

*Volume 51, Issue 1 (Fall 2013)*  
*On Teaching Civil Procedure*  
*Guest Editor: Janet Walker*

Article 3

# Learning the 'How' of the Law: Teaching Procedure and Legal Education

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## Citation Information

Bamford, David; Farrow, Trevor C. W.; Karayanni, Michael; and Knutsen, Erik S.. "Learning the 'How' of the Law: Teaching Procedure and Legal Education." *Osgoode Hall Law Journal* 51.1 (2013) : 45-91.  
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# Learning the 'How' of the Law: Teaching Procedure and Legal Education

## **Abstract**

This article examines the approaches to teaching civil procedure in five common law jurisdictions (Canada, Australia, United States, Israel, and England). The paper demonstrates the important transition of civil procedure from a vocational oriented subject to a rigorous intellectual study of policies, processes, and values underpinning our civil justice system, and analysis of how that system operates. The advantages and disadvantages of where civil procedure fits within the curriculum are discussed and the significant opportunities for 'active' learning are highlighted. The inclusion of England where civil procedure is not taught to any significant degree in the law degree provides a valuable comparator. Common findings from the other jurisdictions suggest that teaching civil procedure enhances the curriculum by bringing it closer to what lawyers actually do as well as enabling a better understanding of the development of doctrinal law.

## **Keywords**

Civil procedure--Study and teaching; Law--Study and teaching; Canada; Australia; United States; Israel; England

## Learning the ‘How’ of the Law: Teaching Procedure and Legal Education

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This article examines the approaches to teaching civil procedure in five common law jurisdictions (Canada, Australia, United States, Israel, and England). The paper demonstrates the important transition of civil procedure from a vocational oriented subject to a rigorous intellectual study of policies, processes, and values underpinning our civil justice system, and analysis of how that system operates. The advantages and disadvantages of where civil procedure fits within the curriculum are discussed and the significant opportunities for ‘active’ learning are highlighted. The inclusion of England where civil procedure is not taught to any significant degree in the law degree provides a valuable comparator. Common findings from the other jurisdictions suggest that teaching civil procedure enhances the curriculum by bringing it closer to what lawyers actually do as well as enabling a better understanding of the development of doctrinal law.

Cet article examine l’approche utilisée dans cinq pays pratiquant la common law (Canada, Australie, États Unis, Israël et Angleterre) pour enseigner la procédure civile. Pour la plupart de ces pays, il souligne l’importante transformation qu’a subi l’enseignement de la procédure civile, qui est passée d’une matière apprise sur le tas à une étude intellectuelle rigoureuse des valeurs qui sous tendent le système de justice civile et une analyse des rouages de ce système. Il discute des avantages et des inconvénients liés à la place qu’occupe dans le programme d’études juridiques l’enseignement de la procédure civile et il met en lumière des occasions privilégiées d’apprentissage « actif ». La référence à l’Angleterre, où la procédure civile n’est pas enseignée de manière significative dans le cadre des études juridiques, fournit un intéressant élément de comparaison. Ce que révèle l’étude de la situation dans les autres

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pays permet de conclure que l'enseignement de la procédure civile améliore le programme des études juridiques, le rapproche davantage de la réalité du travail des avocats et permet de mieux comprendre l'évolution du droit doctrinal.

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## I. INTRODUCTION

WHAT DIFFERENCE DOES the teaching of procedure<sup>1</sup> make? How does it affect other subjects taught in law schools? How does it influence our understanding of the role of legal education and the way this education should be pursued? This is the second article in a collection of four articles examining the impact of teaching civil procedure. In the first article, Knutsen et al compare approaches to teaching procedure in four legal systems: the United States, Canada, Australia, and England and Wales.<sup>2</sup> They surveyed the place of procedure in the law school curriculum and in professional training, ascertained whether procedure was taught as an academic subject or as an aspect of professional training, and asked whether academic or practising lawyers taught the subject.

In this article we ask: What kind of subject is civil procedure such that its inclusion or exclusion from the law school curriculum would affect the curriculum as a whole? There are three significant features of civil procedure. First, it is about rules. Where other private law subjects tend to be based primarily on common law doctrine, in civil procedure the legislated rules of procedure provide the framework for legal analysis. This can be a pedagogical trap for unwary common law students, because there is probably nothing more lifeless than reviewing bare statutes and regulations. Teachers who have assigned statutes or regulations as reading materials can attest to this. Nevertheless, presented in the context of legal principles like fairness, the need for students to engage in statutory interpretation in an academic setting presents a valuable learning opportunity.

Moreover, the particular interpretive context in which the rules operate is often set out in the rules themselves. For example, in Ontario, Rule 1.04 provides that the “rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.”<sup>3</sup> Such an interpretive directive challenges students to develop a critical appreciation of the way rules should apply to various situations and encourages them to reflect on the particular purpose served by the rule in the larger context of procedural fairness. This kind of learning opportunity is not readily found in other subjects.

Second, civil procedure rules shape a key aspect of the work pursued in the legal profession. Studying these rules is different from studying statutes or rules

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1. For an explanation of our use of the term ‘procedure,’ see Janet Walker, “Introduction: The Impact of Teaching Procedure” (2013) 51:1 Osgoode Hall LJ vii-viii.
  2. Knutsen et al, “The Teaching of Procedure Across Common Law Systems” (2013) 51:1 Osgoode Hall LJ 1.
  3. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 1.04.

governing other fields, such as criminal justice or health regulation; the rules of civil procedure directly govern the activities of lawyers in their efforts to prosecute and defend civil actions. These rules, together with professional codes such as the Ontario Rules of Professional Conduct,<sup>4</sup> are immediately applicable to the way in which lawyers go about their work.

As students develop a critical appreciation of the way in which the rules operate, the policy choices inherent in them, and the way in which they interact with one another, they can begin to develop a sense of ownership and responsibility for the rules. Students begin civil procedure courses discussing the way lawyers represent clients and the way they must develop and present a case. But gradually, they find themselves discussing the way lawyers conduct litigation and the reasons why lawyers, as a profession, endorse the particular approach to procedural fairness reflected in the rules—or the way particular rules ought to be revised to better reflect procedural fairness. In no other subjects do students have the opportunity to engage directly with the principles governing dispute resolution, a key aspect of the profession. Critical engagement with the rules supporting the core aspirations of law draws students into the professional community in a way that is not possible in other subjects, and gives students their first opportunity to engage in the kinds of analyses and discussions that are critical to the health of a self-regulating profession.

Third, civil procedure rules reflect a process rather than an outcome. They do not, as substantive law subjects do, prescribe the required relationship of rights and obligations among persons or between persons and society. One consequence of this has already been mentioned: While the outcome may be of greater interest to members of the general public in governing themselves and their affairs, the way in which disputes are resolved through litigation is of particular interest to lawyers. However, there is another important consequence of the fact that civil procedure rules reflect a process: The kind of imagination required to understand the rules is not one involving the constituent features of an ideal situation, but one involving how one step leads to another, how certain options are made available or precluded by a rule, and how an interlocutory step makes a particular outcome possible—or impossible.

There is, perhaps, no other subject as well suited to active learning as one that has as its focus the process of resolving civil disputes. Regardless of how theoretical and intellectually challenging the issues at stake are, procedure is ultimately about how a situation unfolds. This might be the key to understanding why, when taught

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4. Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: Law Society of Upper Canada, 2000, as amended.

in the same way as substantive law courses, civil procedure is predictably dull, and how civil procedure serves most naturally of all standard law school subjects as the opportunity for active and experiential learning. As higher education increasingly embraces these kinds of learning,<sup>5</sup> educational systems in which civil procedure has not been accepted in the mainstream curriculum might create such opportunities by adding extra-curricular (or even intra-curricular) programs (such as mootings) to fill this need.

For countries in which civil procedure is currently included in the law school curriculum (such as Australia, Canada, Israel, and the United States), critical reflection on the role procedure plays in the larger curriculum could enable civil procedure to serve that role better. Critical reflection could also shed light on questions such as the effect of including procedure among the required (or core non-compulsory) subjects, and whether to place it in the first year or upper years of study. In a country such as Canada, where the contents of the required law school curriculum are currently being debated, reflection on the value of procedure to the larger curriculum could be particularly informative. In countries where civil procedure is not included in the law school curriculum (such as in England and Wales), reflection on the pedagogical challenges and opportunities of teaching the “how” of the law may prompt further reflection on the difference it might make to teach civil procedure.

To address these issues, we consider a number of pedagogical questions. In thinking about the “who” of teaching civil procedure, we ask: Are particular kinds of instructors attracted to, and suited for, the teaching of procedure? From whom do students want to learn procedure? What do practitioners and courts say about who should teach procedure? What do other teaching colleagues say about this question?

In terms of the “what” of teaching civil procedure, we look at the kinds of issues and topics covered in procedural courses, including core and related topics, as well as topics that connect directly with other parts of the curriculum.

In terms of “why” we teach procedure, we consider whether, in teaching procedure, we are helping to develop knowledge of procedural systems and their role in society, fostering skills of dispute resolution and legal analysis, or helping students develop a critical awareness of the values that underlie these systems and the values and attributes of the practitioners that participate in them. Our focus

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5. See e.g. Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (United States: Clinical Legal Education Association, 2007), online: Clinical Legal Education Association <[http://www.cleaweb.org/Resources/Documents/best\\_practices-cover.pdf](http://www.cleaweb.org/Resources/Documents/best_practices-cover.pdf)>; William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Jossey-Bass, 2007).

is where students get procedural knowledge and how effective those sources are in law schools. How does a lack of procedural teaching in law school impact students and teachers? How might adding procedure enrich the educational experience and life at law schools that do not currently teach the subject directly, or at all? What sorts of questions does the teaching of procedure cause students to ask about the law that are not promoted by other subjects? How might colleagues assist or be challenged by adding procedure to the curriculum?

In terms of the “when” and “where” of teaching procedure, we are interested in what difference it makes to include procedure in the curriculum. What difference would it make to teach procedure as a required subject? When should procedure be taught (in the first year, upper years, or both)? Does procedure inform other subjects? Should faculties include advanced procedural courses, and if so, what would they look like? What are some other ways of including procedure in the curriculum?

Finally, in terms of the “how,” we look at options for how to best teach procedure as an academic law school subject (including elements of knowledge, skills, and values), as well as specific pedagogical tools, including lectures, problem-based learning, case studies, et cetera.

There are many issues and questions raised by this project. And because of the diversity of views of the co-authors of this article, together with the diversity of approaches between institutions within and between the various jurisdictions that we have considered, not all questions are taken up in each jurisdictional part of this article. However, when viewed together, this article addresses a number of the issues from various pedagogical perspectives. What we offer is a menu of procedural thinking in the spirit of sparking discussion on curricular reform in the area of civil procedure. Given the international team of authors and the comparative nature of our focus, the article is organized into five jurisdictional studies, covering Canada, Australia, the United States, Israel, and England and Wales.

## II. CANADA<sup>6</sup>

Teaching civil procedure in Canada is not without its challenges. In common law Canada, civil procedure is typically a required course, and is different from other required courses. As many experienced law teachers would agree, a course that is both required and different is liable to be regarded with suspicion by students. Being a rules-based compulsory course, civil procedure may appear

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6. Erik S Knutsen took the lead in drafting this Part of the article. We are grateful to Brittany Sargent for excellent research assistance.



dull, but to those who specialize in the subject, nothing could be further from the truth.

To examine how a civil procedure teacher (or scholar) taps into the vibrant landscape of topics in this wide-ranging subject, we first examine why civil procedure is taught—a core question in this series of articles. We then turn our attention to the fact that teachers of civil procedure need to frame the materials in a compelling thematic structure palatable to law students seeking relevance, and provide students with a facility for solving broad procedural issues. Finally, we consider how an instructor actually teaches a course that seems to have the oppositional goals of satisfying the practical and inspiring the intellectual. We conclude this Part with suggestions on how a civil procedure teacher can meet both goals.

## A. WHY TEACH PROCEDURE

Procedure is a necessary component of the law school curriculum in Canada for three reasons. It operates as a fundamental part of an integrated legal system that solves disputes within a human context. Without procedure to provide the factual context beyond the text of a written court decision, substantive private law cases make little sense. Procedural law has rightly become a substantive law course of its own, with as much theoretical complexity and academic nuance as traditional, substantive law courses such as Tort Law or Contract Law.

