Georgia Law Review

Volume 1
Number 4 *Number 4*

Article 3

6-1-1967

Procedural Reform: Its Limitations and Its Limitations and Its Future

Charles Alan Wright
University of Georgia School of Law

GEORGIA LAW REVIEW

VOLUME 1 SUMMER 1967 NUMBER 4

PROCEDURAL REFORM: ITS LIMITATIONS AND ITS FUTURE*

*Charles Alan Wright***

THE invitation to come to the University of Georgia as a John A. Sibley Lecturer in Law is a high honor and a great challenge. In the three years this lectureship has been in existence it has moved to the first rank among occasions of this kind about the country because of the distinction of the people who have been previously called to this rostrum.[1] The lectureship has an added prestige because it is the Sibley Lectureship. John A. Sibley's many contributions to the University of Georgia Law School, and to his state, are a worthy example for those who would follow him to the bar, and the trustees of the Loridans Foundation acted wisely in creating a lectureship named in his honor. Those of us invited to take part in this series of lectures are challenged to say something worthy of Mr. Sibley, and of the lectureship.

On such an occasion one would wish to make remarks that would be profound and stimulating and exciting, but in this life we cannot all be Wechslers or Kalvens, and each of us must fashion his own form of intellectual tribute with such gifts as he has. Thus it seems to me appropriate that I turn my attention to that subject in which I have spent most of my adult life and in which I am most deeply interested—the subject of procedural reform. This is, I fear, a subject that many people regard as extremely dull, but it seems to me a matter of very great importance, and it is the area of the law that I know best.

---

* This article was delivered April 4, 1967, as the third John A. Sibley Lecture in Law of the 1966-67 academic year at the University of Georgia School of Law.

** Charles T. McCormick Professor of Law, The University of Texas. Member, Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States; Associate Reporter, American Law Institute Study of the Division of Jurisdiction between State and Federal Courts.

1 Prior Sibley lecturers, in chronological order, have been Myres S. McDougal, Herbert Wechsler, Sir Arthur L. Goodhart, Charles O. Gregory, Mortimer M. Caplin, William L. Cary, Hardy C. Dillard, Eugene V. Rostow, Harry Kalven, Monrad G. Paulsen.

Procedural reform has become in recent years a far more fashionable matter than it ever was before. My dear friend and former chief, the late Judge Charles E. Clark, one of the great procedural reformers of all time, said in an article published a few months before his death in 1963:

> The growth of interest in problems of legal procedure and law administration has been an outstanding phenomenon of the last quarter century. Before that, only a few law schools and here and there a courageous professional innovator had evinced interest in how the courts performed in fact. Since then the subject has become a major one for the schools, the bar associations, and the courts themselves.[2]

This is, I think, an entirely accurate appraisal. Never in our history has there been as much interest as there is today in what was once thought the drab and lowly subject of how the courts work. There is ferment everywhere, and almost everywhere there has been solid accomplishment. The bar has made it its business to press for reform, in sharp and welcome contrast to the situation in England a century ago, when pressure from nonlawyers led to reform despite the opposition of the legal profession.

It has been 29 years since the Federal Rules of Civil Procedure were adopted. They have twice been extensively revised, as new problems presented themselves, and there have been other narrower amendments of them. In those 29 years some 23 states, including Georgia, have adopted new procedural rules or codes based closely on the federal rules, and 10 other states have had complete, if less sweeping, revisions of their procedure. Even in the states that have not made a complete revision there has been change, as particular ideas have been incorporated into the local procedure. It is literally true that not a single jurisdiction has been unaffected by the great movement that Judge Clark and his colleagues began three decades ago.

Reform has not been confined to the civil side of the docket. In the federal system, and in a significant number of states, criminal procedure has been and is being overhauled, although here it is hard for the reformers to keep pace with the changes imposed on the states by the Supreme Court of the United States. Reformers are turning their attention, too, to the field of evidence, where reform has long been

2 Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUD. SOC'Y 250 (1963).

overdue. California, Kansas, and New Jersey have adoped evidence codes and rules, and movement in that field is certain to gain much momentum when rules of evidence for the federal courts, now in the process of preparation, are put into effect.[3]

The mechanism for procedural change is now well developed. Although in Georgia, as in a few other states, new codes have been adopted by the legislature, the more common pattern has been to give to the highest court power to make rules. The legislatures in a majority of the states have followed the lead of Congress in delegating this power to their courts. Grant of the rulemaking power presupposes that expert advice will be provided to the courts, for they can hardly be expected to make procedural changes entirely on their own. In some states the advisory committees are well financed, while in others the appropriation has been tiny or nonexistent, but this seems to make very little difference in the end result. The lawyers and judges and professors who serve on these committees do so out of a sense of professional responsibility and dedication to the public interest. Where no money has been provided to pay their travel expenses or to provide needed research assistance, they bear the cost themselves.

