

A Procedural Giant

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When I first learned of my colleague and mentor Rick Marcus's intention to retire, I immediately thought to spearhead this written symposium in his honor. I organized one for Geoff Hazard in 2019,¹ and Rick struck me as equally deserving.

I had second thoughts, though, when I congratulated Rick on his retirement, because he told me that he would continue to teach Civil Procedure, to serve as Reporter of the Civil Rules Advisory Committee, and to participate in scholarly enterprises. In retrospect, I shouldn't have been surprised that "retirement" for Rick means quite the opposite of the word for most of us. Functional retirement or not, I decided that a festschrift in his honor was still apt.

The other contributions to this special issue cover the range of Rick's influence on so many facets of procedural law, from his over fifty years teaching students the ins and outs of civil procedure, to his thirty years of service as a reporter on the Advisory Committee, to his influential scholarship both in the United States and abroad.² I hope to offer a more personal touch in this brief reflection on his legacy, though I will weave in those other aspects.

I first met Rick when I was a panelist at the Association of American Law Schools (AALS) Section on Civil Procedure. I was giving some remarks about the changes wrought by *Bell Atlantic Corp. v. Twombly*³ and *Ashcroft v. Iqbal*⁴ on federal pleading standards.⁵ Rick was in the audience. Unsurprisingly, his hand shot up first when the question-and-answer period began. Rick asked what

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1. See generally 70 HASTINGS L.J. 4 (2019).

2. Some of my favorites include Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. U. L. REV. 1827 (2008); Richard L. Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 WAYNE ST. U. L. REV. 103 (2007); Richard L. Marcus, *Putting American Procedural Exceptionalism Into a Globalized Context*, 53 AM. J. COMPAR. L. 709 (2005); Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003); Richard L. Marcus, *Reassessing the Magnetic Pull of Megacases on Procedure*, 51 DEPAUL L. REV. 457 (2001); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

3. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

4. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

5. See Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 447 (2010).

impact the changes might have on United States procedure viewed from abroad, especially the impact on the new ALI/UNIDROIT Principles of Transnational Civil Procedure. I recall being somewhat, though not fully, prepared for the question and bungling through an answer that suggested that U.S. movement away from the procedural exceptionalism of notice pleading might provide opportunities for procedural harmonization—or at least for international conversation.

Afterward, I chatted with Rick about the topic. It was my first physical encounter with the man standing up, and I confess that his towering height and Sam Elliott moustache initially put me on the defensive. But I relaxed as Rick regaled me with a story about his experiences with European approaches to procedure, and we stayed in touch afterward. For a few years, I regularly reached out to Rick to ask him to review draft papers of mine. He invariably did, and I always appreciated his directness, his deep knowledge, and his extensive comments.

Not long after, in 2012, I accepted a lateral offer from UC Law SF (then called UC Hastings Law), where Rick has been a longtime faculty member. I suspect Rick had something to do with the interview invitation from the Appointments Committee; his presence on the faculty certainly influenced my decision to accept UC Law SF's interview request and subsequent offer. At the time, the school boasted quite the star-studded procedure faculty: Rick, Geoff, and Mary Kay Kane, among others. I was honored to join such a group.

What I respected most about Rick early on was his ability to connect to three different audiences—academia, the bench, and the bar. Perhaps his experience on the Advisory Committee had convinced him of the importance of active conversation among those groups. Whatever the reason, Rick's academic contributions to civil procedure have always been attentive to real lessons from practice and from judges.

As a colleague, I quickly learned some of Rick's more endearing quirks. He wasn't much for niceties. When asked the typical casual greeting, "How are you doing?" or "How's it going?," Rick usually responded, borderline gruffly, with, "Well, I don't know." His reasons were factual. He didn't know what illnesses or infirmities might be secretly ravaging his body, so he couldn't reliably give a positive answer. I recall thinking that he was taking the evidentiary foundations of good deposition practice very seriously. I did coax out of him once that he had owned a cat named Pennoyer.

Rick is old school. He may be the last living user of WordPerfect. In fact, Rick does not have Word loaded on his computer, so he usually must rely on WordPerfect's conversion tool, or PDFs, when he needs to open any of the hundreds of email attachments he gets every year. When we officed near each other, I sometimes heard him arguing with the temperamental printer between our offices. The arguments were intense enough that I feared for the printer's safety and imagined one day that Rick might take a baseball bat to it as in *Office Space*. I can't say I blamed him, though. That printer was awful to everyone.

Our recent interactions have featured a recurring bugaboo of Rick's: the use of the epicene singular "they" and its derivatives when an individual's gender is unspecified or unknown. I am a vigorous defender of the practice and have tried to convince Rick of its merits,⁶ but he remains unmoved. To be crystal clear, Rick's objection isn't political or ideological.⁷ Rather, his objection is strictly grammatical. He's particularly worried about the slippery-slope encouragement of situations that I also would consider grammatically abhorrent, such as using "they" when an individual's binary gender *is* known.⁸ Every couple of months or so, I can expect to receive a copy of an article that he has found—often in WordPerfect—that misuses the epicene singular "they" in just that way, accompanied by a screed from Rick about its ills. I secretly enjoy those dialogues.

Over the last handful of years, I have joined Rick on the international circuit. American proceduralists are famously provincial, especially in contrast to their European counterparts, such that major international conferences on civil procedure struggle to obtain American representation. Besides Rick, that is. Rick is a constant presence both at those conferences and behind the scenes. In 2017, he sponsored my application to the International Association of Procedural Law, and I joined the editorial staff of the premier international-procedure journal, the *International Journal of Procedural Law*. Since then, I have had the honor to be a frequent collaborator with Rick on projects originating from the Association. Rick, of course, remains the go-to scholar for comparative perspectives from the United States.

The illustrious and varied group of contributors to this festschrift cannot even scratch the surface of Rick's legacy of enduring contributions to the legal academy and the legal profession. As for me, I am grateful that that legacy is continuing to expand as Rick chugs along, doing more of what he is really, really good at.

6. Say, for example, a female victim of assault testifies that she was not able to get a good enough look at her attacker to determine the attacker's gender. Using the epicene "he" to refer to the attacker may give the misimpression, if repeated often enough, that the attacker is known to be male. Using the phrase "he or she" may give the misimpression that the victim is testifying affirmatively that the attacker is not nonbinary, and the phrase can get awkward when repeatedly used. The epicene singular pronoun "they" avoids those difficulties.

7. Rick has no trouble using "they" pronouns to refer to individuals with "they"-preferred pronouns. His objection, as I take it, is to the use of "they" when an individual's gender is unspecified or unknown.

8. One illustration is this: "I see a man outside my office. What do they want?"
