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Intervention in Roman Law: A Case Study in the Hazards of Legal Scholarship

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All professions undergo periodic self-evaluation, questioning what counts as exemplary work in the field. Like other academic disciplines, legal scholarship frequently features such introspective views and self-critique. Many of these reflections complain about the tedious nature of what appears in law reviews or about the quality of the reviews themselves. Some of these essays—rants, in many cases—simply attack the institution of the law review altogether. A classic piece in this group is Fred Rodell's 1936 essay, *Goodbye to Law Reviews*.[1] In that all-encompassing diatribe, Rodell complained that law reviews have two basic problems, style and content.[2] Other attacks on law reviews include the substantive areas that law reviews cover or ignore.[3] Some judges and practitioners complain that law review articles ignore issues of practical importance and focus on esoterica.[4] A leitmotif of much of this criticism concerns the attribute that distinguishes American law reviews from their foreign counterparts or their counterparts in other academic fields: They are edited by students rather than professors. According to critics, this attribute leads to problems from start to finish, from irrational bases for article

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[1] Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936) [hereinafter Rodell, *Goodbye*]. Rodell followed this up in 1962 with Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279 (1962), which reprinted Rodell's original article and included new attacks on the style of legal writing. Although usual law review style would call for a lengthy footnote here with references to the literature, it would be impossible to catalogue all of the articles critical of legal writing.

[2] Rodell, *Goodbye*, *supra* note 1, at 38.

[3] *See, e.g.*, William J. Turnier, *Tax (and Lots of Other) Scholars Need Not Apply: The Changing Venue for Scholarship*, 50 J. LEGAL EDUC. 189 (2000) (demonstrating that coverage of taxation has declined in standard law reviews).

[4] *See, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

selection by those under qualified to make the selection to the politics of trading-up a piece from a lesser review to a better review to over editing of the author's prose once the students select the piece.[5] The phenomenon of student selection and editing forms an important but not singular thought in legal academic self-reflection. As with all such self-reflection, some of the specific criticism of law reviews hits home while some of it illustrates the problems of scholarship encountered in any discipline. Some of it, however, sounds like self-pitying whining on all sides.

In this Article, I offer a case study of one of the hazards presented by legal scholarship in law reviews as it has evolved over the last century. The standard law review article typically begins with an overview of the author's subject, frequently involving a historical perspective or a chronology of the development of a doctrine. This background section stems from a number of causes, but many attribute it to the fact that most law reviews are student-edited.[6] In order to evaluate an author's argument, students need a brief course in, say, the basics of trade law and pollution control statutes before the author can advance her or his argument about how the two should intersect or how the courts have botched the job of merging the two. (I should note that I have picked this example at random; I have no specific article about this issue in mind as embodying the phenomenon.)

Because the author is most interested in the advanced part of the argument, the author usually does not care much about the material in the background section and does not devote the careful research as he or she might in the other sections. Similarly, the student editors—who, unlike the editors of other academic journals, have taken upon themselves the job of checking every one of the author's citations to see whether they actually say what the author says

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[5] *See, e.g.*, James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527 (1994); *Special Issue: Law Review Conference*, 47 STAN. L. REV. 1117 (1995); *Symposium on Law Review Editing: The Struggle Between Author and Editor over Control of the Text*, 70 CHI.-KENT L. REV. 71 (1994). The professors are not alone. Students also complain about the law review article selection process. *See* Nathan H. Saunders, Note, *Student-Edited Law Reviews: Reflections and Responses of an Inmate*, 49 DUKE L.J. 1663 (2000); Daniel Brian Yeager, *So, You Want to Be Editor*, NAT'L L.J., Sept. 4, 1989, at 13; *cf.* The Articles Editors, *A Response*, 61 U. CHI. L. REV. 553, 554 (1994) (defending practice of basing article selection solely on the credentials of the author rather than quality of article). A defense of the student-run law review can be found in James W. Harper, *Why Student-Run Law Reviews?*, 82 MINN. L. REV. 1261 (1998).

[6] *See, e.g.*, Wendy J. Gordon, *Counter-Manifesto: Student-Edited Reviews and the Intellectual Properties of Scholarship*, 61 U. CHI. L. REV. 541, 547-48 (1994).

they say or at least that they come close[7]—often do not care about the substance of the background section. Indeed, they may not care about the article at all, so long as the finished product has citations that appear to stand for the proposition stated in the text put in the proper form for citation. Finally, most other scholars have little interest in whether an author's background section correctly states the background, regarding it as a long front walk to get to the real point. To the extent that other legal scholars do delve into the background, they do so to reeducate themselves about a field or, more likely, to compose background sections for their own work. An original background section can therefore easily become the received wisdom for the background to a doctrine because going over the actual material is boring, possibly difficult, and potentially fruitless. If an error creeps into a background section, then, other scholars might simply repeat the error without critical inquiry.

I discovered such an error while preparing an article in this standard format. I have previously written about the procedural mechanism of intervention in complex civil cases.[8] Intervention is a device that allows an outsider to force his or her way into litigation between other parties, and I argued, contrary to some, that courts fairly generously allow intervention and that these courts are perhaps too generous in some cases. Some of my later argument about this procedural device actually called for references to older American case law to make some of its points, but, like others before me, I did not rest with a brief discussion of those cases. Instead, I dutifully rooted around in the literature looking for the origins of the right to intervene. In researching and writing my own background section for that article, I discovered the assertion, often repeated, that intervention had its roots in Roman law, and that Roman law had an extensive practice of intervention. Looking at the sources cited in the first article making the assertion,[9] I discovered that the argument had a weak foundation if it had any at all.[10] If intervention did exist in Roman law, it did

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[7] One notable exception to this rule is the *Yale Journal of Law and Humanities*, which actually states in it submissions policy that "Authors are personally responsible for the accuracy of their citations." See their submissions policy *at* http://www.yale.edu/yjlh/submit.htm (last visited Jan. 27, 2003). That expectation goes without saying in other fields.

[8] Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215 (2000).

[9] James Wm. Moore & Edward H. Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 568 (1936).

[10] *See* Appel, *supra* note 8, at 241 n.139.

not resemble the procedure called intervention today, and intervention, if it existed at all, was considered strange, not extensive.

Although I did not make much of it at the time, this seemingly innocuous mistake was significant for three reasons. First, the mistake was made by two monumental legal scholars: James Wm. Moore, one of the legal titans in civil procedure, who served as one of the authors of the Federal Rules of Civil Procedure and was then chief author of one of the leading multi-volume treatises on federal civil procedure; and Edward Levi, who later became dean and president of the University of Chicago and served as United States Attorney General under President Ford. To be fair to Moore and Levi, they made their error when Moore was a mere instructor at Yale Law School and Levi was a Sterling Fellow at Yale obtaining his advanced law degree.[11] But youth or inexperience alone cannot lend them too much cover, because they received their help on Roman law from Friedrich Kessler, German emigré and great scholar in the law of contracts among other areas.[12] Second, the mistake was repeated in much of the academic literature about intervention with due citation to the original mistake or to other sources that in turn cited the original mistake. Third, those who have repeated the collective mistake of Moore, Levi, and Kessler were not just student authors or junior faculty, but have included some of the leading lights in law today. A final reason the mistake is interesting, but not significant, is that Moore and Levi published their article the same year that Rodell blasted law reviews for publishing "stuff that is not fit to read, on subjects that are not worth the bother of writing about them."[13] In particular, Rodell hated the "dumpy dignity and fake learnedness in law review writing."[14] If anything adds "dumpy dignity and fake learnedness" to law review writing, it would be erroneous and superfluous references to Roman law.

