

Heroes of the Revolution:

Henry D. Sedgwick and Timothy Walker

Mark E. Steiner

Legal language has never lacked critics, and its most effective ones have been lawyers. The best-known lawyer-critics are Jeremy Bentham, Thomas Jefferson, and Fred Rodell.¹ But many others have long remained unacknowledged, and prominent among these are Henry Dwight Sedgwick and Timothy Walker.

At first glance, Henry Dwight Sedgwick (1785–1831), a member of a prominent New England family, seems an unlikely advocate of simplifying legal language because he came from a family steeped in law. His father, Theodore Sedgwick, was a staunch Federalist, a member of the First Congress, speaker during the Sixth Congress, a United States Senator, and a judge on the Massachusetts Supreme Court.² But Henry, like several other family members, rejected his father's conservatism. His brother joined the insurgent Democratic party of Massachusetts and unsuccessfully ran for lieutenant governor.³ His sister, a leading novelist, was an advocate of prison reform.⁴

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1. See TOM GOLDSTEIN & JETHRO K. LIEBERMAN, *THE LAWYER'S GUIDE TO WRITING WELL* 7, 15–17 (1989); DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 252–53, 261–66 (1963); RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 4 (1979).
 2. *Theodore Sedgwick*, 8 *DICTIONARY OF AMERICAN BIOGRAPHY* 549 (Dumas Malone ed., 1935); *Robert Sedgwick*, 5 *APPLETONS' CYCLOPÆDIA OF AMERICAN BIOGRAPHY* 450–51 (James G. Wilson & John Fiske eds., 1888).
 3. *Theodore Sedgwick*, 8 *DICTIONARY OF AMERICAN BIOGRAPHY* 551 (Dumas Malone ed., 1935); [William Cullen Bryant], *Political Portraits, No. XVII: Theodore Sedgwick*, 7 *U.S. MAG. & DEM. REV.* 129, 129–30 (1840).
 4. *Catharine Maria Sedgwick*, 8 *DICTIONARY OF AMERICAN BIOGRAPHY* 547 (Dumas Malone ed., 1935); DAVID B. DAVIS, *ANTEBELLUM AMERICAN CULTURE* 24–25 (1979).

Sedgwick, an early supporter of codification,⁵ called for simplifying legal language as part of a reform agenda to eliminate the “evils and absurdities of the practice of the English common law.”⁶ Writing anonymously as “a lover of improvement,” he published a pamphlet in 1822 on the “English Practice,” in which he advocated ending the delay and expense of the legal system and simplifying “rules of proceeding.”⁷ He believed that law should be easily comprehended and easily practiced.⁸

Sedgwick attacked the use of English legal forms in American courts.⁹ English common law “carefully preserved” its antiquated forms “long after the spirit and design which they were originally intended to subserve [had] passed away.”¹⁰ Sedgwick explained:

The life has departed, and the soul has gone; but the body is embalmed, and kept to future ages in a useless state, between preservation and decay. The grand law of human life is mutability, and nothing has yet triumphed over it but legal forms. In the progress of society, laws are improved and abrogated, and one principle is superseded by another, better adapted to the actual state of things. Nothing is immortal but legal forms.¹¹

Sedgwick believed that “the fundamental principle” of English practice was that changes in “the principles, rules, or modes of

5. DAVIS, *supra* note 4, at 150–51, 153–55; THE LEGAL MIND IN AMERICA FROM INDEPENDENCE TO THE CIVIL WAR 135–46 (Perry Miller ed., 1962).

6. [HENRY DWIGHT SEDGWICK], THE ENGLISH PRACTICE (New York, J. Seymour 1822). See generally EDWARD K. SPANN, IDEALS & POLITICS: NEW YORK INTELLECTUALS AND LIBERAL DEMOCRACY, 1820–1880, at 31–33 (1972).

7. [SEDGWICK], THE ENGLISH PRACTICE, *supra* note 6, at 11.

