

# For James Wm. Moore: Some Reflections on a Reading of the Rules

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We have become so transfixed by the achievement of James Wm. Moore and his colleagues in creating, nurturing, expounding and annotating a great trans-substantive code of procedure that we often miss the persistent and inevitable tension between procedure generalized across substantive lines and procedure applied to implement a particular substantive end. There are, indeed, trans-substantive values which may be expressed, and to some extent served, by a code of procedure. But there are also demands of particular substantive objectives which cannot be served except through the purposeful shaping, indeed, the manipulation, of process to a case or to an area of law. What follows is by no means an attempt to denigrate or undermine the ongoing trans-substantive achievement of the Federal Rules of Civil Procedure. Rather it is an exploration to rediscover the feel of a tension. That this tension has by no means been buried strikes me as one of the least appreciated dimensions of the achievement of Professor Moore. 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 them serve so many ends. From the outset, Professor Moore's vision of the integrity of the Federal Rules has struck me as akin to the structure of a coastline. Washed by litigation, the line must shift and shape itself to tides and storms. Viewed from the coastline itself, the shape may seem to alter dramatically. But from a continental perspective it appears remarkably stable and coherent. It is to the particularistic interaction of case and process that I shall address myself. But the choice of that focus should in no sense be read as a denial of the continental form.

## I

Sir Henry Maine's famous observation that "substantive law has at first the look of being gradually secreted in the interstices of procedure,"<sup>1</sup> has been used to justify the notion that substantive crea-

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1. H. MAINE, *EARLY LAW AND CUSTOM* 389 (1891).

tivity may rightly or will inevitably emerge from the application of procedural rubrics by providing that idea with a lineage.<sup>2</sup> It is a strange application; for Maine, and Maitland who quoted him, were writing of “the infancy of the Courts of Justice.”<sup>3</sup> Maine explicitly contrasted the intertwined character of substance and procedure in the Law of Actions with the “modern” (late 19th century) separation of procedural or adjective law from matters of substance. And there is reason to believe that Maine thought of this separation as an “advance,” justly serving as a touchstone distinguishing developed from primitive legal systems.<sup>4</sup> Maitland’s *Forms of Action* which begins by quoting Maine ends with praise of the Judicature Acts and their abolition of the form of action “as a separate thing”:

This results in an important improvement in the statements of the law . . . for the attention is freed from the complexity of conflicting and overlapping systems of precedents and can be directed to the real problem of what are the rights between man and man, what is the substantive law.<sup>5</sup>

Maine and Maitland did not intend a jurisprudential statement against the viability of a distinction which they applauded, nor did they intend to state that the interaction they described was characteristic of anything beyond a distinctly provincial and national jurisprudence.

But as Maine and Maitland were describing early English law, Holmes was preparing a jurisprudential attack on the very idea of separating substance from procedure. Holmes’s view of rights as the “hypostatis of a prophecy” led him to conclude:

But in my old age I become less and less inclined to make much use of the distinction between primary rights duties and consequences or sanctioning rights or whatever you may call them. The primary duty is little more than a convenient index to, or mode of predicting the point of incidence of the public force.<sup>6</sup>

2. See, e.g., Hazard, *The Effect of the Class Action on the Substantive Law*, 58 F.R.D. 307 (1973).

3. F. MAITLAND, *The Forms of Action at Common Law*, in *EQUITY AND THE FORMS OF ACTION AT COMMON LAW* 295 (1932).

4. H. MAINE, *supra* note 1, at 389:

The primary distinction between the early and rude, and the modern and refined, classifications of legal rules, is that the Rules relating to Actions, to pleading and procedure, fall into a subordinate place and become, as Bentham called them, Adjective Law.

5. F. MAITLAND, *supra* note 3, at 375.

6. 1 HOLMES-POLLOCK LETTERS 20-21 (M. Howe ed. 1961).

If by "law" one means a prediction as to what the courts will, in fact, do,<sup>7</sup> then adjective law, as much as substantive law, is a ground for the prediction. To avoid failing in prognostication an "index to, or mode of predicting the point of incidence of the public force" can hardly ignore the remedial tools, the permissible grounds for or rules of inference, or the allocation of handicaps or advantages in the litigation forum. An understanding of all law in terms of predicting public coercion is useful as a corrective to romantic notions of the legal order. But it achieves correction through distortion; the lens flattens all legal rules. Since all categories of relevant rules are potentially predictive, there is some tendency to understand all of them as *properly* predictive in the same way. The perhaps naive view of Maine and Maitland in praising the Judicature Acts was that a neutral, segregated adjective law would render the substantive law the only proper ground for prediction: Procedure would reflect adjudicative values designed to serve the end of effective fact finding so that substantive law alone would become predictive of the incidence of public force.

Professor Hazard has recently taken Maine and Maitland's observation about the Forms of Action in "the infancy of the Courts of Justice" and used it as a generalized law of interaction: "Substantive law is shaped and articulated by procedural possibilities."<sup>8</sup> Speaking of the federal class action rule, Hazard was absolutely right. Federal Rule 23 presents a procedural possibility which, once present, cannot help but shape and articulate substantive law. That shaping is as real if the opportunity is foregone as it is if the possibility is seized. For a choice to forego is pregnant in a way that doing without can never be.

The recognition that procedural possibilities may inevitably shape substance and that the shaping may take forms not wholly or easily predicted may lead one to the conclusion that rational minds make procedural choices at least in part with an eye to potential substantive consequences. Willful manipulation of procedural components becomes one, perhaps necessary, dimension of clear-eyed lawmaking. Direction is better than the centuries of indirection described by Maitland.

It must be noted that the generalities of Maine, Maitland and Hazard are consistent with more particular observations scholars have made about the ways in which various elements of procedure are ac-

7. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1897).

