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## *Foreword*

### A Man for All Seasons: A Remembrance of Geoffrey C. Hazard

DAVID L. FAIGMAN<sup>†</sup>

[Sir Thomas] More . . . is a man of an angel's wit and singular learning. I know not his fellow. For where is the man of that gentleness, lowliness and affability? And, as time requireth, a man of marvelous mirth and pastimes, and sometime of as sad gravity. A man for all seasons.

—Robert Whittington (A contemporary of More)<sup>1</sup>

Geoffrey Cornell Hazard, Jr. was very much a man of his time and, rather more so, a man for all seasons. In his time, he helped define “the law of lawyering” and, in many respects, his gravitas as a scholar lent the subject of professional ethics the weight it enjoys today. He led the prestigious American Law Institute from 1984 to 1999, and his reputation helped solidify the prestige of that organization. He taught at many of the top law schools in the nation, moving east from Berkeley to Chicago, then further east to Yale and then Penn, but finally returning west for the last decade of his career at UC Hastings in San Francisco. It was at UC Hastings that I got to know Geoff and came to appreciate the person behind the legend. What I learned was that although he was someone that helped define his own time, he was truly a man for the ages.

Geoff was one of the most influential scholars of his time, writing, teaching, lecturing, and commenting on a wide variety of subjects, but most prolifically in the areas of civil procedure and professional ethics. He was internationally renowned in civil procedure, and regularly contributed, both nationally and internationally, to the writing or reforming of codes of procedure. His contributions in professional ethics were even more fundamental. Indeed,

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<sup>†</sup> Chancellor & Dean, John F. Digardi Distinguished Professor of Law, UC Hastings College of the Law.

1. Marvin O'Connell, *A Man for All Seasons: An Historian's Demur*, CATH. EDUC. RESOURCE CTR., <https://www.catholiceducation.org/en/controversy/politics-and-the-church/a-man-for-all-seasons-an-historian-s-demur.html> (last visited Apr. 16, 2019) (internal quotation marks omitted) (citing and quoting THE VULGARIA OF JOHN STANBRIDGE AND THE VULGARIA OF ROBERT WHITTINTON, at xxviii (Beatrice White ed., 1932)).

along with a bare handful of other scholars, he largely created and defined the field.

But Geoff's intellectual breadth and depth went well beyond these two subjects. He had an encyclopedic knowledge of legal history, with a profound grip of the details of a wide number of legal subjects. He was, I can say without fear of over-statement, a Renaissance man. Indeed, his broad knowledge of subject areas, his gentlemanly demeanor, and his genuine curiosity about all matter of things, put him in the same class as many of the great intellects in American legal history. Indeed, Geoff would have been right at home having dinner with such greats as Thomas Jefferson, Oliver Wendell Holmes, and Benjamin Cardozo.

For me to really get to know Geoff, it took co-teaching with him. We co-taught a class called "Introduction to American Law," which was a specialty class designed for students in the one-year Masters of Studies in Law (MSL) program. In retrospect, it was also an ideal class for me to appreciate the extraordinary person that Geoffrey Hazard was. His intellect was formidable; his knowledge of legal doctrine was exhaustive; his command of the classroom complete; and his respect and admiration for the students and the subject total and sincere. Observing Geoff teach a class devoted to the full fabric of American law, as he approached the end of his career, was a unique honor for me, the sort of honor I am sure will never be repeated. He was a master at his craft, and I sometimes just sat back and marveled at his virtuosity.

To appreciate Geoff in this context, I need to give a little background on how this class came about, and on how I came to teach it by his side. About ten years ago now, I was asked to oversee the formalization of a partnership between the University of California San Francisco (UCSF) and UC Hastings. Early on, we defined the three areas of natural collaboration as Education, Research, and Service. In filling in the content for these three areas, I had the benefit of numerous conversations with colleagues and, especially so, with Geoff.

An area that Geoff was particularly interested in was the educational component of the partnership. He very much believed in the value of interdisciplinary education and championed the idea that the health science professionals at UCSF could benefit from a fair dose of legal training. UCSF, more than most centers of training in the health sciences, is devoted to policy impacts and the skills and knowledge-base offered in the law school curriculum would complement their health science expertise.

UC Hastings, therefore, decided to join the many other law schools over the last decade that have created a one-year masters program—the Masters of Studies in Law (MSL)—to provide training in legal problem solving and the processes of the law. The UC Hastings program originated out of the partnership

with UCSF and was tailored at the start for students in the STEM disciplines coming from UCSF.<sup>2</sup>

Geoff was an enthusiastic supporter of this initiative and, from the start, contributed greatly to the design of the curriculum. In particular, Geoff insisted that a new course needed to be developed, a broad introduction to American law, that was exclusively designed for non-JD masters students. And then, fully consonant with Geoff's approach to higher education, he volunteered to teach the class, despite already shouldering a full teaching load.

It was at this time that Academic Dean Shauna Marshall approached me and asked whether I would co-teach the class, because Geoff had so much already on his plate. I don't remember my reaction at the time, but my agreeing to do so was one of the smartest professional decisions I ever made.

Geoff was a whirlwind of intellectual energy. He immediately started collecting materials that he would pass on to me—almost daily in those early days—for inclusion in the course-text. They ranged from edited excerpts of De Tocqueville to Cardozo's ruminations on judging. Geoff ultimately designed the course in a way that neatly captured his brilliance. He thought the best way to introduce American law to these masters students would be through the great cases in the traditional law school curriculum. Hence, the course materials were divided into the classical subject areas of contracts, torts, civil procedure, and so forth. The text contained excerpts from the most celebrated cases in those areas—such as *Palsgraf v. Long Island Railroad Co.*<sup>3</sup> in torts and *Hadley v. Baxendale*<sup>4</sup> in contracts. These cases, however, operated as anchors for the other cases and articles that developed the core lessons to be imparted.

The brilliance of this strategy—indeed, the brilliance of Geoff's insightfulness about the law—became evident the first year we taught the class. He had constructed the class around the big ideas of the law; those cases served to create an intellectual latticework on which Geoff would hang innumerable lessons of legal thinking and insights. But they did more too. Geoff's approach worked on at least three completely different levels of intellectual discourse.

First, as a substantive law class, it gave the students a rigorous education into critical legal thinking and the procedures and processes of the law. It was anything but easygoing for these very talented health sciences students. (The inaugural class had, among other stellar students, a neurosurgeon, a pediatric endocrinologist, and a former chief medical officer.) More than one of those students told me that law school generally, and the range of material presented in our class, rivaled the difficulty of any class they had had in medical school. Geoff sought to impart a couple of basic lessons through the cases and materials and his lectures. Foremost, he wanted the students to understand the

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2. Since its inception, the UC Hastings MSL has been broadened to include students from business and tech backgrounds, as well as those that wish to tailor the degree to their own interests.

3. 162 N.E. 99 (N.Y. Ct. App. 1928).

4. 156 Eng. Rep. 145 (Ex. Ch. 1854).

development of legal doctrine through time, along with an appreciation for the fact that those doctrines sought to bring about particular societal outcomes. Geoff never separated a rule from the objective or consequence of that rule. Moreover, he saw the law as having to be responsive to changing social conditions, but ever mindful that legal decisions affected those very social conditions. In response to an ABA interview question about his favorite subjects to teach, Geoff noted that:

I've always been interested in the normative setting of law. That is, law consists of formal rules and formal procedures, but that's not by a long shot what it is that influences how people behave. So I've always thought that attention to the ambient situation in which legal problems arise is very important, and that ambient situation is importantly determined by what the prevailing moral sentiment is. As Holmes said, "The felt necessities of the time."<sup>5</sup>

Another lesson that Geoff was always mindful about was ensuring that the students appreciated the fundamental connectedness of the first-year subjects we covered. Of course, most law students come to appreciate that, for instance, the fact that Benjamin Cardozo wrote both *Palsgraf* in torts and *MacPherson v. Buick Motor Co.*<sup>6</sup> in contracts that a common thread might be found between them. Geoff never treated cases in a compartmentalized way and he was simply brilliant in weaving those common threads into a beautiful tapestry.

A second level of intellectual discourse Geoff sought to impart, and to some extent occupying the other end of the pedagogical spectrum of intellectual discourse, was his desire to give these students an education that permitted them to fit in with their J.D. student colleagues. A not insubstantial part of the law school experience is developing a shared culture and common experience with your fellow law students. Beyond the hazing nature of 1L year, law students develop a common vocabulary and knowledge of certain cornerstone ideas and, perhaps more so, an appreciation of the characters that inhabit legal narratives. These ideas run from the complex, such as the division between law and equity in defining causes of action and remedies, to Helen Palsgraf's unfortunate injury due to remote and unforeseeable circumstances. Geoff's materials gave these students a broad introduction into legal discourse, both profound and casual.

Finally, third, and more a product of Geoff's lecture style than the content itself, he brought the human element endemic to the law to life. Geoff was a product of the school of legal realism and often displayed a healthy skepticism about the motivations that lay below legal doctrine. For instance, I remember once sharing an elevator with Geoff and he asked me what class I was on my way to teach. When I told him constitutional law, he smiled and said, "Ah, current events." Geoff was able to bring the human element into class discussion in two fundamental ways. First, he reveled in telling stories about the people

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5. *Member Spotlight: An Interview with Prof. Geoffrey Hazard*, A.B.A. BUS. L. TODAY (Sept. 19, 2018), [https://www.americanbar.org/groups/business\\_law/publications/blt/2014/07/member\\_spotlight/](https://www.americanbar.org/groups/business_law/publications/blt/2014/07/member_spotlight/).

6. 111 N.E. 1050 (N.Y. Ct. App. 1916).

behind the cases and how their perspectives, biases, and, often enough, peccadillos, affected the law's development. Second, he had a simple humanity about him, such that every student felt himself or herself a valued contributor to every conversation and each developed a bond of friendship with him.

But Geoff was no "crit." While he well understood the underlying foibles of the human characters that presided over legal processes, he deeply believed in the rule, and the rationality, of the law. Geoff related to, and in many instances embodied, the objective procedural and rule-oriented basis on which the fabric of the law rests. But these procedures and rules are employed by people with predispositions and agendas that pushed and distorted that fabric in a multitude of ways. While Geoff was always realistic, he never descended into cynicism.

When Geoff died, I sent around an email to the UC Hastings community relating this sad news. I was not surprised that this set off an avalanche of reply-all emails that expressed grief and sorrow over his passing. Many of those wrote about their experiences having Geoff as a professor at Chicago, Yale or Penn. They talked of his demanding character in the classroom, but also how his lessons resonated years later in their practices and classrooms. What perhaps struck me most, however, was how many told personal stories of the ways that Geoff had helped them over the years. It seemed that Geoff had become a consigliere for the community and, so far as I could discern, had never turned anyone down when they sought his advice and assistance. Professor Blaine Bookey, for instance, the Co-Legal Director of Hastings' Center for Gender & Refugee Studies (CGRS), shared the following:

What a wonderful man, so generous with his time and expertise. Many may not know, but for the last several years, he has been a lifeline for us at CGRS providing invaluable insight on the thorny ethical issues we encounter providing guidance to thousands of attorneys each year representing asylum seekers. Not knowing me from Eve, Professor Hazard answered every email and phone call from me with graciousness and promptness. And it goes without saying he always had an answer.<sup>7</sup>

I had my own experience with Geoff's willingness to offer counsel and whatever help he could provide. My daughter Sarah is a sociologist who did her graduate work at UCLA. When she was working on her dissertation, she came to me with a problem. She was interested in studying the lawyer/client dynamics of a non-profit immigration clinic in which she had volunteered. Specifically, she hoped to be able to interview both attorneys and their undocumented clients about their respective experiences with the U.S. immigration system, as well as one another. When she sought permission from the non-profit's directors to carry out this research, they raised ethical and privilege concerns. Understandably, they were reluctant to go forward without knowing what the law provided in such cases.

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7. Email from Blaine Bookey, Co-Legal Dir., UC Hastings Center for Gender & Refugee Studies, to David Faigman, Dean & Chancellor, UC Hastings (Jan. 11, 2018, 3:41 PM PST) (on file with *Journal*).

Sarah came to me and, of course, being a law professor and her father, she naturally expected that I would know what to do. And I did. I called Geoff.

Geoff agreed to talk with Sarah about her project, which he made time to do the next day. He ended up working with Sarah to fashion her research so that it would be acceptable under the Rules of Professional Responsibility. He gave her a detailed roadmap regarding how to structure her research and then provided feedback on the proposal she wrote to assuage the organization's concerns. He then wrote a letter to the Clinic's Directors offering his opinion that her plan passed muster under the Rules.

When Geoff joined our faculty, he was one of the most influential legal scholars in the country and, for UC Hastings, harkened back to the most famous members of the 65-Club, reminiscent of other great scholars, such as William Prosser, Richard Powell and Louis B. Schwartz (also from Penn), who joined the Hastings faculty after retiring elsewhere. Geoff was a true giant in the law. He was a deeply inspiring teacher, a mentor to many generations of students and faculty, an enormously influential scholar, and a dear friend to so many of us. He was a man for all seasons and I will miss him dearly.



## Articles

# Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators

BENJAMIN H. BARTON<sup>†</sup> & DEBORAH L. RHODE<sup>♠</sup>

*This Article explores controversies over bar regulation of new online technologies that help address the routine legal needs of low- and middle-income consumers. It is critical that lawyer regulators resist the temptation to restrict organizations that respond to the nation's huge unmet needs of individuals of limited means. After briefly reviewing the rise of technology in this space, this Article discusses efforts to rein in three of the largest U.S. providers of consumer-oriented legal services, LegalZoom, Rocket Lawyer, and Avvo Legal Services. Analysis then focuses on the lawsuits and regulatory restrictions faced by Avvo, and the ultimate demise of Avvo Legal Services in the face of bar ethical objections. The final Part of this Article considers the policy implications of the Avvo case history, and concludes that efforts to restrain these initiatives do not serve the interests of the profession or the public.*

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<sup>♠</sup> Ernest W. McFarland Professor of Law, Director of the Center on the Legal Profession at Stanford University. Professor Rhode served as an advisor to Avvo during its initial startup planning, and on its first advisory board, but has no current affiliation with the company.

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## INTRODUCTION

We are honored to publish this Article in a symposium dedicated to Geoffrey Hazard, Jr., the founding father of the field of American legal ethics. I (Professor Rhode) had the good fortune to know him in that context as a student, mentor, coauthor, and friend, and his death marks an enormous loss for me personally as well as professionally. Geoff was my only professor at Yale Law School who ever mentioned ethics. When I attended in mid-1970s, Yale had no required course in professional responsibility. In theory, legal ethics was taught by the pervasive method. In practice, it was pervasive only in its absence. My recollection is that none of us in his basic course on civil procedure paid much

attention to his occasional references to ethical issues. They seemed peripheral and unlikely to be on the exam. But they were, and I am ashamed to admit that I did not distinguish myself in responding. I at least spotted the problematic behavior and pronounced simply, “This would be wrong.” It was not the balanced analysis that he was looking for.

But I ended up taking other courses from him and when I became interested in the topic later, we coedited one of the first books of legal ethics teaching materials together.<sup>1</sup> We later coauthored a reader on the subject.<sup>2</sup> We did not always agree. Geoff went on to become a reporter on the American Bar Association’s Model Rules of Professional Conduct, and I spent much of my early career critiquing those Rules and the organized bar’s stance on competition and access to legal services. But he, too, recognized the self-interest that compromised professional regulatory practices, and I think he would be pleased to know that an Article exploring how lawyers *should* respond to problems of unmet legal needs is part of a symposium in his honor.

We are in the early stages of a technological revolution in legal services. Technology is displacing lawyers in a wide array of tasks such as document drafting, review, and assembly, and is also reshaping the way that lawyers find clients and deliver assistance. For most consumers, these are welcome developments. Such innovations generally reduce costs and increase both accessibility and efficiency. The potential gains are particularly great for low- and middle-income consumers, who cannot afford to address a vast array of basic, often urgent, legal needs. Yet for lawyers, the consequences of technology have been more mixed. Many feel that their professional independence and livelihoods are threatened by the growth of online forms, computerized algorithms, and price competition with internet providers. Responding to these concerns, bar regulators have often fought back through ethics rulings that attempt to rein in organizations such as LegalZoom, Rocket Lawyer, and Avvo Legal Services.

This Article explores the contested technological terrain of legal services for low- and middle-income Americans. It uses the regulatory battle over Avvo Legal Services as a case study of how bar regulators are, and should be, responding to innovations in the legal market for consumers of limited means. After a wave of bar objections to Avvo Legal Services, Avvo’s new parent company, Internet Brands, announced the cancellation of the program in July 2018. Some bar regulators (and lawyers) will consider this a rare triumph in their battle against the provision of legal services on the Internet. We however, consider the demise of Avvo Legal Services to be bad news for American consumers and, paradoxically, also bad news for the American legal profession.

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1. See generally GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* (1985).

2. See generally DEBORAH L. RHODE & GEOFFREY C. HAZARD, JR., *PROFESSIONAL RESPONSIBILITY AND REGULATION* (2002).

Our argument is that defeating Avvo Legal Services, which packages and sells the services of licensed attorneys, while leaving interactive forms providers like LegalZoom and Rocket Lawyer in place, does nothing more than freeze lawyers out of a growing marketplace, and cedes too much of the field to computer programs.

Part I offers a brief overview of the rise of technology in this arena. Part II describes the three big players in consumer-oriented internet legal services—Avvo, LegalZoom, and Rocket Lawyer—with a special focus on the history of Avvo Legal Services. Part III covers some of the lawsuits and regulatory restrictions that Avvo Legal Services encountered and describes its ultimate demise. Part IV assesses the objections of bar regulators to that program and argues that it should have been allowed with some minor reforms. Part V discusses the policy implications of this case history and concludes that initiatives such as Avvo Legal Services can not only enhance access to justice but also assist a struggling part of the legal profession.

Our central argument is that lawyers should embrace the inevitable. Technological innovations are here to stay, and the organized bar should be looking for ways to harness their potential to help underserved constituencies that need help most. The best estimates are that over eighty percent of the legal needs of the poor, and forty to sixty percent of the needs of middle-Americans remain unmet; these figures have not budged over the last three decades.<sup>3</sup> According to the World Justice Project, the United States ranks ninety-fourth out of 113 countries in the “accessibility and affordability” of its civil justice system, below every other high income country, and even below struggling nations such as Afghanistan and Sierra Leone.<sup>4</sup> We can, and *must* do better, and technological innovations such as those pioneered by Avvo are part of the way forward.

We also argue that purely from the standpoint of self-interest, the legal profession should have supported Avvo’s entry into this market. Lawyers in all fields, but particularly those who serve small businesses and middle-class consumers, face increasing competition from online legal services. In the past, Americans who wanted to handle their own routine needs without a lawyer might have tried to buy a book of forms or consulted a form-processing service with limited ability to provide customized assistance. Now those customers can

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3. For estimates regarding the poor, see LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 7–8 (2017). For earlier estimates, see Deborah L. Rhode & Scott L. Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 *GEO. J. LEGAL ETHICS* 485, 487 n.12 (2017). For estimates pertaining to the middle-class, see REBECCA BUCKWALTER-POZA, *CTR. FOR AM. PROGRESS, MAKING JUSTICE EQUAL 2* (2016), <https://cdn.americanprogress.org/content/uploads/2016/12/07105805/MakingJusticeEqual-brief.pdf>.

4. See Carolyn Mobley, *U.S. Again Ranks Among Worst in World for Access and Affordability of Legal Help*, *RESPONSIVE L.* (Mar. 5, 2018), <https://www.responsivelaw.org/blog/us-again-ranks-among-worst-in-world-for-access-and-affordability-of-legal-help>.

meet their legal needs with LegalZoom or Rocket Lawyer, frequently at a price that no attorney can afford to match.

In order to compete in this new marketplace, lawyers serving middle- or low-income consumers must learn how to provide services with greater efficiency and lower cost. They will also need to spend more of their time servicing clients and less of their time finding clients or managing their businesses. And because no lawyers will be able to compete with internet computer programs like LegalZoom's on price, they must learn to compete on quality, cost-effectiveness, and personal responsiveness.

That is no small task. But neither is it impossible, and Avvo Legal Services was an example of how to market routine legal services delivered *by lawyers*, not machines. Instead of smothering this attempt, bar regulators should have tried to find ways to make it work because one way or another technology is going to increase competition and reduce prices in the market for legal services. Either lawyers can get in the game and use technology to compete against online forms or onerous bar restrictions may drive lawyers out of that competition and leave the field open for computers to dominate.

We argue that Avvo Legal Services was an opportunity for bar regulators and lawyers to do well *and* do good. We still have the opportunity to expand access to justice at the same time as we make lawyers more competitive with online legal services. Others are, and will be, trying to marry lawyers, technology, and fixed-fee assistance, and bar associations should find a way to “get to yes” next time, for the good of consumers and the profession.<sup>5</sup>

## I. TECHNOLOGICAL INNOVATION IN THE MARKET FOR SERVICES

### A. MARKET TRENDS

The extent to which technology will transform the practice of law is in dispute. Some see a future in which legal artificial intelligence (“AI”) will largely replace humans in providing legal advice and drafting documents.<sup>6</sup> Others doubt that AI will progress that far.<sup>7</sup> But, everyone agrees that computers are already displacing human lawyers in areas like document review and assembly and will likely continue to do so.<sup>8</sup>

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5. For examples, see *infra* text accompanying notes 22–24.

6. See, e.g., John O. McGinnis & Russell Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 *FORDHAM L. REV.* 3041, 3041–42 (2014) (arguing that legal AI will prove extremely disruptive and may largely replace humans).

7. See, e.g., Dana Remus & Frank Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 30 *GEO. J. LEGAL ETHICS* 501, 536–37 (2017) (arguing that legal AI will be much more circumscribed in effect).

8. See, e.g., Rhys Dipshan, *Looking Beyond Document Review, Legal Is Branching Out with Artificial Intelligence* (July 23, 2018, 10:00 AM), <https://www.law.com/legaltechnews/2018/07/23/looking-beyond-document-review-legal-is-branching-out-with-artificial-intelligence/?slreturn=20190128214952>; William

There is, however, a less noticed revolution occurring under our noses: the computerization of legal services aimed at America's low- and middle-income consumers. For individuals with relatively routine needs, technology is opening up whole new markets and disrupting existing markets. The companies at the forefront of this revolution are not just replacing lawyers on selected tasks, or using technology as part of a team run by a lawyer. Instead, they are replacing lawyers wholesale in areas like preparing wills or forming limited liability corporations. A vast array of interactive legal forms are now available for sale by LegalZoom, Rocket Lawyer, and others.<sup>9</sup> Similar services are available for free to the poor through court-sponsored websites and programs such as A2J Author.<sup>10</sup>

Technology is also radically reshaping the way that middle-class consumers find lawyers. Traditionally, most people found lawyers through personal referrals.<sup>11</sup> The Yellow Pages were another common resource. In the early 2000s, lawyers reportedly received 328 million references a year from ads in the Yellow Pages.<sup>12</sup> As late as 2011, an American Bar Association ("ABA") survey asked consumers how they would find a lawyer for a personal legal matter, and "look in the Yellow Pages" out-poll "look online."<sup>13</sup>

In response to this demand, lawyers often bought larger and splashier Yellow Page ads, some of which featured surprisingly unflattering photos of the lawyers themselves.<sup>14</sup> But as Americans spent more of their lives online, their method of finding a lawyer followed suit. By 2014, the Internet was the primary way of finding a lawyer, preferred by thirty-eight percent of the public.<sup>15</sup> Twenty-nine percent would ask a friend and only four percent reported that they

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Henderson, *What the Jobs Are: New Tech and Client Needs Create a New Field of Legal Operations*, A.B.A. J. (Oct. 2015), [http://www.abajournal.com/magazine/article/what\\_the\\_jobs\\_are](http://www.abajournal.com/magazine/article/what_the_jobs_are).

9. See *Easy Legal Documents at Your Fingertips*, ROCKET LAW., <https://www.rocketlawyer.com/legal-documents-forms.r/> (last visited Apr. 16, 2019); *Legal Forms*, LEGALZOOM, <https://www.legalzoom.com/legalforms/> (last visited Apr. 16, 2019).

10. See *Welcome to A2J Author*, A2J AUTHOR, <https://www.a2jauthor.org> (last visited Apr. 16, 2019) ("A2J Author is available for free to interested court, legal services organizations, and other non-profits . . .").

11. See Mary E. Vandenack, *Sustainable Trusts and Estates and Real Property Practices*, PROB. & PROP., Nov./Dec. 2018, at 31 ("Traditionally, personal relationships and personal referrals were the primary way that lawyers connected with clients.").

12. BARRY MAHER, GETTING THE MOST FROM YOUR YELLOW PAGES ADVERTISING: MAXIMUM PROFITS AT MINIMUM COST 39 (3d ed. 2006).

13. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., PERSPECTIVES ON FINDING PERSONAL LEGAL SERVICES: THE RESULTS OF A PUBLIC OPINION POLL 8 (2011), [https://www.americanbar.org/content/dam/aba/administrative/delivery\\_legal\\_services/20110228\\_aba\\_harris\\_survey\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/20110228_aba_harris_survey_report.authcheckdam.pdf) [hereinafter PERSPECTIVES ON FINDING PERSONAL LEGAL SERVICES].

14. See, e.g., Lloyd Duhaime, *Outrageous Attorney Ads: The Good, the Bad and the Ugly*, DUHAIME.ORG, <http://www.duhaime.org/LawFun/LawArticle-1394/Outrageous-Attorney-Ads-The-Good-The-Bad-And-The-Ugly.aspx> (last updated Dec. 13, 2012).

15. *Internet Is Now the Most Popular Way to Find and Research a Lawyer, Says FindLaw Survey*, THOMSON REUTERS (Apr. 17, 2014), <https://www.thomsonreuters.com/en/press-releases/2014/internet-lawyer-search-survey.html>.

would consult the Yellow Pages.<sup>16</sup> Another recent survey found that three-quarters of consumers seeking a lawyer would use online resources at some point in the process.<sup>17</sup> Avvo has been the leader in this segment of the market, calling itself “the largest online legal marketplace for lawyers to connect with consumers.”<sup>18</sup>

Technology has not only changed the ways that Americans find lawyers, it has created new ways of retaining them. LegalZoom and Rocket Lawyer both sell monthly plans for legal advice from attorneys.<sup>19</sup> It’s Over Easy is a website that offers couples several packages of divorce services.<sup>20</sup> The basic plan offers downloadable forms and spousal support calculators, and more expensive plans serve papers and offer telephone and email consultations.<sup>21</sup> The TIME’s UP Legal Defense Fund, handled by the National Women’s Law Center, is an online matching service that pairs lawyers with individuals seeking assistance for sexual harassment and discrimination.<sup>22</sup> Avvo Legal Services is also a matching program that sold basic legal services such as divorces, wills, and incorporations for a flat fee.<sup>23</sup> At first glance, this may not appear all that innovative. Low, flat fees for routine services are the hallmark of LegalZoom and Rocket Lawyer. Avvo Legal Services’ innovation was that the customers hire a licensed lawyer to do the work, rather than proceeding through a computer-driven forms program.<sup>24</sup>

In some ways, this approach seems like the least tech savvy of these largest online innovations. Unlike LegalZoom or Rocket Lawyer, Avvo Legal Services only automated the shopping experience, not the work itself. Given its modest fees, participating lawyers may well have used their own standardized forms, but that is between the lawyer and the client, not the lawyer and Avvo. What made this program innovative was its pivot from computer programs that replace

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16. *Id.* The Internet is now so dominant in this area that we thought the weirdest finding of the survey is that there were still people in 2014 who have the Internet but would use the Yellow Pages for anything, let alone finding a lawyer.

17. Sarah Mui, *People Look to Yelp to Find Lawyers Online, Survey Says: Fallout over Facebook Mood Study?*, A.B.A. J. (July 11, 2014, 1:30 PM), [http://www.abajournal.com/news/article/around\\_the\\_blawgosphere\\_yelp\\_facebook\\_e-signature](http://www.abajournal.com/news/article/around_the_blawgosphere_yelp_facebook_e-signature).

18. Karen West, *Pardon the Disruption: Consumers Get to ‘Test Drive’ Attorneys with Avvo’s On-Demand Service*, SEATTLE BUS. MAG., Nov. 2015, at 20, 24.

19. *See Let’s Do This Together: We’ll Make Sure You’re on the Right Path to Success for Your Legal and Tax Matters*, LEGALZOOM, <https://www.legalzoom.com/attorneys/> [<https://perma.cc/Y8KS-YTVR>] (last visited Apr. 16, 2019); *Tell Us What You Need—We’ll Recommend the Plan for You*, ROCKET LAW., <https://www.rocketlawyer.com/plans-pricing.r/#/> [<https://perma.cc/LZY4-CXP5>] (last visited Apr. 16, 2019).

20. Amy Sohn, *Easier Path to Divorce? Go Online*, N.Y. TIMES, Feb. 8, 2018, at 1L.

21. *Id.*

22. Elizabeth Blair, *Here’s How the Time’s Up Legal Defense Fund Actually Works*, NPR (Mar. 11, 2018, 8:16 AM), <https://www.npr.org/2018/03/11/592307856/heres-how-the-time-s-up-legal-defense-fund-actually-works>.

23. *See generally Avvo Legal Services*, AVVO, <https://www.avvo.com/legal-services> [<https://perma.cc/UR69-VU3C>] (last visited Apr. 16, 2019).

24. *See infra* notes 93–123 and accompanying text.

lawyers to computer programs that connect lawyers with clients. LegalZoom and Rocket Lawyer started this trend with their legal advice subscription services, but those programs do not directly link attorneys and consumers on specific legal work. Avvo provided this link in a readily accessible and affordable form, and not just for a narrow range of services, such as divorce or gender-related misconduct.

#### B. THE MIXED BENEFITS OF NEW TECHNOLOGIES

One key benefit of new technologies is that they enhance providers' ability to differentiate their offerings. So, if customers want a true do-it-yourself experience of legal services, they can buy a form through LegalZoom and fill it out themselves. If they want somewhat more guidance, they can opt for an interactive program that asks questions and then generates completed forms. If a LegalZoom or Rocket Lawyer client wants some legal advice to go with their forms they can pay for the subscription service, and an It's Over Easy client can buy a more expensive package.

If consumers want to pay a flat fee for more traditional legal services, however, there were few options before the launch of Avvo Legal Services. Avvo hoped that its matching service would demystify the process and help lawyers and clients find each other with minimal transaction costs and a fixed price point that works for both.

There are some further upsides for consumers from this tech explosion. First, when a service or product is commoditized and sold on the Internet, the price of that service tends to drop, sometimes dramatically. This is of particular benefit in the legal services market for low- and middle-income Americans, which, as noted earlier, is characterized by pervasive unmet needs. Second, the Internet offers greater transparency and information in a market that has lacked both for years. One reason that consumers traditionally relied so heavily on the recommendations of friends or family in hiring lawyers was that it was difficult to find more credible information concerning quality. Bar-run referral services did not rate lawyers. Nor did bar regulatory authorities disclose lawyer disciplinary and malpractice records in a form accessible to consumers.<sup>25</sup> One of Avvo's greatest contributions to the market for legal services is its national data bank on lawyer disciplinary actions, as well as its platform for client reviews and its own quality rating.<sup>26</sup>

The impact of these technologies on lawyers is more mixed. Some experts, including Great Britain's leading authority Richard Susskind, believe that technologies will eventually displace attorneys in any context where services

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25. DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* 107–08 (2015).

26. *See infra* notes 39–54 and accompanying text.



can be routinized and commodified.<sup>27</sup> Other commentators are less pessimistic.<sup>28</sup> They believe that technology has the potential to bring new consumers into the market by making services more accessible and affordable. In their view, a growing market and more demand for services would compensate for the inevitable fall in prices. Many commentators similarly argue that technological innovation and standardization can help lawyers increase profits by reducing costs. A wide array of research indicates that solo and small practitioners are spending too much time on running their businesses and seeking clients.<sup>29</sup> Technology can help streamline these processes as well as relieve lawyers from some of the most routine, mind-numbing aspects of legal practice.

The rank and file of the profession, however, has not always been eager to embrace these opportunities. At first, this allowed early non-lawyer adopters to capitalize on technological innovations without attracting competition or regulatory attention. For example, bar regulators did not get around to trying to stem LegalZoom until 2007, long after the company was already well known and hard to dislodge.<sup>30</sup> This late start may help explain why the organized bar has largely failed in its efforts to curtail LegalZoom's online forms business.<sup>31</sup>

By contrast, bar regulators immediately sought to ban lawyers from participating in the new Avvo Legal Services Plan, which is part of why they succeeded in killing it. By Summer 2018, ethics committees in Illinois, Indiana, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Utah, and Virginia had all issued opinions condemning certain aspects of the plan.<sup>32</sup> The collective weight of these opinions helped convince Avvo's new parent company to terminate its Legal Services Plan. There was an irony to this result—bar regulators have been unable to restrict many of the technological innovations that are in direct competition with lawyers, including computerized forms and free legal advice. Instead, regulatory authorities are attempting to curtail a technology that seeks to bring consumers and lawyers together (albeit at a much lower price), which could benefit under-employed tech-savvy practitioners.

What accounts for this anomalous outcome? One explanation is that bar regulators are at their most powerful when regulating licensed lawyers, rather than non-lawyer competitors. For example, when LegalZoom received a cease and desist order from the North Carolina Bar, it just plowed on, and eventually challenged the bar in the courts.<sup>33</sup> By contrast, the bar ethics opinions

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27. See RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 57 (2013).

28. See, e.g., BENJAMIN H. BARTON & STEPHANOS BIBAS, *REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW* 110–37 (2017).

29. See *infra* notes 91–107 and accompanying text.

30. Deborah L. Rhode & Benjamin H. Barton, *Rethinking Self-Regulation: Antitrust Perspectives on Bar Governance Activity*, 20 *CHAP. L. REV.* 267, 277–79 (2017).

31. *Id.*

32. See *infra* notes 149–169 and accompanying text.

33. Rhode & Barton, *supra* note 30, at 277–79.

condemning Avvo Legal Services placed the participating lawyers at risk of professional discipline. Many may have been reluctant to assume that risk.

Another reason that the bar targeted Avvo Legal Services is that lawyers serving individual consumers have long hated price competition. For years, bar associations published mandatory fee schedules and banned advertising that included fees.<sup>34</sup> Avvo created a national, fixed price point for a large number of bread and butter legal services. If it had survived and prospered, other lawyers might have had to match these prices or explain to consumers why they should pay more.

## II. THE EVOLUTION OF THE ONLINE MARKET FOR LEGAL SERVICES

To understand the current regulatory debate, a bit of history is helpful. Starting in the 1970s, Nolo Press published a groundbreaking series of books of legal forms that consumers could fill out themselves, together with limited advice about how to do so.<sup>35</sup> LegalZoom launched in 2001 with a similar set of online fill-in forms for purchase.<sup>36</sup> Over time, LegalZoom added a more sophisticated, interactive question-and-answer approach that assembled the completed forms online.<sup>37</sup>

Rocket Lawyer launched in 2008 with a slightly different business model. It too provided interactive legal forms, but it offered the first form “free,” as long as the client signed up for a legal advice subscription service.<sup>38</sup> This may seem like a small difference, because the main draw at both sites was the forms. But, prioritizing subscriptions actually signals a very different business model. Rocket Lawyer uses its forms business to drive clients into its lawyer-centered legal advice business. When Rocket Lawyer was founded in 2008, LegalZoom still pitched itself mostly as a replacement for the work of lawyers.

Rocket Lawyer’s approach was apparently promising, because LegalZoom added a similar offering in 2010, “creating an ‘independent attorney network’ for people to get personalized legal advice to address their individual needs.”<sup>39</sup> Although other interactive internet forms providers have sprung up, LegalZoom and Rocket Lawyer remain the largest players.<sup>40</sup>

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34. See, e.g., *Bates v. Ariz. State Bar*, 433 U.S. 350, 359 (1977) (applying antitrust laws to advertising); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792–93 (1975) (applying antitrust laws to minimum fee schedules).

35. See *Our History*, NOLO, <https://www.nolo.com/about/history> (last visited Apr. 16, 2019).

36. *About Us*, LEGALZOOM, <https://www.legalzoom.com/about-us> (last visited Apr. 16, 2019).

37. BENJAMIN H. BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* 88–97 (2015).

38. *Id.* at 95.

39. *About Us*, *supra* note 36.

40. Lawdepot.com offers a free trial and then guides users into a subscription model, for example. See *About*, LAWDEPOT, <https://www.lawdepot.com/about.php> (last visited Apr. 16, 2019).

#### A. AVVO LAUNCHES AS A RATINGS SITE FOR LAWYERS

Mark Britton co-founded Avvo in 2007.<sup>41</sup> As the general counsel for Expedia, he watched his company cut into the market for travel services by replacing individual agents with online programs that quickly compared prices and services while eliminating the middle man.<sup>42</sup> This experience led Britton to wonder whether there was a similar way to monetize online information about legal services.<sup>43</sup> As noted earlier, the traditional sources of information about lawyers' performance were quite limited. Neither the Yellow Pages nor bar referral networks offered reliable quality assessments, and friends and family members seldom had enough expertise to evaluate the cost-effectiveness of the assistance they received or how it compared with that available from other practitioners. Nor was there any easy way to find out if a lawyer had been subject to disciplinary charges. Avvo aimed to fill this market gap. Britton named the company Avvo as a shorthand for *avvocato*, the Italian word for lawyer.<sup>44</sup>

Avvo began by gathering as much public information on lawyers as it could, including information from bar disciplinary authorities and lawyers' own websites.<sup>45</sup> Eventually, Avvo provided a ten-point rating for individual attorneys based on the data it was able to collect. Its exact formula is proprietary, but Avvo claimed that it relied on information supplied by attorneys regarding their professional experience and accomplishments, as well as "public records (state bar associations, regulatory agencies, and court records) and published sources on the internet [including attorneys' websites]."<sup>46</sup>

Avvo claims that it does not disclose exactly how it weighs information "primarily because we don't want anyone gaming the Avvo Rating system."<sup>47</sup> For lawyers who find the system overly opaque, a cottage industry of websites and advisors has sprung up to help practitioners boost their Avvo scores.<sup>48</sup> The easiest way is to "claim" your Avvo profile and then provide as much positive

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41. Mark Britton, *Five Questions: Mark Britton on the Avvo Online Legal Directory*, OREGONIAN (June 12, 2009), [http://www.oregonlive.com/business/index.ssf/2009/06/five\\_questions\\_mark\\_britton\\_on.html](http://www.oregonlive.com/business/index.ssf/2009/06/five_questions_mark_britton_on.html).

42. *Id.*

43. *Id.*

44. *Id.*

45. Kevin O'Keefe, *Coffee with Avvo Founder Mark Britton*, REAL LAWS. BLOG (July 3, 2007), <http://kevin.lexblog.com/2007/07/03/coffee-with-avvo-founder-mark-britton/>.

46. *What Is the Avvo Rating?*, AVVO, <https://support.avvo.com/hc/en-us/articles/208478156-What-is-the-Avvo-Rating-> (last visited Apr. 16, 2019).

47. See Stacey L. Romberg, *Attorney Rating Systems: Should You Play? Part 1*, A.B.A. GPSOLO EREPORT (May 2015), [https://www.americanbar.org/publications/gpsolo\\_ereport/2015/attorney\\_rating\\_systems\\_should\\_you\\_play\\_part\\_1.html](https://www.americanbar.org/publications/gpsolo_ereport/2015/attorney_rating_systems_should_you_play_part_1.html) [<https://perma.cc/5ER6-RHCA>] (internal quotation marks omitted) (quoting Avvo's website as it existed at the time).

48. See, e.g., William Pfeifer, *What Is Avvo and the Avvo Lawyer Ranking System?*, BALANCE, <https://www.thebalance.com/what-is-avvo-and-the-avvo-lawyer-ranking-system-2151221> (Jan. 25, 2019); *Understanding & Increasing Your Avvo Rating*, JURIS DIGITAL, <https://jurisdigital.com/guides/increase-avvo-rating/> (last visited Apr. 16, 2019).

information as possible on your experience, awards, and so forth.<sup>49</sup> By providing lawyers an incentive to become active participants on the site, Avvo also enlists them as potential purchasers of advertising and related services.<sup>50</sup>

This is, of course, the genius of the Avvo model. It is hard to make money providing free information on the internet, especially in a niche market like law. Anyone who doubts this point should just ask their local newspapers how the online revolution has worked out for them. Avvo sidesteps this difficulty by drawing potential clients onto the site with free ratings and other legal information, and then charging lawyers to advertise to those clients. Avvo was founded to provide information to consumers, but its profits come from sales to lawyers. This is a textbook illustration of the internet quip: “If you’re not paying for a website, you’re not a consumer, you’re the product.”<sup>51</sup>

Avvo’s original business model is thus quite different from that of LegalZoom or Rocket Lawyer, which started out as direct competitors to lawyers. Avvo started in the opposite place; it makes its money from lawyers. Therefore, Avvo has a stake in the success of at least some practitioners, that is, those who pay to support it. As to other lawyers, not so much.

Avvo offers a number of services to practitioners.<sup>52</sup> They can purchase advertising on the Avvo site or pay Avvo to manage their personal website.<sup>53</sup> In addition, the company offers peer ratings and client ratings with comments.<sup>54</sup> The client rating runs from one to five stars, and client testimonials appear in a section of the lawyer’s profile.<sup>55</sup> The testimonials tend to be positive, partly because savvy lawyers can encourage their happy clients to post on Avvo, and partly because Avvo lawyers may be more keenly aware that positive client feedback is critical to success on the Internet. But Avvo includes some scathing client reviews as well, which do not affect the Avvo rating, but have caused enough concern that there are websites and consultants dedicated to how to react to bad reviews (lesson number one is that escalating the dispute never helps).<sup>56</sup>

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49. *Understanding & Increasing Your Avvo Rating*, *supra* note 48.

50. Scott H. Greenfield, *Avvo: Up to 5, Down from 10*, SIMPLE JUST. BLOG (Sept. 11, 2012), <https://blog.simplejustice.us/2012/09/11/avvo-up-to-5-down-from-10/>.

51. Scott Goodson, *If You’re Not Paying for It, You Become the Product*, FORBES (Mar. 5, 2012, 12:34 PM), <https://www.forbes.com/sites/marketshare/2012/03/05/if-youre-not-paying-for-it-you-become-the-product/#76232425d6ee>.

52. *Pricing*, AVVO, <https://www.avvo.com/for-lawyers/pricing> (last visited Apr. 16, 2019).

53. *Id.*

54. *Avvo: Love It? Loathe It? Or Maybe a Little of Each?*, FOSTER WEB MARKETING, <https://www.fosterwebmarketing.com/blog/should-attorneys-claim-their-avvo-listing-.cfm> (last visited Apr. 16, 2019).

55. *Id.*

56. *How Should an Attorney Handle Negative Online Reviews?*, MOD. FIRM (Feb. 19, 2018), <https://www.themodernfirm.com/blog/qotw/how-should-an-attorney-handle-negative-online-reviews/>.

In early 2018, Internet Brands, a portfolio company owned by hedge funds, purchased Avvo.<sup>57</sup> Avvo joined Internet Brands' other legal offerings, including Martindale.com, Lawyers.com, and Nolo.<sup>58</sup>

#### B. AVVO'S PLACE IN THE COMPETITIVE WORLD OF ONLINE LEGAL SERVICES

At the time of its launch, it was not clear that Avvo would end up in direct competition with LegalZoom or Rocket Lawyer. Avvo was primarily a site for clients to find lawyers. Its revenue came from lawyers who purchased advertising or services to reach those clients. In order to stay successful, Avvo needed to keep drawing in potential clients, because without their eyeballs, lawyers would have no reason to buy advertising. This business model helps explain why most of what was originally on Avvo's platform was free (the rankings, the "ask a lawyer" Q&A function), while most of what was on LegalZoom or Rocket Lawyer came with a charge. Given the structural differences in these service providers, it initially seemed possible that Avvo could coexist in uneasy détente or even in alliance with its internet siblings. But the economic forces operating on high tech companies pushed Avvo in a different direction. Avvo, LegalZoom, and Rocket Lawyer are all under continual, hydraulic pressure to expand revenues and eventually profits for at least three reasons.

First, all of these companies have benefitted from major investments by some very serious and savvy venture capital and all three are still privately held.<sup>59</sup> In 2011, LegalZoom filed the paperwork to go public, but sold itself to the private equity firm Permira instead when it looked like the offering might not be as profitable as hoped.<sup>60</sup> The deal was private, but estimates placed LegalZoom's value in 2011 at around \$500 million.<sup>61</sup> In 2018, Francisco Partners and GPI Capital invested another \$500 million.<sup>62</sup> LegalZoom's estimated value in the new deal was \$2 billion, reflecting a 300% growth in just six years.<sup>63</sup>

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57. See *Internet Brands to Acquire Avvo*, PR NEWSWIRE (Jan. 11, 2018, 12:30 PM), <https://www.prnewswire.com/news-releases/internet-brands-to-acquire-avvo-300581042.html>.

58. *Id.*

59. See *Avvo*, CRUNCHBASE, <https://www.crunchbase.com/organization/avvo#/entity> (last visited Apr. 16, 2019); *LegalZoom*, CRUNCHBASE, <https://www.crunchbase.com/organization/legalzoom-com#/entity> (last visited Apr. 16, 2019); *Rocket Lawyer*, CRUNCHBASE, <https://www.crunchbase.com/organization/rocketlawyer> (last visited Apr. 16, 2019).

60. BARTON, *supra* note 37, at 92, 94–95.

61. Zach Warren, *LegalZoom Announces \$500 Million Investment, Among Largest in Legal Tech History*, LAW (July 31, 2018, 12:29 PM), <https://www.law.com/2018/07/31/legalzoom-announces-500-million-investment-among-largest-in-legal-tech-history/>.

62. *Id.*

63. *Id.*

The investors in internet companies do not just want to see steady growth. They want to see explosive growth.<sup>64</sup> This puts significant pressure on company leaders either to expand existing product areas or to enter new product areas.<sup>65</sup> Steady or flat growth can be a death sentence for a tech company with venture capital financing.

Second, consumer review sites such as Avvo (and to a lesser extent legal services sites such as LegalZoom and Rocket Lawyer) have to worry about what economists call “network effects.” These effects occur when the value of a product increases when more people use the product.<sup>66</sup> The classic example is a fax machine. If there were only one fax machine on earth, the owner of that machine would not find it very useful. Each additional fax machine makes all the other fax machines more useful.

Social media networks are a more modern example. A public social network with few users is pretty useless. Most people don’t want to join multiple social networks or buy different types of fax machines. Thus, over time, network effects guide users to one dominant player, crowding out competitors. This is why Facebook has become so omnipresent and other competitors like Myspace have failed or stalled.<sup>67</sup>

Ratings sites like Avvo benefit from network effects in at least two ways. To the extent that they rely on user-generated content such as customer or peer reviews, the more the merrier. Users of the site prefer seeing large numbers of reviews. And because the point of the ratings is to draw eyeballs and advertising dollars, the larger the audience, the better.

The network effects for Rocket Lawyer and LegalZoom are less clear, but scale is also an advantage to them for reasons in addition to increased revenue. The more users a site has, the more data it can collect on what legal forms are most popular and what features work best. It can also share that information with consumers. For example, LegalZoom often offers a feature indicating, “How did most people answer this question?” on some of its interactive forms. Users can then see the most common response, which may help them answer the same

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64. See, e.g., Mara Zepeda, *Out with the Old: Silicon Valley Needs a New Kind of Sex Education*, QUARTZ (Feb. 18, 2016), <https://qz.com/618886/feminism-can-fix-silicon-valley/>.

65. For an example of the pressure on Twitter, see Dan Frommer & Kurt Wagner, *Twitter Only Grew by Two Million Users During Trump Mania—Facebook Grew by 72 Million*, RECODE (Feb. 9, 2017, 8:58 AM), <https://www.recode.net/2017/2/9/14558890/trump-twitter-user-growth>.

66. Catherine Tucker & Alexander Mathews, *Social Networks, Advertising, and Antitrust*, 19 GEO. MASON L. REV. 1211, 1217–20 (2012).

67. On Myspace, see Harrison Jacobs, *Former MySpace CEO Explains Why Facebook Was Able to Dominate Social Media Despite Coming Second*, BUS. INSIDER (May 9, 2015, 6:13 AM), <http://www.businessinsider.com/former-myspace-ceo-explains-why-facebook-was-able-to-dominate-social-media-despite-coming-second-2015-5>. On Twitter, with a bonus discussion of Snap, see Nick Bilton, *Oh Snap: Is Snap the Next Facebook—or Twitter?*, VANITY FAIR (Mar. 1, 2017, 6:00 PM), <https://www.vanityfair.com/news/2017/03/is-snap-the-next-facebook-or-twitter>.

question.<sup>68</sup> The more users, the better the information available to everyone. More users also offer more data about potential problems with the forms. LegalZoom and Rocket Lawyer have obvious reasons to want to improve the consumer experience and to avoid potential liability for mistakes. More feedback allows for more tweaking, and over time this process improves the product.

Finally, network effects push information markets toward monopoly, and once a monopoly position is established, it is generally hard to dislodge.<sup>69</sup> This is why there are so many internet monoliths.<sup>70</sup> There are system-wide advantages to having only one eBay for online auctions, one Facebook for social networking, and one Google for search. In these markets, individuals generally prefer to go to the one site that everyone uses, because as more people use the service, the service actually improves. Network effects make the competition in emerging information markets particularly fierce, because often there will be only one survivor.<sup>71</sup> This is one of the central drivers of the “winner-take-all” economy.<sup>72</sup> The victor will also reap monopoly profits, which further increases the stakes. Add all of these factors together and you have a pretty rough and tumble battle for market dominance. That helps explain why LegalZoom has sued Rocket Lawyer for false advertising and the companies have expanded their competitive battle into the United Kingdom and other countries.<sup>73</sup>

Avvo’s various expansions have brought it into more direct competition with LegalZoom and Rocket Lawyer. By 2017, Avvo was, by its own account, the web’s largest and most heavily trafficked legal resource with over eight million visits per month.<sup>74</sup> Despite, or perhaps partly because of that success, it has also come into increasing conflict with state regulators of legal services.

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68. To find this feature, start any of the LegalZoom interactive forms. For LLC creation, for example, answer the first few pages of questions and you get to a page that asks “[h]ow many owners will your business have?” and “[a]re you forming a new business?” For each of these questions LegalZoom lets you see how most users answered the question. *Business Formation: LLC (Limited Liability Company)*, LEGALZOOM, <https://www.legalzoom.com/business/business-formation/llc-overview.html> (last visited Apr. 16, 2019). If you answer the first few pages of questions, you will see the common responses.

69. Alan Devlin, *Analyzing Monopoly Power Ex Ante*, 5 N.Y.U. J.L. & BUS. 153, 182 (2009).

70. Deepak Ravichandran et al., *Network Effects—the Keys to Ascending the Consumer-Internet Throne*, BATTERY VENTURES (Feb. 3, 2017), <https://www.battery.com/powered/network-effects-keys-ascending-consumer-internet-throne/>.

71. Adi Ayal, *Monopolization via Voluntary Network Effects*, 76 ANTITRUST L.J. 799, 799–810 (2010).

72. ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL-SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US* (Penguin Books 1996) (1995).

73. Leena Rao, *Online Legal Services Company LegalZoom Sues Rival RocketLawyer for Misleading Advertising, Trademark Infringement and More*, TECHCRUNCH (Nov. 20, 2012), <https://techcrunch.com/2012/11/20/online-legal-services-company-legalzoom-sues-rival-rocketlawyer-for-misleading-advertising-trademark-infringement-and-more/>; Laura Snyder, *Does the UK Know Something We Don’t About Alternative Business Structures?*, A.B.A. J. (Jan. 2015), [http://www.abajournal.com/magazine/article/does\\_the\\_uk\\_know\\_something\\_we\\_dont\\_about\\_alternative\\_business\\_structures](http://www.abajournal.com/magazine/article/does_the_uk_know_something_we_dont_about_alternative_business_structures).

74. Letter from Avvo to the Va. State Bar (May 5, 2017) (on file with authors) (commenting in opposition to proposed Legal Ethics Opinion 1885).

### C. AVVO'S FREE LEGAL SERVICES

Avvo's earliest efforts at expansion involved adding free legal services to its site in the form of searchable legal advice. At first this move seems puzzling. If Avvo makes money from lawyer advertising, wouldn't free legal advice or forms undercut the business? Apparently, no. Avvo wants to be the first (and hopefully only) site that an American with a legal question or problem consults. A site with only lawyer profiles would limit its reach. Providing some free legal services drives traffic to the site, and some of those visitors may decide that they need a lawyer, and browse for one right there on Avvo.

Since 2007, Avvo has offered limited free legal advice in a Q&A forum.<sup>75</sup> Users who ask an anonymous question online receive a brief answer from a lawyer.<sup>76</sup> The question is limited to 128 characters, supplemented by a 1200-character section titled "Explain your situation." The Forum (wisely) encourages consumers to "ask a concise question—be brief and to the point" and to "provide key details," but to feel no pressure "to tell the whole story."<sup>77</sup> The website indicates that a lawyer will likely respond within twelve hours. There are a lot of these questions and answers. By September 2017, Avvo claimed to offer "free legal guidance" to a customer every five seconds, and to have 10.7 million searchable legal questions and answers.<sup>78</sup>

Avvo also allows lawyers to create longer form "legal guides."<sup>79</sup> The guides do not respond to an individual question, but rather offer an overview, such as constitutional rights during a criminal prosecution.<sup>80</sup> Avvo aggregates these questions, answers, and guides into a permanent and searchable "legal advice page," where users can browse previous answers or guides before or after asking a specific question.<sup>81</sup> There are a wide range of topics available on these pages, covering most routine needs such as divorce, bankruptcy, debts, wills, and evictions.

Avvo encourages lawyers to provide this free assistance in order to "boost your [Avvo] contributor level" and also to "generate new leads from potential clients."<sup>82</sup> Not everyone agrees. A blog post titled *How Not to Find Clients:*

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75. *Avvo Launches Free Legal Advice Forum to Answer Consumer Questions*, AVVO (Dec. 11, 2007), <http://stories.avvo.com/media-resources/press-releases/avvo-launches-free-legal-advice-forum-to-answer-consumer-questions>. You can find the current version here: *Avvo Q&A Forum*, AVVO, <https://www.avvo.com/for-lawyers/legal-qa> (last visited Apr. 16, 2019).

76. *Free Q&A with Attorneys*, AVVO, <https://www.avvo.com/ask-a-lawyer#> (last visited Apr. 16, 2019).

77. *Id.*

78. *About Us*, *supra* note 36.

79. Stephen Fairley, *Internet Marketing for Lawyers: How to Use Avvo to Generate Leads*, RAINMAKER BLOG (Dec. 27, 2011), <http://www.therainmakerblog.com/2011/12/articles/law-firm-marketing/internet-marketing-for-lawyers-how-to-use-avvo-to-generate-leads/>.

80. Nikiki Tavia Bogle, *Criminal Legal Guide: Knowing Your Constitutional Rights*, AVVO (Jan. 9, 2010), <https://www.avvo.com/legal-guides/ugc/knowing-your-constitutional-rights>.

81. *Research Legal Advice*, AVVO, <https://www.avvo.com/free-legal-advice> (last visited Apr. 16, 2019).

82. Megan Hargroder, *Avvo to Attract New Clients*, LAW FIRM AUTOPILOT (Oct. 4, 2016), <https://smallfirmbootcamp.com/avvo-to-attract-new-clients/>.



*Avvo.com* describes the surly and unprofitable potential clients whom the author encountered while answering questions on Avvo.<sup>83</sup> Likewise, Luke Ciciliano of SEO for Lawyers warned that lawyers providing free content for Avvo were undercutting their own websites by driving traffic to Avvo.<sup>84</sup> Avvo has responded by rating lawyers on their “contributor level” and providing a weekly and “All-Time Leaderboard” that rewards lawyers’ engagement with Avvo users.<sup>85</sup> The sheer volume of free legal work shown on these leaderboards is astounding.<sup>86</sup> Avvo’s top ranking “All-Time Leader” is a Philadelphia personal injury lawyer who has answered over 140,000 questions by users of the site.<sup>87</sup> If you assume that he has been providing such assistance every day for ten years without taking a single holiday or vacation, this valiant soul has averaged more than thirty-eight answers a day. Avvo’s ability to convince lawyers to provide free legal advice for its site may stem from the public relations (“PR”) value they achieve, but also by appealing to lawyers’ competitive instincts and desire to excel in any ranking contest.

#### D. AVVO LEGAL SERVICES

In January 2016, Avvo launched Avvo Legal Services, which offered a range of legal services for a fixed fee.<sup>88</sup> The services varied in cost and complexity. For example, for \$595, a lawyer would form a limited liability corporation. The assistance included a thirty-minute phone call and preparation of the necessary documents. For help challenging an eviction, the \$149 fee covered a thirty-minute phone call and a review of paperwork.<sup>89</sup> A living trust cost \$895.<sup>90</sup> The most expensive service was a family green card, priced at \$2,995.<sup>91</sup>

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83. Leo M. Mulvihill, Jr., *How Not to Find Clients: Avvo.com*, PHILLY L. BLOG (Jan. 23, 2012, 11:40 AM), <https://phillylawblog.wordpress.com/2012/01/23/how-not-to-find-an-attorney-avvo-com/>.

84. Luke Ciciliano, *Should Attorneys Use Avvo?*, SEO LAWS. LLC (Nov. 27, 2013), <https://www.seo-for-lawyers.com/should-attorneys-use-avvo/>.

85. See *Legal Leaderboard: This Week*, AVVO, <https://www.avvo.com/legal-leaderboards/weekly> (last visited Apr. 16, 2019); *Legal Leaderboard: All-Time*, AVVO, <https://www.avvo.com/legal-leaderboards> (last visited Apr. 16, 2019).

86. *Legal Leaderboard: All-Time*, *supra* note 85.

87. *Id.*; *Christian K. Lassen II*, AVVO, <https://www.avvo.com/attorneys/19102-pa-christian-lassen-1580478.html> (last visited Apr. 16, 2019).

88. Robert Ambrogi, *Avvo Begins Offering Fixed-Fee Legal Services in Certain Locations*, LAWSITES BLOG (Jan. 11, 2016), <https://www.lawsitesblog.com/2016/01/avvo-begins-offering-fixed-fee-legal-services.html>.

89. See *Landlord or Tenant*, AVVO, <https://www.avvo.com/real-estate/landlord-tenant/legal-services> [<https://perma.cc/2BWL-GF3W>] (last visited Apr. 16, 2019) (see heading “Document Review: Eviction Notice”).

90. See *Trusts*, AVVO, <https://www.avvo.com/estate-planning/trusts/legal-services> [<https://perma.cc/QK59-4SM4>] (last visited Apr. 16, 2019).

91. See *We Bring the Clients. You Bring the Legal.*, AVVO, <https://advisor.avvo.com/providers/welcome> (last visited Apr. 16, 2019).

The process started with a consumer choosing a general area of law, such as business, and then specifying a specific need, such as “employment and labor,” “starting a business,” or “contracts and agreements.”<sup>92</sup> Once the consumer identified one of those areas, a list of fixed fee legal services appeared.<sup>93</sup> After choosing a service, the consumer next chose a lawyer within reasonable geographic proximity.<sup>94</sup>

After the consumer chose a lawyer and paid the fee to Avvo, the lawyer contacted the consumer within a day.<sup>95</sup> Participating lawyers could decide what matters to accept.<sup>96</sup> After taking a case and completing the work, lawyers got the full fee deposited in their bank account.<sup>97</sup> Avvo then took back a marketing fee, which varied in amount based on the cost of the services.<sup>98</sup> Here are some examples of how much a lawyer got paid and how much Avvo charged:

- Document review services: \$199 client payment, \$50 marketing fee.
- Start a single-member LLC: \$595 client payment, \$125 marketing fee.
- Uncontested divorce: \$995 client payment, \$200 marketing fee.
- Green card application: \$2,995 client payment, \$400 marketing fee.<sup>99</sup>

Avvo offered a satisfaction guarantee for the services within ninety days of purchase, offering either a refund or a different lawyer if the client was unsatisfied.<sup>100</sup>

Avvo did not provide forms or other assistance to the lawyers who handled this work, which meant that they were responsible for figuring out how to provide satisfactory, low-cost, fixed-fee services while still turning a profit. Above the Law speculated that the only lawyers who would be able to hit this sweet spot were those who could do the work quickly and routinely:

Usually an attorney new to a practice area will not have the requisite expertise to complete a client’s task within the boundary of time and labor defined by the prescribed fee less the marketing fee. . . .

But if you’re an experienced attorney in business, family or immigration law and feel confident you can competently complete certain fixed-fee services, the monthly check can augment your income and the new clients can become long-term customers . . . .<sup>101</sup>

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92. *Start Your Business Off Right*, AVVO, <https://www.avvo.com/business/legal-services> [<https://perma.cc/MAU8-8Y95>] (last visited Apr. 16, 2019).

93. *See Starting a Business*, AVVO, <https://www.avvo.com/business/starting-a-business/legal-services> [<https://perma.cc/AV69-FHHQ>] (last visited Apr. 16, 2019).

94. *See Start a Single-Member LLC*, AVVO, <https://www.avvo.com/business/legal-services/start-a-single-member-llc> [<https://perma.cc/7L86-BFJA>] (last visited Apr. 16, 2019).

95. *Id.*

96. Ambrogi, *supra* note 88.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Satisfaction Guarantee for Avvo Legal Services*, AVVO, <https://www.avvo.com/legal-services/satisfaction-guarantee> [<https://perma.cc/35PT-PZN3>] (last visited Apr. 16, 2019).

101. Sean Doherty, *Avvo Bares Fixed-Fee Legal Services*, ABOVE L. (Jan. 14, 2016, 4:32 PM), <http://abovethelaw.com/2016/01/avvo-bares-fixed-fee-legal-services/?rf=1>.

The possibility of losing money working for Avvo was pretty clear. But the upside was the chance to spend less time drumming up clients or collecting payment and more time actually working as a lawyer. Particularly for practitioners who had expertise and some tech skills, Avvo was likely to produce a win-win relationship for both lawyer and client.

#### E. THE DISTINCTIVE ASPECTS OF THE AVVO MODEL

To understand the business model and ethical implications of Avvo Legal Services, a comparison with LegalZoom and Rocket Lawyer is helpful. As noted previously, those latter companies sell guided legal forms along with legal advice or lawyer review of their forms. They do not, and under bar ethics rules and statutory prohibitions, cannot offer services that constitute the “practice of law.”<sup>102</sup> Their disclaimers make clear that they are, as LegalZoom notes in bold on its platform, “**not acting as your attorney,**” and “**not a substitute for the advice of an attorney.**”<sup>103</sup> Rocket Lawyer similarly declares it does not provide legal advice, but only “a platform for legal information and self-help.”<sup>104</sup> Of course, as noted above, LegalZoom and Rocket Lawyer also sell a subscription service for legal advice and then pay lawyers to provide that advice. Avvo Legal Services differed in that it sold attorneys’ work in single, discrete transactions. Its modest fees and easy process for selecting a lawyer had obvious advantages for many clients who would otherwise have to call around, consult websites and Yellow Pages, and then attempt to compare prices.