8. *Id.*

9. On antebellum legal formbooks, see DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 232 (1963); ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 138–39 (1990).

10. [SEDGWICK], THE ENGLISH PRACTICE, *supra* note 6, at 12.

11. *Id.*

administering” English law were to be adapted to existing forms “instead of adapting the existing forms to the alterations.”¹²

Sedgwick provided examples of forms that had outlived their usefulness. He skillfully analyzed a *capias* writ used in New York courts, pointing out the thoughtless adoption of the version used before the King’s Bench. That form had been carelessly handed down from ancient times, although the circumstances to which it originally applied had wholly changed. The writ was full of unnecessary alarms. For example, it unnecessarily ordered a defendant to make a personal appearance in court. The evils found in the writ, Sedgwick said, would be avoided if the language of the document expressed its “real meaning.”¹³ The fictions that appeared in the writ “never did and never can answer any useful end.”¹⁴

Sedgwick included in an appendix the record in “the usual form” of an “ordinary” debt action. To illustrate the excesses of legal forms, he italicized those portions that he considered “superfluous.”¹⁵ Without changing the content, he edited a 946-word declaration to a lean 180 words. The length of the captions at the beginning of the record dropped from 223 to 31 words.¹⁶ How many modern forms might benefit from Sedgwick’s fine editorial hand?

A contemporary of Sedgwick, Timothy Walker (1802–1856) was an Ohio lawyer, judge, author of the influential treatise *An Introduction to American Law* (1837), founder of the Cincinnati

12. *Id.*

13. *Id.* at 14–15.

14. *Id.* at 18.

15. *Id.* at 55.

16. *Id.* at 55–58.

Law School, and editor of the *Western Law Journal*.¹⁷ Like Sedgwick, Walker supported both codification and simplification of legal language.¹⁸ Unlike Sedgwick, Walker was a conservative Whig. Walker agreed with his mentor, Joseph Story, that moderate reforms were preferable to radical changes in the common-law system.¹⁹

In addresses to law students, in journal articles, and in his treatise on American law, Walker advocated the use of plain language. He observed that "the *language* of the law is a general subject of complaint."²⁰ While recognizing that legal language contains "unnecessary technicality," he noted that law shares that problem with "every science of ancient date."²¹ Walker explained:

There has always been a disposition in the votaries of learning towards exclusiveness. They have sought to create a monopoly of their acquisitions, by employing a language not generally understood, nor easily acquired; and when a phraseology, however barbarous or inelegant, had been consecrated by time, it is very difficult to change it.²²

Walker detailed the origin of Anglo-American legal language, explaining that "[t]he old law language was in fact a jargon com-

17. See generally WALTER THEODORE HITCHCOCK, TIMOTHY WALKER: ANTEBELLUM LAWYER (1980) (unpublished Ph.D. dissertation, University of Mississippi); M. Paul Holsinger, *Timothy Walker: Blackstone for the New Republic*, 84 OHIO HIST. 145 (1975).

18. Timothy Walker, *Codification — Its Practicability and Expediency*, 1 W. L.J. 433 (1844).

19. See HITCHCOCK, *supra* note 17, at 153–88; R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 272–81 (1985).

20. TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 10 (Philadelphia, P.H. Nicklin & T. Johnson 1837).

21. *Id.*

22. *Id.* at 10–11.

pounded of three distinct languages.”²³ He called for broad reform:

It is time that this should be generally understood; and that efforts should be made, on all hands, to simplify the language of the law, so as to make it level to the comprehension of all. The same overpowering reasons which opened the Scriptures to the laity in their vernacular tongue, should operate to make human laws intelligible to every inquirer.²⁴

Walker complained that it takes law students “so long to learn the terms, that little time is left for principles.”²⁵ In his book, he avoided the use of “foreign terms as much as possible” because he believed that one should never “use a foreign word, when a native one will express the idea as well.”²⁶ By using native terms, lawyers were only “giving up pedantry, to promote utility.”²⁷

