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Thoughtful Practitioners and an Engaged Legal Community: The Impact of the Teaching of Procedure on the Legal Profession and on Civil Justice Reform

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Abstract

What difference does the teaching of civil procedure as an academic subject make to the practice of law, to the professional community in which lawyers practice, and to civil justice reform? In this article, proceduralists from Canada, England and Wales, the United States and Australia analyze the broader implications of teaching civil procedure as an integral feature of an academic legal education rather than as a part of vocational training. They consider ways in which the approach taken to the teaching of procedure in their legal system has influenced the evolution of the profession during a decade of increased public interest in the civil justice system and has had an impact on the approach taken to civil justice reform.

Keywords

Civil procedure--Study and teaching (Higher); Practice of law; Law reform

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Thoughtful Practitioners and an Engaged Legal Community: The Impact of the Teaching of Procedure on the Legal Profession and on Civil Justice Reform

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CARLA CRIFÒ, LORNE SOSSIN & DAVID BAMFORD *

What difference does the teaching of civil procedure as an academic subject make to the practice of law, to the professional community in which lawyers practice, and to civil justice reform? In this article, proceduralists from Canada, England and Wales, the United States and Australia analyze the broader implications of teaching civil procedure as an integral feature of an academic legal education rather than as a part of vocational training. They consider ways in which the approach taken to the teaching of procedure in their legal system has influenced the evolution of the profession during a decade of increased public interest in the civil justice system and has had an impact on the approach taken to civil justice reform.

En quoi l'enseignement de la procédure civile comme matière théorique modifie-t-il la pratique du droit, la profession d'avocat et la réforme du système de justice civil? Dans cet article, des spécialistes canadiens, britanniques, gallois, américains et australiens de la procédure analysent dans leurs grandes lignes les répercussions qu'a entraîné dans leur

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pays le choix d'enseigner la procédure civile dans le cadre des études juridiques plutôt que dans celui de la formation professionnelle. Ils examinent la façon dont l'approche adoptée pour l'enseignement de la procédure civile dans leur pays a influencé l'évolution de la profession au cours d'une décennie où l'opinion publique a manifesté un intérêt accru envers les tribunaux civils et influencé l'approche adoptée pour réviser le système de justice civile.

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WHAT DIFFERENCE DOES THE TEACHING of civil procedure as an academic subject make to the practice of law, to the professional community in which lawyers practice, and to civil justice reform? In this article, we analyze the broader implications of opting to teach civil procedure as an integral feature of an academic legal education rather than as a part of vocational training.

In previous articles in this issue,¹ we described the spectrum of approaches to the teaching of procedure across common law systems, focussing in particular on

1. Knutsen et al, "The Teaching of Procedure Across Common Law Systems" (2013) 51:1 Osgoode Hall LJ 1; Bamford et al, "Learning the 'How' of the Law: Teaching Procedure and Legal Education" (2013) 51:1 Osgoode Hall LJ 45; Thornburg et al, "A Community of Procedure Scholars: Teaching Procedure and the Legal Academy" (2013) 51:1 Osgoode Hall LJ 93.

the experience in Canada, the United States, England and Wales, and Australia. To provide context for the current placement of the subject, we compared its history in each system and surveyed the various perspectives on instructors, educational materials, and the stage at which students are expected to study the subject. We then examined the implications of the different approaches taken to the subject on the rest of the curriculum in legal education and on fostering and maintaining a community of scholars specializing in civil procedure.

In this article, we venture beyond the academic community to the legal profession and to questions of civil justice reform. Bearing in mind the different approaches taken to teaching procedure, we examine the broad contours of the profession in each of the four jurisdictions mentioned above in order to identify possible links between the different approaches that those countries take to civil justice reform.