The most complete machinery for procedural reform is in the federal system, and it is right that this should be so, since the federal rules are the model that every state considers, even if they do not always follow them. The federal system has six advisory committees, charged with recommending change in the areas of civil procedure, criminal procedure, admiralty, bankruptcy, appellate procedure, and evidence. These committees report in turn to a Standing Committee on Practice and Procedure. Eighty-five persons, representative of all branches of the legal profession throughout the country, are members of the advisory committees or the Standing Committee. Six law professors serve as reporters for the advisory committees, and the Administrative Office of the United States Courts furnishes valuable assistance. The chairman of the Standing Committee, Judge Albert B. Maris of the Third Circuit, has provided wise and effective leadership for all of these committees, and they have been immeasurably helped by the keen

[3] Much of the leadership in evidence reform has been provided by Professor Thomas F. Green, Jr. of the University of Georgia Law School, who for more than a quarter of a century has been pointing out the needs and the opportunities for improvement in the law of evidence. See Green, *The Admissibility of Evidence under the Federal Rules*, 55 HARV. L. REV. 197 (1941); Green, *Federal Civil Procedure Rule 43(a)*, 5 VAND. L. REV. 560 (1952); Green, *Drafting Uniform Federal Rules of Evidence*, 52 CORNELL L.Q. 177 (1967).

interest in and support of their work by Chief Justice Warren. The Chief Justice makes all appointments to the committees, and to the extent that his schedule permits, he attends their meetings. The Supreme Court has ultimate responsibility to accept or reject the proposals of the committees, after they have first been considered by the Judicial Conference of the United States, and the close attention the Chief Justice gives to this work is not only an inspiration to the committees but also a help to the Court in making an informed judgment on the recommendations the committees send to it.

With reform an accomplished fact in most of the country, with the mechanism for reform standing ready to meet future challenges, it would be easy to be complacent, and to assume that our courts are and will be operating as efficiently as the wit of man can devise. But amid the general clamor of praise for the present system, there is an occasional discordant note. Professor Geoffrey Hazard observes that "a sense of frustration seems to pervade attempts to deal with procedural problems."[4] Judge Charles Breitel, of the New York Court of Appeals, says:

> [L]et us now look at what the lawyers call the adjective or procedural law—the law that governs the manner in which actions and proceedings are brought, tried and concluded. In this field there have been revisions too. There have been repeated recodifications. But is that procedure in harmony with the needs of a modern society? The answer is a doleful no.[5]

These critics seem to me unduly harsh, but, as I shall develop later, I have no doubt that there is more that needs to be done in improving procedure. As I have reflected on their criticisms, however, I have wondered if they have not asked more of procedure than can properly be expected of it, and if they are aware of the limitations that inhibit the freedom of the procedural reformer.

These limitations seem to me of considerable importance, for even if Judge Breitel is wrong, and our procedures today do serve the needs of society, it is obvious that the demands of society on the courts are increasing very rapidly. If these increased demands are of a sort that procedural reform cannot meet, then it is important that we recognize this in advance and search for other cures.

---

4 HAZARD, RESEARCH IN CIVIL PROCEDURE 3 (1963).

5 Breitel, *The Quandry in Litigation*, 25 MO. L. REV. 225, 227 (1960).

It has been aptly said that "our courts are now confronted by the mid-century law explosion."[6] In part this is a function of an increased population, and here the best estimates of what is to come are terrifying in their implications. Today we are a country of about 200 million people. By 1985, according to the experts, the population will be 266 million. For the year 2000 they predict 338 million people, and for 2010 they foresee 399 million. Thus in the lifetime of many of us the population of the United States will double. If past experience is a valid guide, the volume of court business will increase at a more rapid rate than will the population. But the law explosion is not caused by population increases alone. Professor Harry Jones is right when he observes that

> we have a society that is far more complex and vastly more demanding on law and legal institutions. New rights, like those of social security, have been brought into being, and older rights of contract and property made subject to government regulation and legal control. New social interests are pressing for recognition in the courts. Groups long inarticulate have found legal spokesmen and are asserting grievances long unheard. Each of these developments has brought its additional grist to the mills of justice.[7]

The developments of which Professor Jones speaks are surely not about to stop. These, coupled with the growth in population, suggest an enormous increase in the amount of litigation. Already in many places court congestion is exacting a terrible toll. The existing judicial system cannot conceivably cope with the demands the future will make upon it. The time to think about this, and to make plans to deal with it, is now, not when the flood of new business has actually descended. ". . . [W]here change is revolutionary by reason of its speed and magnitude, anticipation is the only alternative to chaos."[8]

There are three ways by which we may deal with the law explosion. One is to take certain kinds of matters out of the courts altogether by providing other means for disposing of them. A second is to provide more courts. The final possibility is to increase the efficiency of the courts so that they can handle more business. This last possibility is

6 Jones, *Introduction* to THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 2 (Jones ed. 1965).

7 *Ibid.*

8 Botein, *The Future of the Judicial Process: Challenge and Response*, 15 RECORD OF N.Y.C.B.A. 152, 170 (1960).

commonly thought of as the business of procedural reform. But my unhappy conclusion is that it would be a mistake to expect procedural reform to make a significant contribution to meeting the increased volume of litigation. To understand this conclusion it is necessary to understand the six limitations under which the procedural reformer works. I shall speak primarily in terms of the federal system, and of changes by rule of court, for it is this that I know best, but I think these limitations are relevant also to reform in the states, and to change by legislation.

Limitations on Reform

1. *No Change in Substantive Rights*

The first limitation is that changes in procedure must not affect substantive rights. This is always a restriction on reform by court rule, and even legislative reforms may not alter substantive rights protected by the Constitution. Thus many distinguished persons put the blame for court congestion on the jury system, and call for abolition of the jury in civil cases. I think Harry Kalven and his associates at Chicago have demonstrated the unsoundness of this criticism of the jury system,[9] but even if it were sound, it would not be within the competence of the existing machinery for procedural reform to make the change.

