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William P. LaPiana's intensive study of the contest over George Lorillard's estate interprets the New York Revised Statutes' Trust Code as a case study of how the common law responded to codification.[1] His detailed study of the reaction of the New York courts, through the lens of the interpretation of a testamentary trust of one of New York's most successful businessmen, is a piece of LaPiana's path breaking work on legal thought in the nineteenth century.[2] LaPiana has previously shown how legal thought (and education) became more professional, more rational, and more scientific in the years before and shortly after Civil War.[3] He is one of our leading scholars of how law moved from a premodern world of natural law and hierarchy to a modern world of commerce and (presumed) rationality.

LaPiana's story in *Social Control of Wealth in Antebellum New York*[4] deals with the struggle over codification in New York in the 1820s and of who will control the making and interpretation of law — the legislatures or the courts — as well as the motives behind the effort at reform.[5] LaPiana's story is that the changes were part of "revolutionary" reform,[6] or to use the phrase of a judge at the time, the changes

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1 William P. LaPiana, *The Social Control of Wealth in Antebellum New York*, 42 ACTEC L.J. 279, 287-310 (2017).

2 Readers of the *ACTEC Law Journal* who know LaPiana as a leading scholar of contemporary trusts and estates law might not know about his legal history scholarship. *See, e.g.,* WILLIAM LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994).

3 *See* William LaPiana, *Jurisprudence of History and Truth,* 23 RUTGERS L.J. 519, 519-59 (1992).

4 LaPiana, *supra* note 1.

5 By focusing on the reforms themselves, and showing how they were deradicalized, LaPiana has a different vantage from most who have written on codification in the pre-Civil War era. Moreover, he answers Robert Gordon's request that codification be seen as the professional response to radical movements. *See* Robert W. Gordon, *The American Codification Movement*, 36 VAND. L. REV. 431, 439 (1983) (reviewing CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM REFORM (1981)).

6 LaPiana, *supra* note 1, at 286.

were "great and radical."[7] His conclusion is that the New York courts resisted some of the more radical changes, even as they permitted some of the Code's limitations of trusts. The trajectory of LaPiana's story is that the New York Court for the Correction of Errors upheld the Code when they invalidated Lorillard's testamentary trust that would have extended for twelve lives in being (those of his twelve nieces and nephews), even though such a trust would have been perfectly fine at common law.[8] This caused Lorillard's estate to immediately go outright to his intestate heirs, only some of whom were the nieces and nephews who would have taken under the trust.[9] A dozen years later, the New York courts interpreted the Code as supplementing rather than displacing entirely the New York common law of trusts when they permitted a trust to be created for a person who *could* manage property himself.[10] The Code had apparently limited to cases where outright ownership was not possible (minors, married women whose property was managed by the husbands, and people under a mental disability).[11]

In thinking about LaPiana's narrative, it is helpful to evaluate what the Trust Code did and what the Commissioners who wrote the code (commonly called the Revisers) thought they were doing. In terms of the reforms, the Code required that all future interests vest in possession within two lives in being at the time of the trust's creation (a key issue in George Lorillard's testamentary trust).[12] The Code also limited the purposes for which a trust could be created. The section of the Code of most relevance to LaPiana's article limited trusts to receiving rents and profits from land and applying them "to the use of any person" for life (or for a shorter period).[13] Thus, the Code on its face made changes that were significant.

There is the second point — what the Revisers thought they were doing – which is an excellent beginning point for understanding the mission of the New York Code that was passed in 1828 and 1829 and took

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7 *Id.* (quoting Coster v. Lorillard, 14 Wend. 265, 298 (N.Y. 1835)).

8 *Id.* at 301-02.

9 *Id.* at 303.

10 *Id.* at 304-08 (discussing Leggett v. Perkins, 2 N.Y. 297 (1849)).

11 *Id.* at 307.

12 3 N.Y. REV. STAT. tit. 2, § 15 (1859).

