

ED COOPER, RULE 56, AND CHARLES E. CLARK'S FOUNTAIN OF YOUTH

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Our happy occasion is to commemorate Ed Cooper's twenty years of service on the Civil Rules Advisory Committee, one year as a rank-and-file member and the following nineteen as its Reporter. Note that I did not say we are here to pay tribute to Ed. That is not because tribute would be undeserved. It takes less than the proverbial drop of a hat to get me to gush about Ed, his work on the Advisory Committee, or his impact on me personally. The reason I did not say we are here to pay tribute to Ed is that he, upon learning of the occasion, asked that the program focus on substance and not him. Will I heed his request? Yes. And no. Though I feel honor bound not to address my comments directly to Ed individually, the next best thing is to address my comments to the institution he has so expertly served. And taking a truly long-term institutional view, I will do so from the perspective of Ed's earliest predecessor—the first Reporter of the Advisory Committee—Charles E. Clark.¹

Nobody had a greater impact on the formulation of the original Civil Rules than Clark. His role as both the principal architect² and the principal draftsman³ of the Civil Rules is well known. As Professor Wright once put it, although the Civil Rules were a joint effort,

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1. I will dispense with a complete biography and recite only the most basic and relevant details. Clark joined the faculty at the Yale Law School in 1919. See *Biographical Directory of Federal Judges: Charles Edward Clark*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=439&cid=999&ctype=na&instat=na> (last visited Aug. 31, 2012). He was named Dean of the Yale Law School in 1929. See *id.* In 1935, the United States Supreme Court appointed Clark as a member of the original Advisory Committee on Civil Rules, also designating him as the Reporter. See Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 18 (1988). In 1939, Clark left Yale to become a judge on the United States Court of Appeals for the Second Circuit, a position he held until his death in 1963. See FED. JUDICIAL CTR., *supra*.

2. See Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 961–73 (1987) (describing the influence of Clark's philosophy on the content of the Civil Rules) [hereinafter Subrin, *How Equity Conquered*]; see also Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 98–103 (1989) (discussing Clark's philosophy and its influence on the adoption of liberal joinder rules); David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 493–505 (2010) (discussing the influence of Clark's philosophy on the rules generally).

3. See Fred Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell*, 65 COLUM. L. REV. 1323, 1323 (1965) (calling Clark the "prime instigator and architect of the rules of

“the end product bears the unmistakable Clark stamp.”⁴ But Clark started shaping the Civil Rules even before drafting began.⁵ Initially, Chief Justice Hughes thought the civil rules project should be limited to creating rules for actions at law (leaving in place—and separate—the existing equity rules).⁶ A passionate advocate for merging law and equity procedure, Clark mounted a multi-front campaign to get the Court to change its course.⁷ His campaign succeeded.⁸ Clark also succeeded in persuading the Court to adopt a centralized drafting process, with the work to be done by a select group of experts, many of whom Clark himself recommended.⁹ Finally, Clark maneuvered to be named Reporter,¹⁰ a position that no doubt contributed to the Civil Rules bearing his stamp.

In this Essay, however, I want to focus not on the events that led up to the 1938 rules but on what happened after they took effect. Was the work of the Advisory Committee done? Did the Advisory Committee even exist anymore? If so, what was the Committee’s assignment? It should come as no surprise that, just as Clark had strong views about the initial drafting of the rules, he also had

federal civil procedure”); Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976) (stating that Clark “was principally responsible for the drafting of the Federal Rules”); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 486 (1993) (calling the Clark the “principal draftsman” of the 1938 rules); Weinstein, *supra* note 1, at 18 (calling Clark the “moving force” behind the Advisory Committee).

4. Charles A. Wright & Harry M. Reasoner, *Introduction to PROCEDURE—THE HANDMAID OF JUSTICE: ESSAYS OF JUDGE CHARLES E. CLARK* 3 (Charles A. Wright & Harry M. Reasoner eds., 1965).

5. According to Professor Stephen Subrin, “Clark’s most meaningful contribution to procedural reform was not the actual drafting of most of the 1938 Federal Rules, but his influence on the development of modern civil procedure during the first six months of 1935, before the drafting began.” Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES E. CLARK 115, 116 (Peninah Petruck ed., 1991) [hereinafter Subrin, *Clark’s Procedural Outlook*].

6. *See id.* at 118.

7. *Id.* at 119–30.

8. *See* Charles Evan Hughes, Chief Justice of the U.S. Supreme Court, Address at Annual Meeting of American Law Institute (May 9, 1935), in 21 A.B.A. J. 340, 342 (1935).

9. *See* Subrin, *Clark’s Procedural Outlook*, *supra* note 5, at 131.

10. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1136 n.539 (1982) (“Clark ensured that he and not Sunderland would be selected as Reporter by bringing the latter’s views [on the issue of uniformity versus conformity] to Mitchell’s attention.”); Peter Charles Hoffer, *Text, Translation, Context, Conversation: Preliminary Notes for Decoding the Deliberations of the Advisory Committee That Wrote the Federal Rules of Civil Procedure*, 37 AM. J. LEGAL HIST. 409, 434–35 (1993) (describing how Clark undermined Sunderland to Mitchell but then made up for it by enlisting Sunderland to draft the discovery and summary-judgment rules); Subrin, *Clark’s Procedural Outlook*, *supra* note 5, at 132–38 (asserting that Clark engaged in negative campaigning to ensure that he, and not Edson Sunderland, would be named Reporter).

strong views about how they should be superintended. Clark lobbied for the creation of a standing Advisory Committee, and he wrote extensively about what the work of the Committee should be. In one capacity or another, Clark continued to toil in the rulemaking fields for another twenty-four years until his death in 1963.¹¹

This Essay proceeds in three parts. Part I looks back at the development of the institution of the standing Advisory Committee. It tells two stories. First, it provides a quick history of what the Advisory Committee did after 1938 and how it came to be in its current form. Second, it sets forth Clark's very influential views about what role a standing Advisory Committee should play. Part II returns us to modern times. It analyzes the most recent set of major amendments to the Civil Rules—the 2010 amendments to Rule 56—to see how that project relates to Clark's views on the continuing rulemaking process. Part III concludes with a few reflections on Ed's role in advancing some of the rulemaking values that Clark held so dear.

I. A FOUNTAIN OF YOUTH FOR THE CIVIL RULES

The rulemaking structure that gives us the Advisory Committee on Civil Rules as we know it recently celebrated its golden anniversary, though the milestone was marked with little pomp and circumstance.¹² After fifty years, I think most people today take the Advisory Committee for granted. But in fact the standing Advisory Committee as we have come to know it emerged at the end of a twenty-five-year campaign. Charles E. Clark was one of the leading figures in that campaign. He started calling for a standing Advisory Committee even before the original Advisory Committee's work was done.¹³ He wasn't looking for personal job security, but he was acting out of a sort of self-interest. Clark had strong views about the role of procedure and the proper design of a procedural scheme, and a standing Advisory Committee would—if it followed his lead—serve to institutionalize those views.

11. From 1939 to 1956, Clark continued as the Reporter for the Advisory Committee on Civil Rules, at least during those times when the Advisory Committee was constituted. See *infra* notes 22–32 and accompanying text. In 1960, Clark was appointed to serve on the United States Judicial Conference's newly constituted Standing Committee on Rules of Practice and Procedure. See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1007, at 38 (3d ed. 2002) (discussing creation and composition of the original Standing Committee on Rules of Practice and Procedure).

12. By way of comparison, on the fiftieth anniversary of the Civil Rules themselves, at least six major conferences marked the occasion. See Symposium, *The 50th Anniversary of the Federal Rules of Civil Procedure, 1938–1988*, 137 U. PA. L. REV. 1873, 1873 n.1 (1989).

13. See *infra* notes 42–43 and accompanying text.

This Part examines the development of the standing Advisory Committee. It begins with a history detailing the evolution of the Advisory Committee from 1938 to 1960. It then turns to the functions that Clark envisioned for the standing Advisory Committee that he advocated.

This Part also develops two principal themes. The first theme is that Clark saw the standing Advisory Committee as a natural extension of his philosophy of procedure. He designed the rules to be flexible, discretionary, and empowering rather than restrictive. A critical role of the standing Advisory Committee would be to preserve those characteristics by counteracting what Clark thought was the inevitable tendency of procedure to harden over time. The second theme is that, for Clark, the quality of a procedural rule was measured by how well it was serving its intended function. Thus, a second critical role of a standing advisory committee would be to keep the rules vital and young, always serving their functions in light of the needs of the day and always on the forefront of procedural progress. In that respect, the standing Advisory Committee would serve as a fountain of youth for the Civil Rules.

A. *Twenty Years in the Making*

I suspect that few people pause to consider the existence of a standing advisory committee overseeing the Civil Rules. Now and then, someone questions the wisdom of having a standing advisory committee. One commentator is said to have remarked that creating a standing advisory committee was a mistake because it would lead to constant “tinkering” with the rules.¹⁴ Perhaps the concern is that a standing advisory committee will make needless changes to justify its continuing existence.¹⁵ But most people, if they did pause to ponder the subject, would probably shrug their shoulders and proclaim the existence of a standing advisory committee to be fully expected, very probably necessary, and perhaps even inevitable.