### III. NO GOOD DEED GOES UNPUNISHED—A BRIEF TOUR THROUGH AVVO’S LEGAL CHALLENGES

Avvo has faced a series of legal challenges over the years, and initially escaped largely unscathed. The first wave of suits challenged the rankings themselves, and there Avvo prevailed. Avvo Legal Services, however, faced a series of bar regulatory challenges, and here Avvo decided to terminate the program.

#### A. LAWSUITS CHALLENGING THE AVVO RATINGS

Just ten days after Avvo launched, it faced a class action lawsuit in Washington State.<sup>105</sup> The plaintiffs were attorneys who claimed that they were

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102. For a review of rules and statutes concerning the unauthorized practice of law, see Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 *FORDHAM L. REV.* 2587 (2014).

103. *LegalZoom Disclaimer*, LEGALZOOM, <https://www.legalzoom.com/disclaimer.html> (last visited Apr. 16, 2019).

104. *Legal Terms*, ROCKET LAW., <https://www.rocketlawyer.com/terms-of-service.rl> (last updated Oct. 4, 2018).

105. Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 *NW. U. L. REV.* 1667, 1721 (2008).

harmed by Avvo's ratings system and that Avvo had violated the Washington State Consumer Protection Act by disseminating unfair and deceptive information.<sup>106</sup> The suit's lead plaintiff, John Henry Browne, had a low Avvo rating partially because of a previous public admonition by the state bar.<sup>107</sup> The district court dismissed the lawsuit on the ground that the First Amendment protected Avvo's ratings, and that the damages claimed were too speculative for a consumer protection claim.<sup>108</sup> Cyberspace Lawyer Eric Goldman called it "a big win for Avvo."<sup>109</sup>

In 2010, a Florida practitioner, Larry Joe Davis, similarly sued Avvo for a low rating.<sup>110</sup> Like Browne, Davis had a low rating primarily because of a public reprimand by the bar.<sup>111</sup> Avvo transferred the case to federal court in Washington, where the trial judge dismissed the complaint. The court also found that Davis had violated the Washington State anti-SLAPP statute and ordered Davis to pay Avvo's legal fees plus a \$10,000 fine.<sup>112</sup> That judgment sent the intended message, and challenges to the legality of Avvo's core ratings have declined, though they have not entirely vanished.<sup>113</sup> For example, in 2018, Avvo settled a New York Attorney General's Office investigation into the transparency of its lawyer ratings by paying a small fine and enhancing its consumer disclosures.<sup>114</sup>

#### B. AVVO LEGAL SERVICES

Avvo Legal Services, however, faced more persistent challenges. Shortly after the program launched in early 2016, Susan Cartier Liebel, who blogs at the

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106. *Id.*

107. Class Action Complaint at 8, *Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249 (W.D. Wash. 2007) (No. C07-0920RSL).

108. *Browne*, 525 F. Supp. 2d at 1251, 1255.

109. Eric Goldman, *Avvo Wins Big in Ratings Lawsuit—Browne v. Avvo*, TECH. & MARKETING L. BLOG (Dec. 19, 2007), [http://blog.ericgoldman.org/archives/2007/12/avvo\\_wins\\_big\\_i.htm](http://blog.ericgoldman.org/archives/2007/12/avvo_wins_big_i.htm).

110. Debra Cassens Weiss, *Another Lawyer Sues Avvo Rating Site, Claims Its Practices Are 'Beyond Unfair'*, A.B.A. J. (Sept. 2, 2010, 10:30 AM), [http://www.abajournal.com/news/article/another\\_lawyer\\_sues\\_avvo\\_rating\\_site\\_claims\\_its\\_practices\\_are\\_beyond\\_unfair/](http://www.abajournal.com/news/article/another_lawyer_sues_avvo_rating_site_claims_its_practices_are_beyond_unfair/).

111. *Id.*

112. *Davis v. Avvo, Inc.*, No. C11-1571RSM, 2012 WL 1067640 (W.D. Wash. Mar. 28, 2012) (order granting motion to strike); Eric Goldman, *Lawsuit Against Avvo for Lawyer's Profile Dismissed as SLAPP—Davis v. Avvo*, TECH. & MARKETING L. BLOG (Mar. 29, 2012), [http://blog.ericgoldman.org/archives/2012/03/lawsuit\\_against\\_1.htm](http://blog.ericgoldman.org/archives/2012/03/lawsuit_against_1.htm).

113. For recent cases challenging the legality of the Avvo rating system, see *Vrdolyak v. Avvo, Inc.*, 206 F. Supp. 3d 1384 (N.D. Ill. 2016); *Darsky v. Avvo, Inc.*, No. 3:15-cv-05495-HSG (N.D. Cal. Mar. 10, 2016) (order dismissing all claims with prejudice); *Hollister & Brace v. Avvo, Inc.*, No. 1440443 (Santa Barbara Cty. Super. Ct. Dec. 20, 2017), *appeal docketed*, No. B284394 (Cal. Ct. App. Jan. 4, 2018).

114. Jason Tashea, *Avvo Will Improve Lawyer-Rating Transparency, Pay \$50K Fine in Agreement with New York AG*, A.B.A. J. (Sept. 24, 2018, 4:37 PM), [http://www.abajournal.com/news/article/avvo\\_will\\_improve\\_lawyer\\_rating\\_transparency\\_says\\_agreement\\_with\\_new\\_york\\_a/](http://www.abajournal.com/news/article/avvo_will_improve_lawyer_rating_transparency_says_agreement_with_new_york_a/).

site Solo Practice University, identified two potential ethical problems.<sup>115</sup> Liebel noted that because Avvo's marketing charges were pegged to the amount of the legal fee, they look more like fee splitting than advertising.<sup>116</sup> She also questioned whether Avvo's practice of holding client fees and paying lawyers once a month violated rules requiring placement of fees in IOLTA (interest on lawyer trust accounts).<sup>117</sup> Other critics piled on quickly. David Miranda, the President of the New York State Bar Association, condemned Avvo's various offerings as unethical fee splitting, the unauthorized practice of law, and a danger to the public.<sup>118</sup> Similar articles appeared in the state bar magazines in Arizona and Wisconsin.<sup>119</sup> Professor Alberto Bernabe wrote the fullest treatment of the issue for the online *Georgetown Law Journal*.<sup>120</sup> In his view, Avvo Legal Services violated the ABA's Model Rules of Professional Conduct governing fee splitting, referral fees, and lawyer trust accounts.<sup>121</sup>

By June 2018, bar ethics committees in eight states had issued opinions that agreed and condemned programs structured along the lines of Avvo Legal Services.<sup>122</sup> It does not appear from these opinions that any of the committees had collected any evidence of customer injury or, except for the Virginia State Bar, even solicited comments from clients or consumer groups.<sup>123</sup> Although such committee opinions are advisory only, and are not binding precedent in a future enforcement actions, they can be considered by a regulatory authority in such an action.<sup>124</sup> Although we found no examples of bar disciplinary charges against Avvo or any lawyers participating in its programs, the threat of such charges likely discouraged many practitioners from involvement and helped prompt Avvo's new parent company to terminate the program.

The first opinion came from the Ohio Board of Professional Conduct around four months after the launch of Avvo Legal Services.<sup>125</sup> Its conclusion was that "[t]his business model presents multiple, potential ethical issues for

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115. Susan Cartier Liebel, *Is Avvo's New 'Marketing Fee' Really a 'Referral Fee' in Sheep's Clothing?*, SOLO PRAC. U. (Jan. 12, 2016), <http://solopracticeuniversity.com/2016/01/12/is-avvos-new-marketing-fee-really-a-referral-fee-in-sheeps-clothing/>.

116. *Id.*

117. *Id.*

118. David P. Miranda, *Lawyers Must Protect the Public We Serve*, N.Y. ST. B. ASS'N J., May 2016, at 5, 6-7.

119. David D. Dodge, *Fee-Splitting and Avvo*, ARIZ. ATT'Y, Feb. 2017, at 8; Aviva Meridian Kaiser, *The "Uberization" of Legal Services: Consistent with Ethics Rules?*, WIS. LAW. (Feb. 2017), <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=90&Issue=2&ArticleID=25384>.

120. Alberto Bernabe, *Avvo Joins the Legal Market; Should Attorneys Be Concerned?*, 104 GEO. L.J. ONLINE 184 (2016), <https://georgetownlawjournal.org/articles/195/avvo-joins-legal-market/pdf>.

121. *Id.* at 191-205.

122. See *infra* text accompanying notes 149-169.

123. Avvo makes this point in its comments on the Virginia Bar's proposed opinion. See Letter from Avvo to the Va. State Bar, *supra* note 74.

124. BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 125-26 (2011).

125. Ohio Bd. of Prof'l Conduct, Advisory Op. 2016-3 (June 3, 2016).

lawyers. These include fee-splitting with nonlawyers, advertising and marketing, a lawyer's responsibility for the actions of nonlawyer assistants, interference with the lawyer's professional judgment, and facilitating the unauthorized practice of law."<sup>126</sup> In a lengthy opinion, the Ohio Board made clear that whatever Avvo called its marketing fees, the board considered them illegal referral fees.<sup>127</sup> In addition, the Board raised concerns about confidentiality, competence, and unauthorized practice.<sup>128</sup> The opinion is a soup-to-nuts indictment of Avvo's business model and the lawyers who staff it.

A few weeks later, the South Carolina Bar Ethics Advisory Committee weighed in against the program.<sup>129</sup> Although less comprehensive than Ohio's indictment, the opinion is identical on the central point:

The arrangement described herein violates the prohibition of sharing fees with a non-lawyer as described in Rule 5.4(a). In the alternative, assuming, for the purposes of this question only, that the arrangement does not violate Rule 5.4(a), the arrangement would violate the Rule 7.2(c) prohibition of paying for a referral . . . .<sup>130</sup>

The Pennsylvania Bar's Legal Ethics and Professional Responsibility Committee followed suit in the Fall 2016 with the most comprehensive indictment.<sup>131</sup> Its fifteen-page opinion listed potential violations of *eleven* different rules of professional conduct ("RPCs") by what it called a "Flat Fee Limited Scope" or "FFLS" program. Among the concerns it raised were: fee sharing with non-lawyers, failure to place advance fees in lawyers' trust accounts, threats to lawyers' independent judgment, unethical conduct by non-lawyer subordinates; disclosure of confidential information; and unauthorized practice of law.<sup>132</sup> The general tone was along the lines of "Apart from that Mrs. Lincoln, how did you enjoy the play?"<sup>133</sup>

The organized bars in Indiana, New Jersey, New York, Utah, and Virginia came to similar conclusions for similar reasons.<sup>134</sup> The New York State Bar Association raised the concern that Avvo's marketing fee constituted a payment for a recommendation or referral in violation of Model Rule 7.2(b).<sup>135</sup> The New Jersey opinion attracted particular attention because it seemed to condemn the

126. *Id.* at 2.

127. *Id.* at 4-5.

128. *Id.* at 3, 6-7.

129. S.C. Bar Ethics Advisory Comm., Advisory Op. 16-06 (2016).

130. *Id.* at 1.

131. Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., Formal Op. 2016-200 (Sept. 2016).

132. *Id.* at 2.

133. This quote has been attributed to the satirist Tom Lehrer. See *Tom Lehrer Quotes*, BRAINY QUOTE, <https://www.brainyquote.com/quotes/quotes/t/tomlehrer128116.html> (last visited Apr. 16, 2019).

134. For Indiana's opinion, see Ind. Supreme Court Disciplinary Comm'n, Advisory Op. 1-18 (Apr. 2018). For New Jersey's opinion, see N.J. Supreme Court Advisory Comm. on Prof'l Ethics et al., Joint Op. 732/44/54 (June 21, 2017). For New York's opinion, see N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1132 (Aug. 8, 2018). For Utah's opinion, see Utah State Bar Ethics Advisory Op. Comm., Op. 17-05 (Sept. 27, 2017). For Virginia's opinion, see Va. State Bar Legal Ethics Comm., Op. 1885 (Nov. 8, 2018).

135. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *supra* note 134.

advice programs of Rocket Lawyer and LegalZoom as well. However, those companies avoided difficulties by quickly registering their programs as legal services plans, leaving Avvo Legal Services as the only potentially affected internet offering.<sup>136</sup>

Three states expressed more flexibility. In 2017, North Carolina's committee suggested ways that Avvo and its lawyers could comply.<sup>137</sup> For example, "[t]o preserve confidentiality [of information learned during the professional relationship,] Avvo may not be a party to client-lawyer communications about the substance of the representation."<sup>138</sup> To insure lawyers' independent judgment, Avvo should confirm its non-interference in writing.<sup>139</sup> To avoid concerns about the unauthorized practice of law, Avvo's advertising and website "must make abundantly clear that Avvo does not provide legal services to others and that its only role is as a marketing agent or platform for the purchase of legal services from independent lawyers."<sup>140</sup> Most importantly, with respect to concerns about fee sharing, the opinion states:

Although Avvo has taken care to separate the transfer of the intact legal fee for a particular legal service to the lawyer from the payment of the marketing fee to Avvo from the lawyer's operating account, the fact that the marketing fee is a percentage of the legal fee implicates the fee-sharing prohibition. Nevertheless, similar arrangements have been approved when the nonlawyer exercised no influence over the professional judgment of the lawyer and the fee was a reasonable charge for marketing or advertising services.<sup>141</sup>

It is not entirely clear why the North Carolina Bar took a more permissive view of Avvo Legal Services than other states. One possible explanation is its unsuccessful experience in attempting to curtail LegalZoom.<sup>142</sup> Another contributing factor may have been the equally unhappy experience of a similar state regulatory authority, the Board of Dental Examiners, when it attempted to protect dentists from competing providers of teeth-whitening services. In *North Carolina Board of Dental Examiners v. Federal Trade Commission*, the United States Supreme Court found that state regulatory boards were "nonsovereign" actors and thus not automatically entitled to state action immunity from antitrust claims.<sup>143</sup> According to the majority, when "a controlling number of decisionmakers" on a board were "active market participants in the occupation

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136. Gabrielle Orum Hernandez, *Rocket Lawyer, LegalZoom Register in NJ; Avvo Weighing Pullout*, LEGAL INTELLIGENCER (July 11, 2017, 5:41 PM), <https://www.law.com/thelegalintelligencer/almID/1202792760553/?slreturn=20190116232104>. For the ruling, see N.J. Supreme Court Advisory Comm. on Prof'l Ethics et al., *supra* note 134.

137. N.C. State Bar Council Ethics Comm., Proposed 2017 Formal Ethics Op. 6 (July 27, 2017), in N.C. ST. B. J., Fall 2017, at 38, 39–40.

138. *Id.* at 39.

139. *Id.*

140. *Id.*

141. *Id.* at 40.

142. Rhode & Barton, *supra* note 30, at 276–80.

143. N.C. State Bd. of Dental Exam'rs. v. F.T.C., 135 S. Ct. 1101, 1110–12 (2015).

the board regulates,” the board would not enjoy immunity unless it was subject to a clear articulation of state policy and active supervision by a non-market participant.<sup>144</sup> Because the North Carolina Board had not received “active supervision” of its efforts to preempt non-dentist provision of teeth whitening services, state-action immunity was not available.<sup>145</sup> As we have argued elsewhere, because many bar regulatory authorities fail to meet the criteria set forth in *North Carolina Board of Dental Examiners*, they may be equally vulnerable to challenge for anticompetitive activities.<sup>146</sup> And online legal service providers have become increasingly willing to challenge bar regulatory activity on antitrust grounds, as a recent Florida lawsuit makes clear.<sup>147</sup> Given this historical context, the North Carolina Bar may have been wary of adopting an overly hostile stance toward Avvo’s competitive efforts. That history also may have prompted them to be more thoughtful and open to evidence. According to Avvo counsel Josh King, the committee “was initially opposed to Avvo Legal Services but reversed course as they learned more. It was a far, far more open and detailed process than we’ve seen with other states.”<sup>148</sup>

Another more tempered state response came from the Illinois Attorney Registration and Disciplinary Commission, which in 2018 released an almost 100-page study of “Client Matching Services.”<sup>149</sup> The study noted the access-to-justice crisis nationally and in Illinois and recommended amendments to the state’s Rules of Professional Conduct to allow lawyers to participate in programs such as Avvo Legal Services.<sup>150</sup> The Oregon State Bar’s Futures Task Force similarly recommended changes to their Rules of Professional Conduct that might remove ethical challenges for a program like Avvo Legal Services.<sup>151</sup>

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144. *Id.* at 1113–15.

145. *Id.* at 1116–17.

146. Rhode & Barton, *supra* note 30, at 280–82.

147. *TIKD Services LLC v. Florida Bar* is a federal antitrust claim by a company that matches drivers who receive traffic tickets with lawyers willing to represent them for a flat fee less than the cost of paying the ticket. Complaint at 4, *TIKD Servs. LLC v. Fla. Bar*, No. 1:17-cv-24103-MGC, 2017 WL 5180986 (S.D. Fla. Nov. 8, 2017), *appeal filed* (11th Cir. Dec. 28, 2018). After the Bar launched an investigation concerning unauthorized practice of law and issued a non-public staff opinion raising ethical concerns, the Ticket Clinic, a local law firm specializing in speeding ticket defense, began filing bar complaints and publicizing the Bar’s opinion. *Id.* at 4–5. This allegedly discouraged lawyers from participating in TIKD defense work and sparked the company to bring a federal lawsuit against the bar and the Ticket Clinic. *See Tech Start-Up TIKD Sues the Florida Bar and the Ticket Clinic Law Firm for Violating Federal and State Antitrust Laws*, PR NEWswire (Nov. 9, 2017, 10:45 AM), <https://www.prnewswire.com/news-releases/tech-start-up-tikd-sues-the-florida-bar-and-the-ticket-clinic-law-firm-for-violating-federal-and-state-antitrust-laws-300553062.html>.

148. E-mail from Josh King, Chief Legal Officer, Avvo, Inc., to Benjamin Barton, Distinguished Professor of Law, Univ. of Tenn. Coll. of Law, and Deborah Rhode, Professor of Law, Stanford Law School (Nov. 9, 2017, 5:33 PM) (on file with authors).

149. ATT’Y REGISTRATION & DISCIPLINARY COMM’N OF THE SUPREME COURT OF ILL., CLIENT-LAWYER MATCHING SERVICES (2018), [https://www.iardc.org/Matching\\_Services\\_Study\\_Release\\_for\\_Comments.pdf](https://www.iardc.org/Matching_Services_Study_Release_for_Comments.pdf).

150. *Id.* at 4–56.

151. OR. STATE BAR FUTURES TASK FORCE, REPORTS AND RECOMMENDATIONS OF THE REGULATORY COMMITTEE & INNOVATIONS COMMITTEE 30–40 (2017), [https://www.osbar.org/\\_docs/resources/taskforces/futures/FuturesTF\\_Reports.pdf](https://www.osbar.org/_docs/resources/taskforces/futures/FuturesTF_Reports.pdf).



Internet companies are known for working around, over, or through regulatory issues. Uber's decision to offer rides in some jurisdictions without first getting taxi medallions or licenses is the most famous example, but LegalZoom and Rocket Lawyer's decisions to offer online legal services first and fight bar challenges later are close parallels. Avvo's initial decision to post lawyer ratings without lawyer approval was a similar online leap of faith.

Nevertheless, by June 2018, Avvo's new parent company had heard enough to decide to terminate the Legal Services program.<sup>152</sup> Part of the reason may have been the departure of much of Avvo's previous management following the acquisition. This left Avvo Legal Services without its creators and most vocal defenders.<sup>153</sup> Second, the sheer volume of negative opinions from bar regulators likely led the company to decide the fight was not worth it in the long run.

#### IV. BAR ETHICAL CHALLENGES EVALUATED

Avvo Legal Services may be dead, but the idea itself is too good to remain buried forever. Many lawyers are underemployed and need work and clients. Many clients need legal help and would like an online way to purchase inexpensive, fixed fee legal services. For example, in 2018 a new company called Basic Counsel announced a somewhat similar website that allows lawyers to sell fixed-fee legal services online.<sup>154</sup> Examining the objections to Avvo Legal Services can help guide these new entrants to a format that can meet bar objections or prompt modifications in bar requirements.

##### A. CONCERNS REGARDING PROFESSIONAL INDEPENDENCE, CONFIDENTIAL INFORMATION, TRUST FUND ACCOUNTS, ASSISTING NON-LAWYER MISCONDUCT AND THE UNAUTHORIZED PRACTICE OF LAW

Because the Pennsylvania Ethics Committee raised the most objections to Avvo Legal Services, we start with its opinion. Not all of its challenges merit extended discussion. Some of what the Pennsylvania's Ethics Committee labeled "substantial risks" seem highly speculative or could be readily addressed. For example, there is no evidence that Avvo sought to interfere with a lawyer's exercise of professional judgment or had any interest in doing so. Many organizations that employ attorneys, such as accounting firms or prepaid legal service plans, have dealt with such concerns through explicit commitments to respect lawyer's professional independence, and there is no indication that

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152. Letter from B. Lynn Walsh, Exec. Vice President & Gen. Counsel, Avvo, to Joshua Walthall, N.C. State Bar Authorized Practice Comm. (June 6, 2018), [https://www.responsivelaw.org/uploads/1/0/8/6/108638213/avvo\\_legal\\_services\\_discontinuation\\_letter.pdf](https://www.responsivelaw.org/uploads/1/0/8/6/108638213/avvo_legal_services_discontinuation_letter.pdf).

153. *Id.*

154. Bob Ambrogi, *Offering Flat-Fee, Limited-Scope Legal Help, New Site Sounds Like Avvo Legal Services, but with Key Differences*, LAW SITES (Nov. 6, 2018), <https://www.lawsitesblog.com/2018/11/offering-flat-fee-limited-scope-legal-help-new-site-sounds-like-avvo-legal-services-key-differences.html>.

such protections have been inadequate.<sup>155</sup> As the North Carolina Bar ethics opinion suggested, Avvo could make similar assurances.

Other concerns raised by the Pennsylvania Ethics Committee are equally speculative and unsubstantiated. For example, the Committee cited prohibitions on lawyers' revealing confidential information, and claimed that the "client's description of his or her perceived legal issues and needs is disclosed to [Avvo] before it is disclosed to the lawyer" along with the legal fee, both of which would normally be considered confidential information protected under Rule 1.6 of the Model Rules of Professional Conduct.<sup>156</sup> But as the Committee also noted, that Rule only applies to *lawyers'* disclosure of confidential information, so clients' disclosures prior to the formation of a lawyer client relationship "does not directly implicate the [rule]."<sup>157</sup> Nonetheless, the Committee expressed concern that the information would be "at risk of disclosure in future litigation, since the communications between the client and the Business would not be protected by the lawyer-client privilege."<sup>158</sup> The committee did not, however, indicate what litigation might be likely that would conceivably compromise a client's interest. Presumably the client had consented to any disclosure of its request for services on a particular legal issue by using the site in the first instance. If any serious concerns materialize, the site could provide an explicit disclosure concerning confidentiality.

Another concern raised by the Pennsylvania Committee, as well as other bars and commentators, involved the handling of client fees. As noted earlier, Avvo collected these fees and sent them to the lawyers, which in ninety-nine percent of cases occurred after the services have been delivered. In the other one percent of cases, most attorneys' retainer agreements provide that they will earn their fees up front, before the matter is fully completed.<sup>159</sup> Some committees, however, raised questions about violations of the Rule 1.15, which requires lawyers to deposit fees that have been paid in advance in a client trust account.<sup>160</sup> The Pennsylvania Committee proposed that a solution to this concern would be to have Avvo immediately pay the advance fees to the client for deposit in the lawyer's trust account. It is not self-evident that the client would be better protected by such a process, given the financial resources, stability, and self-interest of Avvo in maximizing client satisfaction. Nor is it clear that the

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155. The issue has arisen with respect to multidisciplinary practice, in which critics worried about lay owners' interference with professional decision-making. See RHODE, *supra* note 25, at 97; see also A.B.A. COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (1999), in PROF. LAW., Fall 1998, at 1.

156. Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., *supra* note 131, at 11 (citing MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 1983)).

157. *Id.*

158. *Id.*

159. King, *supra* note 148. As King explains, this is because ninety-nine percent of Avvo Legal Services are advisor sessions or contract reviews; in those cases "the consumer's card is not even charged until after the legal services have been fully delivered." *Id.*

160. Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., *supra* note 131, at 11.

Committee members understood how small the percentage of cases was that presented possible ethical violations. But adjusting the Avvo process for those cases may not pose insurmountable obstacles if the concern seems well founded.

The Pennsylvania Committee raised further concerns that seem equally speculative and unsubstantiated. One such concern is that Avvo lawyers might not have time to discuss the limited scope of their representation with clients. However, as Josh King, Avvo's general counsel pointed out, consumers of its services, unlike many other clients of modest means, get a "crystal clear" description of what they are buying "up front and in plain English," which should help allay confusion about whether the potential service will be adequate to their needs.<sup>161</sup> As King also noted, in cases where clients had unrealistic expectations, Avvo lawyers would have an interest as well as ethical obligation to make that clear, and Pennsylvania's Committee cited no evidence that lawyers had failed to do so.<sup>162</sup>

Nor did the Committee offer factual support for other concerns that these lawyers would be assisting non-lawyers to violate professional rules or engage in the unauthorized practice of law, or fail to check for conflicts of interest.<sup>163</sup> Presumably any such violations could be dealt with through disciplinary actions against individual attorneys; they are not inherent to Avvo's business model, which seeks to prevent client dissatisfaction and injuries from arising.

#### B. REFERRAL SERVICES AND FEE SHARING BETWEEN LAWYERS AND NONLAWYERS

The most substantial objection to Avvo Legal Services involves fee sharing. All of the bar ethics opinions have addressed this issue and all but the North Carolina opinion concluded that Avvo's program violated their ethical rules. The vast majority of states have a version of Model Rule 7.2(b)(2) of the ABA Model Rules of Professional Conduct. It prohibits lawyers from giving "anything of value to a person for recommending the lawyer's services."<sup>164</sup> The Rule provides exceptions, of which two are relevant here. A lawyer may:

(1) pay the reasonable cost of advertisements or communications permitted by this Rule; [or]

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority.<sup>165</sup>

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161. Josh King, *Avvo Legal Services and the Rules of Professional Conduct*, LAWYERNOMICS (Feb. 9, 2016), <http://lawyernomics.avvo.com/avvo-news/avvo-legal-services-and-the-rules-of-professional-conduct.html>.

162. *Id.*

163. *See supra* text accompanying notes 149–169.

164. ELLEN J. BENNET ET AL., A.B.A. CTR. FOR PROF'L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT r. 7.2(b) (8th ed. 2015) [hereinafter ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT].

165. *Id.*

Avvo did not seek approval for its Legal Services program and maintained that the program constituted a marketing platform and not a lawyer referral service. In support of that view, it quoted from an ABA Overview of LRS Regulation, which views the “defining characteristic of a lawyer referral service [as] . . . the use of an intermediary to connect a potential client to a lawyer based on an exercise of discretion within stated guidelines.”<sup>166</sup>

Avvo noted that it does not exercise discretion to match a client with a particular lawyer. Rather it allowed clients to choose from multiple profiles, or if clients opted to have Avvo connect them directly with an attorney, “that connection is made to the first available lawyer in the client’s practice area—not on the basis of Avvo’s discretion” or a lawyer’s purchase of “marketing exclusivity.”<sup>167</sup> Because Avvo had no financial stake in selecting a particular lawyer, it plausibly claimed that it is not subject to the potential conflicts of interest that the Rule was meant to prevent.<sup>168</sup>

As to fee sharing arrangements, Avvo said this on its website:

Should I be concerned about fee-splitting? No. Avvo always sends you 100% of the client’s payment. As a completely separate transaction, you will pay a per-service marketing fee. . . . Here’s what ethics expert and Avvo General Counsel Josh King says on the matter, “Fee splits are not inherently unethical. They only become a problem if the split creates a situation that may compromise a lawyer’s professional independence of judgment.”<sup>169</sup>

In its fact sheet on professional rules, Avvo similarly claimed that “fee splits are not inherently unethical. They only become a problem if the fee is split with a party that may pressure the attorney’s decision-making in a given case.”<sup>170</sup>

The difficulty is that this is not what the Model Rules say. As Professor Alberto Bernabe points out, “[a]ccording to the Model Rules, splitting fees with non-lawyers *is* inherently unethical” unless the arrangement falls under one of the exceptions.<sup>171</sup> “[W]hat is really happening here is that Avvo is collecting a percentage of the fee the client pays the attorney. The fact that it does it separately, in a second transaction, does not change that fact.”<sup>172</sup>

166. JOSH KING, AVVO LEGAL SERVICES AND THE RULES OF PROFESSIONAL CONDUCT 3 (2016), <https://sociallyawkwardlaw.com/wp-content/uploads/Avvo-Legal-Services-and-the-RPC-with-supporting-details-2016-2-11.pdf> [hereinafter KING, AVVO LEGAL SERVICES] (internal quotation marks omitted) (citation omitted).

167. *Id.* at 4.

168. *Id.*; ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 164, r. 7.2(b)(2).

169. Alberto Bernabe, *Avvo Joins the Legal Market; Now Offers Legal Services Through Network of Attorneys; Should Attorneys Be Concerned?*, PROF. RESP. BLOG (Jan. 25, 2016), <https://bernabeprof.blogspot.com/2016/01/avvo-joins-legal-market-now-offers.html> (internal quotation marks omitted) (quoting *Attorney FAQ for Avvo Legal Services*, AVVO, [https://www.avvo.com/support/avvo\\_legal\\_services\\_attorney\\_faq](https://www.avvo.com/support/avvo_legal_services_attorney_faq) (last visited Apr. 16, 2019)).

170. *Id.* (quoting KING, AVVO LEGAL SERVICES, *supra* note 166, at 5).

171. *Id.*

172. *Id.*

Avvo's second line of defense was that its marketing charges were permissible because they fall under the exception for fees reflecting the reasonable cost of advertisements. However, as the Pennsylvania Committee pointed out, "[t]he cost of advertising does not vary depending on . . . the amount of revenue generated by a matter."<sup>173</sup> Yet Avvo's marketing fees varied from \$10 for an "Advice Session" costing \$39, to \$400 for a Green Card Application costing \$2995.<sup>174</sup> "Clearly," the Pennsylvania Committee concluded,

there cannot be a 4000% variance in the operator's advertising and administrative costs for these two services . . . . The variation in the amount of the marketing fees based upon the amount of the fees earned by the lawyer establishes that the non-lawyer business is participating directly in, and sharing in, the fee income derived by the lawyer. This is impermissible fee sharing . . . .<sup>175</sup>

Avvo's response was that the marketing fee reflects "a variety of factors, including the type of service purchased, the overall cost of the service, promotional considerations, competition, market testing, and a variety of other factors."<sup>176</sup> But the Model Rules do not list those factors in its exception for advertising. A bar ethics committee that reads Rule 7.2 literally is likely to end up where the Pennsylvania Committee did.

There are four ways around this problem. One is for Avvo or another provider to change its marketing fee to reflect a flat rate, based on a pro rata share of its costs, not a rate that varies with the amount of the client's charges. But this makes no sense from a business standpoint. A lawyer who is already making minimal amounts for advice and other low-cost services will not want to pay such a substantial marketing fee. And Avvo's leadership believes that this and other proposed changes by bar ethics committees would "make the product worse for both consumers and lawyers."<sup>177</sup>

A second possibility is for bar ethics committees to do what North Carolina did, and view "reasonable advertising costs" as an umbrella term to cover all marketing expenses. As Avvo pointed out to the Virginia Bar in comments regarding its proposed opinion, some of its marketing costs scale directly to the costs of services provided: credit card processing fees, risks of refund; and customer service assistance ("purchasers of more expensive services typically have more questions and concerns").<sup>178</sup>

A third possibility is for bar ethics committees to note that advertising on the internet, unlike on television or in a magazine, allows for fluctuating ad pricing depending on sales. For example, the Amazon affiliate program pays websites based upon Amazon sales that come through a website's links, rather

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173. Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., *supra* note 131, at 5.

174. *Id.*

175. *Id.* at 5–6.

176. KING, AVVO LEGAL SERVICES, *supra* note 166, at 7.

177. Email from Josh King, *supra* note 148.

178. Letter from Avvo to the Va. State Bar, *supra* note 74.

than through a flat fee.<sup>179</sup> This solution requires bar regulators to recognize that advertising on the internet (and thus advertising expenses for lawyers on the internet) is different because it is so easy to track the exact sales amount from any particular advertisement. So instead of fee splitting, Avvo's program offers a more modern type of advertising—variable fees tied directly to sales achieved.

A fourth possibility is to follow Bernabe's suggestion: "[If] it is a good idea for potential clients to have access to legal services through platforms like Avvo, . . . then we need to work to change the current rules."<sup>180</sup> Given that Illinois and Oregon are considering these types of changes, this route may eventually prove the most successful.

In our view, the best work-around would be for bar regulatory bodies to consider both the ethical concerns underlying their professional conduct rules and the public's interest in cost-effective services. Such an inquiry should include input from clients and consumer organizations. Rather than speculate about possible harms, the bar should look for evidence of purchasers' experience. And if significant harms are occurring or can be reasonably be expected to occur, bar regulators should look for ways to address them without compromising the public's access to affordable services. Indeed, this is consistent with the bar's approach in the context of "deal of the day" websites and credit card transactions that might be considered technical violations of the rules.<sup>181</sup>

On the basis of evidence available to date, we believe that bar oversight bodies should either interpret ethical rules to permit programs like Avvo's, or modify their rules to do so. As we argue below, such a result would be in the interest of the profession as well as the public. It is ironic that a growing number of states allow programs by LegalZoom and Rocket Lawyer, which pay lawyers very little for their work, but prohibited the Avvo program, which paid lawyers a more generous but still modest and transparent fixed fee. That result speaks volumes about whether current bar decisions serve the interests even of the profession, let alone the public at large.

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179. *20 Tips I Used to Make \$90,336.65 with Amazon*, UP FUEL (June 9, 2018), <http://upfuel.com/make-money-with-amazon/>.

180. Bernabe, *supra* note 169.

181. Josh King made this point. See KING, AVVO LEGAL SERVICES, *supra* note 166, at 5–7 (citing, for example, ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 465 (2013) (discussing lawyers' use of deal-of-the-day marketing programs); Neb. Supreme Court Lawyers' Advisory Comm., Advisory Op. 12-03 (2012); N.C. State Bar Ethics Council Comm., 2011 Formal Ethics Op. 10 (Oct. 21, 2011) (discussing lawyer advertising on deal of the day or group coupon website); S.C. Bar Ethics Advisory Comm., Advisory Op. 11-05 (2011); Colo. Bar Ass'n Ethics Comm., Formal Op. 99 (May 10, 1997) (discussing the use of credit cards to pay for legal services); State Bar of Ariz. Ethics Advisory Grp., Ethics Op. 89-10 (Dec. 20, 1989) (discussing the use of credit cards for the payment of legal fees and/or retainers)).

## V. POLICY IMPLICATIONS OF FIXED-FEE ONLINE MATCHING PROGRAMS

### A. THE BENEFITS FOR LAWYERS OF FIXED-FEE ONLINE MATCHING PROGRAMS

To understand the benefits for lawyers of fixed-fee online programs that match them with clients, it helps to consider the financial realities of small firms or solo practitioners. Clio, a leading legal practice management software program, provides that economic context.<sup>182</sup> It helps lawyers, mostly small firms and solo practitioners, to track their time, send out bills, and collect the fees due.<sup>183</sup> Given its focus, Clio is in a good position to report on the state of the market for these practitioners. Its 2016 Legal Trends Report, aggregated anonymous data from approximately 40,000 users to analyze the consumer/small business market for legal services.<sup>184</sup> The Report found that the average hourly rate for solo practitioners/small firm lawyers is \$232 an hour.<sup>185</sup> These rates run from a high of an average of \$281 an hour in Washington, D.C., to a low of \$155 an hour in Maine.<sup>186</sup> Bankruptcy rates averaged the most, at \$275 an hour, and criminal charges were the lowest at \$148 per hour.<sup>187</sup>

The average rates are the good news. Some simple math suggests that small firm and solo lawyers charging these rates and working reasonably hard could do pretty well. Assume that a lawyer works forty hours a week, forty-eight weeks a year, or 1920 hours a year, which some estimates suggest is on the low side.<sup>188</sup> If they billed half (twenty) of those hours at an average rate of \$232, they would make \$222,720 a year in gross earnings. Even if they charged a bargain rate of \$100 an hour, they would still gross \$96,000 for that amount of billed work.

Regrettably, the Clio Report suggests that these lawyers do not bill twenty hours a week. The report separates out the “utilization rate,” which is the number of hours the lawyers billed internally, the “realization rate,” which is the amount of that billed time the lawyers actually sent out to clients, and the “collection rate,” which is the amount they were actually paid.<sup>189</sup> Of course, every lawyer experiences some slippage between their utilization rate and their collection rate. That slippage is just a cost of doing business.

What is startling about the Clio finding is just how little time lawyers for individual consumers spend on billable matters:

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182. *See generally About Clio*, CLIO, <https://www.clio.com/about/> (last visited Apr. 16, 2019).

183. *Id.*

184. CLIO, LEGAL TRENDS REPORT 3 (2016), <https://files.goclio.com/marketo/ebooks/2016-Legal-Trends-Report.pdf> [hereinafter CLIO REPORT 2016].

185. *Id.* at 4.

186. *Id.*

187. *Id.*

188. Randall Ryder, *Three Myths About Solo Attorneys (Part 1 of 3)*, LAWYERIST (May 13, 2013), <https://lawyerist.com/myth-solo-attorney/>.

189. CLIO REPORT 2016, *supra* note 184, at 24–36.

**Utilization rate:** Lawyers logged 2.2 hours of billable time per day (28 percent of an eight-hour day).

**Realization rate:** Lawyers billed 1.8 hours per day (81 percent of actual hours worked).

**Collection rate:** Lawyers collected payment on 1.5 hours per day (86 percent of actual hours billed).<sup>190</sup>

This helps explain why solo practitioner and small firm lawyers have had such a hard time making a decent living; they are spending too little of their time practicing law and too much of it doing everything else.<sup>191</sup>

The 2017 Clio Report also showed what, exactly, lawyers are doing with the rest of their time.<sup>192</sup> They are not eating bon bons and watching soaps. They spend a third of their time on business development or, in other words, finding clients.<sup>193</sup> They spend about half of their time on administrative matters: keeping their licenses current, managing their offices, generating and collecting bills, and related tasks.<sup>194</sup> That leaves roughly twenty percent of their time for substantive legal work. These findings should be an urgent concern for the legal profession and those who regulate it. A very large cohort of lawyers is struggling to find enough billable work to make ends meet.

Someone who had not read the preceding Parts of this Article might wonder why technology could not help more in directing clients to lawyers and collecting their fees. This would eliminate much of the wasted effort on trying to generate business and dunning for payments. That would, in turn, enable lawyers to spend more of their day doing the thing they went to law school for in the first place: practicing law. Someone who had read the earlier part of this Article might wonder instead why bar regulators did not recognize that Avvo Legal Services is precisely the kind of technological advance that lawyers should embrace not resist.

What then accounts for the resistance? We believe that for the rank and file, it has more to do with price than ethics. Avvo Legal Services replaced billable hours with flat fees for a wide range of services. And those flat fees were relatively low. Many practitioners may justifiably worry that they will need to match those prices or lose business. Either option may seem like a disaster. And bar associations reflect these concerns.

But online form providers such as Rocket Lawyer and LegalZoom are *already* radically lowering the prices for many routine services. That horse is out of the barn. Avvo Legal Services attempted to compete with these providers by connecting consumers who would rather hire a lawyer with the lawyers who were willing to do the work at an affordable price. Lawyers and bar regulators

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190. *Id.* at 5.

191. On the earnings of small firm and solo practitioners, see BARTON, *supra* note 37, at 5–6.

192. CLIO, LEGAL TRENDS REPORT 11–13 (2017), <https://files.goclio.com/marketo/ebooks/2017-Legal-Trends-Report.pdf> [hereinafter CLIO REPORT 2017].

193. *Id.*

194. *Id.*



who hope that prohibiting participation in Avvo Legal Services will hold the line against technology-driven competition have it exactly backwards. Programs like Avvo Legal Services are the profession's best hope at growing the number of clients willing to pay a lawyer rather than a form provider.

#### B. THE BENEFITS FOR CLIENTS AND ACCESS TO JUSTICE

We have both written at length about the breadth and seriousness of America's access-to-justice problems, and we will not belabor the point here.<sup>195</sup> Part of the access-to-justice problem is cost. Given prevailing fees, most Americans can at best afford little more than a few hours of legal work on any given issue.

But price is only part of the problem, as is clear from Rebecca Sandefur's recent American Bar Foundation study.<sup>196</sup> Her random sample found that two-thirds of those surveyed reported at least one civil justice situation in the previous eighteen months, almost half of which resulted in significant negative consequences.<sup>197</sup> However, people described only nine percent of these situations as "legal" and took only eight percent to lawyers.<sup>198</sup> Cost was not the major barrier to seeking legal help; it was critical in only seventeen percent of cases.<sup>199</sup> Rather, the most common reason for failing to obtain legal assistance was some variant of "I don't need any."<sup>200</sup> Even those who recognize that they have a significant legal problem are often loath to see a lawyer on the assumption that it will be expensive, time-consuming, unpleasant, and/or unnecessary.<sup>201</sup> In countries that have fewer restrictions on the delivery of legal services, such as the United Kingdom and the Netherlands, a much larger percentage of individuals (roughly twenty-five percent to thirty-five percent) take their problems to a lawyer.<sup>202</sup>

American attorneys have contributed to consumer wariness by using hourly rates that seem to reward them for maximizing their time rather their efficiency. The bar's traditional resistance to flat fees and routinized services may lead to the highest quality assistance. But that is not what most consumers are willing and able to purchase. To address America's pervasive and persistent problems of access to justice, more lawyers must seek ways of serving more clients at

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195. BARTON & BIBAS, *supra* note 28; RHODE, *supra* note 25, at 30–59; Rhode & Cummings, *supra* note 3.

196. REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 3–4, 7 (2014), [http://www.americanbarfoundation.org/uploads/cms/documents/sandefur\\_accessing\\_justice\\_in\\_the\\_contemporary\\_usa\\_aug\\_2014.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf).

197. *Id.* at 5.

198. *Id.* at 14.

199. *Id.* at 13.

200. Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 450 (2016).

201. SANDEFUR, *supra* note 196, at 11–14.

202. Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: Legal Resources for Ordinary Americans*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 21, 21–53 (Samuel Estreicher & Joy Radice eds., 2016).

more affordable rates. Technology can serve that end. LegalZoom and Rocket Lawyer have done exactly this. The sooner lawyers can follow suit, the better off they, and all the rest of us, will be.

Avvo Legal Services was a step in the right direction. It lowered the price of legal services, and gave consumers a readily accessible way of identifying a lawyer that they could afford. It also encouraged lawyers to work more efficiently. The only way to make a decent living through Avvo Legal Services was to handle a large volume of cases quickly and effectively.

The stated concern of bar ethics committees is that Avvo's approach could force participating lawyers to provide substandard work. Yet the effect of those rulings will be to push more price-conscious consumers in the direction of online form processing services that offer less assurance of quality assistance. In our view, innovative technologies like Avvo Legal Services deserve a chance. Bar regulators should have waited to see if problems materialized, and then looked for the least restrictive means of dealing with them. Their regulatory process should be more evidence-based, and open to comments from affected parties. Snuffing out innovation before it even launches seems more calculated to protect the profession than the public. And, in the long run, even the profession is ill served by such regulatory repression.

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# Incorporation by Reference: Requiem for a Useless Tradition

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I. THE FORMULA  
(INCORPORATION BY REFERENCE)

The talismanic practice of repeating and realleging facts in each count in a pleading is particularly dreadful:

Each and every allegation set forth in paragraphs 1 through 45 of this Complaint is hereby repeated, reiterated, and realleged with the same force and effect and incorporated by reference as if fully set forth herein at length and in detail.

Most practitioners use a shorter but equally exasperating formula for “incorporation by reference.” A 25-page simple complaint with seven counts, for example, would have seven useless boilerplate paragraphs, repeating the formula seven times at the beginning of each count, mechanically incorporating previous paragraphs, whether relevant or not. Without these wasteful paragraphs, the complaint would be one full page shorter.

Modern pleadings have no place for antiquated practices or for useless words. But so far this practice has eluded American lawyers, who do it without knowing what they are doing or why they are doing it.

It is common to justify the practice of incorporation by reference by arguing that “[r]ealleging by reference saves the story from redundancy and tedium.”<sup>1</sup> This is a centuries-old, recycled explanation. Two centuries ago, in an English book widely published in the United States, Joseph Chitty famously said:

In framing a second or subsequent count for the same cause of action, care should be taken to avoid any unnecessary repetition of the same matter, and by an inducement in the first count, applying any matter to the following counts, and by referring concisely in the subsequent counts to such inducement, much unnecessary prolixity may be avoided.<sup>2</sup>

Chitty’s statement was the standard explanation for incorporation by reference; it was cited and plagiarized in dozens of decisions and books for several decades in the 1800s.

More than a century later, in 1913, in the United States, the justification remained the same:

Good pleading demands a plain and concise statement of the facts constituting the cause of action . . . without unnecessary recital or repetition; . . . it is good practice in stating a second cause of action to refer to some prior allegation in the first cause of action to avoid repetition.<sup>3</sup>

The same justification for incorporation by reference is echoed today in the two most comprehensive treatises on federal practice.<sup>4</sup> It is as if Chitty’s treatise on pleading is still being read today.

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1. Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 J. LEGAL WRITING INST. 3, 28 (2009).

2. 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON PLEADING AND ON THE PARTIES TO ACTIONS AND THE FORMS OF ACTIONS 396 (New York, Robert M’Dermut 1809). The last American edition of this treatise, published almost a century later, contained the same statement. See 1 CHITTY, *supra*, at 428–29 (Henry Greening & J.C. Perkins eds., Springfield, Mass., G & C Merriam, 7th Eng. ed. & 16th Am. ed. 1876); see also Phillips v. Fielding (1792) 126 Eng. Rep. 464, 469 (KB) (praising incorporation by reference as a means of streamlining documents); Stiles v. Nokes (1806) 103 Eng. Rep. 191, 194–95; 7 East 493, 502, 506 (KB) (same).

3. Maxwell Steel Vault Co. v. Nat’l Casket Co., 205 F. 515, 522 (N.D.N.Y. 1913); see also Griswold v. Nat’l Ins. Co., 3 Cow. 96, 105 (N.Y. Sup. Ct. 1824); Loomis v. Swick, 3 Wend. 205, 207 (N.Y. Sup. Ct. 1829).

4. See 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1326 (3d ed. 2018) (“Federal Rule of Civil Procedure 10(c) permits the pleader to use an incorporation by reference of prior allegations . . . to encourage pleadings that are short, concise, and free of unwarranted repetition . . .”); 2 JEFFREY A. PARNES, MOORE’S FEDERAL PRACTICE—CIVIL § 10.04 (2018) (updated by the Hon. Jerry E. Smith) (noting that incorporation by reference “eliminates redundancy and repetition”); see also CHARLES EDWARD

Incorporation by reference, however, is useless. If the objective is to avoid repetition, the solution cannot be to reiterate the facts through an inherently repetitive formula. Incorporation by reference is the quintessential redundancy. The narrative would be even less redundant and less tedious if parties did not reallege facts previously alleged in the same document.

Yet current legal writing<sup>5</sup> and civil procedure<sup>6</sup> books explicitly teach incorporation by reference. Most transcribe complaints with the offending formula, validating its use.<sup>7</sup> Formbooks perpetuate the formula amongst practitioners.<sup>8</sup> Books that don't teach the formula either fail to provide a model complaint, present simple complaints with only one count, or do not number the paragraphs.<sup>9</sup>

The Federal Rules of Civil Procedure add to the confusion. Rule 10(c) prescribes that “a statement in a pleading may be adopted by reference elsewhere

CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 37, at 149 (1928) (“[T]he practice would prevent the repetitions of allegations.”).

5. See, e.g., MARGARET TEMPLE-SMITH & DEBORAH E. CUPPLES, LEGAL DRAFTING: LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS 34 (2013) (“To avoid redundancy, an attorney can re-allege a paragraph containing a previously alleged fact or incorporate the material by reference.”); DEBORAH E. BOUCHOUX, ASPEN HANDBOOK FOR LEGAL WRITERS: A PRACTICAL REFERENCE 215 (4th ed. 2017); IAN GALLACHER, A FORM AND STYLE MANUAL FOR LAWYERS 130–31 (2005) (“First, however, you should reincorporate all your facts at the start of each count in the complaint.”).

6. See, e.g., RICHARD D. FREER, CIVIL PROCEDURE § 7.3.1 (3d ed. 2012); STEVEN BAICKER-McKEE & WILLIAM M. JANSSEN, A STUDENT’S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE 186 (2018); JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 5.13, at 286–89 (4th ed. 2005); GEOFFREY C. HAZARD, JR., JOHN LEUBSDORF & DEBRA LYN BASSETT, CIVIL PROCEDURE § 4.7 (6th ed. 2011); LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 556 (4th ed. 2009).

7. See, e.g., HEIDI K. BROWN, THE MINDFUL LEGAL WRITER: MASTERING PREDICTIVE AND PERSUASIVE WRITING 299 (2016); CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 406 (7th ed. 2014); VEDA R. CHARROW ET AL., CLEAR AND EFFECTIVE LEGAL WRITING 34 (5th ed. 2013); BRANDT GOLDSTEIN ET AL., A DOCUMENTARY COMPANION TO *STORMING THE COURT* 23 (2009); LEWIS A. GROSSMAN & ROBERT G. VAUGHN, A DOCUMENTARY COMPANION TO A CIVIL ACTION 78 (4th ed. 2008); NAN D. HUNTER, THE POWER OF PROCEDURE: THE LITIGATION OF *JONES V. CLINTON* 14 (2002); ADAM LAMPARELLO & MEGAN E. BOYD, SHOW, DON’T TELL: LEGAL WRITING FOR THE REAL WORLD 90–102 (2014); KRISTEN KONRAD TISCIONE, RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION 178 (2d ed. 2016).

8. See, e.g., 11 AM. JUR. PLEADING AND PRACTICE FORMS *Federal Practice and Procedure* § 159 (2018); 19C *id.* §§ 15–16 (2019); 1A NICHOLS CYCLOPEDIA OF FEDERAL PROCEDURE FORMS § 38:29 (2018) (“[Plaintiff/Defendant] repeats and realleges each and every allegation contained in paragraphs [number of paragraph] and [number of paragraph], inclusive, of this [complaint/answer/type of pleading] with the same effect as if they were repeated in full in this paragraph.” (alterations in original)); HERZOG’S BANKRUPTCY FORMS & PRACTICE § 6:3 (Nov. 2018); 2C WEST’S FEDERAL FORMS, DISTRICT COURTS-CIVIL §§ 10:62–10:65 (5th ed. 2018); 25B WEST’S MCKINNEY’S FORMS ELECTION LAW § 6-132 Form 5 (2018); 4A NEW YORK PRACTICE, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 52:44 (4th ed. 2018); 1 LA COE’S FLORIDA RULES OF CIVIL PROCEDURE r. 1.110(128) (2018) (giving suggestions of best practices); 2 MICHIGAN COURT RULES PRACTICE, FORMS § 26:25 (2018) (giving five different options of a similar useless formula, including “repeats and realleges,” “incorporates . . . adopts . . . and realleges,” and “reiterates and restates”).

9. See, e.g., BRYAN A. GARNER, THE REDBOOK 444–45 (6th ed. 2013); LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING (6th ed. 2014); DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH 24 (5th ed. 2015); MARY BARNARD RAY, THE BASICS OF LEGAL WRITING (rev. 1st ed. 2008); TERESA J. REID RAMBO & LEANNE J. PFLAUM, LEGAL WRITING BY DESIGN (2d ed. 2013); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 378–82 (6th ed. 2013).

in the same pleading or in any other pleading or motion.”<sup>10</sup> It is a norm without context, a permission without obligation.

Despite being useless, the practice lives on. It is a silly American idiosyncrasy, a ritualistic recitation that clutters complaints, answers, and indictments. It serves no purpose, makes no sense, and is not used in any other legal system. It is there, we can see it, but no one remembers what it is for. And no one asks questions. To borrow an expression of evolutionary biology, incorporation by reference is merely a vestigial evolutionary feature of our litigation procedures, like our vestigial tail.

The time has come for the legal profession to strike this useless recitation from our pleadings and adopt a twenty-first century style. This Article will explain why lawyers had to do it in the past and why they do not need to anymore.

## II. THE DOGMA (THE NEED TO REALLEGE ALL FACTS IN EACH COUNT)

### A. THE DOGMA IN ENGLISH AND AMERICAN COMMON-LAW PLEADING

The practice of incorporation by reference can be traced back more than four centuries, possibly earlier, back to the Middle Ages. It was forged in the Court of Common Pleas and in the King and Queen’s Bench, in a past so remote that the reports were handwritten on parchment rolls (plea rolls).<sup>11</sup> The records of the cases were written in Latin, and many books, in Latin or Law French. The cases are serviceable today only because they were translated into English, generally in a summary of only a few lines.

Incorporation by reference allowed efficient writing at a time when the formulaic common-law pleading rule in England (later transplanted to the United States) substantially restricted the joinder of claims in a legal proceeding. The general rule (subject to debate, exceptions, complications, and litigation) was that a plaintiff could only join claims that required the same kind of judgment, were between the same parties, and proceeded under the same form of action.<sup>12</sup>

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10. FED. R. CIV. P. 10(c).

11. Over a million sheep gave their skins to produce the official record of six centuries of court business in England. See Pym Yeatman, *Our Common Law Records*, 4 LAW MAG. & REV. 162, 169 (1875); *Publication of the Ancient Common Law Records*, 2 CENT. L.J. 149, 149–50 (1875). It is ironic that the earliest case on incorporation by reference is about the sale of wool. See *infra* Subpart III.B (discussing *Barnes v. May* (1591) 78 Eng. Rep. 496, Cro. Eliz. 240).

12. See 1 CHITTY, *supra* note 2, at 196, 200 (“The joinder of action depends on the *form* of the action, rather than on the *subject matter* of it . . .”); EDWARD LAWES, AN ELEMENTARY TREATISE ON PLEADING IN CIVIL ACTIONS 72 (London, C. Roworth 1806); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 111–22 (1952) (discussing the evolution of joinder of claims in common law and code pleading); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 451–63 (2d ed. 1977) (same); HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 279–80 (London, G. Woodfall 1824); 1 JOHN SIMCOE SAUNDERS, THE LAW OF PLEADING AND EVIDENCE IN CIVIL



The idiosyncratic common-law pleading system, with its arcane technicalities, was elevated to a “science.”<sup>13</sup> Its excessive formalism generated several distortions which in turn produced inequitable outcomes and inconvenient proceedings. For example, a plaintiff could join two claims arising out of entirely different facts, however inconvenient, as long as they followed the same form of action. But a plaintiff could not join claims arising out of the same occurrence if they proceeded under different forms of actions, even if they required the same evidence and produced a convenient trial package.<sup>14</sup>

In the limited circumstances in which a plaintiff could join claims, each count (claim, cause of action, action, paragraph) had to be “separately stated.”<sup>15</sup> This rule meant that each count had to be set separately from the other, eventually in a separate grammatical paragraph. The objective was to facilitate the work of the opponent and the court.<sup>16</sup> This requirement is commonsensical and continues to exist today for the same reason.<sup>17</sup>

ACTIONS 418 (London, S. Sweet 1828); BENJAMIN J. SHIPMAN, *HAND-BOOK OF COMMON-LAW PLEADING* § 254, at 363–64 (St. Paul, Minn., West Publ’g Co., 2d ed. 1895); GEORGE L. PHILLIPS, *AN EXPOSITION OF THE PRINCIPLES OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE* § 123, at 106–07 (Chicago, Callaghan & Co. 1896); Edson R. Sunderland, *Joinder of Actions*, 18 MICH. L. REV. 571, 572 (1920) (“Most of the restrictions which the law placed upon such joinder can be shown by experience to be useless.”); William Wirt Blume, *A Rational Theory for Joinder of Causes of Action and Defences, and for the Use of Counterclaims*, 26 MICH. L. REV. 1 (1927) (discussing the irrationality of the old rules of joinder of claims).

13. See LITTLETON’S TENURES 108 (London, Thomas Wright 1600) (1481) (originally published in French) (“[I]t is one of the most honorable, laudable, and profitable things in our law, to have the science of well pleading . . .”); 1 EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON* § 10, at 17.a. (Francis Hargrave & Charles Butler eds., Kite & Walton 1853) (1628); 2 *id.* § 534, at 303.a.; see also PHILEMON BLISS, *A TREATISE UPON THE LAW OF PLEADING* iii (St. Louis, Mo., F.H. Thomas & Co. 1879) (“[T]o be a good pleader gave one an advantage and a rank among his fellows to be acquired by no other single accomplishment.”); JAMES GOULD, *A TREATISE ON THE PRINCIPLES OF PLEADING, IN CIVIL ACTIONS* vii (Boston, Lilly & Wait 1832) (“[T]he science of pleading [is] . . . the most instructive branch of the common law.”); STEPHEN, *supra* note 12, at v (“The science of pleading . . . always among the highest in professional estimation . . .”).

14. See Blume, *supra* note 12, at 8 (noting that a plaintiff could join a range of claims, even if they were “incongruous and unrelated,” so long as they “could all be included under *one form of original writ*” (emphasis added)); JAMES & HAZARD, *supra* note 12, § 10.2, at 453–54 (“[O]n the other hand, claims which arose out of the very same occurrence could not be joined if they required different forms of action for their redress.”).

15. See, e.g., *Boeckler v. Mo. Pac. Ry. Co.*, 10 Mo. App. 448, 450, 456 (1881); *St. Louis Gas Light Co. v. City of St. Louis*, 86 Mo. 495, 499 (1885); *Eaton v. Or. Ry. & Navigation Co.*, 19 Or. 391, 392 (1890).

16. See, e.g., 1 EDGAR B. KINKEAD, *THE LAW OF PLEADING IN CIVIL ACTIONS AND DEFENSES UNDER THE CODE* § 20, at 17–21 (Cincinnati, Ohio, W.H. Anderson & Co. 1895) (“The object of [separately stating and numbering causes of action] is not only to preserve . . . the legal distinction between causes of action in a petition, but to enable a defendant to answer fully, definitely, and clearly, that the facts alleged may be denied or admitted, and the court readily understand the principal points in controversy.”); CLAUDIUS L. MONELL, *A TREATISE ON THE PRACTICE OF THE COURTS OF THE STATE OF NEW-YORK ADAPTED TO THE CODE OF PROCEDURE* 48 (Albany, N.Y., Charles Van Benthuysen 1849) (stating that when several causes of action are in the same complaint, they must be separately set out so that the defendant can be aware when he may “have a defence to one and not to the other”).

17. FED. R. CIV. P. 10(b) (“A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances.”); see also, e.g., FRIEDENTHAL, KANE & MILLER, *supra* note 6, § 5.13, at 286.

But “separately stated” also had another meaning, less obvious and less useful. It meant that each count had to contain all facts and elements essential to its cause of action, even if they were already mentioned earlier in another count of the same pleading.<sup>18</sup> If one fact happened to be an element of two or more counts, it had to be alleged in each—defects and omissions in one count could not be supplied by the allegations in another.<sup>19</sup>

The principle behind this dogma was that each claim was perceived as a separate pleading or even a separate lawsuit.<sup>20</sup> Tellingly, in many old books, joinder of claims was called “joinder of actions.”<sup>21</sup> Because of that, all counts had to be treated as an independent complaint and had to stand by itself: if one count was stricken or dismissed, the remaining counts could survive only if they were complete.<sup>22</sup>

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18. See, e.g., *Dent’s Adm’r v. Scott*, 3 H. & J. 28, 31–32 (Md. Ct. App. 1810) (discussing why “this form of pleading . . . is not allowed” and that each count “must be a full declaration of itself, and must not depend upon any other count”); *Loomis v. Swick*, 3 Wend. 205, 207 (N.Y. Sup. Ct. 1829); *Canterbury v. Hill*, 4 Stew. & P. 224, 228 (Ala. 1833); see also 1 SAUNDERS, *supra* note 12, at 417; 1 JOHN BOUVIER, A LAW DICTIONARY 245–46 (Philadelphia, T. & J.W. Johnson 1839) (defining “count”); WATKIN WILLIAMS, AN INTRODUCTION TO THE PRINCIPLES AND PRACTICE OF PLEADING IN CIVIL ACTIONS 99 (London, C. Roworth & Sons 1857).

19. See JOHN ANTHON, AMERICAN PRECEDENTS OF DECLARATIONS § 5, at 39 (New York, Gould & Van Winkle 1810) (“Any thing in the first count, which is right, cannot help any defect in the second count; though they are both in one declaration, yet they are as distinct as if they were in two.”); *Nelson v. Swan*, 13 Johns. 483, 484–85 (N.Y. Sup. Ct. 1816) (“The second count is imperfect, unless helped by reference to the first; and when . . . one count is bad, nothing in that count can be resorted to for the purpose of helping out, and aiding, another count.”).

20. See *Smith v. Aiery* (1704) 2 Ld. Raym. 1034, 6 Mod. 128, 129 (Eng.) (“[A]ny Thing in the first Count which was right, could not help any Defect in the Second; for tho’ [sic] they both were put in one Declaration, yet they were as distinct as if they had been in two several actions.”); *Mardis v. Shackelford*, 6 Ala. 433, 436 (1844); *Hitchcock v. Munger*, 15 N.H. 97, 102 (1844); see also JOHN FREDERICK ARCHBOLD, A DIGEST OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN ACTIONS REAL, PERSONAL, AND MIXED 172 (New York, Stephen Gould & Son 1824); 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW, *Pleas and Pleading* at B1 (London, Catherine Lintot 1759); 1 CHITTY, *supra* note 2, at 397; 1 MORRIS M. ESTEE, PRACTICE, PLEADING AND FORMS 210, 531 (San Francisco, H.H. Bancroft & Co. 1870); JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION §§ 442, 447, 550, 716 (Boston, Little, Brown & Co. 1876); BLISS, *supra* note 13, § 121, at 162.

21. See, e.g., 1 CHITTY, *supra* note 2, at 397; 1 JOHN A. DUNLAP, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF NEW-YORK IN CIVIL ACTIONS 46 (Albany, N.Y., C.S. Van Winkle 1821); SIMEON NASH, PLEADING AND PRACTICE UNDER THE CIVIL CODE 32 (Cincinnati, Ohio, Robert Clarke & Co. rev. 3d ed. 1864); GEORGE VAN SANTVOORD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS UNDER THE NEW YORK CODE OF PROCEDURE 183 (Nathaniel Co. Moak ed., Albany, N.Y., John D. Parsons, Jr. 1873) (1852); SAMUEL MAXWELL, A TREATISE OF PLEADING AND PRACTICE UNDER THE CODE OF CIVIL PROCEDURE 28 (Lincoln, Neb., Journal Co. 1880); ALEXANDER MARTIN, CIVIL PROCEDURE AT COMMON LAW § 228, at 183 (1905); 1 JOHN PRENTISS POE, PLEADING AND PRACTICE IN COURTS OF COMMON LAW § 282, at 271 (4th ed. 1906); *Sunderland*, *supra* note 12, at 576; MARTIN P. BURKS, PLEADING AND PRACTICE IN ACTIONS AT COMMON LAW § 473, at 914 (C.H. Morrissett ed., 2d ed. 1921).