Nor is it within the jurisdiction of the reformer to take particular classes of cases away from the courts entirely. In state courts, though not in federal courts, domestic relations litigation consumes a substantial part of the time of the judges. It seems to me quite an inappropriate kind of work for courts. The law provides no meaningful standards for when a divorce should be allowed, or which parent should be given custody of children, or whether an adoption should be permitted. Nor do I think that being learned in the law, as our judges are, is as useful training for resolving these matters as are other disciplines. But it is not the business of procedural reform to make this determination, and to set up other agencies to deal with domestic relations. There is considerable interest at the present time in the Keeton-O'Connell plan,[10] and in similar proposals to take automobile accident cases partly or wholly away from the courts and to provide some system similar to workmen's compensation for the injuries. If such a change is to come

9 Zeisel, Kalven & Buchholz, Delay in the Court (1959).

10 Keeton & O'Connell, Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance (1965).

to pass, it will have to be the work of someone other than the procedural reformers.

2. *No Important Substantive Side Effects*

The second limitation is closely related to the first, though it differs in significant ways from it. Reformers ought not to propose changes, even in matters that are clearly procedural, if these changes will have important side effects on substantive rights. The first limitation, that substantive rights not be changed directly, is a firm "Thou shalt not," stated in terms in the enabling acts delegating rulemaking power to the courts. The second limitation, that substantive rights not be changed indirectly, is more in the nature of a "Thou ought not," a limitation the rulemakers should impose on themselves. Most people would agree, I think, that substantive changes should come from the legislature, and should represent a considered decision by that body. This should be as true where the substantive change is the side effect of a procedural reform as where it is made directly. I am not sure that our reformers have always kept this principle in mind.

In the last few years some courts have adopted rules providing that the issue of liability may be tried first in a negligence case, and a second trial on damages is held only if plaintiff prevails on liability. This has had marvelous results in terms of saving court time. A competent study has been made of experience with such a procedure. That study concludes that cases handled in this fashion take 20 percent less time than do cases tried routinely, with the liability and damage issues submitted simultaneously to the jury.[11] A saving of 20% in trial time of negligence cases would be an important gain for the courts. The same data show, however, that while defendants win in 42% of the cases tried routinely, they win in 79% of the cases in which the liability issue is submitted alone.[12] This certainly suggests that juries are moved by sympathy when they have heard evidence as to the extent of plaintiff's injuries, and that this influences their decision on the liability issue. Quite possibly this is a bad thing—certainly orthodox theory supposes that it is. But when it is seen that the split trial reduces by more than half the cases in which personal injury plaintiffs are successful, it is apparent that the new procedure has made a substantial change in the

11 Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1619 (1963).

12 Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies* in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 29, 49 (Jones ed. 1965).

nature of jury trial itself. If this is to be done, and if the Constitution permits it to be done, the change should come from those who are elected to make laws, with full awareness of what they are doing. It should not come under the guise of an attack on court congestion from those of us who are mere technicians, whose function it is to make the gears operate smoothly.

There are other procedural changes that I would feel obliged to reject on similar grounds. Many persons have urged from time to time that we should adopt the English system under which the losing party must pay the expenses the lawsuit has caused his opponent, including the lawyer's fee of the winner. I have no doubt that this is a substantial deterrent to litigation, and that adoption of such a system would help to reduce congestion in the courts. A fair argument can be made that a rule to this effect "really regulates procedure,—the judicial process of enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[13] If this is so, then such a provision would be within the rule-making power as the Supreme Court of the United States has defined it. Indeed the Federal Rules of Civil Procedure already contain provisions by which one party may, in certain narrow circumstances, be required to pay a reasonable attorney's fee to his opponent.[14] But even if I were sure that such a rule is within the rulemaking power, and more persuaded than I now am that it would be desirable, I could not vote to recommend adoption of it by the Supreme Court. It seems to me quite clear that the rule would have a very great substantive effect, even if only indirectly. It would inhibit access to the courts by those whose means are limited, while not affecting those who have ample financial resources. Such class legislation is not the proper business of procedural reform.

In a sense it is true that every procedural rule has consequences of a substantive nature, for every such rule may affect the outcome in some cases, and some of them are deliberately intended to alter the outcome in many cases. When the discovery rules were adopted in 1938 they were expected to "make a trial less a game of blindman's bluff and more a fair contest."[15] This presupposed that they would change the results in many cases. Every lawyer can think of cases that he won only because of what he learned from discovery—or that he lost only because his

13 Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).
14 FED. R. CIV. PROC. 30(g), 37(a), 37(c).
15 United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958).

opponent had access to discovery. Yet I have no doubt that the adoption of these rules was a valid exercise of the rulemaking power. Although they affect the outcome of cases, they do so in a quite unpredictable fashion, and do not help or hurt any particular identifiable class of litigants.

Although I insist on the importance of this second limitation, I must confess that the line it draws is a hazy one, and that sometimes differences of degree may be decisive. When I was a member of the Advisory Committee on Civil Rules, I supported and voted for the amendment to Rule 4(f), adopted in 1963, that in certain situations permits service of process outside of the state but not more than 100 miles from the court. I believe it would be desirable to have nationwide service of process in all cases in federal courts. With modern methods of transportation it is quicker and less burdensome to come from California to New York to defend a lawsuit than it was to go from one town in Georgia to another when the Judiciary Act of 1789 was passed. I have no doubt whatever that the Supreme Court could make a rule providing for nationwide service of process.[16] But if a proposal to this effect were to come to the Standing Committee, of which I am now a member, I should want to think long and hard before deciding whether this is not so basic an alteration in the way of doing things that the change should be made by Congress rather than the Court.