### 1. INTEGRATED SYSTEM OF HUMAN CONTEXT

Understanding procedure is a fundamental part of understanding the common law dispute resolution system as a system in a human context. The human behavioural factor behind and within court decisions explains to lawyers how procedure affects the lives of others through the public dispute resolution process. The procedural web around any case is necessarily integrated into the substantive law of a dispute, since it is through procedure that the case progresses and rights are vindicated. Remove that procedural element, and there is no viable means to explain how and why actors interact with the legal system. The system becomes nothing more than a composite of legal rules, without any guide as to how disputants invoke and respond to rules. Procedural law provides the plan through which to overlay human behavioural context on standard legal rules.

Procedure is part of an integrated legal system that is necessarily tied to disputants as people.<sup>7</sup> For example, tort law is studied in Canadian law schools

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7. See also Elizabeth M Schneider, "Structuring Complexity, Disciplining Reality: The

as a stand-alone course. But, in the human context, tort law is not merely tort law; it is part of a complex accident-compensation system. Tort law is not self-actuating—it requires procedural law. Understanding the role of procedural law is the academic path to understanding the law not as siloed and often arbitrary academic divisions, but as an integrated system through which a lawyer must help his or her client navigate.

For a simple motor vehicle accident case, a lawyer will have to understand the client's rights of recovery under tort law. The lawyer will need to address insurance issues, which might be the only pockets of compensation available to the client. The lawyer will need to determine how and when to address procedural concerns. For example, there might be a limitation period issue, which would require determining the optimal time to bring the case. The lawyer will take the applicable limitation period into account along with the stability of the client's injuries in determining when it is most effective to commence the action. The lawyer will have to sift through evidence to establish what information needs to be disclosed and what information is privileged. The lawyer must also consider the client's risk exposure to an adverse costs award if the client's case is unsuccessful.

These procedural decisions are not made in a vacuum—they are part of litigating in the accident-law system, just as much as recognizing tort rights or understanding the availability of insurance compensation. To operate the law within a human context—the context of a motor vehicle accident victim, for example—the lawyer needs to understand how that multi-faceted, and often dynamic, human context integrates with the legal system. Without procedure, tort and insurance are no more than bare legal concepts. Procedure is the strategic glue that links tort and insurance law to comprise the accident-compensation system. It does so for many other areas of law; it is the filter that takes human behaviour and explains how the system works.

## 2. PROCEDURE AS META-FACT

The procedural story behind each case is as much a part of the case as the written facts and law in any court decision. Facts often drive the result in law. Facts that are not explicitly contained in the written judgment but that explain why and how that case got there, and why and how certain things were done, are often inferred by lawyers to understand the human context and strategy that got the case to where it is. These meta-facts allow lawyers and students of law to place a court decision in its proper procedural context.

Without procedure, no one can understand case law results or the role of lawyers in those results. Why did one party win or lose a case? Why did one party bring a case? Why were other parties not involved? Why was certain evidence not led? Why were certain arguments not made in court? Procedure answers all of these questions and more. It provides the baseline context from which one can understand how private citizens exercise rights in the public court system. It answers “why.” Reading a tort, contract, or property law case without understanding those “why” questions relegates that case to nothing more than an exercise in gleaning a stand-alone legal rule, free of any human context. The meta-facts provide the humanity behind the study of law.

### 3. PROCEDURE AS SUBSTANCE

The appropriateness of the longstanding, yet odd, division of “procedural” and “substantive” law courses in the legal academy has long since passed, at least in Canada. The law of procedure is, in large measure, as substantive as any other core subject in Canadian law schools.

First, it has its own substantive legal tools from which to teach. The rules of civil procedure in Canada are regulations that guide a process requiring interpretation in context to understand their application to a myriad of human conditions. Case law interpretation and the application of rules is the parallel substantive tool for teaching procedure. Knowing the rule for summary judgment is a helpful step in a lawyer’s education. But learning when the rule is inapplicable, and why, as well as the consequences for invoking the rule in inappropriate circumstances, is a higher level of thinking. Furthermore, there are strategic and ethical considerations that might affect decisions made in respect of the rule in order to best serve a client. But the most substantive inquiry occurs when students are prompted to ask why a process like summary judgment exists and the purpose it serves in the firmament of procedural tools. Is it there to speed up an expensive public dispute resolution process, or does it hasten proceedings at the expense of a litigant’s right to have a day in court? Cases and scholarship interpreting and criticizing the rules created by statutes produce as many scholarly debates as there are deliberations in the areas of tort law or contract law.

Second, procedural law today has as much theoretical and doctrinal complexity as any other area of law. For example, the law of limitation periods has become an intricate blend of procedure and equity. To understand the most fundamental limitation on legal rights—when a claimant may no longer bring an otherwise meritorious claim—one must learn not only the applicable limitations statutes, but also the common law concepts of discoverability and capacity to bring a legal claim,

as developed in the case law. Furthermore, one must understand the fundamental purposes of limitation periods. That, in turn, requires a sense of fairness and equity for the plaintiff, and efficiency and finality for the defendant. This might prompt a student to think not only reactively, but also proscriptively: How do limitation periods affect the rights and obligations learned about in classes like Tort Law or Contract Law?

Third, answering that question prompts students to think of procedure not as a discrete area of law, but as an integral feature of the entire civil justice system. The mile-high, systemic view of the justice system is only achieved through an understanding of how procedural law meshes with other areas of law. For example, understanding the rights and obligations that flow from a motor-vehicle accident and evaluating the accident-compensation system require an understanding of procedural law overlaid onto tort law and insurance law. No sensible legal reforms to the accident-compensation system could take place otherwise. As documented in greater detail by Thornburg et al in this issue,<sup>8</sup> the inherent links between procedure and other areas of law are fostering a scholarship of “procedure plus”—procedure as it relates to various areas of law. Understanding procedural law is key to understanding the broader systemic context of many other areas of law.

## **B. THE TEACHING THEME: STRATEGY AND SYSTEM**

How does a teacher convey the understanding of procedure as a fundamental part of an integrated legal system that solves disputes within a human context, and as a necessary part in the law school curriculum as a result? What pedagogic framework demonstrates that procedure is a substantive course, that the meta-facts are key to understanding the legal system as a system? How is this done in a law school context, where the immediate concerns of law students racing towards their career goals often clash with the broader educational goals of a teacher of procedure whose concern is exposure to the mile-high view of procedure that will serve the student as a lawyer in the future? One possible answer to that final question lies in developing a cohesive thematic structure that combines “procedure as litigation strategy” with the theme of “procedure as an integrated system of civil justice.”

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8. Beth Thornburg et al, “A Community of Procedure Scholars: Teaching Procedure and the Legal Academy” (2013) 51:1 Osgoode Hall LJ 93.

## 1. THE IMMEDIATE MICRO-MESSAGE – PROCEDURE AS LITIGATION STRATEGY

The inherent tension in a professional institution of fostering intellectual curiosity and honing professional skills is ever present in Canadian law schools, where students must face ever greater competition for admission and ever greater financial investment. The result is that whatever their natural interests might be in learning about the law, most are motivated to pursue courses that will help them secure employment. Aligning instruction with a decidedly utilitarian and practical bent can be critical to engaging their interest.<sup>9</sup>

The attraction of a mandatory course in which the students expect to study rules and an arcane language—including terms like *res judicata*, estoppel, and demurrer—is not obvious to many students, to say the least. But building a theme to pique their interest and convince them of the utility of the subject while maintaining pedagogic goals can help. Themes not only help students organize information into a coherent whole, but they also assist teachers in making pedagogical decisions about course materials, order of topics, exercises, and discussion points.

Having a “litigation strategy” theme can shake up student expectations, and can convey a message of relevance to students. If students understand that the course is about learning strategic decision making with a common set of rules, civil procedure immediately appears to involve less rote work and be more interesting. Many law students are nothing if not strategic, and enjoy being challenged. In this way, the civil procedure teacher can help the budding lawyer gain an edge on the legal competition. The human context is obvious if the goal is to explore strategic options for lawyers in various procedural scenarios. The question “What would you do as a lawyer in this situation?” takes on a significance not otherwise felt if a course were organized around doctrine, concepts, and rules alone. Students might imagine how the subject can help them on the first day of their new job. Armed with civil procedure, the newly minted lawyer is at least familiar with various strategic decision making paths, no matter what the specific procedural or substantive challenge.

In addition, the litigation strategy theme assists with the academic goal of learning civil procedure as an integrated system, because “litigation strategy” is nothing more than a micro-message, with “the civil justice system as system” as the macro-message. As litigation strategy, civil procedure ceases to be about the minutiae of rules, and instead becomes the broader framework of how the rules operate in a human context.

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9. We are not alone in this observation. See *e.g.* Keith E Sealing, “Civil Procedure in Substantive Context: The Exxon-Valdez Cases” (2003) 47:1 Saint Louis ULJ 63.

## 2. THE FUTURE MACRO-MESSAGE – PROCEDURE AS CIVIL JUSTICE SYSTEM

The goal of many civil procedure teachers is to introduce students to a procedural world that is overarching and fundamentally important to understanding the operation of law in society. Civil procedure teachers know that, at some point, students will be in a position not only to work with procedural issues but to craft procedure as well. Some students will become judges. Some will work in government. Some will engage in law reform. It is important, therefore, for students to understand procedure as a holistic civil justice system that can be viewed through coherent theoretical viewpoints. This is the heart of the academic study of civil procedure. The analytic tools learned in procedure courses serve the future needs of lawyers far more than learning the ability to regurgitate a specific rule. Rules change, but a sense of equity, ethics, cohesion, and humanity endures.

A litigation strategy theme also allows civil procedure teachers to ask the deeper theoretical, academic questions. To make a strategic procedural move, students should know how that move will affect other potential actions down the chain of events and, eventually, what the legal system is all about as an integrated system. What is procedure trying to do? How is it ensuring justice? What professionalism issues are raised? Overarching theoretical issues become imminently relevant. Procedure seems to be less about learning theory and more about learning how litigation behaviour operates on a continuum and in an interconnected fashion, or as a balance between fairness, efficiency, and predictability.

How those questions play out in procedural law make the study of procedure interesting. Consider discovery disclosure rules. How much is too much disclosure? What would make document production inefficient? How much needs to be disclosed to create an efficient balance between avoiding trial by surprise and keeping the proceeding moving in a predictable fashion? What is fair to disclose, and what should be privileged? In discussing the legal standard for disclosure of relevant documents in civil litigation, using a framework of guiding principles like “fairness, efficiency, and predictability” prompts students to think about not only how the rule applies, but also why the rule is there, and whether or not the rule is doing what it is supposed to do.

### C. ACCOMPLISHING THE MACRO- AND MICRO-THEMES IN THE CLASSROOM

#### 1. TEACHING WITH CONTROVERSY

Whatever one’s macro-theme for organizing a civil procedure course, or whatever one’s micro-theme for fulfilling students’ immediate needs, civil procedure teachers

often succeed in presenting civil procedure as an academic subject in a classroom setting by using the inherent strength of the subject to their advantage. Civil procedure exists as a dispute resolution system because humans are constantly embroiled in controversy. Law students may be drawn to law school because they seek to have a career that enables them to solve controversies. Find a controversy and you gain the attention of students! So, teachers teach controversy.

Teaching with controversy can be as easy as highlighting the debatable presumptions in whatever material comes to the classroom, such as an aspect of the procedural system that is out of touch with human behaviour. For example, a litigant may be trying to attack a prior criminal judgment in a civil case, and the opponent wants to argue estoppel. Learning the rules of estoppel can be a natural consequence of recognizing that a litigant wants to do something unfair, unpredictable, or inefficient.

Teaching with controversy means that civil procedure teachers spend less energy on what the rules and cases say, and more on why and how those rules work. Students learn the rules for themselves as they navigate the challenges of resolving the larger procedural controversy. By learning rules through exposure to the civil procedure system as a system, students develop confidence about where to find answers in the future. In an environment where rules and procedures might change, understanding the fundamental conceptual building blocks of our civil dispute resolution system enables students to develop new solutions to challenges they encounter. Teaching with controversy by focusing on the “how,” “why,” and “why not” questions, and foregoing rote rule-learning energizes the classroom to treat the rules and cases as substrate, and the question of *what to do with* the rules and cases as the substance of inquiry.

