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Introduction

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SYMPOSIUM THE FIFTIETH ANNIVERSARY OF THE FEDERAL RULES OF CIVIL PROCEDURE

INTRODUCTION

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It is with pleasure and pride that I commend the *St. John's Law Review* in having selected a theme for this Symposium that is of significance to all who participate in the administration of justice in our federal courts: the fiftieth anniversary of the Federal Rules of Civil Procedure. The adoption of the Federal Rules in 1938 marked a major step in the progression of our procedural law. Indeed, one enthusiastic commentator described the Rules as "one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law."[1]

Perhaps nothing can be said to have had a more profound influence on the adoption of the Federal Rules than Dean Pound's seminal address, *The Causes of Popular Dissatisfaction with the Administration of Justice*.[2] Delivered in 1906, at the 29th annual meeting of the American Bar Association in St. Paul, Dean Pound's address was later described by Dean Wigmore as "the

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[1] Carey, *In Favor of Uniformity*, 3 F.R.D. 507, 507 (1945).

[2] Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

spark that kindled the white flame of progress."[3] Pound looked forward to a "near future when our courts [would] be swift and certain agents of justice, whose decisions [would] be acquiesced in and respected by all."[4] In Pound's view, it was the common law's "contentious procedure" and its "sporting theory of justice," whereby lawyers took advantage of the formalistic and rarefied writ system and its rigid and inflexible requirements, that hindered the administration of justice.[5] What he proposed in its stead was a flexible system based in equity that would eliminate procedural interference with the evolution of the law.[6]

This notion was echoed by the chief drafter of the Federal Rules, then Professor of Law, Charles Clark, later Dean of Yale Law School and Judge of the Second Circuit Court of Appeals.[7] Excessive procedural technicality, Judge Clark warned, could only stand in the way of the attainment of justice. Judge Clark believed that procedure had to be made subservient to substance, and recognized only as a means to an end,[8] *i.e.*, more the "handmaid of justice" than its mistress.[9] To effectuate this goal, Judge Clark, like Pound, proposed the adoption of a federal system of civil procedure based in equity.[10] The proposed system was adopted and went into effect on September 16, 1938.[11]

The philosophies of Pound and Clark are reflected throughout the Federal Rules, and especially in rule 1 which declares that the Rules should be construed so as to facilitate the "just, speedy, and

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[3] Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark That Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y 176, 176 (1937); *see* Re, *The Partnership of Bench and Bar*, 16 CATH. LAW. 194, 195 (1970).

[4] Pound, *supra* note 2, at 417.

[5] *See* Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 945 (1987); *see also* Pound, *supra* note 2, at 404.

[6] *See* Subrin, *supra* note 5, at 945; *see also* Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and* Erie, 54 BROOKLYN L. REV. 1, 6 (1988).

[7] PROCEDURE—THE HANDMAID OF JUSTICE: ESSAYS OF JUDGE CHARLES E. CLARK 1 (C. Wright & H. Reasoner eds. 1965) [hereinafter HANDMAID OF JUSTICE].

[8] Subrin, *supra* note 5, at 962.

[9] Clark, *The Handmaid of Justice*, 24 WASH. U.L.Q. 297, 297 (1938), *reprinted in* HANDMAID OF JUSTICE, *supra* note 7, at 69.

[10] Subrin, *supra* note 5, at 962-63.

[11] *See* Weinstein, *supra* note 6, at 4. "The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than the common law." Subrin, *supra* note 5, at 922. It is also noteworthy that the Rules abolished the distinction between actions at law and suits in equity. *See* FED. R. CIV. P. 2.

inexpensive determination" of every civil action.[12] While it cannot be doubted that the adoption of the Federal Rules in 1938 represented a significant step toward the promotion of these animating goals, it is essential that the Rules constantly be reexamined in light of new experience if they are to continue to promote these goals. Hence, it is wise to remember the admonition of Judge Clark: "Unless revivified, the modern new procedure will soon become as hard and unyielding as the old systems to which reform was directed. . . . I suggest . . . therefore, as one of the most necessary of procedural requirements, that the rules be subject to continuous intelligent examination and criticism."[13]

As Judge Clark recognized, no procedural system can remain static if it is to work efficiently. With this in mind, the leaders of the legal profession met at the Pound Conference in 1976, seventy years after Dean Pound's publication of *The Causes of Popular Dissatisfaction with the Administration of Justice*, to discuss contemporary problems in American litigation.[14] That conference, as well as the many other similar conferences and efforts to improve civil procedure in the federal courts, are essential if we are to meet the needs of a rapidly changing and evolving society.