3. *Considerations of Federalism*

The third limitation on procedural reform applies only to the federal courts and not to the states. It is that reformers must take into account that ours is a federal system, and that they should not attempt to alter by federal procedural rule those matters that are properly the concern of the states. Necessarily I am led here to the great case of *Erie Railroad Co. v. Tompkins*.[17] Until two years ago the *Erie* doctrine was of little moment to federal rulemakers. We recommended the best rules we could devise. If, in a particular case, the basis of jurisdiction was such that the *Erie* doctrine applied and if the subject matter of our rule was such that, on the test then in vogue, *Erie* required federal courts to apply state law, then the court would simply look to the state rule, rather than the federal rule, for that particular matter in that particular case.[18] The federal rule would operate as designed in other cases in

16 *Cf.* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946).

17 304 U.S. 64 (1938).

18 *E.g.*, Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).

which *Erie* was not controlling.[19] All of this was changed in 1965 by the decision of *Hanna v. Plumer*.[20] As I read the *Hanna* case, *Erie* has no application if there is a valid federal rule covering a point. The considerations that underlie *Erie* are relevant in determining if a rule is valid, but once that determination has been made the rule can thereafter be applied in all cases, regardless of the basis of jurisdiction and regardless of what the state law on the point may be. I welcome the *Hanna* decision. I think it is analytically sound, and that it contributes needed clarity and simplicity of application to what had been a very confused area of the law. At the same time, however, I think *Hanna* limits federal rulemakers and imposes a heavy burden on them. With *Hanna* on the books it is now incumbent on the rulemakers to consider the extent to which application of a proposed rule, in cases where state law is different, is consistent with the proper ordering of our federal system.

The area in which this limitation is currently of greatest concern is the formulation of rules of evidence for federal courts. The problem can be seen most clearly, and is most difficult, with regard to the evidentiary privileges for confidential communications. Any rule a member of the Evidence Advisory Committee might propose in the area of privilege would be inconsistent with the law in many states. The states differ widely on which privileges they recognize, and on the scope of and exceptions to the privileges. Yet the creation of these privileges represents an attempt by the states to encourage relations that are primarily of state, rather than federal, concern. On the classic analysis of Wigmore, the existence of a privilege is justifiable only where confidentiality is essential to foster a relation society believes so important that encouragement of the relation outweighs the need to have all relevant evidence in determining the truth of a matter.[21] Suppose that a particular state makes this kind of choice and concludes, for example, that the sources of a newspaperman's information should be privileged, hoping thereby to encourage confidential disclosure to journalists, and thus a fully informed and crusading press. I would think this an unwise choice, but clearly a choice it is within the competence of the state to make. The person who relies on this privilege, and gives information in confidence to a newspaperman, will consider

[19] *E.g.*, Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947), cited with approval in Ragan v. Merchants Transfer & Warehouse Co., *supra* note 18, at 533.

[20] 380 U.S. 460 (1965).

[21] 8 WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).

himself unfairly used if his name should be made public because the reporter is called as a witness in a suit in which the parties are citizens of different states, and that therefore is brought in federal court. Fear of this result may well deter him from making such disclosures, and thus defeat the policy of the state. Of course there is very little evidence that people consult the local law of privilege before making, or refraining from making, confidential communications. Indeed such evidence as exists indicates that they do not.[22] But the existence of privileges assumes that they do, and I think we must accept this assumption.

I believe that a federal rule denying a privilege where the state would grant one would be a valid procedural rule, and that, under the *Hanna* decision, it could be applied in any kind of case. For just that reason I do not believe that the Supreme Court should adopt such a rule. State policies of this kind should not be defeated by federal procedural rules. My view would be different in a federal criminal case or in an action to enforce federal laws. Even here there is an interference with state policy, but here there is a countervailing federal interest in deciding for itself what evidence should be admissible in actions to enforce its own laws. But to fail to recognize a state-created privilege in a suit on a state-created claim that is in federal court only because of the accident of diversity of citizenship seems to me quite indefensible. Professor Ronan E. Degnan, of the University of California, who has reached a similar conclusion, suggests that the rulemakers should not adopt any rules on privilege for state law cases, and should leave those questions to be resolved by state law.[23] I would go somewhat farther than he does. The interference with state policy that seems to me objectionable occurs only if the federal court fails to recognize a state-created privilege. There is no similar interference if the federal court recognizes a privilege that the state would reject. Accordingly I see no problem if a federal privilege is broader than the state privilege, but only if it is narrower. The appropriate solution, I suggest, would be to provide in the federal rules for those privileges thought justified, but then to have a further provision, applicable to diversity cases only, making privileged any other matter that would be privileged by applicable state law.

Here, as in all other areas of procedure where deference to state provisions seems indicated, I would hope that the states would study carefully the model of the federal provisions, and that they might in time

22 *E.g.*, Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 682 (1929).

23 Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275 (1962).

choose to alter their own statutes to bring them into conformity with the federal rule. But this would be a voluntary choice by the state, rather than an interference with the state by the federal rulemakers. To borrow a phrase of Professor Degnan's, the implication of *Hanna* is not that the federal rules are valid because wise men made them, but because wise men thought carefully before making them. Careful thought to the presuppositions of federalism seems to me now essential in the formulation of federal rules.