8. Hazard, *supra* note 2, at 307.

tually used. Judge Charles Clark, writing of code pleading, observed that particular rules governing pleading of disfavored actions or defenses should be viewed as handicaps assessed in order to effectuate certain substantive goals.<sup>9</sup> Similar observations have been tentatively advanced about the pleading of some actions under the Federal Rules of Civil Procedure.<sup>10</sup> The justifications for presumptions and allocations of burdens have uniformly included substantive preferences.<sup>11</sup> And one might easily consider the vast literature on substance-procedure characterization in conflict of laws and in the *Erie* cases as a recognition of the substance-oriented manipulation of procedural components.<sup>12</sup> For it is partly because we understand that substantive-oriented manipulation of procedural rubrics fits the Holmesian continuum of grounds for prophecies that we are troubled by the use of the "procedure" characterization as a sufficient touchstone for decisions that allocate the power to make law.

## II

I accept the conclusion that procedure, broadly conceived, will inevitably shape substance; but I shall argue that there are proper and improper ways of structuring process with substantive ends in mind. I have used the word "proper" advisedly, since it is broad enough to encompass grounds of evaluation ranging from constitutionality to elegance. I shall begin with a series of cases that illustrate the range of relationship between substance and procedure; in so doing I shall appeal to a professional intuition about the propriety of the various interactions. My argument consists of an appeal to intuition rather than to deduction from accepted principles.

Before proceeding to describe and explore this series of intuitions, however, let me justify one aspect of the terminology which follows. I shall speak of "procedural" as opposed to "substantive" rules, policies, principles, preferences or values. The distinction I have in mind

9. C. CLARK, CODE PLEADING 609-10 (2d ed. 1947).

10. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 217, 224 (1972). It is noteworthy, and not, I think, coincidental, that Professor Moore's treatise does not concede a different pleading standard for different sorts of actions. The case law is hardly compelling, and it seems a place for the decision to be put in the hands of the treatise author. Compare *id.* with 2A J. MOORE, FEDERAL PRACTICE § 18.17[1], at 1725 (2d ed. 1974).

11. See, e.g., James, *Burdens of Proof*, 47 VA. L. REV. 51, 58-63 (1961).

12. For the latest round on *Erie* and the uses of procedure, see Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Chayes, *Some Further Last Words on Erie: The Bead Game*, 87 HARV. L. REV. 741 (1974); Ely, *Some Further Last Words on Erie: The Necklace*, 87 HARV. L. REV. 753 (1974). The classic on the significance of the distinction for conflict of laws remains: Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333 (1933), reprinted in W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 154-83 (1942) (with addendum at 183-93).

is the familiar one between that which controls the conduct of litigation and that which controls social conduct outside the courtroom. I am well aware of Walter Wheeler Cook's caveat with respect to such categorization:

If . . . we examine into the distinction between "substantive law" and "remedial and procedural law" as that distinction is involved in legal problems, we find that this distinction is drawn for a number of different purposes, each involving its own social, economic or political problems.<sup>13</sup>

Cook lists eight such distinct purposes. He argues that whenever a legal consequence flows from a characterization, we are involved not in the discovery of a line, but in the drawing of one. There is no reason to draw the line in the same place for all purposes.<sup>14</sup> Yet, in citing Cook's well-known strictures on the dangers of categorization, one should remember his own fierce traverse of the accusation that he attacked generalizations or categories as such. He conceded, indeed affirmed, their necessity for coherent thought and added that ordinarily a "common core of meaning" justified the use of the same rubrics in different contexts.<sup>15</sup> In what follows I am attaching no legal consequences to my characterization of particular rules or values as "procedural" as opposed to "substantive." Rather I am proposing to take seriously the "common core of meaning" involved in the distinction by asking whether there be some values predicated of procedural matters which resist substance-oriented manipulation. By "resist" I mean no more than that such manipulation seems to demand more than ordinary justification.

I ask the reader's indulgence for an excursion into the past, though I promise a return to the considerations of current procedure. It is useful to test our intuition about the substance-oriented manipulation of procedure in a remote context where, hopefully, we may assume a degree of unanimity among readers about substance. The first rough sketch of my intuition thus emerges from four cases involving the issue of whether particular persons were or were not slaves.

*Robinson v. Smyth*<sup>16</sup> was decided by the English Court of Common Pleas in 1799; it is short enough to reproduce in its entirety:

13. W. Cook, *supra* note 12, at 163.

14. *Id.* at 157-59.

15. *Id.* at 161.

16. *Robinson v. Smyth*, 1 Bos. & Pul. 454, 126 Eng. Rep. 1007 (C.P. 1799), discussed in Reisman, *Accelerating Advisory Opinions: Critique and Proposal*, 68 AM. J. INT'L L. 648, 666 (1974).

Shepherd Serjt. moved to put off the trial in this case on account of the absence of a material witness. He stated that the action was brought for wages supposed to be due to the Plaintiff as a seaman, upon a voyage from the West Indies to London, and that the defence to be established by the evidence of the absent witness, was that the Plaintiff was slave to the Defendant who had paid a valuable consideration for him.

Sed per Curiam. This is an odious defence, to which the Court will give no assistance. If the Defendant were to offer to put it on the record, we should not give him a day's time. It is as much a denial of justice as the plea of alien enemy, which is always discouraged by the Court.

Shepherd took nothing by his motion.<sup>17</sup>

This case seems a most troubling one despite (or, rather, because of) the admirable sentiment against slavery expressly stated as a ground for the exercise of discretion. Yet it is not easy to articulate what it is that is troublesome about the case. It is certainly not the result. Indeed, one can easily contemplate a perfectly acceptable decision reaching the same result:

Sed per curiam: It is notorious that seamen, without wages from their voyage, are impoverished, incapable of awaiting the normal measure of the pace of litigation. If that time is given the defendant in this action it is unlikely that the plaintiff, with no wages from his voyage, will be able to subsist without departing again, thereby losing his claim. Under such circumstances, there is less likelihood that injustice will be done by denying defendant's motion than by granting it.

Shepherd took nothing by his motion.

This hypothetical version of *Robinson* answers a question about the element of timing in litigation with a justification that contains at least an implicit, generalizable principle about its uses. It is responsive to the defendant's motion in precisely the terms in which the motion is made. Thus it seems quite clear that the case is troublesome because of the nature of the justification, a manipulation of a procedural component to an admirable (from our moral perspective) substantive end. Needless to say, we would be at least as troubled by a case in which the same procedural amenities were withheld from a black person petitioning for freedom because the jurisdiction held freedom suits in disfavor.