14. See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 761 (1993).

15. I certainly did not find that to be the case during my years on the Advisory Committee. It is perhaps noteworthy that there were no changes to the Civil Rules in 2011 or 2012. To me, that does not suggest a body taking action just for action's sake. Past participants have expressed similar sentiments about the Advisory Committee taking action only when a real need is shown. See, e.g., Charles A. Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee*, 7 VAND. L. REV. 521, 523 (1954) (“Many suggestions were rejected, not necessarily because they lacked merit but because the Committee was opposed to change merely for the sake of change, and approved only those amendments for which there was a showing of clear need.”).

Someone has to at least *watch over* the Civil Rules.¹⁶ And that someone needs to be within (or attached to) the judicial branch, lest Congress take the lack of judicial oversight as an invitation to involve itself directly.¹⁷

But just as the Supreme Court wasn't in a position to personally draft the original Civil Rules, it also can't personally watch over them. Even my most wide-eyed of first-year students are beyond the naïveté required to think that the Supreme Court Justices could or would block out the time to maintain a comprehensive and independent study of the latest procedural developments in the lower courts (let alone do the same thing for the Appellate Rules, the Bankruptcy Rules, the Criminal Rules, and the Evidence Rules).¹⁸ Once you calculate the amount of work that job would entail and then factor in the Court's limited resources, the idea of having a "band of experts" keep the watch and make proposals to the Supreme Court seems like a natural solution.

When the Civil Rules took effect in September 1938, however, the existence of a standing advisory committee was hardly a foregone conclusion. The original Advisory Committee made no secret of its belief that there *should* be a standing advisory committee. A proposal to create a standing advisory committee was included in its Preliminary Draft of the Rules, circulated for public comment in

16. As Professor James Wm. Moore wisely noted a long time ago, there is a big difference between supporting the "continuous study" of the Rules and promoting their "continuous change." See James Wm. Moore, Address of Professor Moore, in *The Rule-Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117, 128.

17. See Charles E. Clark, *The Proper Function of the Supreme Court's Federal Rules Committee*, 28 A.B.A. J. 521, 523 (1942) [hereinafter Clark, *Proper Function*] (discussing problematic delays in amending rules under prior versions of the Rules Enabling Act's congressional submission requirement); Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 443 (1958) [hereinafter Clark, *Two Decades*] (labeling the fear of "legislative tinkering" a "profound stimulus" in discussions to revive the Advisory Committee); see also James Wm. Moore, *The Supreme Court: 1940, 1941 Terms—The Supreme Court and Judicial Administration*, 28 VA. L. REV. 861, 906–07 (1942) ("Unless there is some committee to which they can refer their suggestions and complaints, the only course left open is legislation; but if there is a functioning committee on hand to invite and receive suggestions, then the great bulk of lawyers will acquiesce in the Committee's final decision on changes in the Rules."). While this Essay is not the place to rehearse the reasons for wanting to minimize legislative amendment of the Rules, there is a general consensus that a legislative rulemaking model would be dysfunctional. See Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 288 (2009) ("[W]hile a legislative model of federal court rulemaking has not been attempted, the general consensus is that such a body would be dysfunctional."); see also Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 673 (1975) ("The legislative process seems particularly unsuited both to wholesale reform of court procedures and to technical adjustment of specific regulations.").

18. See Clark, *Two Decades*, *supra* note 17, at 443 ("The Court is not equipped and should not be expected to conduct extensive research on its own; this is a task to be performed for it by others, leaving only broad decisions of policy to be ultimately settled by the Court.").

1936.¹⁹ But the Rules Enabling Act made no mention of a standing advisory committee.²⁰ Neither did the Supreme Court's Order appointing the original Advisory Committee.²¹ The first Advisory Committee members had every reason to wonder whether their work was done when they submitted their final report in November 1937. Ultimately, it would take twenty years before the Advisory Committee scheme as we know it would come into existence.

The Supreme Court's first gesture toward developing a standing advisory committee came very quickly when, in November 1939, it issued an order asking the Advisory Committee members "to prepare and submit to the Court such amendments as they may deem advisable."²² As written, however, the Order called only for a one-time report; it said nothing about ongoing activity. Moreover, it seems likely that the Court's motive in reappointing the Advisory Committee was simply to stake an early claim that the Court—and not Congress—would superintend the Rules going forward, without making any commitment to how that process would work. After receiving the Order but before the Advisory Committee was to meet, Chairman Mitchell wrote to Chief Justice Hughes suggesting that it might be too soon for a review of the new rules. The Rules had only been in effect for little more than a year, and no major problems had developed.²³ Chairman Mitchell suggested that, rather than start "tinkering" with the Rules, it might be better to wait until a longer period of experience demonstrated a more compelling need for changes.²⁴

In response, Chief Justice Hughes made it clear he wanted the Advisory Committee to *do something* at that time to stave off any

19. See ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA 170–71 (1936) (describing Rule A, a proposal for a standing advisory committee on the rules of civil procedure).

20. See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 41 (2d ed. 1947) (noting that the Enabling Act of 1934 contained no express provisions for amendments).

21. The initial Order appointing the Advisory Committee stated that it would be the duty of the Committee "to prepare and submit to the Court a draft of a unified system of rules." Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 775 (1935). That appointment Order made no comment about whether the Advisory Committee would continue to serve in any capacity after submitting its draft. See *id.* at 774–75.

22. Order, 308 U.S. 641 (1939).

23. ADVISORY COMMITTEE OF THE SUPREME COURT OF THE U.S., MEETING MINUTES 2–3 (Dec. 7, 1939), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV12-1939-min.pdf>. At that meeting, other Committee members raised the concern that such early amendment activity would make the Civil Rules seem unstable and thereby undermine the efforts to get the states to follow them. *Id.* at 3.

24. *Id.*

meddling by Congress.²⁵ In deference to the Chief Justice, and recognizing the value of staking an early claim to the task of supervising the Rules, the Advisory Committee proposed a discrete change to make the Civil Rules applicable to compensation proceedings under the Longshoremen's and Harbor Worker's Compensation Act.²⁶ But it otherwise recommended that the Advisory Committee's supervisory work be deferred to allow the case law to develop and to give both bench and bar more time to study the Rules in action and consider what changes might be needed.²⁷ So ended that round of rulemaking.

The Supreme Court called the members of the Advisory Committee back to duty two years later, in January 1942, expressly designating them ("or so many of them as are willing to serve") "as a continuing Advisory Committee to advise the Court with respect to proposed amendments or additions to the [Civil Rules]."²⁸ This time, the Advisory Committee members were ready to undertake a comprehensive review²⁹ and ultimately proposed text amendments (or new committee notes) to thirty-five rules, though not all of them were approved by the Supreme Court. Now acting as a standing committee, the Advisory Committee continued to meet, spending the period between 1947 and 1951 developing what is now Rule 71.1 governing condemnation cases.³⁰ In 1953, the Advisory Committee once again undertook a comprehensive reexamination of the Rules, an effort that culminated in 1955 in proposed amendments to twenty-four of them.³¹ But the Supreme Court took no action on the proposals and instead discharged the Advisory Committee one year later, in 1956.³²

25. See *id.* at 4.

26. See *id.* at 18–21 (discussing the amendment and the reasons for advancing that proposal); WRIGHT & MILLER, *supra* note 11, at 33 (describing the amendment).

27. See *id.* at 31–32.

28. Order Continuing the Advisory Committee, 314 U.S. 720, 720 (1942).

29. See ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF THE PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES iii (1946) ("The time has arrived when the Court should consider amendments which experience may have shown to be desirable.").

30. See ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED RULE TO GOVERN CONDEMNATION CASES IN THE DISTRICT COURTS OF THE UNITED STATES (1948); ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, SUPPLEMENTARY REPORT OF PROPOSED RULE TO GOVERN CONDEMNATION CASES IN THE UNITED STATES DISTRICT COURTS (1951).

31. See ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS (1955) [hereinafter 1955 ADVISORY COMMITTEE REPORT].

32. See Order Discharging the Advisory Committee, 352 U.S. 803 (1956) (discharging the Committee and revoking the 1942 Order constituting the Advisory Committee as a continuing body).

The interregnum did not last long. In 1958, Congress passed legislation giving the Judicial Conference the responsibility to “carry on a continuous study of the operation and effect” of the Civil Rules and to make recommendations for changes or additions to those rules to be submitted to the Supreme Court.³³ In turn, the Judicial Conference created the Standing Committee on Rules of Practice and Procedure and five advisory committees, including an advisory committee for the Civil Rules.³⁴ Under the legendary “Queen Mary Compromise,” the appointments to the committees would be made by the Chief Justice, a practice designed to give the committees the stature and prestige of “Supreme Court Committees” even though they would be operating within the Judicial Conference structure.³⁵ That structure—in which the Advisory Committees and the Standing Committee make recommendations to the Judicial Conference, which then makes recommendations to the Court—remains in place today.³⁶

33. Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified as amended at 28 U.S.C. § 331 (2006)). Interestingly, Clark had raised the possibility of integrating a standing advisory committee into the Judicial Conference and Administrative Office structures as far back as 1942. See Clark, *Proper Function*, *supra* note 17, at 525 (making the suggestion in part because he envisioned that a standing advisory committee would also interact with other rulemaking bodies in both the federal and state systems).