22. See *Phillips v. Fielding* (1792) 126 Eng. Rep. 464, 469; 2 H. Bl. 123, 131 (referring to a case in which the first counts were dismissed, but the remaining counts were considered sufficient only because they had referred to the first one); ANTHON, *supra* note 19, § 5, at 40 (“The [first] count struck out was considered as in existence, and as a part of the record, for the purpose of making the new count and judgment on it good.”); *Nelson*, 13 Johns. at 484; *Crookshank v. Gray*, 20 Johns. 344, 344–48 (N.Y. Sup. Ct. 1823) (dismissing the first two counts, but keeping the third count because it made reference to the first); *Lattin v. McCarty*, 17 How. Pr.

Introductory or prefatory information, however, could be stated just once at the beginning of the pleading (there was no need to repeat or refer to it at each count). Introductory information (also called “matters of inducement” by some courts) was a necessary part of the pleading, but contained unessential elements of any specific count and was applicable to several of them. Examples given in cases and textbooks included the character in which persons were made parties, the jurisdiction of the court, the corporate powers of plaintiffs, partnership and agreement between the parties, as well as the names, capacity to sue, citizenship, marital status, corporate existence, and residence of the parties.<sup>23</sup>

## B. THE DOGMA IN AMERICAN CODE PLEADING

The formalistic common-law pleading dogma (requiring each count to contain all facts and elements of the cause of action) remained in effect in the United States even after 1848, when New York enacted its first Code of Procedure, known as the Field Code.<sup>24</sup> Soon thereafter, about thirty states enacted their own codes of civil procedure emulating the New York model, and inaugurating what became known as the American Reform Experience (or code pleading). During the following decades in the United States, about half the states still followed common-law pleading (modernized and influenced by the codes at differing degrees), while the other half followed the then-modern code pleading.<sup>25</sup> Textbooks and casebooks on common-law pleading were published

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239, 240 (N.Y. Sup. Ct. 1858); *see also* 1 AUSTIN ABBOTT, BRIEF UPON THE PLEADINGS IN CIVIL ACTIONS 34 & n.1 (1904).

23. *See* Sinclair v. Fitch, 3 E.D. Smith 677, 689 (N.Y. Ct. Com. P. 1857); Lowry v. Dutton, 28 Ind. 473, 474–75 (1867); Aull Sav. Bank v. City of Lexington, 74 Mo. 104, 105 (1881); Thompson v. Edwards, 85 Ind. 414, 416–17 (1882); Carver v. Carver, 97 Ind. 497, 503 (1884); West v. Eureka Improvement Co., 40 Minn. 394, 395 (1889); Ronnie v. Ryder, 8 N.Y.S. 5, 6 (City Ct. 1889); Abendroth v. Boardley, 27 Wis. 555, 557 (1871); Stone v. Wendover, 2 Mo. App. 247 (1876); Thompson v. Edwards, 85 Ind. 414, 416–17 (1882); Bigelow v. Drummond, 90 N.Y.S. 913, 914 (App. Div. 1904); *see also* POMEROY, *supra* note 20, §§ 575, 716; GEORGE W. BRADNER, HAND-BOOK OF THE RULES OF PLEADING FOR NEW YORK STATE 47 (Albany, N.Y., Matthew Bender 1892); PHILLIPS, *supra* note 12, § 204, at 183; EVERETT W. PATTISON, CODE PLEADING AS INTERPRETED BY THE COURTS OF MISSOURI § 235, at 138 (1901); 1 ABBOTT, *supra* note 22, at 36; 1 CLARK A. NICHOLS, A TREATISE ON PLEADING AND PRACTICE IN THE COURTS OF RECORD OF NEW YORK 926 (1904); 1 AUSTIN ABBOTT & CARLOS ALDEN, FORMS OF PLEADING IN ACTIONS FOR LEGAL OR EQUITABLE RELIEF 5 (Carlos C. Alden ed., 2d ed. 1918).

24. N.Y. CODE PROC. § 167 (1848) (amended 1863). The code received its name because of the influence of David Dudley Field, widely regarded as its main author and promoter. *Compare* Letter from Charles O'Connor to Messrs. Pope & Haskell (Mar. 14, 1870), in 1 ALBANY L.J. 302, 302 (1870) (“Common fame asserts, and without contradiction, that I am aware of, from any quarter, that Mr. David Dudley Field . . . drew the whole instrument, and may properly be regarded as its sole author.”), with Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 317 (1988) (“Although Field wrote much of the original version of this partial code, the other two commissioners apparently contributed significantly.”).

25. *See* CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 8–16 (Cincinnati, Ohio, W.H. Anderson & Co. 1897) (classifying the states); CLARK, *supra* note 4, § 8 (same).

in the United States well into the twentieth century.<sup>26</sup> They shared the lawyers' shelves with textbooks and casebooks on code pleading.

The legislative evolution of the dogma of complete counts in New York, through its several codes and rules of procedure, is informative.

The common-law dogma survived in the New York Field Code of Procedure of 1848, which provided that “[t]he plaintiff may unite in the same complaint several causes of action . . . . But the causes of action, so united, . . . must be separately stated.”<sup>27</sup> Although the Field Code made pleading and joinder of claims more flexible than the practice at common law, it did not change the rule that each cause of action must be “separately stated.”

The first meaning of “separately stated” in English common-law pleading, as previously discussed, is commonsensical: each claim must be stated separately from the others to avoid confusion.<sup>28</sup> But the interpretation of that expression also imported (unnecessarily) its second meaning: that each count must be complete and contain all facts and elements essential to the cause of action, even if they were already mentioned earlier in another count in the same pleading.<sup>29</sup> This was the uniform interpretation in New York<sup>30</sup> and in all other

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26. See, e.g., ALEXANDER MARTIN, *supra* note 21; EDSON R. SUNDERLAND, COMMON LAW PLEADING (1914); CLARKE B. WHITTIER & EDMUND M. MORGAN, CASES ON COMMON LAW PLEADING (William R. Vance ed., 1916); JOHN JAY MCKELVEY, PRINCIPLES OF COMMON-LAW PLEADING (rev. 2d ed. 1917); WALTER WHEELER COOK & EDWARD W. HINTON, CASES ON PLEADING AT COMMON LAW (1920); see also SHIPMAN, *supra* note 12, §§ 78–79, at 200–01 (3d ed. 1923); JOSEPH H. KOFFLER & ALISON REPPY, HANDBOOK OF COMMON LAW PLEADING (1969).

27. N.Y. CODE PROC. § 167 (1848) (amended 1849); see also WILLIAM WAIT, THE CODE OF PROCEDURE OF THE STATE OF NEW YORK 271–72, 305–06 (Albany, N.Y., William Gould & Son 1875); N.Y. CODE CIV. PROC. § 663 (1850) (proposed complete New York Code of Civil Procedure).

28. See *supra* Subpart II.A.

29. See *supra* Subpart II.A.

30. See, e.g., *Benedict v. Seymour*, 6 How. Pr. 298, 302 (N.Y. Sup. Ct. 1852); *Landau v. Levy*, 1 Abb. Pr. 376, 379–80 (N.Y. Sup. Ct. 1855); *Sinclair*, 3 E.D. Smith at 689 (“[E]ach [cause of action] by itself, and unconnected with the other, may show a good cause of action against the defendants.”); *Simmons v. Fairchild*, 42 Barb. 404, 409 (N.Y. Gen. Term 1864); *Victory Webb v. Beecher*, 55 How. Pr., 193, 202–03 (N.Y. Sup. Ct. 1878); *Reiners v. Brandhorst*, 59 How. Pr. 91, 92 (N.Y. Sup. Ct. 1879) (“Each separate cause of action must be complete in itself and contain everything that is essential . . . to show the plaintiff’s right to relief.” (citation omitted)); *Wallace v. Jones*, 74 N.Y.S. 116, 117 (App. Div. 1902) (holding that the complaint should state in each paragraph a separate cause of action and all the facts necessary to make the cause of action facially complete); *Marietta v. Cleveland, Cincinnati, Chi. & St. Louis Ry. Co.*, 100 N.Y.S. 1027, 1028 (Sup. Ct. 1906); *Daly v. Haight*, 146 N.Y.S. 42, 44–45 (App. Div. 1914).

code pleading (and common-law) states.<sup>31</sup> And the dogma of complete counts was widely taught in all professional books.<sup>32</sup>

By the time the Field Code was enacted in 1848, there was no reason why “separately stated” also meant “completely stated,” except inertia. This backward interpretation was comfortable for practitioners trained in the old system, who read old English common-law pleading books.<sup>33</sup> Even at the time, this interpretation was unwarranted. David Dudley Field’s main objective was to bring relief to the formalistic common-law pleading.<sup>34</sup> When code pleading abolished the old forms of action and merged law and equity, the parties needed only to plead the facts constituting the cause of action or defense, and the court would apply the law to the facts.<sup>35</sup> The Field Code imported this model from Equity practice.<sup>36</sup>

Although code pleading was not free from technicalities, the enactment of the Field Code was the perfect intellectual environment to abandon the old common-law dogma of complete counts. It was, therefore, the first wasted opportunity in the United States to abandon the old dogma, beating England by a few years.<sup>37</sup>

31. *See, e.g.*, *Holton v. Muzzy*, 30 Vt. 365, 374–75 (1858); *Leabo v. Detrick*, 18 Ind. 414, 415 (1862); *Sabin v. Austin*, 19 Wis. 421, 423 (1865); *Day v. Vallette*, 25 Ind. 42, 43 (1865) (“Each paragraph must contain within itself sufficient averments to constitute a good cause of action.”); *Mason v. Weston*, 29 Ind. 561, 564 (1868); *Stewart v. Balderston*, 10 Kan. 131, 144–45 (1872); *Haskell v. Haskell*, 54 Cal. 262, 265–66 (1880); *Entsminger v. Jackson*, 73 Ind. 144, 145–46 (1880); *Clark v. Whittaker Iron Co.*, 9 Mo. App. 446, 448–49 (1881); *Porter v. Drennan*, 13 Ill. App. 362, 365 (1883); *Leavenworth, N. & S. Ry. Co. v. Wilkins*, 26 P. 16, 16–17 (Kan. 1891); *Reading v. Reading*, 30 P. 803, 804 (Cal. 1892); *Ramsey v. Johnson*, 52 P. 1084, 1085 (Wyo. 1898); *Merrill v. Post Pub. Co.*, 83 N.E. 419, 423 (Mass. 1908); *Nat’l Lumber Co. v. Wickliffe*, 125 P. 357, 358 (Cal. Ct. App. 1912); *Gardner v. W. Union Tel. Co.*, 81 S.E. 259, 260 (Ga. Ct. App. 1914); *Smith v. Phila., Balt. & Wash. R.R. Co.*, 115 A. 416, 418–19 (Del. Super. Ct. 1921); *Ross v. Chi. & Alton R.R. Co.*, 225 Ill. App. 633, 638 (1922); *Saffold v. Anderson*, 134 S.E. 81, 83 (Ga. 1926); *A. Mortellaro & Co. v. Atl. Coast Line R.R. Co.*, 107 So. 528, 529 (Fla. 1926); *Paterson & Edey Lumber Co. v. Carolina-Portland Cement Co.*, 112 So. 245, 250 (Ala. 1927); *Lance v. Boroughs*, 102 S.E.2d 167, 169 (Ga. 1958).

32. *See, e.g.*, BRADNER, *supra* note 23, at 14, 48; CLARK, *supra* note 4, § 70, at 312–16; POMEROY, *supra* note 20, §§ 442, 447, 550, 716; PHILLIPS, *supra* note 12, §§ 123, 202–04; SHIPMAN, *supra* note 12, § 254; VAN SANTVOORD, *supra* note 21, at 148–49; 1 VICTOR B. WOOLLEY, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN THE LAW COURTS OF THE STATE OF DELAWARE § 343, at 247 (1906).

33. *See, e.g.*, 2 CHITTY, *supra* note 2, at 429 (H. Greening et al. eds., Springfield, Mass., G. & C. Merriam, 7th Eng. ed. & 16th Am. ed. 1872) (citing English and American common-law pleading cases regarding incorporation by reference).

34. *See* Letter from David Dudley Field to John O’Sullivan (Jan. 1, 1842), in 5 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW-YORK, 64TH SESS. 23–62 (1842). The letter was published as Appendix to the Report of the Committee on the Judiciary, in Relation to the More Simple and Speedy Administration of Justice and described proposed pleading rules. *Id.*; *see also* ARPHAXED LOOMIS, HISTORIC SKETCH OF THE NEW YORK SYSTEM OF LAW REFORM IN PRACTICE AND PLEADINGS 25–27 (Little Falls, N.Y., J.R. & G.G. Stebbins 1879) (“[The code] was designed to abolish all forms and technicalities which obstruct justice and prevent a speedy trial on the merits . . .”). Loomis was one of the members of the commission who drafted the Field Code, together with David Dudley Field and David Graham. *Id.* at 13–15.

35. *See* JAMES & HAZARD, *supra* note 12, § 1.6, at 19.

36. *See* LOOMIS, *supra* note 34, at 25–26 (“The system approaches and assimilates more nearly with the equity forms than with those of the common law.”).

37. *See infra* Subpart IV.A.

Instead, the old dogma persisted unchallenged. It was later maintained in the New York Throop Code of 1877, which provided that where a complaint “sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separate and numbered.”<sup>38</sup> The same rule was applicable for defendants asserting more than one defense or counterclaim.<sup>39</sup> Again, the rule that each cause of action must be “separately stated” had the same common-law interpretation that each count must be complete, containing all facts and elements of the cause of action. After all, that was the only reality that the practitioners knew at the time, and new statutes are interpreted and applied in the context of the time in which they are inserted.

The rule then continued in the New York Rules of Civil Practice of 1921: “Each separate cause of action, counterclaim or defense shall be separately stated and numbered, and shall be divided into paragraphs numbered consecutively, each as nearly as may be containing a separate allegation.”<sup>40</sup> The rule, however, adopted a different regulation for denials of facts: “Denials of facts alleged in the complaint or in an answer and denied by reply must not be repeated nor incorporated in a separate defense or counterclaim. Any fact once denied, shall be deemed denied for all purposes of the pleading.”<sup>41</sup>

The text did not change much in 1962, when the New York Civil Practice Law and Rules were enacted: “Separate causes of action or defenses shall be separately stated and numbered.”<sup>42</sup> But by then, the phrase “separately stated” did not carry the meaning that each count had to contain all facts and elements essential to the cause of action even if previously mentioned in the same pleading. Actually, the opposite was true.<sup>43</sup>

Incidentally, the 1938 Federal Rules also contain a similar provision regarding claims being “separately stated.” But it is couched in a much more tentative language: “If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.”<sup>44</sup> It is still true today that each paragraph must be numbered, each paragraph must be limited to a single set of circumstances, and each claim must be stated in separate counts.<sup>45</sup> But the dogma of complete counts was never adopted in the Federal Rules.<sup>46</sup>

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38. N.Y. CODE CIV. PROC. § 483 (1877) (emphasis omitted). At the time, the law demanded that the counts be numbered. Now, each paragraph in a pleading must be numbered. *See* FED. R. CIV. P. 10(b) (“A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances.”).

39. N.Y. CODE CIV. PROC. §§ 507, 517; *see also infra* Subpart II.C.

40. N.Y. R. CIV. PRAC. § 90 (1921).

41. *Id.*

42. N.Y. C.P.L.R. 3014 (McKinney 1962).

43. *See infra* Subpart IV.B.

44. FED. R. CIV. P. 10(b) (1938).

45. *But see* 2 PARNES, *supra* note 4, § 10.03 (these rules are not rigidly enforced if their violation does not confuse the opponent); 5A WRIGHT & MILLER, *supra* note 4, §§ 1322–24 (2018) (same).

46. *See infra* Subpart IV.C.

The dogma, therefore, has been dead in this country for almost a century (at least more than eighty years in the federal courts, and more than fifty in New York). But its disappearance went largely unnoticed to the legal profession. Because we neglected to give it a proper burial, its ghost still haunts us.<sup>47</sup>

### C. THE DOGMA APPLIED TO DEFENSES

The dogma that required each count to be complete was applied with the same force to responsive pleadings asserting more than one defense (plea) or more than one counterclaim. Each defense or counterclaim had to be “separately stated” and therefore complete: each had to contain all elements of that defense and be able to stand by itself, unaided by other defenses in the same answer.

This was the rule in English common-law pleading,<sup>48</sup> in American common-law pleading,<sup>49</sup> and in American code pleading.<sup>50</sup> So everything said

47. This is an inept attempt to paraphrase Maitland. F.W. MAITLAND, *EQUITY ALSO THE FORMS OF ACTIONS AT COMMON LAW* 296 (A.H. Chaytor & W.J. Whittaker eds., 1910) (“The forms of actions we have buried, but they still rule us from their graves.”). American law’s disorderly development through case law is breeding grounds for a herd of ghosts, zombies, and undead. See, e.g., Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961).

48. See *Stiles v. Nokes* (1806) 103 Eng. Rep. 191, 196; 7 East 493, 507; see also WILLIAMS, *supra* note 18, at 99.

49. See *Currie v. Henry*, 2 Johns. 433, 437 (N.Y. Sup. Ct. 1807); *Hughes v. Moore*, 11 U.S. 176, 190 (1812); *Day v. Clarke's Adm'r*, 8 Ky. 521, 522 (1819); *Griswold v. Nat'l Ins. Co.*, 3 Cow. 96, 113 (N.Y. Sup. Ct. 1824) (stating that “[e]ach plea [defense] must stand upon itself. One plea [defense] cannot be invoked in aid of another” and transcribing a defense containing incorporation by reference) (citation omitted)); *Shook v. Fulton*, 4 Cow. 424, 425 (N.Y. Sup. Ct. 1825); see also 1 WILLIAM W. HENING, *THE AMERICAN PLEADER AND LAWYER'S GUIDE* 33–38 (New York, Isaac Riley 1811); GOULD, *supra* note 13, at 171.

50. See *Bridge v. Payson*, 5 Sand. 210 (1851); *Benedict v. Seymour*, 6 How. Pr. 298, 303 (N.Y. Sup. Ct. 1852) (“[E]very denial . . . must stand by itself as a separate and distinct defence [sic] and must be so pleaded.”); *Williams v. Richmond*, 9 How. Pr. 522, 523 (N.Y. Sup. Ct. 1854) (discussing a defense referring to a promissory note mentioned in the complaint); *Spencer v. Babcock*, 22 Barb. 326, 335 (N.Y. Sup. Ct. 1856) (“A defense cannot be made out in pleading, by connecting two or more separate defenses together . . . each insufficient of itself.”); *Swift v. Kingsley*, 24 Barb. 541, 543 (N.Y. Sup. Ct. 1857) (“Each answer must stand by itself as a distinct defense . . .”); *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372, 386 (N.Y. Sup. Ct. 1858) (“Each defence [sic] so separately pleaded must be in itself complete, and must contain all that is necessary to answer the whole cause of action, or to answer that part thereof which it purports to answer.”); *Catlin v. Pedrick*, 17 Wis. 88, 92 (1863); *Baldwin v. U.S. Tel. Co.*, 54 Barb. 505, 517 (N.Y. Sup. Ct. 1867) (“By the well settled rules of pleading, each answer must of itself be a complete answer to the whole complaint; as perfectly so as if it stood alone. Unless, in terms, it adopts or refers to the matter contained in some other answer, it must be tested, as a pleading, alone by the matter itself contains.”); *Nat'l Bank of Mich. v. Green*, 33 Iowa 140, 144 (1871); *Krutz v. Fisher*, 8 Kan. 90, 96–97 (1871); *Truitt v. Baird*, 12 Kan. 420, 423–24 (1874); *Field v. Burton*, 71 Ind. 380, 387 (1880); *Spahr v. Tartt*, 23 Ill. App. 420, 421 (1887); *Eldridge v. Hargreaves*, 46 N.W. 923, 924 (Neb. 1890); *Black v. Holloway*, 41 S.W. 576, 576 (Ky. Ct. App. 1897); *Corbey v. Rogers*, 52 N.E. 748, 749–50 (Ind. 1899); *Eureka Fire & Marine Ins. Co. v. Baldwin*, 57 N.E. 57, 59 (Ohio 1900); *Gardner v. McWilliams*, 42 Or. 14 (1902); *Smith v. Martin*, 94 Or. 132 (1919); see also POMEROY, *supra* note 20, §§ 715–16, at 736 (“[E]ach [defense] must of itself be a complete answer to the whole cause of action against which it is directed, as perfectly so as though it were pleaded alone.”); T. A. GREEN, *A GENERAL TREATISE ON PLEADING AND PRACTICE IN CIVIL PROCEEDINGS AT LAW AND IN EQUITY UNDER THE CODE SYSTEM* §§ 825, 848–49 (WM. G. Myer ed., St. Louis, Mo., W.J. Gilbert 1879); 1 WILLIAM RUMSEY, *THE PRACTICE IN ACTIONS AND SPECIAL PROCEEDINGS IN THE COURTS OF RECORD OF THE STATE OF NEW YORK UNDER THE CODE OF CIVIL PROCEDURE* 355 (Albany, N.Y., Banks & Bros. 1887); 1 ABBOTT & ALDEN, *supra* note 23, at 7, 16; 16 THE ENCYCLOPEDIA OF PLEADING AND

in this Article about a plaintiff's complaint is equally applicable to a defendant's answer and counterclaim.

#### D. CONSEQUENCES FOR DISREGARDING THE DOGMA

Although the dogma of complete counts seems a frivolous technicality for modern legal minds, violating this fundamental pleading rule led to severe consequences: incomplete claims (or defenses) could be stricken or dismissed for failure to state facts sufficient to constitute a cause of action (or defense).<sup>51</sup> And the arcane rule was rigidly applied because pleadings were strictly construed against the pleader.<sup>52</sup>

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PRACTICE 561–62 (William M. McKinney ed., Long Island, N.Y., Edward Thompson Co. 1899); *see also* N.Y. FIELD CODE PROC. § 150 (1848) (amended 1849) (“[Defenses] shall *each* be separately stated, and refer to the causes of action which they are intended to answer, in any manner by which they may be intelligibly distinguished.”); N.Y. THROOP CODE CIV. PROC. § 507 (1877) (same); N.Y. R. CIV. PROC. § 90 (1920) (same).

51. *See, e.g.*, the defenses filed in *Tindall v. Moore* (1760) 95 Eng. Rep. 716, 716; 2 Wils. KB 114 (old motion in arrest of judgment); *Nelson v. Swan*, 13 Johns. 483, 484 (N.Y. Sup. Ct. 1816) (demurrer); *Crookshank v. Gray*, 20 Johns. 344, 344–48 (N.Y. Sup. Ct. 1823) (incomplete count is not actionable); *Porter v. Cumings*, 7 Wend. 172, 174 (N.Y. Sup. Ct. 1831) (motion to set aside the verdict); *Nestle v. Van Slyck*, 2 Hill 282, 284–85 (N.Y. Sup. Ct. 1842) (motion for nonsuit); *Hitchcock v. Munger*, 15 N.H. 97, 102 (1844) (motion in arrest of judgment); *Sinclair v. Fitch*, 3 E.D. Smith 677, 685 (N.Y. Ct. Com. P. 1857) (direct judgment based on demurrer); *Xenia Branch Bank*, 7 Abb. at 394–95 (motion to strike out a counterclaim from an answer); *Gilmore v. Christ Hosp.*, 52 A. 241, 242 (N.J. 1902) (demurrer); *Richardson v. Lanning*, 26 N.J.L. 130, 132 (1856) (nonsuit); *Abendroth v. Boardley*, 27 Wis. 555, 556 (1871) (demurrer); *Entsminger v. Jackson*, 73 Ind. 144, 146 (1880) (demurrer); *St. Louis Gas Light Co. v. City of St. Louis*, 86 Mo. 495, 498 (1885) (objection to the introduction of evidence); *Ronnie v. Ryder*, 8 N.Y.S. 5, 6 (City Ct. 1889) (motion for a new trial); *Woods v. Armstrong*, 29 Misc. 660, 661 (N.Y. Special Term 1899) (motion to vacate the execution); *Opdycke v. Easton & Amboy R.R. Co.*, 68 N.J.L. 12, 13 (1902) (demurrer); *Henry v. Milner*, 204 Ala. 226, 227 (1920) (demurrer granted after verdict for plaintiff).

52. *See, e.g.*, *Took v. Glascock* (1666) 85 Eng. Rep. 298, 305–06 & n.8; 1 Wms. Saun. 250, 259 & n.8 (“[I]t is a maxim in pleading, that every thing shall be taken most strongly against the pleader.”); *De Symonds v. Shedden* (1800) 126 Eng. Rep. 1209, 1211; 2 Box. & Pul. 153, 155 (“[T]he rule has been established ever since the time of Plowden [sixteenth century] that the intendment is against the party averring.”); *Griswold*, 3 Cow. at 103 (“[E]very pleading is to be taken most strongly against the pleader.”); *see also* 4 BACON, *supra* note 20, at 2; Francis Bacon, *The Maxims of the Law*, in 1 THE WORKS OF LORD BACON 552 (London, William Ball 1838) (“[I]n all imperfections of pleading, whether it be in ambiguity of words and double intendments, or want of certainty and averments, or impropriety of words, or repugnancy and absurdity of words, even the plea shall be strictly and strongly taken against him that pleads.”); LAWES, *supra* note 12, at 52; 1 CHITTY, *supra* note 2, at 241, 520–21 (noting that claims are strongly construed against the pleading party); 2 COKE, *supra* note 13, § 534[p], at 303.b. (“[T]he plea of every man shall be construed strongly against him that pleadeth it, for everie [sic] man is presumed to make the best of his owne [sic] case: *ambiguum placitum interpretari debet contra proferentem*.”); 1 EDMUND PLOWDEN, THE COMMENTARIES OR REPORTS OF EDMUND PLOWDEN 29–30, 46, 103–04 (Samuel Richardson trans., Savoy, Catharine Lintot 1761) (1578) (“[A] plea[] . . . shall be taken most strongly against him that pleads them . . . .”); STEPHEN, *supra* note 12, at 379; 1 SAUNDERS, *supra* note 12, at 416; 1 ESTEE, *supra* note 20, at 159.

The opposite of a rule of construction strictly against the pleader is that a pleading “shall be liberally construed, with a view of substantial justice between the parties.” *Childers v. Verner & Stribling*, 12 S.C. 1, 5 (1878) (internal quotation marks omitted) (citation omitted); *see also* CARLOS C. ALDEN, A HANDBOOK OF PRACTICE UNDER THE CIVIL PRACTICE ACT OF NEW YORK 62–63 (1921) (“At common law the rule of strict construction was applied, against the pleading. Under the present statute, defects in substance cannot be



In several cases, this superstition was taken to the extreme: the incomplete claim could not be amended and would be dismissed for failure to state a claim, or a jury verdict favorable to the plaintiff would be set aside on appeal.<sup>53</sup> The times were indeed hostile to common sense. A party risked losing a substantive right because of a technically defective pleading. Common-law judges were known for treating trivial procedural and formal errors as fatal to the proceeding;<sup>54</sup> and some of this rigidity was carried over to the nineteenth-century practice of code pleading.<sup>55</sup>

Several courts, however, exercised their discretion to allow plaintiffs and defendants to amend their pleadings, within a certain time, to add the omitted information in a count or defense, generally with payment of costs. This was true even during the more formalistic common-law pleading.<sup>56</sup> Despite its formalism and contrary to general misconception, amendments were generously

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overlooked or omissions supplied . . . ." (citations omitted)); EDWIN BAYLIES, *THE RULES OF PLEADING UNDER THE CODE* 68–69 (Rochester, N.Y., Williamson Law Book Co. 1890); 1 RUMSEY, *supra* note 50, at 269–70.

53. *See, e.g., Stiles*, 103 Eng. Rep. at 194, 196 (motion to amend denied in the peculiarity of the situation); *Crawford v. N.J. R.R. & Transp. Co.*, 28 N.J.L. 479, 484 (1860) (insufficient claim and motion to amend denied).

54. *See* 4 BACON, *supra* note 20, at B (noting that "many Miscarriages of Causes [depend] upon small and trivial Objections . . .").

55. *See* JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 91 (1950).

56. *See, e.g., Nelson*, 13 Johns. at 485 (allowing the plaintiff to amend his declaration); *Shook v. Fulton*, 4 Cow. 424, 425 (N.Y. Sup. Ct. 1825); *Sayre v. Jewett*, 12 Wend. 135, 136 (same) (N.Y. Sup. Ct. 1834); *see also* ANTHON, *supra* note 19, § 5, at 39–40 (discussing a 1792 English case).

granted at common law.<sup>57</sup> Amendments for failure to incorporate became even more prevalent with the more flexible code pleading.<sup>58</sup>

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57. *See, e.g.*, *Trethewy v. Ellesdon* (1726) 86 Eng. Rep. 356, 357; 2 Vent. 141 (early English case allowing amendment, on an unrelated issue, upon payment of costs); 4 BACON, *supra* note 20, at H3 (“[T]he judges ought to judge upon the Substance, and not upon the Manner or Form of Pleading.”); 1 ROBERT RICHARDSON, *THE ATTORNEY’S PRACTICE IN THE COURT OF KING’S BENCH* 170, 193 (London, His Majesty’s Law-Printers, 6th ed. 1769); 2 WILLIAM TIDD, *THE PRACTICE OF THE COURTS OF KING’S BENCH AND COMMON PLEAS IN PERSONAL ACTIONS AND EJECTMENT* 632–33 (London, A. Strahan 1799); STEPHEN, *supra* note 12, at 97–98 (“[U]ntil the judgment is signed, . . . either party is, in general, at liberty to amend his pleading as at common law; the leave to do which, is granted as of course, upon proper and reasonable terms, including the payment of the costs of the application, and sometimes the whole costs of the cause up to that time. And, even after the judgment is signed, and up to the latest period of the action, amendment is, in most cases, allowable at the discretion of the Court . . . .” (emphasis and footnotes omitted)); ABRAHAM CARUTHERS, *HISTORY OF A LAW SUIT* § 36, at 27 (Nashville, Tenn., W. F. Bang & Co., 2d ed. 1856) (“If upon demurrer . . . or at any other time before or afterwards, at any stage in the progress of the suit, the plaintiff discovers any defect in his declaration, writ or any other proceeding, he may apply to the Court for leave to amend it. . . . [and] any defect in fine, whether of form or substance, may be amended.”); WILLIAMS, *supra* note 18, at 93–96; FRANKLIN FISKE HEARD, *PRECEDENTS OF PLEADINGS IN PERSONAL ACTIONS IN THE SUPERIOR COURTS OF COMMON LAW* 30–31 (Boston, Little, Brown & Co. 1886) (“There is no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. The present rule, which follows previous legislation on the subject, is that ‘All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.’ As soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.”).

Amendments were common at early common law, especially when the pleadings were oral. With written pleadings, amendments became more restricted and had to be expanded by the statutes of jeofails, not by common-law precedents. *See Townsend v. Jemison*, 48 U.S. (7 How.) 706, 718 (1849) (discussing the statute of jeofails). The level of flexibility, therefore, varied over the centuries and according to the phase of the proceeding.

58. *See, e.g.*, *Landau v. Levy*, 1 Abb. Pr. 376, 380 (N.Y. Sup. Ct. 1855); *Sinclair v. Fitch*, 3 E.D. Smith 677, 691 (N.Y. Ct. Com. P. 1857); *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372, 388, 398 (N.Y. Sup. Ct. 1858); *Simmons v. Fairchild*, 42 Barb. 404, 411 (N.Y. Gen. Term 1864); *Baldwin v. U.S. Tel. Co.*, 54 Barb. 505, 519 (N.Y. Sup. Ct. 1867); *Stewart v. Balderston*, 10 Kan. 131, 149 (1872); *Silvers v. Junction R.R. Co.*, 43 Ind. 435, 447 (1873); *McCarman v. Cochran*, 57 Ind. 166, 169–70 (1877); *Anderson v. Speers*, 8 Abb. N. Cas. 382, 383 (N.Y. 1879); *Reiners v. Brandhorst*, 59 How. Pr. 91, 92 (N.Y. Sup. Ct. 1879); *Haskell v. Haskell*, 54 Cal. 262, 265 (1880); *Ronnie v. Ryder*, 8 N.Y.S. 5, 6 (City Ct. 1889); *Weber v. Squier*, 51 Mo. App. 601, 605 (1892); *McKay v. McDougal*, 48 P. 988, 992 (Mont. 1897); *Hopkins v. Contra Costa Cty.*, 39 P. 933, 935 (Cal. 1895); *Cooper v. Robert Portner Brewing Co.*, 38 S.E. 91, 93 (Ga. 1901) (“The motion to dismiss should have been sustained as to the second and third counts, unless these counts were amended so as to set forth a complete cause of action . . . .”); *Wallace v. Jones*, 74 N.Y.S. 116, 116–17 (App. Div. 1902); *Marietta v. Cleveland, Cincinnati, Chi. & St. Louis Ry. Co.*, 100 N.Y.S. 1027, 1028 (Sup. Ct. 1906); *Dedrick v. Mallery*, 143 A.D. 819, 821 (N.Y. App. Div. 1911); *Schrade v. Camillus Cutlery Co.*, 242 F. 523, 526 (N.D.N.Y. 1917); *Liebster v. Friedman*, 180 N.Y.S. 322, 323 (App. Div. 1920); *Smith v. Phila., Balt. & Wash. R.R. Co.*, 115 A. 416, 418 (Del. 1921); *James Rees & Sons Co. v. Angel*, 211 N.Y.S. 817, 819 (1925); *Levine v. Schaffzin*, 99 N.Y.S.2d 254, 255 (1950); *Latman v. Kalmor Builders, Inc.*, 137 N.Y.S.2d 240, 241 (Sup. Ct. 1954); *Latman v. Kalmor Builders, Inc.*, 138 N.Y.S.2d 145, 147 (App. Div. 1955); *see also* N.Y. CODE PROC. §§ 172–74 (1848) (providing flexible amendment rules); N.Y. THROOP CODE CIV. PROC. §§ 497, 542, 723–24, 783 (1877) (same); N.Y. R. CIV. P. § 244 (1920) (same); 1 HENRY WHITTAKER, *PRACTICE AND PLEADING UNDER THE CODE* § 126 (New York, E.O. Jenkins 2d rev. ed. 1854); 1 RUMSEY, *supra* note 50, at 282–89; 1 KINKEAD, *supra* note 16, § 126, at 119; CLARK, *supra* note 4, at § 113 (discussing flexible amendment rules in code pleading “at any time in furtherance of justice and on such terms as may be proper”).

Indeed, both in common-law and in code pleading, many pleading battles were mostly paper battles. They would not have happened if the plaintiff (or defendant) had simply amended his or her complaint (or defense) instead of fighting the opponent's challenge. For example, a 1908 court excoriated an intervener:

It may pertinently be suggested that the respondent intervener might have saved himself some trouble and expense if, when the motion was made to strike out his second cause of action or defense, he had amended said second count by inserting therein averments covering the point upon which we feel constrained to reverse the judgment.<sup>59</sup>

An 1889 case about an imperfect reference held that a trial court could disregard immaterial errors that did not surprise or prejudice a party and could allow amendment of the complaint.<sup>60</sup>

With time, failure to comply with the dogma of complete counts was not dealt with by a motion to dismiss anymore, but by a "motion to correct," or a "motion to make a pleading more definite and certain" or a "motion to separately state and number."<sup>61</sup> Moreover, starting around the end of the nineteenth century, if the opposing party did not object to an incomplete count the defect was waived.<sup>62</sup>

59. *Cameron v. Ah Quong*, 96 P. 1025, 1027 (Cal. Ct. App. 1908); *see also* *Aull Sav. Bank v. City of Lexington*, 74 Mo. 104, 105–06 (1881) (plaintiff refused to amend and final judgment was rendered for the defendant, later reversed); *Gardner v. McWilliams*, 69 P. 915, 915 (Or. 1902) (defendant declined to amend his answer and the second count was stricken); *Dailey v. O'Brien*, 96 S.W. 521, 522 (Ky. Ct. App. 1906) (plaintiffs were granted leave to amend but preferred to stand by their petition and lost the case).

60. *Ronnie*, 8 N.Y.S. at 6 (1889). *Ronnie* cited § 723 of the 1877 NY Throop Code of Civil Procedure, which provides in part,

The court may . . . at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any . . . pleading . . . by correcting a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence [sic], by conforming the pleading . . . to the facts proved. And, in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party.

*See* N.Y. CODE CIV. PROC. § 723. A similar provision existed in the Field Code. *See* N.Y. CODE PROC. §§ 173, 176; *see also* *Orr v. Russell*, 231 S.W. 275, 276 (1921) ("The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party . . . ." (internal quotation marks omitted) (citation omitted)); MONTGOMERY H. THROOP, THE CODE OF CIVIL PROCEDURE 309 (1892) ("The only limit to the power to amend pleadings upon the trial is that a new cause of action must not be introduced.").

61. *See, e.g.,* *Leavenworth, N. & S. Ry. Co. v. Wilkins*, 26 P. 16, 16–17 (Kan. 1891) (motion to separately state and number); *see also* POMEROY, *supra* note 20, § 716, at 737 & n.1 (motion to correct); 1 RUMSEY, *supra* note 50, at 257, 384 (not ground for demurrer); 1 NICHOLS, *supra* note 23, at 926–27 (motion to make more definite and certain, not demurrer).

62. *See Orr*, 231 S.W. at 276 ("The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party . . . ." (internal quotation marks omitted) (citation omitted)); *Shook v. Fulton*, 4 Cow. 424, 425 (N.Y. Sup. Ct. 1825) (explaining that a party cannot entrap the opponent and that if the party considered a pleading in bad form, it should have challenged it earlier when the opponent still could have amended the pleading); *Truitt v. Baird*, 12 Kan. 420, 423–24 (1874); *St. Louis Gas Light Co. v. City of St. Louis*, 86 Mo. 495, 498 (1885); *Eaton v. Or. Ry. &*

With time, therefore, the violation of the dogma became more an inconvenience to the parties than sanctionable conduct and had no serious adverse consequences for the merits of the claim. In some cases, it was merely a pleading battle between the attorneys.

Little has changed in the past century. It is unthinkable that a contemporary judge would strike or dismiss a claim (or that a court of appeals would reverse a favorable verdict) solely because a count did not incorporate facts previously stated in the same pleading. First, the proper procedural remedy for a failure to incorporate is not a motion to dismiss, but a motion for a more definite statement.<sup>63</sup> The motion will be granted only if the pleading is “so vague or ambiguous that the party cannot reasonably prepare a response.”<sup>64</sup> Second, amendment is widely available for failure to incorporate.<sup>65</sup> Third, if a party does not object to an opponent’s failure to incorporate, that defense is waived.<sup>66</sup> Finally, no pleading imperfection may affect the substantive rights of the parties absent prejudice to the opponent.<sup>67</sup>

A prestigious federal practice treatise argues, wrongly, that “when appropriate, an objection to an incorporation by reference can be made by a motion to strike, a motion for a more definite statement, or a motion to dismiss

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Navigation Co., 24 P. 415, 415 (1890) (“Defects of this character should be pointed out before answering and going to trial; otherwise, when the defects complained of are supplied by the answer, and the defendant is content to go to trial, he will be precluded from raising them.”); *Cleveland, Cincinnati, Chi. & St. Louis Ry. Co. v. Rice*, 48 Ill. App. 51, 55 (1891); *Aulbach v. Dahler*, 43 P. 322, 324 (Idaho 1896) (discussing nonprejudicial errors); see also POMEROY, *supra* note 20, § 716, at 737 & n.1; WILLIAM MCKINNEY, 16 THE ENCYCLOPAEDIA OF PLEADING AND PRACTICE 562 note 1. See generally 1 WHITTAKER, *supra* note 58, § 113, at 334 (formal defects are waivable); PHILLIPS, *supra* note 12, §§ 287–88 (same); 1 NICHOLS, *supra* note 23, at 342 (Supp. 1914) (“The objection that separate causes of actions are not separately stated and numbered is waived unless presented before trial of the action.”).

63. See *Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366–67 & n.5 (11th Cir. 1996) (holding that a defendant faced with “shotgun pleading” is expected to move for more definite statement, but “the [trial] court, acting sua sponte, should have struck the plaintiff’s complaint, and the defendants’ answer, and instructed plaintiff’s counsel to file a more definite statement”).

64. FED. R. CIV. P. 12(e) (amended 1948) (“A party may move for a more definite statement of a pleading to which a responsive pleading is allowed *but which is so vague or ambiguous that the party cannot reasonably prepare a response.*” (emphasis added)). See generally 5A WRIGHT & MILLER, *supra* note 4, § 1322 (“Because the motion to direct a party to paragraph a pleading properly often is employed only as a dilatory tactic, a district court should direct a pleader to paragraph only when the existing form of the pleading is prejudicial or renders the framing of an appropriate response extremely difficult or would be of assistance to the district judge.”).

65. See 5A WRIGHT & MILLER, *supra* note 4, § 1326 (2018) (“Leave to amend the pleading to correct a defective incorporation should be granted liberally.”); see also FED. R. CIV. P. 15(a)(2) (“The court should freely give leave [to amend] when justice so requires.”).

66. See generally 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE: CPLR ¶ 3014.02 (David L. Ferstendig ed., 2019) (“Service of a responsive pleading normally waives any defects in form in the earlier pleading.”); *id.* ¶ 3014.10 (“If a responsive pleading has been served, the party serving it normally should be considered to have waived his right to object to failure to state and number separately.”); 5A WRIGHT & MILLER, *supra* note 4, § 1322 (“A failure to object to improper paragraphing promptly—normally before interposing a responsive pleading—properly has been deemed a waiver of the defect by at least one court of appeals.”).

67. See, e.g., *O’Donnell v. Elgin, Joliet & E. Ry. Co.*, 338 U.S. 384, 392 (1949) (“We no longer insist upon technical rules of pleading . . .”).

for failure to state a claim upon which relief can be granted.”<sup>68</sup> The magic phrase “when appropriate” makes every assertion right twice a day, like a broken clock: of course cases will be dismissed “when appropriate.” Still, it is wrong to say that motions to strike or to dismiss are available to challenge a defective incorporation.<sup>69</sup>

This text is a leftover from the first edition of the treatise.<sup>70</sup> But it was wrong in the first edition as well because the authors cited three cases that directly contradicted their contention. Two cases expressly rejected the possibility of a motion to dismiss for failure to incorporate<sup>71</sup> and the other case was dismissed (with leave to amend) because the whole complaint was confusing and a count was insufficient despite the incorporation.<sup>72</sup> This comment, in such a prestigious treatise, scared four generations of lawyers into complying with a ghost obligation.

### III. THE EXCEPTION TO THE DOGMA (PERMISSION TO INCORPORATE BY REFERENCE)

#### A. INCORPORATION BY REFERENCE IN COMMON-LAW AND CODE PLEADING

But the dogma could not be strictly applied in practice. Demanding pleaders to repeat all relevant facts and elements in each count would lead to unnecessarily repetitive pleadings. This repetition would violate the traditional principle of common-law pleading in England and in the United States, which encouraged conciseness and shunned repetition.<sup>73</sup> This principle was codified in all state codes of civil procedure enacted in the United States after 1848.<sup>74</sup> For example, all New York codes of civil procedure contained express language

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68. 5A WRIGHT & MILLER, *supra* note 4, § 1326 (2018).

69. *See, e.g.*, *Magluta v. Samples*, 256 F.3d 1282, 1284–85 (11th Cir. 2001) (the appropriate disposition of a complaint that disregarded pleading rules is not to dismiss the claim for failure to state a claim).

70. 5A WRIGHT & MILLER, *supra* note 4, § 1326 (1969).

71. *Rosenberg v. Cohen*, 9 F.R.D. 328, 329 (E.D. Pa. 1949) (rejecting a motion to dismiss for failure to incorporate and arguing that “[i]t is by now a familiar rule that a complaint cannot be dismissed ‘except where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim’” (quoting *Cont’l Collieries, Inc. v. Shober*, 130 F.2d 631, 635 (3d Cir. 1942)); *Heintz & Co., Inc. v. Provident Tradesmens Bank & Trust Co.*, 29 F.R.D. 144, 145, 146 (1961) (rejecting a motion to dismiss despite a “fatally obscure” complaint because the failure could be cured by amendment and a more definite statement).

72. *Baird v. Dassau*, 1 F.R.D. 275, 277 (S.D.N.Y. 1940) (“The sixth cause of action does not set forth a single new fact, but merely incorporates eleven paragraphs previously pleaded in the other causes of action, many of which contain the same defects hereinabove discussed.”).

73. *See, e.g.*, LAWES, *supra* note 12, at 60 (“As nothing is more desirable to the court than precision, nothing is more so for the parties than brevity.”); 1 CHITTY, *supra* note 2, at 330 (“[F]or it is a general rule in pleading, that where any matter tends to great prolixity, a concise manner of pleading it may be admitted . . . .”); 1 SAUNDERS, *supra* note 12, at 417; 1 TIDD, *supra* note 57, at 536 (“[I]f a declaration be unnecessarily long, the court will expunge the superfluous matter . . . .”).

74. *See, e.g.*, BLISS, *supra* note 13, § 318, at 365; PHILLIPS, *supra* note 12, § 193, at 174; 1 WILLIAM A. SUTHERLAND, A TREATISE ON CODE PLEADING AND PRACTICE § 91, at 75 (1910).

requiring the statements of facts on a pleading to be concise, without unnecessary repetition.<sup>75</sup>

To avoid repetition, therefore, the old English common-law pleading developed an exception to the dogma requiring that all counts contain a complete statement of the cause of action: a pleader could incorporate previous allegations from one count to another.

Incorporation by reference has enjoyed unbroken authority in common-law and code pleadings for more than four centuries. It is a mistake, therefore, to say that it is a recent technique designed to avoid the repetition and redundancy characteristic of the old common-law pleading. In 1938, for example, after the Federal Rules were enacted, James Moore welcomed Rule 10(c) and incorporation by reference, stating that “the older point of view reflected the common law notion that [incorporation by] reference is not effective.”<sup>76</sup> Moore’s error continued in the 1993 edition: “[incorporation by reference] eliminates the repetition and redundancy which prevailed under the common-law practice where such references were not permitted.”<sup>77</sup> This is just one of the several misconceptions related to common-law pleading.

#### B. INCORPORATION BY REFERENCE IN ENGLAND

The earliest known precedent of incorporation by reference in England is *Barnes v. May*, an action of assumpsit from the courts of the Queen’s Bench decided around 1591.<sup>78</sup> The conflict was about the sale of two packs of wool. On the first count, about the first pack, the plaintiff alleged that the defendant had not paid the purchase price on a specific day and place. On the second count, about the second pack, the plaintiff failed to allege the day and place of payment but referred to the first count. Although the day and place of payment was an essential element of the second count, the court held that the reference to the first count was sufficient.<sup>79</sup> This precedent, now forgotten, was widely cited throughout the nineteenth century.<sup>80</sup>

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75. N.Y. CODE PROC. § 120(2) (1848) (amended 1851) (“The complaint shall contain . . . A statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, . . .”); *id.* § 142(2) (amended 1851) (“The complaint shall contain . . . [a] plain and concise statement of the facts constituting a cause of action without unnecessary repetition.”); N.Y. CODE CIV. PROC. § 481(2) (1877) (“The complaint must contain . . . [a] plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition.” (emphasis omitted)); N.Y. CIV. PRAC. ACT § 241 (1920) (“Every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition . . .”).

76. 1 JAMES W. MOORE & JOSEPH FRIEDMAN, MOORE’S FEDERAL PRACTICE § 10.03 (1938); *see also* *Hester v. Barnett*, 723 S.W.2d 544, 561 (Mo. Ct. App. 1987) (“The adoption by reference technique is designed to avoid the repetition and redundancy characteristic of the common law system of pleading.”).

77. 2A JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 10.05 (2d ed. 1993).

78. (1591) 78 Eng. Rep. 496; Cro. Eliz. 240.

79. *Id.* at 496.

80. Joseph Chitty seems to have been the first who cited *Barnes*. *See* 1 CHITTY, *supra* note 2, at 397. He was presumably aided by the publication of the fourth edition of the Croke’s Reports in 1790 (Cro. Eliz.), a couple of decades before the first edition of his celebrated treatise.

The exception, then, seems to have been born together with the dogma. One can find no earlier case stating the dogma without the exception. The dogma can only be found on cases allowing its exception. This may be an indication that the dogma of complete counts was born a mistake.

*Barnes* was pleaded and recorded in Latin, handwritten on a roll of parchment, during Queen Elizabeth I's reign.<sup>81</sup> It was then selected and reported (in summary) in Law French by Sir George Croke for his personal use. Croke's Report was published posthumously in 1657, seventy years after *Barnes* was decided, translated into English by Sir Harbottle Grimston, his son-in-law. For this Article, I used the third edition of Croke's Report, of 1683.<sup>82</sup> Below is the full content of Croke's summary:

*Barnes versus May*

*Assumpsit.* That whereas he sold to the Defendant a pack of wooll [sic] for twenty pound, to be paid at a day certain, and *licèt requisitus*, viz. at such a day and place, etc. he had not paid it; and that he sold to the Defendant another Pack of Wooll [sic] for ten pound to be paid when required, *Et licèt similiter requisitus*, &c. without alledging [sic] day and place, yet adjudged good, for it shall refer to the first day and place of request.<sup>83</sup>

The summary is cryptic because it was written for Judge Croke's personal use, not for publication. The original record certainly contains the pleadings and a full decision, and may reveal more information about the case.

A professional researcher was hired to locate the full text of *Barnes* but failed,<sup>84</sup> likely because the old English law reports are unreliable (it is still disappointing because the Croke Reports are authoritative).<sup>85</sup> To show the antiquity of this pleading tradition, the text of a contemporaneous case<sup>86</sup> and the cover page of the Queen's Bench roll starting regnal year 1591, with a stylized colored image of Queen Elizabeth I, is attached.<sup>87</sup>

81. After a 1731 statute, pleadings and court records in England were written in English. See 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 213–14, 359 (1938).

82. THE REPORTS OF SIR GEORGE CROKE (Sir Harbottle Grimston trans., 3d ed. 1683) (1657) [hereinafter REPORTS OF SIR GEORGE CROKE] (published in three volumes).

83. *Id.* at 240.

84. Duncan Harrington searched the whole regnal year representing Term 33 Elizabeth of the Queen's Bench (KB 27/1316-1319) using the docket books. Further searches were then made in the docket books for Hilary and Trinity 32 Elizabeth. See *Historical Research*, HIST. RES., <http://www.historyresearch.co.uk> (last visited Apr. 16, 2019).

85. See, e.g., JOHN WILLIAM WALLACE, THE REPORTERS, CHRONOLOGICALLY ARRANGED: WITH OCCASIONAL REMARKS UPON THEIR RESPECTIVE MERITS 143–49 (Philadelphia, T. & J. W. Johnson, 3d ed. rev. 1855); Van Vechten Veeder, *The English Reports, 1292–1865*, 15 HARV. L. REV. 1, 13–14 (1901).

86. *Elsden v. Barnes*, 78 Eng. Rep. 495, 495 (1591). *Elsden* was summarized on the same page of the Croke Report as *Barnes v. May*, allegedly decided on the same year and by the same court. 1 REPORTS OF SIR GEORGE CROKE, *supra* note 82, at 240.

87. Translation by Duncan Harrington: "Pleas before the Lady Queen at Westminster Hilary Term the thirty second year of the reign of our Lady Elizabeth, by the grace of God of England France and Ireland Queen, defender of the faith etc."









Someone with Latin and paleographical skills may extend the research through the millions of original plea rolls in The National Archives near London, which contains about seventy million cases, and find earlier or contemporaneous cases on incorporation by reference.<sup>88</sup> The research might hit a wall around the late fifteenth century, as earlier pleading practice was oral.<sup>89</sup> The research may lead all the way back a millennium to Roman law, when a plaintiff could not join claims, but the court could consolidate proceedings.<sup>90</sup>

No other case was found in the English Reports dealing with incorporation by reference in the century and a half after *Barnes*. Yet it is reasonable to assume that the practice continued uninterrupted in English common-law pleading. A handful of cases were decided towards the end of the eighteenth century.<sup>91</sup> And the literature of the early nineteenth century confirmed the practice.<sup>92</sup>

As discussed below, however, England abandoned the dogma of complete counts and abolished incorporation by reference in 1852.<sup>93</sup>

### C. INCORPORATION BY REFERENCE IN THE UNITED STATES

From the old continent, the practice of incorporation by reference naturally spread to the United States where it was common practice from the eighteenth to the twentieth centuries. The evidence in the United States is even more robust than in England because the practice was abolished in England in 1852,<sup>94</sup> whereas in the United States it continued uninterrupted well into modern procedure. Incorporation by reference was common in the United States for two centuries of common-law pleading.

There is no American case on incorporation by reference from the eighteenth century because most court decisions at the time were delivered orally: there were no published colonial reports and few in the first decades after independence.<sup>95</sup> But it is reasonable to infer that the practice was also common

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88. See ANGLO-AMERICAN LEGAL TRADITION, <http://aalt.law.uh.edu/> (last visited Apr. 16, 2019) (containing the photos of millions original plea rolls from the National Archives).

89. See 3 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 293 (Oxford, Eng., Clarendon Press 1768) (stating that in the past the pleadings were put by the lawyers orally in court and then minuted down by the clerks or protonotaries); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 339–407 (5th ed. 1956).

90. See Robert Wyness Millar, *Joinder of Actions in Continental Civil Procedure*, 28 ILL. L. REV. 26, 31–34 (1933).

91. See *Tindall v. Moore* (1760) 95 Eng. Rep. 716; 2 Wils. KB 114; *Baldwin v. Elphinston* (1775) 96 Eng. Rep. 610; 2 Black W. 1037; *Phillips v. Fielding* (1792) 126 Eng. Rep. 464; 2 H. Bl. 123; *Mors v. Thacker* (1793) 83 Eng. Rep. 514; 2 Lev. 193; 83 ER 514; *Stiles v. Nokes* (1806) 103 Eng. Rep. 191, 194; 7 East 493, 502, 506.

92. See, e.g., 1 CHITTY, *supra* note 2, at 396; 1 SAUNDERS, *supra* note 12, at 417.

93. See *infra* Subpart IV.A.

94. See *infra* Subpart IV.A.

95. See generally Alan V. Briceland, *Ephraim Kirby: Pioneer of American Law Reporting, 1789*, 16 AM. J. LEGAL HIST. 297 (1972) (discussing the creation of the first law report in the United States in 1789 Connecticut); Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291 (1985) (discussing the creation of the Supreme Court Reports); see

in the 1700s in the United States. In an 1824 New York case, the attorney argued that repeating facts without the aid of incorporation by reference would violate the court's policy and jurisprudence of encouraging concision to save expense.<sup>96</sup> The attorney added, "[t]his form is according to the practice of the best pleaders among the profession."<sup>97</sup>

The earliest reported American case dealing with incorporation by reference is a Maryland action of *assumpsit* from 1810.<sup>98</sup> Incorporation by reference was standard practice in common-law pleading in the United States in most state courts in the decades that followed this case.<sup>99</sup> It was also widely taught in professional textbooks published in the United States.<sup>100</sup>

American commentators legitimized the practice and courts often grounded their decisions by citing English authorities, both case law and treatises.<sup>101</sup> Particularly influential was Joseph Chitty's *Treatise on Pleading*, the foremost authority on pleading in the United States for the whole nineteenth century.<sup>102</sup> This reliance on English law was common at the time because

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also John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 571–75 (1993) (discussing Chancellor Kent's role in creating the first written law reports in New York after 1798).

96. *Griswold v. Nat'l Ins. Co.*, 3 Cow. 96, 105 (N.Y. Sup. Ct. 1824).

97. *Id.*

98. *See Dent's Adm'r v. Scott*, 3 H. & J. 28, 28, 32 (Md. Ct. App. 1810).

99. *See Nelson v. Swan*, 13 Johns. 483, 485 (N.Y. Sup. Ct. 1816); *Crookshank v. Gray*, 20 Johns. 344, 344–48 (N.Y. Sup. Ct. 1823); *Griswold*, 3 Cow. at 116; *Loomis v. Swick*, 3 Wend. 205, 205–07 (N.Y. Sup. Ct. 1829); *Rathbun v. Emigh*, 6 Wend. 407, 409 (N.Y. Sup. Ct. 1831); *Porter & Clark v. Cumings*, 7 Wend. 172, 174 (N.Y. Sup. Ct. 1831); *Canterbury v. Hill*, 4 Stew. & P. 224, 228 (Ala. 1833); *Receivers of the Bank of New Brunswick v. Neilson*, 15 N.J.L. 337, 338 (1836); *Shultz v. Chambers*, 8 Watts 300, 303 (Pa. 1839); *Nestle v. Van Slyck*, 2 Hill 282, 286 (N.Y. Sup. Ct. 1842); *Hitchcock v. Munger*, 15 N.H. 97, 101–02 (Super. Ct. 1844); *Mardis' Adm'rs v. Shackelford*, 6 Ala. 433, 436 (1844); *Morrison v. Spears*, 8 Ala. 93, 94 (1845); *Freeland v. McCullough*, 1 Denio 414, 425 (N.Y. Sup. Ct. 1845); *Curtis v. Belknap*, 21 Vt. 426, 433 (1849); *Jones v. Vanzandt*, 13 F. Cas. 1057, 1057–58 (Ohio Cir. Ct. 1851); *Richardson v. Lanning*, 26 N.J.L. 130, 131 (1856); *State v. Lea*, 41 Tenn. 175, 177 (1860).

100. *See ANTHON*, *supra* note 19, at 312; 1 CHITTY, *supra* note 2, at 391–92 (2d ed. 1812); 2 JAMES M. KERR, *A TREATISE ON THE LAW OF PLEADING AND PRACTICE UNDER THE PROCEDURAL CODES* § 730, at 1001 (1919); 1 KINKEAD, *supra* note 16, § 20; 1 JOHN LEWSON, *ANNOTATED FORMS OF PLEADING AND PRACTICE AT COMMON LAW AS MODIFIED BY STATUTES* §§ 980, 1024, 1048, 1082 (1914); SAUNDERS, *supra* note 12, at 417; SHIPMAN, *supra* note 12, § 254.

101. *See Hitchcock*, 15 N.H. at 97. This was a case of rare sophistication for the time, in which Justice Gilchrist fluently discussed several English cases and treatises including 1 CHITTY, *supra* note 2, at 391–92 (2d ed. 1812); *Barnes v. May* (1591) 78 Eng. Rep. 496; *Tindall v. Moore* (1760) 95 Eng. Rep. 716; *Phillips v. Fielding* (1792) 126 Eng. Rep. 464; *Stiles v. Nokes* (1806) 103 Eng. Rep. 191. *But see Mardis*, 6 Ala. at 436. *Mardis* is another well-researched case, in which Chief Justice Collier discussed English treatises like STEPHEN, *supra* note 12 and 1 SAUNDERS, *supra* note 12, but also American cases, like *Dent's Adm'r*, 3 H. & J. 28.

102. Joseph Chitty (1775–1899) was a prominent English pleader, author of numerous professional books. The first edition of his treatise on pleading was published in 1809, simultaneously in London and New York. *See* 1 CHITTY, *supra* note 2. The last edition was probably published in 1883: the sixteenth American edition (adapted to American law by J.C. Perkins) based on the seventh English edition (corrected and enlarged by Henry Greening). For almost a century, his treatise on pleading was one of the most respected in the United States, followed by lawyers, cited by academics, and relied by judges. For Abraham Lincoln, the “cheapest, quickest, and best way” to become a lawyer was to “read Blackstone's Commentaries, Chitty's Pleadings, . . . and Story's Equity Pleadings.” ABRAHAM LINCOLN, LETTERS AND TELEGRAMS: MEREDITH TO

English precedents enacted before the Declaration of Independence were binding in most state courts.<sup>103</sup>

By 1848, New York had enacted its first Code of Procedure, known as the Field Code,<sup>104</sup> and more than half the states followed suit. The state codes created a pleading system known as code pleading, as opposed to the old common-law pleading. Despite not being specifically prescribed in any state procedural code,<sup>105</sup> incorporation by reference thrived in code pleading, both in federal courts and in almost all states.<sup>106</sup> The higher number of cases in the

YATES 254 (1907); *see also* C.S., *Chitty's Pleadings*, 11 AM. JURIST & L. MAG. 320, 320 (1834) (book review) ("This is an improved and enlarged edition of a work extensively used by the profession.")

103. *See generally, e.g.*, Frederick G. McKean, Jr., *British Statutes in American Jurisdictions*, 78 U. PA. L. REV. 195 (1929) (discussing the definition of the binding "common law of England" according to the statutes and precedents in the courts of several states); *see also* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 928 (1987) ("After 1776, several states passed reception statutes that adopted the 'common law.' Although exactly what had been received is not clear, English common law procedures continued in force.") (footnote omitted).

104. N.Y. CODE P. (1848).

105. *See infra* Subpart III.G.

