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THE PARABLE OF THE FORMS

SAMUEL L. BRAY[†]

There shall be one form of action to be known as "civil action."¹

Imagine a university, somewhere, no particular place. The year is 1970. It has all the usual university things, including lots of departments. Because this is life, things break. Light bulbs go out. Toilets flood. Doors get stuck. Football fans get excited, and then they steal the doormats as souvenirs.

If you are at the university—whether student, staff, or faculty—you might notice something that has gone wrong. A needed repair, say. What do you do? You fill out a form. It includes blanks for you to put your name, your contact information, and what you need. And then you send the form to someone who is supposed to take care of the problem.

Now, the exact form you fill out depends on your department. In the History Department, the form has a special box that you can check that says "Archival materials at risk."

The Theater Department has its own form that includes more detailed specs about lighting and sound systems.

The Power Plant has a very long form, with separate boxes for each of the major parts of the plant. It also has in caps at the top: "DO NOT USE FOR MISSION-CRITICAL PROBLEMS."

The Library has its own form, with the following checkboxes as options: "Books damaged," "Books missing," "Books misshelved," "Book requests," "Bookshelf damage," and "Other." It also asks for the call number of the affected book.

The Divinity School has its own form, which has large print and a geometric typeface. Instead of checkboxes, it asks for your contact information and a brief description of the problem.

As time goes by, each department tends to get new kinds of problems or new kinds of equipment. The departmental forms get tweaked. The Power Plant adds a supplemental form for

[†] Professor, Notre Dame Law School. I am grateful for comments from Kellen Funk, Alexandra Lahav, Richard Re, Stephen E. Sachs, and Jay Tidmarsh.

¹ FED. R. CIV. P. 2 (1937).

reporting that something is amiss with the solar panels distributed around the campus. The Library adds checkboxes about audio and video materials. And so on.

Eventually, an enterprising new dean is hired for the School of Engineering. What he hates most is red tape. "Bureaucracy," he likes to say, "is red tape, so red it's almost Communist." Instead of asking "How's your day?" he says, "Cutting through the red tape today?" Most people find it tiresome.

The new engineering dean thinks there are too many forms. His objection has some merit. One problem is that some forms are not well-designed. Another is that when a person from one department happens to be in the building of another department and sees something that needs to be repaired or replaced, the visiting person has to adjust to a new form. For students and faculty who spend time in multiple departments, there can be confusion.

Some departments even have rules specifying that no action can be taken unless a form is correctly filled out. The Theater Department refuses to take action on requests about lighting if the same form makes a request about sound. When the History Department was slow in changing lightbulbs, students who were reporting that a lightbulb was out started checking the "Archival materials at risk" box. The custodian, upon discovering that there were no endangered archival materials, became irate. Now, he regularly throws away piles of completed forms.

One day, the engineering dean announces a new form for his department: the Central Consolidated Help Form. It uses a new sans-serif typeface, Helvetica, and gets rid of a lot of cumbersome details. It has a large empty box with a bolded instruction: **"Describe the critical facts of what happened."**

A lot of other deans think this is progress, and most departments on campus are adopting the new form. The engineering dean is happy. His new form is so much better that it is quickly driving out the old, rigid, specialized, narrow forms.

Then a funny thing happens on the way to the form's domination. In the departments that did adopt the Central Consolidated Help Form, the employees remember the old forms. When they read the new form, they still look for the old words. In the Library, the librarians will read only the first sentence in the "critical facts" box. If a patron wrote "Books damaged" or "Books missing" in that sentence, or used any other old terms, it will be routed to the right person. If not, it will be ignored.

Other departments start customizing the Central Consolidated Help Form, bringing back some of the information on the old forms. The History Department uses the new form, but, underneath the large empty box for "critical facts," it has a checkbox for indicating that archival materials are involved.

Then, some departments that adopted the Central Consolidated Help Form change their minds. The Theater Department switched to it. But then it started getting obtuse explanations like "audiovisual problem." At least before, back when the form required specific information about lighting and sound, the person reading the forms had some idea what was going on. The Theater Department ditches the new form and goes back to its old one.

All of this is very discouraging to the engineering dean. There is so much red tape. It is also discouraging to the new university president, who thinks the mishmash of forms is highly inefficient. She likes the original vision of the engineering dean, and she decides there should be one form to rule them all: the Universal Form. Every department must use it. It is basically the same as the Central Consolidated Help Form, but larger, so there is more room to write down information that might be department-specific. No longer is there a requirement of "critical facts."

The Universal Form is widely praised, and, by the start of the new school year, every department is using it. It is written up in *University President: The Magazine*. Soon other universities have their own Universal Forms.

How well does it work? There were naysayers from the beginning, but it has worked pretty well. No longer is there confusion about which form to fill out. No longer are people baffled by all the options on the more complex forms. No longer are there cases where people have checked the wrong boxes. Because there is less red tape, the engineering dean smiles.

But over time, if you are looking closely, you might observe something else. Some departments do need quite specific information. The Power Plant does want to know the model number of the machine or the part. The Library does want to know the call number. The History Department does want to know if archival materials are damaged.

So, what has happened is that all these departments use the new Universal Form, but many of them put signs next to the box of forms, telling a person completing a form about the

information that is needed. There is one form, but different departments want that one form filled out in different ways because of their specialized needs. One form in appearance, but, in reality, the old specialization is reasserting itself. It is hard to keep it out.

A POSTSCRIPT ABOUT CIVIL PROCEDURE

It might be good for each department to have its own form, or it might be better to have one form for the whole campus. That is an open question. It depends on how different the repair requests are in different departments, and on the value of specialization. It depends on whether we want some complexity about the choice of forms or if we want radical simplicity about the number of forms, with all of the complexity residing within a single form.

So, too, it might be good to have different forms of action. That way, everyone knows upfront what the plaintiff has to show and what the contours of the case are, with special procedures adapted to that kind of case.² But there were real problems with the forms of action and also with code pleading. It might therefore be better to have one form of civil action, as under the Federal Rules of Civil Procedure. This way, no one accidentally chooses the wrong form or is penalized for failing to use the old words. We can be flexible in accommodating new fact patterns that might not fit so easily into the old forms.

These were important questions in the nineteenth century, when the code-pleading statutes were being debated. These were important questions in the first half of the twentieth century, when the Federal Rules were drafted and debated. Now, in the present, these questions are reemerging, as there is an increasing push for specialization in procedure. These are not the sort of questions that will ever really go away.

² See generally SIR JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 60–77 (5th ed. 2019).