## 2. TEACH WITH A STORYLINE

Although concerns about the relevance of a subject disappear once a new lawyer begins to practise law and discovers that each day can bring a new procedural challenge, those concerns remain in the future. Law students have (typically) not practised law, and may have little to no knowledge about civil litigation or any other area of law. This presents a serious challenge for teaching procedure as part of an interconnected system that draws on other areas of law to deal with substantive legal rights.<sup>10</sup> While it can be difficult to understand substantive law without

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10. This unique challenge with civil procedure is described by Kevin M Clermont as “how to get into a subject so marked by interdependencies. To understand anything, the student must understand everything.” “Integrating Transnational Perspectives into Civil Procedure: What Not to Teach” (2006) 56:4 J Legal Educ 524 at 527.

procedure, the corollary may also be true. The leading case on discovery might be a commercial law case. How can students understand the procedural aspect of the case without some basic grounding in tort or contract? How can the procedural part of the case make any sense?<sup>11</sup> For some Canadian law schools, this, together with the possibility that students have had some exposure to civil litigation, are the reasons why procedure courses are typically placed in the upper-year curriculum.<sup>12</sup>

It is for this reason that many law students in Canada study civil procedure in their second or third year, a point in which it becomes possible to draw from a wide variety of hypotheticals, exercises, cases, and exam questions. In addition, many will have taken a clinical program or volunteered for student legal aid, and many will have spent a summer at a law firm or legal clinic, all of which can enrich the classroom environment. Having said that, there is a compelling counterargument that teaching procedure in the first year can bring alive some of the other courses and help students understand—through the operation of law—what the lawyering process can be about. This is discussed in greater detail below when considering the law school curriculum in the United States.

One way in which the students' lack of exposure to litigation can be addressed is to work through a real civil procedure case, from beginning to end. This creates a cohesive narrative and provides a structure for the course. Students start with the complaint, move through discovery, to trial, and then to the appeal.<sup>13</sup> The case could be in any subject area, and can rely on fiction, a case in the news, or a case the teacher has dealt with in a professional capacity. Working through a case file provides context for each of the procedural steps. Simple tort or contractual issues work well. The lead author of this section, for example, uses the unfortunate story of Mrs. Beardy, a woman who was hurt in an accident. Some years, the accident

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11. This is a notion echoed with some concern by Mary Brigid McManamon. "The History of the Civil Procedure Course: A Study in Evolving Pedagogy" (1998) 30:2 *Ariz St LJ* 397 at 438.

12. Mary Brigid McManamon discusses this also: Is civil procedure taught in the first year at law school primarily because that is what "Langdell believed?" According to McManamon, the challenge to students and instructors in having little to no legal baseline upon which to teach procedure merits considering the course as one that should be taught in the upper years of law school. *Ibid* at 439. However, compare this view with the curriculum at the University of Toronto Faculty of Law and Osgoode Hall Law School (York University), which teach civil procedure as a component of a mandatory first-year legal process course.

13. See *e.g.* Stephen J Shapiro, "Teaching First-Year Civil Procedure and Other Introductory Courses by the Problem Method" (2000) 34:1 *Creighton L Rev* 245; Stephen N Subrin, "Teaching Civil Procedure While You Watch It Disintegrate" (1993) 59:3 *Brook L Rev* 1155; Kevin M Clermont, "Teaching Civil Procedure Through Its Top Ten Cases, Plus or Minus Two" (2003) 47:1 *Saint Louis ULJ* 111 at 119.



is a fall. Other years, the accident is caused by something else. The author shows a photo of the fictitious Mrs. Beardy to give the story a human element. Mrs. Beardy's evidence is not perfect, and it often conflicts. The opposing litigant is often a store, a restaurant, or a manufacturer.

The point of Mrs. Beardy versus the store/restaurant/manufacturer is to have a common narrative throughout the year that allows the class to respond to questions including, "What would Mrs. Beardy do here?" and "What would the store do here?" This forces students to think about both litigants and the impact that various procedural decisions have on both sides. What is fair for Mrs. Beardy is not always fair for the store. In addition, having a constant narrative throughout the year allows the civil procedure teacher to talk about the human aspects of procedure.

There is no limit to how far the narrative about Mrs. Beardy can be carried. She (and the opposing party) will need advice on documentary discovery, on settlement, on costs issues, and whether or not there should be an appeal after the trial. The classroom hypothetical story can be used to contrast other cases and materials studied in the course. By keeping a single set of facts and a running story, it is easy to engage other hypotheticals and exercises. Students also quickly learn that the entire procedural system acts as a continuum and that the system must adapt to human behaviour along the way.

### 3. TEACH BY DOING

Finally, civil procedure as a law school course is doubly challenging because students typically have no exposure to litigation matters before they enter law school and procedural issues are often not about the facts and law of a case, but about how to deal with those facts and law in a process. It is extremely difficult for law students to relate to many issues in civil procedure, because they are learning about that process without having seen it in action. How does one learn the law of pleadings, for example, without ever having drafted a pleading, or even having seen one before? It surely must be like learning to fix a car without having ever sat behind the wheel. The solution is to teach by doing.

Here is where the single-story narrative continuum works best. There is no reason that law students in a civil procedure course cannot read or draft pleadings or any other litigation document. Until students have to make the discretionary litigation decisions themselves, they will not understand the complexity of the rules of procedure and why the rules say what they say.

Students respond with surprising eagerness to the prospect of drafting documents. While it is different from writing a law school essay, much of the verve in these assignments comes from the fact that students know they will be expected

to draft these documents one day. In fact, drafting in law school may save students from embarrassment on the first day of their law jobs. They will be a step ahead of students who have not previously drafted litigation documents.

The key to legal drafting assignments is to place less emphasis on technical drafting skill and more emphasis on how lawyers use professional discretion strategically in writing advocacy-based documents for their clients, while still being constrained by the various customs within the world of form-based paperwork. Students can draft a claim, a defence, a list for documentary discovery, or a motion record. Instructors can provide them with one basic precedent from which to work, and encourage them to seek out others to use as samples. Students are often creative in their searches.

By drafting a claim or defence, students learn that economy of language and advocacy must go hand-in-hand with basic legal concepts for pleadings (*e.g.*, material facts, particulars, and the law). By drafting a list for documentary discovery exchange, students must think about which types of documents they will claim as privileged and why, which they will readily disclose, and which are irrelevant. These types of topics are simply alien to a group of students who may be two or three years away from a time when these matters will be important. A drafting assignment provides some context for much of the study of procedural law (and also allows for wonderful opportunities to pass on messages about written advocacy and professional ethics).

Learning by doing does not have to come solely from drafting litigation documents. Students can learn by observation. Showing is much more powerful than just telling. For example, because few, if any, students have been to a discovery before, the lead author of this section takes part of one class to conduct a mock oral examination for discovery of Mrs. Beardy and her husband. Faculty colleagues play Mr. and Mrs. Beardy, and are appointed a set of counsel (students) to advise on the appropriateness of questions. As each plaintiff is examined separately, students quickly see that the facts are not consistent between the two witnesses. The injured Mrs. Beardy claims her life is greatly impacted from her accident. Mr. Beardy, however, provides a contrasting factual background. Mrs. Beardy describes a diminished intimate life with her husband during discovery. However, while alone during discovery, Mr. Beardy reveals that everything in that department is “same old, same old.” Something like this often occurs in a real-life discovery and students are surprised to learn that people do not see things in the same way.

Students may also learn a great deal by watching some procedural aspects. Doing an in-class demonstration (as above) works. Perhaps there is a video of a

discovery that can be played. Or perhaps a selection from a movie,<sup>14</sup> or even from a television show like *Boston Legal*.<sup>15</sup> Students can also attend actual court hearings (time permitting), even as an exercise on which they can write a short optional reflective paper. There is a real teaching advantage to having a baseline set of events through which to discuss how procedure operates, its interface with professional and ethical judgment, and why it affects so much of litigation. This goes beyond discussing the application of legal rules, to demonstrating the concept in action, and moving towards dissecting how the concept affects the system as a system. Without a baseline experience that the class can share as a whole, the experiential playing field is often not level. Teaching by doing fills a particular niche in the civil procedure classroom. The civil procedure teacher is able to close the experiential gaps between students while hammering home the relevance of the topics. Most importantly, learning by doing allows the civil procedure teacher to present the academic study of procedure as a system, using various exercises and observations to examine the theoretical questions in procedural law.

#### D. CONCLUSION

The importance of civil procedure in the firmament of legal education is perhaps more difficult to impart to students than it is to articulate in the abstract. Because of the nature of the course, the civil procedure instructor is placed in the unique position of having to satisfy both the immediate requirements of law students with the future needs of those same students, who typically will someday be lawyers in positions to make changes to the law. Designing a course around two simultaneous thematic structures may help the instructor accomplish pedagogic goals. Teachers can use a micro-theme such as “litigation strategy” and a macro-theme such as “procedure as integrated system.” To further cement these thematic structures within a course that is both practical and theoretical, an instructor can use controversy, a story narrative, and practical procedural activities to ground students in the “how” and the “why” of the subject. Indeed, the dual nature of civil

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14. *The Story of Qiu Ju*, a 1992 Chinese film starring actress Gong Li, is a marvellous example of how the civil dispute resolution system can often eclipse the human element in any dispute. It also provides insight into how the procedural system will seem so daunting to the future clients of students. The film offers comparative moments from which to view one's own procedural system. Many may find that their own legal system is not that far off in result from the human effect on Qiu Ju. *The Story of Qiu Ju* (Hong Kong: Sil-Metropole Organisation and Youth Film Studio of Beijing Film Academy, 1992).
  15. Where the antics of lawyer character Denny Crane played by William Shatner are sure to please any crowd. *Boston Legal* (Beverly Hills: 20th Century Fox Home Entertainment, 2004-2008).

procedure as an academic subject to be taught in law school is unique among law school courses. No other course allows an instructor to arm future lawyers with the powerful analytic tools to strategize about procedural steps and to conceptualize the entire legal system. Among law school courses, procedure rules.

### III. AUSTRALIA<sup>16</sup>

Given the relatively recent interest in civil procedure as a rigorous, academic part of the curriculum, the following discussion provides some basic observations, tentative conclusions, and ideas about the current and future state of civil procedure in Australian law school curricula.

#### A. WHERE CIVIL PROCEDURE FITS IN THE CURRICULUM

The US section of this article will show that law schools in the United States generally teach civil procedure as a first-year subject matter.<sup>17</sup> Why might this be so? The rationale might be that it gives students an early understanding of civil process. This provides context and is often important to a proper understanding of how and why the issues in a case evolved the way they did. It also helps create a more realistic and accurate picture of what lawyers actually do. Students tackle the subject while still fresh and enthusiastic about studying law.

In Australia, where the study of law is typically a four-year course, the approach has been to make civil procedure a compulsory subject in upper years. Students will have already covered substantive areas of law, so the civil procedure course will not detour into, or get distracted by, teaching substantive law. The subject matter is learned closer to the time when students might actually need it; accreditation authorities are keen to ensure that knowledge of civil procedure is current.

The question, raised above in discussing Canada,<sup>18</sup> still remains: Does teaching civil procedure so close to when students enter practice encourage a vocational focus to the subject? In other words, does having civil procedure early in the program of study provide for an academic approach to the subject?

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16. David Bamford took the lead in drafting this Part of the article.

17. See Part IV, below.

18. See Part II, above.

## B. WHO TEACHES CIVIL PROCEDURE?

Historically, there have been very few Australian civil procedure scholars. Most procedure-related publications have been written by judges or practitioners. This reflects the past pattern of having practitioners teaching civil procedure.

It is only in the last ten to twenty years that we have seen a growing body of academics with an interest in procedure. We suspect that, while many Australian law schools are now teaching civil procedure, for many instructors, the subject has been taught out of duty rather than as a result of a bona fide intellectual interest. This, however, is changing. Based on the research completed for this article, it is clear that where teachers are identified in publicly available information about subjects, they are almost always academics. However, this does not shed any light on who does the actual classroom teaching, which may still involve practitioners. Practitioner involvement is very important as it brings contemporary, real-world perspectives that give the subject credibility in the eyes of students, admission authorities, and the professional community.

