

COMMENTARY

COMMENT ON CARRINGTON

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I am delighted to be back among professors of procedure and other procedure lovers. For the past sixteen years, since I went to the Bench in 1972, I have been in exile. The Massachusetts courts have not been procedure-minded. Rules on the style of the Federal Rules did not arrive until 1974—not a moment too soon. Even so, in our version, we cut complications like the class-action rule down to size, and we have passed by recent federal amendments. We have largely suppressed interlocutory reviews of points of procedure. The drive toward decisions on the merits has been relentless. (Is there anything wrong in all this?) Anyway, I have been remote from procedural law; and in the presence of this gathering of hot, up-to-the-minute proceduralists, I feel like Rip Van Winkle.

Paul Carrington's thoughtful paper has three parts or phases—a statement of the present rulemaking process; a defense of trans-substantive, loose-textured Rules; and a proposal of rule changes to supplant the summary-judgment rule and certain related rules. I have a few comments on each part.

First, Professor Carrington's thesis that the Rules should be "general," across-the-board, trans-substantive. This he suggests keeps them out of political controversy and other troubles at the hands of special interests.

Professor Carrington connects his thesis to the word "general" as it appears in the Rules Enabling Act, but "general" may mean only that the Rules, trans-substantive or not, shall apply equally in all districts (subject to permissible local rules).

Professor Carrington qualifies his own position by his espousal of the "loose texturing" of rules. This, as he recognizes, has permitted the exercise of judicial discretion precisely to mold procedure so as to promote the varieties of substantive aims. Is there any inconsistency here

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with the trans-substantive goal?

Professor Carrington does not respond to the claim that differentiations of procedure have in practice already gone very far, by local rules and otherwise, and the results, we are told, have been not merely non-toxic but highly beneficial. Indeed, my old friend and co-conspirator, Maurice Rosenberg, has written euphorically: "The key point is that different *categories* of cases have different processing needs. These are identifiable, classifiable, and usable in putting them through the judicial process."¹ Maurice, is that so? We need to be shown.

The crucial word is "categories." No one wants a return to the categories of the old formulary system: those were dysfunctional. However, can categories be found pointing to differentiated modes of procedure (not excepting diversions to Alternative Dispute Resolution) that will improve on the standard mode of the current Rules? What are the indicia or criteria by which the categories should be defined? How often will the nature of the substantive law be the key? How often other factors? At all events, are we willing to accept responsibility for monitoring and controlling the substantive results of any such diversified procedures? That's one of Professor Cover's points in his article honoring James Wm. Moore.² I do no more than put some queries. At the same time, Paul utters his challenge: "Are there indeed major problems of civil procedure that would yield more readily to multiple solutions each fashioned to meet the needs of litigants asserting a particular set of substantive rights? If so, what are they?"

The basic issue of modifying the trans-substantive character of the Rules is not being unfurled these days for the first time. As retiring Reporter, I proposed to the Advisory Committee in 1967 the happy thought that the question be studied empirically. There was no follow-up.

Professor Carrington's insistence on trans-substantive, politics-free Rules led me to speculate on whether he would have thought it a sound project back in the Sixties to redo the class-action rule. On its face, the amended rule appears trans-substantive. Yet one could foresee that it would apply particularly in certain substantive fields such as securities fraud; and, with no great flight of imagination, one might predict that the working of the rule must bring about changes of substance—as it has in fact done in the very fraud field, to cite one instance. To go further afield, there was a sense in which the amended rule was not

¹ Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243, 248 (1984).

² See Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975).

neutral: it did not escape attention at the time that it would open the way to the assertion of many, many claims that otherwise would not be pressed; so the rule would stick in the throats of establishment defendants. Was it then, on principle, a mistake to go ahead? Perhaps, to the contrary, there is a teaching here against undue timidity in rulemaking. Ironically, I understand that at this moment, by order of the Judicial Conference, on the recommendation of the Advisory Committee, the rulemakers are forbidden to undertake any revision of the class-action rule. And legislative efforts have not prospered.