106. *See* *Benedict v. Seymour*, 6 How. Pr. 298, 303 (N.Y. Sup. Ct. 1852); *Williams v. Richmond*, 9 How. Pr. 522, 523 (N.Y. Sup. Ct. 1854); *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372, 386–87 (N.Y. Sup. Ct. 1858); *Crawford v. N.J. R.R. & Transp. Co.*, 28 N.J.L. 479, 481–82 (1860); *Curtis v. Moore*, 15 Wis. 134, 137–38 (1862); *Dorr v. McKinney*, 9 Mass. 359, 361 (1864); *Baldwin v. U.S. Tel. Co.*, 54 Barb. 505, 519 (N.Y. Sup. Ct. 1867); *Beckwith v. Mollohan*, 2 W. Va. 477, 481–82 (1868); *Abendroth v. Boardley*, 27 Wis. 555, 556 (1871); *Stewart v. Balderston*, 10 Kan. 131, 145 (1872); *Anderson v. Speers*, 8 Abb. N. Cas. 382, 383 (N.Y. 1879); *Reiners v. Brandhorst*, 59 How. Pr. 91, 92 (N.Y. 1879); *Jones v. Marshall*, 10 Ky. Op. 598, 599 (Ct. App. 1880); *Bricker v. Mo. Pac. Ry. Co.*, 83 Mo. 391, 393 (1884); *Bogardus v. N.Y. Life Ins. Co.*, 4 N.E. 522, 523–24 (N.Y. 1886); *Treweek v. Howard*, 39 P. 20, 22 (Cal. 1895); *St. Louis Gas Light Co. v. City of St. Louis*, 86 Mo. 495, 498 (1885); *Bowler v. Bd. of Immigration*, 7 Haw. 563, 567 (1889); *Eaton v. Or. Ry. & Navigation Co.*, 24 P. 415, 415 (Or. 1890); *Eldridge v. Hargreaves*, 46 N.W. 923, 924 (Neb. 1890); *Leavenworth, N. & S. Ry. Co. v. Wilkins*, 26 P. 16, 17–18 (Kan. 1891); *Dexter v. Alfred*, 19 N.Y.S. 770, 771 (1892); *Yost v. Commercial Bank of Santa Ana*, 29 P. 858, 859 (Cal. 1892); *Columbian Accident Co. v. Sanford*, 50 Ill. App. 424, 425 (1893); *Hutson v. King*, 22 S.E. 615, 616 (Ga. 1895); *Hopkins v. Contra Costa County*, 39 P. 933, 934 (Cal. 1895); *Aulbach v. Dahler*, 43 P. 322, 323 (Idaho 1896); *Yong Den v. Hitchcock*, 11 Haw. 270, 271 (1898); *Ramsey v. Johnson*, 52 P. 1084, 1085 (Wyo. 1898); *Realty Revenue Guar. Co. v. Farm, Stock & Home Publ'g Co.*, 82 N.W. 857, 858 (Minn. 1900); *Gilmore v. Christ Hosp.*, 52 A. 241 (N.J. 1902); *Sly v. Palo Alto Gold Min. Co.*, 68 P. 871, 871 (Wash. 1902); *Wilson v. Hoffman*, 123 F. 984, 986–87 (C.C.D.N.J. 1903); *Bryant v. So. Ry. Co.*, 34 So. 562 (Ala. 1903); *Bigelow v. Drummond*, 98 A.D. 499, 501 (N.Y. App. Div. 1904); *Fellows v. Chipman*, 58 A. 663, 664 (R.I. 1904); *Wolf v. Smith*, 42 So. 824, 826 (Ala. 1906); *Schlieder v. Wells*, 114 A.D. 417, 419 (N.Y. App. Div. 1906); *Moniteau County ex rel. Bechtle v. Lewis*, 123 Mo. App. 673, 676 (1907); *Byrne Mill Co. v. Robertson*, 42 So. 1008, 1010 (Ala. 1907); *Chesapeake & N. Ry. Co. v. Crews*, 99 S.W. 368, 370 (Tenn. 1907); *Cameron v. Ah Quong*, 96 P. 1025, 1027 (Cal. Ct. App. 1908); *Mattingly v. Houston*, 52 So. 78, 80 (Ala. 1909); *Maxwell Steel Vault Co. v. Nat'l Casket Co.*, 205 F. 515, 522 (N.D.N.Y. 1913); *Gardner v. W. Union Tel. Co.*, 81 S.E. 259, 260 (Ga. Ct. App. 1914); *Schrade v. Camillus Cutlery Co.*, 242 F. 523, 526 (N.D.N.Y. 1917); *Clark v. Berlin Realty Co.*, 164 P. 333, 334–35 (Cal. Ct. App. 1917); *Ross v. Chi. & Alton R.R. Co.*, 225 Ill. App. 633, 638 (1922); *Purcell v. Wash. & Old Dominion Ry., Inc.*, 111 S.E. 300, 301 (Va. 1922); *McCahon v. Quick Serv. Laundry Co.*, 263 S.W. 238, 241 (Mo. Ct. App. 1924); *Piepmeier v. Meck*, 153 N.E. 523, 524 (Ohio Ct. App. 1925); *Sivalls Motor Co. v. Chastain*, 5 S.W.2d 185, 187 (Tex. Ct. App. 1928); *Tristram v. Marques*, 3 P.2d 947, 950 (Cal. Ct. App. 1931); *City of Princeton v. Baker*, 35 S.W.2d 524, 528 (Ky. Ct. App. 1931); *Bausman v. Feeser*, 17 Ohio Law Abs. 662, 663 (1934); *Moore v. Rice*, 80 S.W.2d 451, 453 (Tex. Civ. App. 1935); *Saxton v. Tucker*, 134 S.W.2d 590, 594 (Ky. Ct. App. 1939); *Wilson v. Moudy*, 123 S.W.2d 828, 838 (Tenn. Ct. App. 1938); *Evatt v. Willard D. Martin, Inc.*, 19 N.E.2d 729, 731 (Mass. 1939);

nineteenth century is a reflex of the dissemination of written decisions and law reports in the United States, nonexistent in the previous century.<sup>107</sup> The practice was also widely taught in professional textbooks and formbooks.<sup>108</sup>

Even the U.S. Supreme Court has dealt with the issue of incorporation by reference, but only in cases related to criminal indictments.<sup>109</sup>

The reference to a previous count that contained the missing information was valid even if the previous count was withdrawn, stricken, or dismissed.<sup>110</sup>

Latman v. Kalmor Builders, Inc., 138 N.Y.S.2d 145, 146 (App. Div. 1955); Olson v. Johnson, 66 N.W.2d 346, 349–50 (Wis. 1954). *But see* Sinclair v. Fitch, 3 E.D. Smith 677, 691 (N.Y. Ct. Com. P. 1857). This early New York case did not allow the *first* count to be aided by information contained in the *second*, probably without reference, despite the plaintiff's protestation that the violation did not prejudice the defendant and that pleadings should be liberally construed to achieve substantial justice between the parties.

107. See JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 832 (2009) (“By 1822, about 140 volumes of American reports had been published, a striking contrast to the handful extant in 1804 . . . . By 1839 there were more than 500 volumes of American reports; by 1882, the number stood at 2,944 . . . .” (footnotes omitted)).

108. See 1 ESTEE, *supra* note 20, at 210; VAN SANTVOORD, *supra* note 21, at 149; 1 BENJAMIN VAUGHAN ABBOTT & AUSTIN ABBOTT, A COLLECTION OF FORMS OF PRACTICE AND PLEADING 114 (New York, Baker, Voorhis & Co. 1875); 1 CHITTY, *supra* note 2, at 428–29; POMEROY, *supra* note 20, § 442; *id.* § 336, at 450–51 (Thomas A. Bogle ed., 4th ed. 1904); RUMSEY, *supra* note 50, at 257; BAYLIES, *supra* note 52, at 47–50, 70–71; EDWIN E. BRYANT, THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE § 137, at 174 (Boston, Mass., Little, Brown & Co. 1894); SHIPMAN, *supra* note 12, §§ 252–54; PHILLIPS *supra* note 12, §§ 123, 202–04; *id.* §§ 320–21, at 339–42 (Percival W. Viesselman ed., 2d ed. 1932); 1 ABBOTT & ALDEN, *supra* note 23, at 7; PATTISON, *supra* note 23, § 234, at 137; 1 ABBOTT, *supra* note 22, at 33–36; 1 JOHN B. WINSLOW, WINSLOW'S FORMS OF PLEADING & PRACTICE UNDER THE CODE § 490, at 276 (1906); 1 NICHOLS, *supra* note 23, at 926–27; JAMES BARR AMES, A SELECTION OF CASES ON PLEADING 16–17 (1905); 2 HARRY B. BRADBURY, BRADBURY'S FORMS OF PLEADING IN LEGAL & EQUITABLE ACTIONS 1136, 1217, 1778 (1908); GOULD, *supra* note 13, at 357 (George Gould ed., 4th ed., Franklin Fiske Heard ed., 5th ed., Arthur P. Will ed., 6th ed. 1909); 1 SUTHERLAND, *supra* note 74, § 193, at 128–29; 1 WILLIAM S. CAMPBELL, FORMS OF CODE PLEADING 11–13 (1912); 4 WAIT'S PRACTICE AT LAW, IN EQUITY AND IN SPECIAL PROCEEDINGS 3650 (David Hopkins Hunt ed., 2d ed. 1913); W. S. SIMKINS, A FEDERAL EQUITY SUIT 279 (3d ed. 1916); SHIPMAN, *supra* note 12, §§ 78–79, at 200–01 (Henry Winthrop Ballantine ed., 3d ed. 1923); CLARK, *supra* note 4, § 70, at 312–16; 3 FRANCIS X. CARMODY & B. G. BONOMI, A TREATISE ON PLEADING AND PRACTICE IN NEW YORK § 893, at 1700–05 (2d ed. 1931); CHARLES WALTER GARLAND, FORMS OF PLEADING IN ACTIONS FOR LEGAL OR EQUITABLE RELIEF §§ 59, 60, 1424 (1935); 3 FRANCIS X. CARMODY ET AL., CARMODY-WAIT'S CYCLOPEDIA OF NEW YORK PRACTICE § 20, at 449–50 (1953); 12 NICHOLS-CAHILL'S ANNOTATED NYCP ACTS 204–06 (1956 & Supp. 1962); KOFFLER & REPPY, *supra* note 26, § 24, at 94–96. Compare POMEROY, *supra* note 20, § 575, at 626 (disallowing incorporation by reference in complaints), with *id.* § 716, at 736–37 (allowing incorporation by reference in defenses).

109. See, e.g., *Blitz v. United States*, 153 U.S. 308, 315–17 (1894); *Crain v. United States*, 162 U.S. 625, 633–34 (1896); *Selvester v. United States*, 170 U.S. 262, 267 (1897); *Joplin Mercantile Co. v. United States*, 236 U.S. 531, 534 (1915); see also Subpart III.H.

110. See *Phillips v. Fielding* (1792) 126 Eng. Rep. 464, 469; *Nelson v. Swan*, 13 Johns. 483, 485 (N.Y. Sup. Ct. 1816); *Crookshank v. Gray*, 20 Johns. 344, 344–48 (N.Y. Sup. Ct. 1823) (dismissing the first two counts, but keeping the third count because it made reference to the first); *Morrison v. Spears*, 8 Ala. 93, 94 (1845); *Jones v. Vanzandt*, F. Cas. 1057, 1058 (Ohio C.C. 1851) (holding that while the first and second counts were abandoned, they were not considered stricken from the record and could be referred to); *Robinson v. Drummond*, 24 Ala. 174, 178 (1854) (concluding that second count was not isolated from the abandoned first count); *Curtis v. Moore*, 15 Wis. 134, 137–38 (1862); *Cleveland, Cincinnati, Chi. & St. Louis Ry. Co. v. Rice*, 48 Ill. App. 51, 56 (1891) (“The withdrawal of the first count . . . did not take it out of being, as a subject of reference. It could not thereafter operate *per se* as an averment of anything in this suit, but it was still in existence and a part of the same paper with the second count.”); *Blitz*, 153 U.S. at 315–17; *Crain*, 162 U.S. at 633 (criminal case) (“[I]f the

And, in criminal proceedings, even if the defendant was acquitted on the first count.<sup>111</sup>

Despite similarities in the general rule statement, however, the practice of incorporation by reference was complex and defied uniform interpretation. It varied considerably in time and space: it varied in the different courts, among the different states, and in the four centuries it remained in use. In addition, it varied to fit the peculiarities of the old procedural practices, the context of specific situations, and the needs of substantive laws. Moreover, some decisions were badly written or poorly researched, the matter was treated cursorily, the analysis was wrong, or the text was ambiguous. Some nuances may now be lost.

Until the first quarter of the 1900s, the dogma that each count must contain all facts entitling the plaintiff to relief (or the defendant to a defense) was widely known by lawyers and even taught in casebooks and textbooks in the United States. For example, a 1916 casebook, part of West's American Casebook Series, contained a subchapter entitled "Incorporation by Reference," transcribing a well-researched case from the Supreme Court of Alabama.<sup>112</sup> A 1928 book from the West's Hornbook Series also made reference to

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previous count be defective or is rejected, that circumstance will not vitiate the remaining counts, if the reference be sufficiently full to incorporate the matter going before with that in the count in which the reference is made."); *Anniston Elec. & Gas Co. v. Elwell*, 42 So. 45, 48 (Ala. 1905); *Shaughnessy v. Holt*, 86 N.E. 256, 257 (Ill. 1908) (striking out a count is "a mere figure of speech"—it still remains on file as part of the record); *McCahon v. Quick Serv. Laundry Co.*, 263 S.W. 238, 241 (Mo. Ct. App. 1924); *McCord v. Rogers*, 99 So. 794, 795 (Ala. 1924); *Barnard v. United States*, 16 F.2d 451, 453 (9th Cir. 1926) (criminal case); *Parker v. United States*, 252 F.2d 680, 681 (6th Cir. 1958) (criminal case) ("[T]he dismissal of a count does not necessarily vitiate later counts making reference to it, if the reference is sufficiently full to incorporate the matter in the later counts."); *see also* ANTHON, *supra* note 19, § 5, at 40 ("The [first] count struck out was considered as in existence, and as a part of the record, for the purpose of making the new count and judgment on it good."). *But see* *Richardson v. Lanning*, 26 N.J.L. 130, 132 (1856) ("[I]f the special count . . . be stricken out, the common count, standing alone, would be insufficient, for it requires a reference to the special count to make it intelligible."); *Gilmore v. Christ Hosp.*, 52 A. 241, 242 (N.J. 1902); *Fraternal Tribunes v. Hanes*, 100 Ill. App. 1, 3 (1902) ("[W]hen one count has been held bad on demurrer, it can not [sic] be resorted to for the purpose of helping and aiding another count."); 2 KERR, *supra* note 100, § 730, at 1001 ("[I]f stuck out on demurrer, the subsequent part of the pleading adopting and incorporating by reference the stricken part will be defective . . .").

111. *See* *Commonwealth v. Clapp*, 82 Mass. 237, 237 (1860) ("In the most approved books of forms, ancient and modern, it is found, almost invariably, when an indictment contains more than one count, that all the counts, after the first, omit the description of the defendant which is contained and is necessary in the first, and describe him only as 'the said [defendant].'"); *State v. Lea*, 41 Tenn. 175, 178 (1860); *see also* *Phillips*, 126 Eng. Rep. at 469 (referring to a criminal case where the grand jury rejected the first three counts, but the remaining counts were sufficient because they had referred to the first one); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 169 (Philadelphia, William Brown 1819) ("[T]hough the first count should be defective, or be rejected by the grand jury, this circumstance will not vitiate the residue . . ."); 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 182, at 132 (Boston, Little, Brown & Co. 1866).

112. *See* WHITTIER & MORGAN, *supra* note 26, at 436–37 (containing an edited version of the excellent *Mardis' Admr's v. Shackelford*, 6 Ala. 433 (1844)); *see also* WILLIAM H. LOYD, CASES ON CIVIL PROCEDURE 317 (1916) (containing an edited and annotated version of the excellent *Hitchcock v. Munger*, 15 N.H. 97 (1844)); SUNDERLAND, *supra* note 26, at 452–56 (containing both *Mardis*, 6 Ala. 433, and *Hitchcock*, 15 N.H. 97).

incorporation by reference.<sup>113</sup> After that, the old dogma that each count must be complete disappeared from the Civil Procedure discourse and was forgotten. No modern law professor teaches or even has a clue about the dogma. Yet the empty teaching of incorporation by reference remains, detached from its original objective, and sometimes merely in passing.<sup>114</sup>

So, American lawyers kept the exception to the dogma long after the dogma was gone. The result is that incorporation by reference is now an empty ritualistic practice in the United States in federal and state courts in civil and criminal litigation.

#### D. SOME STATES DID NOT ALLOW INCORPORATION BY REFERENCE

Against centuries of common-law tradition, however, Indiana consistently demanded all counts in a complaint to be complete—it did not allow incorporation of facts in one count by reference to a previous one. Without the possibility of incorporating allegations previously made, the pleader had to repeat them at each count.<sup>115</sup>

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113. See CLARK, *supra* note 4, § 70, at 312–16. This book was republished after the enactment of the Federal Rules, with no changes to this section, certainly by inertia. See CLARK, *supra* note 4, § 70 (1947). Charles Edward Clark was the chief drafter of the 1938 Federal Rules of Civil Procedure. See generally Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976).

114. See, e.g., TEPLY & WHITTEN, *supra* note 6, at 556 (mentioning incorporation by reference in passing); HAZARD, LEUBSDORF & BASSETT, *supra* note 6, § 4.7 (teaching incorporation by reference, but not the dogma); FREER, *supra* note 6, § 7.3.1 (same); BAICKER-MCKEE & JANSSEN, *supra* note 6, at 186 (same); see also sources and text accompanying *supra* notes 5–8. The exception is FRIEDENTHAL, KANE & MILLER, *supra* note 6, § 5.13, a modern book that teaches the dogma, albeit indirectly and ambiguously, citing cases from 1860, 1879, 1895, 1899, 1916, 1940, and 1961 (the last case was not on point). The practice of teaching incorporation by reference detached from the dogma is not recent. The empty teaching of incorporation by reference were common also in older books. See, e.g., DAVID W. LOUISELL & GEOFFREY C. HAZARD, JR., *CASES AND MATERIALS ON PLEADING AND PROCEDURE: STATE AND FEDERAL* 187 (1962) (transcribing a pleading with a clause of incorporation by reference, but not teaching that each count must be complete); 1 MOORE & FRIEDMAN, *supra* note 76, § 10.03 (same).

115. See, e.g., *Leabo v. Detrick*, 18 Ind. 414, 415 (1862); *Day v. Vallette*, 25 Ind. 42, 43 (1865) (“Our code is not liberal enough to warrant us in sustaining [an incomplete count].”); *Mason v. Weston*, 29 Ind. 561, 563 (1868) (requiring the second paragraph of the pleading to re-state facts in the first paragraph); *Clarke v. Featherston*, 32 Ind. 142, 144 (1869); *Potter v. Earnest*, 45 Ind. 416, 418 (1873); *Silvers v. Junction R.R. Co.*, 43 Ind. 435, 446 (1873) (“Each paragraph must be perfect and complete within itself, and defective allegations in one paragraph can not [sic] be aided by reference to another . . . .”); *McCaman v. Cochran*, 57 Ind. 166, 169–70 (1877); *Smith v. Little*, 67 Ind. 549, 553 (1879); *Field v. Burton*, 71 Ind. 380, 387–89 (1880); *Entsminger v. Jackson*, 73 Ind. 144, 145, 147 (1880) (on the second count, the plaintiff described the property as “the property mentioned in the first paragraph of this complaint,” but the court did not allow this); *Lynn v. Crim*, 96 Ind. 89, 92 (1884) (ironically following the dogma despite using the principle of harmless error in another matter); *Ludlow v. Ludlow*, 9 N.E. 769, 770 (Ind. 1887) (“[E]ach paragraph of a pleading, whether of complaint, answer or reply, must be perfect and complete within itself, and can not [sic] be aided by reference to another paragraph.”); *Farris v. Jones*, 14 N.E. 484, 487 (Ind. 1887); *Little v. Bd. of Comm’rs*, 34 N.E. 499, 500 (Ind. Ct. App. 1893) (“It has been so often decided, as to require no citation of authorities, that the allegations of one paragraph of a pleading can not [sic] be aided by reference to the allegations of another paragraph. Each pleading must be complete in itself.”); *Corbey v. Rogers*, 52 N.E. 748, 750 (Ind. 1899); see also BLISS, *supra* note 13, § 121, at 162. *But see* *Lowry v. Dutton*, 28 Ind. 473, 475 (1867) (allowing prefatory matters without repetition or reference); *Thompson v. Edwards*, 85 Ind. 414, 417 (1882) (holding that names of parties need not be



Indiana, then, had the distinction of adopting an irrational dogma, without adopting the silly exception that made the dogma manageable. As one of the few states that did not allow incorporation by reference, Indiana was a dangerous place for lawyers who trusted the books and formbooks, most of which considered incorporation by reference as a fundamental feature of common-law or code pleading.

No cases were found from the time when Indiana was a common-law pleading state, that is, before the enactment of the Indiana Rules of Practice. One could assume that the rule at common law was also against incorporation by reference. But the issue is not so simple. Georgia, for example, allowed incorporation by reference when it was a common-law pleading state, but curiously stopped allowing it, without reason, when it became a code state.<sup>116</sup>

The Indiana practice was expressly repudiated by other state courts. An 1881 Missouri decision, for example, stated:

[W]e are unable to perceive any reason, either of policy or convenience, [in favor of the Indiana practice] . . . We prefer the common-law rule, which permitted the pleader to save the repeating of matter contained in a preceding count, by making express reference to the preceding count . . . This, so far as we know, has been the practice of good pleaders in this State.<sup>117</sup>

Despite the obvious inconvenience, Indiana upheld this rule as late as 1912.<sup>118</sup> At a certain point, however, it was inevitable that Indiana would start allowing incorporation by reference. It is surprising that it took so long. Incorporation by reference was first authorized in Indiana by a 1917 statute,<sup>119</sup> then maintained in the 1933 Indiana Rules of Procedure.<sup>120</sup> The current Indiana

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repeated); *Carver v. Carver*, 97 Ind. 497, 503 (1884) (same); *McCarnan v. Cochran*, 57 Ind. 166, 169–70 (1877) (allowing amendment).

116. Compare *Hutson v. King*, 22 S.E. 615, 617 (Ga. 1895) (allowing incorporation by reference while Georgia was a common-law pleading state), with *Cooper v. Robert Portner Brewing Co.*, 38 S.E. 91, 93 (Ga. 1901) (disallowing incorporation by reference after Georgia became a code pleading state). But, as shown, other code pleading decisions from Georgia allowed incorporation by reference. See sources cited *supra* note 106.

117. *Boeckler v. Mo. Pac. Ry. Co.*, 10 Mo. App. 448, 451 (1881); see also *St. Louis Gas Light Co. v. City of St. Louis*, 86 Mo. 495, 499 (1885); *Green v. Clifford*, 29 P. 331, 331–32 (Cal. 1892).

118. See *Lake Erie & W. R.R. Co. v. Moore*, 81 N.E. 85, 87 (Ind. Ct. App. 1907); *Citizens' Tel. Co. v. Ft. Wayne & S. Ry. Co.*, 100 N.E. 309, 310 (Ind. Ct. App. 1912).

119. See Act of Feb. 24, 1917, ch. 27, 1917 Ind. Laws 68 (“An Act regulating pleadings, in the courts of the state of Indiana, so as to avoid unnecessary repetition of allegations in the several and respective paragraphs of such pleadings.”).

120. IND. CODE ANN. § 2-1006 (Burns & Watson 1933) (“[T]o avoid needless repetition, such parties [joining claims] . . . may, by proper reference and identification, incorporate any clause or clauses in one [1] paragraph thereof into any other paragraph thereof, without repetition of the language employed in the first instance. And all matters thus incorporated in the subsequent paragraphs of pleading shall be treated and deemed as part of such subsequent paragraphs of the respective pleadings as if fully and completely repeated at length therein.”); see also *Daugherty v. Daugherty*, 57 N.E.2d 599, 601 (Ind. Ct. App. 1944) (“[State law] authorizes the incorporation in a pleading of parts of a prior paragraph by reference and identification without repetition of the language employed in the first instance.”).

law, enacted in 1970, and modeled after the Federal Rules, also authorizes it.<sup>121</sup> And Indiana formbooks encourage the formula.<sup>122</sup> Incorporation by reference is now widespread in Indiana.

A few other states also disallowed incorporation by reference. Although some decisions take an unequivocal approach, others are ambiguous, violate other state precedents, are applicable only in special circumstances, or are not well reasoned.<sup>123</sup>

South Carolina is another state that unambiguously disallowed incorporation by reference:

At first it would seem to be harsh, rigid and extremely technical, and in conflict with the liberal tendencies of the code; but, upon consideration, it will be found based on correct principles and consonant with the true theory of pleadings. The code makes a considerable stride when it permits two or more different causes of action to be joined in the same complaint, and unless these different causes are kept separate and distinct, much confusion and complication must be the result. To prevent this, an orderly system of pleadings should be adopted, and to this end each action should be stated in a single and independent division, so that defendant might meet it without confusion with others, and each should contain all the averments necessary to raise the issues upon which the case is to be tried.<sup>124</sup>

In other states, such as Montana and Oregon, incorporation by reference was limited to introductory allegations (also called prefatory or inducement). Essential elements constituting the cause of action, however, needed to be fully repeated at each count.<sup>125</sup> This was a misinterpretation of the pleading tradition

121. IND. R. TRIAL P. 10(c) (“Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.”).

122. *See, e.g.*, 23 TRACEY BATEMAN & THOMAS MUSKUS, INDIANA LAW ENCYCLOPEDIA: PLEADING, DISCOVERY, AND PRETRIAL PRACTICE § 21 (updated Jan. 2019); 21 STEPHEN E. ARTHUR, INDIANA PRACTICE SERIES: TRIAL PRACTICE § 13.19 (2d ed., updated June 2018); 9 STEPHEN E. ARTHUR, INDIANA PRACTICE SERIES: PROCEDURAL FORMS WITH PRACTICE COMMENTARY §§ 21.5, 50.5 (3d ed., updated Dec. 2018); 24 GEORGE T. PATTON, JR., INDIANA PRACTICE SERIES: APPELLATE PROCEDURE § 12.1 (3d ed., updated Dec. 2018).

123. *See* *Eureka Fire & Marine Ins. Co. v. Baldwin*, 57 N.E. 57, 60 (Ohio 1900); *Cooper v. Robert Portner Brewing Co.*, 38 S.E. 91, 93 (Ga. 1901); *Dailey v. O’Brien*, 96 S.W. 521, 522 (Ky. Ct. App. 1906) (quoting *Black v. Holloway*, 41 S.W. 576 (Ky. Ct. App. 1897)); *Long v. Bowersox*, 19 Ohio Dec. 494, 501, 504 (Ct. Com. P. 1909); *Train v. Emerson*, 74 S.E. 241, 241 (Ga. 1912); *Smith v. Phila., Balt. & Wash. R.R. Co.*, 115 A. 416, 419 (Del. Super. Ct. 1921); *Reid v. Bryant*, 66 S.E.2d 826, 827 (Ga. 1951); *see also* 1 MOORE & FRIEDMAN, *supra* note 76, § 10.03 (citing cases in several states where incorporation by reference was [apparently] not allowed).

The California Supreme Court consistently allowed incorporation by reference. But in *Pennie v. Hildreth* it issued an inexplicable dicta, calling it “a slovenly mode of pleading, only convenient to the attorney who writes the pleading, and very inconvenient to opposing counsel and the courts, and should not be tolerated.” 22 P. 398, 399–400 (Cal. 1889).

124. *Hammond v. Port Royal & Augusta Ry. Co.*, 15 S.C. 10, 28 (1881); *see also* *Latimer v. Sullivan*, 8 S.E. 639, 640 (S.C. 1889); *Wright v. Willoughby*, 60 S.E. 971, 972 (S.C. 1908) (“For no principle of pleading is better settled than that each cause of action must stand or fall on its own allegations, without reference to the allegations to be found in the statement of another cause of action.”).

125. *See* *McKay v. McDougal*, 48 P. 988, 992 (Mont. 1897) (“Inasmuch as the cause must be remanded to the district court, we advise the plaintiff to follow the general rule that each separate division or count of the complaint must be complete in itself . . .”); *Hefferlin v. Karlman*, 74 P. 201, 204 (Mont. 1903) (per curiam);

and the rule regarding introductory allegations.<sup>126</sup> Today Montana and Oregon allow incorporation by reference, as do all fifty states and the federal courts.<sup>127</sup>

These states' refusal to allow incorporation by reference is perplexing because there is no English common-law precedent for this position, and none was ever cited. Some cases cite Pomeroy's classic treatise on Code Remedies, but the author is contradictory and wrong.<sup>128</sup> Other cases cite Philemon Bliss's treatise on pleading, which mistakenly stated that New York did not allow incorporation by reference.<sup>129</sup> Pomeroy and Bliss are American books, both published under code pleading. The peculiar rule in these states disregarded the practice at common law and in the rest of the country and was largely ignored in mainstream cases and textbooks.

On the other side of the spectrum, an isolated 1893 New York case displayed remarkably modern reasoning. The court allowed omissions in the first and second counts to be cured by statements in the third count, even without specific reference.<sup>130</sup> The court reasoned that "[t]he defendants' contention is

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Murray v. City of Butte, 88 P. 789, 792 (Mont. 1907); T.C. Power & Bro. v. Turner, 97 P. 950, 955 (Mont. 1908); see also Waechter v. St. Louis & Meramec River R.R. Co., 88 S.W. 147, 148-49 (Mo. Ct. App. 1905) (finding that the separate causes of action were stated "separately . . . in such manner as to be intelligibly distinguished"); Graves v. St. Louis, Memphis & Se. Ry. Co., 112 S.W. 736, 739 (Mo. Ct. App. 1908). Compare Gardner v. McWilliams, 69 P. 915, 915 (Or. 1902) (disallowing incorporation by reference because the fact was not a matter of inducement), with Smith v. Martin, 185 P. 236, 238 (Or. 1919) (allowing incorporation by reference because the fact was a matter of inducement).

126. See sources and text accompanying *supra* note 23 (discussing that in most states introductory or prefatory information could be stated once at the beginning of the pleading and need not be referred to in each count).

127. MONT. CODE ANN. tit. 25, ch. 20, R. 10(c) ("A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion.") (Laws 2017); OR. R. CIV. P. 16(D) ("Statements in a pleading may be adopted by reference in a different part of the same pleading.").

128. Compare POMEROY, *supra* note 20, § 575, at 626 (disallowing incorporation by reference in complaints), with § 716, at 736 (allowing incorporation by reference in defenses). The same contradiction exists in the 1883 and 1904 editions. See POMEROY, *supra* note 20, §§ 575, 716 (2d ed. 1883); *id.* § 336, at 450-51 (Thomas A. Bogle ed., 4th ed. 1904).

129. BLISS, *supra* note 13, § 121, at 162. Bliss cited two early New York cases: *Landau v. Levy*, 1 Abb. Pr. 376 (N.Y. Sup. Ct. 1855) and *Sinclair v. Fitch*, 3 E.D. Smith 677, 689 (N.Y. Ct. Com. P. 1857). But these cases do not support his position that New York did not allow incorporation by reference. *Landau* was about improper joinder of legal and equitable claims. 1 Abb. Pr. at 379. *Sinclair* did not allow the first count be completed by information contained on the second (not the other way around) probably without reference. 3 E.D. Smith at 689. Dozens of New York cases at the time Bliss wrote the first edition of his treatise allowed incorporation by reference. See, e.g., *Xenia Branch Bank v. Lee*, 7 Abb. 372, 386-87 (N.Y. Sup. Ct. 1858) (addressing *Landau* and citing several English and New York common-law cases: *Barnes*, *Tindall*, *Phillips*, *Crookshank*, and *Freeland*); see also *supra* note 106.

130. *Smith v. Sage*, 25 N.Y.S. 103, 105 (Sup. Ct. 1893); see also *Rider v. Robbins*, 13 Mass. 284 (1816) (allowing an omission on the second count to be cured by a verdict, or supplied by the first count, without incorporation by reference); *United Sur. Co. v. Summers*, 72 A. 775, 780 (Md. Ct. App. 1909) (allowing subsequent counts not to mention the contract); *Louisville & Nashville R.R. Co. v. Adams*, 147 S.W. 384, 386 (Ky. 1912) (allowing a first count, without a prayer for relief, because the second count contained it and noting that "it would be very technical" to rule otherwise); *Tristram v. Marques*, 3 P.2d 947, 949-950 (Cal. Ct. App. 1931) (allowing incorporation by reference that was "neither apt nor express" because the defendant was not prejudiced nor misled by the failure).

too technical, and not in accordance with the requirements of substantial justice. Pleadings should be liberally construed, with a view to substantial justice between the parties.”<sup>131</sup>

One needs to wait a century to find another case adopting a similarly enlightened approach. In 1981, a Louisiana court refused to dismiss a complaint against the defendant’s argument that some paragraphs did not incorporate other paragraphs by reference.<sup>132</sup> The court argued that agreeing with the defendant’s technical argument that the plaintiff “somehow” failed to state a cause of action would be contrary to the requirement that “every pleading shall be so construed as to do substantial justice.”<sup>133</sup>

#### E. THE EVOLUTION OF THE FORMULA—SAID AND AFORESAID

Originally, in order to incorporate by reference previously stated facts, lawyers did not write a full sentence or paragraph as they do now. Pleadings simply started the new count with an introductory formula like *and whereas also*, or *and for a second count*, or *and for a further cause of action*. That would keep the counts separate, as required by common-law and code pleading.

In addition, the plaintiff had to pepper the text with pointing words like *said*, *same*, *as above stated*, *aforesaid*, or *meaning* attached to every previously stated fact.<sup>134</sup> This would work as a valid incorporation of previous facts, as long

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131. *Smith*, 25 N.Y.S. at 105 (citing N.Y. CODE CIV. PROC. § 519 (1877)); *Ramsey v. Johnson*, 58 P. 755, 757 (Wyo. 1899) (referring to “error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party,” but demanding express reference to the previous count).

132. *Carmouche v. Oubre*, 394 So. 2d 805, 807 (La. Ct. App. 1981).

133. *Id.*

134. See 1 CHITTY, *supra* note 2, at 397; EDWARD LAWES, A PRACTICAL TREATISE ON PLEADING IN ASSUMPSIT 94–95 (London, M. & S. Broke 1810); VAN SANTVOORD, *supra* note 21, at 149; 1 CHITTY, *supra* note 2, at 429 (Henry Greening & J.C. Perkins eds., Springfield, Mass., G & C Merriam, 7th Eng. ed. & 16th Am. ed. 1876); PHILLIPS, *supra* note 12, § 203, at 181–82; *Barnes v. May* (1591) 78 Eng. Rep. 496; *Cro. Eliz.* 240; *Baldwin v. Elphinston* (1775) 96 Eng. Rep. 610; *Dent’s Adm’r v. Scott*, 3 H. & J. 28, 28–29 (Md. Ct. App. 1810); *Nelson v. Swan*, 13 Johns. 483, 483 (N.Y. Sup. Ct. 1816); *Frazier v. Felton*, 1 Hawks 231, 231 (N.C. 1820) (criminal case); *Crookshank v. Gray*, 20 Johns. 344, 344–48 (N.Y. Sup. Ct. 1823); *Griswold v. Nat’l Ins. Co.*, 3 Cow 96, 98 n.a (N.Y. Sup. Ct. 1824); *Loomis v. Swick*, 3 Wend. 205, 207 (N.Y. Sup. Ct. 1829); *Porter v. Cumings*, 7 Wend. 172, 174 (N.Y. Sup. Ct. 1831); *Canterbury v. Hill*, 4 Stew. & P. 224, 229 (Ala. 1833); *Nestle v. Van Slyck*, 2 Hill 282, 286 (N.Y. Sup. Ct. 1842); *Hitchcock v. Munger*, 15 N.H. 97, 102 (1844); *Freeland v. McCullough*, 1 Denio 414, 425 (N.Y. Sup. Ct. 1845); *Jones v. Vanzandt*, 13 F. Cas. 1057, 1058 (C.C. Ohio 1851); *Benedict v. Seymour*, 6 How. Pr. 298, 299 (N.Y. 1852); *Williams v. Richmond*, 9 How. 522, 523 (N.Y. 1854); *Beckwith v. Mollohan*, 2 W. Va. 477, 478 (1868); *Bowler v. Bd. of Immigration*, 7 Haw. 563, 565 (1889); *Aulbach v. Dahler*, 43 P. 322, 322 (Idaho 1896); *Ramsey v. Johnson*, 58 P. 755, 757 (Wyo. 1899); *Wilson v. Hoffman*, 123 F. 984, 987 (C.C.N.J. 1903); *Birmingham Ry., Light & Power Co. v. Wilcox*, 61 So. 908, 909 (Ala. 1913); see also the forms in JOHN WENTWORTH, A COMPLETE SYSTEM OF PLEADING (London, G.G. & J. Robinson 1797–98) (ten volumes); LAWES, *supra* note 12, at 60; ANTHON, *supra* note 19, at 312; 2 CHITTY, *supra* note 2, at 260 n.t.; STEPHEN, *supra* note 12, at 282; BENJAMIN L. OLIVER, JR., FORMS OF PRACTICE 57, 73, 80, 105 (Boston, Hilliard, Gray, Little & Wilkins 1828); ANTHON, *supra* note 19, at 342, 345 (West Brookfield, Mass., Merriam & Chapin, 4th ed. 1848); P. B. WILCOX, PRACTICAL FORMS IN ACTIONS, PERSONAL AND REAL 76, 91, 270 (Columbus, Ohio, Isaac N. Whiting, 2d ed. 1848); STEPHEN, *supra* note 12, at 256 (Samuel Tyler ed., Washington, D.C., William H. Morrison, 3d Am. ed. 1882); 2 CHITTY, *supra* note 2 (Henry Greening & J.C. Perkins eds., Springfield, Mass., G & C Merriam, 7th Eng. ed. & 16th Am. ed. 1883); 1 W.H. MICHAEL

as the incorporation was express and the matter referred to was definite, certain, and clearly identified.<sup>135</sup>

In 1894, for example, the U.S. Supreme Court was satisfied that the expression “said election” in the third count referred to the election mentioned in the second count of the same indictment:

The only question that could arise upon the third count is whether the words of the first count, referring to the election had and held on the 8th day of November, 1892, for Representative in Congress, can be drawn through the second count into the third count by the words, “at the said election.” As the election named in the first count is the only one specifically described in the indictment, there can be no doubt that the words “at said election” in the third count refer to the election described in the first count.<sup>136</sup>

Below is a typical second count of a complaint in the United States in the early 1800s:

SECOND COUNT. *And the said [defendant] further saith, that the said [plaintiff] further contriving and intending as aforesaid, heretofore, to wit, on, &c. aforesaid, at &c. aforesaid, falsely, wickedly, and maliciously did publish a certain other false, scandalous, malicious, and defamatory libel, of and concerning the said [defendant] and of and concerning the said action, which had been so depending as aforesaid, and of and concerning the evidence by him, the said [defendant] given on the said trial as such witness as aforesaid, containing, amongst other things, the false, scandalous, malicious, defamatory, and libelous matter, of and concerning the said [defendant], and of and concerning the said action, and of and concerning the evidence given by him, the said [defendant] on the said trial, as such witness as aforesaid, that is to say . . .*<sup>137</sup>

Ten *said*s and six *aforesaid*s clutter a paragraph constructed of a single breathlessly long sentence, as was common at the time.

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& WILLIAM MACK, *ENCYCLOPEDIA OF FORMS AND PRECEDENTS* (Long Island, N.Y., James Cockcroft 1896); CARUTHERS, *supra* note 57, at 582 (Andrew B. Martin ed., 4th ed. 1903).

135. *See* Stiles v. Nokes (1806) 103 Eng. Rep. 191, 194–96; 7 East 493, 502, 506–07 (holding that the reference must be clearly identified); *Crookshank*, 20 Johns. at 344–48 (same); Simmons v. Fairchild, 42 Barb. 404, 409 (N.Y. 1864); *see also* Receivers of Bank of New Brunswick v. Neilson, 15 N.J.L. 337, 337–38 (1836) (holding that the reference was not clearly identified); Holton v. Muzzy, 30 Vt. 365, 366 (1858) (same); Jones v. Marshall, 10 Ky. Op. 598, 599 (Ct. App. 1880) (holding that the reference was not clearly identified when the plaintiff merely said, “making such facts in the first paragraph as are necessary to the cause of action in the second paragraph”); Ramsey v. Johnson, 52 P. 1084, 1085 (Wyo. 1898); Ramsey v. Johnson, 58 P. 755, 757 (Wyo. 1899); Gilmore v. Christ Hosp., 53 A. 241, 242 (N.J. 1902); *see also* POMEROY, *supra* note 20, § 716, at 736–37; 1 MOORE & FRIEDMAN, *supra* note 76, § 10.03. *Compare* Opdycke v. Easton & Amboy R.R. Co., 68 N.J.L. 12, 13 (1902) (determining that “on the day aforesaid” was not sufficiently specific because the preceding count mentioned several different days), *with* Taylor v. N.J. Title Guarantee & Trust Co., 56 A. 152, 153 (N.J. 1903) (concluding that “on the day and year aforesaid” was sufficiently specific because only one day was mentioned in the preceding count).

136. *Blitz v. United States*, 153 U.S. 308, 316 (1894) (criminal case); *see also* Sampson v. Commonwealth, 5 Watts & Serg. 385, 387–88 (Pa. 1843) (criminal case) (discussing the meaning of “said”); FRANCIS WHARTON, *A TREATISE ON CRIMINAL PLEADING AND PRACTICE* § 298, at 200 (Philadelphia, Kay & Bro., 8th ed. 1880) (discussing the meaning of “said”).

137. ANTHON, *supra* note 19, at 312–13 (emphasis added) (footnotes omitted) (“[I]f the second count commence—‘*And whereas also,*’ &c, it will nevertheless be sufficient.”).

This practice explains, in part, the legal profession's addiction to these words that now sound stilted. Legal writers and general stylists have protested for decades the legalese and archaism of *said*, *same*, and *aforsaid*. Even the most learned scholars, however, mistakenly think that the objective of these words was merely to give precision to the text.<sup>138</sup> Although it is true that these words were used with the objective of giving precision to a term,<sup>139</sup> that is not the origin of the habit. Most scholars ignore that these words once had a specific role in common-law and code pleading: from time immemorial it was important to make an explicit reference to “said farm,” “said merchant,” “said defendant,” or even “said John Smith” to incorporate facts previously mentioned in a pleading.

A perceived lack of iron-clad precision in pleading technique, as capriciously decided by the trial judge, or even by the court of appeals after a favorable verdict for the plaintiff, could make the count improper. For example, if, by mistake, the pleader referred a second time to *a* promissory note, instead of *the said* promissory note, the court might never really know for sure whether the pleader was referring to the same note previously mentioned or another one.<sup>140</sup> Or, if the plaintiff referred to the contract described in the first count as “said contract,” the court may find it “impossible to tell to what contract the plaintiff refers” because the plaintiff did not state the particulars of the contract, like date, consideration, and subject matter.<sup>141</sup>

These were the types of nightmares that kept pleaders awake at night, at a time when all counts had to be complete. On the one hand, if a pleading was repetitive, it could violate the rule of concision. Yet, at the same time, each count

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138. See, e.g., *Said*, H. W. FOWLER, A DICTIONARY OF MODERN ENGLISH LANGUAGE USAGE 533 (Sir Ernest Gowers ed., 2d ed. 1965) (“In legal documents . . . are traditional precautions against any possible ambiguity . . .”); DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 305, 318, 405 (1963); GARNER’S DICTIONARY OF LEGAL USAGE 37, 793–94, 796 (2011) (“The usage had its origins in loan translation.”); *Said*, GARNER’S MODERN ENGLISH USAGE 804–05 (4th ed. 2016) (“Legal writers formerly used this word as a supposedly more precise equivalent of *the*, *this*, *that*, *these*, or *those*.”); ANNE ENQUIST ET AL., JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER 120, 125 (5th ed. 2017). *But see* ANTONIO GIDI & HENRY WEIHOFFEN, LEGAL WRITING STYLE 53–54, 91–95 (3d ed. 2018) (discussing the use of *said*, *aforsaid*, and *same* in the historical context of incorporation by reference).

139. See, e.g., U.S. PATENT & TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE § 2173.05(d) (9th ed. rev. 2018), <https://mpep.uspto.gov/RDMS/MPEP/current#/current/d0e18.html> (stating that a claim may be indefinite if it lacks antecedent basis); *see also* ROBERT C. FABER, FABER ON MECHANICS OF PATENT CLAIM DRAFTING § 3:14 (7th ed. 2018) (discussing use of indefinite article *a* when an element is first mentioned on a patent claim and the use of definite articles *the* or *said* to refer to previously mentioned elements).

140. *Nestle v. Van Slyck*, 2 Hill 282, 286 (N.Y. Sup. Ct. 1842) (“[I]nstead of an *innuendo* pointing to ‘*the*’ note already mentioned, the *innuendo* speaks of ‘*a*’ note which may or may not be the same one that is mentioned in the inducement.” (emphasis added)); *see also* *Gertler v. Linscott*, 1 N.W. 579, 580 (Minn. 1879) (“We might conjecture that the ‘mills’ mentioned in the second are the same as the mill or mills mentioned in the first . . . even if it were permitted to indulge in conjecture . . .”).

141. *Weber v. Squier*, 51 Mo. App. 601, 603–05 (1892). *But see* *Ramsey v. Johnson*, 8 Wyo. 476 (1899) (holding that the expression “said contract” in the second count was an unmistakable reference to the contract referred to in the first count, no other).

had to contain every legal element of the cause of action. If a pleader struck the wrong balance between concision and completeness, the error could be fatal.

#### F. THE EVOLUTION OF THE FORMULA—REPEAT AND REALLEGE

The *said/aforsaid* formula worked in common-law and code pleading, undisturbed, for at least three centuries. The current *repeat, reiterate, and reallege* formula, transcribed above,<sup>142</sup> was a fruit of the American ingenuity. It was conceived towards the end of the nineteenth century under code pleading. Although it is impossible to determine the moment when lawyers started using the formula in their pleadings, one can get a glimpse through the cases.

In a New York case decided in 1886, a complaint contained a primitive version of the formula:

[T]he plaintiff . . . “repeats and reiterates all the allegations hereinbefore contained, and makes them a part of this her second cause of action.”<sup>143</sup>

Although this is the earliest recorded example of the current formula, the language was brewed in the practice of the previous decades, as risk-averse lawyers struggled to make sure that judges would approve of their incorporation by reference. The plaintiff in the case above, however, did not think that a boilerplate reference to the allegations in the first cause of action was enough: he still used *said* and *aforsaid* several times in the statement of facts for the second count to make sure all facts were tied up with the first. So, the first generation of the new formula was added to the old, in a belt-and-suspenders strategy.

A few years later, in 1892, however, the formula suffered a major setback when a North Dakota court did not accept it:

For a third cause of action plaintiff makes part thereof each and every allegation contained in the first and second causes of action herein, so far as the same set forth the promises and agreements made by and between plaintiff and defendant, and the obligations arising therefrom; and further alleges . . .<sup>144</sup>

The court found no authority to support this formula as a proper way to incorporate facts by reference to the preceding parts of the complaint. For the court, the reference was too vague and ineffectual to identify specific facts, leaving the court, and the opposing party, to aimlessly explore the complaint in search of them.<sup>145</sup> The pleader probably had not used *said* and *aforsaid* enough. If the pleader had used these magic “pointing words,” the court would not have found the references so vague.

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142. *See supra* Subpart I.

143. *Bogardus v. N.Y. Life Ins. Co.*, 4 N.E. 522, 527 (N.Y. 1886).

144. *Jasper v. Hazen*, 51 N.W. 583, 583 (N.D. 1892) (internal quotation marks omitted) (quoting the plaintiff’s complaint).

145. *Id.*

Despite this setback, the formula survived. And in 1898, in the first edition of their formbook, Austin Abbott and Carlos Alden proposed this simple version:

The plaintiff repeats and realleges as part of this cause of action, all the allegations contained in paragraphs \_\_of the first cause of action.<sup>146</sup>

The formula was followed by a light selection of *said*s and *aforesaid*s, but much less, compared to the previous tradition.

After this boilerplate was included in formbooks, practitioners throughout the country started using it.<sup>147</sup> Eventually, it was expressly sanctioned by the courts.<sup>148</sup> Lawyers never looked back.

By the second edition of Abbott & Alden's formbook, published in 1918, the formula had mushroomed to something closer to the current version:

The [plaintiff] repeats and realleges as part of this [cause of action], each and all of the allegations contained in paragraphs \_\_of the [first cause of action,] with like effect as if herein fully realleged, and incorporates herein all the facts therein set forth [and the denials therein contained].<sup>149</sup>

Eventually, the bizarre formula was fully established in the practice of code pleading.<sup>150</sup> The formula probably did not make sense even then, but no one ever noticed or challenged it. And the formula has endured, substantially unaltered,

146. 1 AUSTIN ABBOTT & CARLOS ALDEN, FORMS OF PLEADING IN ACTIONS FOR LEGAL OR EQUITABLE RELIEF 4, 451 (New York, Baker, Voorhis & Co. 1898). The formbook, however, was not consistent. *See id.* at 458, 504 (not using the formula in a complaint with more than one claim).

147. On the definition of boilerplate, see generally Steven S. Gensler & Lee H. Rosenthal, *Breaking the Boilerplate Habit in Civil Discovery*, 51 AKRON L. REV. 683, 684–98 (2017) (“Something becomes boilerplate not because it is used repeatedly but because it is used thoughtlessly.”).

148. *See, e.g.*, *Green v. Clifford*, 29 P. 331, 331–32 (Cal. 1892) (“Plaintiff hereby refers to paragraph I. of the first cause of action, hereinbefore set forth, and expressly makes said paragraph a part of this cause of action, as if incorporated herein.”); *Treweek v. Howard*, 39 P. 20, 21 (Cal. 1895) (“The plaintiff here repeats and alleges all the matters and things set forth and alleged in the subdivisions of this second amended complaint, numbered 1, 2, 3, 4, and prays that the same be taken and deemed a part of this cause of action, the same as though herein set out at length.”); *Bigelow v. Drummond*, 90 N.Y.S. 913, 916 (App. Div. 1904) (“Plaintiffs repeat and reallege all the statements contained in paragraphs 1 and 2 of the first cause of action . . . .”); *Fla. Cent. & P.R. Co. v. Foxworth*, 25 So. 338, 340 (Fla. 1899) (“And for a fourth count the plaintiff avers each and every allegation of the first count, and further alleges that . . . .”); *Realty Revenue Guar. Co. v. Farm, Stock & Home Publ'g Co.*, 82 N.W. 857, 857 (Minn. 1900) (“Plaintiff realleges and reaffirms all the allegations of paragraphs 1, 2, and 3 of plaintiff's first cause of action.”); *Marietta v. Cleveland, Cincinnati, Chi. & St. Louis Ry. Co.*, 100 N.Y.S. 1027, 1028 (Sup. Ct. 1906) (“The plaintiff repeats, reiterates, and alleges each and every allegation contained in paragraphs first and second of the complaint with the same force and effect as if here set forth in full.”); *West v. Bank of LaHoma*, 86 P. 59, 59 (1906) (“And for a second cause of action, plaintiff repeats the general allegations preceding his first cause of action, and makes the same a part of this second cause of action, just as though the same was herein set out again in the same words.”).

149. 1 ABBOTT & ALDEN, *supra* note 23, at 5–6 (assuring readers that “this is a proper method of allegation,” and citing, as authority, *Bigelow*, 90 N.Y.S. at 916).

150. *See, e.g.*, CAMPBELL, *supra* note 108, at 11–13 (offering three similar versions of the formula, each based on a different case); *see also* formbooks cited *supra* note 108.



for more than a century, passing along from generation to generation until today.<sup>151</sup>

With time, the formula became a safe and sufficient method to incorporate previously alleged facts into a subsequent count, and lawyers slowly stopped feeling the need to pepper their complaints with *same, said* and *aforesaid* after every word previously mentioned. These words slowly lost their purpose in pleadings and became useless; no one remembered why they used them in the past. And they disappeared.

But the change from “pointing words” to a formula was painful for pleaders. Initially, the formula was not uniformly accepted: it took a while to gain favor with judges that had forged their careers in the old tradition. Some courts found the use of the *repeat and reallege* formula “obviously unnecessary and highly objectionable” where a pleader failed to narrow the scope of the referenced allegations, and unintentionally incorporated an irrelevant allegation from a previous count.<sup>152</sup> Several courts did not accept the formula for one reason or another.<sup>153</sup> If the reference to a preceding count was definite and certain, however, courts had no objection to it.<sup>154</sup>

If this artificial and meaningless *repeat and reallege* formula is at all necessary, and if it is sufficient, maybe it is time to start another phase in this evolution. Maybe pleaders could get away with writing the formula only once in each pleading, instead of once in each count. At the beginning or end of each pleading, the party could simply write, “every paragraph in this complaint (or defense) is incorporated in each count.”

In 1964, a smart and impatient lawyer from Colorado tried to do this in federal court. The first paragraph of the complaint stated:

1. Each statement and allegation in each count of this Complaint shall be considered as repeated and realleged and incorporated by this reference into any other count of this Complaint where such incorporation shall be or appear necessary to the validity of the cause of action or claim for relief therein stated.<sup>155</sup>

The court did not accept this formula, not because it was not suitable, but because the incorporation was not explicit. The court, as several courts before and after, was troubled by the expression “where such incorporation shall be or appear necessary.”<sup>156</sup> The court wondered “shall appear necessary to whom?” and said that “[t]his prayer could even be interpreted as an attempt by the

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151. This proves that boilerplate “has a toughness and resilience worthy of the steel plate from which it takes its name.” See Gensler & Rosenthal, *supra* note 147, at 684–85.

152. See, e.g., *Bogardus v. N.Y. Life Ins. Co.*, 4 N.E. 522, 528 (N.Y. 1886).

153. See, e.g., *Wallace v. Jones*, 74 N.Y.S. 116, 116 (App. Div. 1902) (not accepting the following language: “Making the first six sections therein a part thereof.”); *Clinckett v. Casseres*, 200 N.Y.S. 178, 183 (App. Div. 1923) (not accepting the formula, without explanation, and striking out three defenses, possibly because they were not sufficiently specific).

154. See, e.g., *Treweek v. Howard*, 39 P. 20, 22 (Cal. 1895).

155. *Trussell v. United Underwriters, Ltd.*, 228 F. Supp. 757, 773 (D. Colo. 1964) (internal quotation marks omitted) (quoting the plaintiffs’ complaint).

156. *Id.*

plaintiffs to incorporate every allegation of every claim into every other claim. We cannot give effect to this attempted cross-incorporation.”<sup>157</sup> The case, however, was not dismissed: the court granted a motion for more definite statement and for separate statements.<sup>158</sup> The stunt was probably never tried again.

But the current practice is exactly to mechanically incorporate everything into everything. The practice of “shotgun pleading” is what lawyers do every day.<sup>159</sup> Had the plaintiff directly incorporated everything into everything, as pleaders customarily do now, instead of being hesitant to reserve the incorporation to whatever appears necessary, there would probably have been no objection.

If this Article is unsuccessful in banishing incorporation by reference altogether from our pleadings, at least it may convince lawyers to include the formula only once in a pleading.

#### G. STATUTORY PROVISION OF INCORPORATION BY REFERENCE

As we have seen, incorporation by reference has been a feature of common-law pleading for centuries. It was later adopted by the practice of code pleading, even without express statutory permission.

The first written statute to expressly allow incorporation by reference was the New York Rules of Civil Practice enacted in 1920:

The allegations contained in a separately numbered paragraph of one cause of action, counterclaim or defense may be incorporated as a whole in another cause of action, counterclaim or defense in the same pleading by reference without otherwise repeating them.<sup>160</sup>

The rule was born outdated. As we will see below, England had abolished the practice of incorporation by reference seventy years earlier.<sup>161</sup>

#### H. INCORPORATION BY REFERENCE IN CRIMINAL PROCEDURE

The dogma of complete counts also operated in criminal procedure: “Each count in an indictment is regarded as if it was a separate indictment.”<sup>162</sup> Each count in an indictment had to be complete—it had to stand by itself and the omissions of fact in one count could not be aided by another, absent express reference.<sup>163</sup>

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157. *Id.*

158. *Id.* at 774.

159. See 5A WRIGHT & MILLER, *supra* note 4, § 1326 (discussing courts’ displeasure with shotgun pleading).

160. N.Y. CODE CIV. PRAC. § 90 (1921).

161. See Subpart IV.A.

162. See *Dunn v. United States*, 284 U.S. 390, 393 (1932); see also *Selvester v. United States*, 170 U.S. 262, 267 (1898) (“Each count is in fact and theory a separate indictment . . .”).

163. See, e.g., *King v. Westly* (1725) 93 Eng. Rep. 154; Sess. Cas. 152; *Phillips v. Fielding* (1792) 126 Eng. Rep. 464, 469; 2 H. Bl. 123, 131 (referring to an earlier criminal case); *Frazier v. Felton*, 8 N.C. (1 Hawks) 231

Therefore, a similar practice of incorporation by reference existed in the past and still exists in criminal proceedings.<sup>164</sup> The formula is ubiquitous in formbooks.<sup>165</sup> Despite not adopting the dogma of complete counts, the Federal Rules of Criminal Procedure, enacted in 1944, specifically provided for incorporation by reference: “A count may incorporate by reference an allegation made in another count.”<sup>166</sup>

#### IV. THE MODERN PERSPECTIVE (NO NEED TO REALLEGE FACTS IN EACH COUNT)

##### A. ENGLAND ABOLISHED THE DOGMA IN 1852

The dogma of complete counts with incorporation by reference made sense in the legal mindset of the sixteenth to eighteenth centuries, but it sounds primitive to a twenty-first century lawyer.

It sounded primitive in the nineteenth century as well. Indeed, the old practice ended in England in the mid-nineteenth century with the enactment of

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(1820); *Sampson v. Commonwealth*, 5 Watts & Serg. 385 (Pa. 1843); *Commonwealth v. Clapp*, 82 Mass. (16 Gray) 237 (1860); *People v. Graves*, 5 Park. 134, 140 (N.Y. Gen. Term 1860) (“It is the constant practice in criminal pleading, in one count of an indictment to refer to matters in a previous count, and it has been decided that this is proper . . . .”); *State v. Lea*, 41 Tenn. (1 Cold.) 175 (1860); *People v. Danahy*, 18 N.Y.S. 467 (Gen. Term 1892); *Blitz v. United States*, 153 U.S. 308 (1894); *Crain v. United States*, 162 U.S. 625, 633 (1896); *Joplin Mercantile Co. v. United States*, 236 U.S. 531, 534 (1915); *United States v. Segelman*, 86 F. Supp. 114, 126 (W.D. Pa. 1949) (“It would be a travesty on justice if the defendant were exonerated from the penalties of the federal law for technical reasons.”); *United States v. Apex Distrib. Co.*, 148 F. Supp. 365, 370 (D.R.I. 1957); *United States v. Knox Coal Co.*, 347 F.2d 33, 38 (3d Cir. 1965) (“Of course, unless the charging part of a conspiracy count specifically refers to or incorporates by reference allegations which appear under the heading of the overt acts, resort to those allegations may not be had to supply the insufficiency in the charging language itself.”); *United States v. Knowles*, 29 F.3d 947, 952 (5th Cir. 1994) (“While it is true that an allegation made in one count of an indictment may be incorporated by reference in another count of the indictment, . . . any such incorporation must be expressly done.” (citation omitted)); see also 1 CHITTY, *supra* note 111, at 169 (1819) (“[T]hough every count should appear upon the face of it, to charge the defendant with a different offence, yet one count may refer to matter in any other count so as to avoid unnecessary repetition.”); 2 JOSEPH GABBETT, A TREATISE ON THE CRIMINAL LAW 248 (Dublin, J. Cumming 1835); 1 BISHOP, *supra* note 111, § 182 (1866); WHARTON, *supra* note 136, §§ 298–99 (1880); see also the forms in FRANCIS WHARTON, PRECEDENTS OF INDICTMENTS AND PLEAS 10, 38, 50, 54 (Philadelphia, James Kay, Jun. & Brother 1849); FRANK O. LOVELAND, FORMS OF FEDERAL PROCEDURE (1894).

164. See 1 WRIGHT & MILLER, *supra* note 4, § 123, nn.8–9 (4th ed. 2018) (“Although allegations made in one count may be incorporated by reference into other counts, each count must be evaluated separately.”). In previous editions, this book contained a more rigid statement: “[E]ach count is considered as if it were a separate indictment and must be sufficient without reference to other counts unless they are expressly incorporated by reference.” See 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 123, at 349 (4th ed. 1982) (footnote omitted).

165. See, e.g., 3 F. LEE BAILEY & KENNETH J. FISHMAN, COMPLETE MANUAL OF CRIMINAL FORMS § 114:13 (3d ed. 2018) (“16. [The claimant] repeats and reavers Paragraphs 1 through 15 of his Answer to Complaint for Forfeiture as if expressly rewritten and set forth herein.” (alteration in original)); 8 WISCONSIN PLEADING AND PRACTICE FORMS § 73:15 (5th ed. 2018) (“[D]efendant here repeats and restates all the matters alleged in the previous defense . . . .”).

166. FED. R. CRIM. P. 7(c).

the Common Law Procedure Act of 1852, which abolished the forms of action<sup>167</sup> and made joinder of claims flexible.<sup>168</sup> The English procedural reforms at the time were part of the same intellectual environment that led to code pleading in the United States after 1848, although the English reforms were more successful in simplifying the rules of pleading and joinder.<sup>169</sup>

By 1876, English judges had realized something that Americans had not: that the dogma of complete counts was just an annoyance, and that it led to an attack on the way the pleading was written, not on the merits of the case.<sup>170</sup> A legal publication of the time transcribed an amusing dialogue between judges on the Queen's Bench Division calling this practice "niggling demurrers" and "ridiculous."<sup>171</sup>

The dogma, together with incorporation by reference, was formally interred in England by two cases from 1875 and 1876, one about a complaint and the other about an answer. In *Watson v. Hawkins*, the court held that a plaintiff need not assign a specific fact to a specific count; it was enough that any paragraph in a pleading supported one or more claims.<sup>172</sup> A plaintiff needed merely to state all material facts and then ask for relief.<sup>173</sup> In *Nathan v.*

167. Common Law Procedure Act 1852, 15 & 16 Vict. c. 76, § 3 (Eng.) ("It shall not be necessary to mention any form or cause of action in any writ of summons, or in any notice of writ of summons [], issued under the authority of this Act.")

168. *Id.* § 41 ("Causes of action, of whatever kind, provided they be by and against the same parties [] and in the same rights, may be joined in the same suit . . . but the court or a judge shall have power to prevent the trial of different causes of action together, if such trial would be inexpedient, and in such case such court or judge may order separate records to be made up, and separate trials to be had.")

169. See HEPBURN, *supra* note 25, at 173–283 (extensively discussing the English procedural reforms of 1852, 1854, 1860, 1873, and 1875, how they were influenced by code pleading, and how they later influenced procedural reform in the United States).

170. See *Watson v. Hawkins* (1875) 24 WLR 884 (Eng.); *Queen's Bench Division*, LAW TIMES, May 27, 1876, at 67 (Eng.). This was not a novel idea even at the time. On an unrelated matter, more than a century earlier, Matthew Bacon had said, "the judge[s] ought to judge upon the substance, and not upon the manner or form of pleading." See 4 BACON, *supra* note 20, at H3.

171. See *Queen's Bench Division*, *supra* note 170, at 67. This dialogue may have occurred during the deliberation of *Nathan v. Batchelor* [1876] QB 164, 165 (Eng.).

172. *Watson*, 24 WLR at 884 ("If the facts stated in any paragraph demurred to can by any construction be considered as supporting any one of the various reliefs claimed in the pleadings, the paragraph must be held good."); see also L.G. Gordon Robbins, *Quarterly Digest of All Reported Cases*, 4 LAW MAG. & REV. 727, 749 (1876) (Eng.); CHARLES BURNEY ET AL., WILSON'S PRACTICE OF THE SUPREME COURT OF JUDICATURE 217 (London, Stevens & Sons, Ltd. 7th ed. 1888) (Eng.); M.D. CHALMERS & HERBERT LUSH-WILSON, WILSON'S SUPREME COURT OF JUDICATURE ACTS 254, 279 (London, Stevens & Sons, Ltd. 3d ed. 1882) (Eng.); WILLIAM THOS. CHARLEY, THE NEW SYSTEM OF PRACTICE AND PLEADING UNDER THE SUPREME COURT OF JUDICATURE ACTS, 1873 & 1875, at 549–50 (London, Waterlow & Sons 1875) (Eng.); JOHN CUNNINGHAM & MILES WALKER MATTINSON, A SELECTION OF PRECEDENTS OF PLEADING 39–40 (London, Stevens & Haynes 1878) (Eng.); cf. *Anderson v. Dist. Bd. of Tr. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996) (stating that with imprecise incorporation by reference, "it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief"). The American perspective, demanding a party to assign a specific fact to a specific count, is the exact opposite of the 1875 English decision, 120 years earlier.

