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Charles Alan Wright and the Fragmentation of Federal Practice and Procedure

Carl Tobias†

Charles Alan Wright’s preeminent treatise, Federal Practice and Procedure, is both an eloquent testament to his capacious intellect and an enduring legacy of the brilliant scholar.1 Indeed, U.S. Supreme Court Justice Ruth Bader Ginsburg recently characterized Professor Wright as a “Colossus [who] stands at the summit of our profession” and declared that “all who practice the lawyer’s craft profit from his prodigious production.”2 She also praised the 54-volume compendium as “by far the most-cited treatise in the United States Reports [and] the procedural Bible for federal judges and those who practice in our federal courts.”3

Charles Alan Wright exercised a monumental command of the complex, dynamic, and arcane field that is federal practice and procedure. For one half-century, no comer of this sprawling, byzantine area was insufficiently significant to pique the scholar’s curiosity or escape his enormous grasp. Throughout the field, ranging from the apparently least consequential features to the most compelling, intractable aspects, Professor Wright perspicaciously anticipated the manifestation and development of complications, facilitated comprehension of those problems that did arise, and crafted elegant solutions for the difficulties. Charles Alan Wright, therefore, richly deserves the encomium bestowed on the scholar’s illustrious predecessor, Professor James William Moore, by Professor Robert Cover: “His treatise has kept before the profession a vision of the Federal Rules as a coherent structure; at the same time it has embraced the flexibility of application which lets

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3. Id. at 1583; see also id. at 1582 (stating that, were she limited to ten books on her “‘see everyday’ stand in chambers, Wright on Federal Courts would be among them”); Richard D. Freer, Gladly Wolde He Lerne, and Gladly Teche, 73 TEX. L. REV. 957 (1995) (book review) (praising the fifth edition of Wright on Federal Courts).
Charles Alan Wright carefully identified and assiduously attempted to clarify myriad, untidy complications in federal practice and procedure; the quintessential example of this effort is the proliferation of local procedures that govern practice before the appeals and district courts. In fact, three and a half decades ago, Professor Wright trenchantly denominated local strictures, especially provisions that conflict with the federal rules and congressional legislation, as the "soft underbelly" of federal practice and procedure. The mid-1960s timing of the scholar's description accentuates his prescience. Professor Wright's salient prediction of the problems that would result antedated the caseload explosion that has transformed the appellate and district courts over the last generation as well as preceded the steady expansion of local measures that gradually fractured and ultimately balkanized federal practice and procedure.

During 1965, Charles Alan Wright initially emphasized the potential difficulties that multiplying local requirements might create. Thereafter, his one-volume and multi-volume treatises meticulously and incisively analyzed the "threat to the integrity of the Civil Rules [that] has come from the proliferation of local rules for particular districts." Professor Wright comprehensively traced the rather obscure origins and exponential growth of local mandates. Although the scholar acknowledged that Federal Rule of Civil Procedure 83 (as well as the analogous national provisos that cover admiralty, appellate, bankruptcy, criminal and evidentiary practice) specifically authorizes the appeals and district courts to adopt local rules, he tellingly cautioned that the drafters contemplated "these would be few in number and confined to purely housekeeping matters." Despite the drafters' vision, local measures have dramatically increased and have become ubiquitous; thus, they currently regulate numerous, important activities that

5. He typically emphasized local district civil rules. However, local procedures cover admiralty, appellate, bankruptcy, civil, criminal, and evidentiary practice as well. They also range across a broad spectrum from formal, "substantive" published rules, including one that reduces civil jury size, to informal, unwritten practices of individual judges that regulate matters in specific courtrooms, such as when motions are heard. I employ the terms in their broadest senses and interchangeably, but I emphasize the written rules of civil procedure applied by the ninety-four districts.
Charles Alan Wright Tribute

extend far beyond the circumscribed area of quotidian court administration.9 The resulting inexorable expansion of local commands alone jeopardizes “uniformity of procedure throughout the country,” while local provisions frequently constitute a set of pitfalls for unwary attorneys who participate in litigation before multiple appellate or district courts.10 Moreover, the “casual manner” of the local mechanisms’ prescription has strikingly contrasted with the attention that the federal rule revision entities have devoted to the amendment process.11

