TRIBUTE

GEOFFREY C. HAZARD, JR., AND THE LESSONS OF HISTORY

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In the field of civil procedure, it is sometimes a struggle to get practitioners, judges, and scholars to give history the attention it deserves. In many other fields, the analytical significance of history and past practice are well established in our shared professional culture. Torts, property, and the other common law subjects, constitutional law, international law—in these areas and many others, the evolution and growth of legal doctrines over time form an integral part of the common understanding of how modern problems should be understood and approached. The collection of doctrines and institutional practices that govern the field of civil procedure are no less shaped by their history. But that history rarely informs present debates. There are a few conspicuous exceptions, the most notable being the doctrine of personal jurisdiction, which is usually taught in law schools as an historical exercise in legal process and constitutional common law. But when it comes to the core doctrines of civil practice and litigation—preclusion, joinder, discovery, pleadings—discussions often proceed as though the world began in the closing decades of the twentieth century.

This state of affairs makes the work of scholars like Geoff Hazard acutely important. Professor Hazard has been at the center of the world of procedure for half a century. By virtue of that fact alone, he is well equipped to serve as a living archive of the growth and evolution of the practice of civil litigation—a role that he acknowledged somewhat wryly in an essay twenty years ago when, writing about the operation of the Federal Rules on the occasion of their fiftieth anni-

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versary, he began one section by noting, "Remembering as I do how a defense could be conducted under old code pleading . . . ."[1] From his fifteen-year tenure as Director of the American Law Institute, to his role as draftsman of model rules on both judicial conduct and professional conduct for the American Bar Association, to his service as Reporter for the *Restatement (Second) of Judgments*, there are few aspects of the analytical and institutional business of litigation over the last fifty years that have not been shaped by his hand.

But the lessons of history go deeper in the work of Geoff Hazard, for Professor Hazard has been one of a core group of scholars who have emphasized the historical foundations of civil practice as the starting point for understanding modern procedure—its shape, its content, and its direction. Nowhere is this commitment more apparent than in *An Historical Analysis of the Binding Effect of Class Suits*, the magisterial account of the historical origins of the modern class action that Hazard wrote with John Gedid and Stephen Sowle.[2] As one of its central themes, *Binding Effect* disaggregates two ideas that are often taken to be inevitably linked in modern class action doctrine: (1) the propriety, at the outset, of certifying a proceeding that will allow a small number of representatives to litigate claims on behalf of a class of similarly situated individuals; and (2) the binding effect that such a proceeding will have upon the members of the class when the suit arrives at a judgment.[3] Through a careful study of the origins of representative proceedings in English and American equity practice, Hazard and his coauthors demonstrate that the policies of joinder that characterize the first question have a provenance and an evolutionary path distinct from the policies of preclusion and judgments law that characterize the second. Efforts to merge the two policies over the years, they show, have never been harmonious. Hazard and his coauthors thus challenge the notion that a court's choices in constructing a class proceeding ex ante will reliably determine the binding effect that the judgment will have ex post. In so doing, they free modern thinkers to ask more careful and targeted questions about the permissible and desirable boundaries of a representative proceeding,

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[1] Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2242 (1989).

[2] Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998).

[3] *See, e.g.*, *id.* at 1857 ("Our historical study of the precedents reveals that courts have never unequivocally committed themselves to a set of ex-ante procedures that will assure ex-post that the judgment will bind the members of the class in the same way as if the class members had been individually made parties.")

unhampered by assumptions concerning the necessary forms of the class action. For scholars who have attempted to think through the relationship between preclusion policy and class litigation, the article is an indispensable reference.[4]

That type of effort—to identify the structural features that characterize current doctrine and to challenge the assumption that those structures are either analytically necessary or historically mandated—is one of the greatest services that a proceduralist can perform for the profession. Institutional memories can be short, and investment in the familiar (path dependence, as it has come to be called) can be a powerful inertial force in conversations about reform. When scholars can demonstrate which features of current doctrine are the result of conscious and considered trade-offs between competing values and which are merely vestigial holdovers or the product of outright misconception, courts and reformers can make more informed judgments.

Take, for example, the question of when a collateral attack might be available to absentees wishing to escape the binding effects of a class action judgment. This contentious issue has provoked intense disagreement among scholars and judges in recent years, producing a proliferation of highly theorized responses but no satisfying solution.[5] The debate has taken shape around an assumption that the Supreme Court voiced in its only recent statement on the issue, in *Matsushita Electric Industrial Co. v. Epstein*, that "a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is

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[4] My own work in this field stands on Hazard's scholarly shoulders. *See* Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005).

