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Mathias Reimann *

Civil Procedure as Politics: The Field Code and the Shaping of Modern American Litigation

* University of Michigan Law School, rg@lhlt.mpg.de

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Mathias Reimann

Civil Procedure as Politics: The Field Code and the Shaping of Modern American Litigation*

If you had transported Abraham Lincoln, an American lawyer practicing in the 1840s, a century into the future, he would still have found himself roughly at home in the law of property, trust or inheritance, but he would have been completely confounded by the law of civil procedure. A hundred years on, little was left of the way lawyers in Lincoln's day handled cases in court. Between 1848 and 1938, the principles and rules governing civil litigation in the United States changed almost beyond recognition. *Law's Machinery* is the story of this radical change. Its pivot is the so-called Field Code (of civil procedure) of 1848/49, which was one of the two most successful codifications in US history (the other being the Uniform Commercial Code), and the book proffers some interesting observations and perspectives on the fate of codification(s) in the United States. By telling the success story of the Field Code it shows, for example, that contrary to widespread belief, codification in the United States was by no means a complete failure (24). Yet, the book's main theme is not codification as such, but rather the making of modern American civil procedure. In line with the current fashion in American legal historiography, the book is essentially a political (rather than doctrinal) study, and it presents its subject often in the form of stories – two features to which we shall return in the book's overall evaluation below.

Law's Machinery is part of the prestigious Oxford Legal History series. The archival research was aided by computerized text search and analysis borrowed from the »digital humanities«, which enabled the author to access and digest »thousands of newspapers, novels, cases, treatises, tracts, and legislative materials housed in dozens of state archives« (8). Framed by an Introduction and a (mercifully short) Conclusion, the book has two parts of roughly equal length. Consisting of five chapters each, they look at the topic from two different perspectives: one (roughly) chronological, and the other (mainly) thematic.

The first part tells »the political story of the Field Code« (21); it essentially chronicles the emergence of modern American civil procedure. It is entitled »The Machine« because the reformers presented procedure as merely a technical apparatus for the enforcement of substantive rights (see below). Funk sets the stage by describing the broader context of early- to mid-19th-century codification models and debates in the United States (ch. 1). He then explains how »civil justice before the code« was shaped by »the rule of writs« (ch. 2). The struggle to overcome the traditional system was led by David Dudley Field (1805–1894), arguably the most prominent New York lawyer at the time; it took place mainly in Field's home state and resulted in the codification of a radically new system of civil procedure, enacted by the legislature in 1848 and 1849 (ch. 3) (the project was only partially successful, however, because the New York legislature never enacted the code's final, much expanded, version of 1850, 92–96). The book then describes the impressive »migration of Field's Code« to other states of the Union (ch. 4); as depicted in a graph (107), about 30 jurisdictions »borrowed« the New York model directly or indirectly (101 fn. 6, see also the map, 102), a process that reminds a German legal historian of the borrowing of municipal charters *(Stadtrechte)* among medieval cities. As a result, the Field Code was ultimately at least as successful outside of New York as at home. Eventually, it became a »Code American« (ch. 5) when the Federal Rules of Civil Procedure of 1938 were largely shaped along its lines (see also 182–186). Since the current procedural codes of most US states are based on the federal rules, these rules have become the incorporation, so to speak, of the modern American civil litigation system. The first part of the book is worth reading for everyone

* Kellen R. Funk, Law's Machinery. Reforming the Craft of Lawyering in America's Industrial Age, New York: Oxford University Press 2025, 304 p., ISBN 978-0-19-754393-1

interested in the development of modern civil procedure, be it from an internal (i. e. US) point of view or from an external (i. e. comparative) perspective.

The book's second part is entitled »The Garden«, a metaphor for the traditional civil litigation landscape and practice (7, 157). It is organized by topic with each of its chapters focusing on one feature of civil litigation and its transition from the old to the new model. Here, we learn in great detail how the changes initiated by Field's project worked out in actual cases and debates, how they often proved much more difficult to implement than its authors had imagined, and how they frequently generated unintended consequences that were at loggerheads with the project's declared objectives. While this part of the book presents a wealth of information and illustration, it is less suited for a foreign readership than the first part because it deals with the individual topics in greater specificity and at greater length than a foreign audience will want to absorb. It is addressed to readers driven by a particular interest in the genesis of American civil procedure and determined to engage with the material in great depth and detail.

What was the radical transformation of the American civil litigation regime all about? The book highlights five features. They emerge from the chronological account of the book's first part and are then discussed with greater specificity in the five chapters of the second part.