Professor Wright also perceptively recounted a series of unsatisfactory responses to the disadvantages, such as unwarranted expense and delay, that burgeoning local requirements have imposed. Two early responses that apparently had promise proved fruitless. First, the Supreme Court’s 1960 admonition that judges not employ local rules to introduce “basic procedural innovations”12 seemingly heartened Wright. However, the potential of this pronouncement was undermined when the Court subsequently stamped its imprimatur on a local rule that reduced the size of civil juries from twelve to six members.13 The second apparently promising development was the federal judiciary’s invalidation, through litigation, of many local provisions that instituted fundamental procedural reforms or that contravened the Constitution, the federal rules, or Acts of Congress. When analyzing this phenomenon, however, the scholar insightfully hastened to warn that parties have never challenged a plethora of additional questionable local strictures and these accordingly remain in force.14

Professor Wright believed that several, comparatively recent, attempts to rectify or ameliorate the complications that local procedural proliferation en-


10. WRIGHT, supra note 7, § 62, at 431-32; see also Woodham v. Am. Cystoscope Co., 335 F.2d 551, 552 (5th Cir. 1964) (mentioning the possible traps because of multiple rules).


13. Colgrove v. Battin, 413 U.S. 149 (1973); see also 12 WRIGHT ET AL., supra note 1, § 3153, at 520-23; Carrington, supra note 8, at 950-55; cf. Frazier v. Heebe, 482 U.S. 641 (1987) (overturning a local rule denying lawyers who were neither residing nor working in Louisiana access to the bar).

14. WRIGHT, supra note 7, § 62, at 432 (citations omitted); see also Levin, supra note 12, at 1576. See generally Subrin, supra note 7, at 2019-26 (listing local rules conflicting with national rules); Tobias, supra note 8, at 814-16 (describing how local rules that conflict with national rules have proliferated).
tails, have proven no more effective than the earlier actions. These efforts encompassed Supreme Court promulgation of the 1985 and 1995 amendments to the applicable national provisos, such as Federal Rule of Civil Procedure 83, which govern local practice, and congressional passage of the 1988 Judicial Improvements and Access to Justice Act. The national rule revisions and the statute requested that the Judicial Conference of the United States and the Circuit Judicial Councils review and abrogate or modify local appellate and district court measures determined to conflict or be redundant. A closely-related, also unavailing endeavor was the Judicial Conference’s Local Rules Project. This Project systematically scrutinized the local mandates that all thirteen appeals and 94 district courts had adopted before 1989 and “identified hundreds of instances in which local rules are inconsistent with the national rules or are otherwise of questionable validity.”

Nevertheless, Professor Wright expressed disappointment that the hopes “for progress in dealing with local rules... were dashed by the unnecessary and unwise Civil Justice Reform Act of 1990.” This statute encouraged each federal district court to implement local techniques for decreasing cost and delay, many of which contradicted or reiterated provisions applied in the remaining districts, the federal rules, and legislation. The Civil Justice Reform Act compounded already substantial fragmentation; this fragmentation was further exacerbated when the 1993 amendments in the Federal Rules of Civil Procedure

15. WRIGHT, supra note 7, § 62, at 432; Wright, supra note 6, at 10; see also supra text accompanying notes 12-14.
18. Sources cited supra notes 16-17; see also 28 U.S.C. § 331 (1994) (authorizing the Judicial Conference as the policymaking arm of the federal courts and prescribing its duties, which include review of appellate procedures); id. § 332 (authorizing the Councils as policymaking entities in the appeals courts and prescribing their duties, which include review of district court procedures).
19. Wright, supra note 6, at 10; see also Subrin, supra note 7, at 2020-26; sources cited supra note 8. The Project performed an exhaustive study that yielded revealing results on which little action has been taken. H.R. REP. NO. 100-889, at 28 (praising the Project’s “valuable work”).
20. Wright, supra note 6, at 10; see also Patrick Johnston, Civil Justice Reform: Juggling Between Politics and Perfection, 62 FORDHAM L. REV. 833 (1994) (concluding that the CJRA dangerously narrows our perception of procedural justice); Linda S. Mullenix, The Counter-Reformation in Procedural Justice, 77 MINN. L. REV. 375 (1992) (arguing that the CJRA is not constitutional). But see Joseph R. Biden, Jr., Congress and the Courts: Our Mutual Obligation, 46 STAN. L. REV. 1285 (1994) (arguing that the CJRA is constitutional and justified to reduce caseloads).
explicitly empowered every district court to prescribe variations on certain national provisos covering discovery or to reject those commands completely.\textsuperscript{22} Therefore, as Professor Wright surveyed the "federal rulemaking scene," he observed the increased inconsistency engendered by the synergy between the 1990 Civil Justice Reform Act and the 1993 revisions in the Federal Rules of Civil Procedure; this disuniformity inevitably reminded him of Sir Edward Grey's 1914 remark about World War I: "The lamps are going out all over Europe; we shall not see them lit again in our lifetime."\textsuperscript{23}