[5] *See, e.g.*, Stephenson v. Dow Chem. Co., 273 F.3d 249, 257-58 (2d Cir. 2001) (permitting collateral attack of a class action settlement because there was "no prior adequacy of representation determination with respect to individuals whose claims [arose] after the depletion of the settlement fund"), *aff'd in part by an equally divided Court, vacated in part on other grounds*, 539 U.S. 111 (2003) (per curiam); Epstein v. MCA, Inc., 126 F.3d 1235, 1237-38, 1242-45 (9th Cir. 1997) (recognizing a broad right to collaterally attack a class action judgment in which a state court proceeding approved a settlement releasing exclusively federal claims), *vacated*, 179 F.3d 641, 647-50 (9th Cir. 1999) (holding that collateral attack is not available when the initial class proceedings employed minimally adequate procedures); Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765 (1998) (criticizing a broad right to collateral attack). My contribution to the debate over this issue has been a modest one. *See* Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2117-31 (2008) (offering a systemic case for the availability of some collateral attacks, when class action procedures foreclose other avenues by which the interests of absent class members might be protected).

presumptively entitled to full faith and credit."[6] As Professor Hazard and his coauthors trenchantly point out, the Court offered that contestable assumption as the culmination of a long period of equivocation about the binding effects of class or representative proceedings.[7] At the very least, the proposition that a class action judgment (or settlement) should be treated "like any other judgment entered in a state judicial proceeding" requires analytical justification rather than mere citation to precedent. Had the Court's intervention on the collateral attack issue in *Matsushita* enjoyed the benefit of Hazard's work, the current debate might be more focused and productive.

Efforts at institutional reform often suffer from the same lack of perspective. The current reexamination of pleading standards in the wake of the Supreme Court's revolutionary decisions in *Bell Atlantic Corp. v. Twombly*[8] and *Ashcroft v. Iqbal*[9] provides a salient example. Those rulings have provoked an intense debate over the level of factual specificity and evidentiary support that a plaintiff should be required to demonstrate in a complaint before she is permitted to mobilize the powerful tools of discovery (and thereby secure a more advantageous posture for settlement). Thus far, that debate has consisted largely of a back-and-forth discussion about the exigencies of the current civil litigation system, with a particular emphasis on the burdensome costs of documentary and electronic discovery. Many proposed solutions would entail a significant restructuring of the obligations and expectations associated with pleading, and data regarding the likely impact of such changes are often elusive. Past experience with efforts to accomplish reform through substantive pleading standards could help teach us what sort of data we should be trying to collect, but serious discussion of such earlier efforts has thus far been muted.

Professor Hazard's expertise on the history of pleading practice is well known, and it should come as no surprise that his scholarly corpus already offers a perspective on these pressing issues. Over twenty years ago, Hazard wrote several essays to commemorate the fiftieth anniversary of the Federal Rules of Civil Procedure. In one, he described the formal and practical changes to the civil action that the Rules had brought about and then examined the devices by which certain elements of the old forms of action had found their way back

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[6] 516 U.S. 367, 374 (1996).

[7] *See* Hazard, Gedid & Sowle, *supra* note 2, at 1849.

[8] 550 U.S. 544 (2007).

[9] 129 S. Ct. 1937 (2009).

into modern civil practice.[10] In describing the Rules' revolutionary rejection of fact pleading under the Field Code, Hazard offered an observation that should serve as the starting point for appreciating the magnitude of the current debate:

> In an era in which we have become conditioned to broad discovery, it is difficult to fully appreciate the effect of having to rely entirely on one's own evidentiary resources to establish a claim. In yesteryear, an aggrieved person who did not observe the act that resulted in injury, or have documentary evidence to prove it, was dependent upon the voluntary cooperation of third party witnesses and the possibility of inculpating extrajudicial admissions by the opposing party. . . . A claimant could get to trial only by filing a claim that could be prosecuted, and doing that in turn required being able to formulate a proper complaint. A properly formulated Field Code complaint had to state the particulars of the defendant's acts that caused the injury, and the plaintiff had to know those particulars in order to plead them. The contrast with Federal Rules procedure is difficult to exaggerate.[11]

With the *Twombly* and *Iqbal* rulings, yesteryear has returned. As of this writing, Professor Hazard has not weighed in publicly on the debate about what is to be done with pleading standards in their wake. When he does, we will all benefit from the breadth of his knowledge.

As the saying goes, Geoff Hazard has forgotten more about the history of civil practice and procedure than most of us will ever learn. For decades, he has sat at the center of key debates over procedural reform. As both a student of history and a living embodiment of history's progress, he reminds us of how much knowledge we must attempt to hold within our grasp in order to do this work well.

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[10] *See* Geoffrey C. Hazard, Jr., *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628 (1988).

[11] *Id.* at 633 (footnote omitted).