Having reached the conclusion that it is the (admirable) substantive

17. 1 Bos. & Pul. at 454, 126 Eng. Rep. at 1007.

justification for the procedural step in *Robinson* that is troublesome rather than the procedural step itself, we must concede that there are many examples of substantive justification for procedural steps which do not trouble us in the same way. Indeed, the next three opinions from the slavery area are, to a greater or lesser extent, justifiable instances of such manipulations.

Within a month of *Robinson*, the Virginia Supreme Court of Appeals considered a question of standing in *Pleasants v. Pleasants*,<sup>18</sup> the issue was whether to permit a person who had already been discharged as executor of an estate to petition a court of equity in order to compel legatees to free slaves who had passed to them under a will. The will directed the beneficiaries to set the slaves free "when the laws should allow of it." The Virginia Act of 1782, permitting manumission, was passed after the executor had been discharged. The Virginia court allowed the petitioner to present the slaves' claims to freedom, despite its certainty that he did so neither in his capacity as executor nor as heir at law. The court permitted the discharged executor, son of one testator and brother of the other, to represent the claim for freedom:

On mature consideration, I am of opinion, that the suit in Chancery cannot be sustained upon the ground of the appellee's [Robert Pleasants's] claim as heir at law to take the slaves for the condition broken, it being the practice of that Court to relieve against forfeitures and not to aid or enforce them. Neither will his claim, as executor, have that effect; because, having long since assented to the several legacies and bequests of these people, he had fully executed his power over the subject. At the same time, *those characters furnish a commendable reason for his stating the case of these paupers to the Court; and it ought to be heard and decided upon without a rigid attention to strict legal forms, since it can be done, without material injury to the other parties.*<sup>19</sup>

Although this case presented what might be called a question of standing, it is not the sort of standing issue involved in many challenges to administrative action which, as Professor Albert has demonstrated, collapses into the question of whether the petitioner has a claim for relief.<sup>20</sup> Nor is the claim one of *ius tertii*, since Pleasants

18. 6 Va. (2 Call) 319, 6 Va. (2 Call 2d ed.) 270 (1799), discussed in context in R. COVER, *JUSTICE ACCUSED: ANTISLAVERY & THE JUDICIAL PROCESS* (1975) [hereinafter cited as *JUSTICE ACCUSED*].

19. 6 Va. (2 Call) at 350, 6 Va. (2 Call 2d ed.) at 294 (separate opinion of Pendleton, J.).

20. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 *YALE L.J.* 425 (1974).

suffered no injury and sought no relief for himself. Rather the holding in *Pleasants* may be functionally equivalent to judicial ratification of a self-appointment as guardian *ad litem*. Unquestionably the power given him to bring the suit was extraordinary, and would not be generalized to parallel situations outside the area of slavery. My intuitive sense of approval for *Pleasants* is fully as strong as my sense of disapproval for *Robinson*.

My third example is *Hudgins v. Wright*, decided by the Virginia Supreme Court of Appeals in 1806.<sup>21</sup> The issue was to whom a presumption of freedom would attach: To whites only? To Indians and whites? Or to blacks, Indians and whites? The Chancellor of Virginia, George Wythe, ruled that the presumption, derived from the Virginia Declaration of Rights, should attach to all men regardless of race. The Supreme Court of Appeals affirmed the ruling as to Indians, the only plaintiffs before the court, but explicitly reversed Wythe's dictum as to blacks, stating that the presumption of freedom did not apply to them. *Hudgins* raises the question of whether a counter-probabilistic rebuttable presumption ought to be used to effectuate substantive preferences. The Supreme Court of Appeals seemed to analyze the question in terms of the conformity of the presumption to probable fact in each instance, finding that it was likely to be probative as to Indians but not as to blacks.<sup>22</sup> My reaction to Wythe's audacious presumption is one of awe and approval mixed with a faintly troubled echo of *Robinson*.

Finally, consider the United States Supreme Court case of *Mima Queen v. Hepburn*,<sup>23</sup> more particularly, Justice Duvall's dissenting argument. Plaintiffs, Negroes held in servitude, claimed descent from a free maternal ancestor and sought to introduce hearsay of hearsay to prove that fact. The lower court refused to admit such evidence and the Court, per Chief Justice Marshall, affirmed. Marshall asserted that whatever the rules governing admissibility of evidence might be, they must be trans-substantive:

[T]he rule then, which the Court shall establish in this cause will not, in its application, be confined to cases of this particular description, but will be extended to others where rights may depend on facts which happened many years past.<sup>24</sup>

21. 11 Va. (1 Hen. & M.) 133 (1806), discussed in JUSTICE ACCUSED, *supra* note 18, at 51.

22. 11 Va. (1 Hen. & M.) at 137-39.

23. *Mima Queen v. Hepburn*, 11 U.S. (7 Cranch) 290 (1813), discussed in Newmeyer, *On Assessing the Court in History: Some Comments on the Roper and Burke Articles*, 21 STAN. L. REV. 540, 542 (1969).

24. 11 U.S. (7 Cranch) at 295.

Justice Duvall's dissent, the only one he wrote in 24 years on the Court, contains both an argument from established hearsay principles and an argument from the special favor he supposes freedom suits ought to enjoy. He reports that the Maryland courts had admitted such hearsay in freedom suits on "the same principle, upon which it is admitted to prove a custom, pedigree and the boundaries of land."<sup>25</sup> But Duvall goes on to argue that the rationale for admission of hearsay in freedom suits is still stronger since "[i]t will be universally admitted that the right to freedom is more important than the right of property."<sup>26</sup> He then considers the litigation plight of plaintiffs in freedom suits and concludes:

And people of color from their helpless condition under the uncontrolled authority of a master, are entitled to all reasonable protection. A decision that hearsay evidence in such cases shall not be admitted, cuts up by the roots all claims of the kind, and puts a final end to them, unless the claim should arise from a fact of recent date, and such a case will seldom perhaps never, occur.<sup>27</sup>

I am horrified by the Supreme Court's failure to adopt Duvall's position.

