

# Procedure in Context

CATHERINE T. STRUVE<sup>†</sup>

I am grateful for this opportunity to celebrate Geoff Hazard's work.<sup>1</sup> A catalogue of his contributions to scholarship and law reform and his mentoring of lawyers and law professors could easily swell to the size of a treatise. But I will take Geoff's advice<sup>2</sup> and focus my discussion on three points—namely, Geoff's study of legal history; his attention to the social and institutional setting of procedural mechanisms; and his comparisons between procedure in the United States and in other countries. Each of these related to the others and together they richly contextualized Geoff's views on legal doctrine and his involvement in law reform.

In one of his earliest forays into legal history, Geoff criticized then-extant doctrines (under Federal Rule of Civil Procedure 19) concerning necessary and indispensable parties by tracing the roots of those doctrines back to late-seventeenth-century English equity practice.<sup>3</sup> Geoff first examined decisions by Lord Nottingham—a key figure in early equity jurisprudence—and found that Nottingham took a “practical approach to the problem of necessary parties”: “Plaintiff was required to do all he could to bring in the necessary parties, but their joinder was excused when inconvenient for one reason or another.”<sup>4</sup> Lord Hardwicke—an eighteenth-century successor to Lord Nottingham—took a similarly flexible approach, applying exceptions (in various circumstances) to the “general rule[] requiring joinder of all interested parties.”<sup>5</sup> But treatise writers before and after Hardwicke's time as Chancellor

---

<sup>†</sup> Professor, University of Pennsylvania Law School. I thank Daniel Coquillette for helpful comments on a draft and the editors of the *Hastings Law Journal* for their excellent editorial work.

1. We were invited to reflect on Geoff both as a person and as a scholar. I had the privilege of sharing some personal reminiscences in a prior collection of tributes, see Catherine T. Struve, *Geoffrey C. Hazard, Jr.: Scholar, Law Reformer, Teacher, and Mentor*, 158 U. PA. L. REV. 1307 (2010), so I will focus here on a few aspects of Geoff's scholarship.

2. In an essay for a legal writing journal, Geoff offered three pieces of advice, of which the second was: “[T]he basic analysis should be expressed in no more than three propositions. Only very powerful minds can handle anything more complicated. A mathematician once told me there are four elemental numbers: one, two, three, and ‘many.’ If the structure of an argument extends to ‘many,’ it should be restructured.” Geoffrey C. Hazard, Jr., *How I Write*, 4 SCRIBES J. LEGAL WRITING 15, 17 (1993).

3. See Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961) [hereinafter Hazard, *Indispensable Party*].

4. *Id.* at 1259 (footnote omitted).

5. *Id.* at 1264.

sowed problems by failing to mention those exceptions—that is, by failing to note instances when a party should ideally have been joined, but could not be joined, and the court nonetheless proceeded to render a decree.<sup>6</sup> Tracing the doctrine’s evolution through eighteenth- and nineteenth-century English cases and nineteenth-century American cases, Geoff described how courts came to believe that an indispensable party’s absence deprived them of the power to act.<sup>7</sup> Geoff argued that the courts always had the power to act, even if they could not do complete justice; the question then became whether the equities balanced out in favor of rendering an incomplete decree instead of no decree at all.<sup>8</sup>

Three things stand out about Geoff’s analysis in this article. First, it was influential.<sup>9</sup> When, in 1966, Rule 19 was revised to explicitly direct courts to balance the equities before deciding whether to proceed in the absence of a necessary party,<sup>10</sup> the Committee Notes prominently cited Geoff’s article (along with the prior work of Professor John Reed, on whose analysis Geoff had built).<sup>11</sup> Second, it illustrated Geoff’s strong practical bent, and his antipathy for letting the perfect become the enemy of the good.<sup>12</sup> And third, it exemplified Geoff’s willingness to criticize an argument, no matter how eminent the source. Among mid-eighteenth-century treatise authors, Geoff praised the work of the “less celebrated” Joseph Harrison while chiding Jeffrey Gilbert for overlooking the indispensability exceptions.<sup>13</sup> Among the nineteenth-century treatises, Geoff

6. *See id.* at 1263–64 (discussing early-eighteenth-century treatises); *see also id.* at 1269 (discussing JEFFREY GILBERT, *THE HISTORY AND PRACTICE OF THE HIGH COURT OF CHANCERY* (London, Henry Lintot 1758)).