34. See Albert B. Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A. J. 772, 772, 773 (1961); see also WINIFRED BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES 5–8 (1981) (discussing the rulemaking structure created by the Judicial Conference under the 1958 Act); JUDICIAL CONFERENCE OF THE U.S., ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6–7 (1958) (setting forth the Conference’s approval).

35. See Tom C. Clark, *Foreword to Wright & Miller*, *supra* note 11, at xix; see also Subcommittee on Long Range Planning, A Self-Study of Federal Judicial Rulemaking, 168 F.R.D. 679, 686 (1995) [hereinafter *Self-Study of Federal Judicial Rulemaking*] (discussing the “Queen Mary Compromise”); Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323, 328 (1991) (describing the “Queen Mary Compromise”).

36. See *Self-Study of Federal Judicial Rulemaking*, *supra* note 35, at 686 (“The rulemaking process today follows the basic 1958 design.”); Thomas F. Hogan, *The Federal Rulemaking Process: A Summary for the Bench and Bar*, U.S. COURTS (Oct. 2011), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx>; see also Peter G. McCabe, *Renewal of the Rulemaking Process*, 44 AM. U. L. REV. 1655, 1672–75 (1995) (outlining the steps in the federal rulemaking process); Lee H. Rosenthal et al., *They Were Meant for Each Other: Professor Edward Cooper and the Rules Enabling Act*, 46 U. MICH. J.L. REFORM 495, 508–09 (2013) (noting that the 1988 amendments to the Rules Enabling Act did not alter the basic rulemaking structure established in 1958); see generally 28 U.S.C. § 2073(a) (2006) (establishing procedures for the Judicial Conference rulemaking process).

The 1956 discharge of the Advisory Committee presents a minor mystery. The Supreme Court never said why it discharged the Committee.³⁷ Nor is it clear whether the Supreme Court had formulated at that time any definite plans for a substitute process.³⁸ One thing seems clear: the Court could have had no intention of doing the necessary research and drafting work itself. The Court already felt overwhelmed just by its duty of supervising the work of the Rules Committees that reported to it.³⁹ It is equally clear that there was a strong demand—both from the bar and, apparently, within the judiciary itself—for the courts (and not Congress) to continue to watch over the Rules and consider amendments.⁴⁰ The new scheme thus seemed to meet everyone's concerns: the bar got the benefit of an ongoing rulemaking process, the federal judiciary retained its power over rulemaking, and the Supreme Court was relieved of the burden of directly supervising the Rules Committees.⁴¹

B. Keeping the Civil Rules Forever Young

Charles E. Clark was one of the most persistent and vocal proponents of having a standing advisory committee. When addressing the American Bar Association on the published draft of the Rules in 1936, he referred to the proposal for a standing advisory committee (which appeared as Supplemental Rule A in that draft) as “perhaps

37. See WRIGHT & MILLER, *supra* note 11, § 1006, at 37; see also Coleman, *supra* note 17, at 277 & n.100 (speculating that the Court may have been reacting to a general tension caused by negative public opinion towards the Court).

38. See Charles E. Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUD. SOC. 250, 253 (1963) [hereinafter Clark, *Role of the Supreme Court*].

39. See Earl Warren, Statement of the Chief Justice, in *The Rule-Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117, 118.

40. See WRIGHT & MILLER, *supra* note 11, § 1007, at 37 (“Whatever may have been the reasons that led the Supreme Court to discharge the Advisory Committee in 1956, the need for some continuing machinery to study the operation of the Federal Rules of Civil Procedure and to recommend amendments when needed was so obvious that there was strong professional demand, expressed by the American Bar Association, the American Judicature Society, the Judicial Conference of the United States, and other concerned groups, for the establishment of some new machinery to replace the defunct Advisory Committee.”); Stanley Reed, Comment by Mr. Justice Reed, in *The Rule-Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117, 140 (quoting JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE REGULAR ANNUAL MEETING 35 (1956) regarding the importance of continuing court committees to prevent legislative interference with the Rules).

41. For an argument that the loss of direct supervision has harmed the process, see Friedenthal, *supra* note 17, at 677 (“The removal of the direct connection between the advisory committees and the Court appears to have caused deterioration both in the product presented by such committees for the Court’s approval and in the level of supervision exercised by the Court.”).

the most important rule of all, from the longer view.”⁴² Clark repeated his call for the appointment of a standing advisory committee at the time the Rules took effect.⁴³ He continued to advocate the benefits of a standing advisory committee throughout the 1940s and 1950s, until the modern Judicial Conference Rules Committee structure was finally created in 1960.⁴⁴

Why was Clark so insistent that a standing advisory committee was needed? It certainly wasn't because Clark was hoping for a second chance to persuade the Advisory Committee to adopt his views on how to design a set of rules of procedure. Clark had already won that battle hands down.⁴⁵ Indeed, given how thoroughly and pervasively the original Rules tracked Clark's views, one might have expected Clark to play the clichéd role of protective father and declare the existing Rules to be a finished and perfect product not to be tampered with.⁴⁶ In pushing for a continuing advisory committee, however, Clark was simply being true to his core beliefs about both the role of procedure and the proper method of law reform.

Clark's philosophy of procedure is well known but worth restating. A self-avowed legal realist,⁴⁷ Clark famously described procedure as the “handmaid” of justice.⁴⁸ The job of procedure was to get the case to the merits as quickly and inexpensively as possible.⁴⁹

42. Charles E. Clark, *A Striking Feature of the Proposed New Rules—Change in Bar's Attitude Towards Improved Procedure—What Particularly Interested the Lawyers*, 22 A.B.A. J. 787, 789 (1936). At that time, Clark emphasized the need for an easy mechanism for correcting any mistakes the Advisory Committee might make. *See id.* As discussed later, Clark actually envisioned a quite different set of functions for a standing advisory committee. *See infra* notes 56–91 and accompanying text.

43. *See* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 308 (1938) [hereinafter Clark, *Handmaid*].

44. *See supra* notes 33–36 and accompanying text.

45. *See supra* notes 2–4.

46. According to one commentator, however, Clark did engage in protective behaviors as a judge; indeed his battles with several of his colleagues on the Second Circuit to preserve the spirit and integrity of the scheme he had devised are legendary. *See* Smith, *supra* note 3, at 921–22.

47. *See* Marcus, *supra* note 2, at 451.

48. *See* Clark, *Handmaid*, *supra* note 43, at 297.

49. *See* Smith, *supra* note 3, at 916; Marcus, *supra* note 2, at 501 (“Clark often voiced a normative preference as to the foundational purpose of procedural rules: they should facilitate the efficient and just resolution of cases on their substantive merits.”). Charles A. Wright and Harry M. Reasoner described Clark's procedural philosophy this way: “The rules must be flexible tools which will permit the litigants a just, speedy, and inexpensive determination of their lawsuit, rather than a welter of moves in a judicial game of chess.” Wright and Reasoner, *supra* note 4, at 5.

Clark thought the best way of reaching the merits was to deemphasize the role of pleadings and instead rely on discovery, summary judgment, and pretrial conferences.⁵⁰

Fundamentally, Clark wanted to minimize procedural line drawing and empower judges. In his view, past procedural schemes had impeded the efficient pursuit of merits-based justice because they were formalistic, relying on abstract concepts and categorization to determine fixed outcomes without regard to whether those outcomes made any sense. Clark thought that trying to draw and then enforce procedural lines was a waste of time and money, and worse yet, one that often stood in the way of getting to the merits.⁵¹ For the new Federal Rules, Clark envisioned a flexible scheme in which the Rules stated functional goals and then relied on discretionary application by judges.⁵² Later in his career, Clark remarked that “rules of procedure, if soundly prepared, are a liberating, rather than a restrictive, influence.”⁵³ Clark’s scheme would do just that, giving trial judges power and discretion and then relying on their wisdom and common sense.⁵⁴

Clark’s views on the need for and role of a standing advisory committee are a natural extension of his philosophy of procedure.⁵⁵ Shortly after the Advisory Committee was reappointed as a standing committee in 1942, Clark identified four functions of the reconstituted Advisory Committee.⁵⁶ One function would be to correct any drafting errors that might be exposed, though Clark thought these would be few as errors were likely to get pointed out during the public comment process.⁵⁷ The bulk of the Advisory Committee’s

50. See Charles E. Clark, *The Amended Federal Rules*, 15 BROOK. L. REV. 1, 8–9 (1949) [hereinafter Clark, *Amended Rules*]; Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144, 154–59 (1948) [hereinafter Clark, *Influence of Federal Reform*].