173. *Watson*, 24 WLR at 884; cf. *Stewart v. Balderston*, 10 Kan. 131, 133–34 (1872) (a contemporaneous American case concluding that the lawyer was not allowed to allege the general facts initially without stating separately in each count which fact constituted each cause of action).

*Batchelor*, the court held that a plaintiff could not challenge an isolated paragraph if the answer, taken together, presented a good defense.<sup>174</sup> Both decisions justified their conclusions on the Common Law Procedure Act of 1852, although the Act itself was silent on the issue.

As William Charley noticed in 1877, “This decision [*Nathan*] is clearly in accordance with common sense. Order XIX, Rule 4, requires that ‘every pleading shall be divided into paragraphs.’ It would be absurd if the opposite party were allowed to pick out any particular paragraph and say, ‘This paragraph, standing alone, is insufficient in law.’”<sup>175</sup> Almost 150 years have passed, and this common sense is still lacking in the United States.

The dogma and incorporation by reference, therefore, have not existed in England for almost two centuries.<sup>176</sup> The United States badly need their own *Watson* and *Nathan*.<sup>177</sup>

Ireland<sup>178</sup> and Ontario<sup>179</sup> soon followed the new English precedent. The United States did not pay attention to it, even though *Watson v. Hawkins* was

174. *Nathan*, [1876] QB at 164; see also FRANK EVANS, THE PRACTICE OF THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE 720 (London, Horace Cox 1881).

175. CHARLEY, *supra* note 172, at 549 (emphasis omitted). According to Order XIX, Rule 4 of the Rules of Court, every pleading had to be “divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation.” *Id.* at 491. This is a familiar rule for American lawyers.

176. See NEIL ANDREWS, ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM §§ 10.54–10.89 (2003) (Eng.); BULLEN & LEAKE & JACOB’S PRECEDENTS OF PLEADINGS (William Blair et al. eds., 18th ed. 2016) (Eng.); ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE §§ 7.16–7.20 (3d ed. 2013) (Eng.). See generally ATKIN’S ENCYCLOPEDIA OF COURT FORMS IN CIVIL PROCEEDINGS, LexisNexis UK (Judge Philip Waller et al. eds., 2011) (comprising over eighty volumes). None of these books refer to *Watson*, *Nathan*, or to incorporation by reference. For further commentary on the nonexistence of the dogma and incorporation by reference in England, see Email from Peter Susman, QC, Barrister, Henderson Chambers, to Antonio Gidi, Professor of Law, Syracuse University (Jan. 9, 2019) (on file with author) (“In 50 years of practice at the English Bar, I have never seen a pleading in a civil case divided into counts, or repeating in the same terms earlier allegations of fact in relation to further alleged causes of action. Indeed, I remember that when I spent 18 months as an associate with [a law firm] in New York City in 1970–[7]1, I was surprised at what I regarded as the excessive formality, prolixity and repetitiveness of the pleadings I saw.”).

177. See generally MILLAR, *supra* note 12, at 175 (“The American codes have not succeeded as well as the English Rules in reducing pleading to that purely ancillary position which it ought to occupy in the procedural scheme. There is commonly too strong an insistence upon the exactness of statement in the allegation of cause of action and defense . . . . The test of prejudice worked to the opponent of the party at fault is too apt to be overridden by considerations of the regularity of the record . . . . [I]t is still possible for a judgment to be reversed by an appellate court because of a fault in the pleadings alone, without regard to the evidence or to the question of prejudice *vel non* to the opposite party. The English system, in contrast, has virtually attained the position that a fault in pleading, however substantial, will not be permitted to affect the result if it has produced no actual injury . . . . Hence, if a party’s claim or defense is supported by the evidence, he has little to fear from slips in his pleadings, for in practical effect everything depends on the case made at the trial.”).

178. See *O’Grady v. Warden* [1878] 12 Ir. LTR 150 (Ir.); L. S. EIFFE ET AL., THE JUDICATURE ACTS (IRELAND), 1877 AND 1878, at 350 (Dublin, E. Ponsonby 1881).

179. See GEORGE SMITH HOLMESTED & THOMAS LANGTON, THE JUDICATURE ACT OF ONTARIO AND THE CONSOLIDATED RULES OF PRACTICE AND PROCEDURE 434, 456, 461–62 (Toronto, Carswell Co. Ltd. 2d ed. 1898); see also GEORGE SMITH HOLMESTED & THOMAS LANGTON, FORMS AND PRECEDENTS OF PROCEEDINGS

known and could have influenced American lawyers to adopt a more enlightened practice.<sup>180</sup>

The dogma and incorporation by reference, therefore, do not exist in Canada.<sup>181</sup> Current Ontario Rule 25.02, for example, requires pleadings to be divided into consecutively numbered paragraphs, with each allegation contained in a separate paragraph.<sup>182</sup> This is similar to American rules and practice. But it does not require each count to be complete.<sup>183</sup> Nowhere in the Ontario Rules is incorporation by reference mentioned. The same is true in Canadian federal courts.<sup>184</sup>

The practice does not exist in New Zealand or Australia either.<sup>185</sup> A judge of the Supreme Court of Tasmania, probably exasperated by American lawyers or local lawyers consulting American legal forms on the Internet, offers the following advice:

Don't use the expression the plaintiff or the defendant "relies on and repeats the facts pleaded at paragraphs 2–10." Your pleading needs to set out the material facts, and once they are pleaded there is no need to plead them again. And you actually never will, quite literally, wish them repeated.<sup>186</sup>

An exception might be the common-law systems directly derived from the American legal tradition or heavily influenced by American lawyers. For example, although the Rules of Court of the Philippines do not mention incorporation by reference, lawyers in the Philippines repeat and reallege at each count. This practice, however, is fading away with each new generation of lawyers.<sup>187</sup>

IN THE SUPREME COURT OF JUDICATURE FOR ONTARIO AND THE SUPREME COURT OF CANADA 52–262 (1904) (formbook showing that the practice had stopped in Ontario).

180. See AMES, *supra* note 108, at 33 (citing *Watson v. Hawkins* (1875) 24 WLR 884 (Eng.), but making no comment on the issue of incorporation by reference). This forgotten English precedent is still cited in at least one common-law country. See JOSEPH MBAH-NDAM, *A TEXTBOOK ON PRACTICE AND PROCEDURE IN CIVIL AND COMMERCIAL LITIGATION IN THE HIGH COURTS OF THE NORTH-WEST AND SOUTH-WEST PROVINCES OF CAMEROON* 317 & n.70 (2003).

181. See GARY D. WATSON & MICHAEL MCGOWAN, *WATSON & MCGOWAN'S ONTARIO CIVIL PRACTICE: 2019 (2018)* (making no reference to incorporation by reference); see also Email from Janet Walker, Professor & Chartered Arbitrator, Osgoode Hall Law Sch., to Antonio Gidi (Jan. 4, 2019) (on file with author) ("You are right that incorporation by reference is something that is not done in Canada and is a particularly unattractive feature of U.S. procedure. It's been gone for so long that there is no reference in the standard commentaries . . . on the history of its elimination. . . . But rest assured, the practice ended a very long time ago.").

182. Rules of Civil Procedure, R.R.O. 1990, r 25.02 (Can.).

183. See *id.*

184. See Federal Courts Rules, SOR/98-106, c 173 (Can.) (requiring only that "[p]leadings shall be divided into consecutively numbered paragraphs").

185. The New Zealand High Court Rules of 2016 do not mention incorporation by reference. See High Court Rules 2016, pt 5 (N.Z.).

186. See Hon. Stephen Estcourt, *Pleadings Tips and Tricks*, SUP. CT. TAS. (June 29, 2015), [https://www.supremecourt.tas.gov.au/publications/speeches/estcourt\\_j/pleading\\_tips\\_and\\_tricks](https://www.supremecourt.tas.gov.au/publications/speeches/estcourt_j/pleading_tips_and_tricks).

187. See Email from Vanessa Joyce Monge, CEO & Legal Counsel, Inceptigon Pty. Ltd., to Antonio Gidi, Professor of Law, Syracuse University (Feb. 12, 2019, 8:57 AM) (on file with author).

It is impossible to know the pleading practice of all countries of the civil-law tradition (derived from Roman Law and later adopted in all Continental Europe and Latin America and most of Africa and Asia). But the dogma and incorporation by reference do not exist in Germany, France, Italy, Spain, Brazil, Argentina, Japan, Mexico, Colombia, or any other country with a similar tradition.<sup>188</sup> This unpleasant feature is strictly American.

Although this fossilized technique has no place in modern pleadings, American lawyers continue to parrot it, blindly complying with a ghost dogma that has not existed for almost a century in the United States. This is no surprise. As Sunderland said a century ago, on an unrelated matter:

It is safe to say that if a new method of treating cancer were discovered and successfully employed in England; every intelligent doctor in the world would almost immediately know about it and attempt to take advantage of it. But it is equally safe to say that if a new and successful method of treating some procedural problem were discovered in England, American lawyers as a class would remain in substantial ignorance of it for at least two generations, and would probably treat it with scornful indifference for a generation or two more. There are no state lines for progressive doctors, dentists, engineers, architects, manufacturers or business men. But not one lawyer in a hundred knows or cares what reforms are being employed by his profession on the other side of the political boundary. The American lawyer is satisfied with things as they are. As long as clients continue to come and the machinery of the law continues to move . . . .<sup>189</sup>

In retrospect, Sunderland was charitable. Here we are, twelve generations after incorporation by reference was abolished in England, and nothing has changed in the United States. This Article is not exactly about the cure for cancer, but the need to end incorporation by reference is something on which all lawyers can agree.

#### B. NEW YORK ABOLISHED INCORPORATION BY REFERENCE IN 1962, BUT IT SURVIVED

Only in 1962, more than a century after the practice was abolished in England and in other common-law countries, New York expressly released pleaders from the ancient burden of pleading complete counts:

Prior statements in a pleading shall be deemed repeated or adopted subsequently in the same pleading whenever express repetition or adoption is unnecessary for a clear presentation of the subsequent matters.<sup>190</sup>

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188. See generally UGO MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, SCHLESINGER'S COMPARATIVE LAW 489–563, 684–862 (2009) (discussing comparative civil procedure).

189. Sunderland, *supra* note 12, at 572, 579 (stating that with the end of the forms of actions the restrictions on joinder of claims should have ended as well, but “the framers of the code were still unable to free themselves from the common law tradition”).

190. See N.Y. C.P.L.R. 3014 (McKinney 2018); see also 5 WEINSTEIN, KORN & MILLER, *supra* note 62, ¶¶ 3014.04–.07; 3B LISA A. ZAKOLSKI & JUDITH NICHTER MORRIS, CARMODY-WAIT 2D NEW YORK PRACTICE WITH FORMS § 27:44 (2019).

The New York rule just *deemed* previous statements repeated or adopted, so it abolished incorporation by reference while at least implicitly keeping the dogma. Instead of deeming the statements repeated, however, the rule should have abolished the dogma, providing that there was no need to repeat statements. Moreover, the previous sentence undercuts the release from the burden by stating, “Reference to and incorporation of allegations may subsequently be by number.”<sup>191</sup>

Although imperfect, this language represented a major evolution of the previous pleading practice of repeating, reiterating, and realleging. The legal profession received the new language with high hope: “[it] eliminates any need for the standard paragraph found in pleadings . . . which stated that the pleader ‘repeats and realleges each and every allegation contained in paragraph.’”<sup>192</sup> If it had been properly interpreted, this rule would have buried the old practice of incorporation by reference half a century ago. Still a century later than England, but good enough.

Less than a year after its enactment, this provision was put to the test in *Hewitt v. Maass*.<sup>193</sup> The court settled the issue in two sentences: “There is an objection made [by the defendant] to the failure of the complaint to repeat allegations in describing the several causes of action. This essentially formal reaction was recognized as such recently and has been disposed of by [CPLR Rule 3014].”<sup>194</sup> It seemed that the future of that provision was auspicious and that the old practice of *repeating, reiterating, and realleging* would become a mere curiosity, finally archived in the dustbin of the history of impractical rules.

A few years later, however, CPLR Rule 3014 was challenged again in *Nussenblatt v. Nussenblatt*, this time with mixed results.<sup>195</sup> A defendant’s counterclaim failed to reallege essential allegations already made in previous paragraphs of the same pleading. The plaintiff moved to dismiss the incomplete counterclaim because without these allegations the counterclaim did not state a cause of action. The court denied the motion to dismiss, arguing that the new language overruled old cases like *Latman v. Kalmor Builders, Inc.*, decided before the new rules.<sup>196</sup>

In *Latman*, the court, although recognizing that the matters were pleaded in the first cause of action, demanded that they be incorporated by reference in the second one and ordered the plaintiff to amend the complaint.<sup>197</sup> *Nussenblatt* also favorably cited commentators who said that the new Rule 3014 made standard paragraphs repeating and realleging unnecessary. Yet *Nussenblatt*

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191. N.Y. C.P.L.R. 3014 (McKinney 2018).

192. *Nussenblatt v. Nussenblatt*, 309 N.Y.S.2d 397, 399 (Sup. Ct. 1970) (internal quotation marks omitted) (quoting an earlier version of 3 WEINSTEIN, KORN & MILLER, *supra* note 62, ¶ 3014.07).

193. 246 N.Y.S.2d 670 (Sup. Ct. 1964).

194. *Id.* at 672.

195. *Nussenblatt*, 309 N.Y.S.2d at 397.

196. *Id.* at 399.

197. *Latman v. Kalmor Builders, Inc.*, 137 N.Y.S.2d 240, 241 (Sup. Ct. 1954).



issued the same order as *Latman*: that the defendant amend the answer to repeat and reallege the missing elements “[w]ith regard to clarity and in order to remove any doubt as to the pleading in future proceedings.”<sup>198</sup> It was the classic, “you don’t need to do it, but do it.” And just like that, New York was wrenched back, over 400 years, to the sixteenth century. And it never recovered.

For one commentator, repeating and realleging is still necessary in New York, “in a long pleading in which so much has intervened between the original statement and the new reference that the content would be lost without the repetition.”<sup>199</sup> Another treatise offers a defeating interpretation of CPLR Rule 3014, suggesting that it encourages incorporation by reference in a small complaint with a handful of paragraphs for a “clear presentation.”<sup>200</sup>

Another treatise, after praising the New York rule, cautioned: “the pleader must exercise judgment in deciding whether an express reference or adoption is necessary. If there is any doubt that prior allegations in the pleadings will be considered repeated or adopted, an express incorporation would be the safest approach.”<sup>201</sup> They concluded that “[a]s a practical matter, the majority of attorneys still opt to use the obsolete but nonetheless comfortably precise technique of reallegation by reference to prior material in succeeding paragraphs, although this practice is to be discouraged.”<sup>202</sup> Except for the word “obsolete,” there’s nothing correct in this statement. Incorporation by reference is neither comfortable nor precise; and it is a tic, not a technique.

Not surprisingly, therefore, despite the express rule relieving pleaders from the burden of repeating and realleging, New York lawyers are still addicted to the practice, routinely incorporating previous statements by reference. There is no incentive for a lawyer to think independently, when the most prestigious commentators say that incorporating by reference is necessary in some cases, the “safest approach” in others, and a “comfortably precise technique.”<sup>203</sup>

But the dogma of complete counts is incompatible with a modern system of procedure, with broad amendment rules,<sup>204</sup> where “[p]leadings shall be liberally construed,”<sup>205</sup> where “[d]efects shall be ignored if a substantial right of

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198. *Nussenblatt*, 309 N.Y.S.2d at 398–400.

199. PATRICK M. CONNORS, PRACTICE COMMENTARY, MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK, CPLR C3014:5 (2015).

200. See DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 213 (6th ed. 2018).

201. 5 WEINSTEIN, KORN & MILLER, *supra* note 62, ¶ 3014.07.

202. *Id.*

203. See *id.*

204. See, e.g., *Card v. Budini*, 285 N.Y.S.2d 734, 737 (App. Div. 1967) (holding that the incorporation of allegations in a complaint in a previous proceeding was improper, but the plaintiff was allowed to amend her complaint).

205. N.Y. C.P.L.R. 3026 (McKinney 2018).

a party is not prejudiced,”<sup>206</sup> and where objections of form are waivable.<sup>207</sup> This all happened in New York in 2019, almost two centuries after it was abolished in England.

Old practices die hard. American lawyers may not be ready to let go of this ritual.

This practice had a similarly disappointing evolution in Illinois, which is the only other state that has a peculiar rule on incorporation by reference, that is not a copy of Federal Rule 10(c). The Illinois Code provides that

[i]f facts are adequately stated in one part of a pleading, or in any one pleading, they need not be repeated elsewhere in the pleading, or in the pleadings, and may be incorporated by reference elsewhere or in other pleadings.<sup>208</sup>

The language of the Illinois rule is confusing but, well interpreted, might address the issue adequately, abolishing incorporation by reference. Properly interpreted, it is superior to the New York rule because it rejects the fiction that the facts are “deemed repeated” in the subsequent count. Obviously, if the facts are adequately stated in one part of a pleading, there is no reason to repeat them elsewhere in the same pleading. But what the precision of the first sentence gives, the ambiguity of the second takes away. Although the second sentence refers to other pleadings and documents, its ambiguous language encourages the practice that the first sentence had considered unnecessary. The result is that lawyers in Illinois continue to employ the useless formula in all their pleadings, and the formbooks do not allow them to evolve.<sup>209</sup>

Several courts have noticed something strange with incorporation by reference, but they are incapable of seeing exactly what is wrong with it. Courts dislike, for example, “chain letters” or “shotgun pleadings” that cumulatively incorporate by reference all facts in previous claims, whether relevant or not: by count ten, count one was alleged nine times.<sup>210</sup> The dissatisfaction, however, is

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206. *Id.* According to the Advisory Committee Note, this rule is intended to “discourage useless pleading attacks by placing the burden on the attacker to show prejudice.” *Id.* advisory committee note. The same rule existed in all other New York procedural statutes. This principle has been a constant feature of New York and American law for at least a century. *See* N.Y. CODE PROC. § 136 (1848) (“In the construction of a pleading, for the purpose of determining its effect, its allegation shall be liberally construed, with a view to substantial justice between the parties.”); N.Y. CODE CIV. PROC. § 519 (1877) (“The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties.”); N.Y. R. CIV. PRAC. § 275 (1920) (“Pleadings must be liberally construed with a view to substantial justice between the parties.”). Other states had similar rules. *See* 1 ESTEE, *supra* note 20, at 153–54 (citing the codes of California, Nevada, Idaho, and Arizona, as well as case law in several other states); *see also* Dempsey v. Willett, 23 Hun. 264, 265 (N.Y. Gen. Term 1878).

207. *See* 5 WEINSTEIN, KORN & MILLER, *supra* note 62, ¶ 3014.10 (“If a responsive pleading has been served, the party serving it normally should be considered to have waived his right to object to a failure to state and number separately. This follows naturally from the premise that the prime justification for the requirement is to enable the opposing party to respond intelligently.”).

208. ILL. COMP. STAT. CT. R. 134 (2018).

209. *See, e.g.*, 3A ILLINOIS CIVIL PRACTICE FORMS § 64:4 (2018); 5A *id.* § 112:21; 5 ILLINOIS REAL PROPERTY SERVICE § 33:124 (2018).

210. *See, e.g.*, Uhrich v. State Farm Fire & Cas. Co., 135 Cal. Rptr. 2d 131, 135–36 (Ct. App. 2003); Kelly v. Gen. Tel. Co., 186 Cal. Rptr. 184, 187 (Ct. App. 1982); Frugoli v. Winn-Dixie Stores, Inc., 464 So. 2d 1292,

only manifested in complex cases, when the pleading is ambiguous or incomplete despite multiple amendments; the dissatisfaction is not caused merely by imperfect incorporation by reference. Courts have shown their displeasure with tough words and no action.<sup>211</sup>

American lawyers are stuck in a revolving door, unable to modernize on their own. One reason why American law is vulnerable to this kind of hopeless situation is the tradition, both in academia and in practice, of citing only the most recent case or authority and ignoring the original one.<sup>212</sup> A rule appears more current than it is when one cites a recent case. If American jurisprudence preserved the origin of their precedents, it would be easier to know why a rule exists.

### C. THE FEDERAL RULES DID NOT ADOPT THE DOGMA IN 1938, BUT KEPT THE EXCEPTION

Federal procedure has not caught up with New York's 1962 innovation. In a pointless provision that has survived unamended since 1938, Rule 10(c) condones the practice of incorporation by reference: "A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion."<sup>213</sup>

Rule 10(c) allows but does not require incorporation by reference. The Federal Rules, then, mindlessly adopted the exception (incorporation by

1293 (Fla. Dist. Ct. App. 1985); *see also* Alpert v. Hein, 166 N.Y.S.2d 851, 853 (Sup. Ct. 1957); Rubinstein v. Rubinstein, 61 N.Y.S.2d 44, 45 (Sup. Ct. 1946) (same); Stoll v. Long Islander Publ'g Co., 40 N.Y.S.2d 412, 413 (Sup. Ct. 1942) (striking out irrelevant incorporation by reference).

211. *See, e.g.*, Sikes v. Teleline, Inc., 281 F.3d 1350, 1356 n.9 (11th Cir. 2002), *abrogated by* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008); Weiland v. Palm Beach Cty. Sheriff's Office, 792 F.3d 1313, 1320–21 (11th Cir. 2015); *see also* 5A WRIGHT & MILLER, *supra* note 4, § 1326 (2018) (discussing courts' displeasure with shotgun pleading). *But see* Degirmenci v. Sapphire-Fort Lauderdale, LLLP, 693 F. Supp. 2d 1325 (S.D. Fla. 2010) (dismissing sua sponte a confusing shotgun pleading after a fourth amended complaint did not follow the court order to clearly state the facts of each violation and separate counts for each violation, violating Rule 8(a)(2)'s short and plain statement requirement, yet allowing the plaintiff to amend and plead a sixth time); Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corp., 305 F.3d 1293, 1296 (11th Cir. 2002) ("Instead of requiring the plaintiffs to replead, the [trial] court attempted—and admirably so—to ascertain exactly which facts formed the basis of the plaintiffs' federal law claims. We have read Count IV—including all that it incorporates by reference—several times; yet, we must confess that we are at a loss to explain what allegedly transpired . . ."); Byrne v. Nezhat, 261 F.3d 1075, 1128–31 (11th Cir. 2001), *abrogation recognized by* Jackson v. Bank of Am., 898 F.3d 1348 (11th Cir. 2018).

212. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 54 (2008) ("The more recent the citation the better. The judge wants to know whether the judgment you seek will be affirmed by the current court, not whether it would have been affirmed 30 years ago."); MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, LEGAL WRITING AND ANALYSIS 107 (2009) ("Recent authorities are better."); RICHARD K. NEUMANN, JR. & KRISTEN KONRAD TISCIONE, LEGAL REASONING AND LEGAL WRITING 278 (7th ed. 2013) ("If an idea is undisputed and routine . . . it should be enough to cite, with little or no explanation, the most recent decision"); *see also* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.4, at 61–62 (20th ed. 2015) (stating that, generally, cases should be cited in reverse chronological order).

213. FED. R. CIV. P. 10(c); *see also* FED. R. CRIM. P. 7(c)(1) (adopted in 1944) ("A count may incorporate by reference an allegation made in another count.").

reference)<sup>214</sup> without ever having adopted the dogma (each count must contain all facts and elements of the claim).<sup>215</sup>

This rule was born outdated, inconsistent with a modern procedural system of notice pleading that discouraged pleading battles, with the attendant reduced importance of pleadings,<sup>216</sup> judicial discretion, liberal construction of pleadings,<sup>217</sup> flexible amendments,<sup>218</sup> search for substantial justice, and liberal joinder of claims.<sup>219</sup> Most important, it was incompatible with a system that did not adopt the old common-law or code pleading dogma requiring each count to be complete and independent under penalty of dismissal.<sup>220</sup>

By the 1940s, the dogma had practically disappeared in federal courts: the few cases that mentioned incorporation by reference did not mention the dogma of complete counts.<sup>221</sup> No case has expressly abolished the dogma, but this is the wrong perspective. No case expressly adopted it; no case forced a plaintiff to amend a complaint to repeat allegations or dismissed a claim for failure to incorporate.

Moreover, Rule 10(b) does not require joint claims to be “separately stated.”<sup>222</sup> A party may do so if it “would promote clarity.”<sup>223</sup> As stated in a treatise,

Unfortunately, no easy rule can be extracted from the cases to advise a pleader as to when separate paragraphs—or how many—will be necessary. A reliance on common sense and a conscientious effort to produce a pleading that is readily comprehensible to the opposing litigant and the district court are the best guides for a pleader to follow. Separate paragraphing is particularly useful when . . . . Even if separate counts for each ground are not required under the circumstances under the third sentence of Rule 10(b), the clarity of the pleadings will be enhanced by the use of separate paragraphs.<sup>224</sup>

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214. *See supra* Part III.

215. *See supra* Part II.

216. *See* FED. R. CIV. P. 8(d) (“No technical form [of pleading] is required.”).

217. *See* FED. R. CIV. P. 8(e) (“Pleadings must be construed so as to do justice.”).

218. *See* 5A WRIGHT & MILLER, *supra* note 4, § 1326 (“Leave to amend the pleading to correct a defective incorporation should be granted liberally.”).

219. *Compare* FED. R. CIV. P. 18(a) (“A party . . . may join . . . as many claims as it has against an opposing party.”), with *Sunderland*, *supra* note 12, at 572 (discussing arcane rules of common-law joinder of claims, and the severe consequences for misjoinder).

220. *Cf. Sutton v. United States*, 157 F.2d 661, 663 (5th Cir. 1946) (stating, on an unrelated criminal matter, that “[i]t is no longer necessary in the federal courts to follow the old common-law rules of criminal pleadings”).

221. *See, e.g., Aktiebolaget Stille-Werner v. Stille-Scanlan, Inc.*, 1 F.R.D. 395 (S.D.N.Y. 1940) (ordering the defendant to state with particularity which of the allegations in the answer were to be incorporated into the counterclaim, without saying why it was necessary); *Rosenberg v. Cohen*, 9 F.R.D. 328 (E.D. Pa. 1949).

222. *See* Subpart II.A (discussing the meaning of “separately stated” as an obligation to allege all elements of the cause of action in each count).

223. FED. R. CIV. P. 10(b) (“If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.”).

224. 5A WRIGHT & MILLER, *supra* note 4, § 1322 (“Because the motion to direct a party to paragraph a pleading properly often is employed only as a dilatory tactic, a district court should direct a pleader to paragraph only when the existing form of the pleading is prejudicial or renders the framing of an appropriate response

Without the dogma of complete counts, incorporation by reference became a ghost obligation in federal courts: an exception without a rule.

The intellectual environment in the years leading to the adoption of the Federal Rules of Civil Procedure in 1938 was the second wasted opportunity in the United States to abolish incorporation by reference.<sup>225</sup> The first had occurred almost a century earlier, with the enactment of the NY Code of Procedure in 1848. In fact, the 1938 Federal Rules were an even greater departure from the technicalities of common-law pleading than code pleading could ever be.<sup>226</sup> Yet, although rare, some recent cases still mention incorporation by reference, but always without mentioning the dogma of complete counts. This Article starts the third opportunity to abolish incorporation by reference.

Only one (reasonably) recent federal court case took the dogma of complete counts seriously, with tragic consequences for the plaintiff. In 1960, 60 years ago, a federal district court judge in New Jersey paid careful attention to which allegations were and which were not being incorporated in each count. He held that because the plaintiff incorporated certain earlier allegations into a count, the non-incorporation of other allegations demonstrated an intent not to make them a part of it.<sup>227</sup> The judge then granted a motion to dismiss for failure to state a claim upon which relief could be granted.<sup>228</sup>

This was probably the last decision where incorporation by reference was seriously considered, albeit indirectly. Although this decision is from 1960, the judge had graduated from law school in 1919 and was in private practice from 1919 to 1932, when he was nominated to the federal bench by President Herbert Hoover.<sup>229</sup> Clearly, he was an old-school judge.

Another recent federal court decision also paid indirect attention to the issue. Although not referring to the dogma of complete counts, and although stating that Rule 10(c) *permits* incorporation by reference, *Zuzul* seems to consider that a plaintiff *must* do so if she wants to allege the same fact in a

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extremely difficult or would be of assistance to the district judge. Even when a failure to comply with Rule 10(b) is shown, leave to amend ought to be made available to the offending pleader since the defect does not go to the merits of the action. A failure to object to improper paragraphing promptly—normally before interposing a responsive pleading—properly has been deemed a waiver of the defect by at least one court of appeals. Fortunately, practice under this technical aspect of Rule 10(b) has not been the subject of significant litigation, especially in recent decades.”); *see also id.* § 1324 (discussing when separate statements are required); *Lowe v. Consol. Edison Co.*, 1 F.R.D. 559 (S.D.N.Y. 1940) (holding that separate counts were not required because they were not necessary to clear presentation or to enable defendants to plead).

225. *See, e.g.*, Subrin, *supra* note 103 (discussing the movement of flexibilization of the common law pleading towards equity pleading in the Federal Rules).

226. *See id.* at 974 (“The Federal Rules were the antithesis of the common law . . .”).

227. *Reliable Volkswagen Sales & Serv. Co. v. World-Wide Auto. Corp.*, 182 F. Supp. 412, 425 (D.N.J. 1960).

228. *Id.* at 428.

229. *Judges: Forman, Phillip*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/forman-phillip> (last visited Apr. 16, 2019). A curiosity, if not irony, is that Judge Phillip Forman granted Albert Einstein his American citizenship in 1940.

different count.<sup>230</sup> With no context or explanation, the court stated, “For one, these allegations arise in [the plaintiff’s] defamation count and are not incorporated into her counts for race or gender retaliation.”<sup>231</sup> Although dictum, this comment reveals a dangerously wrong interpretation of Rule 10(c).

Federal Rule 10(c) was mimicked in almost all state procedural rules, replicating the error throughout the country. Only New York and Illinois adopted different rules, as discussed above.<sup>232</sup> Forty-three states adopted provisions similar to Rule 10(c), with minimal variation. The most common language is “Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.” A few states were more creative in departing from Rule 10(c) and used “document” or “paper” instead of “pleading,” clarified that it must be “in the same action,” or added a reference to “exhibits” or “other paper of record.” Only five states (Virginia, New Hampshire, Iowa, Connecticut, and California) did not adopt the rule in their codes of civil procedure but allow incorporation by reference through precedents.<sup>233</sup>

No state has expressly adopted the dogma of complete counts in modern procedural law.<sup>234</sup> One would have to go back more than half a century, to the 1960s and 1950s to find a handful of isolated cases clearly stating the dogma of complete counts, maybe by inertia.<sup>235</sup> One would be hard-pressed to find any reference to the dogma after that. Cases before 1950, and especially before 1940, state the dogma unequivocally.<sup>236</sup> So, by following the federal lead, the states also adopted the exception to a dogma that they had abandoned.<sup>237</sup>

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230. *Zuzul v. McDonald*, 98 F. Supp. 3d 852, 869 n.15 (M.D.N.C. 2015).

231. *Id.*; *see also Heying v. Simonaitis*, 466 N.E.2d 1137, 1142 (Ill. App. Ct. 1984) (not allowing, without explanation, allegations in one count that were not expressly incorporated in another).

232. *See supra* Subpart IV.B.

233. *See Pine Terrace Apartments, L.P. v. Windscape, LLC*, 87 Cal. Rptr. 3d 630, 641 (Ct. App. 2009); *Melfi v. City of Danbury*, 800 A.2d 582 (Conn. App. Ct. 2002); *Vawter v. McKissick*, 159 N.W.2d 538, 541 (Iowa 1968); *Signal Aviation Servs., Inc. v. City of Lebanon*, 144 A.3d 869, 879–80 (N.H. 2016); *Hechler Chevrolet, Inc. v. Gen. Motors Corp.*, 337 S.E.2d 744, 746 (Va. 1985).

234. *See, e.g.*, 1 RONALD S. LONGHOFER, MICHIGAN COURT RULES PRACTICE § 2113.4 (6th ed. 2018) (“[I]ncorporation by reference was formerly required when identical facts were relied upon in separate counts or defenses of the same pleading. Although that is still permitted under MCR 2.113, it is no longer required.”). The advice is, “You don’t need to do it, but you may.”

235. *See Reliable Volkswagen Sales & Serv. Co. v. World-Wide Auto. Corp.*, 182 F. Supp. 412 (D.N.J. 1960); *Webb v. Litz*, 102 So. 2d 915 (Ala. Ct. App. 1958); *Lambert v. S. Ctys. Gas Co.*, 340 P.2d 608, 611–12 (Cal. 1959) (“Each count or cause of action in a complaint must be complete in itself, and must either contain all the averments necessary to state a cause of action or expressly refer therefor to other counts.” (citations omitted)); *Steiner v. Rowley*, 221 P.2d 9, 12 (Cal. 1950) (en banc); *Tucker v. Tucker*, 143 S.E.2d 639, 644 (Ga. 1965) (“Each count in the petition must be complete in itself and must state a cause of action.”); *S. Land, Timber & Pulp Corp. v. Eunice*, 133 S.E.2d 345, 350 (Ga. 1963); *Latman v. Kalmor Builders, Inc.*, 137 N.Y.S.2d 240 (Sup. Ct. 1954); *Lampert v. Hollis Music, Inc.*, 109 N.Y.S.2d 319 (Sup. Ct. 1951); *Levine v. Schaffzin*, 99 N.Y.S.2d 254 (Sup. Ct. 1950); *Heath v. Kirkman*, 82 S.E.2d 104 (N.C. 1954); *Cherry v. Walker*, 62 S.E.2d 329, (N.C. 1950); *Olson v. Johnson*, 66 N.W.2d 346 (Wis. 1954).

236. *See supra* Subparts II.A, III.A.

237. The practice in New York and Illinois is discussed above. *See supra* Subpart IV.B.

The absence of evolution regarding incorporation by reference is discouraging because, as Robert Wyness Millar stated, “as procedure develops the advance is from rigidity to flexibility.”<sup>238</sup> Against all odds, and against reason and common sense, the practice is as prevalent today as it was four centuries ago. But at least it made sense in the context of primitive procedural superstitions.

#### D. BEYOND INCORPORATION BY REFERENCE

Some modern courts may be going in a direction beyond the need to incorporate by reference. These courts are influenced by the empty existence of the practice of incorporation by reference; they are not reinstating the rule that all counts must be complete. The result is futile pleading battles and unnecessary repetition, fueled by naturally risk-averse lawyers who would adopt a belt-and-suspenders approach for fear of an unreasonably formalistic judge.

A 2003 Utah decision, *Coroles v. Sabey*, held that in fraud cases, the requirement to plead with particularity is not satisfied with the incorporation of almost 700 previous paragraphs and the mere recital of the elements of fraud.<sup>239</sup> For the court, it was unacceptable for a lengthy complaint to “dump[] upon the trial court, and now upon [the court of appeals], the burden of sifting through the hundreds of paragraphs of alleged facts to ascertain whether Plaintiffs have ‘allege[d] . . . facts necessary to make all their elements of fraud.’”<sup>240</sup>

The *Coroles* court was also influenced by the rule that “the mere recitation . . . of the elements of the fraud in a complaint does not satisfy the particularity requirement.”<sup>241</sup> To facilitate the court’s work, therefore, the plaintiff “should have listed specific paragraphs from their facts section that supported each element of their common law fraud claim.”<sup>242</sup> This silly idea could only have crossed the mind of a judge exposed to the practice of incorporation by reference. The case was dismissed without prejudice, and the request for leave to amend was denied merely because a proper motion to amend was not filed: the plaintiffs should have filed a proper motion to amend or filed a new lawsuit complying with the specificity demanded.<sup>243</sup> *Coroles* represents the triumph of form over substance.

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238. MILLAR, *supra* note 12, at 5. This statement is true only regarding the recent evolution of civil procedure. Earlier procedure, particularly Roman law, was more flexible and less formalistic than the common law. See, e.g., Millar, *supra* note 90, at 31–43 (demonstrating that the Roman and Canon law rules of joinder of claims were more flexible than the common-law pleading rules).

239. See *Coroles v. Sabey*, 79 P.3d 974, 980 (Utah Ct. App. 2003) (“This method for pleading fraud is unacceptable under rule 9(b), especially in a complaint of such enormous length.”).

240. *Id.* (alteration in original) (quoting *Debry v. Noble*, 889 P.2d 428, 443 (Utah 1995)).

241. *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Armed Forces Ins. Exch. v. Harrison*, 70 P.3d 35, 40 (Utah 2003)).

242. *Id.* at 981 n.13.

243. See *id.* at 986.

A 2012 decision, also from Utah, reported plaintiffs following *Coroles*: on a 260-page complaint, each count contained not only the traditional formula of incorporation by reference, but also a summary of the facts and cross references to specific paragraphs giving factual detail to support each element of a fraud claim.<sup>244</sup> Belt, suspenders, and waistband.

This practice of summarizing facts at each count and making cross references to prior paragraphs might become pervasive even beyond fraud cases, as lawyers and courts struggle with the unintended consequences of the plausibility requirement of *Twombly* and *Iqbal*.<sup>245</sup> Unless this is done in rare cases of long pleadings and complex facts under a requirement of pleading with particularity, this practice will prove even more wasteful and pointless than incorporation by reference.<sup>246</sup>

And all this nonsense could happen only in the United States, and only because the legal profession never got rid of incorporation by reference two centuries ago when it stopped making sense. Instead, we allowed the dogma to lie dormant in our judicial system by blindly complying with its exception. One can now see that it was not a benign practice after all. With the emergence of heightened pleading standards, it is possible that the dogma, like the herpes virus, will come back even more powerful and manifest itself in unpredictable ways.

#### E. RELATED ISSUES OF INCORPORATION BY REFERENCE

The objective of this Article is to discuss the incorporation of allegations made previously in the same pleading. But incorporation by reference exists in other situations.

One example is the incorporation of allegations and claims made in previous pleadings or motions in the same proceeding.<sup>247</sup> This strategy, although unnecessary, is commonly used in complex and multiparty litigation.<sup>248</sup> But practical complications may arise when the incorporation refers to a pleading that was amended, abandoned, or superseded.<sup>249</sup> This was a valid concern before the electronic age, when parts of a file could be archived in a different physical

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244. See *Mower v. Simpson*, 278 P.3d 1076, 1082 (Utah Ct. App. 2012).

245. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

246. It will not escape an attentive reader that this Article contains a series of “incorporations by reference” through footnotes that make cross references to other Parts where related information is developed.

247. See FED. R. CIV. P. 10(b) (“A later pleading may refer by number to a paragraph in an earlier pleading.”).

248. See 5 WEINSTEIN, KORN & MILLER, *supra* note 62, ¶ 3014.05; 5A WRIGHT & MILLER, *supra* note 4, § 1326.05.

249. See 2 PARNES, *supra* note 4, § 10.04; 5A WRIGHT & MILLER, *supra* note 4, § 1326; see also *Hinton v. Trans Union, LLC*, 654 F. Supp. 2d 440 (E.D. Va. 2009) (criticizing incorporation of allegations in a superseding complaint because it was not direct and explicit, stating that “wholesale incorporations—particularly those that seek to incorporate superseded versions of a complaint—must be examined with special care, and dismissing the case after two amendments, making this one of those senseless decisions that hurt people by inappropriately making a legal rule out of a silly baseball metaphor).



location.<sup>250</sup> But it lost its force now that previous pleadings are available at the click of a mouse.

A similar complication occurs when an amended pleading supersedes the previous one but fails to refer to or adopt some element contained in the superseded pleading.<sup>251</sup> It is usually considered that “[w]here an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn.”<sup>252</sup> Although this is the general rule in case law, the rules of only one state explicitly limits the practice to a pleading that has not been superseded.<sup>253</sup> In addition, while most states allow incorporation by reference “in the same pleading or in any *other* pleading or motion,” the rules in three states explicitly limit the practice to the *same* pleading.<sup>254</sup>

Another related issue is the incorporation of statements made (or documents) in a different lawsuit. Although Rule 10(c) does not contain any limitation, this practice is not allowed, even if the parties are the same and the proceedings are related, because it fails to give the opponent (and the court) adequate notice.<sup>255</sup> The rules in a few states expressly limit incorporation by

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250. *See, e.g.*, *Oppenheimer v. F. J. Young & Co.*, 3 F.R.D. 220, 226 (S.D.N.Y. 1943) (“[I]t is quite inconvenient to the court to have to send to the Clerk’s office for a file in order to learn the contents of exhibits attached to the discarded pleading.”). The *Oppenheimer* court sua sponte suggested (but did not require) the plaintiff to attach the documents again when drafting the amended complaint.

251. *See* 5 WEINSTEIN, KORN & MILLER, *supra* note 62, ¶ 3014.05; 5A WRIGHT & MILLER, *supra* note 4, § 1326.

252. *See* *McDonald v. Lipov*, 13 N.E.3d 179, 191 (Ill. App. Ct. 2014) (internal quotation marks omitted) (quoting *Foxcroft Townhome Owners Ass’n v. Hoffman Rosner Corp.*, 449 N.E.2d 125, 126 (Ill. 1983)); *see also* *Baker v. Louisville & N. Terminal Co.*, 61 S.W. 1029 (Tenn. 1901). *But see* *McManus v. Williams*, 519 F. Supp. 2d 1, 5 (D.D.C. 2007) (citing *El-Hadad v. Embassy of the U.A.E.*, 69 F. Supp. 2d 69, 71 n.1 (D.D.C. 1999) (allowing incorporation by reference of a superseded complaint), *rev’d in part* by 216 F.3d 29 (D.C. Cir. 2000)).

253. TEX. R. CIV. P. 58 (“Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion, so long as the pleading containing such statements has not been superseded by an amendment as provided by Rule 65.”).

254. *See, e.g.*, MICH. CT. R. 2.113(D) (“Statements in a pleading may be adopted by reference only in another part of the same pleading.”); *Derderian v. Genesys Health Care Sys.*, 689 N.W.2d 145, 162–63 (Mich. Ct. App. 2004) (not allowing incorporation by reference to another pleading, only the same pleading); 1 LONGHOFFER, *supra* note 234, § 2113.4 (stating that the previous Michigan procedural rules allowed incorporation by reference in other pleadings and motions). The other two states that explicitly do not allow incorporation by reference to another pleading are Mississippi and Oregon.

255. *See* 71 C.J.S. *Pleading* § 151 (2019); PATRICK M. CONNORS, PRACTICE COMMENTARY, MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK, CPLR C3014 (2015); 2 PARNES, *supra* note 4, § 10.04; 5A WRIGHT & MILLER, *supra* note 4, § 1326; *see also, e.g.*, *Muttathottil v. Gordon H. Mansfield*, 381 F. App’x 454, 457 (5th Cir. 2010); *Gooden v. Crain*, 255 F. App’x 858, 862 (5th Cir. 2007); *Rohde v. Rippy Surveying Co.*, 132 F.3d 1455 (5th Cir. 1997); *Tex. Water Supply Corp. v. R. F. C.*, 204 F.2d 190 (5th Cir. 1953); *Bronstein v. Biava*, 838 P.2d 968 (N.M. 1992); *Hill v. Hill Spinning Co.*, 94 S.E.2d 677 (N.C. 1956). *But see* 2 KERR, *supra* note 100, § 730 (allowing incorporation of statements in a different lawsuit); *Mass. Mut. Life Ins. Co. v. Residential Funding Co., LLC*, 843 F. Supp. 2d 191, 215 & n.15 (D. Mass. 2012) (considering arguments from joint briefs filed in eight different cases because the court was “familiar with the filings in the other eight cases, which [were] substantially similar to this case, and the usual concerns about inferring arguments from other submissions have less force”).

reference to statements made the same action.<sup>256</sup> And one state allows incorporation by reference “in another pleading in the same court.”<sup>257</sup>

A fourth related issue is the application of this centuries-old trial rule in the appellate context. The United States Court of Appeals for the Tenth Circuit, for example, has listed it among the “disfavored practices: “Incorporating by reference portions of lower court or agency briefs or pleadings is disapproved and does not satisfy the requirements of Federal Rules of Appellate Procedure 28(a) and (b).”<sup>258</sup> Incorporation of lower court filings would allow parties to circumvent page limitations on appellate briefs and unnecessarily complicate the task of appellate judges.<sup>259</sup> Moreover, the mere repetition of arguments already made in first instance does not explain why the lower court erred in rejecting them.<sup>260</sup> As a result, the Tenth Circuit has consistently declined to consider arguments made through incorporation by reference to lower court materials, treating the incorporated arguments as waived, even for pro se litigants.<sup>261</sup>

Yet another related issue is the incorporation of documents by reference.<sup>262</sup> At common law, a written instrument could not be part of a pleading by mere attachment and reference.<sup>263</sup> If a document was the foundation of a claim or defense, the pleader had to transcribe it in full (or in part, if allowed) in the body of the pleading.<sup>264</sup> Code pleading borrowed incorporation of documents by reference from equity practice so that pleaders would not have to transcribe the contents of documents into pleadings<sup>265</sup> and so that the same document could be

256. See N.C. R. CIV. P. 10(c) (“Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion *in the action*.” (emphasis added)); PA. R. CIV. P. 1019(g) (“Any part of a pleading may be incorporated by reference in another part of the same pleading or in another pleading *in the same action*.” (emphasis added)); VT. R. CIV. P. 10(c) (“Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion *in the same action*.” (emphasis added)).

257. See LA. CODE CIV. PROC. ANN. art. 853 (2018) (“A statement in a pleading may be adopted by reference in a different part of the same pleading or in another pleading in the same court.”).

258. 10TH CIR. R. 28.3(b).

259. See *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 624 (10th Cir. 1998).

260. See *Capital Dev. Affiliates LLC v. Zealand Benjamin Thigpen, III*, 744 F. App’x 594, 596 (10th Cir. 2018).

261. See, e.g., *United States v. Riddle*, 731 F. App’x 771, 783 (10th Cir. 2018); *Rodgers v. Beechcraft Corp.*, No. 17-5045, 2018 WL 6615315, at \*20 (10th Cir. Dec. 14, 2018); *United States v. Gordon*, 710 F.3d 1124, 1137 n.15 (10th Cir. 2013); *United States v. Patterson*, 713 F.3d 1237, 1250 (10th Cir. 2013); *Argota v. Miller*, 424 F. App’x 769, 771 (10th Cir. 2011); *Wardell v. Duncan*, 470 F.3d 954, 963–64 (10th Cir. 2006) (“Plaintiff’s pro se status does not except him from such established rules.”).

262. See BAILEY & FISHMAN, *supra* note 165, § 29:4.20; 2 PARNES, *supra* note 4, § 10.05; 5 WEINSTEIN, KORN & MILLER, *supra* note 62, ¶¶ 3014.05, 3014.14; 5A WRIGHT & MILLER, *supra* note 4, §§ 1326–27.

263. See SHIPMAN, *supra* note 12, § 290 (Henry Winthrop Ballantine ed., 3d ed. 1923) (“It is a technical rule that common-law pleading cannot be done by exhibits.”); *Pearsons v. Lee*, 2 Ill. (1 Scam.) 193, 194–95 (1835) (concluding that the court is not permitted to look at an annexed copy of a contract “with legal eyes” because it is not part of the complaint).

264. See, e.g., GREEN, *supra* note 50, §§ 327–33.

265. See CLARK, *supra* note 4, § 37. For a more recent example, see FREER, *supra* note 6, § 7.3.1 (“These provisions are helpful. If the case involves a dispute over a contract, the plaintiff may simply append a copy of

used in different counts.<sup>266</sup> Since 1938, however, “a copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.”<sup>267</sup> There has been dispute, however, over what material constitutes a “written instrument.”<sup>268</sup>

None of these practices are dealt with in this Article, which is exclusively about incorporation by reference at each count within a pleading. But they too are antiquated and must be updated to the twenty-first century.

#### CONCLUSION

The practice of blindly following tradition recollects the old story of the new couple making their first dinner together. The husband is troubled because the wife cut off the ends of the roast: “but that’s the best part!”, he says. She answers, confidently: “That’s the way my mother always made it.” The following week, the couple visits the mother, as she prepares the famous recipe. The young bride is sure she must be missing some vital information, so she inquires her mother. The explanation is comforting: “That’s the way my mother always made it.” Grandma’s eyesight was failing, but she could hear a pin drop. She lumbered into the kitchen and finally clarified the situation: “We have always been poor and cutting the ends was the only way it would fit our small oven.”

That the legal profession cannot get rid of such an obviously meaningless formula is a hint about how clueless we may be about other things that really matter. If this could pass undetected for centuries, what else have we been doing that makes no sense?

A treatise proposed relaxing the application of Federal Rule 10(c) along the same lines as the New York rule, but advised that “good pleading practice requires that express incorporations should be used to avoid any ambiguity and any risk.”<sup>269</sup>

This suggestion is not based on reason or knowledge, but merely a rationalization of a historical accident. The fear that a judge will miss an element of a cause of action merely because it was stated half a dozen or a hundred pages

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the contract to the complaint . . . without the make-work of having to retype the entire contract into the complaint.”)

266. See PHILLIPS, *supra* note 12, § 203 (“Where several causes of action are founded upon an instrument, a copy of which is required to be filed with the pleading, and but one copy is filed, each cause of action should refer to the copy as filed with that cause of action.”).

267. See FED. R. CIV. P. 10(c); *see also* N.Y. C.P.L.R. 3014 (McKinney 1962) (“A copy of any writing which is attached to a pleading is a part thereof for all purposes.”).

268. Compare *Occupy Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013) (citing *Rose v. Bartle*, 871 F.2d 331, 339 n.3 (3d Cir. 1989) (concluding that an affidavit does not constitute a “written instrument”), with *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 453 (7th Cir. 1998) (“[T]he term ‘written instrument’ . . . include[s] . . . affidavits.” (citing *Schnell v. City of Chicago*, 407 F.2d 1084, 1085 (7th Cir. 1969), *overruled on other grounds* by *City of Kenosha v. Bruno*, 412 U.S. 507 (1973))).

269. 5A WRIGHT & MILLER, *supra* note 4, § 1326.

earlier has no place in real life. Not in the twenty-first century, at least. There is no risk of ambiguity if a count does not expressly incorporate facts stated before in the same pleading.

A complaint must be read as a whole. If a plaintiff described an act of violence several pages earlier, the judge will remember it when the plaintiff asks for compensatory and punitive damages at the end of the document. More important, if by the time the plaintiff asks for damages, the plaintiff needs to remind the judge of what happened, abstractly repeating, realleging, and reiterating paragraphs 1 to 45 would not improve the judge's memory of what happened. If information is essential to understanding any part of a text, if its omission will create ambiguity, the plaintiff may want to summarize the information again and make a cross reference to specific paragraphs, containing further details.

American lawyers unquestioningly repeat the old formula, never stopping to think why or even if they have to. "It doesn't hurt and will keep me out of trouble," they may think. But it is a ritualistic recitation, and its omission will not affect the outcome of the case. When lawyers abolish this silly practice, no one will miss these pointless paragraphs cluttering our pleadings.

The most important step now is to recognize that there is no dogma that all counts must be complete within one pleading. Based on this realization, once the mechanical practice stops, one could discuss the peculiar and more complex situations where cross references may be useful.

A national organization, such as The American Law Institute, the American Association of Law Schools, or the American Bar Association could take on the broader charge of identifying useless words in the practice of law. The project could address antiquated terminology, boilerplate, useless words (*come now, by and between, wherefore*), and mysterious formulas (*null and void and of no force or effect, due and payable, give and grant, indemnify and hold harmless*). This work will require extensive research, but will have an immediate impact in the practice of law, freeing lawyers and judges from old formulas and opening our minds to new ideas.

Ideally, lawyers should just stop incorporating by reference. Abolishing incorporation by reference demands a culture change, in which lawyers will write purposefully, not reflexively. But lawyers are risk averse and have little incentive to stop, even if the formula makes no sense. For decades, courts and commentators have sent mixed and ambiguous messages, scaring the profession into complying with this ghost obligation. And lawyers have been doing this for so long that it is now difficult to stop. Without judicial assurance, no lawyer will want to risk the public humiliation of being ordered to amend or having a count dismissed (or whatever mythical consequence happens to lawyers who fail to incorporate).

Therefore, courts must give clear signals that the dogma of complete counts is a thing of the past, and that it is okay to stop repeating and realleging at each

count. Judges could address the issue in dicta, strike these formulas sua sponte, order the parties to amend pleadings to exclude redundant and immaterial paragraphs, or issue standing orders against the practice.

Lawyers can also take the initiative by moving to strike these formulas from each other's pleadings. The motion may not be granted because the surplusage is not prejudicial, but the court will have to address the issue, leaving a trail of precedents. We have to start somewhere. From there, we can rethink legal instruction and rewrite formbooks. Only then can we look back and be deservedly embarrassed by this practice, like we are of our hair in old pictures.

Rule 10(c) does not need to be amended, only correctly interpreted: it merely allows cross references within a pleading, but does not require all counts to be complete. A musician cannot blame the music sheet for a bad performance. A slight change in its first sentence, however, would send a clearer message to the legal profession: instead of saying that statements may be "adopted," it could say that statements may be "referred to." The use of a more informal verb, coupled with a one-sentence Advisory Committee Note, should dissolve any lingering power of the dogma of complete counts.

As this Article has demonstrated, the dogma that each count in a pleading must be complete has been dead and forgotten in the United States for almost a century. And the practice of incorporation by reference is nonexistent in other countries. Yet, because it was not given a proper burial, its ghost continues to haunt the American legal profession. Let this Article be the memorial that forever puts this dogma to rest, and frees American lawyers from a pointless tradition.

*Requiescet in pace.*

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## *Tributes*

### Cornerstones of Civil Justice

NEIL ANDREWS<sup>†</sup>

#### INTRODUCTION

Geoff Hazard was a jurist of great vision and huge intellectual ability. He was also versatile. Many were lucky to have witnessed his mastery of the law in class, or American Law Institute (ALI) meetings, or in the wider forum of soft law preparation, especially the sessions in Rome from 2000 to 2004, which led to the ALI/UNIDROIT's *Principles of Transnational Civil Procedure*.<sup>1</sup> During the Rome discussions, it was clear that he had a remarkable capacity to summarize complex argument, to identify opportunities for progress, and to accept that on other points legal systems approach things quite differently. In this respect, he was also a great comparative lawyer.

Here, the Author will consider briefly the underpinning principles of civil procedure. A stimulating collection of major procedural principles is the ALI/UNIDROIT's *Principles of Transnational Civil Procedure*.<sup>2</sup> In Europe, signatory states, including the United Kingdom, must comply with the jurisprudence of the Strasbourg court concerning the guarantees contained in Article 6(1) of the European Convention on Human Rights. Besides these external influences, there is the internal task of arranging a set of fundamental procedural norms. Such a canon of principles seems indispensable if lawyers are to view procedural justice in a coherent and systematic way, liberated from the fine detail of individual rules. The Author suggests that principles of civil justice can be usefully arranged under these four headings:

- I. Access to Justice
- II. Fairness of the Process
- III. Speed and Efficiency
- IV. Just Conclusions

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1. AM. LAW INST., UNIDROIT, *Principles of Transnational Civil Procedure*, <https://www.unidroit.org/instruments/transnational-civil-procedure> (last updated Sept. 27, 2016) [hereinafter ALI/UNIDROIT]; *see also infra* Part I.

2. *See id.*

In greater detail, this is how the various leading and fundamental principles of civil justice can be arranged:

#### I. ACCESS TO JUSTICE

1. Access to court and to justice (including, where appropriate, promoting settlement and facilitating resort to alternative forms of dispute-resolution, notably mediation and arbitration)
2. Rights of Legal Representation (Right to Choose a Lawyer; Confidential Legal Consultation; Representation in Legal Proceedings)
3. Protection against bad or spurious claims and defenses

#### II. FAIRNESS OF THE PROCESS

4. Judicial independence
5. Judicial impartiality
6. Publicity or open justice
7. Procedural Equality (equal respect for the parties)
8. Fair play between the parties
9. Judicial duty to avoid surprise: The Principle of Due Notice
10. Equal access to information, including disclosure of information between parties

#### III. SPEED AND EFFICIENCY

11. Judicial control of the civil process to ensure focus and proportionality (tempered, where appropriate, by Procedural Equity; the process is not to be administered in an oppressive manner)
12. Avoidance of Undue Delay

#### IV. JUST CONCLUSIONS

13. Judicial duty to give reasons



## 14. Accuracy of decision-making

15. Effectiveness (provision of protective relief and enforcement of judgments)

16. Finality

## I. ALI/UNIDROIT PROJECT (2000–2006)

The working group of the ALI/UNIDROIT project<sup>3</sup>—now known as *Principles of Transnational Civil Procedure*<sup>4</sup>—first met in Rome in 2000. On day one, a detailed document containing Rules of Transnational Civil Procedure, drafted by Geoff Hazard and Michele Taruffo, was on the meeting table. By the second day of this first meeting, the working group had drawn up a list of principles. These were elaborated during the working group’s meetings from 2000 to 2003. Rolf Stürner, appointed to be the General Reporter of the UNIDROIT side of this collaborative project, has chronicled the working group’s elaboration of these principles.<sup>5</sup> The original Rules were not rejected but they became the subsidiary element of the project. They were later refined, once the principles had been established—and fixing the principles took three years of debate. The Rules are more detailed than the Principles. As Geoffrey Hazard explained, the Rules are merely one, among many, possible ways of implementing the Principles.<sup>6</sup> In fact, the Rules were relegated to an unofficial appendix to the main project.

The ALI/UNIDROIT *Principles of Transnational Civil Procedure* offer a balanced distillation of best practice, especially in the sphere of transnational commercial litigation. They are not restricted to the largely uncontroversial ‘high terrain’ of constitutional guarantees of due process. The Principles and Rules were drafted by a team, appointed by the ALI and UNIDROIT. The drafting team met for a total of twenty days in Rome during the years 2000–2003 (the Author was privileged to be a member). The “Common Law” was clearly out-numbered seven to two by the “Civil Law” representatives. It is also fair to say that the civil-law members of the group were strong in resisting certain common-law ideas. Everywhere the restraining hand of the Civil Law is visible, and robust common-law tendencies (American and English) are curbed.

It was apparent throughout the drafting group’s discussion that there were radical differences between the U.S. and English systems, and between the

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3. Neil Andrews, *The Modern Procedural Synthesis: The American Law Institute and UNIDROIT’s “Principles and Rules of Transnational Civil Procedure,”* 164 REVISTA DE PROCESSO 109, 109–20 (2008) (Braz.).

4. ALI/UNIDROIT (2016), *supra* note 2.

5. See generally Rolf Stürner, *The Principles of Transnational Civil Procedure: An Introduction to Their Basic Conceptions*, 69 RABELS ZEITSCHRIFT 201 (2005) (Ger.).

6. See Geoffrey C. Hazard, Jr. & Michele Taruffo, *Transnational Rules of Civil Procedure Rules and Commentary*, 30 CORNELL INT’L L.J. 493, 495–508 (1997) (listing rules).

various civil law jurisdictions represented around the table. These differences make a nonsense of both the glib phrase “Anglo-American procedure” and the crude expression “civilian procedure.”

Sometimes, the Principles acknowledge that there is scope for radical differences of approach on aspects of practice.<sup>7</sup> Such agnosticism pervades discussion of the following topics: sanctions for procedural default, receipt of expert evidence, examination of witnesses, and the system of appeal.

As the Author has suggested elsewhere, the Principles operate at three levels of importance: “*fundamental procedural guarantees*,” other “*leading principles*,” and “*framework or incidental principles*.”<sup>8</sup> The ALI/UNIDROIT principles range from (1) quasi-constitutional declarations of fundamental procedural guarantees to (2) major guidelines concerning the style and course of procedure to (3) points of important detail.<sup>9</sup>

#### I. FUNDAMENTAL PROCEDURAL GUARANTEES

1. Judicial Competence; Judicial Independence; Judicial Impartiality; Procedural Equality;
2. Due Notice or the Right to Be Heard; Publicity; Reasoned Decisions;
3. Prompt and Accelerated Justice;
4. Professional Independence of Counsel; Right to Assistance of Counsel; Attorney-Client Privilege (“Legal Professional Privilege”);
5. The Privilege Against Self-Incrimination.<sup>10</sup>

#### II. LEADING PRINCIPLES CONCERNING THE STYLE AND COURSE OF PROCEDURE

1. Jurisdiction over Parties; Venue Rules; Party Initiation of Proceedings;
2. Party’s definition of scope of proceedings; Joinder Rules; Allocation of burden and nature of standard of proof; Pleadings; Parties’ duty to avoid false pleading and abuse of process;

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7. ALI/UNIDROIT (2016), *supra* note 2, at 12.5, P-12B (“There are differences in the rules of various countries governing jurisdictions over third parties. In some civil-law systems, a valid third-party claim is itself a basis of jurisdiction whereas in some common-law systems the third party must be independently subject to jurisdiction.”).

8. Neil Andrews, *Embracing the Noble Quest for Transnational Procedural Principles*, in *THE FUTURE OF TRANSNATIONAL CIVIL LITIGATION: ENGLISH RESPONSES TO THE ALI/UNIDROIT DRAFT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE* 21, 22 (Mads Andenas, Neil Andrews et al. eds., 2004) (emphasis added).

9. *Id.* at 23–25.

10. *Id.* at 23; *see also* European Convention on Human Rights art. 6(1), Nov. 4, 1950 (amended 1998).

3. Rights of Access to Information; Judicial Initiative in Evidential Matters; Experts
4. Judicial Management of Proceedings; Sanctions Against Default and Non-compliance; Need for Proportionality in Use of Sanctions;
5. Parties' duty to act fairly and to promote efficient and speedy proceedings; Parties' duty to co-operate;
6. Parties' right to discontinue or settle proceedings; Judicial Encouragement of Settlement,
7. Right to an Oral Stage of Procedure; Final Hearing Before Ultimate Adjudicators; Judicial Responsibility for Correct Application of the Law;
8. Basic Costs Shifting Rule; Finality of Decisions; Appeal Mechanisms;
9. Effective Enforcement; Recognition by Foreign Courts; International Judicial Co-operation.<sup>11</sup>

### III. POINTS OF IMPORTANT DETAIL

1. Protection of Parties Lacking Capacity;
2. Security for Costs;
3. Expedited Forms of Communication;
4. Non-party Submissions;
5. Making of Judicial "Suggestions."<sup>12</sup>

The ALI/UNIDROIT project was not the first attempt at bridging the division between civilian and common-law procedures. Marcel Storme (and his team, including Tony Jolowicz) led the way.<sup>13</sup> Although the ALI/UNIDROIT project is relatively young (completed in 2004, published in 2006), it seems likely that it will assist greatly in the intellectual mapping of civil justice and that it will influence policy-makers. At a 2002 London meeting, the

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11. Andrews, *supra* note 8, at 23–24.