My intuition about these four cases, which may or may not be shared by readers, requires an attempt to explain why there is a strong negative reaction to *Robinson*, why there is a strong positive reaction to Duvall's position in *Mima Queen*, and why there is approval for *Pleasants* and for Wythe's position in *Hudgins*. My response to the latter two cases is itself substance-biased: That is, it seems to me that a supposed contrary result in *Pleasants* or the actual reversal of Wythe in *Hudgins* would be acceptable in their own terms and troublesome to some small extent only in their *failure* to further the substantive preference I have against slavery.

*Robinson* seems to me to sit outside the limits of continuum of more to less acceptable manipulations of process. It is thus particularly important to understand what is disturbing in it. The difficulty seems to me fourfold. First, the case seems to further no consistent, coherent substantive policy, given what is presumed to be the operative rule of law to be applied. Since slavery is presumed to be an acceptable defense to the action for wages, we are confronted by the use of process as a means of undermining the formal rule of law. Now qualification

25. *Id.* at 298.

26. *Id.* at 298-99.

27. *Id.* at 299.

or mitigation of substance through process is not unusual or necessarily problematic. But it usually takes the form of imposing presumptions or allocating burdens to structure the usual litigation risks of uncertainty in a fashion which recognizes a substantive preference. What is highly unusual about *Robinson* is that it ignores this route altogether in undermining the rule of law; it purposefully refuses to permit uncertainty to be reduced. And it does so without any reference to cost or efficiency criteria which may, in many situations, acceptably impose a limit on the amount of trouble or expense we are prepared to undertake to reduce uncertainty.<sup>28</sup>

The only sense that can be made of the combination of the substantive rule of law in this case with the procedural ruling and its articulated justification is that slavery is to be formally recognized, but the holding of this form of interest is to be purposefully rendered insecure. It might be noted that this kind of objective, if it can be justified at all, is usually justified as a "transition" stage in the development of substantive law.<sup>29</sup> It suggests a position of disequilibrium which, when resolved, will eventuate in a more stable substantive configuration that will presumably not need, and should not use, such manipulation of procedural components to achieve its ends. In a sense this type of justification is itself a recognition of the character of the process as a departure from a norm, as problematic.

The second disturbing characteristic of *Robinson* inheres in its failure to achieve equality of treatment of litigants. Recall that my suggested alternative to the court's opinion would have justified the decision by invoking the litigation plight of impoverished seamen. It would have stressed that the extension of time sought would unfairly and disproportionately burden the other litigant, thus providing a generalizable, trans-substantive principle which would presumably benefit and burden parties regardless of their positions on the matter before the court.

The third problem in *Robinson* inheres in the unpredictable character of the justification when applied to process. That a claim or defense is "disfavored" does not generate any plausible or predictable pattern of impact on process.<sup>30</sup> If the "disfavored" rubric will justify

28. For a cost-benefit framework of analysis for evaluating procedure, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* 333-56 (1973); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

29. For a similar explanation of "fictions," see, e.g., L. FULLER, *LEGAL FICTIONS* 56-74 (1972); F. MAITLAND, *supra* note 3, at 373-74.

30. A frequent consequence of characterizing an action as disfavored has been more stringent pleading. In going far beyond this without adequate justification, *Robinson* suggests no stopping place.

failure to extend time to secure an absent witness, it may, but need not, eventuate in a predilection to dismiss pleadings for trivial errors, a careful scrutiny of testimony for trivial inconsistencies, an enlargement of privileges to exclude testimony which would support the disfavored claim, a narrowing of privilege to permit testimony against the disfavored claim, etc. Indeed, the sum effect of calling an action disfavored seems to be that lightning may strike at any time or in any way; we know only which party it will strike.

Finally, *Robinson* is troublesome because the court chooses to make a point of the lack of procedural justification for the decision. There are a broad variety of procedural desiderata and a decision often involves a choice among them. While a decision such as the one I suggest as an acceptable alternative implicitly sets off one procedural value against another, the Court of Common Pleas expressly failed to do so. It may be justifiable, once a trade-off between process values is inevitable, to make the choice in one direction rather than another because of the substantive end that will thereby be served; in any event, such a form of decision appears less nakedly as a disregard for a process value. But it seems intuitively troublesome to ignore these values altogether.

The other three cases considered above present fewer difficulties of exposition than did *Robinson*. In *Pleasants* the court is confronted with a problem of remote participatory rights, the issue of access to litigation for those against or for whom a decree will not run. Indeed, one may go further in terms of our present rules governing participation and stress that *Pleasants* himself would have neither been injured nor benefited as a practical matter if his participation had been denied. The conferral of rights of participation upon those whose interest is remote or, in a sense, gratuitous, must represent in large part a judgment about the likelihood of a particular form of litigation taking place without such participation, and about the desirability of encouraging such litigation. It is difficult to imagine how such judgments can be made in a trans-substantive fashion. One might wish to encourage litigation in order to deter a certain kind of conduct (by structuring litigation risks and making adverse results more likely) or in order to protect a certain class of persons considered particularly vulnerable to some specified form of predatory conduct. But those judgments must be made on an individual basis for each substantive question.

Apart from substantive preferences, it is difficult to decide what conditions will determine a decision to permit such remote partici-

pation. But the concept of litigation plights and the likely consequences of permitting participation may furnish some of these. Those conditions could indeed be embodied in a rule which might read:

A person not seeking relief on behalf of himself or herself will be permitted to seek relief on behalf of others if:

- (a) There is reason to believe that those persons on behalf of whom relief is sought are unable or substantially less able to seek relief effectively on their own behalf.
- (b) The representative party will actively and adequately represent the interest of those on behalf of whom he sues.
- (c) Effective adjudication on the merits will not be impeded.

But such a rule would be inadequate if it did not also permit consideration of the effect of enhanced remote participation on the substantive objectives of whatever scheme is being enforced.