To explore the mistake and its ramifications, this Article will proceed in three parts. Part I documents the error that these three men made. It essentially repeats and expands upon the points I made in my earlier work. As a result, for most readers it will plod along, mired in minutiae over a seemingly inconsequential question, namely whether Roman law had the institution of intervention and whether, if it did, intervention practice was extensive. Because of the stature of those whom I criticize, however, the argument must

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[11] Moore & Levi, *supra* note 9, at 565 nn.† & ‡.
[12] *Id.* at 565 n.*.
[13] Rodell, *Goodbye*, *supra* note 1, at 45.
[14] *Id.* at 41.

thoroughly canvass the relevant materials. Ralph Waldo Emerson is said to have told a young Oliver Wendell Holmes, Jr., in evaluating an essay that the Harvard undergraduate wrote on Plato, "When you strike at a king, you must kill him."[15] In criticizing Moore, Levi, and Kessler, I feel that I am striking at kings. Moreover, all three of the principals of this story have died, and I want to avoid picking on those who cannot defend themselves. Thus, after giving them their due, I want to make sure that Moore, Levi, and Kessler made the mistake, and that I did not. Nevertheless, the reexamination of Moore and Levi's argument takes some interesting turns, and may bear out reading.

Readers who wish to escape the tedium of the argument of whether Roman law had intervention and the extent to which it did may wish to skip to the more sprightly Part II, which documents instances in which other scholars—both eminent and not—have repeated the mistake. The purpose of this part is not to place blame on anyone in particular, but to illustrate how an assertion made in an article can spread unquestioned for a long period of time. Finally, Part III provides some reflections on the broader significance of this mistake. Because I offer this short Article as a case study—and because, at this point in my own career, it would be presumptuous and arrogant to dictate a comprehensive solution to the problems I believe the mistake highlights—I offer only tentative conclusions and suggestions about how legal scholarship should react to this phenomenon. In that way, I hope to contribute to the useful aspects of reflecting upon what legal scholars do when they are engaged in scholarship.

I. THE LACK OF INTERVENTION IN ROMAN LAW

In their historical section, Moore and Levi asserted that "intervention practice in Roman law was rather extensive," but immediately qualified this statement with the recognition that "intervention seems to have taken place only at the appeal stage and then on the theory that the losing party might refuse to appeal or might not be vigilant in prosecuting the appeal and the petitioner's interest thus be inadequately protected."[16] This qualification

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[15] Bartlett's attributes the quotation to Emerson, and cites Max Lerner's collection of Holmes's writings for the source. Lerner, in turn, cites no authoritative document. *See* JOHN BARTLETT, FAMILIAR QUOTATIONS 610 (14th ed. 1968); MAX LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 197 (1943). Additional references for the quotation can be found in Michael H. Hoffheimer, *The Early Critical and Philosophical Writings of Justice Holmes*, 30 B.C. L. REV. 1221, 1234 & n.41 (1989).

[16] Moore & Levi, *supra* note 9, at 568.

should have provided a clue of the flaws in their assertion that intervention was "rather extensive" in Roman law. Intervention, as Moore and Levi understood it, was "the procedural device whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto, and become a party for the purpose of the claim or defense presented."[17] The device is primarily understood now to mean adding an outsider to a trial-level proceeding in a civil case, and Moore and Levi used it primarily in that sense. The fact that intervention, according to Moore and Levi, "seems to have taken place only at the appeal stage" should have tipped them off that intervention in Roman law was unlike intervention in the modern understanding. If Roman civil procedure limited the device to appeals only, perhaps it limited application of this doctrine to certain odd cases as well.

To establish their case, Moore and Levi relied only on Justinian's *Digest*. The *Digest* forms one part of the *Corpus Juris Civilis*, the other parts being Justinian's *Institutes*, which was a legal primer for law students; the *Code*, which compiled the statutes of other emperors; and the *Novels*, which were rulings by Justinian and subsequent emperors.[18] If intervention was practiced extensively, one might expect to see references to it in these other works. Moore and Levi provide no evidence that the other parts of the *Corpus Juris Civilis* do, and I have found none. To be fair to Moore and Levi, I am not well-versed with these other parts of the *Corpus Juris Civilis*, but I do not think it unfair to place the burden of proof on them to establish that intervention was extensively practiced in Roman law. Moore and Levi's placement of reliance on the *Digest* exclusively was also somewhat risky on their part, because the *Digest* is the compilation of the writings of many Roman jurists over the years. As with any such compilation, it contains some statements that may not reflect the actual state of Roman law, but the view of only one jurist.[19] Thus, the fact that the *Digest* contains references to something like intervention does not necessarily mean that it was widely practiced; rather, the statement of one jurist might describe an exception rather than a rule or that particular jurist's view of how the law ought to be, not how it actually was. (Of course, this observation applies to any reliance on the *Digest*.)

In any event, Moore and Levi focused on five passages from the *Digest* on which they formed their belief that Roman law allowed intervention in appeals.

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[17] *Id.* at 565.

[18] *See* ALAN WATSON, THE EVOLUTION OF WESTERN PRIVATE LAW 2-4 (expanded ed. 2001).

[19] *See id.* at 140-42 (demonstrating tension in liability for flooding neighbor's land, which illustrates tensions and disagreements within the *Digest* itself).

All of them involve rather specialized instances, and all but one involve cases where two parties collude to use the legal system to bind outsiders. In their first example, Moore and Levi argued that "[i]f the vendee was evicted from the property purchased, his vendor could appeal, and moreover he could intervene if the purchaser appeared to be in collusion with the plaintiff."[20] A modern translation of this fragment is:

> Again, if a buyer fails to obtain ownership, on his yielding the point, his *auctor* can appeal; or if the *auctor* brings an action and loses, the buyer is not to be refused the opportunity of an appeal. But what if a seller, who did not wish to appeal, is not a solvent person? Indeed, and even if the *auctor* appeals but then is seen to be suspect in defending his action, the defense of the action is accordingly to be handed over to the buyer, just as if he himself had been the appellant.[21]

This passage appears at first glance to provide for something like intervention: The court will allow an outsider to litigation to vindicate his or her separate interest.