Nevertheless, the real benefits of a course on civil procedure come from the degree to which the subject is taught with rigorous intellectual and academic analysis. This is more likely to occur if the teacher is an academic. As discussed in relation to Canada, balance is key.<sup>19</sup>

## C. WHAT SHOULD BE TAUGHT?

One significant challenge for teachers is to move away from a focus on the litigation process. Civil procedure needs a new home: perhaps located broadly in a new field of civil justice. The purpose and function of civil procedure—the resolution of disputes through a compulsory process and the development (and enforcement) of norms to regulate behaviour—needs to be understood in light of an increasingly complex civil justice system. Over the last twenty years, the major developments in courts have been to broaden the range of dispute resolution methods and to link them with a range of non-court institutions and bodies. Civil procedure has been adapting to these changes.

A focus on civil justice would lead to an examination of what courts actually do. The course could begin with an examination of the civil justice system, ranging from tribunals and courts to industry-based dispute resolution services that have been incorporated into the civil justice system in some way. Admission requirements and time limitations mean the subject would focus on court-based processes. Along with this would be an attempt to articulate the principles that

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19. *Ibid.*

underpin dispute resolution processes—party autonomy, judicial supervision, transparency, prior notice, reasonable opportunity to be heard, proportionality (time and cost), representation, efficiency, public confidence, et cetera—and an analysis of how existing procedural provisions match up with these principles.

Another challenge is to move away from an exclusive focus on superior court practice. A broader civil justice focus might consider practice in inferior courts such as magistrate or local courts. In Australia, as in the United States,<sup>20</sup> it is necessary to consider the choices to be made between state and federal procedure. Although there are some harmonization projects underway, progress is slow. There is also a question about comparative procedure. The increasing transfer of procedural ideas between legal systems suggests that we should incorporate a component of comparative procedure. One option is to consider other civil litigation systems (such as Germany's), which may provide a useful comparative analysis.

#### D. HOW SHOULD IT BE TAUGHT?

Most schools rely on lectures and small-group teaching methods. As mentioned in the discussion on Canada,<sup>21</sup> this makes it difficult to teach civil procedure materials in an engaging way. The excitement for students is in learning how to engage in dispute resolution and to play an active role in resolving hypothetical cases. Procedure lends itself to learning by doing. Learning outcomes are closely tied to assessment. We suspect that most civil procedure courses in Australia use examination as a primary assessment activity. However, many teachers try to include elements of “doing”—drafting summonses, pleadings, affidavits, et cetera. For example, the civil procedure course at Flinders University in Adelaide, South Australia, includes academic and professional elements. Students handle case files and engage in interlocutory hearings, settlement negotiations, and, eventually, draft bills of costs. This approach is resource intensive and expensive to deliver, but like the law of evidence, civil procedure is difficult to comprehend without understanding how it works and seeing it in operation and context.

Another challenge Australian teachers face is that there are really no jurisdiction-specific texts beyond practitioner services. While Australia has very good general textbooks,<sup>22</sup> teachers of civil procedure are often unable

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20. *Ibid* at 67.

21. *Ibid* at 54.

22. See, for example, David Bamford, *Principles of Civil Litigation* (Sydney: Thomson Reuters, 2010); BC Cairns, *Australian Civil Procedure*, 9th ed (Sydney: Thomson Reuters, 2011); Stephen Colbran et al, *Civil Procedure: Commentary and Materials*, 5th ed (Chatswood: LexisNexis Butterworths, 2012).

to cover particular procedural provisions in the different jurisdictions to the level needed. As a consequence, teachers deliver more content in class than in many other subjects. Yet another challenge, which is common in other subject areas, is that there is a huge amount of discretion and variability of outcomes in procedure. Often, rules are stated simply; it is relatively easy to get students to recognize when injunctive relief is an issue, and only a little more difficult getting them to learn the criteria and associated law on injunctions. However, it is significantly more difficult to have students apply all of this to a situation with sufficient confidence to arrive to a conclusion—even if that conclusion is that further information is required.

Further, as a final year subject, civil procedure begins the process of transitioning into the profession. This has its challenges, but trying to create a quasi-practice culture is one of the goals of the subject.

#### E. WHERE IN THE ACADEMIC FIRMAMENT DOES CIVIL PROCEDURE LIE?

Reflecting its history, civil procedure has struggled to be accepted as a field of serious academic endeavour.<sup>23</sup> In Australia, the number of academics with an interest in civil procedure is growing and we believe this group is close to the critical mass needed to establish itself. But in order to achieve this stature, procedure scholarship needs to move beyond the descriptive. In part, this will occur when proceduralists become initiators of, or have influence on, the development of civil procedure. To date, the role of civil procedure scholars in Australia has largely been reactive and educative.

A measure of the current state of teaching civil procedure in Australia is the lack of teaching outside core topics. Across thirty-one law schools examined in Australia,<sup>24</sup> only five elective courses at the undergraduate level had a core

23. *Supra* note 2 at 62-63 (Section B of the Australia section).

24. The course structure of all Australian undergraduate degrees were examined to identify at what level in the course civil procedure was taught; curriculum or subject outlines for those topics were analyzed to determine the content of the subject. The thirty-one law schools are: Australian National University, Bond University, Charles Darwin University, Deakin University, Edith Cowan University, Flinders University, Griffith University, James Cook University, La Trobe University, Macquarie University, Monash University, Murdoch University, Queensland University of Technology, Southern Cross University, University of Adelaide, University of Canberra, University of Melbourne, University of New England, University of Newcastle, University of New South Wales, University of Notre Dame, University of Queensland, University of Sydney, University of South Australia, University of Southern Queensland, University of Tasmania, University of Technology, Sydney, University of Western Australia, University of Western Sydney, University of Wollongong, and Victoria University.

civil procedure focus; only a few of the law schools have graduate programs with electives in civil procedure.

#### F. HOW DOES CIVIL PROCEDURE RELATE TO OTHER PARTS OF THE LAW SCHOOL CURRICULUM?

Australian law schools generally have a standalone civil procedure subject to be studied at the end of the degree. Only ten of the thirty-one schools we examined with Civil Procedure as an available course had any civil procedure coverage in the first year and, when they did, the subject matter was in a broader introductory course often relating to the study of the profession and ethics.<sup>25</sup> Only two of those ten schools identified pre-trial process as part of the subject, and only three of the ten covered court rules. By contrast, seven of those ten schools cover ethics and professional responsibility, and five covered alternative dispute resolution.

In upper years, all schools had subjects covering the pre-trial process and rules of procedure, but often as part of broader subjects. For example, procedure could be combined with the study of evidence law. Our study found that civil procedure was taught over a number of topics (an average of three), and these topics would constitute an average of approximately 40 per cent of the students' annual workload. Our study also found that there is a clear synergy between first-year subjects covering the profession, ethics, and legal institutions.

Civil procedure also interacts with clinical topics. Many, if not most, clinical topics would have civil procedure as a prerequisite. This is not ideal in schools where procedure is taught only in the final year, in which case procedure becomes a co-requisite. Ideally, some clinical work would be incorporated into civil procedure subjects but practical limitations make this unrealistic for most faculties.

The most important curriculum issue is the relationship between civil procedure and dispute resolution. Civil procedure needs to take a broader perspective than it currently does. A course on civil justice would need to cover dispute resolution in a broader way than is often the case in courses on civil procedure, as would a course that might be called Resolving Civil Disputes. Australian law schools still maintain a significant boundary between civil procedure and dispute resolution. Dispute resolution is still largely the province of elective topics—twenty-two of the thirty-one law schools together offer thirty-three dispute resolution electives,

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25. The ten law schools are: Australian National University, Flinders University, La Trobe University, University of Melbourne, University of New England, University of New South Wales, University of Notre Dame, University of Sydney, University of Western Sydney, and University of Wollongong.



compared with approximately three elective topics in traditional civil procedure, covering rules and pre-trial processes.

Civil procedure courses in Australia must be adapted to the new realities of litigation to give students the mental framework and understanding of their role in assisting clients. It is important to rethink the implications of failing to invest in the teaching of civil procedure through the use of full-time academics, and to see the broader connections and balance between theory and practice. This has only been experimented with in the past decade.

#### IV. THE UNITED STATES<sup>26</sup>

In this issue's first article, Knutsen et al describe Civil Procedure in US law schools as primarily a first-year required course, taught by full-time academics.<sup>27</sup> It is principally taught using a combination of the Socratic method, simulated procedural tasks, and readings from real lawsuits, and it includes doctrinal and theoretical consideration of questions of procedure and jurisdiction.<sup>28</sup> The discussion on Canada in this article has articulated the advantages of an academic—as opposed to a purely “nuts-and-bolts” practice approach—to teaching and learning civil procedure.<sup>29</sup> These hold true in the United States as well. This section will therefore address a slightly different question: What difference does it make to the law school curriculum that all US law students study civil procedure in their first year?

##### A. THE DIFFERENCE MADE BY LAW STUDENTS STUDYING CIVIL PROCEDURE IN FIRST YEAR

Perhaps the most obvious result of a required first-year Civil Procedure course is that, in contrast with the situation in Australia, it is possible to offer an extensive array of upper-level procedure electives. Some, such as Federal Courts, Advanced Procedure, or Complex Litigation, allow further and more sophisticated examinations of procedure topics. Because students will have a wider knowledge of substantive law and an overall framework for procedure,<sup>30</sup> such courses can tackle more complex technical issues and broader policy issues than introductory courses can. Another

26. Beth Thornburg took the lead in drafting this Part of the article.

27. Erik S Knutsen et al, “The Teaching of Procedure Across Common Law Systems” (2013) 51:1 Osgoode Hall LJ 1.

28. *Ibid* at 5-10.

29. See Part II, above.

30. Many students will also have some actual litigation experience, gained through summer work or law school internships.

common upper-level offering in the United States is a course in a specific state's procedure—probably taught in a more practical way, often by adjunct faculty who litigate in that state's courts. Other upper-level courses fall into the procedure plus category, in which students grapple with the intersection of substance and procedure. Offerings such as Commercial Litigation, Mass Tort Litigation, or Securities Litigation are some of the most common. Other upper-level courses are more skills-oriented—students put their procedure (and Evidence) lessons into simulated use in courses such as Trial Advocacy, Pre-trial Practice or even in more specialized classes such as Litigating Intellectual Property Cases. Knowledge of procedure also makes it possible for advanced students to do real lawyering in law school civil or mediation clinics, serve as interns for trial and appellate judges, and serve as interns for litigation attorneys in various public agencies. Pre-existing familiarity with civil procedure can create a broad array of academic opportunities that can help students transition to practice, while they acquire skills with the benefit of academic critique.

Equally important, even if less obvious, is the impact of teaching civil procedure in non-procedure courses. The history of the procedure course in the United States shows that procedure has always been intertwined with substantive law. The modern academic procedure course has its roots in Professor Christopher Columbus Langdell's case law-focused curriculum at Harvard Law School in the nineteenth century, where it began as a course on pleading.<sup>31</sup> Although the course contained some discussion of process—the extremely complex and technical rules of common law pleading—its focus was the forms of action. Thus by taking Pleading, students learned the elements of each cause of action:

It was in Pleading that the students would learn the differences between debt and assumpsit, for example. Thus, the basic procedural course included a large amount of what we regard as substantive material today. One historian . . . reminded us, however, that “substantive and adjective law were far from disentangled [at that time].”<sup>32</sup>

In the early twentieth century, the course expanded to address additional parts of pre-trial and trial proceedings, and as the century wore on, it became more about process values. By then, the course—renamed Civil Procedure—was firmly entrenched as a required first-year course. When some asked why the changed course was retained as a mandatory introductory course, the answer regularly looked to its impact on other courses: “[L]aw faculty members claimed that the

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31. The pre-academic trade schools also taught Pleadings. See McManamon, *supra* note 11.

32. *Ibid* at 407. McManamon quotes John H Langbein. See John H Langbein, “Introduction” in William Blackstone, *Commentaries on the Laws of England*, vol 3 (Chicago: University of Chicago, 1768) iii.

course in Pleading enabled the students to read cases in other classes intelligently.”<sup>33</sup> Procedure itself was characterized as a “handmaid to justice,” and the procedure course could fill a similar supportive role.<sup>34</sup> By explaining court processes, the Civil Procedure course could save professors in Contract Law and Tort Law from having to explain the meaning of “summary judgment” or “directed verdict,” the impact of the burden of proof, or the consequences of the standard of review.