Thus in *Pleasants* one may discern two dimensions to the court's decision. One dimension concerns itself with the procedural variables: The form of litigation determined by *Pleasants's* petition serves the end of effective litigation on the merits; the persons on behalf of whom relief is sought are indeed in a vulnerable litigation situation; the prior position of the petitioner as executor under the will is ground for expecting adequate representation. But without the sense that there is public favor for encouraging and facilitating private manumission (a sense which pervades the opinions in *Pleasants*) there is no sufficient reason for not leaving the matter to action by those aggrieved. In a precisely analogous case the Supreme Court of North Carolina refused to give leave to a discharged executor to sue.<sup>31</sup> And that decision was quite proper given that court's express judgment that the substantive policy of the state was not hospitable to the creation of a class of free Negroes through private manumission. Thus it seems to me that questions of remote participatory rights and representation will always involve a series of trans-substantive values which create conditions for conferring such rights, but must also involve judgments that cannot be made without particularized attention to their effect upon substantive policy.

*Hudgins v. Wright* involved a rule allocating a burden or directing an inference. What appears mildly problematic in procedural terms about Chancellor Wythe's extension of the presumption of freedom to blacks is that the vast majority of blacks in Virginia at the time

31. *Pride v. Pulliam*, 11 N.C. (4 Hawks) 49, 60 (1825).

were slaves. In reversing Wythe, the Supreme Court of Appeals focused on the failure of the presumption to accord with probable fact. Now it is clear that presumptions and allocations of burdens ordinarily conform to probabilities in some sense; McCormick<sup>32</sup> gives justifications for virtually all presumptions that include *both* some policy preference *and* assessments of probability. However, as commentators have often remarked with respect to the presumption of innocence, certain "presumptions" are really initial allocations of the burden of uncertainty. And, given the ordinary degree of uncertainty which is involved in litigated matters, some assessment of the consequences of uncertainty must be made. It is plausible and indeed intuitively compelling that one will wish to be more certain about some matters before imposing consequences when the consequences are particularly serious to one of the parties. The presumption of innocence, with its attendant standard of proof beyond a reasonable doubt, then, is not really related to probability. Rather it is a judgment that one wishes to be more than usually certain before imposing consequences, and, that in the absence of such more than usual certainty, one wishes to treat persons as innocent. Similar statements might be made concerning the presumption of freedom for which Wythe argued. That presumption is not a rule of inference based on probable fact, but a starting point for allocation of risks of uncertainty. It seems in no way offensive to concede that it is more probable than not that a black person is a slave in the Virginia of 1806 while yet asserting that the consequences of the characterization of "slave" are so serious that one wishes to be more certain of such fact than is permitted by a sense of general probability based on race. It seems impossible to conceive of a manner of allocating the risks of uncertainty without considering substantive preferences. A general rule conforming allocations solely to probability flies in the face of our sense that one wants to be more certain when consequences are sufficiently serious.<sup>33</sup>

Our fourth case, *Mima Queen*, involved a still different form for

32. C. MCCORMICK, EVIDENCE §§ 343-46, at 806-33 (2d ed. 1972); see 9 J. WIGMORE, EVIDENCE § 2491, at 288-90 (1940).

33. This conclusion may be buttressed by a particular aversion to permitting race (and/or other "suspect" categories) to be used as the medium for assessing negative consequences. But the argument against using suspect categories in this manner is essentially a modern development, and is less general than the argument developed above. A somewhat more difficult process issue would be presented if Wythe's statement were read to mean that decisionmaking could not consider race as probative of slave status in light of the probability that a black person was a slave (around 1806 in Virginia). No doubt Virginia statute law intimated a requirement for documentary evidence in some kinds of cases; but in the normal situation, no such preference could be plausibly read into the law. The exclusion of the possibility of consideration of race would become, as in *Robinson*, a purposeful procedural move to keep uncertainty from being reduced.

the introduction of substantive preferences. We acknowledged a trans-substantive value of reliability which was furthered by the general hearsay rule. We also acknowledged, however, the likely existence of certain litigation plights which were the inevitable consequence of an unrelaxed application of the rule. As Justice Duvall pointed out, the plight of petitioners for freedom such as Mima Queen constituted an instance of such an unenviable plight. But the issue of whether to relieve such petitioners of that problem may well and properly involve trading off the disutility of "improperly" adjudicating someone a slave because no evidence save hearsay exists as to the freedom of an ancestor against the disutility of possible incorrect adjudications of freedom on the basis of unreliable evidence.<sup>34</sup> The availability-reliability tension is a common one between two process goals.

A brief summary of the positions assumed thus far may be in order. First, there is something problematic about manipulation of a procedural component to undermine the ostensible and articulated rule of law; it appears as a purposeful, result-oriented refusal to permit process to play its accustomed role of reducing uncertainty with no countervailing procedural objective to justify that refusal. Second, beyond the basic participatory rights of those immediately affected by outcomes, scope of litigation can be determined only with respect to substantive goals. Purposeful manipulation of the scope of participation to achieve substantive ends is permissible and appropriate. But there is additional force to the argument to expand remote participatory rights where the litigation plight of a potential litigant is especially vulnerable. That plight and our reaction to it may be (but need not necessarily be) related to our substantive preferences and values. Third, the consequences of uncertainty and the characteristics that certainty need attain before it is satisfactory to assess consequences are substance-related. It is in no sense offensive to my intuition that a single factor be or not be considered sufficient to support an inference even if that decision be made in a patently counter-probabilistic fashion. This intuition is simply a part of my somewhat broader sense that there are some consequences which entail a desire to be more certain about our premises than the single factor inference would warrant. Fourth, it is likewise permissible and possibly desirable to consult our substantive preferences when trading off reliability against availability of evidence.

34. Insofar as the exceptions to the hearsay rule relate to rational goals, they are largely representative of this trade-off.

In all four cases procedural devices are justified partially in terms of substantive objectives. And since we approve of these objectives, we might even find the failure to promote them (in at least three of the cases) more troublesome than their separation from procedural questions. What happens to our ability to further substantive goals in similar situations when procedural norms are codified in a trans-substantive structure is the subject of the next section of this article.

