

Three (Unfashionable) Words About Rick Marcus

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Rick Marcus rules! (Bad pun intended.) No, those aren't my three words about Rick Marcus.¹ Nor am I going to write that Rick is prolific, or brilliant, or gracious, or generous of spirit, or any of the other words one could easily select to describe Rick. They would all be true, but I have a different and slightly subversive theme.

Professor Stephen Burbank once wrote that Rick's work was a bit "old-fashioned,"² a description Rick conspicuously didn't oppose.³ Thinking a bit more broadly, what is the fashion these days for law professors? For we happy few that focus on courts and procedure, has the fashion changed? I think it has.⁴ And that brings me to the three words I want to highlight in paying tribute to Rick and his magnificent career: involved, authoritative, and measured.

These are words that would have counted as high praise in an earlier time, but today they might seem a bit old-fashioned to many. They describe an approach to being a law professor that has perhaps fallen out of fashion in the legal academy. Well, they're not out of fashion with me, and, I think, not with Rick either. So, I take, as a given, the usual modern-day fashionable terms of praise—they all apply—and instead choose three unfashionable words as the foundation for my tribute to a man who has been an inspiration, mentor, colleague, co-author, and friend.

Involved. Law professors can pretty much live in a cave if they want. Or a tower, if you will. Working at a cool distance from the events we chronicle and critique, or the people we seek to cajole, in our writings. We all make a choice about how much of our time—our most precious resource—to devote to matters that take us away from our teaching and writing (let alone our friends, families,

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1. Tempting as it might be, I am also not going to write that Rick embodies the three values of Rule 1. He's certainly "just" and "speedy." See FED. R. CIV. P. 1. I have neither the information nor inclination to say if he is "inexpensive." See *id.*

2. See Stephen B. Burbank, *The Roles of Litigation*, 80 WASH. U. L. Q. 705, 720 (2002).

3. See Richard L. Marcus, *Rulemaking's Second Founding*, 169 U. PA. L. REV. 2519, 2549 (2021) (noting that Professor Burbank said the remark was offered as a compliment).

4. You will find no citation here, just a statement that I don't cite sources for how I feel or for observations based on my own experiences. I am pretty sure Rick would approve. Marcus, *supra* note 3, at 2549 n. 86. (relating his battle with student editors over whether he needed to provide citations for rulemaking events he was describing from personal experience).

and other interests). A defining feature of Rick's career has been how much of it he has spent away from the tower—out in the wilds—both here in the United States and abroad.

Unquestionably, Exhibit A is Rick's work in rulemaking. If there is any outside activity that is associated with Rick, it is his service—soon to reach thirty years—as the Associate Reporter and now Reporter for the Advisory Committee on Civil Rules.

Thirty years is a long time to devote to an enterprise that is not your day job.⁵ Not that Rick is to be martyred for it. Serving as a rules committee Reporter is a plum and coveted opportunity with rewards that far outstrip the burdens. But burdens there are, and many. It's a lot of work, and not all of it is sexy (not even for proceduralists). Agenda books must be filled. Minutes of the meetings must be drafted. Rule proposals must be written and published. The comments received must be read and summarized. The workload can be enormous.⁶ And that's just the work for the regular rulemaking process. Add to that the work the Reporter does for subcommittees or when mini conferences are held.⁷

A full accounting of Rick's commitment to the rulemaking process would also include the time he has spent engaging with the legal community about rulemaking matters. Lots of different groups want to know what's happening in the rulemaking process. All are curious. Some surely hope to influence the process and relish the opportunity to bend an insider's ear. Rick has spent many days and nights out on the road educating judges, lawyers, and even academics about things the rule makers were doing or considering doing. The outreach is important, clarifying for the confused, correcting misimpressions, gathering information to take back to the committee, and sometimes simply just helping people get comfortable with the changes being made and the new ways to come.

That leads me to my final point about Rick's service to the rulemaking process. He has described himself as an insider, and that's true of course. But the Advisory Committee has been operating in the "sunshine" era for the entire time that Rick has been involved as a Reporter. What the "insiders" do is now very visible to the outside world. As Rick once put it, operating in the sunshine also means living in the fishbowl.⁸ So, it hasn't just been thirty years of often very hard work. It has been thirty years of swimming on display, with a lot of cats watching.