While we appreciate the usefulness of this adjunct role, in our view the teaching of procedure also has an important and positive impact on many other aspects of the law school curriculum and goes far beyond providing vocabulary lessons. Understanding the procedural underpinnings of the substantive law that is typically examined in law school brings to life the way that law is made, why it is made, and how it might be made differently. How can a law student or a lawyer really understand substantive law without understanding the process by which it is enforced or not enforced? Learning procedure also assists students in the more skills-oriented aspects of the curriculum, including legal writing, moots, and clinical education.

#### B. SURVEYING NON-PROCEDURALIST TEACHERS OF PROCEDURAL LAW COURSES

A group of US non-proceduralist teachers of procedural law courses was asked whether knowing that their students had previously studied procedure affected their other courses.<sup>35</sup> Their responses illustrate a number of ways in which an understanding of the procedural context enhances an understanding of the law itself. Sometimes their comments reflect the customary belief that knowing procedure helps students understand the processes and choices that produced the opinions they are reading:

“In my Sale of Goods class I spend a considerable amount of time analyzing court decisions with great emphasis on the procedural history of the case.”

“I think that Civil Procedure is very important as background for my Wills & Trusts class. It helps the students understand things like the standard of review and why courts will treat some precedents as binding and others as merely advisory.

33. McManamon, *supra* note 11 at 424.

34. *Ibid.* McManamon quotes Charles E Clark. See Charles E Clark, *The Handmaid of Justice* (1938) 23:3 Wash ULQ 297.

35. In May 2010, all faculty and professional staff (approximately fifty people) at Southern Methodist University, Dedman School of Law, were surveyed asking them in what way the fact that civil procedure is taught to all students in the first year made a difference to their teaching of substantive subjects in the first year or later.

It would be hard to make sense of the opinions without knowing something about procedure.”

Sometimes, the students’ knowledge of the courts’ processes in civil cases provides a useful frame of reference when considering different processes. Faculty members wrote:

Civil procedure “provides a basis for comparison with criminal procedure and helps students understand the higher level of protections that are afforded criminal defendants.”

“In my bankruptcy class ... students should understand the rules of civil procedure so that they can understand the variations introduced by the Bankruptcy Code.”

Studying “the enforcement of negotiable instruments in my Payment Systems class also requires students to have some understanding of the normal procedure.”

Another professor noted ways in which knowledge of procedure was necessary to make sense of various doctrines in contract law:

[It] would be hard to teach contracts to students with no civil procedure course. How do you teach parol evidence to students who do not understand [the] litigation process? The statute of frauds and other contracts concepts [are] important primarily because they provide a basis for a motion for summary judgment. [I w]ould think teaching torts would be even harder.

Another depended on the students’ understanding of procedure to demonstrate the ineffectiveness of common law remedies because of the demands of pleading and proof:

I don’t think I could teach Consumer Law without knowing that the students have had civ pro... . Civ pro questions come into play as early as the second class of the semester when we begin by studying common law deception. I always ask them to consider how difficult it might be for a plaintiff to prove all of its many elements, [and] then ask whether they’ve seen any enhanced burdens placed on plaintiffs. Then we talk about Rule 9(b) [Federal Rule of Civil Procedure 9(b), a rule requiring fraud to be pleaded with particularity] and consider whether policy concerns for the rule might also be present in the law of deception.

That same professor calls on procedural concepts to force students to think through the kinds of facts that match the elements of legal doctrine:

When studying the exclusion or modification of UCC [Uniform Commercial Code] warranties, I routinely ask the class to think about the kinds of interrogatories they would ask to determine whether an “as-is” clause should fail under 2-316(3)(a) [Uniform Commercial Code, section 2-316(3)(a)] because “circumstances indicate otherwise.”

In some cases, the most hotly contested debates in a field revolve around procedural questions. It was therefore not surprising that a professor of Patent Law commented that his students must understand procedure in order to grasp the goals of the current proposals to amend patent statutes:

The students need procedure to appreciate today's debates about venue and forum shopping, 'rocket docket' deadlines, the impact of discovery, the division of power between judge and jury in deciding issues of claim construction and infringement, and the size of jury-determined damage awards.

Examples from a Civil Procedure course have even been used to illustrate concepts in a Jurisprudence course. One professor noted:

I have used civ pro in jurisprudence when we talk about legal realism. I use an article by Jerome Frank<sup>36</sup> which uses the *Black and White Taxi* case [an infamous case in which a corporation re-organized under the law of a different state in order to secure the more favourable substantive law available in federal court] to make an argument in favour of legal realism.

Finally, professors who help students understand the law in their area by having them undertake simulated lawyering tasks recognize that the students' prior exposure to civil procedure makes those exercises possible:

"I use simulations in my Children and the Law seminar, and it is important for the students to understand motion practice and basic civil procedure in order analyze and work through the simulation."

"Students must draft and be prepared to argue a defendant's motion for summary judgment or plaintiff's response. Only possible if students have had civ pro."

I always thought civil procedure was essential as we tried to teach legal writing, *i.e.* legal analysis. How can students really understand some court decisions without understanding their procedural posture? How can they grasp the different standards of review and the way that affects the presentation of an appeal if they do not have some understanding of civil procedure? In fact, the legal writing faculty was bemoaning the fact that the part-time students do not get it until their second year. It is so much harder for them to understand the trial record we give them... without any foundation in procedure.

Whether understood as procedure or procedure plus,<sup>37</sup> a study of the processes through which disputes are resolved is a crucial part of modern law. Just as a law

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36. Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930) 46.

37. For a description of our notion of procedure plus see discussion in Thornburg et al, *supra* note 8 at 98.

school curriculum would be fundamentally impoverished if Tort Law or Contract Law were not taught, it would be a poorer place without the academic teaching of civil procedure. In many ways, we can take a lesson from its roots in Professor Langdell's Pleading class. Process and substance are connected, and without a remedy, there is no right:

Litigation serves as a major vehicle for lawmaking in our government and for articulation of social values. It is for that reason important to study it to comprehend the rest of law studies. That is, it is through the forge of the judiciary that our law takes shape, and to understand that law, we must understand how the forge works. Thus, if we look at our course as one about the nature of our society, we may gain some insights into ourselves and our process that will enable us to make it better. At the very least, I do not think we ever need ask ourselves again why we require this course.<sup>38</sup>

## V. ISRAEL<sup>39</sup>

Legal education in Israel is an undergraduate course of study that lasts three-and-a-half years and leads to a Bachelor of Laws degree (LL.B.). Israel has four faculties of law that are affiliated with public universities, as well as nine colleges that teach law but are affiliated with other institutions of higher education, most of which are private. In all of these institutions, Civil Procedure is taught as a second- or third-year compulsory course or, alternatively, one course in a group of courses from which students are required to take a minimum number. In this latter case, most students elect to take Civil Procedure to enhance their chances of securing a better job placement after graduation, whether in the required one-year apprenticeship or after as an associate lawyer.

### A. TRENDS AND TRANSITIONS

The Israeli rules of civil procedure have been greatly influenced by the English system of civil procedure,<sup>40</sup> though juries in Israel were never part of trial. A major guiding theory of litigation has been that of the adversarial system,<sup>41</sup> but fundamental changes have taken place with courts becoming more and more guided by case management strategies, especially in the pre-trial stage of

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38. McManamon, *supra* note 11 at 438.

39. Michael Karayanni took the lead in drafting this Part of the article.

40. See Stephen Goldstein, "Civil Procedure" in Amos Shapira and Keren C DeWitt-Arar, eds, *Introduction to the Law of Israel* (The Hague: Kluwer Law International, 1995) 295-96.

41. *Ibid* at 297.

litigation.<sup>42</sup> As a result, in many respects, the Israeli rules of civil procedure are a mixed adversarial and inquisitorial system of civil justice. Additionally, alternative methods of dispute resolution are also vigorously promoted by the Israeli civil justice system.

Beyond these general trends in litigation doctrine, the whole discipline of civil procedure in Israel is in a phase of transition. From a subject with a strong practical edge in which pleadings and adjudicative procedures were taught within the frame of the black letter of the law, civil procedure is gradually being taught and researched today from the point of view of legal theory, policy concerns, case management strategies, et cetera. Three interrelated factors stand behind this transition: First, the subject is now principally taught by full-time faculty members with graduate academic training rather than by practitioners and judges, as in the past. Second, in most cases, these faculty members also conduct research in another discipline, such as constitutional law, local government, or Jewish law. Third, the general trend in legal education in Israel is a transformation from a course for the vocational training of lawyers to one of academic training in legal science.

A major impact of these trends has been the incorporation of major doctrines of substantive law, such as the obligation to conduct one's actions in good faith and the constitutionalization of certain procedural norms, into teaching and scholarship in the field. Civil procedure as taught today in Israel integrates major doctrines of law and applies legal analytical methods in a way that is similar to other disciplines of law.

For example, in *Shilo v Ratzkovsky*,<sup>43</sup> Justice Barak made the point that a litigant is obliged to execute his or her procedural privileges and rights in good faith. At issue was whether the plaintiff, a minor who resided in Jerusalem, was required to submit to a medical examination by an expert witness appointed by the defendant, who operated a clinic in Tel Aviv. In terms of the relevant procedural rule, a litigant who files an expert opinion in an effort to prove a material matter is obliged to afford the opposing party the opportunity to examine the subject matter of the expert opinion, otherwise his or her expert opinion as evidence might be dismissed.<sup>44</sup>

Despite the fact that the trial court has considerable discretion in excusing parties from certain examinations if it finds "a reasonable excuse,"<sup>45</sup> Justice Barak went an extra step in holding that each and every action taken by a litigant needs to comport with

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42. See *Sagi v Ta'asiyout Rogozin Ltd*, 1998 CA 3857/96, 52:2 PD 706 at 710-11.

43. 1981 LCA 305/80, 35(3) PD 449.

44. *Ibid* at 451-52.

45. *Ibid* at 452.

the standards of good faith. Interestingly, no such standard is proclaimed anywhere in the existing rules of procedure, nor is the requirement a natural one in a system that abides by the adversarial method of adjudication. Nonetheless, the good faith standard was applied according to Section 61(b) of the *Law of Contracts (General Part), 1973*, which prescribes that the provisions therein are applicable also in respect of legal actions that do not originate in a contract.<sup>46</sup> Section 39 prescribes a general duty to conduct one's contractual obligations and privileges in good faith.<sup>47</sup> A motion submitted under the rules of civil procedure to oblige the opponent litigant to submit to a medical examination is a legal action that originates in a contract and is thus also governed by the obligation of being conducted in good faith. The incorporation of this contractual requirement into civil procedure has had a substantial effect on the development of the discipline. Parties are now obliged to disclose information deemed material for litigation.<sup>48</sup> The requirement prevents a party from appealing an interlocutory decision given the fact that it could have appealed the decision immediately after it was rendered, but abstained from doing so, choosing instead to appeal after the final judgment.<sup>49</sup>

Another important development in which procedural doctrines engaged substantive law doctrines came about with the enactment of the *Basic Law: Human Dignity and Liberty* in 1992, which provided an official recognition of rights such as the right to property and the right to freedom of any person to leave Israel.<sup>50</sup> Significantly, this law provided Israeli courts with a measure of judicial review over subsequently enacted legislation. As a result of this enactment, courts were able to characterize a litigant's cause of action as a right of property, and to afford it constitutional protection. On the basis of this holding, the Israeli Supreme Court unanimously held that a law of the Knesset that unduly limited the right to bring a civil suit against the state of Israel or any of its organs for damages caused by Israeli security forces, including the Israeli Defence Force, was invalid.<sup>51</sup> As a result of the enactment of this law, courts in Israel have become more cautious when issuing attachment orders or when preventing a defendant from leaving Israel while the civil suit is pending.<sup>52</sup>

46. *Law of Contracts (General Part), 1973*, 5733-1973 s 61(b).

47. *Ibid* at s 39.

48. See *Hamami v Ohaion*, 2006 LCA 2236/06.

49. See *Yazdi v Yazdi*, 2006 CA 10430/04.

50. 5752-1992 ss 3, 6 [*Human Dignity and Liberty*]. Actually, the trend of constitutionalizing civil procedure principles started prior to this. See Stephen Goldstein, "The Influences of Constitutional Principles on Civil Procedure in Israel" (1982) 17:4 *Isr LR* 467.

51. *Adalah Legal Centre for Arab Minority Rights in Israel and others v Minister of Defence and others*, 2006 HCJ 8276/05.