Upon closer inspection, however, the passage does not support the notion that the Roman law of intervention was broad, and may not support the argument that intervention even existed. There are four reasons for this conclusion, three textual and one based on a more thorough examination of substantive Roman law of the transfer of property. First, the fragment provides that if one party loses and chooses not to appeal, another party can step in to avoid the possible ill effects of the judgment. Intervention, by contrast, envisions that the original parties remain in the action. Second, the right involved only arose when a judgment was entered and the rights of the parties were determined definitively. Intervention, by contrast, can involve situations where the impact on the outsider is not as clear from the outset. Indeed, Moore and Levi advocated expanding the right to cover just such situations, for

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[20] Moore & Levi, *supra* note 9, at 568. For support, Moore and Levi cited "1.4 § 3 D. 49, 1." *Id.* at 568 n.14. This citation style is one disfavored in America, but if I have understood it correctly, refers to what would be cited now as DIG. 49.1.4.3 (Macer, Appeals 1). Moore and Levi's citation here and elsewhere also contains a revealing typographical error, which I examine *infra* at notes 37-44.

[21] DIG. 49.1.4.3 (Macer, Appeals 1). Throughout this Article, I am relying on the modern translation of the *Digest* edited by Alan Watson. 2 THE DIGEST OF JUSTINIAN (Alan Watson, trans. ed. 1985; 2d ed. 1998).

example where a minority shareholder might be disadvantaged in a corporate reorganization proceeding, and the judgment could adversely affect the minority shareholder, although one could not tell from the outset that the reorganization proceeding definitely would prejudice the outsider. Third, even if the right conferred is one that could be called a right to intervene, it applies primarily when there is collusion among the parties or one party is "suspect in defending his action." This condition envisions the situation where one might expect a legal system to create special exceptions to normal rules, not an extensive right that will be widely practiced.

Moreover, in making their point about procedure, Moore and Levi apparently misunderstood the relationship established in the underlying substantive private law. The transaction discussed in this passage has three named parties, namely the *auctor*, the seller, and the buyer, and one unnamed party, namely the person attempting to evict the buyer from title to the disputed good. Who is the *auctor*, and how is that person different from the seller mentioned in the second sentence ("what if the seller . . . is not a solvent person")? The *auctor* is the seller in this particular instance, but the *auctor* is something more than a mere seller or *uenditor* (the term used in the original Latin). The *auctor* is the person with good title in a particular form of conveying property known as *mancipatio*. Certain goods—land, slaves, and some livestock—could be transferred using this ceremony.[22] Thus, to provide an example, suppose that Gaius decides to transfer an ox to Publius through the device of *mancipatio*. In that case, Gaius is not only a seller but also an *auctor*, and Publius is the buyer. But suppose that Gaius's title to the ox was somehow defective, and Marcus, who has superior title to the ox, successfully sues Publius for return of the ox. Did Publius have any recourse against Gaius? Modern American law would probably say yes and would probably award Publius damages equal to the value of the ox.

In this hypothetical situation, Roman law differed somewhat. Roman law recognized an action called the *actio auctoritatis* "by which one who mancipated property for a price had to repay twice the price if he failed to defend the title when it was attacked, by acting as *auctor*, and the buyer was evicted."[23] Thus, the *auctor* had a separate and continuing interest in the

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[22] For a description of the ceremony, see W.W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JULIAN 235-36 (Peter Stein rev., 3d ed. 1963) [hereinafter BUCKLAND, TEXTBOOK]. Although I have relied on this more recent edition of Buckland, a version of Buckland's work was available when Moore and Levi wrote their article.

[23] W.W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW § 109, at 283 (2d ed. 1939); *see also* BUCKLAND, TEXTBOOK, *supra* note 22, at 489.

outcome of a lawsuit between seller and buyer. If the buyer was sued and lost, the *auctor* would have a unique interest in the outcome of the suit because the *auctor* would face potential double liability for the failed transaction. Similarly, if the *auctor* was for some reason willing to disclaim ability to sell or was insolvent and therefore unable to pay twice the price, the buyer would want to appeal to establish title to the property. The buyer could apparently involve the *auctor* by declaring, "*Quando te in iure conspicio postulo anne far auctor?*"[24] A German work on Roman procedure contemporaneous with Moore and Levi's article described this procedure as "collateral intervention," but described the declaration used to involve the *auctor* as a "strange proceeding," in which the "so-called collateral intervenor is interested in the most favorable outcome of the case for the party supported by him."[25] A "strange proceeding" certainly is not one that is widespread. Buckland also referred to this situation as presenting a possibility of intervention, but also argued that the invocation of the *auctor* may have served a separate function of simply identifying the *auctor* without involving the *auctor* as a party to the litigation.[26] Neither Moore and Levi nor the sources I have examined provide an actual instance where someone used this proceeding and intervened in an appeal from the *actio auctoritatis*.

The second instance of intervention that Moore and Levi found in Roman law was one where "the surety could intervene in the suit of the purchaser."[27] The passage on which they rely includes in the list of those who can appeal a judgment "*fideiussores* on behalf of the person for whom they are sureties. Therefore, the *fideiussor* of the seller will appeal on the buyer's losing his action, even though buyer and seller are content."[28] This passage resembles

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[24] BUCKLAND, TEXTBOOK, *supra* note 22, at 613. LEOPOLD WENGER, INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE § 9, at 86 (rev. ed., Otis Harrison Fisk trans., 1940), renders the invocation as "*quando in iure te conspicio, postulo, anne fuas auctor?*" A rough translation of this invocation—which I have not done—might be "when I designate you under the law, I ask whether you have been the *auctor*."

[25] WENGER, *supra* note 24, § 9, at 85-86. The original edition of this book appeared in 1925, *see id.* at xiii, but Moore and Levi may not have been aware of it because the translation did not appear until 1940. If Moore and Levi researched Roman law books in German, they may have found it. Similarly, if Moore and Levi relied on their colleague Kessler extensively, then Kessler may have known of Wenger's original work. I do not know the language skills of Moore and Levi.

[26] BUCKLAND, TEXTBOOK, *supra* note 22, at 613.

[27] Moore & Levi, *supra* note 9, at 568-59. For support, Moore and Levi cited "1.5 pr. D. 49, 1." *Id.* at 569 n.15. I render this citation as DIG. 49.1.5.pr. (Marcian, Appeals 1).

[28] DIG. 49.1.5.pr. (Marcian, Appeals 1).

the one just discussed, where a *fideiussor* will have a direct financial interest in the outcome of a case. Moreover, that passage begins with the general rule that "[i]t is not possible for there to be an appeal against a judgment passed between other parties," although it recognizes an exception "for just cause."[29] This general rule refutes Moore and Levi's contention that intervention was widely practiced in Roman law. Even if we can call it intervention, the rule applied only in the case of appeals, and even then apparently only in limited circumstances involving collusion or direct financial involvement in the transaction.

Third, Moore and Levi argued that, under Roman law, "[a] creditor could intervene in a suit against his debtor, if the latter did not faithfully defend."[30] In full, the passage states:

> This [rule allowing outsiders to appeal] has also been laid down for the case of a creditor when a debtor, after losing his action [against a third party], had appealed and did not defend his action in good faith. This constitution is to be applied if a debtor, having lost concerning a pledge, appeals with the intervention of his creditor; for the debtor creates no prejudice to an absent creditor, and this has been laid down.[31]

This passage stands more for the view that prior litigation between a debtor and one of his creditors cannot bind other creditors. In addition, it applies again only in cases of collusion between parties to a lawsuit.