Shifting gears, what does one do when not being one of the most influential people in United States procedure? Well, naturally, one becomes one of the most influential Americans in the international procedural world: speaking at international conferences, writing about us for them, writing about them for us,

5. I am reliably informed that other contributions to this tribute will elaborate on the *quality* of Rick's work as Reporter and the *value* of his service to the rulemaking process. I have seen all that up close and in person and happily add my praise to the pile.

6. Marcus, *supra* note 3, at 2534–39.

7. *Id.* at 2542–44.

8. *Id.* at 2534.

and for eight years, serving as the U.S. member of the Presidium of the International Association of Procedural Law.

I'm sure Rick would describe all these activities as labors of love. Still, credit is due for people who make time to be so deeply involved in so many things, even the besotted.

Authoritative. The coin of the realm in the modern legal academy is the splashy article published in the pages of a highly ranked journal. Rick has plenty of those, to be sure.⁹ His articles on pleading practice and discovery remain seminal works for those of us who have developed our own callouses toiling in those fields.¹⁰

Yet, Rick has shown himself to have an old soul when it comes to an aspect of legal scholarship that was as treasured as any bauble for many generations of legal academics but has lost its luster for many today—writing authoritative texts that teach the law as it is to judges, practicing attorneys, and even students.¹¹ The crown jewel in this collection is surely Rick's stewardship of four volumes of the Federal Practice and Procedure treatise, including all three volumes covering the discovery rules.¹²

Law professors have a storied tradition of writing authoritative works. We are naturals at it, or at least we should be. We should be subject-matter experts who have mastered the field broadly and deeply and who can be trusted voices. Trusted to distill, synthesize, explain, and (yes) critique. Trusted to get it right and write it fairly. The field of civil procedure has as rich a heritage as any, from Charles Alan Wright and William Moore to Arthur Miller and Mary Kay Kane. Rick followed in their legendary footsteps.

For generations of judges and lawyers, authoritative texts were an essential foundation for their research and learning. Sources were hard to find. Research often involved reading through a haystack of cases with no guarantee of a needle. Authoritative texts made the inaccessible accessible and the unfindable found. For those of us who practiced in the age of books in the law library, authoritative texts were an essential starting point at a minimum.

The legal profession still needs authoritative voices from the academy, though perhaps for different reasons. Today, we are awash with information. Technology has made it cheap to produce and easy to find. Indeed, technology will now read it for us. We are all but a few keystrokes or an AI prompt away

9. Here's a selected list, in alphabetical order, which you can cross-check against his CV if you like: Columbia; Cornell (x2); Georgetown; Michigan; Northwestern (x2); Notre Dame (x2); Penn (x5!); Texas; Washington University; and Yale.

10. Two examples suffice to illustrate the point: *See generally* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) [hereinafter Marcus, *The Revival of Fact Pleading*]; Richard Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998).

11. His student-facing works include two leading casebooks (one for the first-year Civil Procedure course and another for advanced courses in Complex Litigation) and the Gilberts study aid.

12. Volumes 8, 8A, and 8B cover Rules 26–37. Rick also oversees Volume 12 covering Rules 66–87 (don't forget new Rule 87 on Civil Rules Emergencies!) and the Supplemental Rules for Certain Admiralty and Maritime Claims (which includes Rule G governing forfeiture actions in rem).

from compiling a mountain of information in an instant. But is it smart and insightful? Is it even right? In a swelling sea of voices, human and artificial, the authoritative voice remains a beacon in the lighthouse.

Has any aspect of procedure been as tumultuous as discovery during the last few decades? A period when we woke up one day to find that an “e” had been added while we were sleeping, when we confronted our buyer’s remorse about full-scale expert discovery, and when we became willing (at last) to call proportionality by its name. Judges and lawyers alike have been looking to Rick to help them navigate these changes. As we celebrate Rick’s career, let’s make sure we acknowledge the old-fashioned value of using one’s expertise to explain and guide, and that we recognize the service Rick has provided to so many of us by his doing so.