52. Goldstein discusses the specific power of issuing preliminary orders that restrict the defendant from leaving Israel. See Stephen Goldstein, "Preventing a Civil Defendant from Leaving the Country as a Form of a Preliminary Relief" (1985) 20:1 *Isr LR* 18.



## B. INCORPORATING SUBSTANTIVE LAW DOCTRINES INTO CIVIL PROCEDURE

The incorporation of such substantive law doctrines into the realm of civil procedure has had an immense effect on how civil procedure is taught today in Israel. Many principles, including the whole litigation philosophy, are being questioned and analyzed through the lens of the good faith doctrine and the *Basic Law: Human Dignity and Liberty*.<sup>53</sup>

At one time, the perception was that procedure was an adjectival field in the law that was supposed to serve substantive law, but no more (see our discussion on the US procedural curriculum for similar comments).<sup>54</sup> Jeremy Bentham was candid on this point:

By procedure, is meant the course taken for the execution of the laws... . As in fact every act by which a course of procedure is commenced has for its end or object, the bringing about of the execution of some law of the substantive class, so, in point of utility, it may be said that the course of procedure ought to have in every instance, for its main and primary end at least, the accomplishment of the will manifested in the body of substantive laws. For this is not only a use of it, but the only use for it.<sup>55</sup>

It is accepted today that procedure has its own values that are independent of substantive law.<sup>56</sup> For example, the principles of natural justice guaranteeing litigants due process and a neutral judge are to be respected regardless of whether the judgment accurately implements substantive law. Some argue that procedure is even more important than substantive norms, given the effect that procedural rules may have on the final resolution of the case.<sup>57</sup> In this sense, the portrait we receive of law when studying civil procedure is the most realistic portrait one gets of the law in law school. Procedure is about how cases are filed; it is what the system stands for in terms of basic notions of justice; it is about judicial philosophy; it is about form and substance; simply, it is a mirror held up against the legal system itself.

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53. *Human Dignity and Liberty*, *supra* note 50.

54. Bamford et al, *supra* note 18 at 67-72.

55. Jeremy Bentham, "Principles of Judicial Procedure" in John Bowring, ed, *The Works of Jeremy Bentham* (New York: Russell & Russell, 1965) vol 2 at 5-6.

56. Robert S Summers, "Evaluating and Improving Legal Processes – A Plea for 'Process Values'" (1974) 60:1 Cornell L Rev 1; Michael Bayles, "Principles for Legal Procedure" (1986) 5:1 Law & Phil 33.

57. Jeremy Lever, "Why Procedure is More Important than Substantive Law" (1999) 48:2 ICLQ 285.

## VI. ENGLAND AND WALES<sup>58</sup>

### A. WHY IS CIVIL PROCEDURE NOT TAUGHT AS PART OF THE ACADEMIC LAW CURRICULUM IN ENGLAND AND WALES?

Civil procedure is usually studied in England and Wales at the vocational stage of training.<sup>59</sup> Many institutions teach civil procedure as a small part of a first-year subject on the undergraduate law degree, but only a small minority offer advanced undergraduate subjects that contain some teaching on civil procedure.<sup>60</sup> However, the academic stage of training for the legal profession largely ignores civil procedure as a subject for academic study. A prime reason for this is because it is taught at the vocational stage, closer to the time of practice, and because the recently dissolved Joint Academic Stage Board—the professional body responsible for the academic stage of training—did not require universities to teach it. While it is necessary that the procedural rules should be taught in a practical manner (either at the vocational or practical stages of training), this does not fully explain why this subject is not explored from an academic perspective in the universities of England and Wales. However, there has historically been a marked reluctance by the universities to accept law as a subject worthy of academic study and by the profession to accept a university education in law as an appropriate means of training lawyers. A potential explanation for the fact that civil procedure is not widely taught in the academic curriculum is found in the context of this tension between the universities and the profession.

#### 1. ACADEMIC LAW—A CINDERELLA SUBJECT<sup>61</sup>

In 1758, Sir William Blackstone, as the inaugural holder of the Vinerian Chair<sup>62</sup> at Oxford University, gave the first series of lectures on the English common law. A century later, in 1852, Oxford offered its first degree in English Law. During that time, English law struggled to establish itself as a subject fit for academic

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58. Shirley Shipman took the lead in drafting this Part of the article.

59. Knutsen et al, *supra* note 27 at 31.

60. For further discussion on the topic of teaching procedure in England and Wales, see Knutsen et al, *supra* note 2.

61. Sir Jack IH Jacob, *The Fabric of English Civil Justice* Hamlyn Lectures 38 (London: Stevens & Sons 1987) at 253; Boon and Webb also describe English law as a Cinderella subject. It was not valued as a degree until well into the twentieth century. See Andrew Boon & Julian Webb, "Legal Education and Training in England and Wales: Back to the Future?" (2008) 58:1 J Legal Educ 79 at 86.

62. The Vinerian Professorship in English Law was established in 1755.

study.<sup>63</sup> Even then, and for a considerable number of years subsequently, law was not highly regarded as an academic subject.<sup>64</sup> In 1883, Sir Frederick Pollock, an English jurist, stated that “the scientific and systematic study of law [is] a pursuit still followed in this land by few, scorned or depreciated by many.”<sup>65</sup> According to Brian Simpson, some Oxford colleges in the 1950s “took the view that academic study of the law was as out of place in a university as plumbing and refused to teach the subject at all,” while others used law as a dumping ground for “very dim young men” who were often admitted on the grounds of their sporting ability rather than intellect.<sup>66</sup>

There was a centuries-old adherence to an apprenticeship model<sup>67</sup> of training for legal professionals<sup>68</sup> and, hence, a “strong tradition among English lawyers that law is anyhow not taught, but learned.”<sup>69</sup> This did not sit well with the universities who sought to provide a liberal education, valuing education for its own sake, rather than as preparation for a particular profession.<sup>70</sup> Indeed, Blackstone sought justification for the introduction of English law as a subject of academic study at Oxford by explaining its usefulness for “every gentleman and scholar,” as part of a liberal education,<sup>71</sup> and to better enable students to fulfill their public duties as

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63. The Downing Professorship at Cambridge was established in 1800. University College London and King's College London established Law Chairs in the 1820s and 1831, respectively. The Oxford University Bachelor of Civil Law degree was introduced in 1852, and Cambridge followed suit with the Bachelor of Laws in 1855. By 1909 there were eight law faculties in England and Wales. Boon and Webb, *supra* note 61 at 85-86.

64. *Ibid* at 86.

65. Neil Duxbury, *Judges and Jurists: An Essay on Influence* (Oxford: Hart, 2001) at 70. Duxbury quotes Pollock. Frederick Pollock, *English Opportunities and Duties in the Historical and Comparative Study of Law* (London: MacMillan, 1883) at 22.

66. AW Brian Simpson, “Herbert Hart Elucidated” (2006) 104:6 Mich L Rev 1437 at 1438.

67. Prior to 1700, solicitors (and attorneys, their predecessors) received their education mainly through clerkship (a form of apprenticeship). Barristers (and serjeants at law, their predecessors) received a more liberal and academic education. During the eighteenth century, the training of this latter branch of the profession also took the form of apprenticeship (through clerkship and pupillage). See Paul Brand, *The Making of the Common Law* (London: The Hambledon Press, 1992) 57. See also Christopher W Brooks, *Lawyers, Litigation and English Society Since 1450* (London: The Hambledon Press, 1998) at 149-50.

68. There is clear evidence of the existence of an English legal profession from the thirteenth century onwards. JH Baker, *An Introduction to English Legal History* (Oxford: Oxford University Press, 2007) at 155-56; Brooks, *supra* note 67 at 1; Brand, *supra* note 67 at 1-20.

69. PS Atiyah, *Pragmatism and Theory in English Law* (London: Stevens & Sons, 1987) at 35.

70. Boon & Webb, *supra* note 61 at 86.

71. Sir William Blackstone, *Commentaries on the Laws of England*, vol 1 (London: Cavendish, 2001) at 6.

jurors or as Members of Parliament.<sup>72</sup> Hence, once accepted as a subject suitable for academic study, a university education in law was not intended to equip its graduates for a career in the legal profession. Commenting on proposed changes to undergraduate law degrees, Bradney has suggested that “it is important to remember that universities exist to educate students not workers.”<sup>73</sup>

It is for this reason that legal academics have shown significant hostility to a prescribed content for law degrees. In 1971, the Ormrod Committee on Legal Education—tasked with recommending changes for academic legal training—called for greater coherence in legal education, staged training for the profession (consisting of academic and vocational stages), and continuing development.<sup>74</sup> Law became a graduate-entry profession, and the law degree was recognized as part of the necessary instruction for a legal professional.<sup>75</sup> However, the relevant professional bodies refused to recognize law degrees as sufficient for the academic stage of training unless they contained six compulsory substantive law subjects (later increased to seven).<sup>76</sup> According to Birks:

[T]he fixed list of compulsory subjects is the most obvious symptom of an attitude to legal education which weakens English legal science... It means in effect that nearly half the time available must be clogged up with courses pitched at the most superficial level. There is so much that has to be done in each compulsory module that superficiality is inevitable.<sup>77</sup>

The fact that legal academics wish to retain autonomy and flexibility over what is included in the curriculum, together with a concern to ensure that the law degree provides students with a liberal education, means that (aside from the requisite seven core subjects) there is no single model for a law degree in England and Wales. However, many institutions retain a commitment to teach law in the context of its philosophical foundations and its social, political, historical, and economic contexts. This may be one reason why universities have not generally

72. *Ibid* at 7.

73. Anthony Bradney, “Raising the Drawbridge: Defending University Law Schools” (1995) 1 Web JCLI.

74. UK, Ormrod Committee, *The Report of the Committee on Legal Education*, Cmnd. 4595 (London: Her Majesty’s Stationary Office, 1971) [Ormrod Report].

75. The solicitor branch of the profession became graduate-entry in 1971. A degree was not required for entry to the Bar until 1979. Boon & Webb, *supra* note 61 at 87.

76. The number of compulsory subjects required to gain a qualifying law degree increased to seven following a 1996 report. UK, The Lord Chancellor’s Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training* (London: Advisory Committee on Legal Education and Conduct, 1996).

77. Peter Birks, “Compulsory Subjects: Will the Seven Foundations ever Crumble?” (1995) 1 Web JCLI.

taught civil procedure at the academic level. Civil procedure is largely viewed by both academics and practising lawyers as a practical subject; academics have regarded it as unsuitable for academic study. In delivering a lecture on the forms of action in 1909, Frederic Maitland, an English jurist, expressed his awareness of the objection that “procedure is not a good theme for academic discussion. Substantive law should come first – adjective law [the body of procedural rules], procedural law, afterwards. The former may perhaps be studied in a university; the latter must be studied in chambers.”<sup>78</sup> Sir Jack Jacob deplored the fact that “England is perhaps the only country in the world where civil procedure is not generally taught as a required subject for the first degree in Laws,” and attributed this to the divide between legal practitioners and academics.<sup>79</sup> Patrick Atiyah, too, asserted that the “clear answer” to the lack of English law professors in civil procedure was that the English academic profession “ignored many legal ‘subjects’ as unsuitable for teaching ... if a subject is intensely practical it tends to be assumed in the English legal world, that only legal practitioners can be truly expert at it.”<sup>80</sup>

The division between law in practice and academic law is a common theme in the literature on the history of legal education in England (to the extent that traditionally it was “almost as though they each as a group inhabit[ed] a different planet”<sup>81</sup>), and offers a plausible explanation for a lack of civil procedure teaching at the academic stage. However, a further possible explanation is provided by the fact that the legal profession in England has been divided since its nascence in the thirteenth-century.<sup>82</sup>

## 2. A DIVIDED PROFESSION—ACADEMIC VS. APPRENTICESHIP

The historical partition of the legal profession reflected not merely differing roles and functions, but also a divide in social standing and class. Members of the upper branch of the profession (now barristers)<sup>83</sup> were generally regarded as

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78. FW Maitland, “The Forms of Action at Common Law: Lecture 1” (1909), online: Fordham University Medieval Sourcebook <<http://www.fordham.edu/halsall/basis/maitland-formsofaction.html>>.

79. Jacob, *supra* note 61 at 252-53.

80. Atiyah, *supra* note 69 at 132.

81. Jacob, *supra* note 61 at 253. For an account of the “mutual indifference” between the legal academy and the professions, see Boon & Webb, *supra* note 61 at 89.

