A TOAST

BENJAMIN KAPLAN†

You know and I know that if I qualify at all for this assignment of making a toast, of lighting a bonfire in celebration of the Federal Rules, it is because, and only because, I am the oldest character extant in these parts. So I am reminded of that noble lord who, on receiving the news that he had been named to the Order of the Garter, said: "Bully! No damn nonsense about *merit*!"

It is no merit of mine that I actually practiced law in New York for several years before 1938. Thus, I can testify personally about the *before* and the *after*, which you youngsters cannot. In the *before*, the centerpiece of procedure in the New York courts, state and federal, was the New York Civil Practice Act (the "CPA"). Jack Weinstein had not turned the CPA upside down yet. It stood then in hundreds of sections. It was an arcanum, understood by few and admired by none. Like Winston Churchill's tapioca pudding, it had no theme. In the hands of the canny, it lent itself to nearly infinite protraction of litigation, and I recall so well the chief trial man in our firm, a saturnine fellow with no heart at all, who was a conjurer with all the tricks.

Here comes the *after*, or "how the Federal Rules burst in on me." I had filed an unfair competition case in the Southern District court, and lo!, within a matter of weeks I, or rather my plaintiff client, was hit by the brand new deposition upon oral examination. It was conducted—of all places—in the downtown office of the defendant's counsel. After one day's athletic interrogation, my client's zeal for combat was dampened considerably. Mine was too and we settled the case very promptly, not much to our advantage. I was impressed. Some later practical experiences with the Rules deepened the impression. I remain impressed to this day.

Let us acknowledge that, viewed in their historic setting, the Rules, under the aegis of the Rules Enabling Act, were a positive achievement of the first magnitude. They lifted civil procedure to a fundamentally new and much improved level. Here was a national procedure, a procedure single yet internally multifarious and pliant, conceived in a functional way, with a minimum of anachronistic oddities.

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† Associate Justice, Supreme Judicial Court of Massachusetts, retired; Royall Professor of Law Emeritus, Harvard Law School.

Need I recite: union of law and equity, simplified pleading, revision of the party- and claim-structure of litigation, machinery for pre-trial gathering of information, pre-trial conference, summary judgment, abolition of penalties for technical missteps, or other harmless errors. And by a feat of draftsmanship, the whole system was set forth in no more than eighty-odd rules.

Charles Edward Clark, the chief draftsman, had no mean opinion of his own work. In 1963 he wrote that "the success of the federal system is nothing short of phenomenal" and that "[n]o criticism of major character now appears."[1] There was, indeed, general acceptance well through the 1960s: the federal citadel stood, and there had been much emulation among the states.

Inevitably, that picture changed. The tempest over the rules of evidence might have led to a fatal change in Congress' relation to judicial rulemaking. So far it has not done so; rather it has inspired some useful thinking about how the rulemaking process should be conducted, from the Advisory Committees through to the Supreme Court.

Over the past two decades, however, vast changes have occurred in the volume and character of the cases falling to federal courts, and changes, too, in the composition, economics, practices, and psychology of the legal profession. Statute and common-law changes have spawned rights and defenses to rights in numbers and ways unimaginable by the solons of the 1930s. These developments have put severe challenges to the Rules. In the new environment, broad discovery combines with loose pleading, extensible party- and claim-structure, and other basic features of the Rules to create potentials for delaying the finish and increasing the costs of litigation. Fiercely contentious lawyers have not ignored these opportunities. Overuse and misuse of Rules devices must skew the substantive results of the cases in directions of injustice.

The responses to these troubles by means of particular rule amendments by no means have guaranteed a cure. We recently have had some amendments that depart a little from the usual: first, piling on sanctions against parties and lawyers for the perversion of procedures; second, drawing judges further into the close management of cases and engaging them actively in pursuit of settlement and other shortcuts. The *first* expedient has yet to prove itself as a means of changing habituated conduct; the *second*, acknowledging an existing reality, confirms and encourages the modification of judges' sanctified patterns of behavior and thought, with consequences hard to foresee or

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[1] Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUDICATURE SOC'Y 250, 254 (1963).

appreciate.

Actually there is lots of buzzing activity in the world of civil procedure having only a loose relation to the Rules: local rules, manuals, standard operating procedures, standing orders, and other abracadabra which in effect write elaborate (and frequently confusing) addenda to the Rules; a population of magistrates, special masters, and yet others who weave their own webs. The whole leaves wide room for discretion and thus is beset with fears of arbitrary and unequal decisions. We hear attacks on "loose texture" in all its forms, and advocacy of more defined procedural modes that truly will regulate conduct down the line.

In the year 1988 the trans-substantive premise of the Rules is not only questioned, but considered already overborne by the facts of life in the courts; what is supposed to emerge is diversified procedures, well defined, organized on functional lines, whether the categories arrange themselves according to substantive law differences or other indicators. Then we have proposals, or rather cries of the heart: for the perfection of skills to tell us how quarrels arise and thus how and where to dispose of them; for better equalization of forensic opportunities between the litigants strong and weak (meaning often, but not always, the "Haves" and "Have-Nots"); for a rational or scientific approach which will assure that settlements are made on terms not grievously unfair; for the education of lawyers to recognize and better serve the social or public ends of litigation.

In a period of reconnoiter and reassessment, expect a whiff of revisionism and, sure enough, I have heard lately some kind words for the late Senator Thomas J. Walsh, the arch-enemy of an Enabling Act and of national rules. Possibly this phenomenon is inspired by card-carrying members of the ACLU or, worse still, liberals. But in any sober view, I submit that the fifty years of the Federal Rules must be accounted a good show, as human governance goes. Certainly so, I think, in their early career, especially when set by the side of the CPAs they superseded. For more recent years we can say the Rules adapted reasonably well, if not perfectly, to vastly altered conditions. They have worked to considerable (if not universal) satisfaction to support revolutions of the substantive law. The much criticized discovery function and class action remain together the scourge of corporate and governmental malefactors. Some fundamental faults of litigation procedure—for example, the handicapping of the weak, despite statutory help for them here and there—should be attributed not to the Rules, but rather to the state of the nation, the climate in the big outdoors. Recall the dictum of the Italian master Piero Calamandrei that court procedure reflects the soci-

ety which it inhabits as a drop of water reflects the sky.

What portends, what will happen in the next fifty years, knows God, although even that is doubtful. What is not doubtful is that some generations hence there will be a symposium at Northeastern Law School celebrating and also lamenting what did happen.

Now I have done what is meet. I have steered a middle course, as the wag says, between partiality and impartiality, and I propose to end on the upbeat, as, of course, you expect me to do. I light the bonfire and, please, let none of you throw the Rules or parts of them into the fire. Let us cheer the Rules and Charles Clark, William Mitchell, Homer Cummings, and others who helped in the creation, but, in a spirit of generosity and bonhomie, let us not omit Senator Walsh and his allies. The Rules emerged as a vector of many forces pushing and pulling in different directions. Perhaps Walsh and company were a necessary element in the mix. Let us celebrate all those, including ourselves, who over the years have taken an intelligent interest in that baffling and beautiful subject of civil procedure. And so, drink up!