Fourth, Moore and Levi claimed that under Roman law "[w]here a 'testamentary heir' had been defeated by one claiming that the will lacked necessary formalities legatees under the will and persons freed by it were

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[29] DIG. 49.1.5.pr. (Marcian, Appeals 1). Moore and Levi relied on this passage for the proposition that an outsider to a judgment could appeal for " 'some good reason.' " Moore & Levi, *supra* note 9, at 568 & n.13. I assume that Moore and Levi's translation rendered the Latin as "some good reason" and my translation has rendered it "for just cause." The discrepancy probably makes no difference to the argument.

[30] MOORE & LEVI, *supra* note 9, at 569. For support, they cite "1.4 § 4 D. 49, 1." *Id.* at 569 n.16. If I understand them correctly, the modern rendition of the citation would be DIG. 49.1.4.4 (Macer, Appeals 1).

[31] DIG. 49.1.4.4 (Macer, Appeals 1) (first bracketed material added by author).

allowed to intervene if they could show any collusion."[32] The passage that they cite states:

> If a person instituted as heir loses against an opponent bringing the action of an undutiful will, the legatees and those who have received their freedom [in the will] are allowed to appeal if their complaint is that [judgment] was pronounced by collusion, as was stated in a rescript by the deified Pius.[33]

As with the last instance of supposed intervention on appeal, this passage does not establish a broad right of intervention for three reasons. First, it is limited to the instance of determining the validity of a will. If a will was declared void, then everyone who took from that will (whether they took goods or manumission) would lose. Second, the sole ground for outsiders involving themselves in the case is collusion between the parties. Third, other evidence shows that intervention in an appeal from that judgment was not the means to establish the validity of the will. This authority indicates that the legatees and freed slaves should bring their own independent action to establish the validity of the will before the original judge who declared the will invalid.[34] Thus, even if this fragment presents an instance of intervention on appeal, Roman law devised means other than intervention to protect the rights of third parties. With that provision which Moore and Levi did not acknowledge, their case for widespread use of intervention falters.

Fifth, and finally, Moore and Levi contended that "a relative of a person sentenced to death might intervene to appeal."[35] An examination of these

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[32] Moore & Levi, *supra* note 9, at 569. For support, they cite "1.5 § 1 D. 49, 1." *Id.* at 569 n.17. The modern rendition of this citation would be DIG. 49.1.5.1 (Marcian, Appeals 1).

[33] DIG. 49.1.5.1 (Marcian, Appeals 1) (bracketed material in original translation).

[34] Later in the same book, the *Digest* quotes Ulpian on this subject:

> If an invalid judgment be given against a will, we must see whether the judge's decision is law. And the deified Pius, when it was alleged that an action had been brought by collusion between parties banded together to the ruin of the legatees and their freedoms, allowed the latter to appeal. We apply this law nowadays, so that they can appeal; but they must bring their action before the same judge who conducted the hearing into the will, if they suspect that the heir did not bring his action in good faith.

DIG. 49.1.14 pr. (Ulpian, Edict 14). Modern legal commentators would probably not call this intervention, but rather a collateral attack on a judgment because the legatees in the will go before the same tribunal that originally heard the matter.

[35] Moore & Levi, *supra* note 9, at 569. For support, they cite "4.2 § 3 D. 49, 1." *Id.* at 569

passages reveals two qualifications necessary to this statement. First, all of the passages deal more with what we would call standing to sue, not intervention of outsiders to protect their interests. Second, the text that Moore and Levi cited applied only in capital punishment cases, which both ancient and modern systems regarded as being qualitatively different from run-of-the-mill cases.[36] No matter how extensively the Romans practiced capital punishment, this unique context does not provide good support for Moore and Levi's assertion that intervention was practiced extensively. Finally, this example is from the criminal context, not the civil context, so it provides little support for Moore and Levi's case that intervention was widely practiced as an element of Roman civil procedure.

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n.19. I believe that the passage that they are citing is DIG. 49.4.2.3 (Macer, Appeals 1), which states that the jurist Paul "doubts whether, if a relative appeals on behalf of someone sentenced to capital punishment, he can be heard on the third day." *Id.* This passage suggests that relatives can appeal on behalf of someone sentenced to death. The better passage supporting Moore and Levi's view is one that they quote in their footnote and cite as "1.6 D. 49, 1," and which is probably DIG. 49.1.6 (Ulpian, Appeals 2). That fragment states:

> It is not only the person who is being led off to [capital] punishment who is allowed to appeal but also others in his name, not only if he enjoins it but also [if] anyone else wishes to appeal. Nor is a distinction made as to whether [that person] is a relative of his or not; for I believe that for humanity's sake anyone who appeals should be heard. Accordingly, even if he himself acquiesced in the sentence, we do not inquire what is [the appellant's] interest. What, then, if the condemned man holds out against the appeal, and in his rush to doom does not want an appeal to be allowed? I would think that his punishment should be put off until then.

Id. (bracketed material in original translation). This passage might support the proposition of third party standing in capital cases, but it does not support the notion of intervention. It also appears to reflect the views of Ulpian, who may not have spoken in a representative fashion of the actual law. Similarly, the passage that Moore and Levi cite to the effect that a mother can intervene on behalf of her son supports only a lax requirement of what we would call standing to sue, not intervention. Moore and Levi cite "5.1 § 1 D. 49, 1." Moore & Levi, *supra* note 9, at 569 n.19. That reference is probably to DIG. 49.5.1.1 (Ulpian Edict 29), which states that "when a mother appeals as one who is concerned that her son's property was ruined by a judgment, she ought to be granted a hearing as a concession to family piety. . . ." Those passages should be compared with authority such as Gilmore v. Utah, 429 U.S. 1012 (1976), in which the Supreme Court denied "next friend" standing to a mother seeking to appeal on behalf of son sentenced to death. Although the questions of intervention and standing to sue are related, they are nevertheless distinct in modern systems. In addition, the system of which Ulpian speaks might be a form of executive clemency that the Romans may have exercised in capital cases.

[36] For example, Jewish law provided special rules for the decision of capital punishment cases. *See* THE MISHNAH 386-87 (Herbert Danby, trans. 1964). In the modern American system, the Supreme Court has recognized that death is a qualitatively different penalty. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978).

Wholly apart from their textual analysis, Moore and Levi's argument is plagued with a curious typographical error that points to the weakness of their argument. Almost all of Moore and Levi's citations to the *Digest* contain a superfluous numeral "1" at the beginning of the citation. The numeral "1" does not refer to any subdivision of the *Digest* itself. Instead, Moore and Levi appeared to have followed a form of citing the *Digest* that was popular among German scholars and called for the following citation form: the letter "*l*," standing for "*lex*," then the number of the fragment preceded by the symbol "§," then "D." for *Digest*, then the book number, then the number of the title within the book. When Moore and Levi wrote their article, the system of citation used in law reviews—which is the one used today—copied the style borrowed from British scholars and called for the following order: the number of the book, then the number of the title, then the number of the fragment, then the number of the section within the fragment, with each subdivision separated by periods.[37] Curiously, Moore and Levi did not follow this form of citation even though the citation form dictated by their law journal dictated that they should. (Perhaps law review editors were much more accommodating back then.)