82. In fact, the division of function predated the emergence of the profession. Brooks, *supra* note 67 at 1.

83. The ‘upper’ or ‘senior branch’ of the profession initially consisted of serjeants at law and barristers. *Ibid.* Admittance as a serjeant at law, who was a specialist in pleadings and

of greater intellectual ability and of higher social standing, while the attorneys (now solicitors), the lower branch of the profession,<sup>84</sup> were men of lower social rank. During the fourteenth and fifteenth centuries, members of both professions received certain aspects of their training at collegiate institutions in London known as inns. Attorneys were generally educated by lower status inns, known as the Inns of Chancery, which also provided the initial grounding for students aspiring to the Bar. The former group of students subsequently completed their education at the Inns of Court, which offered a more intellectually-demanding environment for those who wished to be admitted to the Bar. The Inns of Court excluded attorneys and solicitors entirely in the sixteenth century, claiming that “theirs was a scientific subject which involved ‘liberal’ learning” while attorneys were “merely ‘mechanical’ practitioners,”<sup>85</sup> and promoted the Bar as “an honourable calling for a gentleman.”<sup>86</sup>

According to Brooks, a significant factor in this exclusion was the different modes of education for attorneys and barristers: attorneys learnt predominantly through a form of apprenticeship, while the barristers received academic instruction through lectures and private study.<sup>87</sup> This reflected the different functions and abilities of the divided profession: Barristers were advocates, requiring a quick intellect and specialist knowledge of the law. Attorneys managed the formal aspects of the litigation and were specialists in court procedure. As Jacob has stated, “The generally perceived wisdom [has been] that civil procedural law is not an academic subject but should or will be picked up, perhaps even learnt, in the course of the practice of the law.”<sup>88</sup> The fact that attorneys were considered mechanical practitioners who did not require the benefit of an academic education is thus arguably an additional causal aspect to the general failure by legal academics to teach civil procedure as part of the law degree.

It was not until the nineteenth century, following the formation of The Law Society of England and Wales and its predecessor (which was responsible for

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advocacy, was a public honour, equivalent to a knighthood. The judiciary was almost exclusively drawn from this group until the seventeenth century. The last serjeant at law was appointed in 1875. Baker, *supra* note 68 at 67-68.

84. Brooks, *supra* note 67 at 1. Solicitors are not mentioned until the fifteenth century and became a separate branch of the profession in the seventeenth century.

85. *Ibid* at 150.

86. Baker, *supra* note 68 at 163-64.

87. Brooks, *supra* note 67 at 149-50.

88. Jacob, *supra* note 61 at 253.

improving the reputation of solicitors),<sup>89</sup> that the solicitors' profession became as respected as that of the barrister. But even then, the solicitors' profession itself doubted the need for its trainees to receive a university education since they were "destined to attend to the details and routine of an office."<sup>90</sup> Thus, until 1971, when the profession became graduate-entry, there was no requirement of an academic education or acknowledgement that it was of value for solicitors. Since civil procedure was viewed as the specialist domain of that branch of the profession, it seems likely that this has been an influential factor in its non-inclusion as a subject for academic study by law students.

### 3. PREFERENCE OF THE PROFESSIONS—LEARNING THROUGH PRACTICE

During the eighteenth century, the academic instruction offered by the Inns of Court declined, and students intending to practice at the Bar were trained through a form of apprenticeship (clerkship and pupillage).<sup>91</sup> However, there were moves away from a pure apprenticeship model of training with the introduction of compulsory examinations in 1860 for solicitors, and in 1877 for barristers.<sup>92</sup> Initially, the Law Society and the Council of Legal Education for the Bar<sup>93</sup> organized a series of lectures to prepare students, but eventually established their own training schools (in 1903 by the Law Society, and in 1967 by the Bar Council). The Law Society licensed training by more vocationally oriented universities in the 1960s, but the Bar did not follow suit until 1997, when it validated a handful of universities to deliver its Bar Vocational Course.<sup>94</sup> The courses were designed to enable students to pass the practice-oriented Law Society and Bar exams, were vocational in nature, and were taught by practitioners. Law graduates were exempt from some of these exams for a period,<sup>95</sup> and while there were isolated calls for a return to a liberal education for those in training, it was not until after the Ormrod Report in 1971 (which recommended a separate academic stage of training),<sup>96</sup> that law became a graduate-entry profession.<sup>97</sup> Still, the professional bodies

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89. "The Law Society of England and Wales: Our History", online: The Law Society of England and Wales <<http://www.lawsociety.org.uk/aboutlawsociety/whoweare/abouthistory.law>>.

90. Boon & Webb, *supra* note 61 at 58. Boon & Webb cite Samuel Warren, *The Moral, Social, and Professional Duties of Attorneys and Solicitors* (New York: Harper & Brothers, 1855) at 70.

91. Brooks, *supra* note 67 at 149-50.

92. Boon & Webb, *supra* note 61 at 83-85.

93. Established in 1852 by the Inns of Court. *Ibid* at 84.

94. *Ibid* at 84-85.

95. *Ibid* at 87.

96. Ormrod Report, *supra* note 74.

97. In 1971, for solicitors, and 1979, for those intending to practice at the Bar. Boon & Webb, *supra* note 61 at 87.

dictated the core subjects to be studied at the academic stage. These were substantive in nature and did not include Civil Procedure, which was considered to be a practical subject best taught by practitioners.

Even then, the Bar preferred non-law graduates to those with a law degree. Atiyah has asserted that it was “not long since the ablest intending legal practitioners were recommended to read classics at Oxford and then ‘pick up [their] law as [they went] along.’”<sup>98</sup> But it would appear that the professions were showing a preference for non-law graduates even at the end of the twentieth-century. Birks, concerned with the impact of the legal profession’s lack of confidence in the academic law degree, stated that “we will never have strong law schools in this country while the professions continue to disavow them, repeatedly declaring their preference for non-law graduates.”<sup>99</sup> The fact that law had been a profession strongly wedded to an apprenticeship model of learning, together with the aversion shown by universities themselves to law as an academic subject, meant that even towards the end of the twentieth century, legal academics were considered of inferior status to practitioners.<sup>100</sup>

The preference shown by the professions for practitioner-led learning in law has been even more marked in relation to subjects that are considered more practical, such as civil procedure. There appears to be a concern that academics who themselves have not practised cannot teach procedural law.<sup>101</sup> According to Atiyah, “if a subject is intensely practical it tends to be assumed in the English legal world, that only legal practitioners can be truly expert at it.”<sup>102</sup> This, of course, disregards the fact that there are a number of important features surrounding the technical rules governing civil proceedings, and the system within which those rules operates, that repay academic study.

#### 4. FURTHER INFLUENTIAL FACTORS ON THE CURRENT SITUATION

It would appear that the most likely explanation for the current lack of teaching on civil procedure at the academic stage of training is a combination of the foregoing factors working together: the long-held preference of the profession for practical training (either through apprenticeship or learning from the practitioners); the division of the profession itself; the long-term resistance by the universities to teach law as an academic discipline; and, once accepted as a subject suitable for

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98. Atiyah, *supra* note 69 at 36.

99. Birks, *supra* note 77.

100. Atiyah considered that the legal academic has a subordinate role in the English legal system, and suggested that “book learning is often regarded with some scorn, as compared with practical experience, learned on the job.” Atiyah, *supra* note 69 at 35.

101. Jacob, *supra* note 61 at 253.

102. Atiyah, *supra* note 69 at 132.



study, the perception held by those institutions that civil procedure as a technical subject is better learnt in practice.

However, there are a few further influential factors. The first is the division of training. As already stated, since 1971 students intending to practice as solicitors or barristers have been required to complete two stages of institutional training: academic and vocational. Some institutions offer both the academic and the vocational stages of education but those stages are distinct and must comply with separate requirements. Students receive instruction in civil procedure during the vocational stage of training (irrespective of whether they are going to the Bar or training to become solicitors); hence, it may be considered superfluous to teach this subject at both stages. The Solicitors Regulation Authority and the Bar Standards Board do not require students to be introduced to this subject at the academic stage of training, although it does require students in the conversion program to be familiar with the English legal system.

A further issue is the lack of expertise available to teach civil procedure in academic law programs. Because civil procedure has not been taught as an academic subject, there are few locally educated academics that have the necessary interest and expertise in the subject. While law tutors in universities were likely to have a practitioner background (since law was not studied as an academic subject), the main route into a legal academic career is currently through a research background. The public funding on which universities in England and Wales depend is based on the quality of their research output.<sup>103</sup> This creates incentives to recruit faculty who have graduate research degrees (increasingly at the doctoral level) and strong research and publication records. There is little academic teaching of civil procedure at the undergraduate level and there are few masters-level programs that teach civil procedure as a standalone course (although there are a significant number of masters-level programs that offer courses on International Commercial Arbitration and Litigation<sup>104</sup>). Hence, few graduate students complete research degrees and doctorates in this subject. This lack of expertise is not prohibitive; certainly, foundational law subjects, such as Contract Law or Land Law, are often taught by lecturers whose expertise lies in other areas. However, those lecturers will often have had a thorough grounding in those subjects during their undergraduate law degree or in taking

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103. The evaluation of research output is generally undertaken every five years. The latest Research Assessment Exercise (RAE) was conducted in 2008. The quality of research undertaken by universities across individual subject areas is ranked by specialist review panels. Funding institutions receive from national funding councils is linked to their ranking.

104. The best explanation for the expansion in this topic appears to be that it is an attractive and desired option in LL.M. programs for students who intend to practise in international trade or finance law.

the Common Professional Examination/Graduate Diploma in Law (CPE/GDL). This is not the case with civil procedure. Frequently, optional subjects on degree programs are introduced as a result of the research interests and expertise of the academic staff. The low numbers of academics that undertake research in this area make it unlikely that the subject will be introduced on this basis.

#### B. WHAT IS MISSING FROM THE LAW CURRICULUM AS A RESULT OF THE LACK OF ACADEMIC TEACHING ON PROCEDURE?

It is difficult to envisage what is lacking from the curriculum when a particular subject is taught only at a minimal level or more in-depth at only a few institutions. However, a questionnaire distributed for this project (sent to all institutions offering academic legal programs and the vocational training programs<sup>105</sup>) asked what was missing from the academic law curriculum as a result of the minimal attention paid to civil procedure at the academic stage of legal education. Responders gave information on the legal analysis skills fostered through the study of civil procedure, the teaching methods adopted, whether teaching focused on the technicalities of the procedural rules or on the principles behind them, and on the questions and issues civil procedure caused students to consider. Additionally, a subsequent survey looked at online course descriptions for some programs (in particular, at the masters level). The results indicate that there are key opportunities in legal education that may be missed as a result of the general disregard paid to civil procedure in the academic curriculum.

##### 1. THE OPPORTUNITY TO CONSIDER KEY QUESTIONS OF THEORY AND PRINCIPLE

Civil procedure is a compulsory part of the curriculum at the vocational stage of training. Some tutors teach the principles behind certain rules in order to compare them with former rules, but the general focus is on the practical application of the procedural rules.<sup>106</sup> Students need to have an understanding of the overriding objective of The Civil Procedure Rules<sup>107</sup> (CPR; which requires courts to deal with cases justly by considering a number of factors when making any procedural

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105. The questionnaire was sent to all providers of the academic stage of legal education, including undergraduate law programs, the law conversion program (CPE/GDL), and to all providers of the vocational training programs (the Legal Practice Course for solicitors, and the Bar Professional Training Course for barristers). Academic institutions were also asked questions about civil procedure teaching on their masters-level programs. The questionnaire was described in detail in another article in this collection: Knutsen et al, *supra* note 2.

106. *The Civil Procedure Rules 1998* (UK), 1998 No 3132 (L 17) [*Civil Procedure Rules*].

107. *Ibid* at r 1.1.

decision or in interpreting the rules), and in particular, the consequent need for party cooperation to reduce delay, save expense, and settle or advance claims efficiently and expeditiously. But this tends to be the limit of any theoretical or principled understanding of procedure. Similarly, the responses from undergraduate level programs—where civil procedure is generally taught only briefly (if students encounter this subject at all) as part of a broader study in courses such as the English Legal System or Legal Method<sup>108</sup>—suggest that students are generally only taught the broad principles behind the recent reforms of civil procedure (which may be encapsulated in the overriding objective and in judicial case management). While this might, in some cases, provide students the opportunity to critically evaluate the success of those reforms, this appears to be the limit of academic scrutiny.

