, St. Louis, 1871), Sara Kilgore Wertman (University of Michigan, 1871), and Charlotte E. Ray (Howard, 1872). See Elizabeth K. Maurer, *The Sphere of Carrie Burnham Kilgore*, 65 TEMP. L. REV. 827, 832 (1992); J. Clay Smith, Jr., *Faith or Foolishness, Emancipation: The Making of the Black Lawyer 1844-1944*, 11 HARV. BLACKLETTER J. 169, 171 (1994); Leah Taylor, *Women in Law*, 54 ALA. LAW. 373, 374 n.7 (1993). Women were not welcomed to the legal profession with "open arms," however, see, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (upholding statute that denied women the right to practice law), and their progress was slow. It was not until 1917 that Mary Lathrop became the first woman admitted to the American Bar Association. By the 1920s, however, every state bar was open to women, and over 100 law schools admitted women. See Virginia G. Drachman, *The New Woman Lawyer and the Challenge of Sexual Equality in Early Twentieth-Century America*, 28 IND. L. REV. 227, 227 (1995) (noting that every state bar was open to women by 1920); cf. DELAWARE STATE BAR ASS'N, *THE DELAWARE BAR IN THE TWENTIETH CENTURY* 641 (Helen L. Winslow ed., 1994) (noting that the first women were admitted to the Delaware bar in 1923).

17. See FRIEDMAN, *supra* note 11, at 318; STEVENS, *supra* note 5, at 3. "[O]f the thirteen original states, only [Virginia] had no prescribed period of training at all." STEVENS, *supra* note 5, at 3. One historian has found that, through the middle of the nineteenth century, "the main path to practice still went through apprenticeship, for the overwhelming majority of lawyers." FRIEDMAN, *supra* note 11, at 322; see WARREN, *supra* note 11, at 164-65, 170 (discussing apprenticeship in the colonies). This route to practice changed in the second half of the nineteenth century, however. Another historian disclosed: "Some states had abolished or reduced the requirements for apprenticeship even before 1830. . . . By 1840, it was required by not more than eleven out of thirty jurisdictions. By 1860, it was required in only nine of thirty-nine jurisdictions." STEVENS, *supra* note 5, at 7-8 (endnotes omitted). While "[t]housands of the lawyers practicing in 1900 still had come from this rough school of experience[.]" . . . by 1900 it was quite clear that the law schools would come to dominate legal education." FRIEDMAN, *supra* note 11, at 606.

18. STEVENS, *supra* note 5, at 3; accord FRIEDMAN, *supra* note 11, at 318-19; Stein, *supra* note 11, at 442-43. Professor Stein explains the rise of these schools as follows:

With the universities concentrating on the theory rather than the practice of law, with the option of attendance at the Inns of Court [in London] essentially cut off, and with the inadequacies of the clerking system becoming more apparent, the pressures of the market led to the founding of small, private law schools, which thrived for perhaps thirty-five years.

The education received at the proprietary law schools was very different from that found in most of the early university law courses. This distinction led one historian to comment, "[i]n a very real sense the dichotomy between the teaching of law as a liberal and liberating study and the teaching of law as a technical and professional study was already established."¹⁹ The proprietary schools and the more practical of the university courses, like the ones at William and Mary and Transylvania,²⁰ were more successful in attracting students than the more theoretical university courses.²¹ Not surprisingly, universities began to affiliate with proprietary schools or to imitate them by founding their own practice-oriented law schools staffed by judges or practitioners.²² Harvard, in 1817, established the first university-

Id. at 442. The first and most successful such school was the Litchfield School, founded circa 1784 in Litchfield, Connecticut, by Judge Tapping Reeve. See FRIEDMAN, *supra* note 11, at 319; STEVENS, *supra* note 5, at 3-4; WARREN, *supra* note 11, at 357-61; Stein, *supra* note 11, at 443. For a more detailed discussion of Litchfield, see HARNO, *supra* note 11, at 28-32. For other early proprietary schools, see STEVENS, *supra* note 5, at 13 nn.21 & 26, 42 n.5. See generally WARREN, *supra* note 11, at 341-65.

19. STEVENS, *supra* note 5, at 5.

20. See *supra* note 14 and text accompanying note 15.

21. As one historian found, "[t]he truth . . . is that the overall efforts by the colleges to develop law as a scholarly study were not a success. Professorships frequently lapsed or remained sinecures, and serious professional training took place at the private law schools like Litchfield." STEVENS, *supra* note 5, at 5; accord HARNO, *supra* note 11, at 27 (describing early programs "failures"); see WARREN, *supra* note 11, at 358-59 (detailing both the number of students who attended Litchfield and their success at the bar); see also FRIEDMAN, *supra* note 11, at 321-22 (noting that Harvard "was a somewhat different animal, and it proved more permanent than the lectureships at this or that college"); STEVENS, *supra* note 5, at 4 (noting the relative success of the "vocational efforts" at Harvard).

22. See FRIEDMAN, *supra* note 11, at 609. The more theoretical professorships were staffed by judges or practitioners, too. The new college-connected law schools, however, were specifically founded to train practitioners, not to educate gentlemen.

The ideal of the educated gentleman was not completely forsaken, however. For example, when the University of Georgia Law School announced its opening in 1858, it sought not only future practitioners. It invited matriculation from "young men who intend to devote themselves to the honorable employment of cultivating the estates they inherit from their fathers. To them a knowledge of the general principles of law is of inestimable value." STEVENS, *supra* note 5, at 21 (quoting UNIVERSITY OF GEORGIA, LAW DEPARTMENT, ANNOUNCEMENT (ATHENS 1859)). At the same time, New York University appealed to the

thousands of young men in the United States who are in possession, or will come into possession, of large estates. Many of these young men do not design to practice any profession, but nearly all are anxious to avail themselves of the advantages conferred by admission to some one of the learned professions.

Id. (quoting NEW YORK UNIVERSITY, LAW DEPARTMENT, ANNUAL ANNOUNCEMENT OF LECTURES, 1858-59, at 9-10). As late as 1887, Yale offered a degree "for those not intending to enter any active business or professional career but who wish to acquire an enlarged acquaintance with our political and legal systems, and the rules by which they are governed." *Id.* at 39 (quoting FREDERICK C. HICKS, YALE LAW SCHOOL: 1869-1894, at 36 (1937)).

affiliated law school, as opposed to a professorship,²³ and, during the second quarter of the nineteenth century, other colleges did the same.²⁴

B. Practice Courses in Early American Law Schools

Education in early American law schools generally consisted of lectures or recitations on material assigned from available legal texts.²⁵ Instruction often began with Blackstone and would include other major treatises.²⁶ The pupils would study one text or topic at a time—*seriatim*—until

23. “[I]t was Harvard that gave the signal for encouraging a merely nominal connection between the college and the bar. She lent the prestige of her name to the doctrine that calling a practitioner a university professor is equivalent to making his proprietary law class a university school” ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 140 (photo. reprint 1976) (1921). The first law professor at Harvard, Isaac Parker, the chief justice of Massachusetts, was appointed in 1815, and in his inaugural address he proposed a law school at Harvard along the lines of Litchfield. See HARNO, *supra* note 11, at 35-36. Not surprisingly, his teaching was “vocational.” STEVENS, *supra* note 5, at 4. Parker’s dream became reality with the founding of the Harvard Law School in 1817, and it was of the same type as the Litchfield School. See HARNO, *supra* note 11, at 37; ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 31 n.3 (1938). Even in 1829, when Harvard brought in Justice Joseph Story to be a scholar, the school also brought in “John Ashmun—from the Northampton Law School—to provide students.” STEVENS, *supra* note 5, at 5; see also FRIEDMAN, *supra* note 11, at 321-22 (discussing early days of Harvard Law School).

24. See HARNO, *supra* note 11, at 37-39; STEVENS, *supra* note 5, at 5. For example, Yale absorbed a proprietary law school in 1824, see STEVENS, *supra* note 5, at 5, Tulane absorbed one in 1847, see *id.*, Dickinson affiliated with a proprietary law school in 1833, see *id.* at 15-16 n.47, and the University of North Carolina took over such a school in 1845, see *id.* at 5, 13 n.28; Coates, *supra* note 7, at 328-29. Colleges that established their own law schools include Princeton, which “established a law school in 1846, run by local practitioners and judges,” STEVENS, *supra* note 5, at 8, and Marshall College, which, between 1838 and 1848, “ran a law school paying its professor . . . out of student fees,” *id.* at 15-16 n.47. The law schools of the University of Chicago and Northwestern also trace their origins to a proprietary school. See FRANK L. ELLSWORTH, *LAW ON THE MIDWAY: THE FOUNDING OF THE UNIVERSITY OF CHICAGO LAW SCHOOL* 12-13, 15, 18 (1977).

25. See HARNO, *supra* note 11, at 51; Arthur D. Austin, *Is the Casebook Method Obsolete?*, 6 WM. & MARY L. REV. 157, 159 (1965) (“Primarily as a result of Judge Reeve’s *Litchfield School*, the lecture system eventually became the major method of educating law students.”). As to the teaching method at Litchfield, see FRIEDMAN, *supra* note 11, at 319-20; HARNO, *supra* note 11, at 30; Stein, *supra* note 11, at 443. At Harvard, a slightly different method of study was used. Instruction was built around texts rather than lectures on a particular subject. See FRIEDMAN, *supra* note 11, at 610; Austin, *supra*, at 160 (discussing textbook method); Stein, *supra* note 11, at 446-47; see also Stein, *supra* note 11, at 442 (discussing teaching method at Virginia).

A few schools used the Socratic method at this time. See FRIEDMAN, *supra* note 11, at 611; HARNO, *supra* note 11, at 54; STEVENS, *supra* note 5, at 13 n.21. “But case study and case instruction as an exclusive, all-absorbing educational method came in with Langdell.” HARNO, *supra* note 11, at 54.

26. “Blackstone continued to be the student’s first work in the law office and in most law schools until the end of the nineteenth century” POUND, *supra* note 23, at 25; see, e.g.,

they had completed their legal training.²⁷ This program generally took one or two years,²⁸ that is if the student stayed for the full cycle of lectures. Since law school was not a requirement for the practice of law, aspiring lawyers often began their studies in the middle of the curriculum and did not always stay for the full cycle.²⁹ Instead, apprenticeship was the most common means of admission to the bar.³⁰

Assuming that an aspiring lawyer attended law school, what would he study? In 1921, at the behest of the American Bar Association, Alfred Z. Reed³¹ published an analysis of early legal education in the United States.³² He examined early law school curricula and found that “[t]he working classifications devised by early law schools were of two main types, according as a narrowly technical or an ambitiously broad field of study was contemplated.”³³

Whichever model a law school followed, instruction in civil procedure was integral to the curriculum. Reed discovered that a student who completed law school probably devoted ten to twenty percent of his time to studying

ELLSWORTH, *supra* note 24, at 12 (noting use of Blackstone at Chicago); FRIEDMAN, *supra* note 11, at 320 (noting use at Litchfield and William and Mary); STEVENS, *supra* note 5, at 3 (noting use at Litchfield); Coates, *supra* note 7, at 329 (noting use at North Carolina); Stein, *supra* note 11, at 442-43 (noting use at Litchfield, Virginia, and William and Mary).

27. See FRIEDMAN, *supra* note 11, at 612; HARNO, *supra* note 11, at 52; Stein, *supra* note 11, at 446-47.

28. See FRIEDMAN, *supra* note 11, at 609; HARNO, *supra* note 11, at 51. For example, the program of study at Litchfield was 14 months. See FRIEDMAN, *supra* note 11, at 320.

29. See FRIEDMAN, *supra* note 11, at 612; STEVENS, *supra* note 5, at 15 n.46; Stein, *supra* note 11, at 446. “[I]t was said that the best students left for practicing attorneys’ offices since all that the law school was a glorified law office.” *Id.*

30. See FRIEDMAN, *supra* note 11, at 322; HARNO, *supra* note 11, at 39, 49, 52.

31. Alfred Z. Reed was a non-lawyer staff member of the Carnegie Foundation, which the American Bar Association “induced . . . to undertake a study of legal education.” John Henry Schlegel, *Law and Endangered Species: Is Survival Alone Cause for Celebration?*, 28 IND. L. REV. 391, 404 (1995).

