

Charles Clark, Legal Realism, and the Jurisprudential Basis of the Federal Rules of Civil Procedure

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Abstract

Charles Clark was an important legal realist. As the primary author of the Federal Rules of Civil Procedure, he was also the father of modern civil procedure and thus a central figure in twentieth century American law. Few commentators have unearthed or explained the link in any thorough way between Clark's jurisprudence and his efforts at procedural reform. This paper uses Clark's published and unpublished writings to provide an intellectual history of the Federal Rules that demonstrates their significant debt to realism.

Realism has suffered from the misperceptions that its adherents had no use for legal rules and lacked a positive program of law reform. In Part I, I draw upon classical pragmatism, realism's philosophical antecedent, to depict more accurately the place of rules and reform in realism. Two principles – an emphasis on the functional competence of rules to achieve particular ends, and faith in methods of inquiry over theories of ultimate ends – marked realists' approach to both. In Part II, I show why procedural reform would attract a realist like Clark. Prior procedural regimes suffered from the same formalism that beset the substantive common law in the late nineteenth century. Clark developed his procedural philosophy in reaction to this formalism, emphasizing functional competence and good methods of inquiry as key principles. I explain how these principles and Clark's distaste for procedural formalism shaped the Federal Rules in important ways.

In Part III, I explore some implications of the observation that the Federal Rules have realist roots. First, realism offers interpretive guidance for the Federal Rules, a text that has resisted standard methods of textual analysis. Second, the Supreme Court's decision in 2007 to reject Clark's procedural vision in *Bell Atlantic v. Twombly* shows how the lived experience of the Federal Rules illuminates the limits of realism as a jurisprudence of law reform. Realists offered a methodology for law reform but could not propose a theory of ultimate ends. Consistent with realism, the Federal Rules are neutral as to ends and as such are susceptible to use for purposes antithetical to what their authors in 1938 intended.

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