7. *See Hazard, Indispensable Party*, *supra* note 3, at 1271–81.

8. *See id.* at 1282.

9. For further discussion of the influence of this article, see Struve, *supra* note 1, at 1309.

10. *See* FED. R. CIV. P. 19(b).

11. The 1966 Advisory Committee Note to Rule 19 opened with the following directive:

Whenever feasible, the persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished . . . the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

FED. R. CIV. P. 19 advisory committee’s note to 1966 amendment. The note observed, “The foregoing propositions were well understood in the older equity practice, *see Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961) . . .” *Id.*; *see also id.* (citing John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 356, 483 (1957)).

12. This orientation held true throughout Geoff’s writings. *See*, for example, his observations about the aftermath of the Supreme Court’s decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), rejecting proposed class settlements of asbestos claims: “Since the Supreme Court disapproved the settlements, the parties have simply proceeded with ad hoc settlements generally based on the formulas that previously were incorporated in the now-invalidated trial court decrees”—but with “very high transaction costs to claimants.” Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1912, 1917 (2000).

13. *See Hazard, Indispensable Party*, *supra* note 3, at 1269–70 (discussing GILBERT, *supra* note 6, and JOSEPH HARRISON, *THE ACCOMPLISH’D PRACTISER IN THE HIGH COURT OF CHANCERY* (London, Henry Lintot 1741)).

argued that Justice Story's discussion, though very influential, was not as good as Frederic Calvert's.<sup>14</sup>

Geoff's historical work also compared institutional structures across time in order to assess how changes in those structures affected procedural law. His 1984 article *Preclusion as to Issues of Law*<sup>15</sup> is illustrative. His project in that symposium piece was to examine how the interests of the legal system—as distinct from those of the parties—shaped the contours of claim and issue preclusion.<sup>16</sup> The piece, written around the time that Geoff commenced his service as Director of the American Law Institute, structured its analysis around the Restatement (Second) of Judgments and, in particular, considered section 28's exceptions to issue preclusion on issues of law.<sup>17</sup> In assessing why “an issue of law may be more easily reopened than an issue of fact,” Geoff reflected that the doctrine of preclusion had its roots in times and structures very different than those of the present day.<sup>18</sup> A distinctive concept of what constituted the “record”; an older, stronger version of *stare decisis*; and “the structure of the adjudicative system itself prior to the nineteenth century” all helped, in Geoff's view, to explain the dearth of caselaw on preclusion as to issues of law and (in turn) the absence of that concept from the First Restatement.<sup>19</sup>

This was a very different sort of historical analysis from the fine-grained exegesis of Chancery decisions in Geoff's article on indispensable parties. The issue-preclusion article was sketched in broad and speculative, though also erudite and thought-provoking, outlines. In it, Geoff's interest was in how social and institutional needs previously may have shaped doctrine—and how they shaped it in the present day. On the latter point, Geoff noted that the structural features of modern U.S. courts were quite different, and that those features both explained the advent of the doctrine of preclusion on legal issues and provided reasons to temper that doctrine's application.<sup>20</sup> He closed by considering one particular category of modern societal concerns—namely, the interest of repeat government litigants in avoiding broad preclusion on issues of law.<sup>21</sup>

Increasingly, Geoff's institutional comparisons ranged not only across time but also across national boundaries. His 1998 article on document discovery<sup>22</sup> is a good example. It contains what could have been (if Geoff had wished) a

---

14. See *id.* at 1285–87 (discussing FREDERIC CALVERT, *A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY* (Philadelphia, John S. Little 1837), and JOSEPH STORY, *COMMENTARIES ON EQUITY PLEADINGS* (Boston, C.C. Little & J. Brown 1838)).

15. See Geoffrey C. Hazard, Jr., *Preclusion as to Issues of Law: The Legal System's Interest*, 70 IOWA L. REV. 81 (1984) [hereinafter Hazard, *Preclusion*].

16. See *id.* at 83.

17. See *id.* at 86.

18. *Id.* at 89.

19. *Id.* at 89–90.