32. See generally REED, *supra* note 23.

33. *Id.* at 453. For a discussion of the two types of classifications, see *id.* at 453-55.

pleading and practice.³⁴ The vast majority of that time was spent on common law pleading.³⁵

The early course on Pleading was very different from our study of the subject today.³⁶ It included not only an examination of the rules of a much more complicated system of pleading, but also instruction in the various forms of action. It was in Pleading that the students would learn the differences between debt and assumpsit, for example. Thus, the basic procedural course included a large amount of what we regard as substantive material today. One historian noted that this organization of the law “will disconcert the modern reader.”³⁷ He reminded us, however, that “substantive and adjective law were far from disentangled [at that time].”³⁸

The students’ exposure to pleading consisted of reading the popular text books on the subject, which included Blackstone,³⁹ Chitty’s Pleading,⁴⁰ and Stephen’s Pleading.⁴¹ The actual practice of drafting the writs, for example, generally came during apprenticeship.⁴²

Faculty did not stop to ask—as we do today⁴³—“Why do we teach this course?” or “Should it be required?” James Gould, one of the first law

34. See *id.* at 453-54. This figure does not include Evidence, which Reed understandably treated as procedure. Proceduralists, however, have not generally considered Evidence as part of their subject. In the twentieth century, when various procedure courses were being merged into Civil Procedure, see *infra* notes 171-215 and accompanying text, Evidence was considered distinct. See Austin W. Scott, Book Review, 41 HARV. L. REV. 416, 417 (1928) (noting that although “[t]here is still . . . a difference of opinion on the question whether Pleading should be taught as an integral part of Civil Procedure or whether it should be taught separately, . . . there is a general agreement that the subject of Evidence is so distinct that it should be given in a separate course.”) This distinction is maintained today. Evidence will therefore not be dealt with further in this Article.

35. See REED, *supra* note 23, at 453 (noting that little if any practice was taught at various early law schools).

36. For an example of what would have been covered in an early course on Pleading, see JAMES GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS (photo. reprint 1972) (Boston, Lilly & Wait 1832).

37. John H. Langbein, *Introduction* to 3 WILLIAM BLACKSTONE, COMMENTARIES iii, iii (photo. reprint 1979) (1st ed. 1768).

38. *Id.*

39. See 3 WILLIAM BLACKSTONE, COMMENTARIES.

40. See JOSEPH CHITTY, A TREATISE ON PLEADING, AND PARTIES TO ACTIONS (10th Am. ed., Springfield, Mass., G. & C. Merriam 1847).

41. See HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS (8th Am. ed., Phila., Kay & Brother 1859).

42. See LAPIANA, *supra* note 7, at 47-48; STEVENS, *supra* note 5, at 12 n.19 (noting that law school was preparatory to law office where practical knowledge was best learned).

43. Among the topics for discussion at the 1995 AALS Conference on Civil Procedure were the following questions: “Why is civil procedure a first year course? Why is it mandatory?” Flyer, *supra* note 2.

teachers in America,⁴⁴ declared that Pleading was “the most important *single* title in the law.”⁴⁵ Former Cornell law professor Cuthbert Pound explained: “The early lawyer saw the law in the form of an action. Right and wrong grew out of such forms. Unless there was a remedy there was no right. . . . The study of law was [therefore] the study of practice.”⁴⁶

Thus, in an era when judges and practitioners ran the law schools, the subject that would most affect the practice of aspiring young lawyers was an important part of the law school curriculum. By the late nineteenth century, things were very different.

II. HARVARD’S INFLUENCE IN THE LATE NINETEENTH CENTURY

A. *The Emergence of Harvard As the Model Law School*

Almost since its inception, the Harvard Law School has held a special place among American law schools. Due at least in part to a dip in the popularity of law schools beginning in the 1820s,⁴⁷ many of the early

44. James Gould taught at Litchfield, the first and most successful proprietary school. See FRIEDMAN, *supra* note 11, at 319.

45. GOULD, *supra* note 36, at vi-vii. Gould continued:

The relative importance of *pleading*, among the several titles of the common law, has been fully attested, by the most distinguished and authoritative names, which adorn the list of common-law jurists. Lord Coke, in particular, among his other and frequent commendations of the science of pleading, has characterized it, as “the *truest guide* to the knowledge of the common law”—as “the KEY, that opens its inmost recesses, and an EXPOSITOR, that discloses and explains the most abstruse parts of it.” This pre-eminence it owes, not solely to the intrinsic value of its own exact and logical principles, but also, and in no small degree, to the fact, that the principles of pleading are necessarily and closely *interwoven*, both in theory and practice, *with those of every other title of the law*. I say, “necessarily” interwoven, because even the most simple of the judicial remedies, which the law affords, and without which it would be, practically, a dead letter, cannot be obtained, without the aid of *pleading*. And it has been well remarked by an intelligent Judge, that if the practice of *special pleading* were entirely banished from courts of justice; the science of pleading would still be the most instructive branch of the common law.

Id. at vii.

46. Cuthbert W. Pound, *Teaching Civil Procedure*, 4 CORNELL L.Q. 143, 143 (1919).

47. This fall in popularity is sometimes connected with the heyday of Jacksonian democracy. See, e.g., HARNO, *supra* note 11, at 39-40. Not all historians believe that Jacksonian democracy had a negative influence on the law schools, however. See STEVENS, *supra* note 5, at 5-10.

"[c]ollege-connected law schools came and went with great rapidity."⁴⁸ Harvard's law school, however, proved successful.⁴⁹ Therefore, quite a few schools emulated Harvard. One historian went so far as to declare: "As the oldest and most successful [college-connected] law school, Harvard became the model for all newer schools."⁵⁰

What sort of a model was the Harvard Law School? Although "[c]hange from a professional school under the eaves of a university to an academic professional school came with the appointment of [Justice] Joseph Story as Dane Professor at Harvard in 1829,"⁵¹ the school remained practical in its orientation.⁵² One historian described Harvard thus: "It was a pure and rigorous model, as Story wished it to be. It defined the province of law school and legal training severely. Politics and the study of government were put to one side; common law, rather than the study of statutes, was stressed."⁵³

Although the Harvard Law School survived during this period, its quality was adversely affected by the shrinking number of students interested in attending law school: "Despite Story's unique scholarly contributions, the tone of the school was increasingly that of a trade school. . . . [B]y 1829, students not qualified for admission to Harvard College were allowed into the law school."⁵⁴ Not surprisingly, therefore, when the "law school

48. STEVENS, *supra* note 5, at 8. To gain "[s]ome sense of the state of flux in formal legal education," see Stevens's discussion of early Pennsylvania law schools. *Id.* at 15 n.47.

49. "[B]y 1844, 163 students were in attendance [at Harvard], an unheard-of number." FRIEDMAN, *supra* note 11, at 322; *accord* STEVENS, *supra* note 5, at 15 n.46.

50. FRIEDMAN, *supra* note 11, at 322; *see also* Stein, *supra* note 11, at 447.

51. POUND, *supra* note 23, at 31 n.3.

52. "Although Story urged the student 'to addict himself to the study of philosophy, of rhetoric, of history and of human nature,' his actual plans for the school could scarcely have been of a more practical bent." STEVENS, *supra* note 5, at 13 n.25 (citation omitted); *cf. supra* notes 21-23 and accompanying text (discussing practical nature of Harvard Law School).

53. FRIEDMAN, *supra* note 11, at 322 (footnote omitted); *accord* HARNO, *supra* note 11, at 47-48; STEVENS, *supra* note 5, at 13 n.25. For a criticism of this "pure law" model, see generally Carrington, *supra* note 11.

54. STEVENS, *supra* note 5, at 15 n.46. In 1870, "Eliot and Langdell came to Harvard when the Law School accepted as a student any man whose 'moral character' was good." ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 167 (1967); *accord* *THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917*, at 23 (1918) [hereinafter *CENTENNIAL HISTORY*]. Reed explained Harvard's difficulty:

Harvard inconsiderately embarked upon legal education without counting the cost. This was its period of over-expansion, leading to financial embarrassments and complete reorganization in a few years—the path travelled so often by our American universities. No support could be provided for the law school except that derived from students' fees; therefore as many students as possible must be secured and—for as long a time as they would pay their bills—must be retained. It was a question merely of dollars and cents.

REED, *supra* note 23, at 140. For more details about the mediocrity of a Harvard legal education during this period, see LAPIANA, *supra* note 7, at 50-52.

'improvement' movement" began in the 1850s,⁵⁵ Harvard was not poised to steer the new course.⁵⁶ Instead, Columbia, under the leadership of Professor Theodore W. Dwight, was temporarily the nation's premier law school.⁵⁷

Harvard returned to the spotlight after 1870, however, with the reforms wrought by Christopher Columbus Langdell, the new dean of the Harvard Law School.⁵⁸ We all know that Langdell began the case method of study at Harvard, that this method spread to other law schools, and that it is still the dominant method of American law study.⁵⁹ Additionally, he made the study of law more rigorous. He required that matriculating students have a bachelor's degree or pass a difficult entrance examination and, in 1876, he increased the years of study from two to three.⁶⁰

More importantly for the study of the Civil Procedure course, Langdell made two other changes to the American method of teaching law that profoundly affected the development of the study of practice. First, he set the curriculum and divided the courses between first-year courses and second-year courses.⁶¹ Into the first year, he placed the five courses that students still take today in a more modern form: Property, Pleading, Torts, Contracts, and Criminal Law.⁶² Despite lively debate about the propriety of a national curriculum for local law schools, historians have found, "[w]ith respect to the core curriculum, . . . virtually all [law] schools had accepted the Harvard model by 1920,"⁶³ although some schools offered Pleading as a second-year

55. STEVENS, *supra* note 5, at 36.

56. The official Harvard history agrees. For a discussion of how bad the school had become, see CENTENNIAL HISTORY, *supra* note 54, at 21-25.

57. See *id.* at 23-24.

58. See STEVENS, *supra* note 5, at 36. Perhaps a more important appointment preceded that of Langdell:

Much of the credit (or responsibility) for this [reform] ought to belong not to Langdell . . . but to [President Charles] Eliot It was largely through Eliot's efforts and his "social relations" that the Harvard Law School method was accepted by other schools and scholars

It is, however, with Langdell's name that the various reforms that took place while he was at Harvard and rapidly spread through American legal education have been associated.

Id. (endnotes omitted).

59. See Stein, *supra* note 11, at 452. For further discussion of Langdell and the introduction of the case method, see Franklin G. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493 (1920); Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1 (1951).

60. See CENTENNIAL HISTORY, *supra* note 54, at 32, 46; FRIEDMAN, *supra* note 11, at 612.

61. See CENTENNIAL HISTORY, *supra* note 54, at 46, 75; FRIEDMAN, *supra* note 11 at 612. Before that time, lectures were given indiscriminately to first- and second-year men.

62. See CENTENNIAL HISTORY, *supra* note 54, at 76.

63. STEVENS, *supra* note 5, at 41. Stevens found:

subject. Second, he transformed the law faculty from practitioners and judges to academics.⁶⁴ This move set Harvard and, ultimately, other American law schools on a path away from their practical bent.⁶⁵

B. Procedure in the Harvard Curriculum

1. The Procedure Offerings

In 1870, when Dean Langdell arrived at Harvard Law School, he had a rare opportunity to influence the development of American civil procedure. By adopting the case method, Harvard was destined to change the way schools taught law. With the new curriculum, Harvard Law School was in a position to affect *what* schools taught, and thus to help shape the attitudes of young practitioners and future policy makers. While Harvard proselytized other faculties to its way of teaching, its faculty produced both the professors and the books to go with it. Harvard graduates joined the faculties of most American

not surprisingly, here, too, [in the curriculum] Harvard was dominant. In the early years of the nineteenth century the formal subjects of instruction had varied considerably, but by 1900 Langdell and Ames had overseen the emergence of a remarkable uniformity in curricula. Moreover, these essentially professionally oriented curricula were based on the Harvard curriculum of 1852 as revised—in the light of professional needs—during Langdell's time.

Id. at 39 (endnotes omitted); *see also id.* at 123 (discussing acceptance of case method during same period).

64. Before Langdell came to Harvard, law was taught somewhat informally by lecture, primarily by retired judges, as practical, rote instruction based on famous treatises. During his tenure as professor and dean, Langdell introduced . . . [the following] critical innovation [] destined to change legal instruction nationwide: . . . professional academic professors, an approach designed to emphasize the scholarly, as opposed to practical, side of law study

William Epstein, *The Classical Tradition of Dialectics and American Legal Education*, 31 J. LEGAL EDUC. 399, 399 (1981); *accord* POUND, *supra* note 23, at 31 n.3; STEVENS, *supra* note 5, at 38.

65. Twenty-five years after Langdell's arrival at Harvard, President Eliot commented on Harvard's academic experiment:

[T]hat experiment . . . has not only been extended in our own Law School with perfect success, but it has been adopted by various other law schools throughout the country.

. . . This, I venture to predict, is one of the most far-reaching changes in the organization of the profession that has ever been made in our country.