12. *Id.* at 24.

13. APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION (Marcel Storme ed., 1994).

ALI/UNIDROIT text was widely admired by English commentators, who found this work to be suggestive, original, and admirably flexible.<sup>14</sup>

Since 2013, the European Law Institute and UNIDROIT have been engaged in a topic-by-topic project, which is intended to transpose the ALI/UNIDROIT *Principles* and elaborate more concrete soft-law rules within the European jurisdictions (not confined to the European Union).

## II. EUROPEAN CONVENTION ON HUMAN RIGHTS

The Human Rights Act 1998 (United Kingdom)—which took effect in October 2000—rendered the European Convention on Human Rights directly applicable in English courts. The case law of the European Court of Human Rights must be “taken into account” and becomes binding in the United Kingdom only in restricted circumstances, according to the United Kingdom Supreme Court.<sup>15</sup> Lord Neuberger explained the position as follows:

This Court is not bound to follow every decision of the [European court]. . . . Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.<sup>16</sup>

Article 6(1) of the European Convention on Human Rights states: “Right to a Fair Trial: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>17</sup>

The preceding encapsulation of fundamental principles comprises the following elements:

1. The right to “a fair hearing”: this is a wide concept embracing:
  - a. The right to be present at an adversarial hearing;
  - b. The right to equality of arms;
  - c. The right to fair presentation of the evidence;
  - d. The right to cross examine opponents’ witnesses;
2. The right to a reasoned judgment;<sup>18</sup>
3. “A public hearing”: including the right to a public pronouncement of judgment;

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14. Adrian Zuckerman, Note, *Conference on “The ALI-UNIDROIT Principles and Rules of Transnational Civil Procedure,”* 21 CIV. JUST. Q. 322 (2002).

15. *Times Newspapers Ltd. v. Flood* [2017] UKSC 33, [29]–[41] (appeal taken from Eng.); *Poshteh v. Royal Borough of Kensington* [2017] UKSC 36, [29]–[37] (appeal taken from Eng.); *Manchester CC v. Pinnock* [2010] UKSC 45, [48] (appeal taken from Eng.).

16. *Manchester CC*, [2010] UKSC at [48].

17. European Convention on Human Rights, *supra* note 10, art. 6(1); Human Rights Act 1998, 1998 c42, § 1(3), Schedule 1 (incorporating the European Convention on Human Rights into U.K. law).

18. *See English v. Emery Reimbold & Strick Ltd.* [2002] EWCA (Civ) 605 (noting that Article 6(1) of the European Convention on Human Rights requires a court to provide a reasoned judgment within a reasonable time).

4. “A hearing within a reasonable time”; and
5. “A hearing before an independent and impartial tribunal established by law.”<sup>19</sup>

A. ABOLITION OF THE JUDICIAL COMMITTEE OF THE HOUSE OF LORDS:  
CREATION OF THE SUPREME COURT OF THE UNITED KINGDOM

Undoubtedly, the most significant impact of the European Convention on Human Rights was the decision to abolish the traditional judicial role of the Lord Chancellor and reconstitute the Appellate Committee of the House of Lords as the Supreme Court of the United Kingdom, which first sat on October 1, 2009.

These events unfolded as follows. The European Court of Human Rights in *McGonnell v. United Kingdom*,<sup>20</sup> a case concerning legal arrangements on the island of Guernsey—a “mini-legal system” within the British Isles—had signaled the need for there to be complete separation of judicial, executive, and legislative functions. The court (sitting in Strasbourg) held that the United Kingdom infringed this requirement because the Bailiff of Guernsey (a judge and a member of the Guernsey legislature) had sat in a civil case concerning planning legislation, which was enacted when he was presiding over the legislative chamber on the island.<sup>21</sup> The Strasbourg Court in *McGonnell* held that such a confusion of legislative and judicial roles is “[in]compatible with the requirements of Article 6 as to independence and impartiality” demanded by Article 6(1) of the European Convention on Human Rights.<sup>22</sup> The court said that once a person presided over a legislative chamber, he should be precluded from adjudicating in any civil or criminal case that requires interpretation of the relevant enactment.<sup>23</sup> Building on the *McGonnell* case, constitutional purists<sup>24</sup> contended that it would be desirable, even—as they further argued—necessary, to detach the judicial House of Lords from the legislative House of Lords so that (1) the Law Lords would be physically separate from the legislature and (2) they would no longer be allowed to participate in legislative debates.<sup>25</sup>

In 2005, the Constitutional Reform Act<sup>26</sup> was enacted, leading to the House’s abolition in 2009. The Constitutional Reform Act 2005 stripped out the judicial role from the ancient office of the Lord Chancellor. He has ceased to be a judge. Instead, he is merely a representative of the Executive, a Minister of the

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19. European Convention on Human Rights, *supra* note 10, art. 6(1).

20. 30 Eur. H.R. Rep. 289 (2000).

21. *Id.* at [15]–[16].

22. *Id.* at [52].

23. *Id.* at [57].

24. *See, e.g.*, Lord Steyn, *The Case for a Supreme Court*, 118 L.Q.R. 382, 383 (2002) (Eng.) (criticizing the multi-faceted role of the Lord Chancellor).

25. *Id.* at 388.

26. “Reform! Reform! Don’t talk to me about reform. Aren’t things bad enough already?” Lord Neuberger, Pres. of the Supreme Court of the U.K., Address: “The Supreme Court: Is the House of Lords ‘Losing Part of Itself’” (Dec. 2, 2009 at [13]) (transcript available in the National Archives of the United Kingdom).

Crown, and a Cabinet member. Furthermore, since the 2005 Act, the Lord Chancellor need not be legally qualified. Once the Lord Chancellor was downgraded to a non-judicial Minister, the ground was cleared for creating a Supreme Court. On October 1, 2009, the Supreme Court of the United Kingdom sat for the first time.

The constitutional purists prevailed. Whether or not there was any constitutional necessity to disturb the settled traditions of the House of Lords, the new court is now manifestly insulated from any “legislative or executive contamination”: none of its judges is involved in the legislative process or in the practice of Government. But it is still a matter for political debate whether it was necessary to create the Supreme Court and annihilate the judicial House of Lords.

#### B. “ACCESS TO COURT” PRINCIPLE

The European Court of Human Rights in *Golder v. United Kingdom*<sup>27</sup> divined an implicit fundamental right of ‘access to court’. Lord Bingham in *Brown v. Stott* explained:

Article 6 contains no express right of access to a court, but in *Golder v. United Kingdom* the European Court held . . . that it was “inconceivable” that article 6 should describe the procedural guarantees afforded to parties in a pending law suit and should not first protect that which alone makes it possible to benefit from such guarantees, namely access to a court.<sup>28</sup>

Thus, the court in the *Golder* case conceded that this implied right was not absolute and so was subject to limitations.<sup>29</sup>

The right of access to court is not engaged unless there is a procedural restriction or impediment. It follows that a substantive rule, which renders the defendant’s conduct lawful, even though it might be unlawful in the absence of that substantive rule, is not open to challenge by reference to the present human right.<sup>30</sup>

The Supreme Court in *R (on the application of UNISON) v. Lord Chancellor*<sup>31</sup> considered the legality of the Government’s scheme imposing significant commencement fees, payable by persons seeking redress within an Employment Tribunal (for example, claims for unfair dismissal or discrimination). The Supreme Court held that it was a breach of European Union law and contrary to the U.K.’s constitutional principle of access to justice.<sup>32</sup> Lord

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27. App. No. 4451/70 Eur. Co. H.R. para. 35, HUDOC (Feb. 21, 1975), <http://hudoc.echr.coe.int/eng?i=001-57496>.

28. [2003] 1 AC 681, 694.

29. *Golder*, App. No. 4451/70 Eur. Co. H.R. para. 29.

30. *Mohammed v. Ministry of Defence* [2017] UKSC 1, [42]–[45] (appeal taken from U.K.).

31. [2017] UKSC 51 (appeal taken from U.K.).

32. *Id.*

Reed's judgment<sup>33</sup> is a powerful vindication of this principle. The court drew upon detailed studies of the impact of these fees.<sup>34</sup>

The Court of Appeal in *Re K, H (Children)* critically commented on the absence of public civil aid funding to enable cross-examination to be conducted by a lawyer, rather than being left to the court itself. The same court noted that it was inappropriate for the relevant party, a father, to conduct the cross-examination personally because that would involve oppressive confrontation between him and his daughter (the complainant) whom he had allegedly sexually assaulted.<sup>35</sup>

### III. THE EUROPEAN UNION BANS ON ANTI-SUIT INJUNCTIONS

This judicial prohibition (for the European Court of Justice's decisions in the three seminal cases) has hit hard within England and Wales. Many common-law lawyers regret the ban.

#### A. JURISDICTION CLAUSES WITHIN THE EUROPEAN UNION OR FOR LUGANO CONVENTION JURISDICTIONS

The European Court of Justice's decision in *Turner v. Grovit*<sup>36</sup> prevents the English courts from issuing anti-suit injunctions to enforce exclusive English jurisdiction clauses where the offending court proceedings have been commenced within the European jurisdictional zone. Anti-suit relief remains available if the foreign proceedings are outside the European Union.

#### B. ARBITRATION CLAUSES WITHIN THE EUROPEAN UNION OR FOR LUGANO CONVENTION JURISDICTIONS

The European Court of Justice's decision in *Allianz SpA v. West Tankers*<sup>37</sup> prevents the Common Law anti-suit injunction from being issued to counter breach of arbitration clauses by the commencement of inconsistent *court* litigation within the *same* European jurisdictional zone. But Recital 12 of the Jurisdiction Regulation (2012) (effective from 10 January 2015) makes clear that a judgment by a Member State court on the substance of a civil or commercial

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33. *Id.* at [66]–[117].

34. *Id.* at [38] (citing MINISTRY OF JUSTICE, REVIEW OF THE INTRODUCTION OF FEES IN THE EMPLOYMENT TRIBUNALS (2017), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/587649/Review-of-introduction-of-fees-in-employment-tribunals.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/587649/Review-of-introduction-of-fees-in-employment-tribunals.pdf)).

35. [2015] EWCA (Civ) 543 (appeal taken from U.K.).

36. 2005 E.C.R. I-03565; *see also* Neil Andrews, *Abuse of Process and Obstructive Tactics Under the Brussels Jurisdictional System: Unresolved Problems for the European Authorities in Erich Gasser GmbH v MISAT Srl Cased C-116/02 (9 December 2003) and Turner v Grovit Case C-159/02 (27 April 2004)*, EUR. COMMUNITY PRIV. L. REV. 8, 8–15 (2005); *Commerzbank AG v. Liquimar Tankers Management Inc* [2017] EWHC (Comm) 161, [62]–[81] (Cranston, J.) (discussing “asymmetrical” jurisdiction clauses, one party being subject to exclusivity, the other having a choice of jurisdictions).

37. 1 Lloyd's Rep 413 (2009).

case is binding, even though that decision involved an incidental decision that the dispute was not subject to a valid arbitration clause.

In the *Gazprom OAO v. Lietuvos Respublika* case,<sup>38</sup> the European Court of Justice, confirming the *West Tankers* case, noted that it is incompatible with the Jurisdiction Regulation for the court of a Member State to issue a decision prohibiting the respondent from continuing, or initiating, civil or commercial proceedings covered by the Jurisdiction Regulation<sup>39</sup> in another Member State. This is because the latter court must be permitted to determine for itself whether it has jurisdiction<sup>40</sup> and this includes determining whether there is a valid arbitration clause in respect of the relevant civil or commercial matter.<sup>41</sup>

However, the European Court of Justice in the *Gazprom OAO* case distinguished<sup>42</sup> the grant by an arbitral tribunal of an anti-suit order from the issue by a Member State court of an anti-suit injunction (as in the *West Tankers* case). A Member State court does not act inconsistently with the Jurisdiction Regulation if it decides to recognize or enforce such an arbitral award. The result of such recognition might be that the relevant Member State court decides not to receive or continue to hear a civil or commercial matter (wholly or partially). Such a decision is compatible with the Jurisdiction Regulation for these reasons: (1) issues of arbitration fall outside the scope of the Jurisdiction Regulation,<sup>43</sup> so that any decision on such a matter made by one Member State court cannot be binding under the same Regulation on the courts of other Member States; (2) an “anti-suit” arbitral award (that is, one which prohibits a party from pursuing or continuing court proceedings) is unobjectionable under the Jurisdiction Regulation because the arbitral tribunal is not a Member State court; and so the arbitral award involves no attempt by a Member State court to preclude or constrain (whether directly or indirectly) another Member State court’s determination concerning its jurisdiction; there is no conflict between courts in the matter of jurisdiction;<sup>44</sup> and (3) the arbitral tribunal, unlike the Member State court in the *West Tankers* context, has no direct power to issue penalties against the party who fails to comply with the anti-suit prohibition.<sup>45</sup> The result is that a party who is subject to an arbitral tribunal’s prohibition has an opportunity to

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38. Case C-536/13, ECJ (May 13, 2015) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164260&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7798460>.

39. The *Gazprom* case was decided under the pre-2012 Jurisdiction Regulation, Council Regulation (EC) No 44/2001 of 22 December 2000, but it is clear from the Opinion of Advocate General Wathelet (delivered Dec. 4, 2014) that Recital 12 in the preamble to the Brussels 1 Regulation (recast) (2012) is a “retroactive interpretative law,” which “explains how [the arbitration] exclusion must be and always should have been interpreted.” See *Gazprom OAO v. Lietuvos Respublika*, at [91] (2014) (opinion of Advocate General Wathelet).

40. *Gazprom OAO* (2015), at [32]–[33].

41. *Id.* at [34].

42. *Id.* at [35].

43. *Id.* at [28], [36].

44. *Id.* at [37].

45. *Id.* at [40].



contest<sup>46</sup> whether the prohibitive arbitral award (the “anti-suit” arbitral award) should be recognized and enforced (in the case of a foreign arbitral award) by applying the New York Convention 1958’s criteria.<sup>47</sup>

The European Court of Justice in the *Gazprom* case<sup>48</sup> did not endorse Advocate General Wathelet’s Opinion<sup>49</sup> that *West Tankers* has been impliedly reversed by Recital 12 of the Brussels 1 Regulation (recast).<sup>50</sup> And so, the *Gazprom* case confirms that courts in Member States still lack capacity to issue anti-suit injunctions to give effect to arbitration clauses.

#### CONCLUSION

The main contention has been that the wide array of fundamental and important principles of civil justice can be usefully arranged under these four headings:

- I. Access to Justice
- II. Fairness of the Process
- III. Speed and Efficiency
- IV. Just Conclusions

The greatest impact of European law on English and indeed British law has been Human Rights reasoning. But, this ‘impact’ was conveniently crafted by jurists whose main aim was to recast the highest judicial chamber as a court quite independent of Parliament. In short, the creation, under the Constitutional Reform Act 2005, of the Supreme Court of the United Kingdom was ostensibly compelled by European human rights jurisprudence. According to this analysis, the court was necessary to achieve a hermetic separation of functions between the legislature and judicial system and, in particular, to ensure that the Lord Chancellor (that is, the Minister of Justice) can no longer sit as a judge. This dismantling of long-standing arrangements was a dramatic, surprising, and controversial “spin-off” from the separation of powers notion, more exactly, the concept of “judicial independence,” contained within the European Convention on Human Rights.

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46. *Id.* at [38].

47. *Id.* at [38], [41]–[43].

48. *Id.*

49. *Gazprom OAO v. Lietuvos Respublika*, at [130]–[152] (2014) (opinion of Advocate General Wathelet).

50. Council Regulation 1215/2012, 2012 O.J. (L 351/1) 1, 32 (EU) (discussing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

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## Geoffrey C. Hazard, Jr.: An American in Paris\*

LOÏC CADIET<sup>†</sup>

It was October 27, 2000, on Philippe Fouchard's initiative, that the Departments of International Law, European Law, International Relations and Comparative Law of the University of Panthéon-Assas (Paris II) organized a workshop day with the cooperation of the American Law Institute.

The purpose of this meeting was to submit the ALI project “Transnational Rules of Civil Procedure” for examination and assessment by European—mainly French—experts. This day in Paris was only one stage in a tour around the world that would lead the promoters of the project, Geoffrey Hazard and Michele Taruffo, “*da Parigi a Mosca, da Pechino a Singapore, realizzando ore e giorni di discussione con decine di avvocati, di giudici e di professori dei vari paesi.*”<sup>1</sup>

This meeting was very challenging for the ALI project and its promoters. I have to acknowledge the promoters' even-headedness during the strenuous, almost physical, discussions about the project.<sup>2</sup>

This discussion reflected how difficult it is to reach a mutual understanding between American and French lawyers, and more generally between *common-law* and *civil-law* lawyers (to use a classical but far outdated distinction comparative studies are traditionally based on). That point was actually the central subject of the symposium organized in Toronto in 2009 by Janet Walker and Oscar Chase for the International Association of Procedural Law.<sup>3</sup> I had the

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\* AN AMERICAN IN PARIS (Metro-Goldwyn-Mayer 1951). May I be forgiven for this obvious reference to the magnificent, and unforgettable, film written by George Gershwin and directed by Vincente Minnelli. I was in Paris when I first met this cultivated, elegant, lovely man who was also a great altruist.

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1. Michele Taruffo, Obituary, *Geoffrey C. Hazard*, 72 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE [Q. REV. L. & CIV. PROC.] 131, 131–32 (2018) (translating to “from Paris to Moscow, from Beijing to Singapore, creating hours and days of discussion with dozens of lawyers, judges and professors from various countries”).

2. PHILIPPE FOUCHARD, VERS UN PROCÈS CIVIL UNIVERSEL? LES RÈGLES TRANSNATIONALES DE PROCÉDURE CIVILE DE L'AMERICAN LAW INSTITUTE [TOWARDS A UNIVERSAL CIVIL TRIAL? THE TRANSNATIONAL RULES OF CIVIL PROCEDURE OF THE AMERICAN LAW INSTITUTE] (2001) (discussing the active debate surrounding the adoption of the ALI Transnational Principles).

3. See Janet Walker & Oscar G. Chase, *Preface*, in COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES vii (Janet Walker & Oscar G. Chase eds., 2010).

pleasure of meeting Geoffrey Hazard on that occasion. The organizers of that event had asked us to end the symposium by looking to the future.<sup>4</sup>

It can be difficult to reconcile civil law and common law, especially when the systems diverge drastically (compare management of *discovery* or the jury during the trial in America versus France). This difficulty seems to center around the very notions that structure legal reasoning in the two systems. For example, a French lawyer, with Roman-law inheritance, will have a different understanding of common law and civil law. Indeed, he does not translate them but keeps them separate, because, in his mind, the French translations *droit civil* and *droit commun* refer to something very different.<sup>5</sup>

However, mutual misunderstanding is not inevitable.

Three years after the Paris symposium Geoffrey Hazard and Michele Taruffo came back to France, but this time they went to Lyon on June 12, 2003, at the invitation of Frédérique Ferrand, in order to present the April 2003 version of the project<sup>6</sup> and submit it to discussion. By that time the project had become a joint project of UNIDROIT and the American Law Institute, and it was no longer a mere set of *technical rules*, but it had also added a concise corpus of *fundamental principles* of transnational civil procedure.<sup>7</sup>

Saying that this second meeting went way better is not descriptive enough. The calming down was neither due to the very hot, fine day of June, nor to the slow digestion of Lyon's haute cuisine. Rather, it was the consensus that our colleagues eventually managed to reach after working together for months. This consensus was not the result of spontaneous adjustments that had come out as if by magic.

First, the promoters of the project perfectly understood that the scope of the transnational rules project had to be narrowed down in order to avoid the obstacles formed by the main characteristics of the U.S. legal system:

if such a project is feasible, it is not feasible if it correspond in any substantial way to characteristic U.S. procedure.

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4. See JANET WALKER, *Looking Ahead: The Future of Categories—Categories of the Future*, in COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES, *supra* note 3, at 631–33.

5. From Latin *jus commune*, "*droit commun*" stands for the set of rules which generally govern a given territory, a given population or a given situation. From Latin *jus civile*, in France and more generally in the Romano-Germanic tradition, "*droit civil*" stands for the set of rules which normally govern relationships between individuals. It covers the law ruling the rights of persons, family law (which includes non-pecuniary aspects: marriages and dissolutions of a couple, filiation; and pecuniary aspects: prenuptial agreements, wills and trusts), property law, contract law and torts. It is funny that the words *fondation pour le droit continental* are the ones ultimately chosen to translate the Civil Law Initiative, an organization which originated in France in order to promote judicial systems with Roman Germanic traditions. See FONDATION POUR LE DROIT CONTINENTAL [FOUNDATION FOR CONTINENTAL LAW], <http://www.fondation-droitcontinental.org> (last visited Apr. 16, 2019).

6. FRÉDÉRIQUE FERRAND, LA PROCÉDURE CIVILE MONDIALE MODÉLISÉE [THE MODELED GLOBAL CIVIL PROCEDURE] (2004).

7. AM. LAW INST. & UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2006) [hereinafter PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE].

We conclude that a system of procedure acceptable generally throughout the world could not require jury trial and would require much more limited discovery than is typical in the United States.<sup>8</sup>

That is why the project was ultimately limited to the resolution of transnational commercial disputes. And why the initial choice that consisted of drawing up a *corpus* of detailed *rules* had been complemented by drawing up *principles* of transnational civil procedure, whose generality leaves less room for dissent than technical rules of law.<sup>9</sup> As everyone knows, the devil is in the details.

I must also underline that pragmatic rapprochements—a word that has been used several times—generated by fundamental principles can be considered common to all legal systems, at least in the letter of their judicial standards, but not always in their actual practices.<sup>10</sup>

But these rapprochements were possible only thanks to the evolutions achieved in the past decades, whether internationally or within national legal systems.

In the international order, I am specially thinking of the emergence of a European judicial space—article 6, section 1 of the European Convention on Human Rights (ECHR),<sup>11</sup> and article 47 of the Charter of Fundamental Rights of the European Union (CFREU)<sup>12</sup> represent the most visible common denominator. With the right to a fair trial (article 6 of the ECHR) and the right to effective judicial protection (article 47 CFREU), universalization of procedural law is gradually taking place in the order of fundamental values of society. These values transcend both national borders and the borders of a trial, like, for example, ones that separate civil procedure from criminal procedure or administrative procedure.

The reform of the English rules of civil procedure, carried out at the end of last century following the report made by Lord Woolf, who confessed that by moving to the middle of the English Channel, the English civil trial had turned

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8. Geoffrey C. Hazard, Jr., et al., *Reporters' Preface to PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE*, *supra* note 7, at xxvii. It was the American exceptionalism rather than the specific features of common law that was challenged. See Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 279–80 (2002).

9. See Frédérique Ferrand, *Les 'Principes' relatifs à la procédure civile transnationale sont-ils autosuffisants?—De la nécessité ou non de les assortir de 'Règles' dans le projet ALI / Unidroit [Are the "Principles" of Transnational Civil Procedure Self-Sufficient?—Whether or not to Have "Rules" in the ALI/UNIDROIT Project]*, 6 UNIFORM L. REV. 995 (2001).

10. See Frédérique Ferrand, *Les Principes ALI/UNIDROIT de procédure civile transnationale, entre concurrence et compromis [The ALI / UNIDROIT Principles of Transnational Civil Procedure, Between Competition and Compromise]*, in LA CONCURRENCE DES SYSTÈMES JURIDIQUES [COMPETITION OF LEGAL SYSTEMS] 63 (Jean du Bois de Gaudusson & Frédérique Ferrand eds., 2008); see also Neil Andrews, *The Modern Procedural Synthesis: The American Law Institute and UNIDROIT's "Principles and Rules of Transnational Civil Procedure"*, 165 REVISTO DO PROCESSO 109 (2008).

11. Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4 1950, 213 U.N.T.S. 221.

12. Charter of Fundamental Rights of the European Union art. 10, Dec. 18, 2000, 2000 O.J. (C 364) 10.

continental, certainly helped.<sup>13</sup> This rapprochement by the English legal system with what is called Romano-Germanic legal systems of continental Europe has been determinant in the definition of the Principles of Transnational Civil Procedure, as noted by Professor Stürner in his inaugural speech in Mexico during the twelfth world conference of the International Association of Procedural Law.<sup>14</sup> Rapprochements also occurred the other way around, one example is the reform of some items of Spanish civil procedure at the beginning of the 2000s, like the rules of expertise meets with common law solutions.<sup>15</sup>

The idea first appeared during the above-mentioned meeting in Lyon when the scope of ALI/UNIDROIT principles had been raised. I suggested that these principles be considered as a starting point for the development of European principles of civil procedure. Ten years later, the idea gradually took shape with the foundation of the European Law Institute in 2011<sup>16</sup> which built upon them an ambitious project of European Rules of Civil Procedure<sup>17</sup> that is expected to be completed by 2019.<sup>18</sup>

This project was launched in the fall of 2013 during a workshop day in Vienna, Austria, where the institute has its headquarters. The minutes were published in the *Uniform Law Review*.<sup>19</sup> There one can find Geoff's preliminary

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13. See LORD WOOLF, *THE PURSUIT OF JUSTICE* 401 (Christopher Campbell-Holt ed., 2008) ("Our civil procedure is now much closer to the French. As I like to describe it, it is situated somewhere in the middle of the English channel, *au milieu de la manche*.").

14. See ROLF STÜRNER, *Procédure civile et culture juridique* [*Civil Procedure and Legal Culture*], 56 *REVUE INTERNATIONALE DE DROIT COMPARÉ* [INT'L J. COMP. L.] 797 (2004). Rolf Stürner had been in charge of preparing a feasibility study on UNIDROIT Transnational Rules of Civil Procedure based on the ALI project, and was a co-reporter with Geoffrey Hazard and Michele Taruffo for ALI/UNIDROIT project Principles and Rules of Transnational Civil Procedure. See *PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE*, *supra* note 7, at xxvii–xxviii.

15. See Francisco Ramos Méndez, *La Conception du Procès Civil hors de France: Le Cas Espagnol* [*Civil Trial Design Outside France: The Spanish Case*], in 1806–1976–2006: DE LA COMMÉMORATION D'UN CODE À L'AUTRE: 200 ANS DE PROCÉDURE CIVILE EN FRANCE [FROM COMMEMORATION OF ONE CODE TO ANOTHER: 200 YEARS OF CIVIL PROCEDURE IN FRANCE] 311 (Loïc Cadet & Guy Canivet eds., 2006). Many other such examples could be given, making it possible to understand why the project of developing European rules of civil procedure, which is currently in progress, has started.

16. *About the Eli*, EUR. L. INST., <https://www.europeanlawinstitute.eu/about-the-eli/> (last visited Apr. 16, 2019) ("[T]he European Law Institute (ELI) aims to improve the quality of European law, understood in the broadest sense. It seeks to initiate, conduct and facilitate research, to make recommendations, and to provide practical guidance in the field of European legal development.").

17. Excluding the status of individuals, family litigation and insolvency proceedings.

18. *Transnational Principles to European Rules of Civil Procedure*, EUR. L. INST., <https://www.europeanlawinstitute.eu/about-the-eli/bodies/general-assembly/default-title/transnational-principles-to-european-rules-of-civil-procedure/> (last visited Apr. 16, 2019). Various working groups that have worked on civil procedure participated in the project, including Obligations of Parties, Lawyers and Judges, Service and Due Notice of Proceedings, Provisional and Protective Measures, Access to Information and Evidence, Res Judicata and Lis Pendens, Judgments, Costs. The overarching group on *Structure* consolidated works from these working groups.

19. Editorial Board, *ELI-UNIDROIT First Explanatory Workshop: 'From Transnational Principles to European Rules of Civil Procedure'*, 19 *UNIFORM L. REV.* 171 (2014).

observations on the ELI/UNIDROIT project in the light of the ALI/UNIDROIT project.<sup>20</sup>

Ten years after the symposium in Lyon, it was satisfying to see the cooperation between UNIDROIT and ELI—while a binding instrument (like EU regulations or directives) was not produced, a sort of model code of civil procedure was created.<sup>21</sup> This harmonization is the horizon of a path that Europe has followed since the September 27, 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.<sup>22</sup> On this long, difficult, legal path, a scholar project emerged at the beginning of the 1990s on the possible features of a global harmonization of European civil procedures—the project of the Commission chaired by Marcel Storme, another giant in civil procedure who passed this year, three months after Geoffrey Hazard.<sup>23</sup>

During the opening conference in Vienna, Geoffrey Hazard again showed his outstanding qualities: His willingness to sharing his science, his care and dialogue, and his expert advice on how to proceed through technical and political difficulties. Geoffrey was certainly not just a technical expert in law, he was an expert of the law.<sup>24</sup>

With great logic, he wrote the following words in the Principles of Transnational Civil Procedure's foreword:

In this era of globalization, the world is marching in two directions. One path is of separation and isolationism, which war and turmoil: In such a world, this project is useless and unwelcome. The other path is increasing exchange of products and ideas among the peoples of the world; this path underscores the need for a transnational civil procedure.<sup>25</sup>

The question is to know which path today's world is following.

At the Vienna conference, I stated the following:

Here the political question behind the technical issue arises. Indeed, it is not possible to gloss over a going skepticism everywhere towards Europe, even

20. Geoffrey C. Hazard, Jr., *Some Preliminary Observations on the Proposed ELI/UNIDROIT Civil Procedure Project in the Light of the Experience of the ALI/UNIDROIT Project*, 19 UNIFORM L. REV. 176 (2014).

21. See, e.g., EL CODIGO PROCESAL CIVIL MÓDELO PARA IBEROAMERICA [MODEL CODE OF CIVIL PROCEDURE] (IBEROAMERICAN INST. PROCEDURAL L. 1988), <http://www.iibdp.org/es/codigos-modelo.html>.

22. See Council Regulation 2016/1104, 2016 O.J. (L 183) 1 (implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships); see also Council Regulation 1215/2012, art. 39, 2012 O.J. (L 351) 14 (“A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.”).

23. RAPPROCHEMENT DU DROIT JUDICIAIRE DE L'UNION EUROPÉENNE [APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION] (Marcel Storme ed., 1996).

24. But isn't law a technique serving goals that overtake it? See Taruffo, *supra* note 1 (“Geoff era il tipico intellettuale americano di alta cultura, con una grande curiosità su una quantità di problemi, giuridici e filosofici, e cercava in ogni modo di soddisfare questa curiosità non solo leggendo molti libri, ma anche dialogando con chi in qualche modo poteva aiutarlo o conoscere altri sistemi ed altri modelli di pensiero.”).

25. Hazard et al., *supra* note 8, at xxvii–xxviii.

among scholars. This skepticism has reached an alarming proportion with the rise of a populism that everywhere denounces the European construction as the source of all current problems. We cannot bury our head in the sand. Realism must be a keyword of our work beyond the enthusiastic and stimulating pleasure of sharing an ambitious project for the legal future of Europe.<sup>26</sup>

My feeling is that the situation has not improved in that regard. The entire world, the western world included, has not been saved by the trend towards withdrawing into oneself, mistrusting the other, expanding unilateralism and enforcing un-liberalism.

I do not think this trend would get the approval of the world-oriented man that Geoffrey Hazard was. There will always be a lack of people like him. Of course, this is not a reason to give up on the brotherhood-project in an international society ruled by law. His work is a lesson about realistic yet confident perseverance.

Paris, July 14, 2018

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26. Loïc Cadiet, *The ALI-UNIDROIT Project: From Transnational Principles to European Rules of Civil Procedure*, 19 UNIFORM L. REV. 292, 294 (2014).



# Learning from Geoffrey C. Hazard, Jr., by Example and Precept

EDWARD H. COOPER<sup>†</sup>

At the same moment in 1976 I first met two towering figures in American law: Geoffrey C. Hazard, Jr., and Charles Alan Wright. Our interests intersected in the realm of civil procedure, but their scope was wider than that. Each was truly a towering figure across the range of American law. These brief notes sketch fond and admiring memories of Geoff Hazard.

The occasion for that first encounter was a meeting of the advisers on the Restatement Second of Judgments. Hazard was the Reporter. The intimidation factor for me, a youngster less than ten years into full-time teaching and a late-comer to the advisers, was augmented by the full roster of advisers.<sup>1</sup> But Hazard made it easy to be drawn into the conversation. The tentative draft was clear. It addressed often perplexing questions, and at times openly recognized the perplexity. The advisers were fully prepared and completely engaged. Hazard was the equal of the entire group assembled. I was already hooked on *res judicata*. I came away from that meeting hooked on the American Law Institute and its procedures.

The Judgments project continued apace. Geoff showed up for one meeting within driving range in a BMW Bavaria, a source of envy and admiration.<sup>2</sup> My only disappointment with Geoff, ever, was my discovery, much later, that the Bavaria was his wife's car. I never did find out whether he was partial to still more exotic vehicles, but somehow I suspect not.

My connections with Geoff continued to come primarily within the framework of the ALI. He had become Director by the time of the Complex Litigation project. In that capacity, he participated in meetings with the advisers from a special vantage, easily playing a key role even with a larger advisers group and two outstanding procedure scholars as Reporters.<sup>3</sup> This project provided an

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1. The full list included Bennett Boskey, Milton B. Conford, Oscar H. Davis, Ronan E. Degnan, Ruth Bader Ginsburg, Paul R. Hays, Benjamin Kaplan (a Reporter at the outset), Willis L.M. Reese, David L. Shapiro (also a Reporter at the outset), William Stix, Allan D. Vestal, and Charles Alan Wright. Herbert Wechsler attended as the Director of the American Law Institute.

2. Some readers may be too young to remember the Bavaria. Let one description suffice. It was designed to provide "a good stir and steer session on a patch of twisty road."

3. The Reporters were Arthur R. Miller and Mary Kay Kane. No more need be said. The structure of the

opportunity to observe Hazard at work as Director in all three stages of formal deliberation, stages that are repeated several times before final approval as the work of the ALI. After the advisers meet and the draft is revised, it goes to Council. Discussions in Council are different from adviser discussions in some ways. Not every member of Council is an expert in the subjects covered by any project. A Council agenda typically reviews several projects. But there is a wonderful interaction among experts and generalists. The Director has to be in full command of every project, however, to provide guidance and direction. After Council approval, a project goes to the Annual Meeting for review and, ultimately, approval by the full membership. The Director's role is still different in this setting, in part because constraints of time make it essential to allow opportunities to participate for as many members as possible. Watching Geoff through each of these stages on a single project was a revelation, not only of legal knowledge and skill, but also of the ability to keep discussions on track, or, when needed, to bring them back to the track.

Enjoying and continually learning from Hazard over several years of Council meetings continued. One of his habits was the source of a continually frustrated wish on my part. He could close his eyes on an active discussion, seeming to have gone sweetly to sleep. But when the discussion rose above a certain decibel level he would open his eyes, deftly summarize the points of contention, and then prescribe the outcome that became obvious only in his articulation. Many a time have I wished that I could do those two things at once—to indulge restorative, roborative sleep and at the same time think deep thoughts. Sleep is about the best I can manage.

Following his triumphant turn as Director, Hazard again became a Reporter, this time for the ALI/UNIDROIT Principles of Transnational Procedure. The end product is of course masterful. Almost as remarkable is the broad scale of the structures created to elicit international participation. Two other Reporters and the Associate Reporter hailed from Germany, Italy, and Brazil. There were U.S. Advisers, International Advisers, an ALI/UNIDROIT Working Group, and International Consultants from the world over. The influence of this project in stirring broader law-reform efforts in Europe on the ALI model can be illustrated by one anecdote. Hazard suggested that it would be useful to have a couple of the U.S. advisers—Mary Kay Kane and me—attend the first meeting of advisers in Europe. He explained that the European advisers would likely think it disrespectful to voice their doubts, reservations, and outright disagreements with the draft. Our job was to stir discussion, venturing to challenge every point. We started out. Soon other eyes started to twinkle. Then small smiles appeared. Small smiles gave way to big grins. Participation opened up, at first deferentially and then robustly. Hazard was right both in anticipating that some prompts would be useful and in understanding that not much would be needed to open the gates.

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adviser group was different from most in that it had a chair—Justice Herbert P. Wilkins of the Supreme Judicial Court of Massachusetts.

Later on I came to know Hazard in a different enterprise when he became a member of the United States Judicial Conference Standing Committee on Rules of Practice and Procedure. Five advisory committees report to the Standing Committee, one each for the Rules of Appellate Procedure, Bankruptcy Procedure, Civil Procedure, Criminal Procedure, and Evidence. It would be expected that he would contribute in many and valuable ways to examining proposals from the Civil Rules Committee. And so he did. But he was equally active and influential across the range of all these subjects. So much so that when he reached term limits he was asked to stay on as a consultant. As consultant he continued to make important contributions up to life's end.

One particular lesson I learned from Hazard will carry with me always. Once or twice, in one setting or another, I protested that it was too early to attempt to draft a rule or black letter, that more discussion was needed to figure out just what the rule should be. Not so, he rejoined. The discussion will be better focused, and group deliberations will advance further, with the focus provided by a specific target. A mere "cartoon" will do. That will prove out even if the first draft meets total rejection and adoption of a contrary approach. He was right. If there were nothing else, I would be in debt to him for that.

One final remembrance. Once, while walking nowhere in particular with Geoff, I offered one of my pet thoughts for discussion. The nature of law, I suggested, is such that it does not allow genius. It is too incremental. There may be room for a daring leap ahead by a step or two over current thought patterns, but not for wholesale revision of any particular branch of the enterprise. He disagreed. Genius is possible in the law. I did not persuade him. Nor did he persuade me. Still, he instilled a doubt. The doubt is simply explained. If there be room for genius in the law, Geoffrey C. Hazard, Jr., will be a leading candidate for recognition.

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## Geoffrey C. Hazard, Jr., and the Comparison

ANGELO DONDI<sup>†</sup>

Geoff's absence is something that is hard to get used to—however, perhaps the great honor of participating in this vitally important symposium will somehow help. Geoff, whom I have happened to define somewhere else as “*il maestro americano*,” which signifies both the importance of his teaching on me and his impact on my personal and professional experience.<sup>1</sup> Yet especially, and more manifestly, over the years, Geoff was a safe harbor and reliable advisor during discussions about the adversities of life and academic discouragements. Further his impact on other scholars was widespread: from the 1990s on, he mentored and influenced many foreign scholars, so much so that they actually became a fundamental part of Geoff's own approach to comparative law.

Therefore, the aim of these few pages is to talk about this very aspect of Geoff's intellectual personality, of course taking into account and starting from our personal encounters and resulting friendship. This tribute also seeks to honor Geoff's work by reporting, at least in part, the large number of other interactions and influences Geoff's thought and doctrine had around the world. Influences undoubtedly extensive and mighty for almost thirty years now, and actually attributable to a precise period of his scientific activity that date back to the end of the late 1980s.

Until the late 1980s, Geoff's scientific course appears quite autarkic, largely because it was thoroughly entrenched in the American legal culture and scantily recognized the impact of other foreign legal cultures, excepting of course English common law. In other words, until a certain moment his works were definitely great, but somehow nationally circumscribed legal tradition prevailing in the mid-twentieth century. Indeed, like many other prominent American scholars, for a long while, Geoff did not use any comparative references.<sup>2</sup>

Nevertheless, Geoff's interest and mainly—as it has been very keenly noticed—his curiosity about “other unknown” foreign legal cultures shows Geoff's pursuit of a fully-rounded intellectual experience.<sup>3</sup> Such a person is

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1. Angelo Dondi, *Il maestro americano. In memoria di Geoffrey C. Hazard Junior-1929-2018*, 2018 RIV. TRIM. DIR. PROC. CIV. 548, 548-54 (It.).

2. Stephen B. Burbank, *Not Since Thomas Jefferson Died Alone: For Geoff Hazard at Eighty*, 158 U. PA. L. REV. 1283, 1286 (2010).

3. For a report of this see, Michele Taruffo, *Geoffrey C. Hazard, Jr.: A Curious American*, 158 U. PA. L. REV. 1313 (2010).

remarkable, even if most probably brought about by a series of chancy and unpredictable events.

I think of our encounter as one of those unpredictable and chancy events. At least this is how, according to my own personal experience and from the inevitably fading perspective of a very long distance, things appeared to be and to evolve at the very beginning of the eighties when I happened to meet Geoff. The context and moment of our meeting remains clear. We met at Yale Law School where—with the scant pledge of a letter for Dean Guido Calabresi—I went to research and “gather stuffs” in order to write my first book on civil discovery.

To tell the truth it was only because of this subject or, as I gather now, because of a conjunction of subjects of mutual interest that I came to know Geoff. In any case, how we crossed paths tells something also about him and the subsequent events. We actually stumbled on each other, both searching for the same book that I had been luckier to get to first. Geoff came over to my place in the law library and asked how long I planned to consult the book in question. But, straight after asking also and very respectfully (given his seniority) if there was any problem in our sharing the book.

His way of approaching things and people, calmly straightforward and without the slightest change due to social or academic ranks, never changed from our first meeting because it was rooted in Geoff’s personality. This trait cultivated our intellectual relationship. In fact, from the very beginning of our innumerable conversations Geoff was always attentive and interested in my point of view and research, even though I was a mere “apprentice scholar” at the time.

In other words, as I view it trying to reassemble remembrances and impressions after such a long time, it was this very attention or, rather, profound interest that brought about some sort of a change in Geoff’s approach to law and to legal research. Of course, I would not dare calling it an overall change. Our many talks did not affect his general and extremely variegated perspective of research. Still, even if clearly and obviously not caused just or *per se* by our own encounter, a change occurred.

To a somehow more limited extent the point here is that, starting from his late fifties, one of the most prominent American legal scholars somehow begun taking into account what was traditionally (as well as conventionally, if not even proudly) excluded from consideration and scientific analysis because the United States tended to consider foreign legal systems superfluous. And it goes without saying that at this point, the procedural side of civil law legal cultures were mostly unknown and ignored, especially in their Latin versions.

Despite this, Geoff still took an interest in my research. We have had undoubtedly countless conversations, all of them stuffed with hints quite often becoming ideas. Geoff always had a keen interest and a careful concern for what I was trying to do. We shared the mutual incentive of potentially developing some new ideas or conceptions together, and both bore the constant pressure to

evaluate what was actually going on in crucial areas of civil procedure.

It was from this kind of interaction that naturally furthered ideas that we coauthored. Writing with Geoff Hazard—as besides suggested hereto by Michele Taruffo—was in itself an actually unforgettable experience as well as, for me, an incomparable professional enhancement.<sup>4</sup> Speaking of sheer writing skills, Hazard’s suggestions to avoid long sentences in order to be thoroughly clear and understandable still echo in my mind. His ability to compare the different legal systems and procedural models showed his mighty ability to trace problems back to their historical and cultural roots to evaluate the effects of even minute changes.

This skill also showed when we worked together on the two areas in which Geoff is a master. The first, reforming civil procedure (apart from reinventing it anew as in the case of the *Transnational Rules* model) through the analytical discussion of its basic fundamentals. The second, is represented by the vast, shifty, and vague context of legal ethics. I was lucky enough to work on both these areas with him.

As I said before, Geoff was interested in other cultures. To put it differently, he was naively curious about the wide unknown prairies of other countries’ civil procedure. He was eager to understand these systems and encouraged us to “put our arms around problems.” This energetic process of understanding other systems was at the core of his comparative approach or, as I ought rather to say, his longing for a comparative comprehension of the most serious worldwide civil procedural rifts.

To him, among other shortages and inefficiencies, the most striking problem was the lack in civil law countries of discovery machineries somehow comparable to the United States Federal Rules of Civil Procedure. The absence of a judicial role in discovery particularly bothered him.<sup>5</sup>

Even more shocking to him was the scarce interest, especially in Latin European countries, in linking the unavoidable procedural connections of legal ethics. It is not by chance that we decided to point out such a difference of approaches in the book we coauthored in 2004. There in fact, adopting a definitely comparative view, we aimed at stressing—and somehow even explaining or taking note of—the huge gaps still existing in this area of law between the two traditional legal systems, and the influence of this on the whole functioning of the various procedural models.<sup>6</sup> However, on the other hand, we still recognized the huge similarities between these two legal systems, which became a huge part of our approach.<sup>7</sup>

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4. *Id.* at 1313–14.

5. GEOFFREY C. HAZARD, JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY* (2004); Geoffrey C. Hazard, Jr. & Angelo Dondi, *Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits*, 39 *CORNELL INT’L L.J.* 59 (2006).

6. HAZARD & DONDI, *supra* note 5, at 21.

7. *See generally* Hazard & Dondi, *supra* note 5.

When I think of Geoff, I think of our time spent working on our book. The book was a success thanks to him, it was his firm, leading pushes and intellectual agility that helped us cross the finish line. He was the driving force when we ran into some writing problems or when we just stalled. In those moments, instead of giving up or losing his temper—he never did—he faced problems calmly, like a skilled craftsman with the intention to find the proper solution that he always achieved.

This capability of concentration was definitely of paramount importance among Geoff's innumerable professional qualities. He was a problem solver because of his steady determination to a solution, and in doing so, avoid any sort of stylish gratification in favor of clearness, unambiguity, and immediate intelligibility.

To say the least, the "Hazard touch" undoubtedly affected Geoff's approach to comparison. This touch can be seen by his exploration of *terrae incognitas* in the area of procedural law, a late novelty to him, and his steady effort to grasp the proper interpretation and understanding of things.

Hence, one might conclude that the often cutting-edge level attained by his researches was the result of this all, and especially of that combination of concentration and effort to get always to the basics. Surely it was, and for utterly banal that such a remark can sound, I guess this very combination of concentration and effort will represent forever the most distinctive feature of a by far extremely keen and refined man. Above all else, he remains a truly unforgettable friend.



# Professor Geoff Hazard

THE HONORABLE WILLIAM A. FLETCHER<sup>†</sup>

I did not have Geoff as a professor. I started at Yale as a law student in 1972. Geoff was a recent arrival. He had come to Yale from Chicago in 1970. I did not know Geoff, but I certainly knew of him. He terrorized my classmates. His insistence on lawyerly rigor was unusual at Yale, both at the time and since. Not theoretical brilliance (though Geoff was certainly brilliant), but lawyerly rigor. My first contact with Geoff was sometime in 1991. By that time, I had been a professor at Boalt for a little over a decade. He sent me a note by snail mail. This was pre-email. I can quote it close to verbatim even today: “Willy, The question is whether you would like to be a co-author on the casebook. Geoff.” I had never met Geoff, but I course I knew who he was. I guess (and the note is my evidence) that he knew who I was.

I don’t think Geoff knew it (though maybe he did), but I had begun work on a civil procedure casebook of my own, and had pretty much finished the personal and subject matter jurisdiction sections. It was a no-brainer for me. I was, of course, honored by the invitation and delighted to join Geoff as a co-author.

Geoff was an ideal co-author. He encouraged me to make the book my own, inviting me to use much of the jurisdictional material I had just written on my own. He reviewed every draft I sent him. He was an excellent editor. I always took Geoff’s edits. How could I not take them? They were always right.

A few words about the casebook.

Geoff began his career as a law professor at Boalt, as it was then known (and is still known to some of us), in 1958. The first edition of his civil procedure book, then known as Louisell and Hazard, came out in the spring of 1962. Several things about the book were to become Geoff’s hallmarks.

First, the book had a comparative perspective. So far as I am aware, it was the only book at the time, and one of the few ever, to take seriously the task of comparing, in the same casebook, state and federal procedural regimes, the code pleading states such as California and New York, and notice pleading regimes such as the federal courts and many states. That comparative procedural perspective (not limited to the comparison between state and federal) stayed with

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Geoff throughout his career. The most notable example is his work on transnational civil procedure, at the ALI and elsewhere.

Second, and just as important, the book had an historical perspective. The historical notes in the casebook, largely dedicated to English common law procedures, were really extraordinary. At first glance, they were a complete frolic. This was Geoff, who know a lot about English procedural history, taking us on a guided tour. But, on reflection, they were more than a frolic. They told us where we had come from. They told us that procedure was mutable, reflecting the problems and solutions of the time; and they encouraged us to see our problems, and our solutions to those problems, as similarly mutable.

Third, and this was vintage Geoff, the book was about practical lawyering. The casebook was analytically rigorous, but at the same time highly practical. On this point, one part of the book stood out. Geoff had taken up the cause of a Boalt student, Eugene Swann, an African-American who, along with his wife, had been the victim of housing discrimination in Berkeley. Geoff filed suit on their behalf in California Municipal Court (this was before the merger of the California Superior and Municipal Courts), and used the pleadings in that case in the casebook. Not a federal court suit. Not a Superior Court case. A Muni Court case. Justice on the ground, in the real practical world.

A side note on Eugene Swann's class at Boalt. This was the class of 1961. There were two African-Americans in the class, Eugene Swann and future federal district court judge Thelton Henderson. Also in that class were a future California Supreme Court Justice, Katherine Werdeger, and a future California governor, Pete Wilson.

In the roughly quarter century since Geoff sent me that note, we had a consistently interesting, consistently agreeable collaboration. That collaboration grew to include two professors that are here with us today, Professor Stephen Bundy and Professor Andrew Bradt.

A few words about Geoff's style as a colleague and collaborator. One thing about Geoff was his speed. No wasted time, and few wasted words. The note to me in 1991 is an example. As most of you in this room know, he answered the phone: "Hazard." He turned around drafts almost instantly. I would send Geoff a draft of a revised chapter or new note, and I would have his reply and edits the next day. And they were real edits, not spur of the moment toss-offs.

Another thing was his encyclopedic knowledge. There was pretty much nothing about procedure that Geoff did not know.

But the most important thing about Geoff was his generosity. He was always and unfailingly generous with his time and with his encouragement. I value enormously the time and encouragement Geoff has given me over the years. He was a model for us all.

## Reflections on a Thirty-Five Year Collaboration

W. WILLIAM HODES<sup>†</sup>

In the months since the legal community and the American polity lost Geoffrey Hazard in January 2018, it has often been said that the loss was felt in several areas of the law, as well as in several legal institutions.

Consider these resume entries: the American Bar Foundation, the American Bar Association, the American Law Institute, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, law schools at the University of California Berkeley, the University of Chicago, the University of Pennsylvania, Yale University (with an acting deanship at the then fledgling Yale School of Management thrown in on the side), and the University of California Hastings. And consider this array of potential teaching assignments for a harried chair of a law school Curriculum Committee: Civil Procedure, Professional Responsibility, Judicial Administration, Class Actions, Advanced Federal Procedure, and International Contracting.

But Geoff's influence was not limited to the thousands of law students he engaged in the classroom over the years, or the dozens of trenchant articles he published. Hazard was a master of the "big project" also, and in every instance he leveraged his influence by mentoring junior colleagues and developing new talent along the way.

One of those big projects was publication of the first edition of *The Law of Lawyering* in 1985, followed by supplementation at least annually that continues into the current Fourth Edition.<sup>1</sup> I was the fortunate junior colleague whom Geoff selected to accompany him on that particular journey, but our collaboration was the result of much happenstance. No step in the progression was particularly remarkable, but a lot of chips had to fall in a lot of right places; it was not even inevitable that *this* big project would appear on anyone's drawing board.

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1. GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* (4th ed. 2016).

### I. A SERIES OF HAPPENSTANCES GIVES RISE TO A THIRTY-FIVE YEAR COLLABORATION

First, Hazard himself has said in interviews that neither his prominence in Civil Procedure nor in Legal Ethics were written in stone as his career took shape. But for a scheduling crisis at Boalt Hall in 1958, he would have become the next Prosser of the world of Torts rather than the Hazard on Civil Procedure that we all know. And his emergence as the leading architect of modern legal ethics began as he watched from a perch at the American Bar Foundation—not strictly as an observer, it is true—as the American Bar Association struggled with formulation of the Model Code of Professional Responsibility in the late 1960s.

It was, of course, dissatisfaction with that 1969 Code, written as if for “downstate Illinois in the 1860s,”<sup>2</sup> that led to Geoff’s best known and most momentous big project: Reporter for the Commission on Evaluation of Professional Standards—the Kutak Commission—which generated the Model Rules of Professional Conduct that were adopted by the ABA House of Delegates in 1983. The “old” Model Code of Professional Responsibility—it was not even 15 years old—was simply inadequate for the post-Watergate world, and the new Model Rules were pure Hazard in their insistence that this was to be “real” law.<sup>3</sup> No more platitudes; these would instead be binding legal commands enforceable by the State.<sup>4</sup>

My engagement with legal ethics and with the Model Rules (and thence with Geoffrey Hazard) included considerable happenstance as well. I graduated from Rutgers Law School in Newark in 1969, but did not embark on an academic career, at the Indiana University School of Law in Indianapolis, until the fall of 1979.

Civil Procedure was to be my main teaching assignment, but, after the fashion of the time, I was assigned to teach Professional Responsibility as well, in large part because most of my new colleagues didn’t yet know much about it, and the field was only just beginning to achieve real academic rigor. Of course, like most lawyers of my generation, I didn’t know much about it either, not having taken a course in the subject during law school, having barely skimmed

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2. GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 7 (1978) (internal quotation marks omitted).

3. Technically, only the Kutak Commission itself was in a position to determine what the Model Rules would say and how they would “sound;” Geoff Hazard was the Commission’s Reporter, not one of its members. On a major drafting project, a Reporter serves the deliberative body as its guide, draftsman, and research arm, but has no vote; the impact that a Reporter’s own substantive views will have depends on the individual. A Reporter can serve as a mere scrivener (or potted plant), or a Reporter can participate fully in the substantive discussions, explain forcefully why one formulation is superior to another, and thus influence the end product to a significant degree. Hazard did not serve the Kutak Commission as a potted plant. Full stop.

4. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 *YALE L.J.* 1239 (1991) [hereinafter Hazard, *Future of Legal Ethics*]; Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspiration*, 30 *CLEV. ST. L. REV.* 571 (1981).

the then-new Code of Professional Responsibility as I prepared to take the bar exam and begin my legal career,<sup>5</sup> and having had no occasion to consult it during the ten years I practiced before returning to the academy.

The early 1980s was a heady time to be teaching Legal Ethics (while also learning it). Bits and pieces of various tentative and discussion drafts for the Model Rules were being circulated and examined not only in national circles, but in every state and local bar group in the country. When the Indianapolis Bar Association looked for a speaker to defend the new-fangled and supposedly “radical” Kutak Rules, it was inevitable that it turned to the law school. And realistically, that meant that it turned to me.

Now it was time for me to jump more deeply into the weeds, and I took the same approach to the Model Rules that I insisted my students take with the Federal Rules of Civil Procedure: treat it as a well-drafted *statute* and always ask, “What does the text *say*, what does it *mean*, and how does it *fit* with the rest of the text?” (Wait until later to worry about whether the result represents good or bad policy.)

This deep-dive assessment led me to the conclusion that although there were important differences between the nascent Model Rules and the existing Code of Professional Responsibility, the basic core was being retained. Ignoring the slogans and quick takes, and focusing on what the old and new rules *actually* said, as opposed to the mythology surrounding them, I quickly found that a different picture appeared. Preparation for the panel discussion in Indianapolis led to my first published article as a law professor,<sup>6</sup> and, through more happenstance, to my collaboration and mentorship with Geoff Hazard.

When my textual exegesis of the Model Rules was in final draft, happenstance put me on the same plane back from a meeting of the Association of American Law Schools with the chief draftsman of those same Model Rules—Hazard, of course. A colleague had earlier browbeaten me into overcoming my reticence (and awe) to present Geoff with a copy of my manuscript. Thus, I spent much of the flight watching out of the corner of my eye as Hazard looked at my work—apparently not just skimming but actually taking notes!

Two years later, after my article had been published and the Model Rules had officially been promulgated (and Hazard therefore had no further official role in that big project), I received a phone call from a small publishing house in New Jersey. Geoffrey Hazard was going to do a rule-by-rule desk book on the development of the Model Rules, and wanted to know if I would agree to co-author it with him.

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5. Preparation for the bar exam did not itself require *any* engagement with the Code in 1969. There were no questions on the exam dealing with legal ethics or professional responsibility, and, *a fortiori*, there was no such thing as today’s separate Multi-State Professional Responsibility Exam.

6. W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer’s Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739 (1981).

A lawyer with over ten years of experience but a near-rookie law professor, I nonetheless knew enough about academic sensitivities to know that non-tenured faculty cannot lightly agree to co-author any work, so I temporized long enough—considerably less than an hour, as I recall—to receive the enthusiastic support of Dean Frank T. “Tom” Read. Yes; non-tenured faculty members can co-author anything they want if their co-author is Geoffrey Hazard!

## II. THE HAZARD APPROACH TO LAW, THE HAZARD WORK ETHIC, AND THE HAZARD WORK STYLE

Over the years, *The Law of Lawyering* gained more traction, its page count grew, and its internal cross-references became ever more complex. Our sleepy little publisher was absorbed, reabsorbed, then spun off, and finally acquired by international publishing giant Wolters Kluwer. During this period, I was asked from time-to-time some variation of the questions “What was your connection to Geoff Hazard that led him to choose you as his co-author,” and “What is it like to work with a legend in the field,” and “What happened if you disagreed on something?”

As to the first, I was convinced from the outset and never had reason to doubt that Geoff was always both a committed textualist and therefore a committed positivist. (Or perhaps it was the other way around.) As a draftsman and as a scholar and an advocate, he knew that words *mattered*, and that once words were set in type they were to be honored unless modified or replaced.

Sure; interpretive moves are available where more than one reading is possible. That is the common law way, to which Geoff was equally committed. But appeals to pure policy didn’t cut it with Geoffrey Hazard if the text couldn’t get you there. If the text as written was bad policy, gear up, marshal your arguments, and get the text changed.

Presumably Geoff saw that same dedication to the written word in my earlier work that he had read on the plane, given that it was a line-by-line comparison of competing texts.<sup>7</sup> And although he could not have known of my approach to the Federal Rules of Civil Procedure at first, we had many (and early) opportunities to tap into our shared interest and expertise in that beautifully integrated bundle of text.<sup>8</sup>

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7. Perhaps it did not hurt either that my basic conclusions about the substance of the new Model Rules—“Three Peas in a Pod”—were compatible with those of their chief draftsman. As Hazard later wrote,

I have tried to show that the content of the legal profession’s narrative and core ethical rules, as pronounced in the 1908 Canons, has been preserved largely unchanged in today’s Rules of Professional Conduct. However, the form in which those rules are expressed has changed dramatically. What were fraternal norms issuing from an autonomous professional society have now been transformed into a body of judicially enforced regulations.

Hazard, *Future of Legal Ethics*, *supra* note 4, at 1249.

8. See, for example, THE LAW OF LAWYERING, *supra* note 1, Chap. 30, especially sections 30.02 to 30.04 and 30.11, comparing in great detail the substantive and procedural approaches to frivolousness found in Model Rule 3.1 and FED. R. CIV. P. 11, including their overlapping legislative histories.

Making the right connections between critical pieces of a large integrated text, especially a text of black letter rules, is not only a noticeable feature of every edition of the Hazard & Hodes book, but it also dictated Geoff's plan for getting the First Edition organized and down on paper. We did *not* start with Rule 1.1—there was no Rule 1.0 then—and press on to the end. Instead, he started us with Rule 1.6 on confidentiality, which is not only at the very core of the client-lawyer relationship, but had been, by far, the most controversial provision during the drafting and adoption process. That chapter—originally Chapter 9 and now Chapter 10 in the Fourth Edition—has always been the longest, in part because it deals with the related subjects of privilege and work product, and in part because it also includes by far the largest number of cross-references to other rules and other bodies of law.

We then built the book “from the inside out,” taking up in order the cluster of rules that are chiefly concerned with the limits on what lawyers may ethically do in the service of clients<sup>9</sup>—but always with either an explicit or implicit tie-in to the consequences for the confidentiality principle.

A lawyer may not counsel or assist a client in crime or fraud (Model Rule 1.2(d)), but suppose the client engages in crime or fraud on his own and then claims that the lawyer told him how to get away with it? A lawyer may not knowingly present perjured testimony (Model Rule 3.3(a)(3)), but suppose the client insists on testifying falsely anyway? Or suppose the lawyer only learns about the perjury after the fact? A lawyer may not sit idly by while a client defrauds a third party by telling lies or omitting crucial facts (Model Rule 4.1(b)), but how should the lawyer respond if it happens?

All of these and more demand an answer to a critical question: is the lawyer on the scene *still* required to maintain client confidentiality? Or is the lawyer permitted—or sometimes even required—to disclose just enough to right the wrong?

As to how the work actually progressed—“what it was like”—the answer is that Geoff Hazard and I almost never met in person, and never—well, hardly ever—talked on the phone. Instead, an unending stream of drafts (all in hard copy) passed between us, with FedEx and the Xerox Corporation the major beneficiaries. This was early days for word processing programs and Geoff was stuck on the typewriter (essentially for the duration).

Sections that I initiated would come back to me covered with hand-written edits and suggestions, with longer inserts typed out. I would incorporate what Hazard had done onto the electronic version, while making further tweaks of my own. That version would be copied again and sent back to Geoff for final approval and transmittal to our editors. For material that Geoff initiated, the first round of editing took place as I re-keyboarded his typed manuscript into a word

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9. See Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981).

processor, adding material or rephrasing as I proceeded. That version would go back to Hazard as if it was the first draft, and he would then edit further—possibly restoring some of his original language.

Technologically, this was highly inefficient, but it created a working relationship that grew smoother as we progressed through the First Edition and then into each successive supplement and later edition of the book. It is probably fair to say that while Hazard's writing style was more elegant, mine was slightly edgier. The give and take of multiple edits soon produced a satisfactory blend.

In addition, the constant interaction should have produced a clear sense that this was a true collaboration, with each co-author equally responsible for every word. Certainly, that was the reality. Despite what Hazard himself referred to as his "severe" public persona, he was easy to work with in private—generous with his time, always ready to praise others, never pulling rank.<sup>10</sup>

And what about disagreements between the co-authors? Most were matters of emphasis, style, or phraseology, handled the way good lawyers always handle these things—compromise reached through respectful dialog. Rare cases of substantive disagreement were resolved through a different form of compromise: instead of diktat that "X is correct" or "Y is correct," the reader would eventually see on the page the outlines of a lawyerly argument for and against both X and Y.

### III. THIS IS WHAT WE GOT WITH HAZARD

Not long after Geoff Hazard's death, I had a prescheduled dinner with Peter Jarvis, the third co-author of *The Law of Lawyering* (who has also contributed to this Symposium).<sup>11</sup> At one point Peter mused, "In legal ethics, what is it that we got when we got Hazard," which I took to be a question about Geoff's signal contributions, his signature issues. I gave an on-the-spot approximation, but I now see that Peter's query is a perfect way to organize the balance of my thoughts.

Before getting down to specifics, I should start with the Hazard worldview—at least as regards lawyers and lawyering. Geoff was unabashedly bullish on the American legal system and the role of lawyers in it, but the appreciation was clear-eyed and free from both romanticism and cant. He knew where the warts were, and he didn't shrink from acknowledging them.<sup>12</sup> Instead,

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10. Someone who didn't know Geoff Hazard at all—perhaps someone who wasn't even a lawyer—once wondered aloud if *The Law of Lawyering* was a case in which the senior sloughed off all of the work to the junior and then took the lion's share of the credit. That was unequivocally *not* the case, as anyone who has ever worked with Geoff on a major project will attest—including, no doubt, several of the contributors to this Symposium.