In Part I we explore the impact of the study of procedure on the practice of law and the state of the profession. Does it make a difference if all members of the profession have studied procedure and have done so as an academic subject? Alternatively, does learning the rules primarily for the purpose of practising law affect the approach taken to the way these rules are used in one's practice? For example, all lawyers are expected to provide their clients with a range of options for dispute resolution. However, is the range of options for resolving disputes offered by lawyers who have studied procedure only in a practical training program likely to be narrower than that offered by those who studied procedure and dispute resolution first when they were law students? What effects, if any, in the approach taken to professionalism and ethics may be traced to having first learned these subjects in an academic environment? What vision of the professional community is fostered by the various approaches taken to the teaching of procedure?

In Part II we explore the impact of the teaching of procedure on civil justice reform. How is civil justice reform affected by being pursued within a legal community whose members' understanding of procedure has been informed either by early academic study or by subsequent vocational training? How does the varying nature and extent of the understanding of procedure within a community affect the composition of the participants in civil justice reform and their approaches to it? Does a community's understanding of procedure engage the profession as a whole and the wider public? Is it pursued as a continuous or episodic exercise? What advantages (or obstacles) to civil justice reform arise from the presence or lack of a broad understanding in the larger legal community of basic procedure and the way in which civil justice is administered?

I. THE IMPACT OF THE TEACHING OF PROCEDURE ON THE LEGAL PROFESSION

A. CANADA: LEGAL EDUCATION AND THE PROFESSION AT THE CROSSROADS

1. A BRIEF HISTORY OF THE PROFESSION AND LEGAL EDUCATION IN CANADA²

Much of the story of the legal profession and of legal education in the common law parts of Canada can be told through a history of a building in Toronto known as Osgoode Hall.³

The Law Society of Upper Canada was founded in 1797, a date early in Canadian history. At that time it had been less than two decades since Britain lost its American colonies in the War of Independence and less than a generation since it had gained control of the parts of North America that would eventually become Canada. In an effort to improve the governance of this distant outpost, the area had been divided into two colonies—“Upper” Canada (now Ontario)—so named because it was farther up the St. Lawrence River than “Lower” Canada (now Quebec).

In 1791, with the creation of Upper Canada, William Osgoode was named the first Chief Justice. And it was barely six years later that a professional body of lawyers called the Law Society of Upper Canada came together to provide the province with a “learned and honourable body, to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the said Province.”⁴ In other parts of the world, where the legal profession is regulated by the state, the objective of serving the public would not seem unusual. However, the mandate assumed by the self-regulated Law Society of Upper Canada to “support and maintain the constitution of the Province” might be seen as an encroachment on the role of state officials. Nevertheless, this central role for lawyers seemed quite natural to Upper Canada, and the Law Society prospered.

In 1829, the Law Society members had amassed the resources to purchase a sizeable property and construct a substantial building to house the law courts and to provide a place where they could offer classes to their students at law. This building was named Osgoode Hall after the first Chief Justice. At that time, and for some

2. Janet Walker took the lead in preparing this section.

3. John Honsberger, *Osgoode Hall: An Illustrated Story* (Toronto: The Osgoode Society for Legal History, 2004).

4. Law Society of Upper Canada, “History,” online: <<http://www.lsuc.on.ca/with.aspx?id=427>>.

time to come, entrance to the profession was primarily through apprenticeship: “Students at law,” or “articled clerks,” learned the profession by working under the supervision of lawyers. However, beginning in the nineteenth century, the lawyers began to offer classroom instruction to their “students at law” to enhance the education they received. This form of education—an apprenticeship supplemented by classes offered by practitioners—continued through the nineteenth century and into the early twentieth century. Interestingly, at one point in the late nineteenth century, the resources for providing these classes faltered and the students took it upon themselves to organize lectures on law, which they invited the members of the profession to provide.

As the country expanded west and new provinces were created, some members of the Law Society of Upper Canada also moved west and established the governing bodies of the profession in the newly formed western provinces. They took with them the perspectives on the legal profession, its role in society, the way it should be governed, and on legal education that they had developed in Upper Canada (now called Ontario).⁵ This shared history among the founders of the various law societies may well be credited with creating a significant degree of common understanding among members of the profession throughout the country—one that has largely continued until today.