The sad passing of Charles Alan Wright means that he will never see the lamp of consistency lit. However, the darkness need not endure. It would be a fitting tribute to the memory of Charles Alan Wright if those responsible for maintaining and nurturing uniform federal practice and procedure could halt balkanization altogether or at least slow additional fragmentation. For example, particular appeals and district courts as well as individual judges might seize the initiative by canvassing their own local measures and abolishing or changing provisions deemed to be in conflict or repetitive. More specifically, districts could eliminate any remaining inconsistent or redundant mechanisms adopted pursuant to the ostensibly-expired Civil Justice Reform Act.\textsuperscript{24} The Judicial Conference and the Circuit Judicial Councils might correspondingly complete the local procedural review that the 1985 and 1995 federal rules revisions and the 1988 Judicial Improvements Act require, while lawmakers should budget sufficient resources to facilitate discharge of the duties imposed.\textsuperscript{25}

There is one final idea that can be implemented, but Congress is the appropriate branch to authorize the action. This would be to resurrect a 1991 proposed amendment to Federal Rule of Civil Procedure 83, one that the rule reviewers withdrew out of apparent deference to the contemporaneous expense and


\textsuperscript{23} Wright, supra note 6, at 11; see also Lauren K. Robel, Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules, 14 REV. LITIG. 49 (1994) (criticizing the Advisory Committee's justifications for Rule 26 and arguing for a more coherent vision of national procedural goals). But see Paul D. Carstening, Learning From the Rule 26 Brouhaha: Our Courts Need Real Friends, 156 F.R.D. 295 (1994) (describing the Advisory Committee's reasoning and the background to Rule 26 and arguing for a new commitment to the principle of judicial rulemaking).

\textsuperscript{24} E.g., D. MONT. R. 105-2; D. NEV. R. IB 2-2; D. OR. R. 72.1; see also Hajek v. Burlington Northern R.R. Co., 186 F.3d 1105 (1999). See generally Carl Tobias, Did the Civil Justice Reform Act of 1990 Actually Expire?, 31 U. MICH. J.L. REFORM 887 (1998) (arguing that Congress or the Judicial Conference should proclaim that the CJRA has expired to force districts to eliminate CJRA-related mechanisms); supra notes 20-23 and accompanying text.

\textsuperscript{25} Supra notes 16-18 and accompanying text; see also Levin, supra note 12, at 1576-79; Carl Tobias, Some Realism About Federal Procedural Reform, 49 FLA. L. REV. 49, 76, 79 (1997).
delay reduction effort instituted under the Civil Justice Reform Act.\textsuperscript{26} The suggested modification would empower federal district courts to experiment for not more than five years with local strictures that contradict or duplicate the federal rules or congressional statutes, if they secure Judicial Conference approval.\textsuperscript{27} That approach should prove efficacious, principally because the alteration recommended strikes a carefully-calibrated balance. The proposal would foster uniformity while affording the requisite flexibility to experiment with promising devices and to develop felicitous solutions for peculiar local difficulties that the federal rules often do not resolve.\textsuperscript{28}

The recent death of Charles Alan Wright is a grievous loss for everyone who is affected by, works in, or writes about federal practice and procedure. All of the actions suggested above would honor Professor Wright by reversing the balkanization that he decried and by restoring a measure of consistency to modern federal practice that local procedural proliferation now seriously threatens.\textsuperscript{29}


\textsuperscript{28} In fairness, the federal judiciary may have applied conflicting or redundant local strictures to experiment, to address unusual local complications, or to treat rising dockets. However, the ideas that I proffer would be responsive to these needs and to the difficulties that local procedural proliferation creates. See Robert E. Keeton, The Function of Local Rules and the Tension with Uniformity, 50 U. Pitt. L. Rev. 853 (1989); see also Chemerinsky & Friedman, supra note 21, at 783-91; Levin, supra note 26, at 888-94; Tobias, supra note 25, at 68, 72-73.