13 *Id.* § 55(3). It may be significant that section 55 as enacted allowed the application of "rents and profits of land" to any person, whereas the initial draft had limited the purpose to "education and support, or support only" of any person. *See* REPORT OF THE COMMISSIONERS APPOINTED TO REVISE THE STATUTE LAWS OF THIS STATE, MADE TO THE LEGISLATURE 31-32 (1827) [hereinafter REPORT OF THE COMMISSIONERS] (dealing with section 56, which was subsequently codified as section 55).

effect in January 1830 are the Revisers' Notes.[14] The Notes reflect the Revisers' goals to bring rationality to the law of property, to limit trusts, and to promote alienability of property. As to the rationalization part of the story, the Notes explain that property law was

> very imperfectly understood by any, who have not made it an object of peculiar study and attention; and so remote are its principles and maxims from ordinary apprehension, that to the mass of the community, they seem to be shrouded in impenetrable mystery. It is surely needless to add, that in the same proportion as the law is complex and obscure, is litigation frequent, expensive and uncertain.[15]

And they thought there was little reason for the complexity of land law. And yet it seemed to the Revisers that the principles could be simplified and made more accessible, as was the case with, for instance, French property law.[16]

The Revisers blamed the complexity on the common law and the legacy of feudalism, as well as efforts over centuries to adapt property owners' desires around the arcane law.[17] The Revisers also had grand, one might even say grandiose, ideas about the importance of their changes, that the changes would bring rationality and promote commerce. The Revisers were particularly anxious that the legislature adopt the real property reforms because that would make land transactions easier and less confusing – and thus less likely to lead to litigation.[18] Their Notes acknowledged that the proposed modification and restrictions on trusts "may be viewed by some as an alarming innovation."[19]

Such were the major issues that the Revisers said were motivating them, the grand themes of rationalizing law, undoing the legacy of feudalism, and promoting commerce. The Revisers also spoke about why they proposed specific reforms. And those statements can help us understand a little better the multiple goals they were advancing when they revised the rule against perpetuities and also when they trimmed

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14 REPORT OF THE COMMISSIONERS, *supra* note 13, at 21. *See also* Coster v. Lorillard, 14 Wend. 265, 298 (N.Y. 1835) (Savage, C.J.) (quoting REPORT OF THE COMMISSIONERS, *supra* note 13, at 21).

15 REPORT OF THE COMMISSIONERS, *supra* note 13, at 36.

16 *Id.*

17 *Id.*

18 *Id.*at 41.

19 *Id.* at 35. *See also* GREGORY S. ALEXANDER, PROPRIETY AND COMMODITY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970, at 97-125 (1997) (speaking of tension between liberality in interpretation of trust law and technicality). While the tension between liberal reading of law and technical readings is clearly key to the trust code, I would emphasize that there were significant differences on issues of alienability and on the desirability of trusts at all.

the permissible uses of trusts. When it came to perpetuities, the Revisers said they sought to promote alienation of land.[20] Because creating trusts "is always in a greater or less degree the source of inconvenience and expense, by embarrassing the title and requiring the frequent aid of a court of equity," the Revisers concluded that "it was desirable that express trusts should be limited as far as possible, and the purposes for which they may be created, strictly denned."[21] That was the Revisers' justification for the limitation of express trusts to cases where "the trust is to receive the rents and profits of lands and to apply them to the education of a minor, the separate use of a married woman, or the support of a lunatic or spend-thrift."[22]

The Revisers' Notes are important and should be read in conjunction with the case challenging George Lorillard's testamentary trust, *Coster v. Lorillard*, because they reveal the skepticism of great wealth. The Code and the judges' ideas seem to have worked in conjunction to defeat the testamentary trust. For the various opinions — particularly at the New York Court for the Correction of Errors — reveal a deference to the legislature and also satisfaction that the Revisers had rationalized the law. Chief Justice John Savage spoke in poetic terms of the new Code:

> The learned antiquarian will pause and ponder over this vast pile of ruins; venerable at least for their antiquity, the erection of which occupied centuries, and put in requisition the labors of kings, ecclesiastics and laymen. Upon these ruins have been erected new edifices — a new system of uses and trusts, apparently plain and intelligible, and adapted to the real wants of society. . .[23]

The opinions also revealed concern over grander issues of tying up wealth in trust for an extended period of time and they framed this frequently in terms of concern for the Republic (or what legal historians frequently call Republicanism). For instance, Democrat Senator Samuel Young's concurrence drew on rhetoric about Republican institutions.[24]

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20 REPORT OF THE COMMISSIONERS, *supra* note 13, at 22-23, cmt. to § 15 (considering the Revisers' Notes for the rule against perpetuities). When the Revisers listed the ways that the new Code differed from the common law they began with a focus on alienation. *See id.* at 23. *See also* Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History,* 120 HARV. L. REV. 385, 454-56 (2006) (explaining that desire for credit in the eighteenth and nineteenth centuries shaped American property law that made real property easily reachable by creditors).