### III

The fine tuning of remedial and procedural instruments for implementing substantive preferences which I have suggested was at work in the slavery cases is severely retarded once procedural norms are codified in a trans-substantive structure. Professor Moore's great achievement—the continued viability, efficacy and, indeed, excellence of the Federal Rules of Civil Procedure—seems all the more remarkable when one realizes that the river of litigation constantly erodes the architecture of process-oriented codes, leaving us with its case law incidents of application. It is extraordinary that our legal system holds a divided view of procedure: Our norms for minimal process, expressed in the constitutional rubric of procedural due process, are generally conceded to constitute a substance-sensitive calibrated continuum in which the nature of the process due is connected to the nature of the substantive interest to be vindicated;<sup>35</sup> yet our primary set of norms for optimal procedure, the procedure available in our courts of general jurisdiction, is assumed to be largely invariant with substance.<sup>36</sup> It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action to restrain the building of a pipeline are sufficiently identical to be usefully encompassed in a single set of rules which makes virtually no distinctions among such cases in terms of available proc-

35. Thus if the interest protected is a possessory interest in a disputed chattel, the process due may involve nothing more than a hasty judicial oversight of an affidavit, *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); if the interest is continued receipt of social benefits, the process due will depend on the importance or nature of the benefits and may require some sort of hearing, notice, opportunity to present one's case and to confront adverse witnesses. Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring relatively elaborate process for termination of welfare benefits), with *Arnett v. Kennedy*, 416 U.S. 134 (1974) (upholding much less formal procedures for termination of government employment).

36. There are certainly exceptions to this principle. Certain Federal Rules are explicitly related to special substantive areas. See, e.g., FED. R. CIV. P. 23.1 (shareholders' derivative actions); FED. R. CIV. P. 9(b) (pleading fraud, mistake or states of mind). Other rules necessarily require incorporation of substantive law in their application, e.g., FED. R. CIV. P. 14 (standard of "is or may be liable to").

ess.<sup>37</sup> My point is not that the Federal Rules are not workable over such a broad range. But it may be worth asking in what sense that codification works well because of its trans-substantive aspiration, and in what sense it works in spite of it. While a comprehensive catalogue of the problems and advantages of generality in our code of procedure is not possible in this article, notation of a few outstanding problems which bear some resemblance to the cases I have discussed above may well demonstrate the value of such an inquiry.

A. *The Limits of Generality: Remote Participatory Rights in the Contemporary Setting*

In recent years courts have had to consider a modest variety of schemes which can permit or encourage the participation of litigants whose interests are remote or who seek to represent interests not their own. Some of these cases have involved the class action and have required construction of Federal Rule 23.<sup>38</sup> Others have involved the construction of Federal Rule 24 governing intervention.<sup>39</sup> But many cases which present issues of this sort have not arisen under particular federal rules. Instead, the remedial structures invoked have either been relatively novel or remotely analogous to common law and equitable rubrics.<sup>40</sup> Both construction of the Federal Rules and creation of new remedies would seem equally susceptible to the input of substantive preferences along the lines suggested in *Pleasants*.

The class action has constituted the most widely noted and most problematic case for construction of the Federal Rules. Commentators could hardly fail to note the variety of contexts in which the remedial clout purchased by the class action has far-reaching effects on substantive law. Some, like Milton Handler, have argued for a cautious approach to the application of the Rule to antitrust laws because of the inhibiting effect on legitimate business activity of both the increased likelihood of private litigation and the possibility of enormous

37. It is clear that certain basic distinctions have already permeated the application of the Federal Rules, though ordinarily not found within the text of the Rules themselves. For example, the use of the pretrial conference is largely directed to encouragement of settlement in most routine actions. But in "big" or "complex" actions, the conference(s) is (are) directed to planning future stages, whether trial or discovery.

38. See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *In re Antibiotic Antitrust Action*, 333 F. Supp. 267 (S.D.N.Y. 1971); Handler, *The Shift from Substantive to Procedural Innovations in Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1 (1971).

39. See, e.g., *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129 (1967); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Natural Resources Defense Council, Inc. v. TVA*, 340 F. Supp. 400 (S.D.N.Y. 1971), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972).

40. See, e.g., *Hawaii v. Standard Oil Co. (Cal.)*, 405 U.S. 251 (1972); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

recoveries.<sup>41</sup> Others have argued that the private class action should be embraced precisely because it is a form of private enforcement, which may well be more efficient and cheaper in deterring unwanted and illegal activity than public enforcement.<sup>42</sup> But with the single significant exception of truth in lending cases,<sup>43</sup> courts have not analyzed class action cases as presenting problematic questions of substantive law: of antitrust, securities regulation or environmental policy. Rather, they have treated the text of the trans-substantive rule as more or less controlling on the issue of its availability.<sup>44</sup>

Some opponents of the class action have argued that it is precisely the characteristics noted above that make application of the rule problematic under the Rules Enabling Act, a statute which provides that the rules not "abridge, enlarge or modify" substantive rights of parties.<sup>45</sup> The first section of this article leads to the conclusion that the manipulation of procedural tools to effectuate substantive objectives is by no means undesirable and often seems necessary. Thus if the Enabling Act were read to forbid a Federal Rule to have substantive impact, it would create an anomaly. Federal Rules, intended to provide a flexible structure for achieving substantive ends, would remove from the courts a useful arsenal for remedial policy by freezing process in a single posture for all cases. But there is a way of reading the Enabling Act which neither renders it a dead letter, as courts have tended to do, nor construes it as a bulwark against change. Such a

41. See Handler, *supra* note 38, at 5-12.

42. See, e.g., Becker & Stigler, *Law Enforcement, Malfeasance, & Compensation of Enforcers*, 3 J. LEGAL STUDIES 1, 14 n.18 (1974).