51. See Subrin, *Clark's Procedural Outlook*, *supra* note 5, at 139–42.

52. See Marcus, *supra* note 2, at 484–87.

53. Charles E. Clark, *Foreword*, 10 RUTGERS L. REV. 479, 482 (1956) [hereinafter Clark, *Foreword*].

54. See Charles E. Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, 164 (1956) (stating that the central purpose of pretrial is the “individualization of the case, so that it may be separated for its own particular treatment from the vast grist of cases passing through our courts”); Charles E. Clark, *Pre-Trial Orders and Pre-Trial as a Part of Trial*, 23 F.R.D. 506, 506 (1959); see generally Subrin, *Clark's Procedural Outlook*, *supra* note 5, at 148 (“Throughout his career, Clark urged that the discretion of capable judges, not procedural rules and juries, are [sic] what was ultimately needed to have the law fairly and expeditiously applied.”).

55. See Marcus, *supra* note 2, at 504–05 (“In a sense, the Advisory Committee represented the institutionalization of a pragmatic approach to law reform that placed faith in a method of investigation shepherded by experts as sufficient to ensure good results for procedure.”).

56. See Clark, *Proper Function*, *supra* note 17, at 522.

57. *Id.*

efforts naturally would go toward the other three functions: clarifying the policy choices the Advisory Committee had already made when formulating the Rules, revisiting those policy choices as might be needed in light of experience under the Rules, and considering new matters outside the scope of the existing Rules. Each of those functions reflects Clark's pragmatic and instrumental approach to procedure.

Clark's philosophy of procedure manifests itself initially in the fact that two of the functions he envisioned for a standing advisory committee—revisiting the policy choices previously made and considering new matters—contemplate actual changes to the Rules. Some might be surprised that Clark would invite scrutiny of the correctness or completeness of the rules he had just molded. Wouldn't that be tantamount to saying that his scheme was wrong? But Clark didn't see it that way. In Clark's eyes, a procedural rule was only as good as the results it yielded, measured by whether it hindered or facilitated the process of getting to the merits quickly and cheaply. If experience under the Rules showed that they were hindering the goals of Rule 1 or that there was a better way of advancing those goals, then the Rules should change.⁵⁸ Similarly, if experience under the Rules exposed gaps in the scheme, and additional rules addressing those gaps would advance the goals of Rule 1, then the Advisory Committee should propose them.⁵⁹ We have no reason to believe that Clark anticipated wholesale changes. He was clearly proud of the 1938 Civil Rules and was convinced they were at the forefront of procedural progress.⁶⁰ But he was equally

58. See Clark, *Handmaid*, *supra* note 43, at 304 (stating that rules "should be changed as soon as they are found by experience to be hampering. Even good rules may become a nuisance when lawyers discover how to use them as instruments of delay."); see also Marcus, *supra* note 2, at 503 ("[Clark] envisioned the Federal Rules as impermanent, with their content contingent upon their functional success and thus always susceptible to change when their success, or lack thereof, in practice required it").

59. The process of filling in gaps in the text of a rule included codifying helpful practices that had developed under the Rules. See Wright, *supra* note 15, at 537. One vivid metaphor for that practice is that of putting down sidewalks where the people have worn footpaths.

60. Clark's pride and confidence in the Civil Rules were evident in his writings from the time of their enactment until Clark's death. See, e.g., Clark, *Influence of Federal Reform*, *supra* note 50, at 145 ("But even though my own enthusiasm for the rules may thus require some discounting, the course of judicial and professional opinion and decision appears to demonstrate the success of the reform so thoroughly that I think we may take it as accepted fact in our further discussion of reasons and consequences."); Clark, *Proper Function*, *supra* note 17, at 521 (asserting in 1942 that the Civil Rules were an "outstanding success" and had achieved "universal acceptance as a vital part of our federal law"); Clark, *Role of the Supreme Court*, *supra* note 38, at 254 ("Viewed in perspective the success of the federal system is nothing short of phenomenal."); Clark, *Two Decades*, *supra* note 17, at 435 ("Two decades of lively experience

adamant that nobody should conclude that “the job has been done once and for all.”⁶¹

The final task Clark identified for a standing Advisory Committee was to take steps to “clarify” the policy choices that were already a part of the Civil Rules. This function is also very much an expression of Clark’s philosophy of procedure, though some context is required to see why. The starting point is to examine Clark’s somewhat cynical view about what happens to procedural rules once they are in the hands of judges.

From his first reflections on the rulemaking process to the end of his career, Clark emphasized what he called the natural tendency of procedural rules to harden with use. Despite his orientation as a legal realist, Clark was an advocate of having rules of procedure (as opposed to a completely unguided each-judge-makes-her-own-rules free-for-all) because he thought they promoted both efficiency and fairness.⁶² By creating a system of recurring processes, rules of procedure allow for the efficient processing of a large volume of cases while simultaneously promoting both the fact and appearance of equal treatment.⁶³ But Clark viewed it as inevitable that practice under the Rules would cause them to calcify as those recurring process hardened over time into rote.⁶⁴ As Clark put it, “[i]t is the nature of all procedure to harden and solidify, to become increasingly ‘red tape.’”⁶⁵

Clark perceived a second, rather different phenomenon that he felt inevitably caused good rules to go bad. In Clark’s view, many of the judges of his era simply didn’t take procedure seriously, which led to two types of problems. First, Clark believed that even great judges were prone to stumbling into fundamental mistakes when they hadn’t taken the time to develop a genuine understanding of

under the federal civil rules provide adequate perspective for both survey and prognosis. The rules have been thoroughly tried and not found wanting.”).

61. Clark, *Proper Function*, *supra* note 17, at 524; *see also* Charles E. Clark, *Stability and Change in Procedure*, 17 VAND. L. REV. 257, 260 (1964) (“More has been done to improve the administration of justice in the past twenty-five years than in all our previous history. But it would be a mistake to believe the task ended. In truth, reform begets reform; the first steps show others which must be taken.”).

62. *See* Clark, *Handmaid*, *supra* note 43, at 299–300.

63. *See id.*

64. *See id.* at 300.

65. Charles E. Clark, “Clarifying” Amendments to the Federal Rules?, 14 OHIO ST. L.J. 241, 244 (1953) [hereinafter Clark, *Clarifying Amendments*]; *see also* Clark, *Amended Rules*, *supra* note 50, at 2 (“Court procedure, like all routine red tape, while quite necessary, does have an inveterate tendency to petrify. One cannot continue to do the same tasks recurringly without developing a routine.”); Clark, *Proper Function*, *supra* note 17, at 524 (“[I]t is the tendency of procedure, as it is of all things which must be done recurringly and with fairness to all involved, to follow settled rules and with ever increasing rigidity as time goes on.”).

the Rules.⁶⁶ Second, and perhaps more problematic, was a phenomenon Clark called “procedural particularism.” By this he meant the tendency of judges to manufacture a limiting principle to do justice in the case before them without thinking about how that principle will affect the operation of the general rule in other contexts and cases.⁶⁷ Although those newly devised limiting principles might conveniently terminate the cases at hand, once noticed by the bar they morph into restrictive subrules destined to “plague judicial administration” going forward.⁶⁸

Compounding these problems was what Clark called a Gresham’s Law of how procedural precedents become established.⁶⁹ As Clark saw it, when a judge concludes that an activity is *permitted* under a discretionary rule, that conclusion typically would not be set out in any detail in a published decision.⁷⁰ But when a judge concludes that an activity is *not permitted*, despite the flexible ambit of the rule, the judge often feels the need to justify and explain the restriction, oftentimes in a written opinion.⁷¹ Moreover, lawyers pay more attention to decisions that create restrictions because they establish pitfalls that must be known and avoided.⁷² Over time, the case law becomes dominated by the restrictive view, which gains prominence simply by its higher visibility.⁷³ Eventually, Clark thought, the restrictive view squeezes out the permissive one.⁷⁴

66. See Clark, *Influence of Federal Reform*, *supra* note 50, at 163 (noting the tendency of great judges to “stumble over some of the more trite problems [of pleading] which a deeper appreciation would have enabled them to avoid”).

67. See Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 497–98 (1950) [hereinafter Clark, *Special Problems*]; cf. Clark, *Handmaid*, *supra* note 43, at 304 (“[A] brilliant court may show a general impatience with procedural delays and faults only to make some of the strangest of procedural rulings, either without appreciating their significance and how far they are departing from modern viewpoints or in an endeavor to rid themselves of unattractive cases through an assumed procedural fault. But such omissions come back to plague us mightily.”) (footnote omitted).

68. See Clark, *Special Problems*, *supra* note 67, at 498.

69. See Clark, *Amended Rules*, *supra* note 50, at 2. Gresham’s Law is an economic principle stating that if two forms of currency have the same face value but have different commodity values, people will keep the currency with the higher commodity value and spend the other. See *Gresham’s Law*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/245850/Greshams-law> (last visited Oct. 14, 2012). Over time, Gresham’s Law has become associated with the simplified proposition that “bad money drives out good.” See *id.*

70. See Clark, *Amended Rules*, *supra* note 50, at 2; Clark, *Clarifying Amendments*, *supra* note 65, at 245; Clark, *Special Problems*, *supra* note 67, at 498;

71. See Clark, *Two Decades*, *supra* note 17, at 445.

72. See Clark, *Amended Rules*, *supra* note 50, at 2.

73. See Clark, *Special Problems*, *supra* note 67, at 498.

74. See Clark, *Clarifying Amendments*, *supra* note 65, at 245. Later in his career, Clark referred to this phenomenon as a “well-known fact.” See Clark, *Foreword*, *supra* note 53, at 480.