The superfluous numeral "1s" can only be explained as a typographical error, and a revealing one. The "1s" should be "*l*s." I cannot explain the two citations that do not begin with the numeral "1," except to point out that each of these citations has a superfluous numeral "1" at the end. Almost all of the other citations include a superfluous "1" at the beginning of the citation, and the only way of following the citations is reading the "1" as an "*l*." At the time that Moore and Levi wrote, a lowercase "*l*" was frequently used by typists for the numeral "1," which could explain how the typographical error crept into their article. Nevertheless, this persistent typographical error lends credence to the argument that Moore and Levi did not have great familiarity with the sources on which they relied because, had they used the *Digest* and followed this citation convention regularly, the error would have stood out like a sore thumb to them.

Moore and Levi also argued that "[t]he passages in Corpus Juris dealing with intervention were broadly interpreted by medieval writers. . . ."[38] That argument might well be true, but it misses the point. Alan Watson has given examples of medieval and later jurists using Roman law to support legal

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[37] *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 25 (Columbia Law Review Ass'n et al. eds., 4th ed. 1934).

[38] Moore & Levi, *supra* note 9, at 569.

conclusions that Roman law simply does not support.[39] It may well be that the supposed Roman roots of intervention lay in the medieval writers. My problem in evaluating this argument is the physical inaccessibility of the sources and my own language deficiencies. Nevertheless, I believe some superficial evidence exists to at least raise question with their argument.

To support their argument about the medieval writers, Moore and Levi cited three sources. First, Moore and Levi cited "TANKRED, ORDO IUD. IV tit. 5 § 1."[40] This citation probably refers to Tancred's *Ordo Iudiciarius*, a medieval work on canon law.[41] I have been unable to secure a copy of this work, which is listed in some libraries (including Yale's, where Moore and Levi presumably did their research, but not the Library of Congress, the only law library outside of my home institution that I visited), but the source is usually archived as a rare book and is thus not readily available through interlibrary loan. I therefore cannot evaluate whether Moore and Levi have Tancred right. But their citation is odd, because they misspell Tancred's name, because they do not capitalize the second word in the title of the work, and because the first subdivision number, if it refers to the volume of the work, should precede the name of the author under the citation style that Moore and Levi followed. Second, Moore and Levi cited "SCACCIA, DE APPELLATIONIBUS QU. 5 Nr 73."[42] Again, some libraries (interestingly, not Yale's) have this work but I have not seen it. Nevertheless, Moore and Levi's citation is again odd, because again they did not capitalize the second word of the title, and they placed a period after the first subdivision abbreviation but not after the second. Finally, in the list of medieval writers, Moore and Levi cited the work of Adolf Wach from 1885, a book I located at the Library of Congress.[43] It goes without saying that an author writing in 1885 is not a medieval authority on Roman law, although he certainly could provide insight into medieval works.

But Wach's work provides a clue about how Moore and Levi may have done their research, because Moore and Levi's citation to Tancred includes yet

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[39] *See* WATSON, *supra* note 18, at 27-33.

[40] Moore & Levi, *supra* note 9, at 569 n.20.

[41] For the description, I am relying on 1 PATRICK MAC CHOMBAICH DE COLQUHOUN, A SUMMARY OF THE ROMAN CIVIL LAW § 148, at 164 (Fred B. Rothman & Co. 1988) (1849).

[42] Moore & Levi, *supra* note 9, at 569 n.20. 45 YALE L.J. 565, 568.

[43] Moore & Levi, *supra* note 9, at 569 n.20. Moore and Levi cite the work at "CIVILPROZESS," but I believe what they are citing is ADOLF WACH, HANDBUCH DES DEUTSCHEN CIVILPROZESSRECHTS (Leipzig, Verlag von Duncker & Humblot, 1885). I base this on the fact that Moore and Levi cite page 616, footnote 3 of Wach's work, and that note contains the sources that Moore and Levi cite.

another revealing typographical error. This jurist's name as rendered in the United States and as indexed in most law library catalogs is Tancred, not "Tankred" as cited by Moore and Levi. The shift from C to K is odd, because it appears to be a German spelling. Yet if one turns to the material in Wach cited by Moore and Levi, one finds a possible source of their citation. In his material on "Das Interventionsrecht," or the law or right of intervention, Wach cites "Tankred, Ordo iud. IV tit. 5 § 1,"[44] which is exactly—to the letter—what Moore and Levi cite. Wach then cites "Scaccia, De appellationibus qu. 5 Nr 73," which again is *exactly* what Moore and Levi cite, capitalization, punctuation, and all. (Moore and Levi did change the typeface in their citations, which may indicate that law review editors had some points on which they would not budge back then.) Moore and Levi thus may have relied entirely on Wach for their medieval sources, considering the typographical errors, the strange citation styles, and the fact that their law library now lacks one of the sources. It probably lacked the source then, given the age of the source.

To round out their argument, Moore and Levi argued that "[t]he ecclesiastical courts introduced the Roman practice of intervention into England."[45] For support, they cite "the famous case of *Dalrymple v. Dalrymple*" for the proposition that a party can intervene "if he '*consider* that his interest will be affected.' "[46] That language certainly supports a broad right to intervene, for, as it is now understood, a party must show more than a mere passing interest in litigation to support a petition to intervene. Moore and Levi's description of *Dalrymple v. Dalrymple* as a famous case might make one think that it is famous for what it had to say about intervention. *Dalrymple* may be famous, but not for that reason. The case involved an English soldier from a wealthy family of Scottish descent who, while stationed in Scotland, apparently fell in love and entered into a secret and nonreligious marriage with a Scottish woman. The solider's romantic ardor subsided, and he subsequently returned to England and married an English woman of high station, this time in a religious ceremony. The first putative wife sued to have the second marriage declared void. Scots law recognized irregular, nonreligious marriages under some circumstances, but English law did not. The legal questions thus presented in the case were whether the Scottish marriage was valid, and, if it

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[44] WACH, *supra* note 43, at 616 n.3.
[45] Moore & Levi, *supra* note 9, at 569.
[46] *Id.*

was, whether it was enforceable in an English proceeding, thus voiding the later English marriage.

As a historical matter, *Dalrymple v. Dalrymple* is well-known because it involved prominent families and took many years to settle. Indeed, rumored marital problems in the Dalrymple family from the seventeenth century inspired Sir Walter Scott's *Bride of Lammermoor*—known to opera fans through Donizetti's *Lucia di Lammermoor*—and John Cairns has argued that the more recent Dalrymple family woes caused Scott to withhold information on his source for the *Bride of Lammermoor* story until over a decade after he first published the fictional version of the earlier tale.[47] As a legal matter, *Dalrymple v. Dalrymple* is well-known as a conflict of laws case involving the legitimacy of marriages and how the legal system of a foreign jurisdiction is proved (in that case, the court took expert testimony about the state of Scots law).