4. *Conservatism of the Reformers*

The three limitations on procedural reform I have so far described are desirable limitations that ought to be maintained. The remaining limitations of which I shall speak are of a different kind. They represent the way procedural reform works in practice, as I have seen it, and not necessarily the way it ought to work. The fourth limitation is the conservatism of the reformers themselves. Dean Charles W. Joiner of the University of Michigan, who is a member of the federal advisory committees on both civil rules and rules of evidence, and who led the reform of Michigan procedure, has said:

> The third attitude essential for procedural appraisal is accented in the words "No one wants to be a radical." Few lawyers wish to be so characterized, yet procedure reform and honest appraisal demand radicals.[24]

Dean Joiner is right that few lawyers wish to be considered radicals, and in my acquaintance with procedural reformers around the country I know of very few radicals. The law is a conservative profession, accustomed to building slowly on the wisdom of the past rather than making a single bold leap. The lawyers who have distinguished themselves sufficiently in the practice to be chosen for a leadership role in a reform effort ordinarily exemplify this tradition. To a large extent this is a healthy thing. Though I agree with Dean Joiner that a radical approach is useful in appraising procedural institutions, a more cautious approach is the wiser course in changing those institutions. It is all very well to sit in a committee room and to agree that a novel idea sounds appealing, but hundreds of thousands of litigants will be affected, for good or ill, if the change is put into effect. And so it is quite natural, even desirable, that the reformer heed the ancient wisdom, better safe than sorry.

[24] Joiner, *Lawyer Attitudes Toward Law and Procedural Reform*, 50 JUDICATURE 23, 27 (1966).

There are times when I have thought reformers were being unduly cautious. But I will not cite examples, for I fully recognize that these may be only my own predilections, and that what is too radical, or too cautious, is always the other person's idea. The important point is this. The changes in the demands on the courts will be radical. The response of the procedural reformers is not likely to be. For this reason alone, procedural reform is not going to be the answer to all future needs.

5. *Need for Acceptance by the Profession*

A fifth limitation on reform is the need to have professional acceptance of the proposals made. A major reason for the success of present methods of procedural reform has been that the bar is given a full opportunity to consider and to comment on proposed changes before they are finally recommended. This does not amount to a referendum. Comments on tentative drafts that come from lawyers, judges, or bar groups are considered on the basis of their inherent persuasiveness. No attempt is made to count noses. But it would be a mistake to impose on the profession a procedure to which it has strong opposition, for the rule will work only as those who must employ it want it to work. Let me give one example. In a preliminary draft of proposed amendments to the criminal rules, the Advisory Committee on Criminal Rules suggested a revision of Criminal Rule 32 (c) (2) that would have made it mandatory before sentencing a criminal defendant to disclose to the defense the contents of the pre-sentence report, in which a probation officer has set forth information he has found that may be useful to the court in sentencing.[25] This proposal brought forth violent opposition from some probation officers. An organized campaign was launched against it. A survey was made of the views of federal judges, and the great majority of them indicated that they did not approve the proposal. As a result, the amendment, as finally recommended by the Standing Committee and adopted by the Supreme Court, leaves it in the discretion of the judge in each particular case whether to disclose the presentence report.[26] I think this was the right thing to do, although on the merits I would have preferred mandatory disclosure and consider that the objections to the earlier draft were not well founded. It did not seem wise to force on judges and probation officers a practice, however sound, to which they had such strong opposition. I would expect that the discretionary rule finally adopted will have a useful educational

25 SECOND PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE 39-40 (March 1964 Draft).

26 FED. R. CRIM. PROC. 32(c)(2), as amended July 1, 1966.

effect, that judges will try disclosure in some cases and find that it works well and that disclosure avoids sentencing on the basis of information that may be erroneous. As they become familiar with the procedure and see its advantages, their views about it will change, and in a few years it should be possible to make disclosure mandatory, if indeed it has not already become universal as a matter of practice.

As the example just described suggests, I think it better to make haste slowly, and to give the profession rules it is willing to take and try to work with, rather than rules that are simply imposed because the Supreme Court has the power to make them. But the need for professional acceptance of change has a dampening effect on reform. I referred a moment ago to the conservatism of the reformers. The reformers are radicals, however, compared to the profession at large. It is a commonplace that "the rank and file of the bar will always work for the practice it knows, will, indeed, view with suspicion, if not active dislike, a system even in smooth operation next door across those imaginary, but sharp, lines which divide states. Reform has always come, must always come, from the students and leaders, not those whose horizons are limited by their office walls or at most by the walls of the nearest courtroom."[27] The members of advisory committees are the leaders, not the rank and file. They are likely already to be expert in procedure when they are named to such a committee, and if they are not, their work on the committee will soon make them experts. They devote countless hours of study to voluminous materials examining every aspect of a proposed change. Because of the public responsibility that is theirs, they view matters with detachment and concern for the interest of all litigants. It has been very gratifying to see how, with very few exceptions, members of these committees put aside at the door to the committee room the interests of the particular kinds of clients they represent, and think instead of what is good for all.

But when the proposals go forward to the bar they come to the attention of lawyers who are not expert, who can give the draft at best cursory study, if that, whose instinct is to oppose any change, and whose immediate thought is likely to be in terms of how the changes would affect their clients and their practice. I would like to give two illustrations of this reaction that do not concern procedural reform, strictly speaking, but rather the related area of jurisdictional reform. The American Law Institute is engaged, at the suggestion of Chief Justice

[27] Clark & Wright, *The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV. 346, 348 (1950).