2. THE PROFESSIONAL ACCREDITATION OF LAW SCHOOLS IN ONTARIO

Until the middle of the twentieth century, the law school at Osgoode Hall was the only accredited provider of legal education in Ontario that was officially recognized by the Law Society of Upper Canada. While other universities in the province began to offer courses and programs in law, and while students interested in the law were free to study at any one of them, to practise law it was necessary to graduate from Osgoode Hall.

Nevertheless, considerable prestige was brought to the profession by admitting members who had previously studied law as an academic subject, and eventually the value of an academic degree to a practising lawyer was formally acknowledged. In 1957 the Law Society decided to accredit the five existing universities in Ontario as providers of law degrees that would be recognized as necessary pre-requisites to the Bar Admission Course. A decade later, an affiliation agreement was entered

5. Upper Canada no longer exists. In 1841, Upper and Lower Canada were united as the Province of Canada in a bid to better secure the governance of the colony. At that time, Upper Canada was renamed Canada West. In 1867, Canada West became the new province of Ontario when Canada ceased to be a colony and became a federation of four provinces.

into with the newly established York University, and the law school at Osgoode Hall became Osgoode Hall Law School of York University (the sixth accredited university in Ontario). Thereafter, only the Bar Admission Course was taught at “Old” Osgoode Hall.

For the next five decades, relatively little changed in the relations between legal education and the profession. Despite the establishment of new universities, no new law schools were created in Ontario.⁶ Comparatively onerous admission standards were maintained for lawyers with foreign degrees who wished to be licensed to practise in Ontario and elsewhere in Canada. This kept the proportion of those who gained admission on the basis of a foreign degree very small. The number of places in some law schools increased over the years, but these increases represented relatively minor incremental changes in the overall availability of the places in the programs leading to the degree required for access to the profession. This maintenance of the status quo in the face of the steady increase in the population of Ontario and the demand for legal services had a remarkable effect. The places in law schools became more and more scarce, and increased competition for them raised the standards for applicants and, accordingly, assured that the graduating students entering the profession were highly talented and motivated in their chosen profession.

The inherent talent of the cohort of law students and the extent to which they value their opportunity to practise law may be no guarantee of the ease of regulating them as members of the profession, but it would seem reasonable to believe that there could be some correlation. Accordingly, as the overall quality and commitment of the entrants to the profession increased, it was unlikely that a reason for reviewing the effectiveness of the profession’s regulation in Ontario would emerge.

3. THE EMERGENCE OF A PROFESSION OF PARALEGALS AND THEIR REGULATION

As places in law schools became scarcer and demands for legal services increased, the quality of the services provided was not likely to be an issue of concern for regulators. However, quality is only one aspect of concern in the provision of legal services. Two other key aspects of the provision were not addressed by the evolution of this model over time: the availability and the cost of legal services. With proportionately fewer lawyers to provide legal services—lawyers whose

6. It would not be feasible to establish a law school without accreditation.

heightened abilities and aspirations brought corresponding increases in career expectations—the availability of affordable legal services was bound to decline.

The response to this need, particularly in an era in which information about the law and the justice system was more readily available to the public, was an increase in the provision of legal services by paralegals. Paralegals initially acted independently and without the supervision of lawyers. In an area that is otherwise regulated, the provision of services in the absence of regulation raises obvious concerns. A range of responses could be imagined to address these concerns. One might expect to see the imposition of limits on the services that such service providers are permitted to provide, and one might expect this to be combined with no regulation, government regulation, or self-regulation. None of these responses were adopted in Ontario. Instead, in 2007, the *Law Society Act* was amended to make the Law Society of Upper Canada responsible for regulating the paralegal profession.⁷

It is worth pausing here to note that the regulation of the legal profession in Canada is unusual. In many civil law countries, the profession is regulated by the state, and the promotion of the welfare of the members of the profession is typically undertaken by provincial associations. The separation of these functions is thought to be an important safeguard against the potential conflict between these roles. By contrast, in many common law countries the profession is self-regulating. The courts usually oversee admission to the bar, and this is thought to be an important safeguard against the potential for conflicts brought about by state regulation of lawyers. But, the standards for professional conduct and the maintenance of discipline are usually the responsibility of particular departments of the local bar association.