What *Dalrymple v. Dalrymple* is not as well known for is its role in the development of intervention jurisprudence. The only comment in the reported case concerning intervention is an aside from the judge that Laura Manners, the second wife,

> is nowhere made a party to the suit; she might have been so in point of form if she had chosen to intervene; in substance she is; for her marriage is distinctly pleaded and proved, and is as much therefore under the eye, and under the attention, and under the protection of the Court, as if she were formally a party to the question respecting the validity of this marriage, which is in effect to decide upon the validity of her own.[48]

This language does not confer a broad right allowing anyone who considers that he or she has an interest in a case to intervene; indeed, it appears that Ms. Manners did not attempt to intervene in the trial court. The reported opinion also ends with a footnote stating that the second Mrs. Dalrymple was allowed to intervene when the adverse judgment was appealed.[49] No reason is given for the intervention. Moreover, the case does not advance the thesis that

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[47] John W. Cairns, *A Note on* The Bride of Lammermoor*: Why Scott Did Not Mention the Dalrymple Legend Until 1830*, 20 SCOT. LITERARY J. 19 (May 1993).

[48] Dalrymple v. Dalrymple, 161 Eng. Rep. 665, 667-68 (1811). Here I must confess to a typographical error of my own. In my earlier work, I cited this case as "161 Eng. Rep. 602 (1811)." Appel, *supra* note 8, at 243 n.142. *Mea maxima culpa.*

[49] *Id.* at 693 n.*.

intervention has its roots in Roman law, for neither the body of the opinion nor the footnote cites Roman sources as the reason for discussing or eventually allowing intervention in that case.

Moore and Levi knew this. The language that Moore and Levi quoted concerning intervention is not in the reported decision but is attributed by Moore and Levi to "2 CHITTY, GENERAL PRACTICE (1834) 354."[50] I have not located the 1834 version of this work, but I have located subsequent editions of it. These subsequent editions of Chitty's work all include the language that Moore and Levi quoted, and the subsequent versions also attribute the language to the "learned judge" of *Dalrymple* without further citation. That attribution is not necessarily suspect, for the quality of reported cases in the early nineteenth century varied considerably; the judge in *Dalrymple* may have said something like the quoted language that appeared in a reporter that did not survive or was known to members of the bar. But, once again, the reliance on this source raises more questions than it answers. The versions of Chitty that I have located all contain the quotation that a person can intervene if he " 'consider that his interest will be affected by a cause which is depending.' "[51] None of the editions that I found, however, indicate the end of the quotation that supposedly came from *Dalrymple*. The text in each edition continues:

> The intervener may come in at any stage of the cause, and even after judgment, if an appeal can be allowed of the cause, or he may have no interest to interfere until he applies to intervene. The Orphan Board in that case were not interested in the matter in dispute until the decease of Mrs. Durr, and immediately after her death, they applied to intervene. It is immaterial in what state the cause is, if, at the time of the intervention, the proceedings are not deranged by it.[52]

Dalrymple did not involve the Orphan Board or a Mrs. Durr, but the reference to "that case" could only refer back to the *Dalrymple* case. We therefore have

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[50] Moore & Levi, *supra* note 9, at 569 n.22.

[51] 2 J. CHITTY, THE PRACTICE OF LAW IN ALL ITS PRINCIPAL DEPARTMENTS 493 (3d ed., London: S. Sweet 1837) [hereinafter CHITTY, 3D ED.]; 2 J. CHITTY, THE PRACTICE OF LAW IN ALL ITS DEPARTMENTS 493 (Philadelphia: P.H. Nicklin & T. Johnson, 1836) [hereinafter CHITTY, 1836 ED.]; 2 J. CHITTY, THE PRACTICE OF LAW IN ALL ITS DEPARTMENTS 493 (1st Amer. ed., Philadelphia: P.H. Nicklin & T. Johnson, 1835) [hereinafter CHITTY, 1835 ED.].

[52] 2 CHITTY, 3D ED., *supra* note 51, at 493; 2 CHITTY, 1836 ED., *supra* note 51, at 493; 2 CHITTY, 1835 ED., *supra* note 51, at 493.

no sure sense of whence the language arguing for a broad right to intervene came.

Chitty's work may also have given Moore and Levi their first introduction to the notion that Roman law had intervention, but not for the notion that Roman law had an extensive intervention practice. Each edition of Chitty that I have examined provides a reference to a portion of the *Digest* examined earlier, which looks at specific instances in which parties may appeal.[53] In each edition, Chitty argued that the examples "are only put as examples, the rule which they establish extending, according to the words of this law, to all cases of the same sort, that is, to all cases where the party may have an interest in the event of the suit."[54] Chitty's extension of the words of the *Digest* is remarkable, since the passage begins, "It is not possible for there to be an appeal against a judgment passed between other parties, except for just cause. . . ."[55] Thus, the general rule of the *Digest* was that only parties may appeal with perhaps some exceptions; Chitty transformed the list of exceptions into illustrations of a more general rule. That extension had no basis in the *Digest* because other portions of the *Digest* indicate that the original party had to pursue the appeal himself and not through a representative.[56] The extension of the rule of intervention is also tenuous because each edition of Chitty argued that intervention could occur in the ecclesiastical courts but not in the courts of law or chancery.[57]

To put it briefly, there is much to doubt in Moore and Levi's account of the Roman law of intervention. The sources that apparently stand for creating a right of intervention apply, if at all, in narrow circumstances. Roman law had other means for parties to vindicate their interests. In addition, one leaves Moore and Levi's argument unsure about the conclusion because the quality of the citations lead one to question the quality of the argument. Finally, working back from pathways that they cited—such as looking more deeply into Chitty and the sources he relied upon—also show that the case for intervention in Roman law is tenuous at best.

Another odd fact about Moore and Levi's argument that Roman law had a broad right of intervention is what they do not cite for support, either in this context or anywhere. First, Moore and Levi cite no secondary English-

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[53] *See* sources cited *supra* note 51 (each citing DIG. 49.1.5).
[54] *See* sources cited *supra* note 51.
[55] DIG. 49.1.5.pr (Marcian, Appeals 1).
[56] *See* DIG. 49.9.1 (Ulpian, Appeals 4).
[57] *See* sources cited *supra* note 51.

language sources on Roman law that would support their argument. That lack of citation might stem from the fact that no such source existed that would help their argument. For example, Moore and Levi do not refer to standard English-language texts on Roman law such as Buckland. I have looked into these sources, and none mentions the right of intervention.

Another English-language source that Moore and Levi did not refer to at all—again, surprisingly—is Lord Gilbert's account of the equity courts which is known as *Forum Romanum* or Roman Forum.[58] The title of that work alone would tend to support Moore and Levi's argument of the Roman origins of intervention, and Gilbert advocated an expansive right of intervention, just as Moore and Levi did. Again, they may not have referred to it because Gilbert does not cite Roman law to support his argument. Moreover, as Maitland and others have argued, Roman law probably played a smaller part in the development of equity law and procedure than has been claimed in the past.[59] The chancellors probably knew Latin and some canon law, but the rules of equity itself were probably a domestic product. Gilbert may have referred to his work as the *Forum Romanum* for many reasons, but the lack of references to the *Digest* or other Roman sources undermines any claim that English equity courts borrowed a Roman rule.