11. Peter R. Jarvis, *Geoff Hazard: My Views as a Law Student, Mentee and Coauthor*, 70 HASTINGS L.J. 1085 (2019).

12. See Geoffrey C. Hazard, Jr. & Dana A. Remus, *Advocacy Revalued*, 159 U. PA. L. REV. 751, 781 (2011) ("We acknowledge that, as implemented, our adversarial system has numerous flaws, and, as practiced, advocacy can be abused. But we argue that these evils lie in the practice, and not the core function, of adversarial advocacy.").



he used the necessarily unlovely aspects of lawyering as the ballast in his overall judgment that being an American lawyer is excruciatingly difficult, fraught with moral ambiguity and hard judgments, but ultimately supremely worthwhile and uplifting.<sup>13</sup>

In particular, Geoff Hazard defended the American adversary system against its many modern critics, while again recognizing the political and moral tradeoffs involved (and also ridiculing the extreme defenses of the system that had sometimes been advanced in earlier times). *Of course* role differentiation requires an advocate to adhere to Thomas Macaulay's sardonic definition, in an 1837 essay, of a lawyer as someone who would "with a wig on his head, and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire."<sup>14</sup>

But lawyers ultimately serve justice and morality even in these situations, by upholding the autonomy and human dignity of even the least of us. Hazard demolished critics whose answer to role differentiation was to urge lawyers instead to withhold from their clients assistance and advice that was *within* the bounds of law, but unsupportable under what *the lawyer* took to be "common morality."<sup>15</sup>

For specific features that we "got" by having Geoffrey Hazard as our chief architect I will list four, while recognizing that the edifice of modern legal ethics was not designed and built by one person alone.

First, Geoff insisted that despite the legal profession's long-standing (and wholly appropriate) focus on the near-sacred duties that lawyers owe to clients, that cannot be the *only* focus. Taking seriously the meme "zealous representation *within* the bounds of law" means recognizing that these boundaries were established to protect the interests of people who are *not* clients or former clients or would-be clients, which in turn means that lawyers often have duties that run to rival parties in transactions and even to opponents in litigation.

Certainly, client interests remain primary, but situations in which the interests of others must be factored in to a lawyer's overall judgment are not rare. Indeed, the Model Rules of Professional Conduct are crowded with provisions explicitly protecting the rights of non-clients,<sup>16</sup> and part of Hazard's

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13. See Geoffrey C. Hazard, Jr., *My Station as a Lawyer*, 6 GA. ST. U. L. REV. 1 (1989); Geoffrey C. Hazard, Jr., *Remarks upon Acceptance of Michael Franck Award May 29, 2008*, J. PROF. LAW. 389, 389 (2008) ("I believe the practice of law is demanding intellectually, ethically and, if I may say so, spiritually.").

14. 3 LORD MACAULAY CRITICAL, HISTORICAL, AND MISCELLANEOUS ESSAYS 376 (New York, Albert Mason 1874).

15. See Geoffrey C. Hazard, Jr., *The Morality of Law Practice*, 66 HASTINGS L.J. 359 (2015).

16. Examples include Rule 1.2(d) (duty not to counsel or assist a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent); Rule 1.16(a) (duty to withdraw from representation if necessary to avoiding violation of Rule 1.2(d)); Rule 3.3(a) (duty not to knowingly make a false statement of fact or law to a tribunal, duty not to offer evidence that the lawyer knows to be false); Rule 3.4(a) (duty not to unlawfully obstruct another party's access to evidence or to unlawfully alter, destroy or conceal evidence); Rule 3.4(b) (duty not to falsify evidence or suborn perjury); Rule 4.1(a) (duty not to knowingly make a false statement of material fact or law to a third person); Rule 4.1(b) (duty not to knowingly fail to disclose a material fact where

mission as Reporter to the Kutak Commission was to make them clearer and, therefore, more clearly enforceable than the predecessor provisions in the Model Code of Professional Conduct.<sup>17</sup>

For example, Geoff never stopped being surprised—amused too, perhaps, and possibly irked—when serious lawyers professed to think it “radical” that a long-standing rule requiring advocates to disclose legal authority that is directly adverse to the position of a client *really means what it says*.<sup>18</sup> This is an instance in which a lawyer is *required by law* to subordinate client interests to the interests of opponents in litigation—the “law” here being the very same rule of professional conduct.

Thus, despite endless incantation in professional circles of the “core value” of untrammelled client loyalty, the reality is that the interests of non-clients—including the interests of the courts and the administration of justice itself—trumping in with some regularity and require limited “betrayal” of a client, even in a litigation setting.

Perhaps the most important thing we “got” from Hazard in the world of legal ethics grew out of the regrettable fact of life that people who are not clients can sometimes be the victims or intended victims of a client’s crime or fraud. What duties do lawyers owe to *these* non-clients? Everyone has an interest in not being victimized, after all, but what is the wrongdoing client’s lawyer supposed to do about it? What is that lawyer even *permitted* to do about it? How can a lawyer say or do *anything* without acting disloyally or disclosing client confidences (a.k.a. “blowing the whistle”)?

Geoff’s contribution was to provide a full understanding of the ramifications of the well-known difference between zealously defending a client who has *already* (irretrievably) victimized someone else, and various forms of knowingly aiding or encouraging or even failing to interdict or rectify *planned or ongoing* client wrongdoing.<sup>19</sup>

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disclosure is necessary to avoid violation of Rule 1.2(d)); Rule 4.4 (duty to respect the rights of third persons during representation of a client); and Rule 8.4(d) (duty not to engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation). See MODEL RULES OF PROF’L CONDUCT r. 1.2(d); 1.16(a); 3.3(a); 3.4(a); 4.1(a), (b); 4.4; 8.4(d) (AM. BAR ASS’N 2018).

17. See Geoffrey C. Hazard, Jr., *Dimensions of Ethical Responsibility: Relevant Others*, 54 U. PITT. L. REV. 965, 969 (1993) (“Although a lawyer is generally required to give preference to the interests of the client, there are circumstances when legal rules and norms of common decency require otherwise.”). That most of the provisions protecting the interests of non-clients had clear antecedents in earlier professional codes was the chief point of my *Three Peas in a Pod* article. See Hodes, *supra* note 6.

18. See MODEL RULES OF PROF’L CONDUCT r. 3.3(a)(2). The identical language had been present in the Model Code of Professional Responsibility, and the Kutak Commission proposed minor adjustments that would have minimally increased the occasions for making disclosure. This proposal caused such an outcry over a supposedly “radical” new departure that the Commission decided to leave the language as it had existed for years. See Geoffrey C. Hazard, Jr., *Arguing the Law: The Advocate’s Duty and Opportunity*, 16 GA. L. REV. 821, 825–28 (1982).

19. See Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041, 1046 (1997) (“The legal problem in these circumstances is to differentiate between assistance by the professionals that is legitimate and assistance that is not.”).

The chief ramification is that *in practice* there must be some mechanism to decouple innocent lawyers from clients bent on crime or fraud, at least as a matter of self-preservation and good citizenship. Simply withdrawing from the representation—which is rarely simple—will not always be sufficient, Hazard maintained. Often, the only way to counter the effects of lawyer assistance already unwittingly given will be to make limited disclosure about the true situation. But it took most of the profession almost exactly 20 years to “get” it.<sup>20</sup>

Along the way, Geoff had to remind us repeatedly—in every edition and supplement of *The Law of Lawyering*, for example—that despite Model Rules language that seemed to be absolutist in forbidding this kind of disclosure, *in practice* the combined effect of other ethics rules and the requirements of “other” law was not only to permit this kind of limited whistle-blowing in many situations, but sometimes to require it.<sup>21</sup> In our book, we called these “forced exceptions to confidentiality,” meaning that they were effectively forced upon the lawyer by the operation of law.<sup>22</sup>

Third, once Hazard had demolished the reductionist view that lawyers inhabit a world in which there are only clients on the one hand and everyone else on the other—all of whom must be held at least at arm’s length—he was able to move on to consider ever more subtle variations on a lawyer’s allocation of his

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20. See Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 302 (1984) (recounting how the Kutak Commission’s proposal to permit lawyers to reveal client confidences on a limited basis in order to interdict and rectify client frauds was flatly rejected by the American Bar Association House of Delegates in 1983).

He then offered a subtle improvement on the Commission’s proposal, advancing what is essentially the language of today’s Model Rules 1.6(b)(2) (limited disclosure permitted to *prevent* client crimes or frauds involving substantial financial injury) and 1.6(b)(3) (limited disclosure permitted to *prevent, mitigate or rectify* financial injury *resulting from* client crimes or frauds). See MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(2), (b)(3). In both situations, the exception to confidentiality applies *only if* the client has “used the lawyer’s services” in connection with the wrongdoing.

When the Commission on the Evaluation of the Rules of Professional Conduct (commonly referred to as the Ethics 2000 Commission) undertook a full review of the Model Rules, Geoffrey Hazard was appointed as a member of the Commission, and the duties of Chief Reporter were turned over to the exceptionally capable hands of Professor Nancy Moore. The Commission’s final (2001) report included Rules 1.6(b)(2) and 1.6(b)(3), but these provisions were, again, either rejected or withdrawn for lack of support in the House of Delegates.

It was not until the Task Force on Corporate Responsibility (the Cheek Task Force) re-introduced those two rules verbatim, in 2003, that the House of Delegates abruptly reversed course. That was almost exactly twenty years from the publication of Hazard’s Emory Law Journal article.

21. The most significant ethical rule in this regard is Model Rule 1.6(b)(5), which permits disclosure of otherwise protected information “to establish a claim or defense on behalf of the lawyer” or to “respond” to various allegations made against a lawyer. MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(5). This so-called “self-defense” exception is long-standing and has never been controversial. But Hazard showed that the exception can be employed preemptively, and that there are times when *in practice* it *must* be so employed. Applicable “other” law includes the law of agency and the law of fraud and accessorial liability for torts and crimes.

22. The concept came primarily from Hazard, but the terminology came from Hodes. Having been admitted first to the Louisiana Bar, I was familiar with the Louisiana Code provisions establishing “forced heirs” who could not be disinherited, and adapted the term.

loyalties and his talents. This led to a theory of “primary and derivative clients,” the latter sometimes referred to as “almost clients.”<sup>23</sup>

Employing this mode of analysis pushes beyond the common understanding that, subject to the rules regulating conflicts of interest, a lawyer can have two or more co-clients in the same matter, each equally entitled to the same measure of the lawyer’s loyalty and diligent efforts with respect to that matter. And it is entirely different from situations in which, also subject to monitoring to prevent interference with the lawyer’s independent professional judgment, a non-client engages a lawyer to serve some *other* person or entity as *the* client (or simply pays for a lawyer’s representation of another).

Hazard’s analysis applies when a lawyer’s client owes special duties—usually duties of a fiduciary nature—to someone who is *not* the lawyer’s client in the traditional sense. However, because the client has a keen interest in carrying out those fiduciary duties lawfully and properly, the primary client is best served when the lawyer is *particularly* attentive to the interests of the derivative client—more so than in the case of an ordinary non-client, as described above.

The results reached by applying primary and derivative client analysis can almost always be replicated by applying other precepts of the law of lawyering, which includes melding in the law of contracts, agency, fiduciary breach, and more. But Hazard’s approach makes it easier to keep track of the players.

For example, when a lawyer represents a corporate entity, it is almost universally understood that the lawyer formally represents the organization *only*, not the officers, directors, employees, or any other “constituent.”<sup>24</sup> Yet the entity client owes duties to all of *these* non-clients that it does not owe to ordinary third parties. Rule 1.13 and the rules regulating conflicts of interest shed considerable light on how an entity lawyer should manage internal discord, but the task becomes easier if the lawyer recognizes that the constituents nicely fit the definition of derivative clients.

Finally, Geoff Hazard contributed to a revival of the concept of “lawyering for the situation,” which had roiled the confirmation hearings for Justice Louis Brandeis in 1916. Unlike in the primary and derivative client situation described above, a lawyer here has two or more full-fledged clients to whom he owes equal loyalty and effort. Indeed, inasmuch as a “situation” cannot literally need a lawyer or engage one, it is technically more accurate to think of the lawyer as representing several individuals who are together involved in or bound up in a “situation” of some kind.

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23. See Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 31 (1987). For the latter usage, see GEOFFREY HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 648–74 (5th ed. 2010).

24. See MODEL RULES OF PROF’L CONDUCT r. 1.13; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 (AM. LAW INST. 2018).

Typically, the situation is one in which the clients have interests that are mostly harmonious, but with some differing interests that the lawyer will try to help them accommodate. The most common “situations” arise when several associates are forming a business in which they will have different roles and different financial interests, or when members of an extended family differ over business or financial or other arrangements going forward—as was true of some of the situations that Justice Brandeis made famous.

Although recognizing that lawyering for the situation is essentially a specialized application of conflicts of interest and client communication rules, Hazard prevailed upon the Kutak Commission to highlight the subtleties of this kind of representation by creating a separate rule for “intermediation,” which is quite different from “mediation,” in which a lawyer serving as a third-party neutral represents *nobody*.

Model Rule 2.2 on intermediation and its Comments closely tracked the language of the other relevant rules, and repeatedly stressed the importance of continuing client consent, constant communications with all of the clients, and alertness to the possibility that the “situation” was getting worse rather than better, so that withdrawal from the venture would be necessary.<sup>25</sup> Moreover, this kind of representation is pervasive in modern practice, outside of contested litigation.<sup>26</sup>

Nonetheless, the profession generally failed to “get” the connection, and resisted the concept of lawyering for the situation as if it represented a further erosion of client loyalty. Accordingly, the House of Delegates adopted the Ethics 2000 Commission’s recommendation to eliminate Rule 2.2 and to move all of its substance to detailed comments in the conflicts of interest rules.<sup>27</sup>

#### IV. CODA: IN HIS OWN WORDS

In this Article, I have described how I became involved in a long-term collaborative relationship with Geoffrey Hazard in legal ethics, and how that collaboration proceeded over the years. I also provided some thoughts about Hazard’s views on lawyers and lawyering generally, and gave examples of some of his most telling contributions to the field.

In closing, I cannot do better than to repeat a quote from Hazard himself that I insisted be used in the First Edition of *The Law of Lawyering*, and have made sure ever since has never seen the cutting room, let alone hit the cutting room floor. This passage is from the small 1978 book *Ethics in the Practice of Law* that was the precursor to the early drafts of the Model Rules of Professional Conduct.

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25. See MODEL RULES OF PROF’L CONDUCT r. 2.2 (deleted 2011).

26. See Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377 (2004).

27. See MODEL RULES OF PROF’L CONDUCT r. 1.7 cmts. 26–28 (nonlitigation conflicts), 29–33 (Special Considerations in Common Representation).

It is nominally about what later became Model Rule 2.2 on “intermediation,” but it is really about American law and American lawyers generally. Hazard at his best, it is also about experience and judgment, as well as elegance in writing and in thought.

[An intermediary, or lawyer for the situation,] is no one’s partisan and, at least up to a point, everyone’s confidant. He can be the only person who knows the whole situation. He is an analyst of the relationship between the clients, in that he undertakes to discern the needs, fears, and expectations of each and to discover the concordances among them. He is an interpreter, translating inarticulate or exaggerated claims and forewarnings into temperate and mutually intelligible terms of communication. He can contribute historical perspective, objectivity, and foresight into the parties’ assessment of the situation. He can discourage escalation of conflict and recruitment of outside allies. He can articulate general principles and common custom as standards by which the parties can examine their respective claims. He is advocate, mediator, entrepreneur, and judge, all in one. He could be said to be playing God.

Playing God is a tricky business. It requires skill, nerve, detachment, compassion, ingenuity, and the capacity to sustain confidence. When mishandled, it generates the bitterness and recrimination that results when a deep trust has been betrayed. Perhaps above all, it requires good judgment as to when such intercession can be carried off without unfairly subordinating the interests of one of the parties or having later to abort the mission.

When a relationship between the clients is amenable to “situation” treatment, giving it that treatment is perhaps the best service a lawyer can render to anyone. It approximates the ideal forms of intercession suggested by the models of wise parent or village elder. It provides adjustment of difference upon a wholistic [sic] view of the situation rather than bilaterally opposing ones. It rests on implicit principles of decision that express commonly shared ideals in behavior rather than strict legal right. The basis of decision is mutual assent and not external compulsion. The orientation in time tends to be a hopeful view of the future rather than an angry view of the past. It avoids the loss of personal autonomy that results when each side commits his cause to his own advocate. It is the opposite of “going to law.”<sup>28</sup>

Geoffrey Hazard was a man of many talents and many careers, no doubt, but also a man of many major projects. I was fortunate to be deeply involved in one of them, and that involvement largely shaped my own entire career. A thirty-five year collaboration, and quite a ride.

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28. HAZARD, *supra* note 2, at 64–65.

# Geoff Hazard: My Views as a Law Student, Mentee and Coauthor

PETER R. JARVIS<sup>†</sup>

I have now been a lawyer for more than four decades. I owe a good portion of both my happiness and success as a lawyer to Geoff Hazard.

My first interaction with “Professor Hazard” (as we all called him in law school) came in first year Civil Procedure. Three memories from that Fall 1972 term stand out. The first memory is of what seemed to me at the time to be the overly harsh approach he took to us as first term/first year law students. What I have long since learned is that when I go to court prepared to the Geoff Hazard level, I will always be okay.

The second memory comes from what I thought at the time was one of those harsh-seeming Civil Procedure classes. We were discussing *quasi in rem* jurisdiction,<sup>1</sup> and Professor Hazard asked the class why a court had reached a particular result in a particular case. As hand after hand went up and students offered various answers, Professor Hazard thundered “no” to each. Finally, and wholly unsure of myself, I raised my hand half-way and was called upon. I said, “because that was the only way the court could reach the result it wanted,” to which Professor Hazard responded, “you’re right!” This was the first moment when I really thought I might have a future as a lawyer.

The third memory comes from something Professor Hazard had included in the casebook we were using. Although not central to the Civil Procedure issue that was the subject of that portion of the casebook, he had included a brief session reflecting the use of lawyer-directed “testers” to prove housing discrimination cases.<sup>2</sup> It was an issue that I thought about a lot at the time and

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<sup>†</sup> Partner at Holland & Knight.

1. The long-since abandoned doctrine of “*quasi in rem* jurisdiction” sometimes allowed a court to assume jurisdiction over a case because the court had jurisdiction over the property involved in a matter even though the court otherwise lacked jurisdiction over one or more parties to the case. Cf. *Shaffer v. Heitner*, 433 U.S. 186 (1977) (abandoning the broad form of *quasi in rem* jurisdiction established in *Harris v. Balk*, 198 U.S. 215 (1905), and holding that in order to exercise *quasi in rem* jurisdiction based on property unrelated to the suit at hand, the established personal jurisdiction test announced in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), had to be met).

2. For a relatively early discussion of ethics issues pertaining to testers, see David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791 (1995).

that I have written and spoken about a great deal since then. This short bit of text was my first experience with what has become the principal subject of my career for more than three decades: professional responsibility and the law of lawyering.

After first year Civil Procedure, I took two other classes from Professor Hazard. The next one was Evidence, which Professor Hazard taught in a cooperative and collegial manner that was unlike Civil Procedure. Nonetheless, he made clear what he expected of us. On the very first day of class, he said the following:

“There are four questions to be addressed with any rule of evidence. First, what does the rule say? Second, what are the stated reasons for the rule? Third, what are the unstated reasons, if any, for the rule? Finally, how should the rule be changed, if at all?”

He then went on to say that the problem with too many of us Yale Law students was that we insisted on answering these questions in reverse order. Point well taken, and not just for students from Yale. We need to know whereof we speak.

My third and final class with Professor Hazard was Conflicts of Laws. That class was also taught in a cooperative and collegial manner. Professor Hazard’s key point throughout that term was that Conflicts of Laws was an area of law so plastic that one can reach almost any result one wants to reach. In other words, good lawyers should take very little as “given.”

Even when I was a law student, my contacts with Professor Hazard were not limited to the classroom. Along the way, my wife and I developed a potential interest in moving to Portland, Oregon, and I interviewed there with what was then the firm of Davies, Biggs, Strayer, Stoel & Boley. As I learned when interviewing there, Professor Hazard had started his own career there in the 1950s when the firm was called Hart, Spencer, McCulloch, Rockwood & Davies.<sup>3</sup> Learning this, I asked Professor Hazard what he thought about Portland, Oregon as a place to practice and what he thought about his former firm. He told me that if he was going to start over and if he wanted to remain in private practice rather than becoming an academic, he would very strongly consider Portland and would equally strongly consider that firm. My wife and I chose Portland, where we remain today, and I spent my first twenty-seven years of practice at that firm.

Just as he described them, the core group of lawyers that I effectively inherited from Geoff (as I then came to call him) was truly exceptional in their kindness, their thoughtfulness, their legal abilities and their patience with young upstarts. Another result of my going to the firm where Geoff had started was that

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3. See, for example, *Hess v. United States*, No. CIVIL 8041; 8076; 8256, 1957 WL 87479 (D. Or. Mar. 29, 1957), a case on which Professor Hazard and Hart Spencer were on the losing side until it reached the Supreme Court in *Hess v. United States*, 361 U.S. 314 (1960). By 1960, Professor Hazard was no longer at the firm.



I heard the other side of the stories about his experiences in private practice that he told during the three classes I took from him. To my recollection, he tended to be the hero of the stories that he told in class—the one who came up with the case-saving idea. Although his former colleagues all had great respect for Geoff and his abilities, they sometimes had different recollections of who had contributed what. That made me smile then and it makes me smile now.

Geoff was also central to what remains the best single law-related evening of my entire career. In the 1990s, and after several years of trying and failing to get Geoff to do a live CLE in Portland, I came up with a concrete plan. I told Geoff that the people with whom he had practiced years before really wanted to see him and that if he would come to Portland, we would hold a dinner in his honor.

Geoff came, and just about everyone who had practiced with him attended. I was struck by the warmth they exhibited towards each other as well as the many recollections they had of experiences and cases from decades before. As a gift for Geoff, we had made a copy of a large picture which had long hung in the firm library and which showed the sixteen or so lawyers who were at the firm after Geoff had left. When we unveiled the picture to present it to him, Geoff immediately reeled off all of their names.

My final interactions with Geoff were the result of my asking about a dozen years ago to be a coauthor with Geoff and Bill Hodes of *The Law of Lawyering*.<sup>4</sup> I leave it to Bill to speak about Geoff as a coauthor. I will only add here that being endorsed and embraced by Geoff and Bill has been a wonderful seal of approval.

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4. The Fourth Edition of GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* was published in 2014. Annual or semiannual updates are regularly published as well.

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## A Tribute to Geoff Hazard from an Admirer, Colleague, and Friend

MARY KAY KANE<sup>†</sup>

I was introduced to the scholar, Geoffrey C. Hazard, Jr., in my first-year civil procedure course in 1968, where his seminal articles about indispensable parties,<sup>1</sup> interpleader,<sup>2</sup> and personal jurisdiction<sup>3</sup> established him as a leading civil procedure scholar, even though it was still in the early stages of his career. Not surprisingly, subsequent publications and his many leadership roles in the legal profession<sup>4</sup> now have made his influence legendary. But my first real opportunity to get to know and work with Geoff, and to think of him as a friend and colleague, was through the American Law Institute (ALI). And so, in this brief tribute I will focus on Geoff's contributions as both a Reporter and the Director for the Institute, as well as his continuing contributions after he retired as Director and later joined the Hastings faculty as the Thomas E. Miller Distinguished Professor of Law.

The goals of the American Law Institute are "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."<sup>5</sup> Geoff's first major substantive contribution to those goals is seen in his work for nine years as the Reporter for the Restatement Second of Judgments, published in 1982. That Restatement exemplifies in every aspect the objectives of the ALI. It approached a field that many would say is extremely complex and masked in mystery, yet it sets forth the underpinning doctrines in clear and effective prose. More important, it transformed the field

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<sup>†</sup> Emerita Dean and Chancellor, and Distinguished Professor of Law, University of California, Hastings College of the Law.

1. Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961).

2. Geoffrey C. Hazard, Jr. & Myron Moskowitz, *An Historical and Critical Analysis of Interpleader*, 52 CALIF. L. REV. 706 (1964).

3. Geoffrey C. Hazard, Jr., *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241.

4. My personal appreciation of his expertise is, of course, in civil procedure as it is my own field. But, he has been equally influential in the field of Professional Responsibility, where he was the Reporter for the American Bar Association Model Rules of Professional Conduct, promulgated in 1983, and the draftsman-consultant for the ABA Model Code of Judicial Conduct, promulgated in 1972.

5. The goals are set forth in the Institute's 1923 Certificate of Incorporation and have remained consistent through its history.

by importing new terminology that better expressed the policies underlying and the effects of judgments to make more accessible the complicated case law that supports these doctrines. Thus, what was formerly “res judicata” became “claim preclusion” and “collateral estoppel” became “issue preclusion.” The terms had been suggested by an earlier scholar,<sup>6</sup> but Geoff adopted them and persuaded the Institute’s membership as to the need to use new ways of talking about the binding effect of judgments in order to clarify and simplify this most challenging area of the law. He also introduced a new formulation to define the scope of judgments and the “transaction” standard replaced the outmoded “cause-of-action” standard that was a holdover from the days of code pleading, but not meaningful in the modern joinder era. The influence of this work is seen to this day as this terminology and the transaction standard are now the accepted ways to examine the binding effects of judgments.

In 1984, Geoff succeeded Herbert Wechsler as the ALI’s fourth Director, serving in that capacity for fifteen years. In that role he oversaw numerous Restatement projects, including Agency, Property, Restitution, Suretyship, Torts, Trusts, Unfair Competition, and the Law Governing Lawyers. He also guided less traditional projects, such as the Complex Litigation Project, and other Principles projects, such as the Law on Family Dissolution. Those projects are addressed to courts, legislatures, or agencies and express the law as it should be, but may or may not reflect the law as it is. He also expanded the Institute’s scope to focus on some international projects, such as the one on Transnational Insolvency. The listing of the above projects is not meant to be exclusive, but is designed to illustrate the incredible breadth of his abilities. I say that because, although he was not an “expert” in many of the above fields when those projects were begun, no one would gainsay his expertise at their conclusion. He immersed himself in all the details, but always had a clear vision of the bigger picture. When the projects were brought forward for approval first by the Institute’s Council and then by its membership at the Annual Meeting, he really listened carefully to the competing arguments on controversial topics. And, quite frequently, he was the one who finally would suggest a common resolution to which all could agree.

My work with Geoff in the ALI began in 1990, when, as Director, he asked me to serve as a co-reporter with Arthur Miller, then of Harvard, for what was to become the Complex Litigation Project.<sup>7</sup> The Project was designed to develop an understanding of the phenomenon of multiparty, multiform lawsuits and to analyze potentially fruitful options for mitigating the problems those cases pose. Throughout the four years during which we did that project, Geoff shepherded us through the sometimes contentious processes that led to our final

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6. For years, Professor Allen Vestal urged the new terminology in a series of articles. One of the earliest is Allan D. Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U. L.J. 29 (1964). Allen Vestal also was one of the Advisers to the Restatement Second of Judgments.

7. AM. LAW INST., *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* (1994).

recommendations. He was simply masterful, did not suffer fools gladly, and supported his reporters and their work with grace, skillful political savvy, and carefully crafted suggestions to find common ground among competing ideas.

Our collaboration expanded after he retired as the ALI Director. He immediately embarked as a Reporter on yet a new, international ALI Project—the ALI/UNIDROIT Principles of Transnational Procedure—a project with two other co-reporters in Germany and Italy and one Associate Reporter from Brazil. The Project was designed to craft a set of procedural rules that could be understood and applied in commercial settings in courts around the world, whether civil or common law. The core idea was to find commonalities between procedural systems, rather than focus on the differences, and to build on those common grounds. To accomplish that the ALI did something unique in the way the project was structured. While there was the typical Advisory Committee appointed by the ALI Council of predominantly U.S. experts, we also had advisory committees in countries throughout the world and the Council asked Edward Cooper (of the University of Michigan) and me to serve as Council liaisons to those committees. Thus, for several years we travelled with Geoff (and Mike Traynor who was then the ALI President and Lance Liebman, the then Director) to places around the globe presenting proposals and getting feedback as to what would or would not work in different systems. Not surprisingly, the meetings were totally fascinating and, after each one, the Reporters ably shaped and reshaped their proposed system to meet the concerns and questions of the varying legal communities. The success of the project is seen in the approval of its final set of recommendations separately by the Institute and then by Unidroit in Rome.<sup>8</sup> Even more impressive is the fact that the proposed transnational rules are spurring law-reform efforts in Europe today with the newly formed European Law Institute engaging in a joint project with Unidroit to try to develop model European rules of procedure, using the earlier project as a starting point.

Travelling with Geoff for the transnational rules project provided me the first real opportunity to know him more than as a procedure colleague. As many know, travelling together can either make you better friends or enemies—fortunately, we remained friends. Watching Geoff adapt to local cultural customs, exercising superb diplomatic skills in doing so, was most elucidating. Anyone who knew Geoff knows that he was a very dedicated and serious worker and that he did not like to waste time on frivolities. And these were working trips. I still remember him complaining to us (his U.S. colleagues) about why it was that in Bologna the Italians insisted on two-hour lunches, with wine served! And in China, we were treated to some very long and elaborate banquets—one of which had some non-identifiable and not very appetizing looking offerings. So much so, that we finally told our interpreter to please not

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8. ALI/UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2004).

tell us any more what we were being served because otherwise we might not be able to eat it at all! But I am sure our hosts never had even a vague inkling of his dismay. He understood that our hosts' gracious attempts to entertain us were a necessary part to encourage the intellectual exchange.

I say with no exaggeration, that one of the best professional days I had during my deanship was the one when Geoff telephoned me to say that he and his wife, Beth, were contemplating moving to the Bay Area for the next phase of their lives and he wondered whether Hastings might be interested in having him join the faculty. For the next ten years, Geoff was an integral part of our faculty, offering sage advice to the administration and colleagues about law school matters. (He never missed a faculty meeting!). Even more important, he was deeply involved in the intellectual life of the college, attending colloquia, workshops, lectures, etc. and offering his unique insights to help all of us improve our understanding of the law and our scholarship. There could be no better mentor for junior and senior faculty alike. I am so gratified that my Hastings colleagues had the opportunity to get to know and learn from such a legal giant. His love of the classroom and his students also was on display daily and the students returned it. Indeed, when he was eighty, he volunteered to teach Constitutional Law, which he had not taught in decades, when he learned that we had a sudden need and no one to fill it. He was an institutional loyalist and his lifelong career exemplifies the very best of our profession.

# My Teacher, My Friend

SUSAN P. KONIAK<sup>†</sup>

In 1977, I think it was, the Yale law faculty considered whether to bar recruiters who discriminated against gays and lesbians—most notably the military—from interviewing students on campus. With the faculty then dominated by liberal giants, one might think the ban would have been a matter of little controversy. But the liberals thought the matter complex, so many interests to consider, nuance, nuance everywhere.

Geoff Hazard was not a liberal giant of that faculty. He was a titan and stood in awe of no giant, liberal or conservative—and there were conservative giants on the faculty then too, albeit fewer in number. Geoff was conservative, in the true and now oh-so-rare sense of that word. A man who believed in the conservation of core principles, those worthy of a decent and free society. In stark contrast to his colleagues, all tangled up in the supposed complexity of the matter before the faculty that day, Geoff saw past all that. As always, he spoke succinctly: “The matter is simple. First, it was blacks, then Jews. Irish, Italians. Now gays.” The discriminating entities should be banned from campus. And Geoff voted that way. Before I graduated in 1978, the measure passed.

I was my class representative to the faculty that year. And I am proud to say it was my two mentors, Geoffrey C. Hazard, Jr. and Robert M. Cover, who were the strongest advocates for the dignity of all people when this matter came up. Two great scholars of civil procedure, whose approach to that subject was so dissimilar one could plausibly wonder if they were writing about the same thing. Geoff, a Republican and Bob all but an anarchist. Both were alumni of Columbia Law, where Bob had been one of the students occupying Columbia’s offices in 1968. Geoff was not there then, but had he been, he would not have been sitting in with Bob—of that I’m sure. Both were somewhat outliers on the Yale faculty, albeit in very different ways. The liberal giants wanted to rein Bob in just a bit, so they might more easily call him their own. As for Geoff, he did not see them, they knew, as most of legal academia did—as towering figures whose every pronouncement merited the deepest respect. They’d have wished that were different, but they knew it would never be. So he was an irritant, too sure of himself, a man who went his own way, and they kept their distance, which did not bother Geoff at all. What they did not know and could not have imagined was the enormous respect the arrogant irritant and the near-anarchist

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<sup>†</sup> Professor of Law, Boston University.

had for one another. In fact, they read and admired each other's work and respected each other as men.

I knew because I was close to them both, a fact in itself that almost no one on the faculty could quite understand—first because the two were so different from one another, and second because they had trouble imagining what either of them saw in me: a disco dancing working class Brooklynite who knew almost nothing of grammar and very few big words. Not obvious Yale material, to say the least.

I met Geoff the first day of my law school career. I was late to school that first day, having noticed half way to the campus from my Orange St. apartment that I had left my textbook home. My first class was Civil Procedure with Professor Hazard, who had a formidable reputation as a tough guy, but I knew nothing of that then, having chosen to live off campus, which left me shut out of all the pre-start-of-school gossip. When I got to school I peered into the classroom thru the glass in the door and saw on the podium a non-smiling man with posture stiff as a board presiding over students who looked terrified. Normally, I'd have walked in—in Brooklyn lateness was no sin—but the mood I sensed through that window told me not this time. So I waited outside the door and when Professor Hazard finally exited I accosted him and started spewing forth in my Susan rambling way the story of my being late. And as I talked this man peered down at me with a clear message in his eyes: "You're making a fool of yourself. Grow up." Message received my story began to peter out until I stopped mid-sentence, standing now silently before this man. He said nothing for a good 10 beats, letting his message sink in deep. And then he spoke. "Make my class on time." He then turned and walked away.

He had me from that not-hello. This man had held a mirror up that helped me see myself: his eyes, 10 beats. 5 words. I knew right then this was a man who could teach me much, a man whose respect was worth winning as it would come, if it came, not from sucking up or playing weak but from growing up and being strong.

And so I set out to meet the challenge he had placed before me that first day. I did not try and change to impress him. When I did not understand I said so surely and directly, and when I had a point to make I spoke that way too. Despite my ignorance of grammar, in the second term of my first year I signed up to do a writing project under his tutelage, this tyrant who unlike his colleagues failed students who did not know their stuff. I took every class he taught.

By the end of my three years at school I thought of Geoff and Bob as my friends. Bob and I shared more in common. My politics were and are as left as his and we were both Jews, spent Jewish holidays together and shared a Jewish sensibility to being other in a Christian world. Geoff was a Republican and had been raised a Quaker, later joining the Episcopal Church. Far from an outsider, he seemed more than "of the establishment," he seemed to personify the establishment itself. But Geoff and I were more like each other than Bob and I.



Neither of us suffered fools lightly. We could be cutting and dismissive and could not be swayed, cajoled or shamed out of a position when we knew we were right—or more right than those on the opposing side. Geoff was amused by how few of our sentences got completed in conversation. He would cut me off as soon as he got the point and move on to what followed and I would cut him off just as much. It made working with him a joy.

Not having shed my Saturday Night Fever air, which still lingers to this day, I had trouble getting a job after law school, something almost unheard of at Yale. But I did not ask Geoff for help. I did not want to intrude on our friendship and ask Geoff to vouch for me in a world that was unlikely to see me as he did. I'd manage on my own. After nine years of jobs that were more secretarial than legal, for example, Assistant to the President of the ABA and CLE director, not having clerked or worked in a big law firm or done anything a would-be law professor should have done, I decided I wanted to join academia. Now it was time to ask for Geoff and Bob's help.

I had stayed close to both these men in the nine years since graduating from law school and neither had criticized my strange job choices, neither had told me to clean up my act, be more "professional." Both let me be.

When I called Bob he said "It's about time. I've been waiting for you to decide. I will call Tom Krattenmaker right now, his buddy at Georgetown, whom Bob was sure would help. I tried to tell Bob that Tom knew me and thought me a lightweight, but Bob would have none of it, until, that is, he talked to Tom. "Nothing I said had any effect on the man," Bob told me right after he'd placed that call. Unlike Geoff, Bob could never quite understand that the world did not see me as he did. Geoff, more worldly wise, knew calling around would do little good with my unimpressive resume combined with my so Brooklyn behavior. And, unlike Bob, he knew what the Georgetown faculty thought of their CLE director. In fact, a few years before Geoff had been invited to give a named muckety-muck talk at Georgetown; he told his invitees that he wanted me at the small dinner where the big shot faculty would get a chance to talk with Geoff. They were appalled, but he insisted and sat me next to him to the great chagrin of the others present at the dinner that night. More, when he saw how they refused to acknowledge my presence, look at or speak to me, he turned his chair toward me and spent the rest of the dinner speaking to me alone, which, of course, infuriated his hosts.

When I called Geoff to say I wanted to enter academia, he said, "Let's write a book."

And it was that book that got me my first teaching job. With one call from me and with no hesitation Geoff lent me all his credibility. Linked me to him, giving me an air of respectability, probity, a public pedigree, which would all help to balance out how not of the cloth I seemed.<sup>1</sup> By forever linking my name to his, he changed the course of my life.

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1. GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* (1990).

And for his act of generosity and faith in me, he demanded nothing of me in return. He never once asked me to behave myself, even though throughout my career what my many critics in academia called “my style” was despised and closed many doors that might otherwise have opened to me. Even more important, instead of expecting deference from me in private or public, he reveled in my continuing to call him out when I thought him wrong. I did not like how much expert witnessing he did because too often I thought he was being too clever by half. Finding some plausible argument to support a position unworthy of his or anyone’s support.

Instead of standing silently by when that happened, I would call to tell him how I saw through the nonsense he was spewing forth on behalf of some law firm that had hired him and this never ceased to amuse and delight him. He enjoyed having someone around who’d call him out. These disagreements stayed between us until the case that has come to be known as *Amchem*, but which we first knew as *Georgine*.<sup>2</sup> The case involved one of the biggest, if not the biggest, class action settlements to be proposed up to that time, purporting to resolve the claims of thousands upon thousands of people who had become, in many cases, deathly ill from exposure to asbestos and the family members of those who had died from such exposure. In order to increase their take in the settlement, the class action lawyers had kept their own clients out of the big settlement, arranging to settle those cases separately, which would yield much more money for the lawyers. The question for the trial court and ultimately the United States Supreme Court was whether that carving out of their own clients made the lawyers unfit representatives of the clients in the class for whom they’d negotiated a less favorable deal.

Geoff, who was hired by those plaintiff lawyers to opine on the ethics of the matter, said the arrangement was not disqualifying. A plaintiff’s firm opposing the deal called me to see if I agreed. There were many reasons for me not to take this matter on. I had never testified as an expert witness before. I knew nothing about class actions, was not a professor of civil procedure and had no practical experience lawyering. But I said yes, as I later explained in an article about the case,<sup>3</sup> because Geoff was on the other side and in a matter of this much import I felt an obligation, as we were so closely connected, to try and speak for the side I thought was right. Geoff could not have been more proud or pleased. And that was true years later, when once again in a matter I saw as important—the behavior of Enron’s lawyers—I again agreed to oppose his position as the expert for the other side.

And in both instances, with the passage of years, it is much easier to understand why Geoff took the positions he did. It’s the same reason he didn’t

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2. *Georgine v. Amchem Prods., Inc.*, 137 F.R.D. 246 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff’d* *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997).

3. Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1045 n.† (explaining this connection).

call Tom Krattenmaker or anyone else when out of the blue I announced I wanted to teach law. Geoff was a pragmatist with a clear view of the world and how it operates. My position in *Georgine* was ultimately upheld by the Supreme Court, but that has made no difference at all. The lawyers found a way around that decision and class actions today settle with lawyers putting their own interests above that of the classes they purport to represent every day. Geoff's point: As a practical matter, given the institutions involved, no matter what it's going to work this way. Similarly, many top tier law firms behave today much as Enron's lawyers did, especially given how the courts and Congress have both made it harder to charge lawyers as aiders and abettors.<sup>4</sup>

I will not write here of the many times Geoff helped me when I was in despair because of some personal trial. Suffice it to say, he had a generous and loving heart and was all a friend could be. I cannot help but mention, however, how much he loved his many children and grandchildren. One could hear it in his voice as he spoke. And then there was Elizabeth, his wife, whom, if anything, he loved even more. He was blessed to have found her and blessed again by the joy and support she provided him in their many years of marriage.

Geoff did not tell me that his health was failing. I found out only after he died that he'd been in hospice for a while. This broke my heart, although it was apparently what he wanted. I would so much have liked to say goodbye, to tell this man, whom I thought of as a second father, how much he'd changed my life, how much he taught me, and most of all how much I loved him for being the titan he was among men. He knew these things of course. But I so wish I'd been able to say them to him again, once more, before he passed.

I miss him very much and will forevermore.

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4. See HAZARD & KONIAK, *supra* note 1, at 189–234 (5th ed. 2010).

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## A Man for the Situation

EVAN LEE<sup>†</sup>

I met Geoff Hazard in Fall 1983, when I took two classes from him, Advanced Civil Procedure and the Legal Profession (roughly our Professional Responsibility). I was more looking forward to the Civil Procedure class—Civil Procedure had been my favorite subject in my first year. But it's the Legal Profession class that more sticks with me.

Geoff taught the class out of the Model Rules of Professional Conduct, partly because he had largely written them,<sup>1</sup> and partly because it was the concepts rather than the pinpoint rules that held more pedagogic value. And of course one of the most important concepts is that a lawyer may not accept a representation which places him/her in conflict with a client.

Yet think of how many times people who are nominally on the same side have potentially divergent interests. When a corporation is in financial trouble, the officers, rank and file employees, shareholders and creditors have sharply diverging interests. The partners in a law firm or medical practice. An insurer and its insured. All these individuals have potentially conflicting interests, and so they may need their own lawyers.

If there's enough money involved, there's no problem. Lawyers for everybody! But what about when there isn't a lot of money involved? Think about family law. Every member of the family can have potentially divergent interests. But typically there's not going to be enough money involved to make that practical.

Geoff used to say that in those situations what might really be needed is not a lawyer for every client, but *a lawyer for the situation*. Make full disclosure to every person involved and give them their options. Heretical as it may sound, Geoff saw that as the most pragmatic solution to a ubiquitous problem. It wasn't right for every situation, but when it was the *only* practical solution, it was the *best* solution.

From my vantage point as a student, and later as a colleague, Geoff had three main values: pragmatism, "technical virtuosity," and decency. I'd like to say a word about each of these values.

When I got to law school, I was an ideologue. Ideologies were the most

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1. He served as Reporter to the American Bar Association Committee on Evaluation of Professional Standards, commonly known as the "Kutak Commission" after its chairman, Robert Kutak.

interesting thing to me, the sexiest thing, and I was initially attracted to the professors whose lectures hewed to their well-defined ideologies. Geoff wasn't that. He offered taxonomies and typologies, but they were descriptive, not prescriptive.

What I learned from Geoff was how to take stock of a situation and move forward. Don't impose your own pre-conceived template on the situation—see it for what it is, and figure out how to help. He told me, “The definition of a lawyer is someone who can walk into an ongoing meeting absolutely cold, having no idea what they're talking about, and within fifteen minutes more or less understand the dynamic and be able to make a contribution.” You don't walk in and say, “I'm the lawyer, and I'm going to say what lawyers say.” You read the room and adjust your mental frame to what's actually going on. And there were many times, especially in administration, that this piece of advice really helped me.

Technical virtuosity: such a felicitous phrase, isn't it? It really caught my attention because it would seem that “technical merit” and “moral virtue” are apples and baseballs—you wouldn't dream of marrying the two concepts. But Geoff always had that totally unique way with words, and whenever he said “technical virtuosity,” it was with a wink and a wry smile.

But there was never any doubt: Geoff held craft essential to professionalism. There was a right way to do things—address all key points, check all references, proper attributions for everything. Write well and speak well. Turn square corners.

When he would speak of reporters of ALI restatements or projects, or when he would speak of judges—ones he particularly respected—they always had two things in common. They had great judgment and were technically virtuous.

To say Geoff was a pragmatist and a stickler for technical merit is not to say that he didn't have political or moral beliefs. Of course he did. Some years ago there was a push to get the ALI to condemn the death penalty. (The original Model Penal Code hadn't taken a position on it.) He didn't think it was a good idea. He told me, “Look, any decent person considers the death penalty an abomination.” But he said the ALI didn't have any unique insights, and he didn't want to dilute the ALI's credibility on more technical matters where it DID have unique insights. Geoff was a highly decent man, and nothing was more important to him. But he never acted as if he was the only one who knew decency when he saw it.

He was decent to the end. Just a few months ago, right before Geoff and Beth were about to move back to Philadelphia, I asked whether I could call on him at their house here in San Francisco. The house was completely packed up in boxes, and it was going to be highly inconvenient. But he said, “of course.” And Beth, gracious as always, found a little table and a couple of chairs for us, and Geoff and I had a wonderful chat. I knew it was probably going to be my last chance to see him because neither one of us was going to do much traveling. He knew how important it was to me, and he went out of his way to

accommodate me. A highly decent gentleman.

In the end, although Geoff was a lawyer, a teacher, a scholar, an executive director, a dean, I don't think he rigidly identified himself with any one of those roles or positions. He was a man for the situation. He was my teacher, my colleague, and my friend, and I will miss him.

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# Remembering Geoff Hazard

JOHN LEUBSDORF<sup>†</sup>

During my first year of law school, my Civil Procedure teacher suggested that we read Geoffrey Hazard's article on indispensable parties.<sup>1</sup> Like most of his work, combined historical perspective with incisive analysis that showed just what the procedural problem was and how courts had confused it. It helped to replace previous attempts to sort parties into fixed categories with a functional approach focused on the practical consequences of joining absent parties to civil litigation or proceeding without them. And it was typically influential. Only a few years later, the rulemakers amended Federal Rule of Civil Procedure 19 along the lines of Geoff's approach.<sup>2</sup> After Geoff and others had done their scholarly work, it was no longer possible to think along the old lines.

The law of indispensable parties was not the only law that Geoff helped to envision. He served as Reporter for the Restatement Second of Judgments, which shaped both the law and the terminology of what we now (thanks to it) call claim and issue preclusion.<sup>3</sup> He wrote (among a myriad other illuminating publications) a seminal article on personal jurisdiction.<sup>4</sup> And when it came to Professional Responsibility, he himself became virtually an indispensable party in the reshaping of legal ethics into the law of lawyering and the inclusion in that law of much civil and criminal law that other scholars had tended to overlook.<sup>5</sup> He was the main Reporter for the original ABA Model Rules of Professional

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<sup>†</sup> Distinguished Professor of Law, Rutgers Law School. I appreciate the suggestions of Lynn Montz, Susan Koniak, and William Simon.

1. Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961) [hereinafter Hazard, *Indispensable Party*].

2. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 366–71 (1967) (describing the history and rationale of the amendment). Both Geoff and the rulemakers also relied on John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327 (1957).

3. RESTATEMENT (SECOND) OF JUDGMENTS §§ 13–29 (1982). Hazard succeeded Benjamin Kaplan and David Shapiro, who got the Restatement under way as its original Reporters but withdrew early in the project. Herbert Wechsler, *Preface*, 66 CORNELL L. REV. 401, 401 (1981).

4. Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241.

5. On this trend, see Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991). On the applicability to lawyers of criminal and civil law, see, for example, Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 675 (1981); Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701, 720 (1993) [hereinafter Hazard, *Lawyers and Client Fraud*]; Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987).

Conduct of 1983,<sup>6</sup> as well as one of their main revisers and commentators.<sup>7</sup> He was also the Reporter for the original ABA Model Code of Judicial Conduct of 1972. Having been an Associate Reporter for the Restatement of the Law Governing Lawyers, I can attest to his very active and influential participation in that project as Director of the American Law Institute. Scarcely a meeting—and there were innumerable meetings—took place without him.

My selection as Associate Reporter was only one of many ways in which Geoff helped me.<sup>8</sup> Soon after I started teaching, he sent a note welcoming my second article. And soon after I started work on the Restatement, he pressed me to join him as co-author of what had started as Fleming James on Civil Procedure and then become James and Hazard.<sup>9</sup> For no very good reasons, I resisted at first, but he persisted and prevailed. No doubt he hoped to share the burdens of revision with me but, typically for him, when an illness in my family prevented me from contributing much, he immediately volunteered to do almost all the work himself. He helped and mentored many others as well, as witness the many articles he co-authored with younger scholars.<sup>10</sup>

Geoff's great kindness was usually masked by a gruff exterior. He was the only person I ever heard inject profanity into the exalted proceedings of the American Law Institute, freely referring to "the damn conflict" or "the damn confidence." I was not surprised when, after I learned that he was seriously ill and sent him a note, he replied that he was fine.

In legal matters too, his hardboiled approach sometimes covered other aims, typically ethical ones. Commenting on mass tort class action, in some of which he had testified for defendants, he nevertheless concluded as a scholar that "[t]he proper issue is not whether defendants might go bankrupt, but whether they deserve to do so."<sup>11</sup> And during his long struggle to induce the American Bar Association to authorize lawyers to disclose their clients' ongoing fraud, he preferred to stress that any other rule would expose lawyers to suits by the victims of the fraud: "[A] rule allowing disclosure of client fraud was

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6. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 60–62, 61 n.72 (1986) (describing the history of the Model Rules and noting Geoff's rule).

7. GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* (4th ed. 2017); Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 *GEO. J. LEGAL ETHICS* 441, 441 n.1 (2002) (noting Geoff's membership on the "Ethics 2000" Commission).

8. I do not know whether Geoff or Chuck Wolfram, the Restatement's Reporter, first mentioned me as a possible Associate Reporter, but I could not have been chosen without Geoff's involvement.

9. FLEMING JAMES, JR., *CIVIL PROCEDURE* (1965). The second (1977) and third (1985) editions were revised by Geoff. I joined for the fourth (1992) and fifth (2001) editions, and Debra Bassett joined us for the sixth (2011) edition.

10. See, for example, Susan Koniak's reference to him as "my dearest friend, colleague, and coauthor" in Susan Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 *CORNELL L. REV.* 1045, 1045 n.† (1995), an article in which she took issue with his testimony, and the reminiscences in Symposium, *In Honor of Geoffrey C. Hazard, Jr.*, 158 *U. PA. L. REV.* 1283, 1283–1327 (2010).

11. Geoffrey C. Hazard, Jr., *Class Certification Based on the Merits of the Claims*, 69 *TENN. L. REV.* 1, 11 (2001).

necessary for self-protection.”<sup>12</sup> That was not necessarily his own main concern.

Not that his toughness was wholly a mask—he was criticized for his somewhat adversarial approach in his role as expert witness and consultant.<sup>13</sup> In the cases in which we both gave opinions, mine was almost always contrary to his, so I obviously disagreed with him, though that never impaired our friendly relations. Nor would I defend his having signed an opinion in the *Kaye, Scholer* case drafted by lawyers at the accused firm.<sup>14</sup> Yet to some extent this is an occupational risk. When leading Professional Responsibility experts have spoken with me, I have noted their willingness to charge any absent expert with venality, causing me to wonder what might be said about me in my own absence. Since experts have testified for pay, they have aroused suspicion, which will no doubt continue until we change the paid expert system.

Geoff had unusual skill in rendering opinions that would support the party retaining him while avoiding issues on which that party’s position was untenable, as indeed his critic Bill Simon has noted and condemned.<sup>15</sup> In *Georgine v. Amchem Products, Inc.*, for example, Geoff opined that the would-be class lawyers had not violated any professional rules, but said nothing about whether their various involvements made them appropriate representatives within the meaning of the class action rule—something I did not notice until well after the case was decided when he mentioned it to me.<sup>16</sup> Geoff undoubtedly made a good deal of money through his consulting and expert witness work, but it is less well known that he repeatedly testified without charge, typically on behalf of agencies seeking to discipline a lawyer or judge. And his testimony for a party did not prevent him from later taking a more dispassionate view.<sup>17</sup>

A master of legal analysis, both doctrinal and policy, and an accomplished legal historian,<sup>18</sup> Geoff sought to broaden his perspectives. He explored foreign

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12. Hazard, *Lawyers and Client Fraud*, *supra* note 5, at 720. For more on this controversy, see Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271 (1984) [hereinafter Hazard, *Rectification of Client Fraud*]; Michael Ariens, “Playing Chicken”: *An Instant History of the Battle Over Exceptions to Client Confidences*, 33 J. LEGAL PROF. 239 (2009).

13. William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1572–74, 1583–95 (2008).

14. Steve France, *Just Deserts: Don’t Cry for Kaye, Scholer*, LEGAL TIMES, Apr. 6, 1992, at 28.

15. Simon, *supra* note 13, at 1573, 1587, 1590, 1592. Simon’s article also criticized two other well-known experts.

16. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 297–98, 302 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff’d*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). I did not testify in this case, but wrote an amicus brief for a group of Professional Responsibility teachers on the side opposing Hazard’s. Later, we clashed in another important asbestos class action case. *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995), *rev’d sub nom. Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

17. In the case of class actions, see Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901 (2000); Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257 (1995); Hazard, *Rectification of Client Fraud*, *supra* note 12.

18. Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978); Harold Chesnin & Geoffrey C. Hazard, Jr., *Chancery Procedure and the Seventh*

legal systems,<sup>19</sup> wrestled with moral philosophy,<sup>20</sup> and even touched on law and economics.<sup>21</sup> It was he who added a chapter on the social and economic aspects of litigation to the Fleming James Civil Procedure text.<sup>22</sup> Always, his ultimate concern was pragmatic and functional: to develop rules that would make the law work better. Theory was to serve practice. That orientation enabled him to reach practitioners and judges as well as academics.

Geoff was a scholarly giant both in Civil Procedure and in Professional Responsibility. He somehow was able to be an incredibly productive author and a great teacher and colleague, while also taking on the administration of the American Law Institute and the American Bar Foundation, serving as Reporter for any number of touchy and time-consuming projects, and practicing law as a consultant and expert. And he was a kind man. His influence will be with me to the end of my own career as it has been from the beginning.

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*Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 YALE L.J. 999 (1974); Geoffrey C. Hazard, Jr. & Myron Moskovitz, *An Historical and Critical Analysis of Interpleader*, 52 CALIF. L. REV. 706 (1964); Hazard, *Indispensable Party*, *supra* note 1; sources cited *supra* note 5. These articles alone would have more than sufficed to make the reputation of any legal scholar.

19. GEOFFREY C. HAZARD, JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY* (2004); ALI/UNIDROIT *PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE* (2006), <https://www.unidroit.org/instruments/transnational-civil-procedure> (for which Geoff served as Reporter).

20. GEOFFREY C. HAZARD, JR. & DOUGLAS W. PINTO, JR., *MORAL FOUNDATIONS OF AMERICAN LAW: FAITH, VIRTUE AND MORES* (2013); Geoffrey C. Hazard, Jr., *Equality and Affiliation as Bases of Ethical Responsibility*, 61 LA. L. REV. 173 (2000).

21. Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983).

22. FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* 279–99 (3d ed. 1985).

# The Last Man Who Knew Everything

RICHARD MARCUS<sup>†</sup>

Hastings lost a tremendous resource when Geoff Hazard died. But he was a resource for much more than Hastings. Indeed, he was probably the most significant resource for American law, or at least those parts devoted to procedure, of the last fifty years. I want to try to pay tribute to both Hazard the Scholar and Hazard the man.

## HAZARD THE SCHOLAR

How can you say enough about Geoffrey Hazard as a scholar? As Steve Burbank put it in a collection honoring Geoff on his eightieth birthday, thinking of him reminds one of the old saying about the best and the brightest—when they assembled, the brainpower was so great that one had to look back to the last time Thomas Jefferson dined alone to find its equal.<sup>1</sup>

My comparison is a little different, but to the same point. About fifteen years ago, as Chair of the Appointments Committee, I introduced our enthusiastic recommendation that the Faculty appoint Geoff a Distinguished Professor and, recalling Aristotle (“The last man who knew everything”), I said that Geoff was “the last man who knew everything”—about law.

And that wasn’t all blather. For instance, when Richard Posner—no mean scholar himself—wrote an essay for the hundredth anniversary issue of the *Harvard Law Review* in 1987, he entitled it *The Decline of Law as an Autonomous Discipline: 1962-1987*.<sup>2</sup> Posner was President of the Harvard Law Review in 1962 and, as a prime mover in the Law & Economics movement, had played a prominent role in that decline. But I doubt he foresaw this future while he was still in law school.

Geoff Hazard got there first, however. In 1960, when he was in his second year as a law professor and all of thirty-one years old, Geoff was approached by the Walter E. Meyer Research Institute of Law to contribute a monograph for its effort

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1. Stephen B. Burbank, *Not Since Thomas Jefferson Dined Alone: For Geoff Hazard at Eighty*, 158 U. PA. L. REV. 1283 (2010).

2. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761 (1987).

to probe beyond the conventional in legal thought.<sup>3</sup> Along with many other things, including the first edition of his path-breaking civil procedure book,<sup>4</sup> Geoff produced a far-ranging study of the flaws in then-contemporary legal research on procedure, which foresaw not only what Posner reported on a quarter century later but also much more, such as the growing importance of empiricism in legal research.<sup>5</sup> Though that work was not published until 1963, most of the work was done in the summer of 1960,<sup>6</sup> when Posner had just finished his first year in law school.

By the mid-1960s, Geoff had been hired away from Boalt by the University of Chicago and had become Director of the ABA Foundation, which pioneered many empirical studies of legal matters. Along the way, he served as Reporter of the hugely influential Restatement of Judgments (Second). By the 1980s, after he moved to Yale Law School, he had become Director of the American Law Institute, where he presided over and deeply influenced projects affecting a huge array of legal fields, including several that had not even been recognized as legal fields when Posner was in law school and Hazard was getting going as a law professor. To list a few of them as examples proves the point: In the 1980s, he guided the ALI in fashioning its Principles of Corporate Governance, an extended effort in compromise and innovation.<sup>7</sup> Of course, he was a natural to guide the ALI's development of Principles of Transnational Procedure, but also headed up the ALI's development of projects on such diverse fields as Property, Restitution,

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3. The remarkable aspirations of this Institute are described in David Cavers book. See DAVID FARQUHAR CAVERS, "TO THROW LIGHT ON MATTERS WHICH WILL BE OF AID IN SECURING TO HUMANITY A GREATER DEGREE OF JUSTICE:" A HISTORY OF THE WALTER E. MEYER RESEARCH INSTITUTE OF LAW (John Henry Schlegel ed., 1997). As detailed in this book, Hazard was not the only young and exceptional scholar enlisted in this cause. Professor Herbert Packer of Stanford prepared a similar study of criminal law, his specialty. See *id.* at 67. But Packer tragically died in 1972, at age forty-seven. Had Hazard died that year, rather than in 2018, the legal profession would have lost enormous contributions on many topics. For procedure buffs, the Meyer Research Institute played a role later in the 1960s, when it supported research by Professor Maurice Rosenberg of Columbia Law School on the use of the pretrial conference in the New Jersey state courts. *Id.* at 123–24. It also supported a critically important empirical research project that led to the publication of WILLIAM GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM (1968), which laid the empirical foundation for comprehensive amendments to the discovery rules in the Federal Rules of Civil Procedure that went into effect in 1970.

4. See DAVID LOUISELL & GEOFFREY HAZARD, PLEADING & PROCEDURE (1962).

5. See GEOFFREY C. HAZARD, JR., RESEARCH IN CIVIL PROCEDURE (1963). This book is a joy to read for its penetrating analysis, but also for its wry commentary about the state of scholarship as the legal academy perched on the brink of the "law and . . ." revolution. Consider, for example, the following:

I think university legal researchers may have abandoned the exercise of the skills in doctrinal research in which they have been trained and at which they are expert in favor of adventures in non-technical methods, such as philosophical or psychological reflection, at which they are in varying degrees amateurs. I think this may be attributable to an uncritical adoption of the premises of "legal realism" without adoption also of the obligation to be "realistic" in a systemic and disciplined sense.

*Id.* at 57. With regard to faculty work more generally, he also observed that "many of those who have published are more concerned with having written something than having said something." *Id.* at 56.

6. See *id.* at v.

7. See *In Memoriam: Geoffrey C. Hazard, Jr.: ALI Director 1984–1999*, 40 A.L.I. REP. 1 (2018).

Suretyship, Torts, Trusts, Family Dissolution, and Transnational Insolvency.<sup>8</sup>

In the process, if not from the start, he developed such a breadth of view that I have no hesitation saying that he nearly *did* know everything about law, and I'm sure there's nobody else who will ever deserve that mantle in the future. Despite (or perhaps because of) that, he constantly cast his penetrating gaze over exceptionally broad horizons.<sup>9</sup>

#### HAZARD THE MAN

When I picture Aristotle, I do not imagine him as a folksy guy. To know everything, you probably have to have your head in the clouds. But that was certainly not the way of Geoff Hazard. When he died, it was extraordinary the volume of tribute within Hastings about things he had done for people during his time here. And it was equally extraordinary that he had been doing these things throughout the school—the tributes came from people at all levels of Hastings. For example, the initial proposal that the flag on the 100 McAllister Tower be flown at half-mast in honor of Geoff came from one who got to know him as a member of our security detail.

That breadth of contact also seems to have been a life-long trait. As evidence of that, I offer a tale from around 1962 told by Michael Tigar, one of the most famous Boalt Hall graduates (whose son is now a U.S. District Judge in San Francisco). Tigar was appalled by the McCarthy era pledge the California State Bar then required first-year students to sign, and went to the library and found a Supreme Court case called *Cramp v. Board of Public Instruction*<sup>10</sup> that said one could not constitutionally be required to swear never to have given “aid, support, advice, counsel or influence to the Communist Party.”

Armed with this find, Tigar wrote a memo he intended to distribute to first-year students, saying that he would not sign the pledge and urging them to refuse also. That's where Geoff makes his appearance:

Before I sent the memo, I made an appointment with Professor Geoffrey Hazard, who taught civil procedure and seemed to be quite active in the California bar. I took volume 368 of the *U.S. Reports*, where *Camp* was reported, with me. I put the bar form and the case before Professor Hazard. He read through both of them, looked up, and to my surprise said: “You are absolutely right. What do you want me to do?” I said, “Help me.”

Hazard was then and is now witty, articulate, and given to grand gestures. He picked up the telephone and dialed the general counsel of the California bar, whose name I no longer remember. Let's call him Bill.

“Bill, this is Geoff Hazard. I am sitting here with one of my students and we have

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8. *See id.* at 4.

9. One of Geoff's recent books, published when he was in his eighties, surveys and comments on the sweep of philosophical, religious, and moral development, but also brought these intellectual currents to bear on contemporary events. *See* GEOFFREY C. HAZARD, JR. & DOUGLAS W. PINTO, JR., *MORAL FOUNDATIONS OF AMERICAN LAW: FAITH, VIRTUE, AND MORES* (2013).