43. The truth in lending cases have been a partial exception largely because the \$100 minimum recovery per violation can be and has been read as inconsistent with the multiplier effect of 23(b)(3) class actions. These cases began to take a strange turn with the significant opinions of Judge Marvin Frankel in *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972). For recent cases and developments, see Note, *Class Actions Under the Truth in Lending Act*, 83 YALE L.J. 1410 (1974); Note, *Recent Developments in Truth in Lending Class Actions and Proposed Alternatives*, 27 STAN. L. REV. 101 (1974).

44. The epitome of such reasoning is *Eisen II*, *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968). The subsequent reversal of direction in this case is noteworthy for continued failure to take into account substantive justifications or lack of them for the use of this remedy. There is a noteworthy difference in approach to this issue of substance-oriented justification for use of the class action between the two leading federal practice treatises. Professor Moore is characteristically concerned with the subordination of procedure to substance. In interpreting the provision of Rule 23(b)(3) that the class action be found "superior to other available methods for the fair and efficient adjudication of the controversy" citing *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1972), Professor Moore states that this requirement "involves continuous awareness of the consequences for substantive rights which follow from decisions on procedural matters." Moore adds: "An important substantive issue which the court must face in assessing the superiority of a class suit in a (b)(3) situation is the desirability of using this procedural mechanism to encourage litigation, in each particular case." 3A J. MOORE, *supra* note 10, ¶ 23.45[3], at 23-801 to 02. Contrast the absence of such substance sensitivity in the treatment of the same issue in 7A C. WRIGHT & A. MILLER, *supra* note 10, § 1779, at 57-64.

45. 28 U.S.C. § 2072 (1970).

reading would start with the premise suggested above, that absent a trans-substantive structure of rules, courts must often justify decisions about procedure with a combination of substantive and procedural objectives and values. The Rules Enabling Act might then be read to mean that the courts, in applying the Federal Rules of Civil Procedure or any subsequently enacted similar body of rules, may not forsake their responsibility to justify substantive impact in terms of substantive values. It would not be enough to point to Rule 23; one would have to justify invoking it.<sup>46</sup>

The Rules Enabling Act, then, would operate to render explicit the obligation of the courts to make the same sort of determination when applying Federal Rules or similar codifications as they would make when justifying a form of non-rule remedy such as equitable relief. Insofar as the application of the federal rule to the particular area were not well-established, it would require the degree of elaborate inquiry into substantive objectives which marked the Supreme Court's discussion of non-rule remedies in cases like *J. I. Case Co. v. Borak*,<sup>47</sup> *Bivens v. Six Unknown Named Agents of the FBI*,<sup>48</sup> *Brown v. Board of Education (II)*<sup>49</sup> and *Hawaii v. Standard Oil*.<sup>50</sup> Insofar as the general applicability of the federal rule to the substantive area were well-established, the inquiry would center on the utility of its specific incidence. Above all, the Rules Enabling Act would not be read to forbid the application of a federal rule because it altered substantive rights. However, it would forbid the reasoning by which a rule altered the right simply because it is a rule of procedure. As part of the repository of our collective procedural imagination the Federal Rules of Civil Procedure would be read to include remedial structures which could be applied where appropriate in light of substantive objectives.

At this point it is well to consider the argument that the Rules, as a quasi-legislative enactment, should restrict the courts in much the same way as statutes should. In this view, however desirable it is for courts to exercise a residual power to manipulate all process norms (including Rules) to achieve substantive objectives, they no longer have the power to make such decisions as to the Federal Rules of Civil Procedure. The answer to such an argument is twofold. First, remedial creativity is exercised apart from the Federal Rules, and

46. It may well be that one dimension of such a justification would involve an acknowledgment of the character of "mass production" transactions, a quality which may be common in many different substantive areas. Hazard, *supra* note 2, at 308-09.

47. 377 U.S. 426 (1964).

48. 403 U.S. 388 (1971).

49. 349 U.S. 294 (1955).

50. 405 U.S. 251 (1972).

the extension of that creativity to application of the Federal Rules is not inherently beyond the power of a court. In imposing a limitation on the power to alter substantive rights *through* the Federal Rules, Congress was not concerned with the danger of explicit remedial creativity accompanied by substance-oriented justifications. Rather it was concerned lest the power granted to regulate procedure enlarge the power of the courts to make substantive law. So long as courts make explicit their substance-oriented justifications for procedural steps, they will place themselves in precisely the same position they occupy with respect to (nonconstitutional) questions of standing, equitable relief, or any other remedial characteristic. Congress will know what choice was made and will be able to correct it or not as it chooses. Moreover, the problematic character of the Federal Rules under the Constitution must color our treatment of them as controlling. They are not passed by Congress, but are promulgated pursuant to the Rules Enabling Act. Justices Black and Douglas have long dissented from promulgation on the grounds of the unconstitutionality of that procedure. If the Federal Rules are to be read as removing the power of a court to treat substantive objectives as overriding where they otherwise would control, have they not "abridged, modified or enlarged" substantive law in a fashion more far-reaching than some outcome-determinative test would suggest?

### B. *The Problem of Ad Hoc Application*

The model of decisionmaking under the Federal Rules that I have suggested hardly constitutes a cure-all for our procedural ills. For in the past several years the application of the Federal Rules of Civil Procedure to federal habeas corpus actions has worked along just such a model with, at best, mixed results. Far from precluding use of tools such as interrogatories for purposes of discovery, the Supreme Court has simply turned the question into one of case-by-case determination of whether the needs of effective adjudication of the particular issue warrant the use of such a tool. In *Harris v. Nelson*,<sup>51</sup> the Court stated:

We conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to elicit facts necessary to help the court to "dispose of the matter as law and justice require."<sup>52</sup>

51. 394 U.S. 286 (1969).

52. *Id.* at 290.

Most important for our purposes is the Court's reasoning concerning the *source* of authority for discovery, such as it may be, in habeas corpus:

Clearly, in these circumstances [the absence of specific congressional guidance on methods of "securing facts"], the habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. . . . Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651. This statute has served since its inclusion, in substance, in the original Judiciary Act as a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'"<sup>53</sup>

Justice Harlan's dissent in *Harris*, though prompted by his satisfaction on the record that the discovery sought in the instant case was not necessary to a fair hearing, also raised in stark form the difficulty inherent in a case-by-case approach to procedure.