So as Clark saw it, one of the standing Advisory Committee's most important functions would be to restore the Rules to their original state.⁷⁵ As Clark put it, "[u]nless revived, the modern new procedure will soon become as hard and unyielding as the old systems to which reform was directed."⁷⁶ Thus, when the case law started to tie judges' hands instead of empowering them—either because of an error of understanding or an act of procedural particularism—the Advisory Committee would undo the damage. And when restrictive subrules started to accumulate on the Rules like barnacles on the hull of a ship, the Advisory Committee would scrape them away. In short, Clark saw the standing Advisory Committee as essential to preserving the discretion and flexibility of judicial action that he had managed to inject into the new scheme.

I think it is fascinating to observe that Clark would have vested the standing Advisory Committee with a range of tools for performing that function. Clark recognized, of course, that sometimes the situation would call for a change to the rule text. But Clark envisioned that, most of the time, the standing Advisory Committee would leave the rule text as is and rely on other levers to restore practice under the rule to its intended state. One of Clark's suggestions, for example, was that the standing Advisory Committee issue an annual report to the Supreme Court identifying any ill-advised developments in the case law.⁷⁷ Clark thought the reports would be the best means of keeping the Rules clear of unwanted accretions because regular published reports would retard the growth of the barnacles before any scraping was needed.⁷⁸ And although the annual reports would not have the force of law, Clark seemed confident of their persuasive power—having "such force as the experience and considered judgment of the committee could command."⁷⁹

Finally, we know from actual events that Clark thought it appropriate to issue new Committee Notes without changing the rule

75. See Wright, *supra* note 15, at 531 ("Probably the most important single function of a continuing rules committee is removing glosses which courts have written onto the rules.") (citing Clark's work).

76. Clark, *Special Problems*, *supra* note 67, at 507.

77. See Clark, *Proper Function*, *supra* note 17, at 523.

78. See *id.*; see also Clark, *Special Problems*, *supra* note 67, at 508 (stating that a standing committee should make a regular report and "should not hesitate to point out how judicial trends as to particular rules were developing"); Clark, *Two Decades*, *supra* note 17, at 445–46 (stating that annual reports criticizing bad case law would be more effective than "clarifying" amendments because the reports can be issued faster).

79. Clark, *Proper Function*, *supra* note 17, at 523. Clark plainly thought that such force would be powerful, since he anticipated that the reports would make frequent amendments unnecessary. See *id.*

text. A very notable example—one with modern resonance—was the 1955 proposal to issue a new Committee Note to Rule 8(a)(2) reaffirming the text while providing the new note “in answer to various criticisms and suggestions for amendment which have been presented to the Committee.”⁸⁰ As readers of this essay are likely to know, current Judicial Conference policy speaks to proposals for “rule changes” and Committee Notes that accompany those changes.⁸¹ Currently, there is no overt mechanism for the issuance of new Committee Notes separate from a rule change.⁸²

We are close to capping this tale, but before doing so I have one more thread to introduce. No less than the original Advisory Committee, a standing Advisory Committee would need to have its own philosophy of rule drafting. Clark had distinct views on that subject too, which he set out in a 1950 symposium article in the *Vanderbilt Law Review*. Clark began with the premise that rules of procedure should be viewed as grants of power.⁸³ But he recognized that it is not enough to just grant discretionary authority. As Clark put it, “it turns out that telling a court it has power does not guarantee the exercise of that power.”⁸⁴ In order for that grant to be deployed effectively, four conditions must exist: (1) judges must better understand the rules that they are interpreting and applying, (2) the rules must be stated in terms of the functions they are to perform and not as abstract mandates, (3) the rules must guide judges in how to apply them, and (4) there must be a standing Advisory Committee to continually examine and amend the rules.⁸⁵

In the end, all four of Clark’s “drafting” conditions are directed at the same problem—maintaining the flexibility of the scheme. As discussed earlier, judges who don’t fully understand the rules too readily get lulled into engrafting restrictive principles that then harden into ill-advised restrictive subrules.⁸⁶ The second and third

80. 1955 ADVISORY COMMITTEE REPORT, *supra* note 31, at 18–19, 54–56 (discussing proposals to add new explanatory Committee Notes to Rule 8(a)(2) and Rule 54(b)).

81. See 1 GUIDE TO JUDICIARY POLICY § 440.30.20, available at www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/laws-procedures-governing-work-rules/rules-committee-procedures.aspx.

82. The lack of any mechanism to issue freestanding new Committee Notes explains why the Advisory Committee cannot simply “fix” misguided case law by issuing new Committee Notes disavowing that case law. It also explains proposals (usually made tongue-in-cheek) to *republish* existing rule text *as is* to provide a platform for a new Committee Note. See, e.g., Edward H. Cooper, *King Arthur Confronts TwIqy Pleading*, 90 OR. L. REV. 955, 980 (2012) (noting a “less reverent” possibility that Rule 8(a)(2) be republished with a new Committee Note disavowing the plausibility standard).

83. See Clark, *Special Problems*, *supra* note 67, at 493.

84. *Id.*

85. See *id.*

86. See *supra* notes 62–76 and accompanying text.

conditions relate to the difficulty of displacing old habits. Abstract declarations (e.g., simply declaring that law and equity are merged) have little effect if the rules where those concepts intersect (e.g., allocating cases to judge or jury trial) fail to implement the concepts functionally.⁸⁷ And rules that grant discretion without instructing judges about how to use them leave the judge grasping for guidance. As Clark saw it, “[e]xperience . . . shows that without some signposts the tribunals inevitably drop back into past practices.”⁸⁸ Finally, per the fourth condition, when the rules become distorted by restrictive subrules or the reemergence of older and disavowed norms, a continuing advisory committee must stand prepared to sweep aside those accretions and return the Rules to their pristine form.⁸⁹

To recap, the 1938 Civil Rules were indeed, as Professor Stephen Subrin famously put it, the conquest of equity procedure over common-law procedure.⁹⁰ Abstract conceptual mandates and rigid formalisms were out. Empowerment, flexibility, functionalism, and discretion were in. But Clark recognized that the system he designed would need constant tending to maintain those qualities. Judicially added barnacles would need to be removed to preserve flexibility and discretion. Rules would need to be changed when experience showed that they did not achieve the results intended. New ideas had to be cultivated and adopted when new problems emerged or when those new ideas offered superior solutions to familiar problems. The job was not “done once and for all” nor would it ever be. Left untended, the Civil Rules would harden with age and lose their vitality, eventually becoming the target of some future reform.

Clark’s answer to that problem was, of course, the creation of a continuing rules committee.⁹¹ If the Civil Rules were to serve their function of getting cases to the merits quickly and efficiently, if the Civil Rules were to remain at the forefront of procedural progress, they would need to “be continually changed and improved.”⁹² The

87. See Clark, *Special Problems*, *supra* note 67, at 499–500; see also Clark, *Amended Rules*, *supra* note 50, at 11 (calling for a procedural philosophy that eschews “abstract formulas” and instead “defines appropriate objectives and then creates natural means for their achievement”).

88. Clark, *Foreword*, *supra* note 53, at 483.

89. See Clark, *Special Problems*, *supra* note 67, at 507.

90. Subrin, *How Equity Conquered*, *supra* note 2.

91. See Clark, *Amended Rules*, *supra* note 50, at 2–3.

92. See Clark, *Handmaid*, *supra* note 43, at 304.

role of the standing Advisory Committee was to “prevent[] the system from ever growing old.”⁹³ For Clark, a standing Advisory Committee would provide the Civil Rules with a built-in fountain of youth.

II. RULE 56 VISITS CLARK’S FOUNTAIN OF YOUTH

Rule 56 received a substantial overhaul in 2010. It was not the first time that the Advisory Committee had revisited Rule 56—far from it. On a relative basis, Rule 56 has been among the most active areas for further attention by the rulemakers.⁹⁴ Prior to 2010, Rule 56 had been amended five times—in 1946, 1963, 1987, 2007, and 2009—with the 1946 and 1963 amendments being both substantive and significant.⁹⁵ In addition, there were two sets of major proposed amendments that were forwarded by the Advisory Committee that did not get approved. This occurred in 1955 and 1992.⁹⁶ Come to think of it, hardly a decade has gone by when Rule 56 did not make it onto the Advisory Committee’s agenda for some reason.

In this Essay, I want to look at the 2010 amendments to Rule 56 from a specific angle. I do not attempt here to provide a detailed explanation of the 2010 amendments or to analyze them on the merits. Rather, I will consider them through the lens of Clark’s rulemaking vision. Thus, having sketched in Part I Clark’s views on the function of a continuing rulemaking committee, my aim in this Part is to discuss how the 2010 amendments to Rule 56 conform to (or depart from) Clark’s views about the role of a standing Advisory Committee.