In Canada, as in other jurisdictions, the voices of the profession—the bodies that promote the welfare of the members of the profession—are the Federal and provincial bar associations. The bar associations are vigorous supporters of the interests of the profession. However, unlike other jurisdictions, the bar associations neither license nor discipline lawyers. Apart from the role that they play in continuing legal education, these associations have relatively little to do with the academic degree program necessary for admission to the profession.

In Canada, it is the provincial law societies, not the bar associations, that license lawyers and set and maintain standards of professional conduct. The law societies serve these functions as bodies that are independent of the state and the

7. For the amending statutory provisions, see *Access to Justice Act, 2006*, SO 2006, c 21, Sched C, s 19. For the current statutory provisions, see *Law Society Act*, RSO 1990, c L.8, ss 25.1-25.2.

courts and, moreover, are independent of the role of advocating on behalf of the profession. While Canada is typical of other common law countries in having a self-regulated legal profession, the regulators—the law societies—are not also the advocates for the interests of the profession. Rather, the law societies regulate on behalf of the public. While the regulators in civil law countries are usually not independent of government, and the regulators in common law countries are not independent of the profession, in Canada the regulators are independent of both.

This unique role may well have contributed to the confidence of the Law Society of Upper Canada when it took on the responsibility of regulating paralegals in Ontario. In the initiatives taken to address the need for paralegal regulation, a standing committee comprised of paralegals and members of the Law Society's governing board established the regulatory framework, together with Rules of Conduct and an application process. The immediate results have been that, apart from specified exemptions, anyone providing legal services in Ontario, whether a lawyer or a paralegal, is subject to licensing requirements; and the Law Society is authorized to educate and license paralegals and to regulate their conduct.

The larger implications for the profession, however, are profound. With the rise of paralegals, a key feature of the role of the professional community of lawyers in the larger community (*i.e.*, their monopoly on the provision of legal services) was at risk of disappearing. The introduction of paralegal regulation in Ontario did not, however, undermine the centrality of the legal profession, but instead re-affirmed and even strengthened it. Unlike the situation in the United States, in Ontario, paralegals may provide certain legal services without the supervision of lawyers. However, they do so under the regulation of the Law Society. Thus, the amended regulatory framework in which these legal services are provided, whether by lawyers or by paralegals, has preserved the central place of the professional community of lawyers in the justice system.

Can a link be drawn between these developments and the ongoing exposure of law students to current issues and debates concerning the civil justice system and the provision of legal services through the inclusion of a required course on civil procedure in the law school curriculum? The profession demonstrated considerable flexibility and adaptability that enabled it to retain a central role in the provision of legal services in the face of important changes in the demands for legal services. Could this be attributed to the universal engagement by members of the profession with the broader issues of civil justice at the academic stage of their preparation for the profession? It may be difficult to demonstrate such a link in any conclusive way. However, comparison with recent experience in other jurisdictions, notably England and Wales, as discussed in a later section of this article, suggests that such a connection might not be purely speculative.

B. ACCREDITATION OF LEGAL EDUCATION IN CANADA⁸

The rise of paralegals in the provision of legal services has not been the only significant change in the structure of the profession in recent years that might suggest the significance of the role of teaching civil procedure as an academic subject. Another such development has related to the formal requirements for legal education as a necessary prerequisite to admission to the profession.

As mentioned, the provincial and territorial law societies of Canada have the statutory responsibility to regulate Canada's legal profession in the public interest. This responsibility includes admitting lawyers to the profession, stipulating the articling requirement, setting bar admission examinations and courses, overseeing continuing professional development and quality, regulating professional discipline and, if necessary, removing lawyers from the profession. In all common law provinces and territories there are three requirements for admission to the bar: a Canadian law degree or its equivalent, successful completion of a bar admission or licensing program, and completion of an apprenticeship known as articling. For applicants who receive their legal training outside Canada, the determination of what constitutes qualifications equivalent to a Canadian law degree is made by the National Committee on Accreditation, a committee of the Federation of Law Societies of Canada (FLSC).