If discovery procedures are developed case by case, there will at least be a very long period during which procedures will differ from district to district. . . . It is unlikely that the rules thus generated will be the best that could have been devised.<sup>54</sup>

As a result, Harlan concluded that the model of "rules" setting consistent and coherent standards ought to be invoked in the establishment of a code of habeas corpus rules of procedure.<sup>55</sup> But Harlan's suggestion of referring the habeas procedure question to a Rules Advisory Committee was followed with ironic results: The proposed Habeas Rules (now nearly two years old with no action taken) refer the question of discovery to the discretion of the court for case-by-case treatment along the lines suggested by the Court in *Harris*.<sup>56</sup>

In some sense Harlan has certainly been proven correct. One cannot re-invent a procedural system for every case. And the question of what is to be presumptively or generally available may be best settled by rule. But where the only or primary issues at stake are substantive, justifications in substantive terms may be necessary.

53. *Id.* at 299.

54. *Id.* at 306.

55. *Id.*

56. Habeas Corpus Rule 6, § 2255 Rule 6, in COMM. ON RULES OF PRACTICE AND PROCEDURE, AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE, PROPOSED RULES GOVERNING HABEAS CORPUS PROCEEDINGS, PROPOSED RULES GOVERNING § 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS AND PROPOSED AMENDMENT TO THE FEDERAL RULES OF APPELLATE PROCEDURE 62,113 (1973).

*Sero v. Preiser*,<sup>57</sup> a recent application of the method of *Harris v. Nelson*, is an example. In that case the Second Circuit upheld a habeas corpus class action on behalf of "more than 500" New York state prisoners who had received special four year sentences as young adults for misdemeanors which would have entailed shorter sentences if treated as adult crimes. The places and conditions of confinement for those "young adult" (16 to 21 years old) offenders were the same as for adult offenders.

In upholding the class action the court grounded its authority in the All Writs Act and found the content of its procedural tool by analogy to Rule 23. But it went further:

A number of other persuasive justifications enforce our conclusion that the class action was appropriately used in this case. Because many of those serving reformatory sentences are likely to be illiterate or poorly educated, and since most would not have the benefit of counsel to prepare habeas corpus petitions, it is not improbable that more than a few would otherwise never receive the relief here sought on their behalf.<sup>58</sup>

This invocation of the litigation plight of young, poor prisoners is highly reminiscent of the justification for the holding in *Pleasants* and for Justice Duvall's dissent in *Mima Queen*.

Why, indeed, may the All Writs Act (or alternatively, some notion of a residual constitutional power of a court) not be read to provide the same flexibility of process for ordinary civil actions to which the Federal Rules apply as that provided for habeas corpus? The significance of that question may be demonstrated by contrasting *Sero* with the opinion of the Supreme Court in *Eisen v. Carlisle & Jacquelin*.<sup>59</sup> In *Eisen* the Court, eschewing constitutional grounds for its decision, ruled that actual notice must be sent to all known or readily ascertainable class members in a 23(b)(3) action, even if the cost of such notice would be so high as effectively to preclude the action being brought. The Court grounded its opinion in the language of Federal Rule 23(c)(2):

[T]he Court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

57. *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974).

58. *Id.* at 1126.

59. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

*Eisen* is remarkable for its absolute silence on the issue of the impact that this ruling would have on substantive issues of antitrust and securities law enforcement. Instead of considering a vague term, "practicable," as an invitation to inject substantive preferences, the Court treats the Rules notice provision as a clear legislative command which is binding and susceptible to only one resolution. I must stress that my criticism of *Eisen* does not go to the result. It may be eminently reasonable (though I doubt it) to refrain from the use of such a procedural device in terms of antitrust policy. But it seems absurd to refrain from a remedy which *may* make sense in substantive terms because of lack of individualized notice to persons who cannot conceivably be harmed thereby as a practical matter. In *Eisen* both economic considerations and the statute of limitations made it a virtual certainty that no individual actions would conceivably be brought if the class action failed. Thus a class member would lose no viable litigation opportunity even if notice failed to reach him, while the defendants' securing of a *res judicata* bar would constitute no better barrier to subsequent law suits than that afforded by cost barriers to individual suits and the statute of limitations.

If the All Writs Act may serve as a repository of power to create the process needed by a particular case or substantive interest, *absent* a rule or body of rules, why could it not serve equally to provide a basis for modification of rules where they do exist? Such a scheme would neither destroy the Federal Rules of Civil Procedure nor violate some notion of separation of powers. Indeed, just as *Sero* and *Harris* have hardly shaken the normal presumption that habeas corpus petitioners' actions will have no recourse to discovery or class actions, so an application of the All Writs creative power to modify the Federal Rules in extraordinary circumstances such as *Eisen* would not alter the presumptive applicability of the Rules as they stand. As to separation of powers, I have already argued that the most problematic character of the Federal Rules of Civil Procedure under the Rules Enabling Act emerges from letting the mere fact of a rule's existence control the promotion (or lack thereof) of substantive values. The use of the All Writs Act to implement substantive values is simply a device for avoiding such a bind.

Professor James Wm. Moore has always envisioned the Federal Rules as a tool which embodies a practical philosophy of procedure, one

which liberates the courts to achieve substantive ends. From his insistence in 1935 with Judge Clark that the Federal Rules break through outmoded categories which no longer served substantive objectives to his very recent insistence that we break through the shibboleth of jurisdiction,<sup>60</sup> the contemporary counterpart of the forms of action, Professor Moore has persistently struggled against the elevation of form over substance. I think he will agree that the Federal Rules of Civil Procedure, themselves, ought never to become the categories to which substance must bend. Indeed, he might prefer to find his source for this perspective not in the All Writs Act, but in the text of the Federal Rules themselves, in the oft-quoted but little used authority of Rule 1: "They [the Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."

60. Moore & Wicker, *Federal Jurisdiction: A Proposal to Simplify the System to Meet the Needs of a Complex Society*, 1 FLA. ST. U.L. REV. 1 (1973).