I found the *Forum Romanum* through my own research into the history of intervention, and my source for Gilbert was C.L. Bates, who wrote on federal equity practice. Curiously, Moore and Levi did not refer to Bates, even though they were writing about a procedural device found in the federal equity rules at the time of their article. I have no reason to doubt the quality of Bates as a reference on this subject and cannot explain why Moore and Levi did not refer to Bates. Bates traces the basis of intervention to the civil law systems of France and Spain, but he does not trace intervention back to any Roman roots nor does he cite any Roman sources in making his argument.[60]

The final frustrating aspect of Moore and Levi's assertion that Roman law recognized a broad right of intervention is that they never bring up the subject again. The bulk of the article examines American cases and divides these cases to two types: one in which courts appeared to allow intervention of right,

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[58] GEOFFREY GILBERT, THE HISTORY AND PRACTICE OF THE HIGH COURT OF CHANCERY (Samuel Tyler ed., 1st American ed., Washington, D.C., W.H. & O.H. Morrison 1874) (1st ed.1758)

[59] *See* F.W. MAITLAND, EQUITY 8 (A.H. Chaytor & W.J. Whittaker eds., 1909); *see also* G.W. KEETON, AN INTRODUCTION TO EQUITY 14, 25 (6th ed. 1965) (relying on Maitland).

[60] *See* C.L. BATES, FEDERAL EQUITY PROCEDURE: A TREATISE ON THE PROCEDURE IN SUITS IN EQUITY IN THE CIRCUIT COURTS OF THE UNITED STATES § 624 (1901).

and the other in which courts allowed intervention permissively. This core of Moore and Levi's argument was the most influential part of the article, because the Federal Rules of Civil Procedure adopted that categorization in the initial rule, and the distinction between intervention of right and permissive intervention continues to this day.[61] The use of intervention in Roman law did not inform this distinction; indeed, after the passing mention in the beginning of the piece, Roman law never again surfaced. The main suggestion for reform that Moore and Levi's article made was that courts should allow intervention more often in complicated receivership and reorganization cases to protect minority shareholder interests. Roman law would add little to that discussion, and Moore and Levi do not refer back to it. Their article did not urge an adoption of intervention from civil law, nor did it establish an account of intervention from a comparative perspective, nor, to my understanding, did Moore or Levi ever delve into Roman law again in their other works.[62] Why include this odd paragraph or two about Roman law?

Reviewing the evidence supports a possibly even more damning account of Moore and Levi's account of intervention in civil law systems. Moore and Levi relied on Friedrich Kessler for their account of civil law systems. I suspect—and have only the evidence I am about to lay out to support my suspicion—that Kessler outlined or basically drafted this account of intervention under civil law systems and that Moore and Levi incorporated Kessler's account into their article uncritically. We know that Moore and Levi relied on Kessler, who had emigrated from Germany to the United States two years before Moore and Levi published their article. We also know that Moore and Levi's citation form for Roman materials followed a German convention, not the American one established at the time their article was printed. Moore and Levi referred to a medieval source using the name of the author as rendered in German, not in English, and they followed to the letter citations for two medieval sources from a German source. We also know that Moore and Levi thanked Kessler in particular for his assistance with the civil law materials. While will probably never know exactly how Moore and Levi went about drafting these paragraphs, at least Moore and Levi relied on the work of a preeminent scholar and not research assistants.

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[61] *See* FED. R. CIV. P. 24(a), (b).

[62] I confess that I have not looked at every work that Moore and Levi wrote; I base this conclusion on looking at the titles of every article that either Moore or Levi wrote or coauthored after 1936 and examining those that might indicate a discussion of Roman law.

Moreover, to be fair to Moore and Levi, all scholars must stop their digging at some point. I have relied on a particular translation of the *Digest* in assembling my argument. Although I have every reason to believe the translation I used is entirely reliable, perhaps I should have consulted several translations to obtain a more comprehensive sense of what the passages mean. Perhaps I should have undertaken years of studying Latin to render my own translation of the passages, and then German to understand the secondary sources. Moore and Levi relied on Chitty but did not rely on Gilbert or Bates perhaps because they did not have easy access to these works or perhaps because they were fairly confident in their conclusions and did not want to spend time tracking down merely repetitive material. They could have traced their argument about Roman law further back than Chitty, who, for his part, cited for support the work of the seventeenth century Dutch scholar Johannes Voet.[63] Voet makes a claim about the Roman origins of intervention.[64] I found a translation of Voet, but decided not to spend time laying out and refuting his claim for a variety of reasons, some good and some perhaps not good: Moore and Levi did not expressly rely on Voet for their claim; I thought I had proved my point; and, for whatever it is worth, my gut told me that the translation might be unreliable because it is a South African edition from the era of apartheid. Scholars must devise their own standards for when their work is done. And at least Moore and Levi cited to the original sources in making their argument about the Roman origins of intervention. Others, however, have gone no further than Moore and Levi in making the same claim.

II. THE MISTAKE REPEATED

In my opinion, Moore and Levi, like all humans, made a mistake. Interestingly, other scholars repeated their mistake about the Roman origins of intervention without researching any further than Moore and Levi's article or sources that rely on it. Like Moore and Levi, these scholars made the point that intervention can be traced to supposed Roman origins, but never turned to the Roman sources and never used the supposed Roman origins of intervention to suggest how modern American scholars or courts should consider intervention.

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[63] *See* sources cited *supra* note 51.

[64] 2 JOHANNES VOET, THE SELECTIVE VOET, BEING THE COMMENTARY ON THE PANDECTS 40-43 (Percival Gaines trans., 1955).

One is not surprised to find the reassertion of the Roman origins of intervention in Moore's treatise on federal civil procedure.[65] After all, Moore originally asserted the point, so why should subsequent contributors question his assertion? Indeed, much of the historical language in the current version of Moore's treatise is lifted straight from the article that Moore coauthored with Levi. It contains no references to the *Digest* but it does keep the reference to *Dalrymple v. Dalrymple*.[66] Again, the phenomenon of self-copying comes as no surprise.

One might expect, however, that the marketplace of ideas would root out an error so that other works might have a competitive advantage over Moore, but the chief competitor to Moore's multi-volume treatise also traces intervention back to its supposed Roman roots, relying on Moore and Levi.[67] Other treatises make the same assertion, again relying on Moore and Levi.[68] One can forgive the treatise writers because treatises are, by definition, supposed to canvass a particular field in depth. However, the error also shows up over and over again in the law reviews. Numerous articles by professors and students make the claim that Roman law had an extensive practice of intervention.[69] And here the repetition of the mistake cannot be as easily

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[65] *See* 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 24 App. 101 (3d ed. 1997).

[66] *See id.* at 24 App. 8.

[67] CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1901, at 228 (2d ed. 1982).

[68] JACK H. FRIEDENTHAL ET AL, CIVIL PROCEDURE § 6.10, at 373 & n.2 (3d ed. 1999); FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 10.17, at 542 & n.4 (4th ed. 1992). The last cited work actually relies on an earlier edition of Moore's multi-volume treatise for the argument that Roman law was hospitable to intervention.