10. 368 U.S. 278 (1961).

been looking at this form you make all first-year law students sign.” Hazard read the question aloud. “I also have a Supreme Court case right in front of me—unanimous, by the way—that holds that question cannot be asked. Denies due process, because it’s too vague. Now, Bill, the question is, are you going to delete the question or are we going to have a dispute about it? I have to support these students because they are right about this one.”

I was amazed at the alacrity and commitment of Hazard’s response. . . . This vignette showed why I came to law school.<sup>11</sup>

This sort of thing was repeated again and again within the Hastings community.

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Hastings will not see his like again. I fear America will not see his like again. It is an honor to be permitted to honor Geoff Hazard.

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11. MICHAEL TIGAR, *FIGHTING INJUSTICE* 44–45 (2002).



# My Memories of Professor Hazard

KOICHI MIKI<sup>†</sup>

It was autumn or perhaps winter in 1991 when I first met Professor Hazard, who later became a most instrumental mentor for me. He had been invited by several Japanese universities to present his lectures to scholars of civil procedure gathered from universities in Tokyo and the neighboring prefectures. That was his first visit to Japan. He was staying about a week in Tokyo. When looking back from the view of the present, I had a special fortune to be personally asked by one of the professors who invited him to Japan to take care of him during his stay, given my status as a young scholar possessing interest in American civil procedural law. Back in those days, the eyes of most Japanese in the domain of civil procedure were turned to German and French laws.

I called at his hotel every morning, and accompanied him both going and returning to the seminar venue. At the hotel lobby, in the taxi, in the subway and at the seminar hall before and after his lectures, we discussed various topics including legal theories in both the United States and Japan. Remembered in this way now, it was quite an enjoyable and intellectually vibrant time. To my delight, he always praised my arguments as sharp and deep. As our relationship developed, he also came to talk of his days of boyhood in Missouri. In the train heading to Narita International Airport, on his last day in Japan, I told him that I hoped to study at a law school in the United States. I asked him to write a letter of recommendation to some universities in California. At that time, I longed for the free style culture of the West Coast. He replied with a severe face, “My answer is no.” I was disappointed by his answer, which was contrary to my expectation. But, he continued: “Because, I would like to guide you myself at Yale in New Haven.” This was the moment Professor Hazard became the mentor of my life. At that time I didn’t even know where New Haven was located.

In April, 1993, I arrived in New Haven from Tokyo. As soon as some small business at the student affairs center was complete, I visited the office of Professor Hazard. When I knocked on the door of his office, an assistant emerged from the adjoining room and said that he was absent. She asked me, “Would you like to look inside of his office?” I nodded and she unlocked the office. The room was large and tidy. Casting my eye around the room, I found mountains of copies of his new textbook, which had just arrived from the publisher, piled high up on the side desk. The assistant snatched one of them and

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<sup>†</sup> Professor of Law, Keio University, Tokyo, Japan.

handed it over to me. I asked her with trepidation, "Is it OK?" She replied with arching laughter. "There's so many. What's the matter?" I took it and held it in my arms.

Several days later, I again visited the office of Professor Hazard. He welcomed my arrival to New Haven with a soft smile. After a bit of chatting, I took his new textbook out from my bag. I joked that I had stolen the textbook from his office. He made a serious face and said in a low voice, "That's a crime. Return it now." I disgorged the book while turning a little pale. He maintained a serious face, took the purloined book, and picked up his ballpoint pen on the desk. He then wrote a dedication and his signature on the back cover, and gave it back to me flashing a wicked smile. The textbook, of course, is still on my bookshelf now.

In this way, I started my life studying-abroad as a visiting scholar at Yale. In September began the Civil Procedure class that Professor Hazard taught. I always occupied a seat right in front of him, in the first row. He used plain English, but I could not catch half of it, as a result of my poor English listening comprehension and lack of vocabulary in those days. In addition, the topics of the class were only related to technical issues of jurisdiction that were boring for a young scholar from Japan who burned with enthusiasm to study. As a result, I used to go to Professor Hazard after class and come up with something to question which had nothing to do with the class. He always listened to my questions pleasantly and patiently.

The topics I often asked him about then concerned the comparison of legal theories and case law in Japan and the United States. It was hard to find a professor or lawyer capable of understanding the nuances and implications of that kind of question accurately, and in turn formulating an appropriate answer from a comparative legal point of view. This is due to the deep understanding and knowledge needed of both common law and civil law. He was the only foreign scholar who always gave me a satisfying response. It was often in the hallway to his office from the classroom that we engaged in arguments on such topics. At the time, he always held me round the shoulder. His way of calling me was "Miki." Although he knew my first name is "Koichi," he simply said that "Miki" is easy to pronounce. As time passed, I don't exactly remember when it was, he changed to calling me "My boy." I was already over the age of thirty and was no longer a boy in any sense at that time. However, I was happy when he called me that.

In the early spring of 1994, Professor Hazard told me that he was going to move to the University of Pennsylvania Law School. At that time, he was serving as the Director of the American Law Institute. He was having to go back and forth between New Haven and Philadelphia each week, and some of his family lived in or near Philadelphia. He asked me whether I wished to move to Pennsylvania with him. I thought a little, and answered that I'd like to stay at Yale. More than one year of my stay already had passed, and I had become completely accustomed to Yale Law School and the town of New Haven. Thus,

the opportunity to receive instruction from him directly after my second year at Yale was lost.

Fortunately, however, our exchange did not break off after all. I continued to live in New Haven for two and a half years in total. After Professor Hazard moved to Penn Law School, I visited Philadelphia several times to meet him. Moreover, in the winter of 1995, Yale Law School invited him for intensive lectures for the students of that academic year. My wife was an LLM student at that time. She says that she remembers he and I having a long chat in front of the students on the platform after his lecture.

In August, 1995, I finally went back to Japan and returned to fulltime teaching as an associate professor at Keio University in Tokyo. On May 31, 1997, as luck for legal society in Japan and myself would have it, the Japanese Association of the Law of Civil Procedure officially invited Professor Hazard to Tokyo as a special guest at the opportunity of the annual meeting. I was nominated by the Association as the interpreter for the lecture and the translator of the report manuscript as well. At that time, the American Law Institute, where he was still the Director, had launched a major project called “Transnational Rules of Civil Procedure,” and he took up the subject for his lecture, which was entitled “Harmonization of Procedural Law.” His lecture commenced at 4:30 p.m. He went up upon the platform and took his seat, and I sat down right next to him. The seats immediately in front were completely vacant, but behind the front rows it was full of people. Among them, sat a number of authorities in our academic society. While a staff member adjusted the microphones, the hall was silent as a grave. Then, he brought his mouth close to my ear and whispered. “Nothing different from students, isn’t it? Everyone wants to sit in the back seats.” Immediately after, my impolite laughter echoed loudly in a silent hall, and I felt deeply awkward. His magnificent lecture at that time appears in a bulletin of the Association by my translation. My howl of laughter isn’t transcribed, of course.

Professor Hazard visited Japan several times after that. In some cases, it was for a lecture invited by some university, as he was the most famous professor of civil procedure in the United States. When he would come to Japan for a lecture, I went to the venue without fail. He always introduced me to the audience at the begging of the lecture. “I’m very glad Professor Miki, my former student, is in this hall.” In some cases, it was for missionary work on the “Transnational Rules of Civil Procedure” project, as Director of the American Law Institute. I was designated as an official Japanese translator of the Rules, along with the translators for other languages. When meeting in such occasions, he always approached me with a full smile, hugged me tight by both arms, and whispered those familiar words: “My boy.” He kept calling me “my boy” even when I was in my forties and fifties. It was embarrassing a bit at those ages, but still made me happy.

I served as the representative of the Japanese government for the working group of arbitration and conciliation of the United Nations Commission on

International Trade Law (UNCITRAL) from March 2000 to July 2010. During that time, I visited New York for at least two weeks almost every year. It was around 2005 or 2006 when I received an email from Professor Hazard. It said that he would visit the United Nations in Manhattan during the UNCITRAL meeting and hoped to see me at that occasion. He was interested in the process of discussion and compromise for establishing transnational rules at UNCITRAL. After the UNCITRAL meeting, we ventured to the Yale Club near Grand Central Station, at his suggestion. I remember that he ordered a hamburger as usual. His lunch was always simple.

As Japan entered the twenty-first century, the introduction of collective litigation systems such as American class actions or European group litigation started to be extensively discussed, both in political and academic scenes. I came to be involved in the legislative process as chairperson of several councils of the government and a research representative especially regarding overseas systems. In June 2007, I visited UC Hastings College of the Law as an adviser of a research team of the Japan Federation of Bar Associations. We interviewed Professor Hazard regarding U.S. class actions. His answers were enlightening as usual. The most useful instruction for us was his assertion that the U.S. class action is a system for settlement, not a system for judgment.

In 2012, I acquired the right for a half-year sabbatical. I asked my friend Professor Richard Marcus for advice regarding my plan of research. He kindly arranged for my status as a visiting scholar at UC Hastings College of the Law from October 2012 until March 2013. After twenty years since my time at Yale, I was once again to study abroad—and once again Professor Hazard happened to be there. While there, I pleaded with him to arrange a meeting with Justice Sonia Sotomayor of the U.S. Supreme Court. My wife was, and still is, a judge in Japan and was an LLM student in 1994 at Yale. When she finished her LLM course in May 1995, she was introduced to Ms. Sotomayor as a promising young female judge on the U.S. District Court, who was also a graduate of Yale Law School. My wife was admitted as a short-time trainee under her. Time passed, and my wife hoped to meet again with Ms. Sotomayor, who had then become a Justice of the U.S. Supreme Court. However, they had lost contact over the years. I related this situation to Professor Hazard. Only a few days later, a meeting with Justice Sotomayor was planned, like a rabbit taken from a magic hat. My wife and I met Justice Sotomayor in her chambers at the U.S. Supreme Court in Washington, D.C. on January 5, 2013. That would have been impossible without his special arrangement.

My last episode with Professor Hazard was recent, and I did not even expect it at all until it happened. Japanese universities generally have a kind of seminar class which is called “zemi,” derived from German. Unlike ordinary seminars, in a “zemi,” students learn a certain subject under the instruction of a certain professor for usually two years. The students have one “zemi” in their chosen field during their undergraduate years. The students and the professor in the “zemi” jointly hold intensive off-site camps for study, as well as drinking

parties, sports events and so on, in addition to regular class on campus. Accordingly, a special kind of lasting comradeship develops between the students and their “zemi” professor. A “zemi” class is typically referred to simply under the name of the supervising professor, for example, my “zemi” is called “Miki-zemi.” Even after the students graduate, it is usual that exchanges between students and their professor continue, often for a lifetime. The same goes for “Miki-zemi,” and it has an alumni association with more than eight hundred members. On November 25, 2017, the “Miki-zemi” alumni association organized a large party to celebrate the twenty-fifth anniversary of “Miki-zemi.” Toward the end of the party, video messages from graduates who were unable to attend that day, as well as professors and friends from overseas, were displayed on the screen, one after another, as surprises. Professor Hazard appeared at the end. It was a photograph of him and a written message, not a video message. One of the members of the alumni association had written a letter to him secretly for me, and he received the message from him through exchange of emails about a month before the party. His message was not so long, but was warm-hearted as usual.

It was only one month and a half after the party that Professor Hazard passed away. I do not know what his state was like when he wrote the message for me, however, his message still touches me deeply. I will always cherish our memories and time together, and his touch will forever remain on my career.

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# Tribute to Geoffrey Hazard

THE HONORABLE ANTHONY J. SCIRICA<sup>†</sup>

It is with unbounded admiration that I join in these wonderful tributes to an extraordinary man, Geoffrey Hazard. A few years ago, I joined several friends in a tribute to Geoff published in the *University of Pennsylvania Law Review*.<sup>1</sup> It is entirely fitting that Geoff be similarly honored by the *Hastings Law Journal*. Geoff was a treasure of integrity, incandescent insight, and wise counsel. And he was an incomparable friend.

It is difficult to overstate the profound influence that Geoff has had on the state of the law during his distinguished career as legal scholar, rule-maker, and former Director of the American Law Institute. But I would like to relate some personal stories.

If you ever played tennis with Geoff, the first thing you noticed was that he was a good athlete. The second thing you noticed was that he had no apparent weakness. The third was that he played to win. And the last was that he was generous, gracious, and fun to play with. And if you played mixed doubles—as we often did together with our wives, Beth and Sue—all of the above also applied.

If Geoff had been a professional tennis player, he would have won multiple grand slams on different surfaces on different continents, having displayed unmatched skill, unflagging stamina, and extraordinary finesse, all the while earning the respect and admiration of younger players, as he nurtured their careers.

In short, he would have been one of those magnificent players who transforms the game.

Our friendship began soon after Geoff left Yale Law School to join the law faculty of the University of Pennsylvania, and he and Beth moved to Philadelphia. We had known each other from our service on the Supreme Court procedural rules committees, Geoff on the parent Committee on Rules of Practice and Procedure, and I on the Advisory Committee on Civil Rules. Our

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<sup>†</sup> Senior Circuit Judge, United States Court of Appeals for the Third Circuit; Member, Council of the American Law Institute; Senior Fellow, University of Pennsylvania Law School. Judge Scirica delivered a version of these remarks to the Council of the American Law Institute, January 18, 2018, and at the University of Pennsylvania Law School, January 27, 2018. See Anthony J. Scirica, Judge, Third Cir., Memorial Service for Geoff Hazard at the University of Pennsylvania (Jan. 27, 2008), [https://www.ali.org/media/filer\\_public/38/78/38783ea9-433c-4eaa-b106-75930718d5a2/anthony\\_scirica-pennlaw\\_memorial.pdf](https://www.ali.org/media/filer_public/38/78/38783ea9-433c-4eaa-b106-75930718d5a2/anthony_scirica-pennlaw_memorial.pdf).

1. See Anthony J. Scirica, Tribute, *A Wise Man of the Law*, 158 U. PA. L. REV. 1301 (2010).

friendship deepened when I was appointed chair of the Committee on Rules of Practice and Procedure, commonly known as the Standing Committee.

At that time, I was an adjunct professor at Penn and had the good fortune to have been invited by Professor Stephen Burbank to join in his seminar on civil procedure. When Steve went on sabbatical leave, Geoff suggested that we teach the seminar together. The pairing stuck, and Geoff and I went on to teach that seminar together for almost two decades. When Geoff and Beth moved to San Francisco and Geoff joined the law faculty at Hastings, we had the providential good fortune to be joined by Professor Catherine Struve, whom Geoff greatly admired. Geoff continued to teach the seminar with us by video conference.

Year after year, students were quick to recognize their great good fortune. As his former student Michael Fitts put it, Geoff had “a serious and penetrating style that deeply challenged the class and brought the subject matter to life.”<sup>2</sup> He effortlessly wed doctrine with practice, drawing on history and deep principles of the law without overcomplicating matters. An apostle of rigorous thinking and clear exposition (as he used to say, “describe the metes and bounds”), Geoff took time to help students refine their analytical skills. He was patient, welcoming, and generous. The students were thrilled. On a recent occasion, Geoff remarked, “I have always cherished the opportunity to teach. I have also cherished the opportunity to learn.”

Geoff was also a rule-maker. For several years, we served together on the Standing Committee. No member made a greater contribution. He was patient and sympathetic, and, when necessary, constructively critical. His advice was precise and essentially pragmatic, informed by decades of rigorous thought on a multitude of topics and first-hand experience as a lawyer, scholar and educator. As with the Restatements he guided to fruition that profited from his insight and care, Geoff’s learning, intellect, and unerring judgment were invaluable. And his value was appreciated and recognized when, at the end of his term of service, Chief Justice William Rehnquist appointed Geoff as consultant to the Standing Committee.

The range of Geoff’s interests was astounding. But none was more important to Geoff than the administration of justice, and building and strengthening institutions that safeguard the rule of law. In this regard, he had a sharp eye on our constitutional system’s separation of powers and checks and balances, and on the proper but indefinite lines dividing authority between our three branches of government, so essential to the functioning of a stable democracy.

For fifteen years Geoff was the director of the American Law Institute (ALI), which has long been recognized worldwide as a uniquely valuable institution. Under Geoff’s leadership, the ALI thrived as a “cooperative venture

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2. Michael Fitts, *Tribute, A Time-Honored Model for the Profession and the Academy*, 158 U. PA. L. REV. 1289, 1289 (2010).



of concerned professionals” from across the law, engaging “matters of public interest.”<sup>3</sup> Geoff recognized that there was “no single viewpoint—no Olympian height—from which to contemplate a legal system in a comprehensive way.”<sup>4</sup> So he encouraged lawyers from all corners of the profession to engage what he called “operative law”—that is, “with the legal system itself—inside the sausage factory.”<sup>5</sup> The results spoke for themselves. Other countries considering whether to create a similar model asked Geoff for advice and counsel. In recent years, Geoff was sought out by legal institutions in the European Union and in Latin America.

A few years ago, we travelled to Buenos Aires, Argentina, where we participated in several conferences with Argentine judges and lawyers. Of particular interest to the Argentine legal community was the role and experience of the American Law Institute. And then, in 2009, the Chief Justice of Argentina convened a Conference of the Supreme Courts of the Americas in Buenos Aires. Geoff and I were invited.

Geoff and I collaborated on a paper that was presented to the Conference, entitled “The Constitutional Role of the American Law Institute.”<sup>6</sup> Geoff gave a stunning talk at the conference, explaining the role and value of the American Law Institute. The paper was later published abroad. I include the concluding paragraphs, which capture how the ALI was able to masterfully bridge and connect the worlds of the academy, law practice, and the administration of justice:

The [ALI] project technique brings about a convergence of viewpoints and experience from the various professionals in the law—judges, lawyers, and academicians. It can be said that the judges bring to the deliberations their sense of responsibility to the law and knowledge of administering the law; that the lawyers bring their knowledge of the practical working of the law and the viewpoints and interests of those affected by the law; and that the academics contribute their familiarity with legal theory and legal history and the tradition of legal scholarship.

However, there is no division of responsibility and competence, but rather mutual appreciation and respect. All participants are expected to leave their professional affiliations “outside the door,” whether the interests of clients of the lawyers, the interests of judges in their positions in the judiciary, or the interests of academicians in their academic reputations.

The product of the projects—the Restatements and the Principles in various subjects—represents the convergence of intellectual effort among the branches of the professions. The Restatements and Principles have achieved a respected reputation in the judicial and professional community outside the ALI. The final texts are not legally official or obligatory, but rather educational and persuasive.

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3. Geoffrey C. Hazard, Jr., *The American Law Institute Is Alive and Well*, 26 HOFSTRA L. REV. 661, 664 (1998).

4. *Id.*

5. *Id.*

6. Geoffrey C. Hazard, Jr. & Anthony J. Scirica, *The Constitutional Role of the American Law Institute*, in CONFERENCE OF THE SUPREME COURTS OF THE AMERICAS 463–68 (2009).

Over the years since the ALI was founded, its work has come to be accepted as very reliable, both within the United States and in the international legal community.

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The work of the ALI has brought together members of the judiciary, the practicing legal profession, and the law faculties in a common purpose of improving and refining the law. Pursuing that purpose has become of increasing practical importance as the rate of social change has accelerated in the modern era. The work of the ALI therefore has never been more significant in practical terms. It represents an unofficial but serious and respected “voice” concerning the community’s law and its administration.

A by-product—a secondary consequence—of the ALI’s work has been the continuous strengthening of the professional relationships among the judiciary, the practicing legal profession, and the faculties of law. These relationships have yielded greater understanding and acceptance of the various aspects of the law—the responsibility for its administration by the judiciary, the awareness of its practical effects through the legal practitioners, and, through the academicians, appreciation of specific subject matter in the larger fabric of law. It has thus contributed to what may be called professional solidarity among the judiciary, the practicing profession, and the legal academy.

This increased solidarity in turn is a source of strength in the relationship between these professionals and the public at large, particularly in the political and constitutional processes in which the law must be administered, practiced, and studied. In the common-law tradition, as in the United States, the underlying affinity within the branches of the profession is probably greater than in many civil-law systems. An institute similar to The American Law Institute could increase the affinity within the professions in a civil-law system.<sup>7</sup>

Geoff impressed us all with how deeply he played so many and such varied roles in the law. We are fortunate that he imbued his energy and vision for collaboration into the American Law Institute and all of the other institutions of which he was a part. Geoff’s ability to foster professional solidarity among different institutional players in the law will reward us for generations to come.

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7. *Id.* at 467–68.

# Procedure in Context

CATHERINE T. STRUVE<sup>†</sup>

I am grateful for this opportunity to celebrate Geoff Hazard's work.<sup>1</sup> A catalogue of his contributions to scholarship and law reform and his mentoring of lawyers and law professors could easily swell to the size of a treatise. But I will take Geoff's advice<sup>2</sup> and focus my discussion on three points—namely, Geoff's study of legal history; his attention to the social and institutional setting of procedural mechanisms; and his comparisons between procedure in the United States and in other countries. Each of these related to the others and together they richly contextualized Geoff's views on legal doctrine and his involvement in law reform.

In one of his earliest forays into legal history, Geoff criticized then-extant doctrines (under Federal Rule of Civil Procedure 19) concerning necessary and indispensable parties by tracing the roots of those doctrines back to late-seventeenth-century English equity practice.<sup>3</sup> Geoff first examined decisions by Lord Nottingham—a key figure in early equity jurisprudence—and found that Nottingham took a “practical approach to the problem of necessary parties”: “Plaintiff was required to do all he could to bring in the necessary parties, but their joinder was excused when inconvenient for one reason or another.”<sup>4</sup> Lord Hardwicke—an eighteenth-century successor to Lord Nottingham—took a similarly flexible approach, applying exceptions (in various circumstances) to the “general rule[] requiring joinder of all interested parties.”<sup>5</sup> But treatise writers before and after Hardwicke's time as Chancellor

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<sup>†</sup> Professor, University of Pennsylvania Law School. I thank Daniel Coquillette for helpful comments on a draft and the editors of the *Hastings Law Journal* for their excellent editorial work.

1. We were invited to reflect on Geoff both as a person and as a scholar. I had the privilege of sharing some personal reminiscences in a prior collection of tributes, see Catherine T. Struve, *Geoffrey C. Hazard, Jr.: Scholar, Law Reformer, Teacher, and Mentor*, 158 U. PA. L. REV. 1307 (2010), so I will focus here on a few aspects of Geoff's scholarship.

2. In an essay for a legal writing journal, Geoff offered three pieces of advice, of which the second was: “[T]he basic analysis should be expressed in no more than three propositions. Only very powerful minds can handle anything more complicated. A mathematician once told me there are four elemental numbers: one, two, three, and ‘many.’ If the structure of an argument extends to ‘many,’ it should be restructured.” Geoffrey C. Hazard, Jr., *How I Write*, 4 SCRIBES J. LEGAL WRITING 15, 17 (1993).

3. See Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961) [hereinafter Hazard, *Indispensable Party*].

4. *Id.* at 1259 (footnote omitted).

5. *Id.* at 1264.

sowed problems by failing to mention those exceptions—that is, by failing to note instances when a party should ideally have been joined, but could not be joined, and the court nonetheless proceeded to render a decree.<sup>6</sup> Tracing the doctrine’s evolution through eighteenth- and nineteenth-century English cases and nineteenth-century American cases, Geoff described how courts came to believe that an indispensable party’s absence deprived them of the power to act.<sup>7</sup> Geoff argued that the courts always had the power to act, even if they could not do complete justice; the question then became whether the equities balanced out in favor of rendering an incomplete decree instead of no decree at all.<sup>8</sup>

Three things stand out about Geoff’s analysis in this article. First, it was influential.<sup>9</sup> When, in 1966, Rule 19 was revised to explicitly direct courts to balance the equities before deciding whether to proceed in the absence of a necessary party,<sup>10</sup> the Committee Notes prominently cited Geoff’s article (along with the prior work of Professor John Reed, on whose analysis Geoff had built).<sup>11</sup> Second, it illustrated Geoff’s strong practical bent, and his antipathy for letting the perfect become the enemy of the good.<sup>12</sup> And third, it exemplified Geoff’s willingness to criticize an argument, no matter how eminent the source. Among mid-eighteenth-century treatise authors, Geoff praised the work of the “less celebrated” Joseph Harrison while chiding Jeffrey Gilbert for overlooking the indispensability exceptions.<sup>13</sup> Among the nineteenth-century treatises, Geoff

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6. See *id.* at 1263–64 (discussing early-eighteenth-century treatises); see also *id.* at 1269 (discussing JEFFREY GILBERT, *THE HISTORY AND PRACTICE OF THE HIGH COURT OF CHANCERY* (London, Henry Lintot 1758)).

7. See Hazard, *Indispensable Party*, *supra* note 3, at 1271–81.

8. See *id.* at 1282.

9. For further discussion of the influence of this article, see Struve, *supra* note 1, at 1309.

10. See FED. R. CIV. P. 19(b).

11. The 1966 Advisory Committee Note to Rule 19 opened with the following directive:

Whenever feasible, the persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished . . . the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

FED. R. CIV. P. 19 advisory committee’s note to 1966 amendment. The note observed, “The foregoing propositions were well understood in the older equity practice, see Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961) . . .” *Id.*; see also *id.* (citing John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 356, 483 (1957)).

12. This orientation held true throughout Geoff’s writings. See, for example, his observations about the aftermath of the Supreme Court’s decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), rejecting proposed class settlements of asbestos claims: “Since the Supreme Court disapproved the settlements, the parties have simply proceeded with ad hoc settlements generally based on the formulas that previously were incorporated in the now-invalidated trial court decrees”—but with “very high transaction costs to claimants.” Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1912, 1917 (2000).

13. See Hazard, *Indispensable Party*, *supra* note 3, at 1269–70 (discussing GILBERT, *supra* note 6, and JOSEPH HARRISON, *THE ACCOMPLISH’D PRACTISER IN THE HIGH COURT OF CHANCERY* (London, Henry Lintot 1741)).

argued that Justice Story's discussion, though very influential, was not as good as Frederic Calvert's.<sup>14</sup>

Geoff's historical work also compared institutional structures across time in order to assess how changes in those structures affected procedural law. His 1984 article *Preclusion as to Issues of Law*<sup>15</sup> is illustrative. His project in that symposium piece was to examine how the interests of the legal system—as distinct from those of the parties—shaped the contours of claim and issue preclusion.<sup>16</sup> The piece, written around the time that Geoff commenced his service as Director of the American Law Institute, structured its analysis around the Restatement (Second) of Judgments and, in particular, considered section 28's exceptions to issue preclusion on issues of law.<sup>17</sup> In assessing why “an issue of law may be more easily reopened than an issue of fact,” Geoff reflected that the doctrine of preclusion had its roots in times and structures very different than those of the present day.<sup>18</sup> A distinctive concept of what constituted the “record”; an older, stronger version of *stare decisis*; and “the structure of the adjudicative system itself prior to the nineteenth century” all helped, in Geoff's view, to explain the dearth of caselaw on preclusion as to issues of law and (in turn) the absence of that concept from the First Restatement.<sup>19</sup>

This was a very different sort of historical analysis from the fine-grained exegesis of Chancery decisions in Geoff's article on indispensable parties. The issue-preclusion article was sketched in broad and speculative, though also erudite and thought-provoking, outlines. In it, Geoff's interest was in how social and institutional needs previously may have shaped doctrine—and how they shaped it in the present day. On the latter point, Geoff noted that the structural features of modern U.S. courts were quite different, and that those features both explained the advent of the doctrine of preclusion on legal issues and provided reasons to temper that doctrine's application.<sup>20</sup> He closed by considering one particular category of modern societal concerns—namely, the interest of repeat government litigants in avoiding broad preclusion on issues of law.<sup>21</sup>

Increasingly, Geoff's institutional comparisons ranged not only across time but also across national boundaries. His 1998 article on document discovery<sup>22</sup> is a good example. It contains what could have been (if Geoff had wished) a

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14. See *id.* at 1285–87 (discussing FREDERIC CALVERT, *A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY* (Philadelphia, John S. Little 1837), and JOSEPH STORY, *COMMENTARIES ON EQUITY PLEADINGS* (Boston, C.C. Little & J. Brown 1838)).

15. See Geoffrey C. Hazard, Jr., *Preclusion as to Issues of Law: The Legal System's Interest*, 70 IOWA L. REV. 81 (1984) [hereinafter Hazard, *Preclusion*].

16. See *id.* at 83.

17. See *id.* at 86.

18. *Id.* at 89.

19. *Id.* at 89–90.

20. See *id.* at 90–92.

21. See *id.* at 92–94.

22. Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665 (1998) [hereinafter Hazard, *No Secrets*].

free-standing and illuminating article on the history of document discovery from 1938 on, including related procedural, institutional, and social developments in the United States.<sup>23</sup> The original Civil Rule 34 required a court order, on good cause, for document discovery from the opposing party.<sup>24</sup> The changes in pleading practice ushered in by (inter alia) *Conley v. Gibson*,<sup>25</sup> Geoff argued, undermined that requirement.<sup>26</sup> Also undermining it were developments—“changes in the scope of jury trials, the composition of the jury, and the formulation and application of the summary judgment rule”—that shifted the determination of disputes toward lay decision-makers and, in so doing, expanded judges’ conceptions of the scope of discovery under Civil Rule 26(b).<sup>27</sup> Further supporting the transition to a broad concept of civil discovery, Geoff argued, were societal shifts toward greater sunshine in political and corporate governance.<sup>28</sup> All these trends, he asserted, contributed to “a gradual but sweeping transformation in American jurisprudence as to the right of a party claiming injury to obtain documents from alleged wrongdoers that may illuminate the course of action leading up to the injury.”<sup>29</sup>

Geoff did not content himself, however, with documenting “[t]he American [e]xperience.”<sup>30</sup> He nested that account within a discussion of commonalities and differences among the procedures employed in the United States, other common-law countries, and civil-law countries. The commonalities formed the core basis for Geoff’s then-ongoing project to draft transnational principles of civil procedure.<sup>31</sup> The differences included, prominently, two ways in which U.S. procedure stood apart from both civil-law jurisdictions and other common-law jurisdictions: pleading and document discovery. As to pleading, Geoff drew together his historical and comparative analyses by observing that fact pleading—which would be a feature of the Transnational Principles<sup>32</sup>—not only resembled practices in non-U.S. jurisdictions but also recalled pre-1938 code pleading in the United States.<sup>33</sup> As to document discovery, Geoff noted that party-controlled document production did not exist in civil-law systems.<sup>34</sup>

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23. *See id.* at 1682–93.

24. *See id.* at 1683.

25. 355 U.S. 41 (1957).

26. *See Hazard, No Secrets, supra* note 22, at 1685.

27. *Id.* at 1686, 1692.

28. *See id.* at 1692–93.

29. *Id.* at 1684–85.

30. *Id.* at 1682.

31. *See id.* at 1668–70.

32. *See id.* at 1671; *see also* AM. LAW INST. & UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE princ. 11.3, at 30 (2006) (“In the pleading phase, the parties must present in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be offered in support of their allegations. When a party shows good cause for inability to provide reasonable details of relevant facts or sufficient specification of evidence, the court should give due regard to the possibility that necessary facts and evidence will develop later in the course of the proceeding.”).

33. *See Hazard, No Secrets, supra* note 22, at 1671–72.

34. *See id.* at 1682.

Taking England as an exemplar of common-law systems outside the United States, Geoff noted that the scope of discovery in English practice sounded similar to that under the Civil Rules in the United States, but that other features combined to limit that scope: in addition to “the general culture of the bench and the bar,” Geoff suggested, “the combination of specific pleading, the short time limit imposed for document production, and the definition of the obligation to produce set forth in the general rule results in considerably narrower response in the way of document production than that to which we have become accustomed in this country.”<sup>35</sup> Geoff’s historical analysis thus served to explain how the United States’ discovery practices came to diverge from those prevalent in England (let alone in continental Europe).

Like many of his historical reflections, Geoff’s comparative analyses had a very practical bent. They guided his law-reform efforts (as in the Transnational Principles project). And they were designed to help U.S. lawyers better understand the challenges of transnational litigation. Take, for example, Geoff’s 1998 article *Discovery and the Role of the Judge in Civil Law Jurisdictions*.<sup>36</sup> The doctrinal hook for that article was the U.S. Supreme Court’s 1987 decision in *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, which accorded U.S. federal trial judges (addressing discovery requests directed at a foreign litigant) discretion regarding whether to proceed, in the first instance, under the discovery procedures set by the Civil Rules or under the letter-of-request mechanism set in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.<sup>37</sup> A trial judge’s choice between these methods determines whether a discovery demand will take effect only if so ordered by a judge in the relevant foreign country, or whether the demand will take effect without any involvement by such a judge. Geoff set out to explain to a U.S. audience why the latter choice offends participants in civil-law systems. The offense arises not only from ideas of territorial sovereignty, but also from a differing concept of the role of the judge.<sup>38</sup> In civil-law systems, Geoff explained, the judge (rather than the parties) develops the facts and does so in stages (“issue by issue”).<sup>39</sup> This judicial role was “historically embedded in the social orders” of countries such as France and Germany, so that disregarding it can cause profound offense.<sup>40</sup>

Geoff also invoked comparative analysis to suggest the implications of domestic legal and policy questions. Contributing to a conference that took access to justice as its theme, Geoff chose to ask what would happen if governments in the United States stopped funding legal services for poor

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35. *Id.* at 1677, 1681.

36. Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017 (1998) [hereinafter Hazard, *Discovery*].

37. 482 U.S. 522, 543–44, 546 (1987).

38. See Hazard, *Discovery*, *supra* note 36, at 1023–24.

39. *Id.* at 1021–22.

40. *Id.* at 1028; see also *id.* at 1025.

people.<sup>41</sup> In the United States, Geoff suggested, “[o]ur system of social ordering is dependent . . . on a procedural principle of equal participation in legal disputation.”<sup>42</sup> In this view, the goal in U.S. legal proceedings is to assure a procedurally fair contest rather than a substantively accurate result. In civil-law systems, Geoff suggested, the systemic goals are substantive and administrative correctness rather than mere procedural correctness. “The civil law judge is not obligated merely to referee a dispute between parties . . . . Rather, the civil law judge has an affirmative responsibility, beyond what the parties may submit or argue, to achieve substantively correct judgments.”<sup>43</sup> If legal services for the poor went unfunded, then the United States would have to either “abandon[] any pretense to equal justice,” or else “adopt[] substantive concepts of justice in a wide range of settings where poverty is a salient factor.”<sup>44</sup> Here Geoff’s comparative observations serve perhaps two functions. One is to show that a different ordering, centered around substantive correctness, is possible. The other is to suggest that, to be true to its own legal culture, the United States must “make serious effort to make procedural justice a reality, that is, to establish real legal aid for the poor.”<sup>45</sup>

The breadth of Geoff’s field of vision was a significant part of what made him such a beloved and valued counselor to law-reform bodies (such as the American Law Institute and the U.S. Judicial Conference’s rulemaking committees). But it was only a part. There was also the way in which Geoff brought to bear his expertise both on procedure and on legal ethics.<sup>46</sup> There was his capacity for analyzing, and deriving key insights about, fields with which he did not have detailed familiarity. And there was the man himself—melding discernment with understanding,<sup>47</sup> and combining both of those with a quick and

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41. See Geoffrey C. Hazard, Jr., *After Legal Aid Is Abolished*, 2 J. INST. STUDY LEGAL ETHICS 375 (1999).

42. *Id.* at 382.

43. *Id.* at 383.

44. *Id.* at 386.

45. *Id.*

46. As one example, take Geoff’s 1989 analysis of civil discovery. He provided a not-unsympathetic account of the discontents of corporate and government officials who felt “that production of . . . documents violates a principle of privacy.” Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2242 (1989). But that did not prevent him from vigorously critiquing sharp practices by the defense bar (“[h]ighly developed dialectical skills have evolved”) or from suggesting that in cases with massive discovery requests “corporate and governmental documents [could] be turned over for inspection to a parajudicial officer.” *Id.* at 2240–41. He wryly noted that there had “been no second to this suggestion.” *Id.* at 2241. As another example, consider Geoff’s analysis of ethics issues in asbestos class settlements. See Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257 (1995).

47. Reflecting, many years ago, on the challenges facing a lawyer who seeks to “reconcile the conflict between person and professional,” Geoff wrote that “[i]f he is fortunate, he may find a colleague who can understand what his dilemma is without judging him for suffering it, and who may even be ready to engage in a dialogue.” Geoffrey C. Hazard, Jr., *Rethinking Legal Ethics*, 26 STAN. L. REV. 1227, 1227, 1228 (1974) (reviewing DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* (1973)). Geoff was that sort of colleague, and we who knew him were indeed fortunate.



pithy wit. He was a mentor and friend to generations of students and scholars. I miss Geoff greatly. Though I cannot myself approach the scope of Geoff's analyses of procedure in historical, institutional, and comparative context, it comforts me that I can continue to learn from them.

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# Geoffrey Hazard Abroad

MICHELE TARUFFO<sup>†</sup>

It is a great pleasure and a privilege for me to take part in this Symposium in memoriam of Geoffrey Hazard, not only for the high level of his cultural and human personality, but also because of several decades of sincere friendship. Among the number of things that may be said—and actually are said—in praise of Geoff, I would like to stress an important dimension of him, that is his international fame.

Our common story began in the Eighties, when I met Geoff at Yale, with the purpose not only to make his acquaintance, but also to ask him to write a book on American civil justice for non-American readers. Geoff accepted, but under the condition that the two of us had to make the book. So we did, working actually together in the various phases of the writing, until the final revision of the text, which we completed in Geoff's room at Yale. The book<sup>1</sup> was an important step in the growth of Geoff's international prestige, because it was published not only in Spanish and Italian, but also in Japanese and Chinese.

After publishing the book, which was a very nice experience, we began thinking of a further opportunity to continue working together. During a good dinner in Pavia (near my university), the idea came to us, but mainly to Geoff, that an interesting topic could be that of looking for transnational rules of procedure. In that time Geoff was beginning to think in terms of a globalizing world, while in all countries the attention was still devoted mainly to “national” procedural systems, and I shared his interest in this kind of problems. Then we began exchanging ideas and hypotheses, by mail and meeting together in various places, in the United States and outside. The moment came when Geoff told me: “Listen: what we were able to think we already thought of. Now it's time to broaden the work”. We ultimately submitted a project to the American Law Institute and, with our great surprise, the project was approved and sponsored.

Then we went on working in this new perspective. The main purpose was to find out a set of procedural rules that could be applied in any country when a transnational case needed to be decided. The problem was that such cases ended up to be dealt with in different ways depending on the various national jurisdiction and this was the origin of many problems. A possible solution could

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1. GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, *AMERICAN CIVIL PROCEDURE. AN INTRODUCTION* (1993).

have been just to apply the same rules in any national system. The purpose was not of compelling the lawgivers of several countries to reform their procedural codes in a uniform and general way, but just to suggest the adoption of the same procedural rules for transnational cases. The method we followed was not that of proposing the American procedural system as a model for all the rest of the world, since Geoff was perfectly aware of the problems and the defects of that system. On the contrary, we selected a series of relevant procedural topics and began looking for the best possible solution for any problem. This required a continuous and complex analysis of the answers that the most important systems of common law and of civil law provided for those problems. When we found a good one, we tried to state in general terms, in order to make it applicable in all the countries. Sometimes we did not find good solutions existing in any system, and then we try to invent a new kind of rule possibly applicable in every procedural system. Geoff was extremely curious about the rules existing out of the United States, and we spent hours and hours collecting information and discussing whether and how to use them for our purpose.

But the most interesting and demanding aspect of such a work was that, mainly under Geoff's suggestion, we decided to organize a series of meetings aimed at discussing our ideas with experts living in several countries. Eventually, meetings were set up in many places, from Paris to Beijing, from Moscow to Tokyo and in several other places like Singapore and Bologna. Usually a meeting lasted two or three full days, with the participation of several dozens of professors, lawyers, judges and arbitrators. In each meeting a version of our project was submitted for remarks and criticisms, and we answered questions, of course taking into account all the interventions. Then we worked modifying and updating our project to prepare it for the following meeting. Once a year we submitted our text of the moment to discussion in the general ALI meetings.

It was an extremely interesting experience, in which the Geoff's international authority emerged in an extremely clear way. On the one hand, his name worked as a sort of key to open a lot of doors all around the world. On the other hand, the two of us were co-reporters on the project, but it was clear to everyone that Geoff was the real leader of the whole enterprise.

At the end of several years of a rather difficult work, a final outcome of our enterprise was approved by the ALI, and then UNIDROIT joined the project. Therefore, we concentrated mainly on principles, although several rules were also stated, and Geoff became the general reporter of the whole project (while I was the reporter for ALI). The conclusion of all this came in 2006, when the ALI-UNIDROIT *Principles of Transnational Civil Procedure* were published. Correspondingly, the international prestige of Geoff continued, since the *Principles* were translated into several languages, such as Spanish and Farsi. Since the moment of its publication this text circulated all around the world, and is a basic reference for discussion, comparison and even procedural reforms. A recent example of its importance is that the *Principles* inspired a large

investigation concerning the principles of civil procedure in most Ibero-American countries, the outcome of which is published in a huge volume.<sup>2</sup>

Another important aspect of Geoff's prestige out of the United States derived from his friendship and cooperation with Angelo Dondi, a well-known Italian professor of civil procedure and comparative law. With Dondi, Geoff wrote an important book about professional ethics<sup>3</sup> that was also published in Italy. Moreover, Dondi translated some of Geoff's essays into Italian, and the two published together some essays in various legal journals in Europe and in the United States. Correspondingly, the University of Urbino awarded Geoff an honorary degree in 1998.

It is clearly impossible to draw up a list of the people who met Geoff and appreciated his high culture, and of the many places where he was invited for meetings and lectures all around the world. Suffice it to say, as these examples hopefully may show, that Geoff's international fame and prestige has been for decades an important aspect of his cultural and human personality; an aspect that will ensure the memory of him long into the future.

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2. Michele Taruffo, Daniel Mitidiero, Eduardo Oteiza, Jordi Nieva Fenoll, Giovanni Priori, Diana María, & Ramírez Carvajal, *Los Principios Procesales de la Justicia Civil en Iberoamérica* (2018).

3. GEOFFREY C. HAZARD, JR. & ANGELO DONDI, *LEGAL ETHICS. A COMPARATIVE STUDY* (2004).

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Geoffrey C. Hazard, Jr.:  
Dear Friend, Eminent Scholar, and Director  
Exemplar of the American Law Institute

MICHAEL TRAYNOR<sup>†</sup>

We have lost a dear friend, eminent scholar, and Director Exemplar of the American Law Institute. Geoff Hazard led the Institute for fifteen years. Among his many contributions to law reform, ethics, teaching, and scholarship, he strengthened the ALI as a prized institution in the life of our country.

We worked closely together, on ALI matters and other issues including the ethics of lawyers and judges, amicus briefs and an article urging that federal law and a “specific fairness” as well as a “system fairness” test of due process govern the recognition and enforcement of foreign judgments,<sup>1</sup> and his last labor of love, the book he edited on my father’s jurisprudence.<sup>2</sup> My introductory essay began:

My father would have liked this book. It focuses on his jurisprudence. It is edited by Geoff Hazard, Professor Emeritus at the Hastings College of the Law, a scholar whom he admired and collaborated with on the American Bar Association’s Model Code of Judicial Conduct. With Geoff’s encouragement and oversight, the book is written by his students. They are the successors to those my father loved to teach at a law school he held dear. Emphasizing analysis, this

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<sup>†</sup> President Emeritus, The American Law Institute. Hastings College of the Law was the last law school at which Geoff taught. This *Hastings Law Journal* symposium in his honor and memory is a fitting and lovely tribute to him. Prior to joining the Hastings faculty, Geoff was a member of the faculty of the Yale Law School, and then the University of Pennsylvania Law School, and was honored in 2010 by an issue of the University of Pennsylvania Law Review. Symposium, *In Honor of Geoffrey C. Hazard, Jr.*, 158 U. PA. L. REV. 1283–1327 (2010). This Tribute draws in part from a tribute to him then, Michael Traynor, *Geoffrey C. Hazard, Jr., Director Exemplar of the American Law Institute*, 158 U. PA. L. REV. 1317 (2010), and in part from remarks in his memory at the ALI Council meeting on January 18, 2018 and at his memorial service at the University of Pennsylvania Law School on January 27, 2018.

1. Brief for Geoffrey C. Hazard, Jr., Michael Traynor, and Louise Weinberg as Amici Curiae Supporting Petitioner, *DeJoria v. Maghreb Petroleum Expl.*, 136 S. Ct. 2486 (2016) (No. 15-1033) (certiorari was denied); Brief for Geoffrey C. Hazard, Jr. and Michael Traynor as Amici Curiae Supporting Petitioner, *Tropp v. Corp. of Lloyd’s*, 564 U.S. 1046 (2011) (No. 10-1249) (certiorari was denied); Geoffrey C. Hazard, Jr. & Michael Traynor, *Foreign Judgments: Is “System Fairness” Sufficient or Is “Specific Fairness” Also Required for Recognition and Enforcement?*, 10 BERKELEY J. INT’L L. PUBLICIST 2 (2012). Recently, several amici urged the application of federal law in another amici brief, Brief of Scholars and Petitioners as Amici Curiae Supporting Petitioner, *World Programming Ltd. v. SAS Inst., Inc.*, No. 17-1459 (U.S. May 23, 2018) (certiorari was denied).

2. GEOFFREY C. HAZARD, JR. ET AL., *THE JURISPRUDENCE OF JUSTICE ROGER TRAYNOR: TWENTY-THIRD CHIEF JUSTICE OF CALIFORNIA* (Geoffrey Hazard ed., 2015).

book will elicit the interest of thoughtful readers.<sup>3</sup>

Immanuel Kant said, “To have a friend whom we know to be frank and loving, neither false nor spiteful, is to have one who will help us to correct our judgment when it is mistaken. This is the whole end of man, through which he can enjoy his existence.”<sup>4</sup> Geoff was such a friend. For eighteen years, Geoff and his wife Beth and my wife Shirley and I were weekend neighbors at Stinson Beach and shared many moments and conversations. During a talk with Geoff there about the ALI’s constructive influence, he made the crucial point that our work is persuasive because it is not authoritative.<sup>5</sup> It provides judges and lawyers with wisdom without compelling them to follow it.

Working with Geoff was a professional and personal pleasure. Sometimes we could anticipate each other’s thoughts. We shared an interest in seeking principles that would bring reason and order to the law. It was an honor to join Gerhard Casper, David Levi, and Neil Andrews in reviewing and praising *The Moral Foundations of American Law*, which Geoff wrote with his son Doug Pinto, Jr.:<sup>6</sup>

Beginning with the reality and challenge of modern Supreme Court confirmation hearings, Hazard and Pinto demonstrate the relationships and differences among law, morals, and politics, Hazard, a legal ethicist and scholar, and Pinto, a biblical historian, are a unique team. Their succinct and vital work draws from the wisdom of the ancients and the evolution of modern thought. Anyone concerned with the living law must understand its moral roots to sense when the old growth should be pruned and the new nurtured in light of evolving principles of liberty, equality, and morality.<sup>7</sup>

Geoff and I also shared a sense of skepticism (attended by bemusement) about occasional promotional claims by lawyers, for example, that they are “ethical.” Geoff’s view was that “Oh yes, and anyone who says I am ethical is obviously worrying about whether he or she is. The lady doth protest too much.”<sup>8</sup>

Professor Stephen Gillers has written that in “the law governing lawyers and judges,” Geoff’s “influence is unsurpassed by any scholar of his generation.”<sup>9</sup> Geoff’s view was typically both pragmatic and wise. During a discussion of the Restatement Third of the Law Governing Lawyers, he said,

I think gray-area Illustrations are dangerous . . . I would strongly urge the Reporters to give what I call “bookends,” one that is clearly, “You can’t do that,”

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3. *Id.* at 2.

4. IMMANUEL KANT, LECTURES ON ETHICS 206 (Louis Infield trans., Harper Torchbook 1963) (1930).

5. Conversation with Professor Hazard in Stinson Beach, Cal. (Dec. 27, 2009).

6. GEOFFREY C. HAZARD, JR. & DOUGLAS W. PINTO, JR., MORAL FOUNDATIONS OF AMERICAN LAW: FAITH, VIRTUE AND MORES (2013).

7. *Id.* at back cover (comment by Michael Traynor).

8. Email from Geoffrey C. Hazard, Jr., Emeritus Professor of Law, Univ. of Pa., to Michael Traynor, President Emeritus, Am. Law Inst. (Nov. 26, 2007) (copy on file with author).

9. Stephen Gillers, Hazard, Geoffrey C., Jr., in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 259, 259 (Roger K. Newman ed., 2009).



the other one clearly, “You can do this,” and not try to go beyond that in nuance. You are just asking for trouble if you try to do that.<sup>10</sup>

Throughout his fifteen-year tenure as Director of the ALI, from 1984 to 1999, and thereafter as a member of the Council, Geoff consistently gave such incisive, cogent, and succinct advice at annual meetings, meetings of the Council, meetings of Advisers and Members Consultative Groups,<sup>11</sup> and in his critical consultations with Reporters and editing of their drafts to make them worthy of consideration.

Two illustrious bookends in Geoff’s ALI career bear noting: First, before becoming Director, he was the Reporter for the Restatement Second of Judgments. Our then-Director, Herbert Wechsler, in his Foreword to the first volume, stated that the “sole responsibility for the development and the completion of the work [was placed] upon Professor Hazard. That he has discharged that trust with high distinction will be evident to all who study the succeeding pages of these volumes.”<sup>12</sup> Second, after retiring as Director, Geoff, together with ALI Co-Reporter Michele Taruffo and Associate Reporter Antonio Gidi, and ALI/UNIDROIT Working Group Co-Reporter Rolf Stürner, completed the ALI/UNIDROIT Principles of Transnational Civil Procedure,<sup>13</sup> with widespread acclaim.<sup>14</sup> They and their colleagues synthesized the best elements of procedural law from the common law system and the civil law system, creating unifying principles for international commercial litigation.

At the Institute’s annual dinner in 1999, President Charles Alan Wright said, “I have for Geoff great respect, great admiration, great affection. The ALI has been wonderfully served to have him as our Director for 15 years.”<sup>15</sup> In his

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10. *Continuation of Discussion of Restatement of the Law Third, The Law Governing Lawyers*, 74 A.L.I. PROC. 388 (1997).

11. Members Consultative Groups for the ALI’s projects were a vital innovation and began under the leadership of President Perkins and Director Hazard. See John P. Frank, *The American Law Institute, 1923–1998*, 26 HOFSTRA L. REV. 615, 627 (1998).

12. Herbert Wechsler, *Foreword* to 1 RESTATEMENT (SECOND) OF JUDGMENTS vii (AM. LAW. INST. 1982). My first introduction to Geoff’s effective engagement and mentoring of able law students occurred one year when he was teaching at Yale Law School and I was interviewing students for summer clerkships and learned that he had enlisted nearly every one to help on the Restatement Second of Judgments project.

13. ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2006), <https://www.unidroit.org/instruments/transnational-civil-procedure>.

14. See, e.g., Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 S. ILL. U. L.J. 145, 166–67, 167 n.120 (2007) (praising the “vision, promise, boldness, and potential influence” of the Principles and citing numerous sources discussing them). UNIDROIT and the European Law Institute are working on a transnational civil procedure project based on the ALI/UNIDROIT principles. See, e.g., Geoffrey C. Hazard, Jr., *Developing Civil Procedure Rules for European Courts*, 100 JUDICATURE 58 (2016); Symposium, *The ELI-UNIDROIT Project*, 19 UNIFORM L. REV. 171 (2014); *ELI-UNIDROIT Transnational Principles of Civil Procedure*, UNIDROIT, <https://www.unidroit.org/work-in-progress-eli-unidroit-european-rules> (last updated Dec. 4, 2018); *From Transnational Principles to European Rules of Civil Procedure (with the International Institute for the Unification of Private Law, UNIDROIT)*, EUR. L. INST., <https://www.europeanlawinstitute.eu/projects-publications/current-projects-feasibility-studies-and-other-activities/current-projects/civil-procedure/> (last visited Apr. 16, 2019).

15. Charles Alan Wright, *Introductory Remarks*, 76 A.L.I. PROC. 360 (1999).

contemporaneous written tribute, he said that at meetings Geoff often will lean forward, pull his microphone toward him, and make some remark that is exactly appropriate. Sometimes it will be to point out the fallacy in what Reporter or a member has just said. At other times it will offer a solution to a problem that has been giving difficulty.<sup>16</sup>

Conrad Harper described Geoff as the “rightful successor” of Herbert Wechsler, saying, “It has been a stunning 15 years.”<sup>17</sup> In his Annual Dinner Address, Geoff remarked,

Being Director of The American Law Institute is the best job that a lawyer or legal academician can have, except, perhaps, being on the Supreme Court of the United States. Indeed, there are aspects of the Director’s job that are clearly superior to those of a Supreme Court Justice. The Director has more privacy, does not require the concurrence of four others to do anything official, and does not have to live in Washington.<sup>18</sup>

Geoff’s remark was accompanied by appreciative laughter, which often occurs, a welcome counterpoint to the solemnity of our deliberations.

Referring to our debates over legal formulations, Geoff developed the profound point that “interchanges about legal rules that appear as divisive disputes from one point of view are from another point of view affirmations of common ground across a wide range of opinion.”<sup>19</sup> The ALI takes comparable account of all U.S. jurisdictions, does not pretend to restate the law of any particular state, and respects the constitutional responsibilities that courts and other institutions must carry out within their own frameworks. This sense of respect for the opinions and responsibilities of others contributes to the ALI’s influence. Just as members often request Reporters to “consider” a point, the ALI makes suggestions for courts and others to consider, which they do frequently, usually with approval, sometimes with countervailing views.

During Geoff’s tenure as Director, the ALI initiated, as well as completed, many projects.<sup>20</sup> Recognizing the growing international implications of our work, he started projects on transnational insolvency and international jurisdiction and judgments, and commenced consideration of international intellectual property. He, like his predecessors, also laid a strong foundation for future projects, which his worthy successors, Lance Liebman and now Richard

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16. Charles Alan Wright, *The President’s Letter*, A.L.I. REP., Spring 1999, at 1, 3; see also HILARY MANTEL, WOLF HALL 470 (2009) (“When you are writing laws you are testing words to find their utmost power.”).

17. Conrad Harper, *Introductory Remarks*, 76 A.L.I. PROC. 360 (1999). Mr. Harper evoked the dedication by Felix Frankfurter of his lectures, entitled *Mr. Justice Holmes and the Supreme Court*, to “Mr. Justice Cardozo, rightful successor of Mr. Justice Holmes.” See *id.*

18. Geoffrey C. Hazard, Jr., *Address by Professor Geoffrey C. Hazard, Jr., Retiring Director of the American Law Institute*, 76 A.L.I. PROC. 361 (1999).

19. *Id.* at 362.

20. See Harry G. Kyriakodis, *Past and Present ALI Projects (as of April, 1999)*, 76 A.L.I. PROC. 505–09 (1999). Director Hazard reviewed the work and the process of the ALI in Geoffrey C. Hazard, Jr., *The American Law Institute Is Alive and Well*, 26 HOFSTRA L. REV. 661 (1998).

Revesz, have developed and augmented.

Among pioneering projects, two bear special mention in this tribute to Geoff: the Principles of Corporate Governance<sup>21</sup> and the Principles of the Law of Family Dissolution.<sup>22</sup>

Initiated during Herbert Wechsler's final years as Director and completed during Geoff's term, the Principles of Corporate Governance are invoked by courts<sup>23</sup> and significantly improve corporate behavior.<sup>24</sup> Illustrating Geoff's point that "precise formulation can make a difference,"<sup>25</sup> our members vigorously debated the standard of conduct applicable to a corporate director who invokes the business judgment rule in her defense and seeks the additional leeway a "rationally believes" test provides compared to a "reasonably believes" test.<sup>26</sup>

Two noteworthy Forewords accompanied the published Principles, Geoff's as Director, and Rod Perkins's as President. Geoff emphasized that "Professor [and Chief Reporter] Eisenberg's persevering intellectual leadership was rendered with unfailing diplomacy" and "President Perkins's persevering diplomatic leadership was rendered with unfailing intelligence."<sup>27</sup> In turn, President Perkins, in his historic Foreword, stated that Director Hazard "has provided superb leadership in steering the Project over most of its life and in bringing it to completion."<sup>28</sup>

In the Principles of the Law of Family Dissolution, the ALI reached beyond the customary subjects of private law addressed in the Restatements. With Geoff's leadership and encouragement in this innovative and far-reaching project, Professor Ira Ellman, Reporter, and his principal colleagues, Professors Katharine Bartlett and Grace Blumberg, provided workable solutions and

21. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994).

22. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

23. See, e.g., *Cuker v. Mikalauskas*, 692 A.2d 1042, 1049 & n.5 (Pa. 1997).

24. See, e.g., Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 464 (1993) (asserting that legal standards of conduct "serve as a foundation for private standards of conduct" upon which "prudent lawyers" are "likely to give advice"); Roswell B. Perkins, *Thanks, Myth, and Reality*, 48 BUS. LAW. 1313, 1317 (1993) (stating that the Principles assist "in analyzing factual situations, in fitting those factual situations within the concepts articulated in the Principles, and in applying the applicable law").

25. Hazard, *supra* note 18, at 362.

26. *Discussion of Principles of Corporate Governance: Analysis and Recommendations, Tentative Draft No. 4*, 62 A.L.I. PROC. 146-217 (1985); *Continuation of Discussion of Principles of Corporate Governance: Analysis and Recommendations, Tentative Draft Nos. 4 and 2*, 62 A.L.I. PROC. 230-43 (1985). See generally 1 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(c) (1994) ("A director or officer who makes a business judgment in good faith fulfills the duty under this Section ['the business judgment rule'] if the director or officer . . . (3) rationally believes that the business judgment is in the best interests of the corporation."). While recognizing the etymological ties between the words "rational" and "reasonable," the Principles draw a "sharp distinction" between them. *Id.* cmt. d.

27. Geoffrey C. Hazard, Jr., *Director's Foreword* to 1 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, at x (1994).

28. Roswell B. Perkins, *President's Foreword* to 1 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, at xxii (1994).

pragmatic approaches to perplexing problems of separation and relationship termination, child custody, and child support, including those that arise in relationships between persons of the same sex.

The ALI is known historically and currently for: (1) its Restatements, which “are primarily addressed to courts and aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might appropriately be stated by a court;” (2) its Principles, which “are primarily addressed to legislatures, administrative agencies, or private actors” but “can, however, be addressed to courts when an area is so new that there is little established law;” and (3) its Codes (model or uniform), which “are addressed to legislatures with a view to statutory enactment: and “are written in prescriptive statutory language.”<sup>29</sup> It also is known for its contribution to the Universal Declaration of Human Rights and for the Reporters’ Study entitled, “Enterprise Responsibility for Personal Injury.”<sup>30</sup> The ALI, with Geoff’s encouragement, remains open to new approaches to implementing the Institute’s mission “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.”<sup>31</sup> For example, at our initial discussion of international intellectual property, Geoff suggested that the Institute might consider developing alternative terms of an intellectual property license, in a format that could identify reasonable ranges and negotiating options while alerting lawyers to avoid time-wasting outliers.<sup>32</sup>

As a Council member, Geoff continued to give sage and welcome advice. As just one example, when a question arose about the role of judges in our debates, Geoff drew upon his years of experience and provided guidance.<sup>33</sup> He observed acutely that “in participation in this kind of activity, the judges have been extremely conscientious in not expressing ideas regarding politically sensitive issues,” and that “in the exploration and discussion of all issues, whether controversial or otherwise, the judges contribute useful perspective, specifically a broad view of the public interest and a strong sense of civic responsibility.”<sup>34</sup>

In addition to being a leader, ethicist, scholar, and friend of the ALI and of our profession, Geoff was unpretentious and witty. Here are just a few

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29. *How the Institute Works*, AM. L. INST., <https://www.ali.org/about-ali/how-institute-works> (last visited Apr. 16, 2019). See, by our esteemed late Treasurer, Bennett Boskey, *The American Law Institute: A Glimpse at Its Future*, 12 GREEN BAG 2D 255, 258–61 (2009).

30. *Id.* at 260; see also Traynor, *supra* note 14, at 161.

31. AM. LAW INST., CERTIFICATE OF INCORPORATION (1923), available at [https://www.ali.org/media/filer\\_public/10/62/106284da-ddfe-4ff4-a698-0a47f268ee4c/certificate-of-incorporation.pdf](https://www.ali.org/media/filer_public/10/62/106284da-ddfe-4ff4-a698-0a47f268ee4c/certificate-of-incorporation.pdf) (last visited Apr. 16, 2019).

32. According to my recollection, he made this suggestion at an early meeting in San Francisco.

33. Letter from Geoffrey C. Hazard, Jr., Dir. Emeritus, Am. Law Inst., to Michael Traynor, President, Am. Law Inst. (Dec. 20, 2000), in A.L.I. REP., Winter 2001, at 3, 3–4.

34. *Id.* at 4.

selections: to a Reporter, “the clock is your friend;”<sup>35</sup> “I will treat this [report] with the degree of routine that it fully deserves;”<sup>36</sup> “[M]aybe better than a motion we would have insight here.”<sup>37</sup> When a member addressed President Wright as “Your Honor,” Geoff interjected, “Your grace, not Your Honor.”<sup>38</sup> To President Wright, who reported he had slipped out during one discussion to survey the medicines available in the gift shop, Geoff said “I thought you were going to say you were looking for a medicine that would work toward clarification of thought. That would be very welcome for any of our projects.”<sup>39</sup> In response to a question “what does the Institute do in this case,” Geoff responded, “Make a sensible decision, I think.”<sup>40</sup> With the model of Geoff’s steadfast leadership and friendly guidance, that is what we usually accomplish.

Geoff enriched our lives. We miss him dearly and remember him with affection and appreciation for the chance that life gave us to know him.

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35. Geoffrey C. Hazard, Jr., Comment at Council Meeting (Dec. 2009).

36. Geoffrey C. Hazard, Jr., *Report of the Director*, 75 A.L.I. PROC. 5 (1998).

37. *Discussion of Restatement of the Law Third, The Law Governing Lawyers*, 75 A.L.I. PROC. 45 (1998).

38. *Discussion of the Uniform Commercial Code, Revised Article 2A (Leases)*, 76 A.L.I. PROC. 377 (1999).

39. *Discussion of Transnational Insolvency Project (International Statements of United States and Canadian Bankruptcy Law)*, 74 A.L.I. PROC. 264 (1997).

40. *Continuation of Discussion of Restatement of the Law Third, the Law Governing Lawyers*, 75 A.L.I. PROC. 105 (1998). Geoff summed up his views about a sensible judicial decision in his Owen J. Roberts Memorial Lecture at the University of Pennsylvania Law School on February 19, 1986, when he identified four key dimensions “to the judicial process and to any particular judicial decision:” “the decision must be intelligible in terms of precedent . . . [T]he decisions in general must arrive at the right outcome . . . [T]he decisions indeed involve value choices by the judges . . . And, fourth, a decision entails a commitment to the future.” Geoffrey C. Hazard, Jr., *Rising Above Principle*, 135 U. PA. L. REV. 153, 190 (1986).

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