SUTHERLAND, *supra* note 54, at 184 (quoting *Report of the Ninth Annual Meeting, in ESPECIAL HONOR OF CHRISTOPHER COLUMBUS LANGDELL 70*); *accord* STEVENS, *supra* note 5, at 38-39.

law schools.⁶⁶ Furthermore, for many years, the only casebooks available were edited by Harvard professors.⁶⁷

Harvard's ascendancy, moreover, came at an especially important moment in the development of American adjective law. Common law pleading had been under attack for years. Critics maintained that a problem with the old system was

the unbending character of the different causes of action at common law, and the narrow and rigid way in which the judges administered the same. Every suitor had to elect his cause of action at his peril, for if he mistook it he was thrown out of court and saddled with the costs. Moreover, if the injury sustained did not fit any existing writ or cause of action, he was without remedy at law. . . . This had two results. It greatly extended chancery jurisdiction and it caused the invention of the writ of Trespass on the Case and the manifold applications of this writ by means of legal fictions, nearly all of a highly artificial character. Thus the old common-law pleading became highly technical, artificial and pedantic.⁶⁸

The code pleading movement, started in the United States by David Dudley Field, had made great inroads on these problems. In particular, it was commended for merging equity and law and disposing of the ancient forms of action: "To escape from this mediaeval scholasticism and to remold legal procedure to suit modern practical life and relationships the codes have been adopted, the central and controlling feature being the reduction of all forms of action at law or suits in equity, to a 'single form of action.'"⁶⁹ From New York's adoption of the Field Code in 1848 until Langdell came to Harvard in

66. By 1917, Harvard had sent graduates to the faculties of 67 American law schools. Of the 52 members of the Association of American Law Schools in 1917 that are still extant today, 44 had at least one faculty member from Harvard. *See* CENTENNIAL HISTORY, *supra* note 54, at 384-96; *cf.* 1995-96 AALS DIRECTORY OF LAW TEACHERS 21-157 (listing current member schools with dates of membership). In those days, even one professor was a significant percentage of a faculty. For example, when Langdell joined the Harvard faculty, there were only three members, *see* CENTENNIAL HISTORY, *supra* note 54, at 27, 46, and when he left, there were eight, *see id.* at 46. By 1916, that number had increased to 12. *See id.* at 172 (facing page contains photographs of the faculty).

67. Harvard's hegemony lasted from 1871, when Langdell published the first casebook on Contracts, until 1893, when the first non-Harvard casebook was published. *See* CENTENNIAL HISTORY, *supra* note 54, at 80-83.

68. Book Review, 40 U. PA. L. REV. 314, 314 (1901).

69. *Id.*

1870, twenty-five states and territories had enacted a procedure code.⁷⁰ The codes, however, also were coming under attack.⁷¹

With a fresh new look at the defects and the strengths of the systems in place, perhaps eager young minds could be influenced or given the insights to reform procedure. Unfortunately for those who wanted forward movement, Harvard did not provide any leadership in the field of procedure. Instead, the procedure course that Langdell put into the first year was the same one Harvard Law School had offered virtually every year since 1846, when a curriculum had come into existence there.⁷² Pleading.⁷³ Despite the move toward merger, Langdell maintained Equity as a separate course and put it into the upper level.⁷⁴

Harvard offered very little else to the student in the field of procedure. Code Pleading, which some considered "basely mechanical and beneath the attention of the scholarly mind,"⁷⁵ was not offered. Moreover, it was "urged by many . . . that code pleading [could not] be taught as a general subject, but that it [was] only possible to study the particular code of one state."⁷⁶ Thus, courses in New York and Massachusetts Practice were available in alternating years from 1896. They did not count toward a degree, however.⁷⁷ In addition, United States Jurisdiction was given sporadically.⁷⁸ Finally, there

70. See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 24 (2d ed. 1947); Book Review, *supra* note 68, at 314; Book Review, 39 U. PA. L. REV. 122, 122-23 (1900). Actually, the first state to adopt a procedural code was Louisiana, which enacted its Code of Practice in 1805. See CLARK, *supra*, at 28 n.70.

71. [T]he codifiers have been inconsistent in making an exception to the "one cause of action" by introducing "the Special Proceeding." As the author says, "In more than one instance, it is as if the reformers have grown weary in well doing, and had left unfinished their task of establishing uniformity in our judicial procedure." This distinction often results, as the cases show, in many fine-drawn, highly technical decisions denying a right of action in the form employed by the plaintiff. In other words the very evil sought to be eliminated has been retained, though in a lesser degree.

Book Review, *supra* note 68, at 314-15; see Book Review, 14 HARV. L. REV. 554, 554 (1901) (noting that the codes are to blame for confusing the subject).

72. Originally, studies at the Harvard Law School were organized around various textbooks. See *supra* note 25. In 1846, the studies were first organized around a particular topic: "Thus, in the Catalogue for 1845-46, the announcement of studies is made in the old form, 'The following books are read with the Dane Professor.' In 1846-47 it runs, 'The following studies are pursued with the Dane Professor.'" CENTENNIAL HISTORY, *supra* note 54, at 74.

73. See CENTENNIAL HISTORY, *supra* note 54, at 75.

74. See *id.* at 76.

75. Pound, *supra* note 46, at 144.

76. Charles E. Clark, Book Review, 33 YALE L.J. 109, 109 (1923) (citations omitted).

77. See CENTENNIAL HISTORY, *supra* note 54, at 77, 84.

78. The course was offered in 1872 and 1886 to 1891. See *id.* at 77.

Before the 1930s, there were very few schools with a course on federal jurisdiction and procedure: . . . "The subject of federal jurisdiction [w]as, as

were occasional practice courts for the students to hone their skills, but, as the official Harvard history remarked, “[s]uch experiments have been more successful in affording amusement than in substantial benefit to the participants. A fact trial now and then is well worth while, but only as a relief to the tedium of serious work.”⁷⁹ There was a course on Modern Developments in Procedural Law, but it was a graduate course for S.J.D. candidates.⁸⁰

Other law schools followed this pattern, although quite a few schools offered Code Pleading as an upper-level course or as an alternative to Common Law Pleading.⁸¹ However, Common Law Pleading had such a grip on the academy that even schools in code pleading states like Wisconsin, still required the students to take Common Law Pleading.⁸² As for additional procedural courses, the curriculum at other schools remained as sparse as Harvard’s. In 1915, a proceduralist at another school wrote:

From an early period law schools have recognized the importance of pleading and evidence and have offered well organized courses in these subjects, but until recently the law of procedure has been inadequately treated. In most schools, where the subject was noticed at all, it was covered by a lecture course on general practice, or more frequently, the practice of a particular jurisdiction, supplemented by more or less unsatisfactory work in a “moot court” of some sort.⁸³

a general rule, if offered at all, . . . given by a federal judge or by a lawyer who ha[d] a great deal of practice in the federal courts; and that, too, in a series of lectures.”

Mary Brigid McManamon, *Felix Frankfurter: The Architect of “Our Federalism,”* 27 GA. L. REV. 697, 757 (1993) (footnotes omitted). For a discussion of the development of the course on Federal Courts, see *id.* at 757-70 and Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 681-86 (1989).

79. CENTENNIAL HISTORY, *supra* note 54, at 85; see *id.* at 77 (noting that moot courts were abandoned by the school in 1897).

80. See *id.* at 77.

81. For example, in the first decade of the twentieth century, Virginia required Common Law Pleading, but offered both Virginia Pleading and Practice and Code Pleading as electives. See RITCHIE, *supra* note 6, at 79-80. At the same time, both Yale, see DEPARTMENT OF LAW, YALE UNIVERSITY, BULLETIN 7-8 (1901-02), and Notre Dame, see PHILIP S. MOORE, A CENTURY OF LAW AT NOTRE DAME 37 (1969), required Common Law Pleading and Code Pleading. Wisconsin offered both Common Law Pleading and Code Pleading. See Schlegel, *supra* note 31, at 402.

82. See Schlegel, *supra* note 31, at 402.

83. EDWARD W. HINTON, A SELECTION OF CASES ON TRIAL PRACTICE AT COMMON LAW AND UNDER MODERN STATUTES at iii (1915). In 1928, Austin Scott wrote:

Until about fifteen years ago, although there were several casebooks on Pleading and on Evidence, there was none in general use upon the other branches of Civil Procedure. Such instruction as was given in regard to the

2. The Procedure Faculty

Initially, Langdell taught both Pleading and Equity himself,⁸⁴ but that changed fairly quickly. Within a few years, a new faculty member, James Barr Ames, took over the class on Pleading.⁸⁵ Professor, and later Dean, Ames was destined to become an important figure in the history of the Civil Procedure course. He taught Pleading twenty-two times in his thirty-six years at Harvard, more than any other faculty member of his time.⁸⁶ Moreover, he assembled the first casebook on the subject.⁸⁷ This book, along with Ames's other books, was very influential: "It was Ames who really fixed the type of case book in American law schools."⁸⁸

Ames was the first of the new breed of faculty. After graduation from the law school, Ames spent a year in graduate study there. During that year, he was appointed as an assistant professor at the law school. It was a controversial appointment,⁸⁹ as he was the first non-practitioner to be appointed to the faculty.⁹⁰ Previously, all instructors at the law school had been men with some years of experience practicing law.⁹¹ The overseers were reluctant, but agreed to a probationary appointment of five years. Although there were those who thought it was foolish to hire a law professor who had never practiced law,⁹² Ames was promoted to full professor before his probationary period was over.

Not surprisingly, Ames agreed that young men with little or no practice experience, devoted to academics, made the best law professors.⁹³ He and Langdell worked together to increase the numbers of such men on the

other steps in an action was given in practice courses or was taken up incidentally in courses on the substantive law.

Scott, *supra* note 34, at 416-17.

84. See SUTHERLAND, *supra* note 54, at 185.

85. Ames also taught Equity, see CENTENNIAL HISTORY, *supra* note 54, at 79, but it was Langdell whose forte was Equity. He produced the first casebooks on the subject, see CASES IN EQUITY PLEADING (Cambridge 1875-76); CASES ON EQUITY JURISDICTION (Cambridge 1879), and taught the course 26 times, more than any other colleague, see CENTENNIAL HISTORY, *supra* note 54, at 78.

86. See CENTENNIAL HISTORY, *supra* note 54, at 78-79.

87. See JAMES BARR AMES, A SELECTION OF CASES ON PLEADING AT COMMON LAW (1875) [hereinafter AMES (1st ed.)]. Ames published a revised version of the casebook 30 years later. JAMES BARR AMES, A SELECTION OF CASES ON PLEADING (1905) [hereinafter AMES (2d ed.)].

88. CENTENNIAL HISTORY, *supra* note 54, at 81.

89. See FRIEDMAN, *supra* note 11, at 615-16; STEVENS, *supra* note 5, at 38.

90. See SUTHERLAND, *supra* note 54, at 184.

91. See *supra* note 64 and accompanying text.

92. See SUTHERLAND, *supra* note 54, at 186-87.

93. For Ames's views on the subject, see James Barr Ames, *The Vocation of the Law Professor*, 39 AM. L. REG. (n.s.) 129 (1900), reprinted in JAMES BARR AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 354 (1913).

faculty. The issue initially divided the faculty, but Langdell and Ames had the support of the Harvard president. Ames followed that same policy in hiring after he became dean himself. That his colleagues came to accept this policy is symbolized by the man chosen to replace him in the classroom. The faculty hired Austin Wakeman Scott, who had been out of law school for about six months, to teach Equity and Pleading.⁹⁴

What sort of a law teacher was the first "pure" academic at Harvard? When Assistant Professor Ames joined the Harvard law faculty in 1873, he "became the second teacher [there] to use the case method."⁹⁵ His choice of teaching method was no surprise, since he had been a member of Dean Langdell's first Contracts course and an early admirer of the new technique.⁹⁶ Although Ames arrived on the faculty as Langdell's acolyte, he surpassed his master at using the case method.⁹⁷ As one biographer described the difference,

94. At a faculty lunch one day in November 1909, Dean Ames suddenly announced that his health was failing and he had to take a leave from the law school for an unknown duration. He went immediately to a sanatorium in New Hampshire, where he died in January 1910. See Memoir of James Barr Ames, in JAMES BARR AMES, *supra* note 93, at 6-7, *quoted in part in* CENTENNIAL HISTORY, *supra* note 54, at 188-89; SUTHERLAND, *supra* note 54, at 224. Austin Wakeman Scott, who had graduated from Harvard in June 1909, was appointed to take over Ames's Pleading and Equity classes in December of the same year. See CENTENNIAL HISTORY, *supra* note 54, at 59; SUTHERLAND, *supra* note 54, at 224. Scott came to Harvard first as a part-time lecturer, but was appointed an assistant professor the next year. See Letter from Austin Wakeman Scott to W. Barton Leach (1962), in SUTHERLAND, *supra* note 54, at 234.

In the few months since graduation, Scott had been "at the instance of Felix Frankfurter, a clerk in the office of Winthrop & Stimson in New York." Letter from Austin Wakeman Scott to W. Barton Leach, *supra*; *accord* CENTENNIAL HISTORY, *supra* note 54, at 59; SUTHERLAND, *supra* note 54, at 234-35. For a discussion of Professor Frankfurter's placement activities, see McManamon, *supra* note 78, at 755.