It is precisely this necessary and laudable purpose that is served by the articles of this Symposium. In her opening article, Chief Judge Wald illustrates that the Federal Rules are "living documents"—requiring continual interpretation in light of newly emergent problems. Perhaps the most pressing problem that the federal courts face today involves the severe backlog of cases cluttering their calendars. The need to alleviate this problem emerges as a pervading theme in the articles of this Symposium. Chief Judge Markey offers four suggestions, each of which is designed to expedite the flow of litigation in the federal courts. Judge Sprizzo's call for the strengthening of rule 68's too seldom used "offer of judgment,"[15] and Mr. Evans' suggestions regarding requests for ad-

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[12] FED. R. CIV. P. 1.

[13] Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 507-08 (1950), *reprinted in* HANDMAID OF JUSTICE, *supra* note 7, at 137.

[14] *See* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Levin & R. Wheeler eds. 1979) (proceedings of National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice); *see also* Subrin, *supra* note 5, at 974.

[15] Rule 68, which is intended to encourage early settlements of litigation, permits a party defending against a claim to serve upon the adverse party, at any time more than ten days prior to the beginning of trial, an offer to have judgment taken against him according to the terms of the offer. The rule then goes on to provide that "if the judgment finally

mission, are similarly designed to ease the backlog in our federal courts, as is the ever-increasing utilization of federal magistrates, a post-1938 development noted with great approval by Judge Weinstein.

Other articles in this Symposium focus on specific causes of the congestion that currently plagues the federal dockets. In its article on *pro se* litigation, the New York State Bar Association makes a number of recommendations on how the high volume of *pro se* cases in the New York federal courts can be minimized. Mr. Simons, in his article, discusses what is becoming one of the most prevalent causes of the backlog faced by the federal courts today: the rapidly growing number of complex cases. Mr. Simons suggests that stricter adherence to the *Manual for Complex Litigation* will serve to promote the more expeditious resolution of these cases. Of course, in the pursuit of speed we cannot allow ourselves to forget that the command of rule 1 is for a *just* as well as a *speedy* determination of every action. As I have stated elsewhere, "[s]urely, there is no virtue in speed to the detriment of the quality of justice."[16] With this in mind, the New York State Bar Association, in its article on jury comprehension in complex cases, offers several suggestions to facilitate the ability of a jury to understand a complicated evidentiary record, thereby enhancing the likelihood of reaching a just verdict.

Finally, this Symposium includes articles by Professors Ward and Chase. Professor Ward calls for a clarification and revitalization of the attorney work product doctrine. Professor Chase, while noting the impact of the Federal Rules upon state procedure, focuses primarily on the inherent difficulties in achieving truly effective procedural reform. In light of Professor Chase's remarks, the accomplishments of the drafters of the Federal Rules seem all the greater.

These accomplishments, however, great as they are, must continually be reexamined "in the never ending quest for a perfect judicial system."[17] Only by constant reexamination and improve-

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obtained by the offeree is not more favorable than the offer, the offeree *must pay* the costs incurred after the making of the offer." FED. R. CIV. P. 68 (emphasis added); *see* Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D.N.Y. 1974).

[16] Re, *The Administration of Justice and the Courts*, 18 SUFFOLK U.L. REV. 1, 12 (1984).

[17] Kaufman, *The Philosophy of Effective Judicial Supervision Over Litigation*, 29 F.R.D. 207, 215 (1961).

ment can we hope to make, as did the drafters of the Federal Rules, a lasting contribution to the administration of justice.