[69] *See Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 877, 897 (1958); Brian Hutchings, Note, *Waiting for Divine Intervention: The Fifth Circuit Tries to Give Meaning to Intervention Rules in* Sierra Club v. City of San Antonio, 43 VILL. L. REV. 693, 702 n.31 (1998). Some authors have hedged on the question. *See* Jeffrey L. Rensberger, *Ancillary Jurisdiction and Intervention Under Federal Rule 24: Analysis and Proposals*, 58 IND. L.J. 111, 115 & n.22 (1982) (intervention "was known to Roman law," but "[t]he exact scope of intervention practice in Roman law is unknown."). Sometimes the reference to Roman law is in passing, and does not rely directly on the Moore and Levi article for support but rather on a source which itself relied on Moore and Levi. *See* Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263, 270 n.34 (1999); David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 735 n.60 (1968) (relying on Professor Fleming James, who relied on Moore).

forgiven, for in no instance does the point have any relevance to the argument advanced.

Even if I am wrong about Moore and Levi's argument and Moore and Levi correctly argued that intervention was extensively practiced in Roman law, to date I am the only person to re-inspect their work. All of the authors I have cited rely either on Moore and Levi, on follow-up works of theirs or on works that rely directly on them, to support their assertion that intervention can be traced to the Romans. These later works cite nothing from the *Digest* or other sources as documentation. Moore and Levi's statement has become the gospel truth on the matter. Why has this happened?

III. LESSONS LEARNED

As the title of my Article suggests, I offer this discussion as a case study. The general phenomenon I believe the mistake illustrates may not plague legal scholarship as much as I imply. Nevertheless, I believe that it illustrates a larger problem in legal rhetoric generally and legal scholarship specifically.

Legal argument in the Western legal tradition builds on one fundamental rhetorical construct. Justice consists of treating like cases alike. Thus, if *A v. B* comes out in favor of *B*, then *C v. D* should come out in favor of *D*, all other things being equal. The problem, of course, is that not all things are equal. Law develops a notion of what is a proper comparison and a proper distinction between cases. Law students are trained in the rhetoric of making comparisons and distinguishing cases, finding the limit of rules and stretching them to fit a particular case. The fundamental struggle, then, becomes a search for authority to support a particular argument. Judges often ask attorneys what their authority (or their best authority) is for a particular proposition. One of Alan Watson's contributions to legal scholarship is to document instances in which legal systems borrow (and transform) authority in this never-ending search for support.

One would think, however, that legal scholarship would not suffer from this problem. After all, much legal scholarship exists to criticize existing legal structures. Moore and Levi's article provides a good example. Moore and Levi did not approve of how intervention was practiced in certain cases, including complicated receivership cases. Whatever the merits of their view, they clearly disagreed with existing case law. Making reference to the cases that they disagreed with was perfectly appropriate. What is puzzling, however, is why they felt it necessary to cobble together an argument about the origins of intervention when they never cared about it in the first place and when they

never returned to it later in the article. The rhetorical form of legal argument provides the answer: their article had to provide an overall treatment of the subject. Legal scholars, of all people, should shun the problems created by the repeated use of a particular form. Yet even great scholars such as Moore and Levi can fall into the trap, if the case study I offer is indicative.

Rhetorical forms are powerful, and the rhetorical structure of the law review article as it has developed is probably to blame for the mistake that Moore and Levi made. Perhaps the mistake is an uninteresting and isolated problem. Moreover, as with any case study, the lessons learned from the mistake will be somewhat indeterminate. Nevertheless, one can draw some cautionary advice from the example I have identified, in at least three ways.

First, legal scholars should reassess the form of the law review article. As it stands, law review articles are, for the most part, unnecessarily long, and the length is due in part to the fact that most authors feel compelled to provide a complete background section to support the argument that they wish to make.[70] Moore and Levi did not need to discuss Roman law to support their argument about classifying intervention into two types or supporting expanding the right of intervention in the context of reorganization and receivership cases. Indeed, most scholars of intervention—or, for that matter, most subjects—do not need to refer to Roman law to support their argument. Instead, perhaps law review articles should resemble articles in other disciplines: roughly twenty to thirty pages on a narrow subject, rather than 100 pages on a broader topic. Under this approach, the law review article would pose a narrow question, such as: Should courts be more generous in allowing intervention in receivership cases? How can one categorize the different types of cases involving intervention? Did Roman law have a procedural device like our modern device of intervention? Moore and Levi's article attempts to answer all three questions. If they had actually been interested in the last question, they might say yes, others could disagree, and everyone could move on to other subjects. Instead, the law review article has become an overgrown monstrosity.

Second, legal scholars should reassess the involvement of students in law review article selection and editing. Students are not to blame for Moore and Levi's mistake. The fault for any error in Moore and Levi's article, at bottom, remains their own, regardless of Kessler's involvement, the editing and cite-checking that students may have performed, Moore and Levi's possible unfamiliarity with the sources, or any other factor that may have informed their

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[70] A European commentator has made the same observation. *See* Reinhard Zimmerman, *Law Reviews: A Foray Through a Strange World*, 47 EMORY L.J. 659, 678 (1998).

judgment. But the student-edited law review as an institution provided a structural incentive for them to make their mistake and for others to repeat it (at least in subsequent law review articles). To get published, Moore and Levi had to educate their potential audience about intervention and where it comes from. The natural incentive is to begin at the beginning, and it is hard to find a better beginning than Roman law. To overcome this problem, the law schools could amend the institution of the student-edited law review, perhaps by including more faculty in the selection process. The purpose of involving faculty would not be to inject faculty politics into student-run law reviews—there are enough allegations of that happening too much as it is—but faculty could help by explaining the general background to an article so that students could evaluate it. This change would allow the student-run law review to provide the educational function that it presently serves but would remove the necessity of everyone plowing through abstruse material in an effort to appear erudite.

Third, legal academics might wish to reassess the role that articles play in the promotion and tenure process. Although law schools undoubtedly vary in the standards that they apply before granting tenure to an individual, my understanding is that the standard is often, if not usually, couched in terms of producing a certain number of law review articles in the standard form, articles that generally must undergo some type of outside review by other legal academics. The law review article has thus become the coin of the realm, and new scholars must show that they can produce the standard product to gain admission to the ranks of the tenured. Many legal academics go on to continue producing articles for the law reviews after tenure, but many others go on to communicate in other fora and through other means. Some may abandon the law reviews precisely for the reasons that led Moore and Levi to make their mistake: the expectation, stated or unstated, that a law review article will canvass the relevant materials before going into the deeper argument. Some may not wish to conduct this background research and write it down, and others may fear that they will make a mistake in doing so. Beginning scholars should perhaps be allowed to show scholarly progress in ways other than producing law review articles. This argument does not imply that if someone produces decent law review articles she or he should not get tenure; rather, law schools may wish to count other indicia of scholarship rather than the law review article predominantly or exclusively.

The argument set forth in this Article is not meant to urge everyone to join Rodell and say goodbye to law reviews, or to agree with him that what appears

in law reviews is largely "spinach."[71] Rather, I offer it as a cautionary tale of legal scholarship. If wise people like Moore, Levi, and Kessler can make a mistake like the one I have outlined here, imagine what we lesser people could do unwittingly.

[71] Rodell, *Goodbye*, *supra* note 1, at 45.