95. SUTHERLAND, *supra* note 54, at 180. "Langdell and Ames used the case method; the other three [John Chipman Gray, James Bradley Thayer, and Emory Washburn] lectured as usual." *Id.* at 185.

96. In the early days, admirers were few and far between. When the Dean conducted the class by asking questions instead of giving the traditional lecture, he created quite a stir: "To the great majority of the class it was mere folly Langdell's courses were soon practically deserted by all except a few devoted admirers The most devoted of all . . . was Ames." Memoir of James Barr Ames, *supra* note 94, at 4, *quoted in* CENTENNIAL HISTORY, *supra* note 54, at 176; *accord* CENTENNIAL HISTORY, *supra* note 54, at 34-35; FRIEDMAN, *supra* note 11, at 615; SUTHERLAND, *supra* note 54, at 179-80.

97. "Ames . . . was a better classroom dialectician than his master" SUTHERLAND, *supra* note 54, at 180. While a great number of alumni believed Ames was an excellent teacher, see SUTHERLAND, *supra* note 54, at 204, this sentiment was not without some qualification. For example, Dean Roscoe Pound, reminiscing about his student days, observed, "Ames was a great teacher, and yet he wasn't a natural teacher as [Austin Wakeman] Scott is." *Id.* at 201. Also, a young Austin Scott wrote in his first year at Harvard, "With all due respect to the Dean [Ames] it does seem to me that [Samuel] Williston can teach [Pleading] better." *Id.* at 221.

[w]ith Langdell the use of cases in instruction meant the careful and painstaking tracing of a doctrine through the line of authorities by which it was established and developed Ames used a case or a series of cases chiefly to form the basis of a Socratic discussion which should draw out the legal principle involved. . . . Ames's way was far better adapted to the needs of the student, and by the use of it he succeeded in building up in his pupils "the legal mind." Ames gave the system its success as a method of teaching.⁹⁸

In fact, Ames is largely responsible for spreading the Socratic method to other American law schools.⁹⁹ His own disciples went to teach, using his technique, at other schools¹⁰⁰ and faculty from other schools sought his advice on how to employ the case method.¹⁰¹ In addition, Ames was a casebook machine. In his first year on the faculty, he produced a casebook on Torts¹⁰² and, a year later, he compiled the first casebook on Pleading.¹⁰³ He went on to produce many more casebooks, and the official history of the Harvard Law School averred that "[i]t may well be said that it was the very wide use of Ames's nine case books that established the case system in other law schools."¹⁰⁴

3. The First Procedure Casebook

Ames's Pleading casebook reveals his approach to the case method. Even though the content of the book was traditional, the format was not. His choice and ordering of cases forced the students to grapple with the material and thereby teach themselves the basic principles of Pleading. In so doing,

98. Memoir of James Barr Ames, *supra* note 94, at 8; *accord* CENTENNIAL HISTORY, *supra* note 54, at 36-37; *cf. id.* at 80-82 (describing the same contrast in Langdell's and Ames's casebook styles).

99. See Memoir of James Barr Ames, *supra* note 94, at 10.

100. See CENTENNIAL HISTORY, *supra* note 54, at 81-82; Memoir of James Barr Ames, *supra* note 94, at 11-12, 15.

101. See Memoir of James Barr Ames, *supra* note 94, at 10, 12-13, 15.

102. JAMES BARR AMES, SELECT CASES ON TORTS (1874).

103. AMES (1st ed.), *supra* note 87.

104. CENTENNIAL HISTORY, *supra* note 54, at 81-82. His books covered the following diverse topics: A SELECTION OF CASES ON BILLS AND NOTES AND OTHER NEGOTIABLE PAPER (Boston, Soule & Bagbee 1881); A SELECTION OF CASES ON THE LAW OF TRUSTS (Cambridge 1881-82); A SELECTION OF CASES ON THE LAW OF PARTNERSHIP (Cambridge 1881-87); A SELECTION OF CASES ON THE LAW OF ADMIRALTY (1901); A SELECTION OF CASES ON THE LAW OF SURETYSHIP (1901); A SELECTION OF CASES ON EQUITY JURISDICTION (1901-03).

they learned not only those principles, but how to ascertain the law through reading cases, as they would have to do in practice.¹⁰⁵

An example will give the flavor of what Ames was doing. In a traditional lecture course on Pleading, the student would be taught first that:

As the office of a demurrer is to deny, not the *truth*, but only the *legal sufficiency*, of the allegations demurred to; it therefore *admits* all such facts, alleged by the adverse party, as are *well pleaded*; and refers the question of law, arising upon them, to the court.¹⁰⁶

After the student understood this basic rule, he was taught that there were exceptions, or rather, he was instructed in what facts were not “well pleaded.” For example, the student was taught that “as [a demurrer] confesses not what is *ill pleaded*, it of course does not confess any averment, *contradicting* what before appears certain, on the record.”¹⁰⁷ Moreover, the student learned that “[a]n averment of any thing, naturally or legally *impossible*, is not confessed by a demurrer.”¹⁰⁸

A student who used Ames’s casebook did not have such an easy time.¹⁰⁹ The student first learned the basic rule that a demurrer admits all well pleaded facts through an excerpt from Coke: “*A demurrer cometh of the Latin word demorari to abide; and therefore he which demurreth in law, is said, he that abideth in law . . .*”¹¹⁰ The student was then presented with two cases demonstrating how the basic rule was applied. Through the 1680 case of *Barber v. Vincent*,¹¹¹ the student found that when an underage defendant, trying to get out of a contract to pay for a horse, demurred to an allegation that he bought the horse “for his conveniency to carry him about his necessary

105. For the view that the case method is not particularly practical, see generally Schlegel, *supra* note 31.

106. GOULD, *supra* note 36, at 461 (note omitted).

107. *Id.* at 470.

108. *Id.* at 471 (note omitted).

109. The following discussion is based on the second edition of Ames’s casebook on Pleading. The first edition provided the same lesson, although the cases are in a slightly different order. Cf. AMES (1st ed.), *supra* note 87, at 1-4 (covering the same principles discussed in the text).

110. AMES (2d ed.), *supra* note 87, at 1. This excerpt was followed by the case of *Haiton v. Jeffreys*, 10 Mod. Rep. 280, 88 Eng. Rep. 728 (K.B. 1715), which asked the question whether a party could “plead a plea, and demur to the declaration, at the same time.” AMES (2d ed.), *supra* note 87, at 1. The answer was that “Here you plead, and at the same time pray that you may not plead. . . . This was never attempted before.” *Id.* at 2. The perceptive student soon realized that by demurring, a party admitted the truth of the opponent’s allegations, and thus asked the court to decide the dispute based on the law only. That being the case, it made no sense to demur—that is, admit the opponent’s allegations—and attempt to *deny* those allegations at the same time.

111. 1 Freeman 531, 89 Eng. Rep. 397 (C.P. 1680).

affairs,” he had admitted that the purchase was for a *necessary* item.¹¹² Therefore, the contract was enforceable against him under the rule that an infant is chargeable for necessities.¹¹³ Then, through the 1693 case of *Hodges v. Steward*,¹¹⁴ the student learned that when a plaintiff claimed to bring an action based upon a certain custom and the defendant demurred, “without traversing [denying] the custom, he had thereby confessed there was such a custom, though in truth there was not, and for that reason the plaintiff had judgment.”¹¹⁵

The student was then presented with the 1601 case of *Tresham v. Ford*¹¹⁶ and the 1635 case of *Cole v. Maunder*.¹¹⁷ In the first case, for an account, a jury had determined that the defendant was a receiver of £120 of plaintiff’s money. Later, before the auditors, the defendant alleged that he was not a receiver, but had given value for the money. Plaintiff demurred. Seemingly contrary to the general rule, the court held that the plaintiff had *not* admitted that the defendant gave value for the money, for this allegation was “contrary to the [earlier jury] verdict, which found him to be receiver.”¹¹⁸ Then in the second case, the student learned that “one cannot throw stones *molliter* [gently], although it were confessed by a demurrer.”¹¹⁹

What had the student learned? Although the general rule was that an opponent’s facts were admitted on a demurrer, there were clearly some facts that were not admitted. The student was forced to puzzle out which facts would not be admitted: facts that were contrary to a verdict or to common knowledge were not admitted on a demurrer. Why were those facts different from other facts, such as a nonexistent custom? When the student had answered this question, he had learned not only the basic premises that the student in the lecture class had learned,¹²⁰ but he had also learned something about the difference between facts and law and how to distinguish between cases that were applicable to his client’s situation and cases that were not.

Besides his Socratic innovation, what did Ames bring to the study of procedure? He made a revolutionary change in the order of the Pleading course: he took the subject of demurrers, which was traditionally taken up

112. AMES (2d ed.), *supra* note 87, at 2.

113. *See id.* at 2-3.

114. 3 Salkeld 68, 91 Eng. Rep. 696 (K.B. 1693).

115. AMES (2d ed.), *supra* note 87, at 3.

116. Croke’s Eliz. 830, 78 Eng. Rep. 1057 (C.P. 1601).

117. 2 Rolle’s Abridgment 548 (K.B. 1635).

118. AMES (2d ed.), *supra* note 87, at 4. A footnote to the case proclaims, “Similarly, a demurrer does not admit the truth of allegations contrary to legislative acts and records, of which the court must take judicial notice.” *Id.* at 4 n.2.

119. *Id.* at 5.

120. *See supra* notes 106-08 and accompanying text.

after the study of declarations,¹²¹ and put it at the beginning.¹²² This was a controversial change,¹²³ but, ultimately, it was almost universally accepted. In 1931, one law professor commented: "When, in 1875, Professor Ames published his *Cases on Common Law Pleading* he began with demurrers. . . . [I]n most law schools the course in common law pleading still deals largely with proceedings subsequent to the declaration."¹²⁴

Ames was able to realize several pedagogical benefits by this change.¹²⁵ First, the student was taught how to learn the law by reading cases. Judicial opinions do not usually contain phrases such as, "Now, here is an excellent declaration." Instead, when researching case law, a lawyer would find cases dealing with challenges to pleadings. It was through such cases that the student would have to infer what was a good pleading. In having the students do what they would have to do in practice, Ames taught them not only what was a good declaration, but also how to read cases. Second, by studying the declaration through the demurrer, the student learned of the symbiosis between them, much as a modern student learns of the relation between the Rule 12(b)(6) motion and the complaint.¹²⁶ Finally, Ames saved time by teaching both the declaration and the demurrer at once. With the advent of the case method, time was precious, since teaching that way took more time than simply lecturing.

What Ames did not change is just as important, or perhaps more important, than what he did change. He merely altered the method of presentation, not the content of the course. It continued to be the traditional course in Common Law Pleading. While dramatically different in style from

121. For example, in both GOULD, *supra* note 36, and CHITTY, *supra* note 40, declarations are found in chapter four and demurrers in chapter nine. In BENJAMIN J. SHIPMAN, *HAND-BOOK OF COMMON-LAW PLEADING* (2d ed. 1895), declarations are treated in chapter five and demurrers in chapter six.

122. See AMES (1st ed.), *supra* note 87, ch. 1; AMES (2d ed.), *supra* note 87, ch. 1.

123. Over 50 years later, law professors were still grumbling about the placement of demurrers at the beginning of a course on Pleading. See, e.g., GEORGE L. CLARK, *COMMON LAW PLEADING* at iii (1931) (hoping that new book will "remedy the situation"); E.D. Webb, Book Review, 11 N.Y.U. L.Q. REV. 132, 132 (1933) (complaining that the new book "repeats the mistake made by Dean Ames of considering in detail the demurrer before the declaration").

124. CLARK, *supra* note 123, at iii.

125. The following discussion is merely my own evaluation of the choice to teach demurrers first, based on my experience teaching Civil Procedure. I have been unable to find any discussion by Ames himself explaining his ordering of the Pleading materials.