The discussion is organized around two themes. First, Clark believed that one of the most important functions—and perhaps the essential function—of the continuing Advisory Committee was to “revivif[y]” the Rules and prevent them “from ever growing old.”⁹⁷

93. See Clark, *Special Problems*, *supra* note 67, at 508.

94. By way of contrast, consider Rule 8, which has not experienced a major substantive amendment since it was enacted seventy-five years ago. At the other end of the spectrum would probably be the rules governing case management and discovery, which have been repeatedly amended in the last four decades in an ongoing battle to contain perceived problems of cost and delay. See Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 676–78 (2010) (discussing discovery and case management rule amendments since the 1970s).

95. See FED. R. CIV. P. 56 advisory committee’s note (2010) (chronicling the various rule amendments).

96. See 1955 ADVISORY COMMITTEE REPORT, *supra* note 31, at 56–59; ADVISORY COMMITTEE ON RULES ON CIVIL RULES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE, 119–29 (1992).

97. See Clark, *Special Problems*, *supra* note 67, at 507–08.

Accordingly, this Part of the Essay looks at the 2010 amendments to Rule 56 as a modern makeover designed to make the text of the rule relevant and responsive to the needs of modern summary-judgment practice. Second, Clark's basic procedural philosophy was to empower judges by writing rules that stated goals and functions and provided useful guidance, but then left the decision to the judge's case-by-case discretion. Following that theme, this Part then considers how the 2010 amendments to Rule 56 consistently implement this theme of guided discretion.

A. *Rejuvenating Rule 56*

In 2010, Rule 56 was given a modern makeover. It was badly needed, a fact the Advisory Committee discovered during the restyling of the Civil Rules. The Committee's task when restyling was to take the existing rule content and translate it into modern language.⁹⁸ Restyling Rule 56 turned out to be a bit surreal. Much of the text seemed starkly disconnected from summary-judgment practice as the practicing lawyers and judges (and even the academics!) knew it. Some of the existing provisions were simply outdated and out-of-step with modern summary-judgment practice.⁹⁹ At the same time, many important summary-judgment practices (e.g., motions for partial summary judgment and the court's power to act *sua sponte*) were not to be found in the rule text.¹⁰⁰ Yet under the constraints of the Style Project, the Advisory Committee was forced to restyle provisions no one used while keeping mum on the issues important to practice but absent from the rule text. Accordingly, the Advisory Committee flagged the need for content reform but left it for another project and another day.¹⁰¹

The wait was short. The Advisory Committee started looking at a potential Rule 56 project in October 2005.¹⁰² During the course of

98. See Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1761 (2004) (describing the Style Project as an effort "to translate present text into clear language that does not change the meaning"); Mary Kay Kane, *Professor Edward Cooper: The Quintessential Reporter*, 46 U. MICH. J.L. REFORM 631, 632 (2013) (explaining the Style Project's objectives to ensure consistency among the language of rule amendments developed by various reporters, remove archaic usages, and clarify ambiguous text).

99. See Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139, 1150 (2010) (discussing outdated provisions for hearings and the service of affidavits).

100. See *id.* at 1150–51.

101. See ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES 38–39 (2004), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0404.pdf>; Gensler, *supra* note 99, at 1150.

102. See ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES 24–25 (2005), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2005-min.pdf>.

the next three meetings, the Advisory Committee extensively discussed whether to undertake the Rule 56 Project and, if so, what its scope should be.¹⁰³ Ultimately, the Committee decided to embark on a project that was both limited and comprehensive. The Rule 56 Project was limited in that the Advisory Committee made a deliberate choice early in the process not to alter the summary-judgment standard. Experience from a prior effort to restate the summary-judgment standard in 1992 provided two valuable lessons: first, that translating summary-judgment concepts into clear and concise rule text is no easy feat; and second, that any alteration of the existing text would ignite controversy.¹⁰⁴ The Advisory Committee decided there was no need to go down that road. The summary-judgment standard simply was not the part of Rule 56 that needed fixing. Conceptually, the operative phrases of “no genuine dispute of material fact” and “entitled to judgment as a matter of law” are sound.¹⁰⁵ From beginning to end of the Rule 56 Project, the Advisory Committee repeatedly emphasized that the summary-judgment standard was not being changed.¹⁰⁶

Apart from the summary-judgment standard, everything else in Rule 56 was on the table. The purpose of the Rule 56 Project was to

One of the main agenda items at this October 2005 meeting was to determine what, if any, new projects the Advisory Committee might undertake. The Committee was in a position to consider new projects because it had substantially completed its work on the e-discovery rules (which at that time had been approved by the Judicial Conference and forwarded to the Supreme Court), and there was a lull in work on the Style Project because the draft amendments had been published for an extended comment period.

103. See ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES 3–4 (2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2007-min.pdf>; ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES 37 (2006), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV05-2006-min.pdf>; ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES 24–25 (2005), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2005-min.pdf>.

104. See Gensler, *supra* note 99, at 1152; Lee H. Rosenthal, *The Summary Judgment Changes That Weren't*, 43 LOY. U. CHI. L.J. 471, 479 (2012).

105. Although there is no shortage of academic criticism of current summary-judgment practice, the bulk of the criticism is directed not at the phrasing of the rule text but at claims that judges—including the Supreme Court—are not applying the rule text faithfully. See, e.g., Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 895–902 (2009) (discussing *Scott v. Harris* as an example of “cognitive illiberalism” in which judges improperly intrude on the jury’s fact finding role by making improper conclusions about what inferences “reasonable jurors” could draw); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1064–71 (2003) (discussing cases in which the judge assumed the role of fact finder). But see Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 685 (2012) (arguing for a return to the “scintilla” rule “either by express amendment or judicial consensus”).

106. See FED. R. CIV. P. 56 advisory committee’s note (2010) (“The standard for granting summary judgment remains unchanged.”); ADVISORY COMMITTEE ON CIVIL RULES, REPORT TO

improve the summary-judgment process and bring it up to date with actual practice.¹⁰⁷ The Advisory Committee formed a subcommittee to take a hard look at every provision of Rule 56 and consider any and all suggestions for new or improved provisions. The only litmus test was whether the suggestion would improve practice under the Rule.

In the end, the Rule that emerged combined the old and the new. The basic concept of granting judgment before trial when a preview of the available proof showed that the outcome was fixed as a matter of law had not changed; that concept was preserved by preserving the standard. And various existing practices that are staples of the summary-judgment process (e.g., using affidavits to present facts and the mechanism allowing the nonmoving party to state that it needs more time to gather facts) remained in the Rule. But the new Rule certainly looked different, having been reorganized to present the contents in a more logical sequence. And many new provisions had been added, including the following:

- New language specifically authorizing motions for partial summary judgment;¹⁰⁸
- New language suggesting that courts state the reasons for their decisions;¹⁰⁹
- Detailed instructions on supporting assertions of fact;¹¹⁰
- A mechanism for parties to object that another party is relying on materials that cannot be presented in an inadmissible form;¹¹¹

STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 21 (2008) (“From the beginning, the Committee has been determined that no change should be attempted in the summary-judgment standard or in the assignment of burdens between movant and nonmovant.”).

107. See FED. R. CIV. P. 56 advisory committee’s note (2010) (“Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts.”).

108. FED. R. CIV. P. 56(a). The 2010 amendments also made clear that parties could seek “summary judgment” on particular issues even if the resolution of those issues would not dispose of any claim or defense. See STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 1027–28 (2012).

109. FED. R. CIV. P. 56(a).

110. FED. R. CIV. P. 56(c)(1).

111. FED. R. CIV. P. 56(c)(2). The purpose of this new provision was to displace motions to strike the allegedly improper materials. See FED. R. CIV. P. 56 advisory committee’s note (2010) (“There is no need to make a separate motion to strike.”). But old habits are hard to break; lawyers are still filing motions to strike, and judges are still granting them. See 11 JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 56.91[4] (3d ed. 2011 & Supp. 2012).

- A new provision directly establishing the principle that judges need not scour the summary-judgment record looking for proof not offered by a party—a provision affectionately called the “antiferret rule”;¹¹²
- New provisions addressing the consequences of a party’s failure to properly support its own factual assertions or, more commonly, to properly oppose the other side’s factual assertions;¹¹³ and
- New provisions addressing the court’s power to act *sua sponte*.¹¹⁴

None of these changes to Rule 56 speak to the “high theory” of summary judgment. But they all fit squarely within Clark’s model of continuing rulemaking. Each change addresses a practical issue that is relevant on a day-to-day basis to the work of lawyers and judges. Moreover, the importance of each topic flows not from its value as an abstract concept but from evaluating where guidance was needed based on actual experience under the Rule. Each change is designed, in its own way, to promote the utility of the Rule by clarifying its functions and providing guidance for its effective use. The 2010 Amendments are unapologetically pragmatic. To use Clark’s term, they “revivify” the Rule by reconnecting the text with modern practice. Clark surely would have approved.

B. Guided Discretion

Perhaps the most Clarkian aspect of the 2010 amendments is the degree to which they empower judges with guided discretion. Indeed, *every* new or expanded provision places one or more matters within the discretion of the judge and—in either the text or the Committee Note—provides guidance about the exercise of that discretion.

