

# REFLECTIONS

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I had no intention of contributing to this volume, but then it occurred to me: they probably will feel obligated to print anything I write; at last, I won't have to face multiple rejections. At the symposium I spoke twice, first at the Friday night dinner and then at the end of the symposium on Saturday. I thanked my former student and friend, Larry Cetrulo, who provided necessary financial support, and my friends, Margaret Woo, Thom Main, and Jeff Stempel, who made the symposium honoring my work happen. I expressed gratitude to the many others who helped, especially my Northeastern colleagues, Mielle Marquis and Stacey Velarde. Here is approximately what else I said, with a few changes permitted by the passage of time.

I feel that the most important audience for my reflections consists of younger civil procedure scholars, several of whom are at this symposium. Perhaps I can impart a modicum of learned wisdom. After all, by age seventy-seven, one should have learned something.

Remember the importance of good fortune: in my case, being married for over fifty years to a loving and wise woman; falling into a job at Northeastern, then an unaccredited, four-year law school, always centered on attributes I believe in: learning by doing, social justice, and an informal learning environment; having Thom Main show up in my civil procedure class, and then becoming my dear friend and co-author; serendipitously meeting Steve Burbank, who has encouraged my work for over thirty years and provided deep friendship; dining at a boring law conference in New York City with my buddy, Rich Freer, resulting in our idea for what became the Field Family Forum; teaching with my close friend Judy Brown, who became my desperately needed and ruthless editor; adding Margaret Woo to our faculty, who became a friend, co-author, and my mentor for, and fellow traveler to, China.

What we achieve we do not achieve alone. Be grateful for good luck and cherish and nurture your colleagues and friends; you need each other. If you find yourself on third base, you probably didn't hit a triple.<sup>1</sup>

What seems like bad fortune can be good fortune in disguise. My first-year civil procedure class at Harvard treated the Federal Rules of Civil Procedure as the most enlightened litigation system on the planet, with not one word on how

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<sup>1</sup> According to Wikiquote, the “born on third base and thought he hit a triple” is often misattributed to Ann Richards, referring to George Bush, Sr. *Ann Richards*, WIKIQUOTE (Apr. 14, 2015), [https://en.wikiquote.org/wiki/Ann\\_Richards](https://en.wikiquote.org/wiki/Ann_Richards). A similar quote was allegedly used by Oklahoma football coach, Barry Switzer. Tom Shatel, *The Unknown Barry Switzer: Poverty, Tragedy Built Oklahoma Coach into a Winner*, CHI. TRIB., December 14, 1986, at 6.

the Rules came into existence. It was as if the Rules had descended from heaven. My outrage at this lack of context led to an adult lifetime of exploring the historical background of procedural rules. And what I perceived as the cold, inhumane climate of Harvard Law School led me and a number of other victims of that environment to create and help build Northeastern University School of Law as a counter model of legal education.

Consider the intellectual bravery of many of those at the symposium. Steve Burbank wrote that the Enabling Act's limitations were centered on considerations of separation of powers, rather than state sovereignty, as virtually every other scholar and the judiciary had assumed. Judith Resnik, at the Northeastern conference on the Fiftieth Anniversary of Federal Rules, responded vigorously to the allegations that we were making procedure political; she urged that others, like the insurance and business communities, had politicized the field, not us. Deborah Hensler, much to the anger of those in power, and in resistance to their pressure, stuck to the empirical evidence that very little positive had come from alleged experiments resulting from the Civil Justice Reform Act. Jeff Stempel to this day faces hostility from those in positions of power for compiling and revealing the evidence that the Advisory Committee on Federal Rules had become dominated by Republican judges and large firm defense lawyers, which helped explain voting patterns. And it was not just the proceduralists in attendance who demonstrated the importance of courage. My friend, Rabbi Bernard Mehlman (who co-authored a paper for the symposium) and my colleague, friend, and confidant, Dan Givelber, secretly delivered needed medical supplies to Jews in Russia who had not been permitted to immigrate—a task that put both men at great personal risk.