126. FED. R. CIV. P. 8(a) provides: "A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief" FED. R. CIV. P. 12(b) provides: "Every defense . . . to a claim for relief in any pleading . . . shall be asserted in the responsive pleading . . . , except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted."

the textbooks on Pleading, his book followed the traditional lessons. In fact, the material covered in his first edition is very closely tied to Gould's lectures on Pleading at Litchfield.¹²⁷ For example, Ames's chapter on demurrers develops with cases the principles covered in Gould's lectures on the subject, in virtually the same order.¹²⁸

By the time Ames revised his casebook in 1905, he acknowledged the existence of code pleading. First, he changed the title of his book from *A Selection of Cases on Pleading at Common Law* to *A Selection of Cases on Pleading*.¹²⁹ More importantly, he added material to cover new procedures, such as amending the pleadings¹³⁰ and counterclaims.¹³¹

The revised book does not offer a comparative view of common law and code pleading so that students can discuss and evaluate them. Nor is the focus of the book on the more modern procedure. Instead, Ames treats the law of Pleading as if it were a unitary system. Moreover, he presents the new practice codes as if they made only minor changes, if any, to the traditional common law pleading rules. For example, he concludes the section on general demurrers with the English rule abolishing the demurrer.¹³² But he follows that rule with a series of notes demonstrating that the new "objection in point of law" is "substantially a demurrer under another name."¹³³ As a second example, Ames presents the students with a Massachusetts case in which plaintiff argued that the declaration was sufficient under the new practice act.¹³⁴ The court rejected plaintiff's argument and sustained defendant's demurrer, relying on Gould's text on Common Law Pleading.¹³⁵ As a final example, Ames follows a case on pleading a debt in a code pleading state with an extensive note demonstrating that "[i]t is still permissible under the Codes or Practice Acts of most of our states to declare after the manner of the common law *indebitatus* counts."¹³⁶

127. Compare AMES (1st ed.), *supra* note 87, at iii-v (listing table of contents), with GOULD, *supra* note 36, at 1 (listing table of contents).

128. Compare AMES (1st ed.), *supra* note 87, ch. 1, with GOULD, *supra* note 36, ch. 9.

129. Compare AMES (1st ed.), *supra* note 87, with AMES (2d ed.), *supra* note 87.

130. See AMES (2d ed.), *supra* note 87, ch. 10.

131. See *id.* ch. 11.

132. See Order 25, R. of the Sup. Ct. (1883), *reprinted in* AMES (2d ed.), *supra* note 87, at 26.

133. AMES (2d ed.), *supra* note 87, at 26 n.2.

134. See *Millard v. Baldwin*, 69 Mass. (3 Gray) 484 (1855), *reprinted in* AMES (2d ed.), *supra* note 87, at 10.

135. See *id.*, *reprinted in* AMES (2d ed.), *supra* note 87, at 11 (citing GOULD, *supra* note 36, ch. 9, § 29).

136. AMES (2d ed.), *supra* note 87, at 314 n.4.

Thus, at the dawn of the twentieth century, the book that was to set the standard for the introductory procedure course focused on old English practice and gave short shrift to modern American practice.

III. THE TWENTIETH CENTURY

A. Problems Created by the Nineteenth-Century Procedure Curriculum: A Crisis of Faith

By the early twentieth century, there was strong and growing criticism of the procedure curriculum. For one thing, the introductory course at the leading law schools taught a procedure that was almost completely out of date. By 1900, not only had over half the states in the Union adopted code pleading,¹³⁷ but those states that had not yet adopted a procedural code “departed substantially from the common-law system.”¹³⁸ Thus, while the students delved deeply into the old common law pleading rules, they were not being given the tools of their trade.¹³⁹ In 1898, a Harvard reviewer remarked: “The old muzzle-loading precedents of the common law pleading have lost their value in the eyes of the active American practitioner. The model which is to be of service to him in constructing his own pleadings must be dominated by the ‘New Procedure’ under which he is working.”¹⁴⁰ In addition, there were many important and difficult topics that were not covered in the typical procedure curriculum. The students might spend a year studying pleading, but what about such topics as jurisdiction and venue, jury trial and verdicts, and res judicata? There was no systematic way for a pupil to study them.¹⁴¹

This state of affairs led to a reevaluation of the procedure curriculum. There were two interrelated issues to be decided. First, should the introductory course remain the historical course in Pleading? Second, should other issues of procedure be taught to the law students? If so, at what stage of

137. By 1900, 25 of the 45 States had adopted a version of the modern “Field Code.” See CLARK, *supra* note 70, at 22, 24. In addition, the territories of Alaska, Arizona, New Mexico, and Oklahoma had adopted such a code. See *id.* at 24. Moreover, Louisiana had adopted the Code of Practice in 1805. See *id.* at 28 n.70; see also *supra* note 70 and accompanying text (noting that half the States had adopted a civil practice code by 1870).

138. CLARK, *supra* note 70, at 26; accord Book Review, *supra* note 68, at 314.

139. “By many of the younger schools, Harvard is condemned as unpractical, on the ground that it fails to devote adequate attention to ‘practice.’” W. Jethro Brown, *The American Law School*, 21 LAW Q. REV. 69, 71 (1905).

140. Book Review, 12 HARV. L. REV. 362, 362 (1898).

141. See *supra* notes 75-83 and accompanying text.

their education? The debate began in 1896, when Chancellor Emlin McClain¹⁴² and Professor Blewett Lee¹⁴³ advocated the teaching of practice before the American Bar Association.¹⁴⁴

As to the first question, many academics clung steadfastly to the traditional introductory course in Common Law Pleading, as is evidenced by the proliferating casebooks on the subject,¹⁴⁵ as well as the continued appearance of the course in law school curricula.¹⁴⁶ Among the academics who favored retention of the traditional Pleading course, however, one can almost sense a crisis of faith. This crisis is not surprising, given the change in the position of their course in the curriculum as a whole. When law schools began, the course in Pleading was central to the curriculum.¹⁴⁷ A century later, the growing separation between the law as it existed in practice and as it was taught was exacerbated by the modern subordination of procedure to substance.¹⁴⁸ Instead of teaching the key to all the other courses, proceduralists were teaching a course that was coming to be known as merely

142. In 1896, Chancellor McClain was the chancellor of the law department at the State University of Iowa, having started teaching there in 1881. He went on to be a judge on the Supreme Court of Iowa from 1901 to 1912. After leaving the bench, he taught law at Stanford until he died in 1915. See 1 WHO WAS WHO IN AMERICA 800 (1981).

143. Professor Lee taught law at Northwestern University from 1893 to 1901 and at the University of Chicago from 1902 to 1903. He left teaching to take a job with the Illinois Central Railroad Company. See 9 WHO'S WHO IN AMERICA 1455 (1916-1917).

144. See O.L. McCaskill, *Methods of Teaching Practice*, 2 CORNELL L.Q. 299, 299 (1917).

145. The following books on Common Law Pleading, listed in chronological order, appeared in the first three decades of the twentieth century: E. RICHARD SHIPP & JOHN B. DAISH, A SELECTION OF CASES ILLUSTRATING COMMON LAW PLEADING (1903); JAMES TOWER KEEN, CASES ON PLEADING (1905); CHARLES A. KEIGWIN, PRECEDENTS OF PLEADING AT COMMON LAW (1910); CLARKE B. WHITTIER, CASES ON COMMON LAW PLEADING (1911); EDSON R. SUNDERLAND, CASES ON PROCEDURE: COMMON LAW PLEADING (1914); CLARKE B. WHITTIER & EDMUND M. MORGAN, CASES ON COMMON LAW PLEADING (1916); WALTER WHEELER COOK & EDWARD W. HINTON, CASES ON PLEADING AT COMMON LAW (PART I—COMMON LAW ACTIONS) (1920); WALTER WHEELER COOK & EDWARD W. HINTON, CASES ON PLEADING AT COMMON LAW (1923); CHARLES A. KEIGWIN, CASES IN COMMON LAW PLEADING (1924) [hereinafter KEIGWIN (2d ed.)].

146. Common Law Pleading was offered, for example, at Chicago, see ELLSWORTH, *supra* note 24, at 100, Hastings, see THOMAS GARDEN BARNES, HASTINGS COLLEGE OF THE LAW: THE FIRST CENTURY 162 (1978), Notre Dame, see MOORE, *supra* note 81, at 58, 70, Rutgers-Camden, see Keith J. Kasper, Note, *A History of the Curriculum at the Rutgers School of Law-Camden: 1926-1986*, 17 RUTGERS L.J. 223, 228 n.22, 232 n.46 (1986), and Virginia, see RITCHIE, *supra* note 6, at 79. Even Michigan, which was on the forefront of modernizing the procedure curriculum, see *infra* notes 171-83 and accompanying text, offered Common Law Pleading until the 1920s. See ELIZABETH GASPAR BROWN, LEGAL EDUCATION AT MICHIGAN 1859-1959, at 504-11 (1959).

147. See *supra* notes 34-46 and accompanying text.

148. As one professor commented, "procedure is tending to become unimportant." Robert W. Stayton, Book Review, 25 TEX. L. REV. 558, 563 (1947).

the "handmaid of justice."¹⁴⁹ Under these circumstances, the academy concluded that "the law schools of the country are teaching too much adjective law."¹⁵⁰

Proceduralists, therefore, began to question why they required Pleading. There were four justifications given for the requirement. First, law professors maintained that it was important to study legal history, and Pleading was the course where the students learned it.¹⁵¹ Second, other faculty believed that the common law system was a beautiful, logical system and to understand it was to understand "the logic of the law."¹⁵² Third, law faculty members claimed that the course in Pleading enabled the students to read cases in other classes intelligently. Finally, some law professors maintained that common law pleading had been around so long, it would certainly make a "comeback." As one casebook author noted, "[C]ode [P]leading seems only an abortive attempt to change the unchangeable."¹⁵³

These reasons sound a little like rationalizations. Except for the eternal optimists awaiting the second coming of common law pleading, the apologists for teaching the course admitted that it was antiquated, yet insisted it must still be taught. One wonders whether part of the resistance to a more modern course stemmed from faculty who had no interest in teaching the new procedure, as they considered it too simple to be interesting and viewed it as "merely" local in nature.¹⁵⁴

As to the second question, whether and when to offer additional subjects in practice, many academics resisted changing the traditional curriculum. For one thing, "[t]he introduction of practice courses into the

149. The phrase is Charles Clark's. See Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938). He derived it from the following remark in an English case:

"Although I agree . . . that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of a handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

Id. at 297 (quoting *In re Coles*, 1 K.B. 1, 4 (1907) (opinion of Collins, M.R.)).

150. AALS, *Report of the Committee on the Reform of Legal Procedure*, in HANDBOOK AND PROCEEDINGS 57, 57 (1920) [hereinafter AALS Report].

151. "[I]t has been thought that part of the task of a first-year procedure teacher is to give his students some conception of legal history and the uses of the historical method as applied to the study of law." Roswell F. Magill, *An Introductory Course in Civil Procedure*, 6 AM. L. SCH. REV. 119, 119 (1927); see also JAMES TOWER KEEN, *CASES ON PLEADING* at vii (1905) (opining that ancient procedure must be studied to understand modern procedure).

152. Book Review, 11 HARV. L. REV. 274, 274 (1897) (quoting from the introduction to R. ROSS PERRY, *COMMON LAW PLEADING* (1897)).

153. E.M. Morgan, Book Review, 48 HARV. L. REV. 366, 367 (1934).

154. See *supra* notes 75-76 and accompanying text.

curriculum would necessitate a still further displacement of some of the [doctrinal] subjects . . . from the work of the student.”¹⁵⁵ Additionally, there were those who believed that “law schools should not teach practice because it is not as well worth while as the teaching of the subjects which it displaces.”¹⁵⁶ As one “prominent member of an eastern law school faculty” said, “[T]he study of the doctrinal courses gives the student the trained mind of a lawyer, whereas the study of practice is a mere memorizing of artificial rules.”¹⁵⁷

In addition, there were perceived pedagogical difficulties with teaching practice. As one proceduralist commented:

Several causes were responsible for this condition of affairs [i.e., the dearth of practice courses]. First, the absence of any text adapted to class room needs; second, the tendency to confuse the law of practice with the art of advocacy, a subject difficult, if not impossible, to teach by ordinary methods; third, the assumption that practice was essentially a local matter, to be picked up in the office and court room after graduation.¹⁵⁸

Unfortunately, with requirements for admission to the bar changing, students no longer learned local custom and practice from a formal apprenticeship.¹⁵⁹

On the other side of the debate, critics of the traditional procedure courses pointed to the impact of the curriculum on the practice of law. First, “[t]he result was that graduates came to the bar well trained in the substantive branches of the law, but practically untrained in the law of procedure.”¹⁶⁰ Second, reformers complained that the graduates’ ignorance hampered law reform efforts.¹⁶¹ Charles Clark blamed the academic attitude that “‘practical’ knowledge can be better acquired by the lawyer in actual practice than by the student in the law school.”¹⁶² He wondered:

Should our hopes of future improvement rest in lawyers whose knowledge of the problem is limited to the local procedural methods to which they may have been introduced by their own practice, or should it rest in those who have endeavored to discover how identically the same problem has been treated in other

155. McCaskill, *supra* note 144, at 301; *accord* AALS Report, *supra* note 150, at 57.

156. McCaskill, *supra* note 144, at 301.

157. *Id.*

158. HINTON, *supra* note 83, at iii.

159. *See supra* notes 17, 29-30 and accompanying text.

160. HINTON, *supra* note 83, at iii.

161. *See, e.g.,* Clark, *supra* note 76, at 110 (averring that “the law schools at least ought to do their part towards supplying the kind of knowledge which alone makes improvement possible”); *see also* WILLIAM H. LOYD, CASES ON CIVIL PROCEDURE at iii (1916) (asserting that educated lawyers are in the best position to reform the system).