Let me start by emphasizing that I am not referring to the question whether judges have discretion to deny a summary-judgment motion even when the requirements for granting summary judgment have been met. As I have chronicled elsewhere, that question was flagged for comment during the public comment period and received considerable attention during the rulemaking process.¹¹⁵

112. FED. R. CIV. P. 56(c)(3); see Rosenthal, *supra* note 104, at 488 (describing the provision as “relieving judges of the obligation to behave like ferrets or truffle pigs”).

113. FED. R. CIV. P. 56(e).

114. FED. R. CIV. P. 56(f).

115. See Gensler, *supra* note 99, at 1150.

For present purposes, it is enough to note that the Advisory Committee very openly and explicitly elected *not* to address that question during the Rule 56 Project, largely on the grounds that it was too tied up with the summary-judgment standard (which the Advisory Committee had already decided not to revisit).¹¹⁶

Rather, the discretionary powers I'm referring to concern the court's power to shape the *process* by which summary-judgment motions are made, supported, opposed, and resolved. Rule 56(a), for example, provides that judges "*should* state on the record the reasons for granting or denying the motion."¹¹⁷ But the absence of a mandatory "must" is unmistakable, and the accompanying Committee Note explains that "[t]he form and detail of the statement of reasons are left to the court's discretion."¹¹⁸ Moreover, the Committee Note very clearly explains the *function* served by a statement of reasons so that judges can determine what kind of statement, if any, is needed under the circumstances.¹¹⁹

Rule 56(c) contains two important examples of guided discretion. Subsection (c)(2) is nominally addressed to the parties in that it provides a mechanism for raising objections to the admissibility of another party's summary-judgment materials. But as the Committee Note makes clear, the *function* of this provision is to align the summary-judgment proof with the anticipated proof at trial so that the judge can properly determine whether a trial is needed.¹²⁰ The Note explains that "[t]he objection functions much as an objection at trial, adjusted for the pretrial setting."¹²¹ If a proof could not be considered at trial (e.g., because it is inadmissible hearsay subject to no possible exception) then it can have no bearing on whether there is enough proof to send the matter to a jury. But neither the text nor the Note establishes any rigid requirement that all summary-judgment proofs must be reduced to an admissible form at the time the motion is made or opposed. Rather, the Rule creates a framework for raising the issue—and the Committee Note explains what is at issue—but it is up to the judge to determine whether, under the circumstances, to accept proof that is currently not in an admissible form upon an explanation of the admissible form that is

116. See *id.* at 1159; Rosenthal, *supra* note 104, at 487–88. In a forthcoming article, I take the position that judges do and should have a limited discretion to deny properly supported summary-judgment motions. See Steven S. Gensler, Discretion to Deny Summary Judgment: Can Judges Just Say No? (unpublished manuscript) (on file with author).

117. FED. R. CIV. P. 56(a) (emphasis added).

118. FED. R. CIV. P. 56 advisory committee's note (2010).

119. See *id.*

120. See *id.*

121. *Id.*

anticipated. In a similar vein, subsection (c)(3) endows judges with discretion to consider proof that is in the summary-judgment record but that has not been called to the judge's attention by any party.¹²² Although it is fair to put the burden on the parties to take responsibility for marshaling their proofs, there are times when it would smack of formalism for a judge who already knew of critical proof in the record to ignore it because the party forgot to cite to it in the papers. Subdivision (c)(3) sensibly leaves it to the judge to make that determination on a case-by-case basis.

Rule 56(e) tackles the question of what to do with unopposed motions. The case law from most circuits had held that judges could not grant summary judgment solely because a motion was unopposed, but instead had to determine whether the motion was at least supported on its face.¹²³ Many districts had adopted so-called "deemed admitted" rules, in which any fact assertions not opposed were deemed admitted for purposes of determining whether the requirements for summary judgment had been met.¹²⁴ During the rulemaking process, some argued that the rule should explicitly provide that an unopposed motion should be treated as having been confessed. The Advisory Committee ultimately rejected that view, believing that a party seeking a pretrial judgment should have to make at least some showing of entitlement.¹²⁵ Moreover, the Advisory Committee was wary of a strict rule of forfeiture given that sometimes the deficiency in the response might be understandable, if not excusable. In short, there is no one-size-fits-all answer about what to do when a party fails to properly oppose a summary-judgment motion. In that spirit, the Rule provides the court with options and then provides guidance in the accompanying Committee Note regarding the factors that might be relevant to the judge's choice.¹²⁶

122. FED. R. CIV. P. 56(c)(3).

123. See, e.g., *Reese v. Herbert*, 527 F.3d 1253, 1268 (11th Cir. 2008); *Vermont Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004); *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002); *NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1, 7–8 (1st Cir. 2002).

124. At the Advisory Committee's request, two of the staff attorneys in the Rules Support Office surveyed the local district court rules to determine, among other things, how many had "deemed admitted" provisions. The survey identified these provisions in twenty districts. See Memorandum from Jeffrey Barr & James Ishida to Judge Michael Baylson, Survey of District Court Local Summary Judgment Rules 1–3 (Mar. 21, 2007), in ADVISORY COMMITTEE ON CIVIL RULES, AGENDA (2007) available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2007-04.pdf>.

125. See FED. R. CIV. P. 56 advisory committee's note (2010) ("As explained below, summary judgment cannot be granted by default even if there is a complete failure to respond to the motion . . .").

126. See FED. R. CIV. P. 56(e) & advisory committee's note (2010).

Finally, Rule 56(f) now provides explicit authority for the court to act *sua sponte* upon giving the affected party notice and a reasonable opportunity to respond.¹²⁷ The purpose of the new provision was to codify powers that the courts had already claimed under the prior rule.¹²⁸ But the court's newly codified power is explicitly discretionary.¹²⁹ This is not an area where absolutes exist nor is it an area where all of the relevant considerations could be reduced to concise rule text. The rule empowers but leaves its application flexible and subject to the common-sense application of judges.

I think all of the changes discussed above reflect a very Clarkian emphasis on empowerment, flexibility, and discretion. But the story continues with a change that, in hindsight, might have had Clark rolling in his grave had it gone through. I'm referring to the proposal to embed the so-called "point-counterpoint" motion and briefing process into Rule 56. As readers may recall, the Advisory Committee included a point-counterpoint scheme in the proposed amendments published for comment in 2008.¹³⁰ Modeled after local briefing rules used in many districts, the proposal required moving parties to state their assertions of fact in separate paragraphs (the "point") and then required opposing parties to state their acceptance or opposition of each assertion in correspondingly numbered paragraphs (the "counterpoint"). The goal of this type of scheme was to ensure that the parties' papers actually speak to each other, instead of seeming like ships passing in the night.

The 2008 proposal would have created a default provision, not a mandate.¹³¹ Individual judges could have opted out in any case. Indeed, nothing would have prevented a judge from opting out in *every* case. Nonetheless, the proposal drew heavy criticism from

127. FED. R. CIV. P. 56(f). The rule identifies three types of *sua sponte* action: (1) granting summary judgment for the nonmoving party, (2) granting a motion on grounds not raised by the moving party, and (3) raising the question of summary judgment on the court's own initiative. *Id.*

128. See FED. R. CIV. P. 56 advisory committee's note (2010) ("Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice.").

129. See FED. R. CIV. P. 56(f) (stating the court "may" take the actions listed).

130. See REPORT OF THE ADVISORY COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 65-70 (2008) [hereinafter MAY 2008 REPORT], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-2008.pdf>; see also Rosenthal, *supra* note 104, at 489 (describing the point-counterpoint proposal). For the text of the proposal, see Rosenthal et al., *supra* note 36, at 521-22 n.102.

131. Proposed Rule 56(c)(1) stated, "The procedures in this subdivision (c) apply unless the court orders otherwise in the case." MAY 2008 REPORT, *supra* note 130, at 66.

many, including critics from both bench and bar.¹³² The most recurring objections were that the point-counterpoint scheme skews outcomes by creating a sterile, sliced-and-diced version of the events and that it increases the cost and complexity of the motion process.¹³³

After reviewing the written comments and listening to the live testimony offered at three hearings, the Advisory Committee elected not to proceed with the point-counterpoint proposal.¹³⁴ Although one of the main goals of the proposal had been to achieve national uniformity, motion and briefing practices are not the type of aspects of practice that absolutely must be the same in every district.¹³⁵ In other words, the value of national uniformity would depend on getting the model right. And in the end, the Advisory Committee was not convinced that point-counterpoint was the only or the best methodology. Judges and districts would continue to be free to choose to follow it. But the case had not been made for enshrining point-counterpoint into the national rule, even on a default basis.

I think Clark would have approved of both the process and the result. First, the process of listening to feedback from lawyers and judges who had experience with similar rules was very much in the Clark tradition. Clark was an early advocate of empirical research.¹³⁶ He also believed in procedural experimentation.¹³⁷ What mattered most to Clark was figuring out what works. The Advisory Committee backed off the point-counterpoint proposal because feedback from districts around the country that had experimented with similar schemes suggested that they did not always work as intended. Second, the point-counterpoint provision would have been inconsistent with Clark's primary values of empowerment and flexibility. Clark wanted rules that liberated judges to do what made sense under the circumstances. The point-counterpoint scheme would

132. See Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 247–48 (2011) (discussing judicial opposition); see also Rosenthal et al., *supra* note 36, at 522–23 (discussing opposition to the point-counterpoint proposal).