The most radical change was the abolition of the common law »forms of action« (ch. 2 and 6). The traditional system of civil litigation was inherited from England and based on the system of writs, each of which incorporated a particular kind of action covering only a specific kind of harm (in mid-19th-century New York, 14 writs were in use, 51). Similar to the Roman *actiones*, the forms of action inextricably combined procedural and substantive elements: The substantive law was, in Henry Sumner Maine's well-known words, »secreted in the interstices of procedure« (H. S. Maine, Early Law and Custom, London 1890, 389; cited 5). As Funk explains, »each writ had a distinct set of processes to follow and requests to make« (5), and for each, the plaintiff had to plead certain facts (often as fictions) in precisely the right fashion. The writs were also mutually exclusive so that the plaintiff had to select exactly the appropriate one. As a result, under the writ system, civil litigation proceeded under a multitude of independent actions and without a clear distinction between procedure and substance as we understand it today. Thus, there was a complex system of »pleading« (of the right form of action) but no »civil procedure« as a unified field. By the mid-19th century, this highly formalistic system had become antiquated, cumbersome, and inefficient, at least in the eyes of the reformers. The Field Code undertook to change it completely: It abolished the traditional »forms of action« and replaced them with a uniform, all-purpose, »civil action« under which the plaintiff had to present merely the facts on which his complaint was based (165). »Common law« (writ) pleading was replaced by code (fact) pleading, a step intended to move »from fiction and falsehood toward truth and common sense« (163). Since the substantive elements of the complaint were no longer included in the – now generic – civil action, procedure became separate from substance: On the one side, the concept of »civil procedure« as a field in its own right was born; on the other side, substantive private law was gradually conceptualized as contract, tort, property, trust, etc. (172–174). Yet, as the reformers soon found out, it is difficult to abolish centuries of a legal tradition with a stroke of the (legislative) pen; even though the old forms of action were abruptly buried, for a while, they continued to rule, as Maitland famously quipped, »from their graves« (F. W. Maitland, The Forms of Action at Common Law, 1909, 1) as lawyers inevitably continued to think in traditional terms (293). Over time, however, the forms of action came to rest in peace, and Field's uniform civil action prevailed. In our own day, the traditional system of common law pleading is as alien to American lawyers as modern civil procedure would have been to Lincoln.

The second truly radical change pursued by Field and his reformer colleagues was the fusion of law and equity (ch. 9) – as Funk observes, »a joint project across the common law world in the nineteenth century« (255). The United States had inherited the English dichotomy between these two elements. The common law was formalistic and strict, and it provided only for money damages or title to property; by contrast, equity was flexible, used to avoid injustice in the individual case, and it offered a broader array of remedies. The two elements were also radically different in their institutions and procedures: The common law was administered by judges and juries, and it was tied to the writ system; equity was administered by

the chancellor (in the court of chancery) without a jury, and its procedure was less strict and formalistic, though it grew more so over time (55–59). Some US states (like New York) had maintained the separation between courts of law and courts of equity while others had not; yet, even where there was no institutional difference, it was understood that proceeding at common law was one thing, proceeding in equity quite another. The Field Code merged the two sides' institutions and procedures by replacing them with the one, generic, mode of civil procedure, making jury trials available and requiring oral testimony in all cases (89). Yet, like the common law forms of action, the dichotomy between law and equity could not be completely cast aside because there were fundamental differences in »the nature of things« (ch. 9). Still, over time, the institutional and procedural distinction fell into disuse, and modern civil litigation makes no fundamental distinction between proceedings at law or in equity. What has persisted, however, are the differences between the available remedies: on some issues, one can get a jury trial, on others not; for some injuries, one can get only monetary damages, for others an injunction; etc. Yet, today's American lawyers are at best dimly aware that these differences still reflect a centuries-old dichotomy, and for most purposes, it no longer matters.

The remaining three changes were less fundamental even though they reshaped civil litigation in important ways. The first and second sought to promote the finding of the (factual) truth. The traditional prohibition of testimony by the parties themselves (and often even witnesses with an interest in the outcome) was abolished. Now, the parties could testify and even be put under oath (ch. 7). At the same time, the responsibility for gathering evidence eventually shifted from the court officials to the parties (and their attorneys), a process that now took place essentially in the attorneys' own offices (rather than in court) before the trial commenced (239), thus paving the way for the modern system of pre-trial discovery (ch. 8). Finally, there were substantial changes concerning how and by whom lawyers get paid. The tight regulation of attorney fees was abolished, leaving their determination to the agreement between lawyer and client and thus transferring the power over lawyer fees from the state to the market. This put pressure on the traditional shifting of attorney fees to the losing party; it eventually gave way to what came to be called the »American rule« under which each side pays its own attorney, win or lose. At the same time, the deregulation of attorney remuneration permitted the widespread practice of contingency fees (ch. 10).