162. Clark, *supra* note 76, at 109.

jurisdictions or under other systems? Why for example has such a simple and practical reform as pleading in the alternative, a reform adopted in England in 1873, in Rhode Island in 1876, in Connecticut in 1879, and in New Jersey in 1912, remained apparently unknown in a state like New York until the last Practice Act of 1920, and in most jurisdictions unknown even now? The answer would seem to be a lack of any adequate *general* knowledge of the subject. It is not only the reformer who desperately needs such knowledge; it is the ordinary practitioner and the trial and appellate judge.¹⁶³

In 1920, the AALS Committee on the Reform of Legal Procedure took a stand on the issue. It reported that “[y]our committee is unanimously of the opinion that our present system of legal procedure should be and is bound to be reformed.”¹⁶⁴ The committee urged that all students should be trained so that they could “participate in the divinely appointed task of controlling the impending reform of procedural rules.”¹⁶⁵ The committee, therefore, recommended as follows: “[W]hat the law school men should do in this respect is to start a campaign of education on Modern Procedural Methods, so as to educate the present and the prospective members of the profession both as to the necessity of reform and as to best plans of reform.”¹⁶⁶ This call to reform by education may have been the start of an approach that has continued to this day.¹⁶⁷ This campaign, the committee determined, should include the development of a casebook and a course on comparative procedure, teaching the students about English code pleading, American code pleading, the Federal Equity Rules, the impending Rules Enabling Act, various model acts, as well as procedure in Ecclesiastical and Equity Courts and in Roman, Scottish, French, and German courts.¹⁶⁸ More realistically, other members of the academy urged at least the merger of the courses on Common Law, Equity,

163. *Id.* (footnote omitted).

164. AALS Report, *supra* note 150, at 57.

165. *Id.* at 59.

166. *Id.* at 58.

167. After the promulgation of the Federal Rules, Professor James W. Moore called for a course centered around them to continue the reform work. *See generally* James W. Moore, *The Place of the New Federal Rules in the Law School Curriculum*, 27 GEO. L.J. 884 (1939). His suggestion was put into practice by Professors Richard H. Field and Benjamin Kaplan. *See infra* notes 234-38 and accompanying text. This effort to reform by education continues today. *See* ROBERT M. COVER ET AL., *PROCEDURE* (1988); *infra* text accompanying note 246; *see also* William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 948 (1989) (book review) (saying the Field & Kaplan book, now edited by Professor Kevin M. Clermont, is still urging reform of the Federal Rules).

168. *See* AALS Report, *supra* note 150, at 59-60.

and Code Pleading.¹⁶⁹ One professor suggested the addition of Criminal Procedure as well.¹⁷⁰

B. The Origins of the Modern Civil Procedure Course

Even before the AALS took a stand on the procedure debate, reformers at some of the leading law schools had been able to convince their colleagues to expand and modernize the procedure curriculum. In the vanguard were Edson Sunderland of the University of Michigan, Edward W. Hinton of the University of Chicago, and Austin Wakeman Scott of Harvard, who, in the first two decades of the twentieth century, developed new courses in procedure and produced the casebooks to teach them.¹⁷¹

The new books were, quite literally, breathtaking in their modernity. The first thing that impresses a reader who has plowed through the old Pleading casebooks is the accessibility of the cases in the new books. Not only do they cover modern procedure, they are written in modern English. In contrast to the Pleading casebooks, which are filled with ancient English cases, most of the cases in the new books are American.¹⁷² Moreover, in the Sunderland book, seventy-five percent of the cases were less than twenty years old at the time of publication, and ninety-seven percent of the cases were fifty years old or less. In the Scott book, thirty-seven percent of the cases in the book were less than twenty years old, and sixty-six percent of the cases were fifty years old or less.¹⁷³ To put these figures into perspective, “[a] survey of more than 275 law school casebooks reveals that until the middle of this

169. See O.L. McCaskill, *Teaching Pleading so as To Meet Future as Well as Present Needs*, 5 AM. L. SCH. REV. 286, 290-91 (1924); Francis S. Philbrick, *A Casebook for the First Year in Procedure*, 6 AM. L. SCH. REV. 123, 126 (1927).

170. See Stayton, *supra* note 148, at 560. At least one author complied with this suggestion. See BERNARD C. GAVIT, *CASES AND MATERIALS ON PROCEDURE* (1940) (treating both civil and criminal procedure). This experiment did not last, however. When Professor Gavit revised his book in 1952, he deleted the material on criminal procedure. See BERNARD C. GAVIT, *CASES AND MATERIALS ON CIVIL PROCEDURE* (1952) [hereinafter GAVIT (2d ed.)].

171. See HINTON, *supra* note 83; AUSTIN WAKEMAN SCOTT, *A SELECTION OF CASES AND OTHER AUTHORITIES ON CIVIL PROCEDURE IN ACTIONS AT LAW* (1915); EDSON R. SUNDERLAND, *CASES ON PROCEDURE: TRIAL PRACTICE* (1912).

172. Almost 90% of the cases in the Scott book and all of the cases in the Sunderland book are American. The Hinton book still contains a significant dose of English cases.

173. A descendant of this book survived well into the modern era. See AUSTIN WAKEMAN SCOTT & ROBERT BRYDON KENT, *CASES AND OTHER MATERIALS ON CIVIL PROCEDURE* (1967). In one of the ironies of history, however, the book changed from a dramatically modern one into a very historical one. As the authors proclaimed in the preface, “[i]ntended for use in a first-year introductory course, the book is premised on the proposition that the study of procedure should be grounded in historical materials. . . . Thus the common law and equity systems remain focal points of study in the first portion of the book.” *Id.* at vii.

century casebooks rarely emphasized recent decisions.”¹⁷⁴ The early procedure books surveyed ranged from a mere two to six percent of their cases under twenty years old and from seven to forty-nine percent of their cases fifty years old or less.¹⁷⁵

Despite claims that practice was a local matter, all three books presented the law of procedure in a uniform manner. Hinton explained: “It is believed that a study of the cases will demonstrate that the law of procedure, while superficially variant in details in the several jurisdictions, is in the main surprisingly uniform, and no more local than torts or contracts.”¹⁷⁶ The authors’ approaches to the subject varied, however. Hinton and Sunderland constructed an upper-level course, while Scott revamped the first-year procedure course.

Hinton and Sunderland were instrumental in developing a fledgling course called Trial Practice. This course did not teach trial advocacy.¹⁷⁷ Instead, it was an advanced procedure course treating such issues as process, jury trial, and motions for directed verdict and new trial.¹⁷⁸ The course did not include pleading and was meant for upper-level students who had already taken the traditional introductory course.

Some schools not only adopted this new doctrinal course, but also complemented it with a sequence of courses in procedure, including what we would today call “skills” courses. For example, Michigan offered an “exceptionally large amount” of practice courses.¹⁷⁹ These offerings were of two types: “[C]lassroom work in the principles of Practice and a practical application of these principles in the Practice Court.”¹⁸⁰ As an illustration of

174. Michael L. Closen, *Teaching With Recent Decisions: A Survey of Past and Present Practices*, 11 FLA. ST. U. L. REV. 289, 289 (1983).

175. *See id.* at 312-24.

176. HINTON, *supra* note 83, at v; *accord* Scott, *supra* note 34, at 417 (“[T]here is a systematic and well-ordered body of principles underlying procedure in courts, principles which are not merely local but which have been generally applied throughout the United States.”); SUNDERLAND, *supra* note 171, at vi (“In truth, the principles of trial practice are largely of general application. The variations found in different jurisdictions are most of them on minor points.”).

177. *See supra* text accompanying note 158 (noting tendency to confuse practice and advocacy).

178. *See* HINTON, *supra* note 83; SUNDERLAND, *supra* note 171. William H. Loyd of the University of Pennsylvania also created a casebook on the subject at about this time. *See* LOYD, *supra* note 161. Two later additions to the field were produced by James P. McBaine of the University of Missouri and later the University of California and Percival William Viesselman of the University of Kansas. *See* JAMES PATTERSON MCBAIN, *CASES ON TRIAL PRACTICE IN CIVIL ACTIONS* (1927); PERCIVAL WILLIAM VIESSelman, *CASES AND MATERIALS ON TRIAL PRACTICE* (1940). Viesselman’s book included additional topics, such as judicial power and subject matter jurisdiction. For a further discussion of his book, *see infra* text accompanying notes 225-26.

179. SUNDERLAND, *supra* note 171, at v.

180. *Id.*

the Michigan procedure curriculum, take the 1915-1916 school year.¹⁸¹ The school offered the traditional procedure courses of Common Law Pleading and Evidence. Equity was divided into three courses: Equity, Equity Pleading and Procedure, and Equitable Remedies. Michigan also offered the new courses in Code Pleading and Trial Practice. There were, in addition, rarely seen courses, such as Federal Courts,¹⁸² Judgments, and Procedural Reform. Finally, these courses were rounded out by the Practice Court course.¹⁸³

Meanwhile, at Harvard, Scott took a very different path:

[W]hen [he] began his work as a teacher of law in the Harvard Law School, he decided to enlarge the course on Pleading in that school into a course on Civil Procedure. It seemed that it would make the subject easier for the student to understand if he were shown how an action is carried through the courts, and if he were taught Pleading in its proper relation to the other steps in an action.¹⁸⁴

His new course began with venue, process, and jurisdiction, continued with pleading and trials, and ended with judgments and *res judicata*.¹⁸⁵ In short, his course was the first modern Civil Procedure course and his book was the first Civil Procedure casebook.

Despite the book's modernity, its focus is still on traditional common law practice. As does the Ames casebook,¹⁸⁶ Scott's book presents the student with the view that the dominant procedure is still common law procedure, albeit amended by the codes. Reformers applauded the new procedure because it abolished the forms of action and merged law and equity, resulting in the unitary civil action. Scott, however, retains a chapter on the forms of action, allocating twenty-five pages to the common law forms¹⁸⁷ and eleven pages to "Actions under Modern Codes and Practice Acts."¹⁸⁸ Moreover, in the section on modern actions, for example, Scott presents the New York Code provision, "There is only one form of civil action."¹⁸⁹ This provision is

181. See BROWN, *supra* note 146, at 509-10.

182. See *supra* note 78 (noting there were few schools offering Federal Jurisdiction before the 1930s).

183. A second example is Cornell Law School, which very early on developed a complete practice department with courses in all three years, supplemented by a practice court. See Pound, *supra* note 46, at 145. For a discussion of the Cornell program, see generally McCaskill, *supra* note 144.

184. SCOTT, *supra* note 171, at iii.

185. See *id.* at v-vi (listing contents).

186. See *supra* notes 127-36 and accompanying text.

187. See SCOTT, *supra* note 171, at 75-100.

188. *Id.* at 100-11.

189. N.Y. Code of Civ. P. § 3339, reprinted in SCOTT, *supra* note 171, at 100.

immediately followed by a New York case that holds, despite the liberality of the Code, that “the *two* forms of action”—fraud and assumpsit—are still treated differently.¹⁹⁰ As far as Equity goes, he leaves that for a separate course.

Scott’s change was controversial. While his approach would ultimately prevail,¹⁹¹ it would be decades before most proceduralists came to accept a single course that taught both Pleading and Trial Practice.

C. The Modern Era

1. The Impact of the Federal Rules of Civil Procedure

As the 1930s waned, the debate still raged as to what was the ideal first-year procedure course.¹⁹² Although there was “an apparent tendency to swing the trial practice material to the first year course,”¹⁹³ in 1936, the AALS Curriculum Committee reported that the member schools were “about evenly divided between the plan of giving . . . a course in common-law pleading and the plan of giving a broader procedure course in the first year.”¹⁹⁴ In 1938, however, something happened that was destined to change the introductory procedure course: The Federal Rules of Civil Procedure were promulgated.

The change was not immediate, however. In the same year, Harvard announced its new curriculum with great fanfare.¹⁹⁵ The first year included a

190. *Barnes v. Quigley*, 59 N.Y. 265 (1874), *reprinted in* SCOTT, *supra* note 171, at 101-03 (emphasis added). Another example is the case of *Raymond Syndicate v. Guttentag*, 177 Mass. 562 (1901), *reprinted in* SCOTT, *supra* note 171, at 107-09, which held that despite the new code simplified provisions, plaintiff had not pleaded trover correctly.

191. *See infra* notes 212-14 and accompanying text.

192. “Probably there is no greater difference of opinion concerning the proper organization of any law course than there is concerning the organization of the student’s first course in adjective law.” Thomas F. Green, Jr., Book Review, 24 IOWA L. REV. 403, 403 (1939).

193. Charles W. Fornoff, Book Review, 13 TUL. L. REV. 646, 649 (1939); *accord* Mason Ladd, Book Review, 33 ILL. L. REV. 489, 491 (1938).