20. See *id.* at 90–92.

21. See *id.* at 92–94.

22. Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665 (1998) [hereinafter Hazard, *No Secrets*].

free-standing and illuminating article on the history of document discovery from 1938 on, including related procedural, institutional, and social developments in the United States.<sup>23</sup> The original Civil Rule 34 required a court order, on good cause, for document discovery from the opposing party.<sup>24</sup> The changes in pleading practice ushered in by (inter alia) *Conley v. Gibson*,<sup>25</sup> Geoff argued, undermined that requirement.<sup>26</sup> Also undermining it were developments—“changes in the scope of jury trials, the composition of the jury, and the formulation and application of the summary judgment rule”—that shifted the determination of disputes toward lay decision-makers and, in so doing, expanded judges’ conceptions of the scope of discovery under Civil Rule 26(b).<sup>27</sup> Further supporting the transition to a broad concept of civil discovery, Geoff argued, were societal shifts toward greater sunshine in political and corporate governance.<sup>28</sup> All these trends, he asserted, contributed to “a gradual but sweeping transformation in American jurisprudence as to the right of a party claiming injury to obtain documents from alleged wrongdoers that may illuminate the course of action leading up to the injury.”<sup>29</sup>

Geoff did not content himself, however, with documenting “[t]he American [e]xperience.”<sup>30</sup> He nested that account within a discussion of commonalities and differences among the procedures employed in the United States, other common-law countries, and civil-law countries. The commonalities formed the core basis for Geoff’s then-ongoing project to draft transnational principles of civil procedure.<sup>31</sup> The differences included, prominently, two ways in which U.S. procedure stood apart from both civil-law jurisdictions and other common-law jurisdictions: pleading and document discovery. As to pleading, Geoff drew together his historical and comparative analyses by observing that fact pleading—which would be a feature of the Transnational Principles<sup>32</sup>—not only resembled practices in non-U.S. jurisdictions but also recalled pre-1938 code pleading in the United States.<sup>33</sup> As to document discovery, Geoff noted that party-controlled document production did not exist in civil-law systems.<sup>34</sup>

---

23. *See id.* at 1682–93.

24. *See id.* at 1683.

25. 355 U.S. 41 (1957).

26. *See Hazard, No Secrets, supra* note 22, at 1685.

27. *Id.* at 1686, 1692.

28. *See id.* at 1692–93.

29. *Id.* at 1684–85.

30. *Id.* at 1682.

31. *See id.* at 1668–70.

32. *See id.* at 1671; *see also* AM. LAW INST. & UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE princ. 11.3, at 30 (2006) (“In the pleading phase, the parties must present in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be offered in support of their allegations. When a party shows good cause for inability to provide reasonable details of relevant facts or sufficient specification of evidence, the court should give due regard to the possibility that necessary facts and evidence will develop later in the course of the proceeding.”).

33. *See Hazard, No Secrets, supra* note 22, at 1671–72.

34. *See id.* at 1682.

Taking England as an exemplar of common-law systems outside the United States, Geoff noted that the scope of discovery in English practice sounded similar to that under the Civil Rules in the United States, but that other features combined to limit that scope: in addition to “the general culture of the bench and the bar,” Geoff suggested, “the combination of specific pleading, the short time limit imposed for document production, and the definition of the obligation to produce set forth in the general rule results in considerably narrower response in the way of document production than that to which we have become accustomed in this country.”<sup>35</sup> Geoff’s historical analysis thus served to explain how the United States’ discovery practices came to diverge from those prevalent in England (let alone in continental Europe).

Like many of his historical reflections, Geoff’s comparative analyses had a very practical bent. They guided his law-reform efforts (as in the Transnational Principles project). And they were designed to help U.S. lawyers better understand the challenges of transnational litigation. Take, for example, Geoff’s 1998 article *Discovery and the Role of the Judge in Civil Law Jurisdictions*.<sup>36</sup> The doctrinal hook for that article was the U.S. Supreme Court’s 1987 decision in *Soci t  Nationale Industrielle A rospatiale v. U.S. District Court*, which accorded U.S. federal trial judges (addressing discovery requests directed at a foreign litigant) discretion regarding whether to proceed, in the first instance, under the discovery procedures set by the Civil Rules or under the letter-of-request mechanism set in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.<sup>37</sup> A trial judge’s choice between these methods determines whether a discovery demand will take effect only if so ordered by a judge in the relevant foreign country, or whether the demand will take effect without any involvement by such a judge. Geoff set out to explain to a U.S. audience why the latter choice offends participants in civil-law systems. The offense arises not only from ideas of territorial sovereignty, but also from a differing concept of the role of the judge.<sup>38</sup> In civil-law systems, Geoff explained, the judge (rather than the parties) develops the facts and does so in stages (“issue by issue”).<sup>39</sup> This judicial role was “historically embedded in the social orders” of countries such as France and Germany, so that disregarding it can cause profound offense.<sup>40</sup>