Warren, in a Study of the Division of Jurisdiction between State and Federal Courts. The portion of the Study dealing with diversity jurisdiction has already been put in final form and published.[28] It recommends a substantial curtailment of federal jurisdiction in diversity cases. The diversity materials were completed before I became associated with the Study, I have no responsibility for them, and indeed my reservations about some portions of those proposals are a matter of public record.[29] Thus I am not indulging merely in polite rhetoric when I say that reasonable men may well differ about the desirability of the proposals, and that some of the opposition to them has come from able and intelligent lawyers who have fully studied what is proposed. At the present moment, however, bar associations all over the country are adopting resolutions condemning the diversity proposals. They are doing so as the result of an organized campaign by a group of trial lawyers that see in these proposals a threat to the privilege they now have, in many cases, of choosing for themselves a state or a federal forum on the basis of which is likely to give a higher verdict in a particular case. Most of the lawyers who have voted for such resolutions in their local bar associations have never even seen the 216 page document in which the ALI proposals are set out and explained, and have at best read a summary of the proposals by the group that is seeking to defeat them. This hardly seems to me a responsible way for the organized bar to formulate its position on a matter of public importance, but I fear it is not untypical.

My other illustration also concerns the diversity proposals. I attended a meeting at which those proposals were debated by able spokesmen for each side. That evening I was talking with a lawyer who had been present. "Professor Wright," he said, "I'm for anything that will be good for our courts, and improve the administration of justice, but that proposal they were talking about this afternoon would cut my income more than 50 percent." I can sympathize with his attitude. I am sure that it would be difficult to persuade me that any reform that would have so substantial an effect on my income was really an improvement in the administration of justice. But it is forces such as these that make the need for professional acceptance a significant limitation on what can be accomplished by way of reform.

---

28 ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Official Draft Part I, 1965).

29 41 ALI PROCEEDINGS 69, 72 (1964); Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 n.* (1963). See also WRIGHT, FEDERAL COURTS § 23 (1963).

6. *Imperfect Nature of Our Knowledge*

The sixth, and last, of the limitations on procedural reform is the imperfect state of our knowledge. We know very little about how present procedures work. We know even less well what changes might produce improvement in the future. If I had the power to put into effect tomorrow any change in procedure I thought desirable, regardless of the other limitations, I would not know what to recommend to meet future needs. There is much truth in Professor Hazard's remark that "procedural scholarship is groping in a fog."[30]

Fortunately the fog is thinning behind us. Techniques have been devised, and are now being used, for empiric research on existing procedures. The most important research of this kind have been the Chicago Jury Project, the study of automobile accidents costs and payments by Professor Conard and his associates at the University of Michigan, and the work of the Project for Effective Justice at Columbia University. We can now make a better informed judgment as to present procedures and past reforms. Unfortunately that judgment is not an encouraging one. On the whole these studies show that past innovations, widely hailed as offering a panacea for problems of court congestion, have not worked that way at all. Professor Maurice Rosenberg of Columbia, who was the head of the Project for Effective Justice there while it was making its studies of such highly-touted devices as the pre-trial conference, use of masters, discovery, and adoption of a comparative negligence rule, concludes that

> there is no acceptable evidence that any remedy so far devised has been efficacious to any substantial extent. Only a few of the new measures have worked even to a modest extent, and some of them have been positively counter-productive on the efficiency scale.[31]

This does not mean that the devices he studied are bad. Indeed his studies, and others like them, provide evidence that such things as the pre-trial conference and discovery do improve the quality of the trial and thus, presumably, lead to better justice. Efficiency is a desirable attribute of courts, but it is not the end for which they are created.

The techniques of empiric research recently developed have thinned the fog behind us, but it remains as dense as ever straight ahead. In this instance, that we now know something of where we have been is little help in deciding where we should go. There is an almost total absence even of ideas as to possible future changes. The Federal Rules of

30 HAZARD, *op. cit. supra* note 4.

31 Rosenberg, *supra* note 12, at 55.

Civil Procedure were themselves for the most part an adaptation of ideas already well known. They combined features taken from the Field Code of 1848, the English Judicature Act of 1873, and the Equity Rules of 1912. But there were other contributions. The motion for summary judgment had been known in English practice for 50 years, and in New York for a shorter time, but the federal rules made this device applicable to any party in any kind of suit. The highly popular pre-trial conference was based on a practice tried out in a few large cities shortly before the federal rules were drafted.

It may fairly be said that since the adoption of the civil rules there has hardly been a significant new idea in the area of civil procedure. Local rules for a split trial of liability and of damages, or for impartial medical witnesses, perhaps qualify, although these only implement powers plainly granted by the original rules, and are in any event of doubtful wisdom. The one really important contribution over the past 29 years has been with regard to appeals. The late Judge John J. Parker, of the Fourth Circuit, developed the very useful notions of hearing an appeal on the original papers, rather than having them copied to make up a "record," and of permitting the parties to print in seperate appendices to their briefs the portions of the proceedings below they wished the court to read, rather than printing the record below. These ideas did reduce the expense of appeals, and the original papers method is now universally used in federal courts, although the Advisory Committee on Appellate Rules proposes to prohibit the seperate appendix system.[32] With these few exceptions, there have been no new ideas in procedure. The various amendments to the rules have been very useful, but they are a polishing and a refining of concepts already in the rules rather than significant innovations. Earlier I quoted Judge Breitel's critical observation that procedure today is not in harmony with the needs of a modern society. Let me quote him again:

> There is a persisting fallacy that simplifying the language of statutes, making them shorter rather than longer and reshuffling their location, is procedural reform. It is not at all. At best it is an improvement, and worthwhile only in facilitating the understanding and handling of existing procedural law. It does not mark the kind of fundamental kind of procedural reform which is needed.[33]

---

32 DRAFTS OF PROPOSED RULE 30, UNIFORM RULES OF FEDERAL APPELLATE PROCEDURE 9-10 (Dec. 1966 Draft).

33 Breitel, *supra* note 5, at 237.

But if, as I believe, we do not know what fundamental procedural reforms are needed, or are even conceivable, I do not think we can fairly criticize the reformers for not making them.