194. Green, *supra* note 192, at 403 (citing AALS, *Report of the Committee on the Curriculum*, in HANDBOOK AND PROCEEDINGS 268 (1936)). *But see* Bernard C. Gavit, Book Review, 13 TEMP. L.Q. 276, 276 (1939) (“The Common Law Actions is a subject-matter which is still found in practically all first-year curricula.”); *id.* at 278 (“Most schools still place the detailed courses on Procedure late in the law school curriculum and devote little time to the subject in the first year.”).

195. Harvard announced the new curriculum at the 1937 AALS meeting, AALS, HANDBOOK 60-62 (1937), and then in an article in the *Harvard Law Review*, Simpson, *supra* note 4. The procedural world, at least, took note of the new curriculum. No fewer than 16 reviews of the new Harvard procedure course, or the book published to go along with it, appeared, including one in Canada and one in Scotland. *See* Leo Carlin, Book Review, 45 W. VA. L.Q. 194 (1939); Clark, *supra* note 9; Otho S. Fasig, Book Review, 4 J. MARSHALL L.Q. 287 (1938); Fornoff, *supra* note 193; Gavit, *supra* note 194; Green, *supra* note 192; Ladd, *supra* note 193; John P. Maloney, Book Review, 14 ST. JOHN’S L. REV. 245 (1939); John A. O’Leary, Book Review, 14 NOTRE DAME

revamped procedure course, called "Judicial Remedies." This course was Harvard's version of "metaprocedure," and it was to cover the following:

[T]he development of the court system; procedure in actions at law, including the forms of action, common-law pleading and trial, and the enforcement and effect of judgments; the extraordinary legal remedies; the history of equity, equity pleading and trial, equity jurisdiction in tort and contract cases, and the enforcement and effect of equitable decrees; and an introduction to modern procedure and the elements of code pleading.¹⁹⁶

Austin Wakeman Scott, now joined by Sidney Post Simpson, prepared a new casebook to use in this course.¹⁹⁷ These authors noted, as Charles Clark remarked, "with an appropriate Bostonian rating of relative importance,"¹⁹⁸ that "[b]y a fortunate coincidence, the new curriculum of the Harvard Law School is going into effect at the same time as the new Federal Rules of Civil Procedure."¹⁹⁹ Nevertheless, the authors presented a course meant to "emphasize the historical development of the legal system on its adjective side."²⁰⁰ The book, like Gaul, is divided into three parts.²⁰¹ The first part, which is a revision of Scott's original Civil Procedure book,²⁰² covers actions at law—from the forms of action to judgment—in 677 pages.²⁰³ The second part treats suits in equity—from jurisdiction to execution—in 452 pages.²⁰⁴ The third part discusses modern procedure—first dealing with merger in sixty-

LAW. 227 (1939); Bolling R. Powell, Jr., Book Review, 25 VA. L. REV. 639 (1939); Paul Sayre, Book Review, 87 U. PA. L. REV. 629 (1939); Godfrey E. Updike, Book Review, 16 N.Y.U. L.Q. REV. 331 (1939); Percival W. Viesselman, Book Review, 27 CAL. L. REV. 238 (1939); Herbert Wechsler, Book Review, 53 HARV. L. REV. 345 (1939); Book Review, 17 CANADIAN B. REV. 217 (1939); Book Review, JURID. REV. 84 (1939). As one reviewer observed, "the considerable number of reviews which have recently appeared in legal periodicals offer additional and unqualified testimonial to its importance." Maloney, *supra*, at 245.

196. Simpson, *supra* note 4, at 975.

197. See AUSTIN WAKEMAN SCOTT & SIDNEY POST SIMPSON, CASES AND OTHER MATERIALS ON JUDICIAL REMEDIES (1st ed. 1938).

198. Clark, *supra* note 9, at 294.

199. SCOTT & SIMPSON, *supra* note 197, at vii.

200. Simpson, *supra* note 4, at 976; accord SCOTT & SIMPSON, *supra* note 197, at vii, 4.

201. Actually, the table of contents lists four parts. The first part, however, is only 15 pages and is comprised of an Introduction, see SCOTT & SIMPSON, *supra* note 197, at 1-4, and a chapter summarizing the organization of the English and American court systems, see *id.* at 5-15.

202. See Maloney, *supra* note 195, at 245; Viesselman, *supra* note 195, at 238. For a discussion of Scott's first book, see *supra* notes 184-90 and accompanying text.

203. See SCOTT & SIMPSON, *supra* note 197, at 16-692.

204. See *id.* at 693-1144.

six pages²⁰⁵ and then with the rules of modern procedure from pleading to judgment in sixty-three pages.²⁰⁶

Despite the inclusion of modern material, critics asserted that the “new” Harvard first-year course in procedure merely expanded the existing course and remained a “brief historical survey of the field.”²⁰⁷ The authors did not completely disagree. They acknowledged, “this course must be thought of as being in part a course in legal history.”²⁰⁸ Simpson regretted the absence of a course on Legal History in the new Harvard curriculum and maintained that “the historical emphasis to be given in the new course on Judicial Remedies will supply in part what is a real lack.”²⁰⁹

Why teach the course in the first year? Simpson replied: “[T]o introduce the entering student to the organization and operation of the judicial machinery and to give such instruction in procedure at law and in equity as is essential to optimum progress in the substantive law courses of the first year.”²¹⁰ Thus, not only had procedure become the handmaiden of substance in the courtroom, it became subservient to the substantive courses in the schoolroom.²¹¹

205. See *id.* at 1145-1210.

206. See *id.* at 1211-73. Modern procedure is also interspersed in the other portions of the book: “On every procedural subject the new federal rules dealing with the problem are set out in full.” Ladd, *supra* note 193, at 490. However, a study of these rules is left to “more extensive federal jurisdiction and procedure courses.” *Id.*

Dean Clark maintained that despite the inclusion of modern materials throughout the book, the student was not being taught modern procedure. He complained, “[W]e are continually jerked back and forth between the ancient and the modern law, so that it is difficult even for an experienced person, not to speak of a first-year student, to realize where we are or what century we are in at a given point.” Clark, *supra* note 9, at 295. For a fuller criticism of the treatment of modern procedure, see *id.* at 294-96.

207. Clark, *supra* note 9, at 294; see also Sayre, *supra* note 195, at 632 (“[I]n some way that has not yet been indicated, these materials must be considerably amplified before the law student is equipped for active practice in the courts.”); Wechsler, *supra* note 195 (criticizing the historical approach of the book).

208. SCOTT & SIMPSON, *supra* note 197, at 4; see also *supra* note 151 and accompanying text.

209. Simpson, *supra* note 4, at 981.

210. *Id.* at 975-76; accord SCOTT & SIMPSON, *supra* note 197, at viii, 3.

211. Scott and Simpson fully recognized this transformation: “Since the law of procedure is, so to speak, the handmaiden of the substantive law, the student should consider this course as in part designed to aid his study of the other courses of the first year.” SCOTT & SIMPSON, *supra* note 197, at 3. Compare Wechsler, *supra* note 195, at 348 (noting this subordination with disapproval), with Ladd, *supra* note 193, at 492 (praising authors’ “presentation of their material interrelating procedure as a background to the study of substantive law”).

For a thought-provoking essay on this view of procedure, see Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990).

Although the Scott and Simpson book was highly acclaimed,²¹² it was not destined to become the model for the modern civil procedure book. Its popularity,²¹³ though, may have been the impetus needed to tip the balance in the procedure debate in favor of the Civil Procedure course, and away from the Pleading course. By 1953, it could be said, "the time of the separate course in Common Law Pleading is undoubtedly and happily closed,"²¹⁴ although the last Pleading casebook was published in 1958.²¹⁵

The Harvard approach, which focused on pre-code procedure, however, was moribund. With the promulgation of the Federal Rules, procedure courses began to discuss them. In 1939, Professor James Moore called for a sweeping change of the basic procedure course, making federal procedure the focus of the course.²¹⁶ That year, James Pike, an attorney at the SEC and a lecturer at George Washington, edited the first casebook built around the Federal Rules.²¹⁷ Progress was slow, however, as Moore had predicted.²¹⁸ But from that time on, new Civil Procedure, as opposed to Pleading, casebooks increasingly at least introduced the students to the new rules and a few spent significant time on the new procedure.²¹⁹

2. The New Paradigm

It is difficult to find evidence of innovations in procedure courses for several years, because "World War II stopped the publication of new casebooks."²²⁰ As the 1950s began, there was still no consensus as to the

212. See Maloney, *supra* note 195, at 246 (noting that "only severe criticism is found in the scholarly critique of one of the acknowledged leaders of a different school of thought" [i.e., Charles Clark]).

213. See John M. Kaufman, Book Review, 8 RUTGERS L. REV. 558, 559 (1954) (referring to Scott and Simpson book as "widely used").

214. Schuyler W. Jackson, Book Review, 6 J. LEGAL EDUC. 263, 264 (1953); see also Charles H. King, Book Review, 36 CORNELL L.Q. 613, 613 (1951) ("In recent years, with the decline in curricular emphasis on common law pleading, this approach [a 'bird's-eye view' of the whole procedural field] to the problem of the first year procedure course has become increasingly popular.").

215. See EDWARD W. CLEARY, CASES ON PLEADING (2d ed. 1958).

216. See Moore, *supra* note 167, at 884.

217. See JAMES A. PIKE, CASES AND OTHER MATERIALS ON NEW FEDERAL AND CODE PROCEDURE (1939).

218. See Moore, *supra* note 167, at 891-92.

219. See, e.g., GAVIT (2d ed.), *supra* note 170, at 1 (announcing "the Federal Rules of Civil Procedure are used as the basic materials"); ARTHUR T. VANDERBILT, CASES AND OTHER MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION 11 (1952) (explaining that "it seems advisable to introduce the law student at the outset of his course to the Federal Rules of Civil . . . Procedure").

220. William Ray Forrester, Book Review, 25 TEX. L. REV. 110, 111 (1946).

scope of the various procedure courses. First, there were some topics that did not have a clear niche in the traditional courses. The typical procedure courses, either Pleading and Trial Practice or the combined course in Civil Procedure, covered such subjects as pleading, discovery, summary judgment, and right to jury trial.²²¹ What about subject matter and personal jurisdiction or judicial power and other constitutional issues? Did they belong in the basic procedure courses or somewhere else in the curriculum? Second, what portion of the course should be devoted to federal procedure instead of state practice? A problem that faced any Civil Procedure author interested in treating the new federal procedure was the overlap with the relatively new course on Federal Jurisdiction.

Before the 1930s, very few schools offered a course in Federal Jurisdiction. With the growth of federal litigation in the twentieth century and the promulgation of the new rules, the course increased in importance.²²² It had originally been a course on the ins and outs of federal practice. In the 1930s, Felix Frankfurter of the Harvard Law School attempted to change the course to one on public law, exploring the interesting tensions inherent in "Our Federalism."²²³ Although subsequent Federal Jurisdiction casebooks were more theoretical than the earliest ones, the majority published before 1953 remained more or less procedural in orientation.²²⁴ How much of federal procedure and jurisdiction could be offered in Civil Procedure without making the Federal Jurisdiction course redundant?

Proceduralists, moreover, recognized the "growing need for a course of study that emphasizes not only the inter-relationship of the procedural courses, but also the bearing thereon of certain phases of constitutional law, conflict of laws, and administrative law."²²⁵ Procedure teachers proposed various solutions to meet this need. For example, in 1940, Percival William Viesselman of the University of Kansas added such topics as judicial power

221. For a description of the Trial Practice course, see *supra* notes 177-78 and accompanying text.

222. See *supra* note 78.

223. The first edition of Professor Frankfurter's casebook was published in 1931. See FELIX FRANKFURTER & WILBUR G. KATZ, CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE (1931). The book was revised in 1937. See FELIX FRANKFURTER & HARRY SHULMAN, CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE (rev. ed. 1937). Given the theoretical nature of Frankfurter's books, it is probably no coincidence that he rushed his second edition through in 1937 so that it could not cover the new Federal Rules of Civil Procedure, which were not promulgated until 1938. For a more detailed discussion of the early Federal Courts books, see McManamon, *supra* note 78, at 757-70.

224. See, e.g., ARMISTEAD M. DOBIE, CASES ON FEDERAL JURISDICTION AND PROCEDURE (1935); CHARLES T. MCCORMICK & JAMES H. CHADBOURN, CASES AND MATERIALS ON FEDERAL COURTS (1st ed. 1946).