Geoff also invoked comparative analysis to suggest the implications of domestic legal and policy questions. Contributing to a conference that took access to justice as its theme, Geoff chose to ask what would happen if governments in the United States stopped funding legal services for poor

---

35. *Id.* at 1677, 1681.

36. Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017 (1998) [hereinafter Hazard, *Discovery*].

37. 482 U.S. 522, 543–44, 546 (1987).

38. See Hazard, *Discovery*, *supra* note 36, at 1023–24.

39. *Id.* at 1021–22.

40. *Id.* at 1028; see also *id.* at 1025.

people.<sup>41</sup> In the United States, Geoff suggested, “[o]ur system of social ordering is dependent . . . on a procedural principle of equal participation in legal disputation.”<sup>42</sup> In this view, the goal in U.S. legal proceedings is to assure a procedurally fair contest rather than a substantively accurate result. In civil-law systems, Geoff suggested, the systemic goals are substantive and administrative correctness rather than mere procedural correctness. “The civil law judge is not obligated merely to referee a dispute between parties . . . . Rather, the civil law judge has an affirmative responsibility, beyond what the parties may submit or argue, to achieve substantively correct judgments.”<sup>43</sup> If legal services for the poor went unfunded, then the United States would have to either “abandon[] any pretense to equal justice,” or else “adopt[] substantive concepts of justice in a wide range of settings where poverty is a salient factor.”<sup>44</sup> Here Geoff’s comparative observations serve perhaps two functions. One is to show that a different ordering, centered around substantive correctness, is possible. The other is to suggest that, to be true to its own legal culture, the United States must “make serious effort to make procedural justice a reality, that is, to establish real legal aid for the poor.”<sup>45</sup>

The breadth of Geoff’s field of vision was a significant part of what made him such a beloved and valued counselor to law-reform bodies (such as the American Law Institute and the U.S. Judicial Conference’s rulemaking committees). But it was only a part. There was also the way in which Geoff brought to bear his expertise both on procedure and on legal ethics.<sup>46</sup> There was his capacity for analyzing, and deriving key insights about, fields with which he did not have detailed familiarity. And there was the man himself—melding discernment with understanding,<sup>47</sup> and combining both of those with a quick and

---

41. See Geoffrey C. Hazard, Jr., *After Legal Aid Is Abolished*, 2 J. INST. STUDY LEGAL ETHICS 375 (1999).

42. *Id.* at 382.

43. *Id.* at 383.

44. *Id.* at 386.

45. *Id.*

46. As one example, take Geoff’s 1989 analysis of civil discovery. He provided a not-unsympathetic account of the discontents of corporate and government officials who felt “that production of . . . documents violates a principle of privacy.” 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). But that did not prevent him from vigorously critiquing sharp practices by the defense bar (“[h]ighly developed dialectical skills have evolved”) or from suggesting that in cases with massive discovery requests “corporate and governmental documents [could] be turned over for inspection to a parajudicial officer.” *Id.* at 2240–41. He wryly noted that there had “been no second to this suggestion.” *Id.* at 2241. As another example, consider Geoff’s analysis of ethics issues in asbestos class settlements. See Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257 (1995).

47. Reflecting, many years ago, on the challenges facing a lawyer who seeks to “reconcile the conflict between person and professional,” Geoff wrote that “[i]f he is fortunate, he may find a colleague who can understand what his dilemma is without judging him for suffering it, and who may even be ready to engage in a dialogue.” Geoffrey C. Hazard, Jr., *Rethinking Legal Ethics*, 26 STAN. L. REV. 1227, 1227, 1228 (1974) (reviewing DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* (1973)). Geoff was that sort of colleague, and we who knew him were indeed fortunate.

pithy wit. He was a mentor and friend to generations of students and scholars. I miss Geoff greatly. Though I cannot myself approach the scope of Geoff's analyses of procedure in historical, institutional, and comparative context, it comforts me that I can continue to learn from them.

\*\*\*