Second, Professor Carrington offers amendments of a brace of rules which would encourage the disposition of issues of fact and law as soon as feasible.

This suggestion is caught up in the push for the speedy finish of cases short of trial. Recent amendments to the same end leave me—and possibly Professor Carrington—rather cold. Can heavy sanctions against abuse of procedural forms, as in Rule 11, really work? I doubt it; they are negative enforcers which, as B.F. Skinner teaches, are not calculated to alter conduct. The drive toward settlement, as in Rule 16, raises doubts about manager-judges, and about the fairness of treaties of peace reached under hydraulic pressure. By contrast, Professor Carrington's proposal is in the more conventional main line, improving existing rules by devising better rules. And the challenge is there to disbelievers in trans-substantive rules, as I have said. I like Professor Carrington's markup. I enjoy the way the several rules are brought together and harmonized, and I award a nice prize for the elimination of some of the detritus of history in present Rule 50. But, of course, there are possible bugs.

I assume, despite fashionable theory to the contrary, that mere rule changes can mean something and make a difference. Still, I doubt the proposed new standard to be applied in establishing fact—"A fact may be established by the court if there is no evidentiary basis for a reasonable trier of fact to reject that fact"—will actually work a significant improvement in the standard or standards now applied under Rule 56. The amendments would hold out a strong invitation to litigants to try to secure piecemeal decisions of issues of fact and law, perhaps with accompanying pressure toward interlocutory appeals. Will the possible gains in individual cases not be overwhelmed by the fuss and bother and costs and delays in the mass of cases where parties will try to employ the devices? Will the devices, intended mostly for ramified cases, be sought needlessly and perversely in simpler cases? Professor Carrington recognizes the shoals, but one wonders whether the cautionary provisions in one of his draft rules will avoid them. I suggest, too, that

propositions of fact and law, as they appear at the outset of litigation, may turn out to be quite irrelevant as the case develops, so the whole proposal is instinct with waste motion in some percentage of cases.

To sum up, I would vote cheerfully to give the proposal its chance. Maybe there should be some requirement that it be reexamined after a number of years, but then would we know how to reassess it except by raw intuition?

Third, Professor Carrington's description of the present rulemaking process from Advisory Committee to Supreme Court and Congress.

Charles Clark seemed to think that rulemaking was really for the coterie of experts, though some concessions should be made toward informing the public (preferably after the event). In resuming rulemaking in the 1960s, our Advisory Committee did reach out in moderate fashion for criticism, and I believe the Standing Committee was pretty well informed of the nature of the debated issues. The drafts and redrafts of Rules and Notes, however, as published, were rather flat, not fully informing of the pros and cons. That was regrettable.

Professor Carrington shows that the process today invites criticism and contributions from all and sundry, and is open and candid, thereby, he suggests, repelling influence by special interests. Under the proposed legislation now circulating in Congress to revise the Rules Enabling Act—I have seen one late version—the whole process would be taking place, firmly, in the glass goldfish bowl. I trust room will still be left for some private, secret discussion within the Advisory Committee, for example, to denounce with any expletives such a monstrous decision of the Supreme Court as *Schiavone v. Fortune*.³

The legislation, wisely I think, would retain the Supreme Court at the apex of national rulemaking; I would not substitute the Judicial Conference. Unwisely, it would largely abrogate the famous provision by which valid rules supersede inconsistent law. I recommend to you Professor Carrington's masterly submission to the Senate committee in support of supersession. The Court acts in rulemaking by a kind of revocable delegation from Congress, but Congress by the supersession clause symbolizes its understanding that rulemaking is primarily—although not finally—for the courts.

The legislation would also attempt to put the matter of local rulemaking and similar activity under some hierarchical control. But on this I won't testify—the experts are Dean Coquillette and Professor

³ 477 U.S. 21 (1986) (misreading Rule 15(c)).

Subrin and their associates in a big project on local rules run out of Boston College Law School.