The questionnaire responses make it clear, however, that even in such a brief visit to this subject, individual tutors take the opportunity to raise broader questions of theory and principle. For example, one course on the civil justice system provides students with the opportunity to consider the minor role of litigation in practical dispute resolution, while another course prompts students to question their preconceptions about equality of access to the justice system. A similar course at another university leads students to appreciate the need for dispute resolution in society and the role of different resolution methods in achieving that end, while another course leads students to consider what justice is. In the one-year law conversion program (the CPE/GDL) students are required to pass an assessment on the English legal system at the start of the program. Most students who take this route to qualification as a legal professional will, therefore, encounter civil procedure in the context of the recent reforms (usually through pre-course reading or an introductory lecture during induction week). One CPE/GDL provider suggests that, even with a minimal coverage of this topic, students learn that procedural aspects of a case may prevent legal justice.

Hence, it would seem probable that courses devoted to civil procedure at the academic stage (rather than addressing it briefly in the context of the legal system), would provide the opportunity to consider questions such as what is meant by access to justice in greater depth. Students would also be able to consider dispute resolution theory in this context. In England and Wales (and in the European Union, more broadly) there is a significant impetus for disputes to be settled away from the courts through the use of alternative dispute resolution procedures.<sup>109</sup>

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108. The questionnaire and survey suggest that around 60 per cent of undergraduate degree programs offered a small element of teaching on civil procedure in subjects such as the English Legal System and Legal Method.

109. Shirley Shipman, "Court Approaches to ADR in the Civil Justice System" (2006) 25 *CJQ*

Hence, an opportunity for a fuller discussion of civil procedure would enable students to consider whether the compromise entailed in alternative dispute resolution procedures can properly be characterized as justice, and may also encourage them to consider whether the law is concerned with dispute resolution or the enforcement and determination of rights and obligations.

A more in-depth consideration of civil procedure would also likely raise broader systemic issues. For example, one respondent stated that he “would like to have time to consider the rationale behind the adversarial system.” In the context of the recent radical changes to civil procedure in England and Wales, in particular with judges taking an active role in managing cases,<sup>110</sup> this would be a useful intellectual and comparative exercise. Current students in undergraduate law programs are likely to have only a basic understanding of the adversarial system when compared to their understanding of civil law.

The small number of masters-level programs that focus directly on civil procedure do appear to provide an opportunity for students to consider broader issues of theory as well as universal principles behind procedural rules. This offers students the opportunity for some comparative study with procedure in other jurisdictions. The much larger number of LL.M. programs that offer options on commercial arbitration, litigation, or dispute resolution in the international context address a number of theoretical perspectives on procedural issues, including dispute resolution theory, procedural justice theory and access to justice, as well as core issues across these courses such as jurisdiction, conflicts, and enforcement. While it would be expected that masters-level programs offer a greater opportunity for engagement with theoretical debate, the academic stage of legal professional education ought to provide the opportunity for critical engagement with issues of academic interest or importance. The issues highlighted above (and others like them) are unlikely to be discussed in the context of substantive law classes such as Land Law, Contract Law, or Tort Law.

## 2. THE OPPORTUNITY TO PROVIDE CONTEXT FOR SUBSTANTIVE LAW SUBJECTS

The predominant focus of the undergraduate law degree and of the CPE/GDL conversion program is substantive law. The focus on substantive legal rules and the application of those rules to case law may lead students to overestimate the importance

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181-218.

110. Courts have a duty and power to actively manage cases in order to promote the overriding objective of the *Civil Procedure Rules*. See *Civil Procedure Rules*, *supra* note 106, r 1.4, 3.1.

of the trial in deciding disputes and protecting rights. Without an understanding of the procedural context and the hurdles faced by individuals seeking to enforce their rights in the courts, students have only a partial understanding of the law's function in society. Further aspects are grasped at the vocational stage when, according to one respondent to the questionnaire, students "start to understand how legal costs can dictate the outcome rather than the legal argument." Similarly, students at that stage are, in the words of respondents, taught that "non compliance with rules can weaken an application" and are encouraged to "question the draconian powers (including sanctions) available to the Court to impose the [procedural] rules and to achieve justice." The fact that procedural non-compliance, costs, or party tactics, rather than a meritorious argument, may compromise a claim rarely informs the academic stage of training.

In one CPE/GDL program, after brief introductory classes on the civil justice system and key skills, students are divided into two teams. The teams act for the claimant or defendant in a mock civil claim. The dispute is contract based: The subject tutor suggests that taking part in the process of the case may help students engage with the substantive Contract Law course. As more than one questionnaire response indicated, the teaching of civil procedure (even at the minimal level currently provided) gives "context to the substantive law" or, as stated in another response, provides the "bridge between the content of the law and its practical application."

### 3. THE OPPORTUNITY TO ADOPT ALTERNATIVE TEACHING METHODS

According to the questionnaire and survey responses, the predominant method for teaching the undergraduate and CPE/GDL English Legal System or Legal Method courses (both of which contain a brief introduction to civil procedure) is through a combination of lectures and seminars, or other small group teaching methods (in the case of the CPE/GDL, this is frequently augmented by a course of pre-directed reading prior to the start of the program). A similar approach appears to be adopted for the vocational courses, although at that stage the small group sessions are linked to realistic case studies or briefs, and students are required to undertake a number of practical tasks (including drafting correspondence, statements of case, and court applications and conducting negotiations or advocacy). Feedback from students at the vocational stage suggests that, while some find the technical detail of the rules challenging and dry, a number enjoy the practical application of their learning.

Feedback from students at the academic stage in relation to the introductory courses to the legal system is mixed. Some students in these courses also find the

civil procedural aspects of the course challenging, and others find that the course (which covers aspects of the criminal justice system, the judiciary, the law-making process, the legal profession, et cetera) is too fragmented. However, others enjoy engaging with “the big picture questions on the relationship between law and justice.” The challenge for tutors is to teach the subject in a way that is accessible but that also provides the opportunity for appropriate critical examination.

A few institutions have taken the opportunity to engage with innovative methods of teaching on their academic programs. One institution offers an advanced undergraduate module entitled “Law in Practice.”<sup>111</sup> In a transactional learning environment, students mirror the practical experiences of legal professionals in a fictional town. Students interact with clients, witnesses, and opposing counsel online, but also have the opportunity for face-to-face case work, which might include interviews. The significant difference in conducting this type of learning during the undergraduate degree rather than at the vocational stage of training is the opportunity for students to, in the words of respondents, “submit the practice of the law, particularly pre-court and lower court work, to academic scrutiny” and conduct research into the “workings of the law [and] legal processes.” One questionnaire response further stated that the course “enables students to analyse and practice ... skills and subject[s] them to intellectual examination that is rare in the undergraduate context.”

Arguably, it is the academic stage (distanced as it is from the practice-orientated vocational stage of training) that offers the greatest opportunity for the use of such teaching methods to promote intellectual and critical engagement with procedural issues and professional skills. A similar course for undergraduate students in the first year of their law degree provides the opportunity to, in the words of a respondent, “weigh up the strengths of each side of the claim and its weaknesses, and to consider the risks of different settlement strategies, including ADR and litigation.” Feedback via learning logs suggests that students enjoy the course. One CPE/GDL provider whose students take part in a mock civil claim (over a three-week period) has received “almost universally positive feedback”; students “feel that it enables them to link substantive academic subjects with legal practice.” For undergraduate students in particular, who may yet face at least three more years of institutional education before setting foot in a law firm or barrister’s chambers, the opportunity to experience teaching in a way that links practice with academic scrutiny might prove attractive.

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111. Taken in the second, third, or fourth year of the undergraduate law degree (some undergraduate programs offer four-year law programs, although three-year programs are more common).

### C. SUMMARY

It is difficult to conclude with certainty why civil procedure is not taught more widely in England and Wales at the academic stage of legal training. As described above, this state of affairs is the result of a number of factors. The questionnaire responses suggest that some key issues are not considered by law students in any depth as a result of the neglect of civil procedure as an academic subject. Issues of what justice is in the procedural context and what is meant by access to justice, as well as discussions about whether the law is concerned with the enforcement of rights or with dispute resolution have significance, particularly in a jurisdiction where costs are high and the political impetus to fund civil justice is low. Arguably, undergraduate students' lack of opportunity to engage with civil procedure as an academic subject weakens the legal academic community. One questionnaire response, relating to a first-year undergraduate program on the civil justice system, indicated that teachers "do not feel competent addressing the civil procedure component of the course," even if they feel "at ease with the judicial reasoning component." This is understandable, since a significant number of lecturers are not trained practitioners and have only research backgrounds: Hence, if they have not studied civil procedure at the undergraduate level, they are unlikely to have studied it at all.<sup>112</sup>

## VII. CONCLUSION

At the outset of this article, we posed a number of questions relating to the teaching of civil procedure: how it fits within the law school framework, how it affects other subjects taught in law schools, how it influences different understandings of the role of legal education, and the way civil procedure should be pursued. With these questions in mind, and in light of the foundational work set out by Knutsen et al,<sup>113</sup> we proceeded to look at these questions through the lens of five different jurisdictions with five different legal and educational approaches to teaching civil procedure. While there are similarities, there also exist stark contrasts in civil procedure's place in the curriculum and its traction amongst students and faculty.

There are certainly differences across jurisdictions, and disagreements even among the authors of this article, about the best stage at which to teach civil

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112. This is all the more likely since there are very few masters-level programs that offer modules that focus on civil procedure (other than in the context of international commercial law).

113. *Supra* note 2 at 1.

procedure, especially the choice between first year and upper years. Both options have their merits, and both have different effects on the balance of the curriculum. There is also clearly some variation in terms of the content of what is delivered. In the English tradition, many still see this subject as very much a skills-based program that can be learned in the upper years of law school, if not after that, in the vocational stage of a student's continuing training. There is clearly a vestige of that thinking still in Australia, for example. However, across the jurisdictions, perhaps most profoundly in the United States (and increasingly in Canada and Israel), there is a move to make civil procedure a more academic subject. Full-time faculty are teaching and writing about it, which—in our view—is likely a necessary (although not sufficient) precondition to making this subject mainstream in the law school curriculum in jurisdictions in which it is still marginalized. At the same time, ideas for bringing together theory, practice, and professionalism in a Civil Procedure course (perhaps even adding legal research and writing) are developing. Such integration allows students and teachers to achieve the varied and connected goals of both theoretical exploration and practical experimentation, which, in the long run, bring students closer to the “practice-ready” standard that is still sought after—even if overstated.

All of these decisions (who teaches the course, what is taught, when it is taught, et cetera) have significant influences not only on the civil procedure course but also on that course's impact on and relationship with other courses. Regardless of the differences across jurisdictions, universities and instructors, we have confirmed that civil procedure plays a pivotal role in balancing the curriculum. For many, it is hard to imagine proceeding through a legal curriculum without having studied civil procedure. For others, having procedure in the curriculum is a determining influence on what is taught (and understood) in other courses.

This relational and dialectic view of the law school curriculum reveals, more generally, a genuine need to see the content of courses, as well as the overall content of the curriculum, not as a series of individual and isolated moments of learning, but rather as part of a curricular continuum—a partnership of learning—designed to outline and animate the procedural and substantive elements of the law machine. In this way, it not only makes sense to teach an interesting course on civil procedure for the sake of learning the micro- and macro-levels of procedural justice (as articulated, for example, in our discussion on Canada). As is evident in our discussion on the US model, if we do not teach civil procedure, the continuum of the overall curriculum is impoverished: Students will learn little or no procedure, and they will not understand the operational side of substantive courses. Therefore, failing to teach civil procedure does a double disservice to our students. Teaching civil



procedure well, perhaps both early and again in upper years in a clinical or advanced setting, militates strongly in favour of a much broader and richer understanding of what the law is, how it operates, and, importantly, how it sometimes fails to operate (particularly for marginalized members of society).

Seeing the forest through the trees is often a challenging task for law students. Doing so without recourse to a robust course on civil procedure, which adequately balances theory, practice and professionalism, is virtually impossible (and certainly undesirable). Therefore, it seems clear to us that civil procedure should be a central part of the law school curriculum. But even more than that, the case is made for devoting substantial resources—teaching and research—to better understand what we mean by procedural teaching, and to better understand how we can effectively teach and write about it.