21 REPORT OF THE COMMISSIONERS, *supra* note 13, at 42.

22 *Id.* at 42 (comment to section 56, ultimately codified as section 55).

23 Coster v. Lorillard, 14 Wend. 265, 314 (N.Y. 1835).

24 *Id.* at 372.

Senator Young believed that every law "which impedes or discourages the acquisition or alienation of property is a subtraction from the elements of public prosperity."[25] Young was concerned that those who inherited wealth — those who were "shielded from common wants" — would also lack the "virtues and sympathies which are the ordinary concomitants of man's nature."[26] He was in favor of a rule that distributed the property immediately to Lorillard's many intestate heirs "in equal shares to those in whose veins equal portions of his blood flows."[27] The opinions expressed concern about the harms of concentrations of wealth by themselves, which were so central to Senator Young's opinion[28] and to ideas of republicanism. They also expressed concern about restraints on alienability and thus on the effects of trusts on a commercial republic.[29]

What LaPiana shows is how the common law courts interpreted the Code's relatively narrow approach to trusts. While the New York courts continued to narrowly construe the revised and limited Rule against Perpetuities, they read the Code broadly to allow trusts to be created for competent individuals.[30] Thus, LaPiana demonstrates how the New York courts in some ways followed the Code, but at other points how they reclaimed control of the trust law and expanded the permissible purposes of trusts.[31]

Now let me turn to another point, which is what LaPiana's case study says about the conflict over property rights in New York in the 1820s and 1830s. For as I have suggested before, there was both a moderate strain to the Code — the rationalization of trust law — and a more radical element — trimming of trust law in terms of perpetuities and of the permitted purposes of trusts. That is, the reform was both moderate and radical at the same time.

What LaPiana shows is that the Code was not just about rationalization; there were also important parts of it that limited the reach of trusts. The reform also involved suspicion of established wealth at a time when many dominant ideas involved protection of vested rights. The

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25 *Id.* at 371.

26 *Id.*

27 *Id.* at 390.

28 Chancellor Reuben Walworth wrote about concentrations of wealth as a threat to Republicanism. Lorillard v. Coster, 5 Paige Ch. 172, 225 (N.Y. Ch. 1835). And he also thought that state had the power to substantially curtail inheritance. *Id.*

29 In discussing the implications of limiting alienability for the lives of the twelve nieces and nephews, Senator Leonard Maison wrote that "land thus shacked and encumbered is worth nothing; it is valueless." *Id.* at 357.

30 In 1849 *Leggett v. Perkins*, allowed a trust to have a competent beneficiary. 2 N.Y. 297 (1849).

31 LaPiana, *supra* note 1, at 306-08.

paradox here is that Americans revered property deeply at the same time that they feared it. And that paradox is reflected in the New York Code. For the Code limited trust purposes and limited the length of trusts to two lives in being at the time of the trust's creation. Yet, the Code also validated the spendthrift trust, which presented its own problems with protecting vested rights at the expense of creditors.[32]

The New York Trust Code was about both rationalization and reform of the substantive law to trim trusts. Each impulse amplified the other, and both took place in an environment that respected property but feared wealth tied up in families for decades. Yet, at the same time significant reform was taking place the impulses for the dramatic growth in trusts was also taking place. In the years between the New York Code and the Civil War, the incidence of trusts grew dramatically throughout the nation.[33]

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[32] 3 N.Y. REV. STAT. tit. 2, §§ 63, 65.

[33] One quick way of gauging the rising importance of trusts is a search in Westlaw's New York Courts file, which reveals that in the decade of the 1820s 473 cases used the work "trust"; that grew to 693 cases in the 1830s, 1093 cases in the 1840s, and 1228 cases in the 1850s.