Young scholars at the conference assured me that they would do their best to continue the tradition of bravery.

Three ideas, captured in the following quotes, have guided me in my teaching and scholarship.

A friend of mine from high school, Jack Yuhasz, gave me a copy of Edmund Wilson's *To The Finland Station*. Wilson traced the discipline of the modern writing of history, starting with Vico's influence on Michelet. Quoting Wilson:

In August [1820] we find Michelet preaching as follows on the occasion of the awarding of school prizes: "Woe be to him who tries to isolate one department of knowledge from the rest. . . . All science is one: language, literature and history, physics, mathematics and philosophy; subjects which seem the most remote from one another are in reality connected, or rather they form a single system."<sup>2</sup>

I was a history and literature major in college and could not look at the Federal Rules of Civil Procedure disengaged from their legal, economic, social, and political history. I think that most of us who labor in the field of civil litiga-

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<sup>2</sup> EDMUND WILSON, *TO THE FINLAND STATION* 6 (1940), (the excerpt is from chapter one, entitled *Michelet Discovers Vico*).

tion and procedure feel compelled to add context in much of our writing and teaching.

The second quote that has influenced my thinking is from the great legal historian Frederic William Maitland, who taught that “[e]quity without common law would have been a castle in the air, an impossibility.”<sup>3</sup> He explained that equity evolved to operate in the interstices of the law, and that the more structured and defining common law system was necessary to provide the security, stability, and predictability of a sound legal system. Unfortunately, current American procedure has proven Maitland wrong in his impossibility assertion, but all too right in his prediction of the negative effects of equity’s almost total displacement of law, at least in the case of procedure. Two of the untoward results of this displacement have been, first, that the broad attorney latitude in joinder, pleading, and discovery, along with a host of other variables, in part political, helped lead to the current backlash against, and constriction of, civil procedure and litigation. Second, the great discretion given to trial judges under the initial Federal Rule regime, augmented by the subjectivity inherent in deciding motions to dismiss at the pleading and summary judgment stages under current procedural jurisprudence, has resulted in a distinctly anti-plaintiff bias, especially in civil rights cases. Our inevitable prejudices as human beings, including the biases of judges, tend not to be dampened by current federal civil procedure.

Third:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.<sup>4</sup>

It misses a lot to see civil litigation as merely a process for resolving disputes. The Founders, including the citizens who insisted on the Bill of Rights, distrusted unbridled power in limited hands. They saw the American jury as one restraint on the judiciary and as a way to add broad community input to law application. They thought that twelve opinions and sets of observations would result in more wisdom and legitimacy than residing power and decision making in one person. The jury was to be a counter-weight to the inevitable self-interest of accumulated wealth. One byproduct of the jury was permitting American citizens to partake in their own governance and educating non-lawyers in the importance of law. Another was forcing diverse groups of people to talk with one another, to respect each other’s views, and to try to come to a fair, unanimous decision, acceptable to all twelve, even if not totally embraced by each. Efficiency is not mentioned in the Seventh Amendment.

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<sup>3</sup> F.W. MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 19 (A.H. Chaytor & W.J. Whittaker eds., 1909).

<sup>4</sup> The third quote required no citation at a symposium of civil procedure professors, nor does it here.

“Trial by jury” included live testimony in open court. The decision makers were forced to look at and listen to real people, face to face. The parties, through their lawyers, were forced to respond to opposing views. The ultimate decisions were based not solely on pieces of paper. Judges and juries were forced to confront the “on the ground” results of their decisions. The prejudice of each of us could be countered by the vividness of the drama of trial, in which one is forced to see and hear the viewpoints, pain, and histories of others.

The dearth of trials today, whether jury or judge, is truly distressing.

Are the Seventh Amendment’s goals, ideals, and achievements less important today?

If we, who dedicate our lives to researching and teaching civil procedure, do not fight for the continued critical importance of the American jury trial, who will?