The Future of Reform

By this point you must surely be ready to throw up your hands in despair, and to abolish the elaborate machinery we have developed for procedural reform. If the reformers do not know what to do, and are so limited in what they can do, it hardly seems that they serve any useful function. But if I have persuaded you to such a view, I have gone too far. I think procedural reform does have a valuable contribution to make, and have intended only to be sure that you understand what that contribution is, and that you do not expect from the reformers more than they can provide. The problems of calendar congestion and delay that lie in the future will not be met, in any significant way, by changes in procedure. According to Professor Rosenberg,

> systematic inquiry into how procedural devices function in practice has disclosed time and again that their chief effect is not so much to change the speed of the flow of cases through the courts as to change their results.[34]

If by procedural reform we can achieve better, juster results in litigation, then this is sufficient reward for the effort involved, even though we must look elsewhere for cures for the law explosion.

1. *Improve Understanding of Existing Procedures*

Future procedural reform is likely to have three major functions. The first is what Judge Breitel referred to unenthusiastically as "facilitating the understanding and handling of existing procedural law."[35] The amendment adopted last year to Rule 19, on compulsory joinder of parties, is a good example of that kind of reform. The old rule could not be read literally, and was not. It was symbolic only, serving to remind judges and lawyers that there are cases that cannot go on unless certain persons are made parties. The rule, however, did not say what these cases were, and so the reader was sent to the precedents and the commentaries to find out how the doctrine works. The amended rule recognizes candidly that the matter is in the discretion of the court, and tells the court what factors to consider in exercising that discretion. The

---

34 Rosenberg, *supra* note 12, at 57.

35 Text accompanying note 33 *supra*.

doctrine of compulsory joinder is understandable under the amended rule. It was not under the former rule. This kind of change seems to me worthwhile.

Or take the much-mooted question whether plaintiff is entitled to find out, by discovery, how much insurance the defendant carries. There are twenty-seven reported opinions from federal district courts on this question, and the decisions are hopelessly split.[36] There is no appellate decision on the point, and probably no way to get one in the federal system, although it has reached appellate courts in the states. Surely this is a matter that should be settled, one way or the other, so that every district judge in the country is not required to hear argument on the matter, research the question, and decide how he thinks it ought to be resolved. Changes in the rules are needed, and will be needed, to resolve issues like this on which the decisions are in conflict, and to restate the intent of the rules where the courts have misconstrued them.

2. *Reexamine Belief in a Unitary Procedure*

A second promising area for the reformers is to reexamine the belief that all cases are to be handled by the same procedure. What we have here is an overreaction to the sins of history. The forms of action were an abomination, and separate courts of law and equity were a disgrace. Thus every reformer, from the day of David Dudley Field to the present, has worn emblazoned on his shield the bold motto, "there shall be one form of action to be known as 'civil action.' " This is a splendid goal. A major step toward achieving it was taken last year when suits in admiralty were brought under the civil rules. But if the reformers really believe that law suits are fungible, and that the procedures that are good for one are good for all, then they have blinded themselves to what all others know and understand. Surely it is true that "the issue as to whether a group of mammoth corporations have conspired on a national scale to restrain trade or to monopolize an industry and, if so, what to do about it, cannot be handled by means of those rules or techniques suitable for the trial of an issue of trespass upon land or the breach of an employment contract."[37] Much of the differentiation that different kinds of cases require—and are, in fact, given even

36 Those cases reported through September, 1966, are cited in 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 647.1 nn.45.5, 45.6 (Wright ed. 1961, Supp. 1966). There are several later cases.

37 Botein, *supra* note 8, at 161.

today—must come from an *ad hoc* tailoring of rules by a trial judge to meet the needs of a particular case, but it is worth considering whether some distinctions in the rules themselves might not be helpful, as was done in a few respects when admiralty was brought within the umbrella of "civil action."[38]

In the same connection it would be useful to consider whether our elaborate methods of factfinding are justifiable in every case. Professor Benjamin Kaplan of Harvard, for six years the distinguished Reporter for the Advisory Committee on Civil Rules and now a member of that committee, asks "are we in this country simply paying too much in time, effort, and money to pursue the finer lineaments of truth which must in any event elude us?"[39] It is a fair question. My present answer would be that our use of "expensive and brittle tools to do a meticulous job on the particular case"[40] is justifiable in some cases but not in all. We would hardly wish to have an inquiry as exhaustive as that of the Warren Commission to ascertain the true facts of every automobile accident or even of every shooting, and indeed recent discussion of the report of the Warren Commission suggests that the most careful inquiry will leave some questions unanswered. Thus it seems possible that there are some cases in which a simpler, possibly less precise, method of factfinding than that now used by the courts would be tolerable. It might be possible to identify those cases in which less refined factfinding techniques would be satisfactory, or perhaps, as I am rather inclined to think, an optional procedure might be made available that the litigants could choose if they wished, and in return be given benefits such as a high place on the calendar. In a sense this is what is already done with applications for a preliminary injunction, though the analogy, while suggestive, is of course not complete.

3. *Adapt to Technological Change*

The final area in which important reform may be expected is in adapting to technological change. Within the last decade the computer and the technique of xerography have had a revolutionary impact in all other areas of life. The courts will have to take these into account, as well as whatever other scientific wonders are to come in the future. These technological developments have three implications for the re-

38 FED. R. CIV. PROC. 9(h).

39 Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFFALO L. REV. 409, 421 (1960).