225. VIESSELMAN, *supra* note 178, at iii.

and subject matter jurisdiction to his upper-level book on Trial Practice.²²⁶ In contrast, Edson Sunderland added material on “the organization, operation, and jurisdiction of courts and of the judicial power” to his book on Pleading.²²⁷ In the late 1940s and early 1950s, the next generation of Michigan faculty proposed a new division of procedural topics. The so-called “Michigan plan”²²⁸ divided most of the material into two courses:²²⁹ a “traditional” course on Pleading and Joinder²³⁰ and a new course on Jurisdiction and Judgments.²³¹ The latter course “includes material on federal jurisdiction that is not generally found in civil procedure books.”²³² As such, it “would entail the elimination of a separate course in Federal Jurisdiction,” and “[t]he course in Conflict of Laws would have to be rather drastically revised.”²³³

The allocation of procedural topics was decided, however, at least for the modern era, in 1953, when two paradigmatic books were published in Civil Procedure and Federal Courts. Richard H. Field and Benjamin Kaplan of the Harvard Law School federalized the first-year course in Procedure.²³⁴ This course was not repetitive of the upper-level course in Federal Jurisdiction because in the same year, Henry M. Hart, Jr., of Harvard and Herbert Wechsler of Columbia completed a change in the direction of the latter course.²³⁵

The Field and Kaplan book presented “a radical departure from traditional concepts of teaching civil procedure to the beginner.”²³⁶ First,

226. See *id.* at v-x (listing contents).

227. Green, *supra* note 192, at 404; see EDSON R. SUNDERLAND, JUDICIAL ADMINISTRATION ITS SCOPE AND METHODS (1937).

228. For a thorough description of the Michigan plan, see Charles W. Joiner, *Teaching Civil Procedure: The Michigan Plan*, 5 J. LEGAL EDUC. 459 (1953).

229. There was also an elective upper-level course on Trials and Appeals and a required practice laboratory. See *id.* at 465.

230. See WILLIAM WIRT BLUME & JOHN W. REED, PLEADING AND JOINER at v (1952) (describing book as “traditional”). This book appeared in an earlier, “draft,” version. See E. BLYTHE STASON & WILLIAM WIRT BLUME, CIVIL PROCEDURE I: CASES AND MATERIALS ON PLEADING AND JOINER (1948).

231. See WILLIAM WIRT BLUME & CHARLES W. JOINER, JURISDICTION AND JUDGMENTS (1952). This book appeared in an earlier, “draft,” version. See WILLIAM WIRT BLUME & CHARLES W. JOINER, CIVIL PROCEDURE: CASES AND STATUTES ON JURISDICTION AND JUDGMENTS (1949).

232. John A. Bauman, Book Review, 6 J. LEGAL EDUC. 265, 265 (1953).

233. *Id.*

234. See RICHARD H. FIELD & BENJAMIN KAPLAN, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE (1953).

235. See HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

236. Kaufman, *supra* note 213, at 558. Moore had suggested this course in 1939, see *supra* note 167, but no one had dared to publish a book based on his model before. For example, Pike’s

instead of taking the earlier approach, which used a mixture of decisions from all jurisdictions, Field and Kaplan presented the procedure of a single system, the Federal Rules of Civil Procedure. Reviewers praised this move because it gave the students a sense of direction.²³⁷ The advantages of using the federal system were also recognized: it was simple and it was influencing the procedure of the states. Second, the Field and Kaplan book defined the topics that we teach our students today in the basic Civil Procedure course. Not only did the authors include traditional topics, such as pleading, joinder, and directed verdicts, they added such federal subjects as federal subject matter jurisdiction and the impact on federal procedure of *Erie Railroad Co. v. Tompkins*.²³⁸

Meanwhile, Hart and Wechsler

wrought substantial changes in the subject generally known as "Federal Jurisdiction" Departing from the usual pattern which focuses almost exclusively on the rules for entering and proceeding in the United States courts, this book explores "[t]he jurisdiction of courts in a federal system [as] an aspect of the distribution of power between the states and the federal government." Except as relevant to this theme, federal procedure is turned back to the procedure courses.²³⁹

This paradigmatic allocation of subjects between the two courses has not been universally accepted.²⁴⁰ For example, in Civil Procedure, the book by Geoffrey C. Hazard, Jr., Colin C. Tait, and William A. Fletcher²⁴¹ still treats state procedure prominently.²⁴² In Federal Courts, Charles Alan Wright

book, *see supra* note 217, presented the Federal Rules, but did not include matters such as federal jurisdiction and the *Erie* doctrine.

237. *See* Donald C. Lubick, Book Review, 67 HARV. L. REV. 1489, 1494 (1954); *see also* Kaufman, *supra* note 213, at 559.

238. 304 U.S. 64 (1938). *Erie*, of course, held that there was no general federal common law. *See id.* at 78. Very soon thereafter, however, the Court expanded this holding, calling into question the validity of federal procedure. *See Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

239. Paul J. Mishkin, Book Review, 21 U. CHI. L. REV. 776, 776 (1954); *accord* Edward L. Barrett, Jr., Book Review, 42 CAL. L. REV. 202, 202 (1954); Charles W. Joiner, Book Review, 14 LA. L. REV. 722, 722 (1954).

240. Note that the paradigm is the topics covered, but not necessarily the order. For example, a number of modern books begin with jurisdiction, but the Field and Kaplan book does not. What is significant is that all modern books include jurisdiction.

241. GEOFFREY C. HAZARD, JR. ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE: STATE AND FEDERAL (7th ed. 1994).

242. *See* David C. Louisell & Geoffrey C. Hazard, Jr., *Preface to the First Edition* of GEOFFREY C. HAZARD, JR. ET AL., *supra* note 241, at v ("Despite the increasing acceptance of the Federal Rules of Civil Procedure a number of states, including California and New York, still pursue the 'Code road.' Students preparing for Code practice cannot be ignored . . .").

continues to edit and revise a book originally published in 1946 by Charles T. McCormick and James H. Chadbourn.²⁴³ Despite the many changes to the book in the intervening years, “the general concept of the book, and even many details of its arrangement and its choice of cases, remains as it was when they issued a first pioneering edition in 1946.”²⁴⁴ In particular, the book still covers much procedural matter not included in the Hart and Wechsler paradigm.²⁴⁵

Moreover, a number of scholars in the intervening forty years have expressed very different ideas about the proper scope of the introductory procedure course. The most striking example is the vision presented by Robert M. Cover, Owen M. Fiss, and Judith Resnik. Their unusual book offers a course on so-called “metaprocedure,” a combination of civil, criminal, and administrative procedure.²⁴⁶

By and large, however, the two paradigms published in 1953 have defined the basic scope of the Civil Procedure and Federal Courts courses to the present day.

IV. DRAWING LESSONS FROM THIS HISTORY

It seems that we are poised on the brink of post-modernity. The Civil Procedure and Federal Courts paradigms have recently been criticized as out-of-date.²⁴⁷ I do not have any brilliant suggestions for the direction we should now take. I do, however, think that before we take the leap into the next era, we should draw some lessons from our history, if we are not to be doomed to repeat it. There are many, but let me just mention a few.

First, we have asked ourselves why we require Civil Procedure.²⁴⁸ One of my fellow panelists, Edward Sherman, suggested several answers to

243. MCCORMICK & CHADBURN, *supra* note 224.

244. CHARLES T. MCCORMICK ET AL., *CASES AND MATERIALS ON FEDERAL COURTS* at iv (9th ed. 1992).

245. *See id.* at 603-706 (covering procedure in district court).

246. COVER ET AL., *supra* note 167.

247. For a criticism of the Field and Kaplan paradigm, see, for example, Eskridge, *supra* note 167, at 948, which concludes, “[d]evelopments in legal theory and education have undermined the cogency of [Field’s and Kaplan’s] ideas . . . and have paved the way for new approaches to teaching procedure.” For a discussion about the continued viability of the Hart and Wechsler paradigm, see Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993 (1994), Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994), Judith Resnik, *Rereading “The Federal Courts”: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021 (1994), and Mary Brigid McManamon, *Challenging the Hart and Wechsler Paradigm*, 27 CONN. L. REV. 833 (1995) (book review).

248. *See supra* note 43.

that question. Interestingly, one of the reasons he gave was an old familiar one: that Civil Procedure teaches the students to read the cases in their substantive classes. My “substantive” colleagues say the same thing: they need me to explain such concepts as “demurrer” and “summary judgment” so they do not have to waste their time doing so in, say, Contracts. That troubles me. Of course, Civil Procedure can shed light on the students’ other courses, just as Contracts and Torts shed light on Procedure. But I do not see my role as an adjunct to “more important” courses. I understand Charles Clark’s desire to prevent procedure from getting in the way of the merits of a case, but I believe we do ourselves, our students, and the law a disservice if we see our course as less important than the others.

I do not believe that Civil Procedure is, or should be, subordinate to the other classes that students take. I think we can take a lesson from our forebears about the importance of the course: without a remedy, there is no right. Litigation serves as a major vehicle for lawmaking in our government and for articulation of social values. It is for that reason important to study it to comprehend the rest of law studies. That is, it is through the forge of the judiciary that our law takes shape, and to understand that law, we must understand how the forge works. Thus, if we look at our course as one about the nature of our society, we may gain some insights into ourselves and our process that will enable us to make it better. At the very least, I do not think we ever need ask ourselves again why we require this course.

Second, critics of the modern course suggest adding Alternative Dispute Resolution. At one of the small group discussion meetings I attended at the Civil Procedure Conference, one teacher expressed a typical opinion. She said that she did not teach ADR because it is so easy to grasp. She believed that if any one can learn the more difficult procedure under the Federal Rules, he or she can learn ADR outside the classroom. After writing this Article, however, I wonder if in fifty years we will sound as short-sighted and reactionary as those who resisted teaching Code Pleading because it was “basely mechanical and beneath the attention of the scholarly mind.” I read the words of the author of a 1934 casebook on Common Law Pleading and I heard myself:

[A]ny pleader who has an intimate working knowledge of common law procedure need have no qualms of doubt as to his ability to use any code system that has ever been devised, and with very little additional study to become skilled in the art, far beyond the

aptitude displayed by the code pleader who has slurred over the foundation of his system.²⁴⁹

Of course, we can distinguish ourselves from someone promoting Common Law Pleading on the eve of the promulgation of the Federal Rules. Common law pleading had virtually disappeared from the judicial landscape, while today, the Federal Rules are still viable and oft-used, in both federal court and most state courts. Moreover, even students using ADR have to understand such concepts as jurisdiction,²⁵⁰ the scope of a lawsuit, discovery, and *res judicata*. Finally, ADR operates in the shadow of the law as declared through litigation. One of the lessons of our history, however, is that as we find ourselves resisting the pressure to change, we need to question our motives closely. It may be that we are resisting a new way of conceptualizing the law, which would lead to an enrichment of our understanding.²⁵¹

Third, we are afraid of creativity. When Langdell set the curriculum, he placed the traditional course on Pleading in the first year and Evidence in the second year. As more procedural topics were thought worthy of attention, they were simply overlaid on the Langdellian plan. Perhaps there is a very good reason to teach Trial Practice—that is most of procedure besides pleading—after Evidence. For example, have you ever noticed how difficult it is to teach discovery without evidence? How do you explain that material must be relevant and not privileged without explaining relevance and privilege? Likewise, how do you teach summary judgment without teaching burden of proof? By the same token, in discussing motions for directed verdicts, judgments notwithstanding the verdict, and new trial, the students have to understand such concepts as impeached or unimpeached evidence and the weight of the evidence. Why is it so necessary to have Civil Procedure first and Evidence second? Because that is what Langdell believed?

If we cannot convince our colleagues to give us three years of required procedure courses, perhaps we could take a lesson from the pre-Langdell era, when the courses were not uniform in length. For example, the students could be given four credits in procedure in their first semester. The first quarter could be a unit on Pleading. This could be followed by three units of Evidence. In the second semester, perhaps the first three-quarters of the semester could be spent on the subjects covered in the old Trial Practice course, followed by the last quarter of the semester spent on a Practice Court.

249. ROGER O'DONNELL, *PROCEDURE AND FORMS COMMON LAW PLEADING* at vi (1934), quoted in E.M. Morgan, Book Review, 48 HARV. L. REV. 366, 367 (1934).

250. See, e.g., *Hameli v. Nazario*, 930 F. Supp. 171 (D. Del. 1996).

251. For example, see the preface to COVER ET AL., *supra* note 167, which discusses the authors' non-linear approach to litigation.

This would present the material to the students in a way that makes more sense, include the use of the information in an applied course, and yet not tie up the entire three years.

I do not seriously propose such a solution. I toss it out simply to provoke debate. Moreover, I know how receptive to such a drastic departure from the Langdellian curriculum the rest of our faculty would be. I do suggest, however, that we should not be afraid to question our Langdellian universe. If we are truly on the brink of a new era, we should dare to be creative to provide the procedural course that makes the most sense, not one that is merely the old course in a slightly new shape. After all, our view of the role of litigation in our society has changed dramatically over the years.²⁵² Perhaps we should communicate this change to our students.

252. For an interesting discussion of our changing attitudes toward the courts, see Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).