133. See Rosenthal, *supra* note 104, at 491–93.

134. See *id.*

135. See *id.* at 494 (discussing reasons for adopting national rules and why the point-counterpoint proposal did not satisfy those criteria).

136. See Carl Baar & Steven Flanders, *False Start? Charles Clark and the Quantitative Study of Judicial Administration*, in JUDGE CHARLES EDWARD CLARK 1 (Peninah Petruck ed., 1991) (describing and analyzing Clark's empirical work).

137. See Clark, *Clarifying Amendments*, *supra* note 65, at 251 (supporting state adaptations to the Civil Rules and noting that state innovations may lead the way toward future federal amendments).

have created an exoskeleton that, even as a default provision, invariably would have led to less flexibility in the summary-judgment process.

I confess that I was among the members of the Advisory Committee that started out supporting the proposal. I changed my mind after listening to the witnesses at the hearings and reviewing the written comments. I still think that the point-counterpoint scheme is a valuable tool. If I were a district court judge, I expect that I would use it from time to time—when it was the right tool for the job. But adopting set motion and briefing practices will not solve the problems of unnecessary cost and delay in summary-judgment practice. Those problems are not the result of too much flexibility or too little fixed process. Continued reflection has led me to quite the opposite conclusion. The biggest problem with summary-judgment practice is that it has become too routinized.¹³⁸ I now believe that the key to a more effective and efficient summary-judgment practice lies in having the judge tailor the process to the needs of each case.¹³⁹

III. BACK TO ED

Because this Symposium commemorates Ed Cooper's service to the Civil Rules Advisory Committee, I want to close with a few comments related to rulemaking, the 2010 Rule 56 amendments, and Ed. I will not attempt to set forth a Cooperian philosophy of rulemaking. Though I suspect such a thing exists, it is not my place to explicate it, even if I thought I could do it justice. Nor will I attempt to link Ed with any particular provisions of the 2010 Rule 56 amendments. I do not need to tell anyone who follows the Advisory Committee's work how powerful Ed's voice is in the rulemaking process. But above all it remains a *process* populated by many voices. I am sure Ed would want neither the credit nor the blame for the Advisory Committee's collective work. Rather, I will limit myself to two related observations about Ed that have to do with writing rules that give judges discretion.

Academics continue to debate the role of discretion in the rules of procedure.¹⁴⁰ The Civil Rules are often criticized for relying too

138. See Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 *LOY. U. CHI. L.J.* 517, 555 (2012).

139. *Id.* at 520–21.

140. See Gensler, *supra* note 94, at 720–26 (canvassing the debate).

heavily on judicial discretion. Some commentators worry that discretion gives judges too much power.¹⁴¹ The fear is that judges will abuse that power, and that the lack of clear standards makes the abuses effectively unreviewable. Other commentators have argued that relying on discretion allows the Advisory Committee to perpetuate the fiction of “trans-substantive” rules.¹⁴² These critics argue that the Advisory Committee could not continue to have a single set of rules for all cases if the rules themselves had to acknowledge and incorporate the de facto differences in procedure that different types of cases get from the exercise of judicial discretion.¹⁴³ Another commentator has argued that the Committee uses discretion as a crutch to duck making difficult decisions.¹⁴⁴

Not everyone is so wary or skeptical of judicial discretion. Professor Richard L. Marcus (currently the Co-Reporter for the Advisory Committee) has described his “guarded optimism” about the trend toward increased procedural discretion.¹⁴⁵ Addressing the amendments to Rule 16, Professor David Shapiro praised the choice to give judges significant discretion in how to manage their cases, noting that “cases do vary in ways that are difficult to spell out in advance.”¹⁴⁶ In his seminal analysis of procedural discretion, Professor Maurice Rosenberg distinguished between good reasons and bad reasons for giving trial judges discretion.¹⁴⁷ Bad reasons include trying to make judges happy and blindly pursuing efficiency or

141. See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982); Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 531 (2006).

142. See, e.g., Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988) (“Federal Rules that avoid policy choices and that in essence chart ad hoc decision-making by trial judges are uniform and hence trans-substantive in only the most trivial sense.”); Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2176 (1989) (“[B]y and large the erosion of trans-substantive rules has come via ad hoc informal, customized procedures devised by judges . . .”).

143. See, e.g., Stephen N. Subrin, *Federal Rules, Local Rules and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2048 (1989) (“When one begins to define procedures more rigorously, it becomes obvious that some cases need different rules.”).

144. See Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1974 (2007) (“[D]elegating discretion allows rulemakers to dodge difficult and controversial normative choices by handing them to trial judges in individual cases, where they are less transparent and less likely to trigger public debate.”).

145. See Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1605–15 (2003) (noting that the bar generally favors discretion, instances of real abuse seem rare, and the alternatives are likely worse).

146. David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1995 (1989).

147. See Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 660–65 (1971).

finality.¹⁴⁸ In contrast, a good reason exists where the subject cannot be helpfully reduced to more particularized guidance. Chiefly, Rosenberg was thinking of circumstances where it would be impracticable—if not impossible—to anticipate and address all of the situations that might arise under the rule.¹⁴⁹

I would characterize Ed Cooper's views on discretion—at least those he has shared with the public in his writings—as moderate and practical. One might even call them Rosenbergian. Reflecting on discretion, Ed once wrote:

Discretion is a useful rulemaking technique when it is difficult—as it almost always is—to foresee even the most important problems and to determine their wise resolution. Reliance on discretion is vindicated only when district judges and magistrate judges use it wisely most of the time and in most cases. The ongoing revisions of the Civil Rules time and again reflect an implicit judgment that confidence is well placed in the discretionary exercise of power by federal trial judges.¹⁵⁰

As discussed above, there is a powerful pro-discretion theme in the 2010 amendments to Rule 56. Time and again, the Advisory Committee chose to create frameworks that addressed practical issues that come up often, identified the interests at stake, and provided options and guidance, but then left the solution in any particular case to the district judge's discretion. I think I can safely say—without stitching a scarlet “D” onto his frock—that Ed played a significant role in the Advisory Committee's decision to opt for these discretionary frameworks. In my mind, I can see and hear Ed regularly reminding us that so many of the practical questions that come up in summary-judgment administration defy easy categorical answers. A rigid subrule that might make sense in one scenario might lead to unfairness or inefficiency in another. Any effort to cover all the possible factors and outcomes would lead to a bramble of rule text turning on ever-finer distinctions. Wouldn't it be better to sketch out the contours of the problem and let the judge find the best solution in light of the particulars of the case?

That brings me to my second, and related, point. If anyone on the planet *could* write a rule that really did incorporate all of the potential variables, it would be Ed. And if anyone on the planet

148. See *id.* at 660–62.

149. See *id.* at 662–63.

150. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1795 (2002).

could then identify the correct outcomes for all of those combinations, it would be Ed. All of us who have been privileged to serve on the Advisory Committee (or wise enough to attend one or more of the meetings, which are open to the public¹⁵¹) have had the singular pleasure of hearing Ed recite without notes or rehearsal a detailed history of a procedural issue that we weren't even aware existed—and then tie it into a savvy discussion of the pros and cons of some choice the Committee had to make. Trust me: nobody knows this stuff better than Ed.

But I think Ed would be absolutely horrified by the thought of writing a rule that attempted to incorporate all of the variables and then prescribed outcomes for each combination. In part, I think Ed would abhor any rule that tried to operate on such a granular level. So much for simple structure and elegant drafting! But mostly I think the reason goes back to the passage of Ed's that I quoted above: "*Discretion is a useful rulemaking technique when it is difficult—as it almost always is—to foresee even the most important problems and to determine their wise resolution.*" Ed knows more about the Civil Rules than anyone, but you will never hear him claim to have all the answers or to be infallible. The 2010 amendments to Rule 56 leave a lot to the judge's discretion to account for all of the circumstances that rules—and even the best of rulemakers and the very best of Reporters—cannot foresee or wisely resolve in advance.

My final comment ties us back to the man who first held Ed's position, Charles E. Clark. When writing about the conditions needed for quality rule drafting, Clark could not help but mention the importance of having quality drafters.¹⁵² He wanted experts of course. But he cautioned against the expert who, like Stephen, the drafter of the Hilary Rules of 1834, thought it his duty to enshrine the entirety of his knowledge into the text.¹⁵³ Clark then described his ideal rule drafter this way: "The conclusion is therefore that we need for the task skilled technicians not only with complete knowledge of their subject, but also with the poise and common sense to keep their technical knowledge from warping the result."¹⁵⁴ I don't know where Ed was in 1950 when Clark wrote that, but Ed, he was talking about you.

151. See 28 U.S.C. § 2073(c)(1) (2006) ("Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting.").

152. See Clark, *Special Problems*, *supra* note 67, at 499.

153. See *id.*

154. *Id.*