40 *Id.* at 426.

formers. First, procedures must be altered to accommodate these new devices. Here the concern must be largely with the rules of evidence and of discovery. How does one discover facts buried in the magnetic memory of a computer? What will happen to the so-called "best evidence" rule if machines in fact can make copies that are indistinguishable from the original? We need rules now to deal with problems such as these.

Second, these marvelous tools must be put to use by the courts. I was horrified by the suggestion of several experts at a conference last month that "a computer could be used as a judge to hear minor violations such as traffic cases" and that it might replace judges for deciding appeals.[41] Perhaps the day will come when a computer will have the mental ability of a judge, but the computer, like the Tin Man in the Wizard of Oz, will always lack the most important ingredient of a judge, a heart. There is no way to program into a computer the human understanding and compassion that are essential on the bench. We are not, I think, willing to settle for what one computer expert has rightly called " 'jukebox justice'—a justice of legal stereotypes more readily machine retrievable."[42]

In more humdrum ways, however, these modern devices can be of real help to the courts. The computer could be invaluable in record keeping.

> Judicial records are still hand posted in bound ledgers, a method more suited to the era of common law pleading—and of the horse and buggy. Docket information is not organized in a way that is useful or available to the judge-administrator. He cannot, for example, put his hands quickly on cases bogged down by lawyer-inspired delay, or on cases that might quickly be settled if judicially nudged.[43]

Already there have been very promising results from the use of automated data processing systems for court docket control.[44] The new

---

41 N.Y. Times, March 22, 1967, p. 35, col. 1. See also Harris, *Judicial Decision Making and Computers*, 12 VILL. L. REV. 272, 299-312 (1967); Boyle, *Computer Axes Court Logjam*, TRIAL, June-July 1967 at 22.

42 Adams & Carabillo, *Data Proceessing and the Law*, 7 SDC MAGAZINE, Summer 1962, p. 3.

43 Halloran, *Court Congestion*, in ABA SPECIAL COMMITTEE ON ELECTRONIC DATA RETRIEVAL, COMPUTERS AND THE LAW 67 (1966).

44 Ellenbogen, *Automation in the Courts*, 50 A.B.A.J. 655 (1964); *Space Age Electronics Speed the Wheels of Justice*, 48 J. AM. JUD. SOC'Y 37 (1964).

methods of duplicating, inspired by the development of xerography, are used by courts today, and the reformers should press for their increased use. Why should a printed record ever be necessary for appeal, when at a fraction of the cost duplicates can be produced of the original transcript? This procedure is now available in the Ninth Circuit, it is used in some 95% of the cases, and the judges of that court report that they are greatly satisfied with it. I am disappointed that the Advisory Committee on Appellate Rules has taken such a negative view of this procedure.[45]

Let me give one final example of possible use of technological developments. Suppose that a jury is deliberating and it decides that it cannot remember what a particular witness said on a critical point. The jury comes back to the courtroom, the reporter is called in, he skips through his notes, finds the right place, and then, in a dreadful monotone, reads to the jury the Q's and the A's. This seems a terribly old-fashioned method for a world that is quite accustomed in everything else to the "instant replay." Would it not be perfectly feasible to have a television recording, or even a sound recording, of what happens in the courtroom? We have the machines. We ought at least to think about whether they would be of help to our judicial system.[46]

The third way in which the procedural reformer can take advantage of technological developments is to assist him in his work. In part we are already doing this. The empirical researches by the Columbia Project and others would be quite unmanageable without modern machines to extract the answers from great masses of raw data. But this is not the only possibility. In the report of the President's Commission on Law Enforcement there is a fascinating description of the use of a computer to predict the effect particular reforms would have on delay in a particular court. The computer is able to simulate the court processing activity, and permits experimentation with court procedures. Thus the machine showed that if the District of Columbia had had a second grand jury sitting during part of a particular period, the delay between presentment and indictment would have been reduced from thirty-five days to less than one day, at a cost of less than $50,000 per year for the additional grand jury and associated support resources.

45 DRAFTS OF PROPOSED RULE 30, UNIFORM RULES OF FEDERAL APPELLATE PROCEDURE 10-11 (Dec. 1966 Draft). The savings possible through such a method of reproducing the record are persuasively described by Joiner, *supra* note 24, at 25.

46 "Videotape recording, television's familiar 'instant replay,' is being used to record the interrogation of suspects by the Santa Barbara, California, Police Department." Kane, *Videotape Recording*, 50 JUDICATURE 272 (1967).

Similar information was produced on such other matters as the effect on delay of requiring all motions to be filed and heard within 17 days, and the impact on time in the court system that possible reductions of the percentage of guilty pleas would have. The commission concluded generally that "simulation has been found an effective tool for examining reallocation of existing resources or efficient allocation of additional resources."[47] At present the reformer can at best make a guess about the effect of the changes he proposes. To the extent that the computer can make that guess more informed, it will be an invaluable aid to reform.

So, as you see, I think there is still plenty of work for the reformers, even though I do not think they will provide a solution to the challenge of court congestion threatened by the law explosion. For that latter solution, we must look elsewhere. Perhaps drastic changes in substantive law must be made to take certain kinds of business away from the courts. Or perhaps we shall simply have to double or triple the number of courts. As our population increases in the future, we are not likely to keep the same number of schools we presently have and simply make them more efficient. Nor are we likely to keep the same number of churches and hospitals, while we demand that they take care of peoples' souls or bodies twice as speedily. We are going to build more buildings, and train more teachers and ministers and doctors. If society is prepared to provide more of every other kind of facility and kind of professional that it thinks important in order to meet the needs of a doubled population, why is the thought of more courthouses and more judges regarded as unthinkable?

[47] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 257-59 (1967).