Walker viewed the eventual reform of legal language optimistically. In an 1838 address, he told his graduating law students: “In by-gone times the language used by lawyers was scarcely intelligible beyond the pale of the profession, on account of the quaint and barbarous expressions with which it abounded.”²⁸ But “this disgusting pedantry,”²⁹ he thought, was disappearing:

Learned sound no longer passes with the ignorant for sense. Stupid admiration can no longer be excited by a pompous phraseology. If you would have credit for knowledge, you must

23. *Id.* at 11.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Timothy Walker, *Advice to Law Students*, 1 W. L.J. 481, 484 (1844).

29. *Id.*

evince that you possess it, by using words which your hearers understand.³⁰

The "harsh and unseemly jargon . . . [was] giving way to the liberalizing spirit of modern times."³¹ Lawyers did not have to be "viewed as enemies of the English language";³² in fact, lawyers had purged "legal parlance of its awkward and uncouth style."³³ Walker asked law students to cooperate in this commendable work. He advised them: "You cannot confer a greater benefit upon your profession, than by assisting to purify its phraseology."³⁴

Like Sedgwick, Walker assailed the legal forms in common use. He considered lawyers' least pardonable abuse to be "the unconscionable redundancy of all legal instruments and proceedings."³⁵ Lawyers, he thought, should strive to make their forms like those of merchants: as "short and comprehensive as possible."³⁶

But lawyers, because in former times they were paid by the letter, have aimed to make their forms as long and incomprehensible as possible; and they . . . have admirably succeeded. The fictions, tautologies, and circumlocutions devised by them to elongate legal documents, may be cited as specimens of marvellous ingenuity. Take the common deed as an example, which is at least six times as long as it need be; and from this one instance learn all. The evil may seem trivial in a single case; but when you take into view all the legal forms, and the millions who daily use them, the aggregate swells into an enormous magnitude.³⁷

30. *Id.*

31. *Id.* at 485.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

Walker exhorted his students to emancipate themselves from “the tyranny of custom.”³⁸ He counseled them to adopt the maxim “that the shortest form, which will satisfy the law, is the best.”³⁹

In the September 1848 issue of the *Western Law Journal*, Walker included a short item on “Law Phraseology,” which modern legal-language critics still use (though usually without citing a source). Walker purported to translate the phrase “I give you that orange” into this example of legal phraseology:

I give you all and singular my estate and interest, right, title, and claim, and advantage of and in that orange, with all its rind, skin, juice, pulp, and pips, and all right and advantage therein, with full power to bite, cut, suck, and otherwise eat the same, or give the same away, as fully and effectually as I, said A B, am now entitled to bite, cut, suck, or otherwise eat the same orange, or give the same away with or without its rind, juice, pulp, and pips, any thing heretofore, or hereafter, or in any other deed or deeds, instrument or instruments, or what nature or kind so ever, to the contrary in anywise notwithstanding.⁴⁰

In another article in the *Western Law Journal*, Walker estimated that four-fifths of any pleading or conveyance could be pruned “without the slightest injury to perspicuity or precision.”⁴¹

Walker and Sedgwick produced sophisticated and prescient criticisms of legal language. Their work foreshadowed many of the themes developed by modern critics of legal language. Most impressively, they understood that the key to changing legal language was changing legal forms. Without this change, legal documents would continue to display “unconscionable redundancy.”

38. *Id.*

39. *Id.*

40. [Timothy Walker], *Miscellaneous: Law Phraseology*, 5 W. L.J. 574, 574 (1848).

41. [Timothy Walker], *Miscellaneous: General Law Reform*, 1 W. L.J. 78, 78 (1843).

Modern lawyers should recognize the wisdom of Walker and Sedgwick: legal forms are not immortal, and the shortest form that satisfies the law is the best.