Putting all these changes together, one can see that civil litigation pre-1848 was a game fundamentally different from civil litigation post-1938. While Funk does not make that clear, it is well to remember that some elements persisted: the constitutionally guaranteed jury trial (today a rarity in practice), the strongly adversarial mode of litigation (today as strong as ever), or the role of the judge as an umpire overseeing the battle between the parties (today increasingly modified by the trend towards managerial judging). Yet, *Law's Machinery* powerfully demonstrates that in the history of American civil procedure, there has been much more radical change than today's American lawyers realize. It also shows how modern civil procedure was not only shaped by the practicing attorneys who, under Field's leadership, designed the new system, but also catered to their very interests: The empowerment of lawyers to conduct pre-trial discovery gave them a much more prominent role in, and thus much greater control over, the proceedings, and the deregulation of their fees was a huge benefit for lawyers like Field, whose clients were wealthy corporations that could afford to pay their counsel lavishly.

Law's Machinery looks at this whole process mainly from a political perspective, albeit in a broader sense that encompasses society, economy, and even religion. This is in line with current American legal historiography. In the 1950s and 1960s, J. Willard Hurst (1920–1997) established the discipline in its modern form as part of the study of »law and society,« and in the 1970s through the 1990s, the »critical legal studies« movement led by scholars like Morton Horwitz (*1936) and Robert Gordon (*1941) called further attention to the political dimensions of the law's development. Ever since, the mainstream of American legal historiography has focused heavily on the law's political, social, and economic origins, contexts, functions, and effects, largely neglecting institutional or doctrinal studies. *Law's Machinery* is part of that ongoing tradition. The book brings the strength of this political approach to the fore, thankfully without overdoing it. By putting the development of civil procedure into its political, social, and economic context, it shows that this development was not driven by doctrinal or aca-

demic ambitions but shaped by party politics (Democrats v. Republicans), the make-up of political institutions (commissions and legislatures), professional organizations (like bar associations), and economic interests (e. g. in the streamlining of debt collection). A central theme is the political function of conceptualizing civil procedure as the »law's machinery.« The idea supported two of the reformer's principal strategies. First, the reformers alleged, time and again, that civil procedure is merely a technical instrument for the enforcement of substantive rights which leaves these rights as such entirely unaffected. By thus presenting civil procedure as an eminently apolitical matter, the reformers pursued an eminently political goal: They sought to persuade the legislature that it could pass (even radical) procedural reform without having to worry about the protection of property interests, freedom of contract, or economic association. Second, the image of the »machine« supported the reformers' claim that its delicate construction and careful maintenance must lie in the hands of experts, i. e. lawyers working in special drafting commissions; since it cannot be entrusted to untrained legislators, they must simply accept and pass the experts' work product. Both strategies were based on dubious assumptions, e. g. about the clear separability of substance and procedure (15–16), but they by and large worked. In exploring these, and many other, political dimensions, Kellen Funk fortunately does not fall into the trap of totalizing the political perspective. Instead, he carefully weaves it together with institutional, religious, and doctrinal elements as well as with the leading protagonists' personalities, predilections, and affiliations. The result is a wonderfully rich and multi-layered account of an important part of American legal history.

The book is also in line with the current fashion in American legal historiography to present its subject in the form of a story or, as in this case, a series of stories: Virtually every chapter begins with a tale of some contemporary event. Such a narrative approach has its upsides and downsides, and the book demonstrates both. On the one hand, it enlivens the discourse and awakens the reader's curiosity, it shows the personal interests at work and at stake, and it often vividly illustrates how theoretical issues play out in the practical context of a political battle or court case. Thus, (legal) history becomes concrete and tangible, which is also furthered by the photos and illustrations scattered throughout the book. On the other hand, Kellens' narrative approach has two downsides. In some cases, the connection between the narrative and the topic of a chapter seems farfetched (for example, the opening story, 1–3, involves a character and a state that turn out to play no significant role in the rest of the book). Perhaps more importantly, in many instances, the stories take on a life of their own, are told at unnecessary length, and entail digressions that can tire the reader of an already intricate account. American legal historians are used to this habit of telling tales full of more or less interesting, but ultimately needless, specifics and thus will not mind it much. From the perspective of a European reader, less would have been more. It is to the author's credit, though, that despite the presentation of much nonessential detail, he never loses sight of the forest before the trees.

The book also suffers from considerable redundancy. The strategic use of the »machinery« metaphor, for example, is reiterated or reintroduced over half-a-dozen times (see 5–6, 20, 74, 87–88, 97–98, 107, 148–150, 295). Again, American and European readers are likely to react differently. Since redundancies are frequent in current American legal historiography, local readers are used to them and often don't even take notice. European audiences, expecting and appreciating a tighter and more focused discourse, are likely to find these redundancies somewhat annoying.

The book is not an easy read for a weekend. This is not because it is poorly written (it is not), but because its topic is multifaceted and its discourse is complex and challenging. Yet, working one's way through it is rewarding. This is not only because the tale itself is important and interesting; it is also because the book demonstrates how much the genesis and shape of even a technical field of law like civil procedure is the result, and thus also a manifestation, of politics.

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