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## TRIBUTE

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### GEOFFREY C. HAZARD, JR.: DIRECTOR EXEMPLAR OF THE AMERICAN LAW INSTITUTE

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MICHAEL TRAYNOR<sup>†</sup>

Geoff Hazard, during a discussion of the *Restatement (Third) of the Law Governing Lawyers*, 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,” 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>1</sup>

Throughout his fifteen-year tenure as Director of the American Law Institute (ALI), from 1984 to 1999, and thereafter as a member of the Council, Geoff consistently has given such incisive, cogent, and succinct advice at annual meetings, meetings of the Council, and meetings of Advisers and Members Consultative Groups,<sup>2</sup> as well as in his critical consultations with Reporters and in the editing of their drafts to make them worthy of consideration. 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.

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

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<sup>†</sup> President Emeritus and Chair of the Council, American Law Institute; Senior Counsel, Cobalt LLP, Berkeley, California.

<sup>1</sup> *Continuation of Discussion of Restatement of the Law Third, The Law Governing Lawyers*, 74 A.L.I. PROC. 388 (1997).

<sup>2</sup> Members Consultative Groups for the ALI’s projects were a vital innovation that began under the leadership of President Roswell Perkins and Director Hazard. See John P. Frank, *The American Law Institute, 1923–1998*, 26 HOFSTRA L. REV. 615, 627 (1998).

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>3</sup> Second, after retiring as Director, Geoff, together with ALI Co-Reporter Michele Taruffo and UNIDROIT Co-Reporter Rolf Stürner, and with the able assistance of Professor Antonio Gidi, completed the ALI/UNIDROIT Principles of Transnational Civil Procedure<sup>4</sup> to widespread acclaim.<sup>5</sup> They and their colleagues synthesized the best elements of procedural law from the common law system and the civil law system, creating principles that promise to bring reason and order to international commercial litigation.

At the ALI’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>6</sup> In his 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 a Reporter or a member has just said. At other times it will offer a solution to a problem that has been giving difficulty.<sup>7</sup>

Conrad Harper described Geoff as the “rightful successor” of Herbert Wechsler, saying, “It has been a stunning 15 years.”<sup>8</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

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<sup>3</sup> Herbert Wechsler, *Foreword to 1 RESTATEMENT (SECOND) OF JUDGMENTS*, at vii (1982).

<sup>4</sup> PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2006).

<sup>5</sup> 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).

<sup>6</sup> Charles Alan Wright, *Introductory Remarks*, 76 A.L.I. PROC. 360 (1999).

<sup>7</sup> Charles Alan Wright, *The President’s Letter*, A.L.I. REP., Spring 1999, at 1, 3. See generally HILARY MANTEL, WOLF HALL 470 (2009) (“When you are writing laws you are testing words to find their utmost power.”).

<sup>8</sup> Conrad Harper, *Introductory Remarks*, 76 A.L.I. PROC. 360 (1999). Mr. Harper evoked Felix Frankfurter’s dedication of his lectures entitled *Mr. Justice Holmes and the Supreme Court* to “Mr. Justice Cardozo, rightful successor of Mr. Justice Holmes.” See *id.*

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>9</sup>

Geoff's remark was accompanied by appreciative laughter, which often occurs and is 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>10</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 respect for the opinions and responsibilities of others contributes to the ALI's influence. Indeed, the ALI is persuasive because it is not authoritative.<sup>11</sup> 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>12</sup> Recognizing the growing international implications of our work, he started projects on transnational insolvency and international jurisdiction and judgments, and he commenced consideration of international intellectual property. He, like his predecessors, also laid a strong foundation for future projects, which his successor Lance Liebman has developed.

I will briefly mention two pioneering projects, the Principles of Corporate Governance<sup>13</sup> and the Principles of the Law of Family Dissolution.<sup>14</sup> Initiated during Herbert Wechsler's final years as Director and completed during Geoff's term, the Principles of Corporate Go-

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<sup>9</sup> 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).

<sup>10</sup> *Id.* at 362.

<sup>11</sup> Conversation with Professor Hazard in Stinson Beach, Cal. (Dec. 27, 2009).

<sup>12</sup> 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).

<sup>13</sup> PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994).

<sup>14</sup> PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

vernance are invoked by courts<sup>15</sup> and, by articulating standards of conduct, tend to improve corporate behavior.<sup>16</sup> Illustrating Geoff's point that "precise formulation can make a difference,"<sup>17</sup> our members vigorously debated the standard of conduct that should apply 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>18</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 that "President Perkins's persevering diplomatic leadership was rendered with unfailing intelligence."<sup>19</sup> In turn, President Perkins, in his historic foreword, stated that Director Hazard "provided superb leadership in steering the Project over most of its life and in bringing it to completion."<sup>20</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 of this innovative and far-reaching project, Professor Ira Ellman, Chief Reporter, and his principal colleagues, Professors Katharine Bartlett and Grace Blumberg, provided workable solutions and pragmatic ap-

<sup>15</sup> See, e.g., *Cuker v. Mikalauskas*, 692 A.2d 1042, 1049 & n.5 (Pa. 1997).