Measured. The market for legal scholarship (especially student-edited journals) tends to favor the provocateur. Bold calls for action get noticed more than defenses of the status quo. A breathless pronouncement that a recent development signals the arrival of the law-apocalypse will generate far more buzz than an article explaining why the sky hasn’t fallen yet, nor is likely to any time soon. Writing that a topic is *less* important or controversial than some claim is typically not the best way to stack high-status placements.

Let me be clear: Rick has written more than his share of very influential pieces. His articles on pleading were landmarks when they came out and remain foundational even after *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.¹³ He is still a (the?) go-to voice on discovery.

But there is a calmness to his work. Professor Burbank once called it “judicious.”¹⁴ You won’t find any breathless pronouncements of falling skies or a coming apocalypse. It doesn’t peddle overstatement. It resists the opportunism of declaring a crisis to justify the writer’s proposal. Rick’s tone, his analysis, and his conclusions are unfailingly . . . measured. It is old-fashioned in the vein of Rudyard Kipling’s poem “If-.”¹⁵

Here are just a few examples: Has sunshine ruined the rulemaking process? No. It has changed things, to be sure, but in many ways for the better.¹⁶ Are class actions dead or dying? Don’t write the eulogy just yet.¹⁷ Do the discovery rules

13. I can’t think of a post-*Twombly* pleading article that doesn’t build off something Rick wrote in his “Revival of Fact Pleading” article, Marcus, *The Revival of Fact Pleading*, supra note 10, or his follow up piece, Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998) [hereinafter Marcus, *The Puzzling Persistence*]. If one exists, it probably isn’t worth reading.

14. Burbank, supra note 2.

15. See generally Rudyard Kipling, *If—*, in REWARDS AND FAIRIES (1910). Some of the poem’s more relevant lines include: “If you can keep your head when all about you are losing theirs and blaming it on you” and “If you can dream—and not make dreams your master; If you can think—and not make thoughts your aim.” *Id.* Kipling’s lesson on composure, rationality, and reserve feels every bit the product of the stiff-upper-lip values of Victorian Britain. Old-fashioned indeed, but still good advice.

16. See generally Marcus, supra note 3.

17. See Richard L. Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 498 (2016).

allow defendants to hide their misdeeds behind a cloak of secrecy? Only if you start from a premise that the act of asking for information in discovery makes the information public, and there are good reasons not to start from that premise.¹⁸ Do we need to upend the pleading model adopted in the bygone era of the 1930s? No, and just how would you propose to improve upon what we currently have anyway?¹⁹ Is it time for another rules revolution, akin to what happened in 1938? Nope. The scheme is still performing quite well and will continue to perform well with improvements (evolution) rather than blowing it up and starting over from scratch (revolution).²⁰ It is perhaps telling that in his tribute to Ed Cooper, Rick praised Ed's instincts for knowing when *not* to act.²¹

This is not to say Rick is incapable of imagining the provocative and the revolutionary. Rulemaking projects typically start with a large funnel of ideas, many of which challenge the old ways and the assumptions behind them. I can recall many discussions in which Rick (Ed Cooper was a master at this too) sketched what the contours of change *could* look like, from the tiniest tweak to total apostasy, leaving the committee members to choose which paths to explore. You can sometimes see that “well, if you want to know all the options” approach in Rick's scholarship as well. My favorite example comes from his “Puzzling Persistence” article, in which Rick provides a very measured discussion of whether the pleading rules need to be reformed (no) but teases the idea that if the rule makers were to start tinkering with pleading practice they might just as well resurrect Charles Clark's preferred approach and abolish pleading motions altogether.²²

The Wrap-up. Rick Marcus has been one of the most influential procedure professors of his time. And he has accomplished it in an old-fashioned way—by being the consummate voice of reason and careful reflection in the many roles he plays inside and outside the academic walls. His example proves that being involved, authoritative, and measured is still a pretty darn good recipe for success.

18. See Richard L. Marcus, *A Modest Proposal: Recognizing (At Last) That the Federal Rules Do Not Declare That Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV. 331, 331–32 (2006).

19. See Marcus, *The Puzzling Persistence*, *supra* note 13, at 1775.

20. See Richard L. Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 300 (2008).

21. See Richard L. Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J. L. REFORM 637, 638 (2013).

22. Marcus, *The Puzzling Persistence*, *supra* note 13, at 1775.