<sup>16</sup> 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").

<sup>17</sup> Hazard, *supra* note 9, at 362.

<sup>18</sup> See *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 "close etymological tie[s]" between the words "rational" and "reasonable," the Principles draw a "sharp distinction" between them. *Id.* cmt. d.

<sup>19</sup> Geoffrey C. Hazard, Jr., *Director's Foreword* to 1 *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS*, at x (1994).

<sup>20</sup> Roswell B. Perkins, *President's Foreword* to 1 *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS*, at xxiii (1994).

proaches to perplexing problems of separation and relationship termination, child custody, and child support, including those problems that arise in relationships between persons of the same sex.

The ALI is known, historically and currently, for its Restatements, which state the law as it optimally should be, as well as more recently for its Principles of the Law, which state the law as it should develop, and for its statutory projects, which articulate principles and accompanying statutory language for legislatures, and by extension courts, to consider.<sup>21</sup> It is also known for its contribution to the Universal Declaration of Human Rights and for the Reporters' Study entitled *Enterprise Responsibility for Personal Injury*.<sup>22</sup> The ALI, with Geoff's encouragement, remains open to new approaches to implementing its 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>23</sup> For example, at our initial discussion of international intellectual property, Geoff suggested that the ALI 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>24</sup>

As a Council member, Geoff continues 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<sup>25</sup> and provided guidance.<sup>26</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>27</sup>

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<sup>21</sup> See, by our esteemed Treasurer, Bennett Boskey, *The American Law Institute: A Glimpse at Its Future*, 12 GREEN BAG 2D 255, 257-61 (2009).

<sup>22</sup> *Id.* at 260; see also Traynor, *supra* note 5, at 161.

<sup>23</sup> AM. LAW INST., CERTIFICATE OF INCORPORATION (1923), available at <http://www.ali.org/doc/charter.pdf>.

<sup>24</sup> According to my recollection, he made this suggestion at an early meeting in San Francisco.

<sup>25</sup> In "the law governing lawyers and judges," Geoff's "influence is unsurpassed by any scholar of his generation." Stephen Gillers, *Hazard, Geoffrey C., Jr.*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 259, 259 (Roger K. Newman ed., 2009).

<sup>26</sup> See 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.

<sup>27</sup> *Id.* at 4.

In addition to being a leader, ethicist, and friend of the ALI and of our profession,<sup>28</sup> Geoff is unpretentious and witty. Here are just a few selections: To a Reporter, “[T]he clock is your friend”;<sup>29</sup> “I will treat this [report] with the degree of routine that it fully deserves”;<sup>30</sup> and “[M]aybe better than a motion we would have insight here.”<sup>31</sup> When a member addressed President Wright as “Your Honor,” Geoff interjected, “Your grace, not Your Honor.”<sup>32</sup> To President Wright, who had reported that he had “slipped out during [a] 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>33</sup> In response to a question about “what . . . the Institute [would] do in [a particular] case,” Geoff stated, “Make a sensible decision, I think.”<sup>34</sup> With Geoff’s steadfast leadership and friendly guidance, a sensible decision is what we usually accomplish. We hold him in affectionate and high regard.

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<sup>28</sup> See generally IMMANUEL KANT, LECTURES ON ETHICS 206 (Louis Infield trans., 1930) (n.d.) (“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>29</sup> Geoffrey C. Hazard, Jr., Comment at Council meeting (Dec. 2009).

<sup>30</sup> Geoffrey C. Hazard, Jr., *Report of the Director*, 75 A.L.I. PROC. 5 (1998).

<sup>31</sup> *Discussion of Restatement of the Law Third, The Law Governing Lawyers*, 75 A.L.I. PROC. 45 (1998).

<sup>32</sup> *Discussion of the Uniform Commercial Code, Revised Article 2A (Leases)*, 76 A.L.I. PROC. 377 (1999).

<sup>33</sup> *Discussion of Transnational Insolvency Project (International Statements of United States and Canadian Bankruptcy Law)*, 74 A.L.I. PROC. 263-64 (1997).

<sup>34</sup> *Continuation of Discussion of Restatement of the Law Third, The Law Governing Lawyers*, 75 A.L.I. PROC. 105 (1998).