In Canada, until quite recently, no national standards or academic requirements for a law degree were ever developed. The closest de facto standard was a brief two-page outline of requirements, which the Law Society of Upper Canada approved in 1957 and revised in 1969. This outline included a list of compulsory courses, among which was Civil Procedure. These requirements have only recently been reviewed and, although they were informally adopted in other provinces, they were never formally approved by other law societies. Furthermore, unlike the situation in the United States, in Canada until recently there has never been any formal review of the degree programs of accredited law schools to determine whether they merit continued accreditation. This brief outline of required components for an accredited law degree reflected a workable balance between regulatory and academic priorities, and it afforded to the law schools the necessary flexibility for them to innovate in response to changing needs. For example, in the case of civil procedure, the current content of the required course and the approach to its objectives bear little relation to those of its counterparts in the 1950s and 1960s.⁹ Concentration on

8. Lorne Sossin took the lead in preparing this section.

9. Knutsen et al, *supra* note 1 at 14.

the technical details of the rules and the practice of civil litigation has long since given way to a broader consideration of the various contexts in which they operate.

Nevertheless, in 2006, after nearly a half-century without any new law schools in Ontario, the pressure to expand the positions for students in accredited programs led to applications for accreditation or expressions of interest from a number of new universities.¹⁰ A number of provinces also enacted legislation respecting access to regulated professions that required regulators to ensure that admission processes for domestic- and internationally-trained applicants were transparent, objective, impartial, and fair. Further, the number of internationally-trained applicants for entry to bar admission programs in Canadian common law jurisdictions¹¹ was on the rise. The standard for such applicants is that they have legal education equivalent to the requirements for a Canadian common law degree, which highlighted the need to delineate those requirements. Finally, the federal and provincial governments made clear their commitment to national labour mobility and harmonized standards, underscoring the national dimension of this concern. A 2007 Canadian Competition Bureau study on regulated professions explicitly questioned the justification for variations in admissions requirements between law societies.¹²

The FLSC created a Task Force, which generated significant controversy from the start. Many academics and legal educators viewed its activities as a threat to academic freedom and institutional autonomy, while lawyers from across the country weighed in on what might be deemed to be the essential elements of a lawyer's training. Some lawyers also expressed the concern that this initiative would download or offload the responsibility for professional training from law societies to law schools.¹³ The Council of Canadian Law Deans (CCLD) were concerned to ensure that a national requirement would preserve the flexibility that Canadian law schools required to continue to innovate in legal education to position graduates for valuable and diverse roles in society. The CCLD opposed the imposition of required competencies,¹⁴ and some law schools also voiced their

10. Including Lakehead University, Wilfred Laurier University, Laurentian University, and the University of Waterloo.

11. That is, all provinces and territories outside of Québec.

12. Government of Canada, Competition Bureau, *Self-Regulated Professions: Balancing competition and regulation* (2007) at 65, online: <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions-study-final-E.pdf/\\$FILE/Professions-study-final-E.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions-study-final-E.pdf/$FILE/Professions-study-final-E.pdf)>.

13. For a discussion of some of the reaction to the *Final Report*, see Jean Sorenson, "Setting the Standard" *Canadian Lawyer* (Fall 2010), online: <<http://www.canadianlawyer.com/Setting-the-standard.html>>.

14. The CCLD submission read in part:

opposition.¹⁵ In addition, an ad-hoc group of legal academics held a symposium on the Task Force and issued their own submission raising concerns that the Task Force was proceeding without sufficient evidence and understanding of the nature and diversity of legal education.¹⁶

Despite this controversy, in October 2009 the FLSC released their Task Force's *Final Report*.¹⁷ The Task Force recommended that the FLSC adopt a national academic requirement for entry to the bar admission programs of the common law jurisdictions. The rationale for developing a requirement that applies equally to applicants educated in Canada and internationally is to ensure that all those seeking to enter bar admission programs in Canadian common law jurisdictions have demonstrated certain essential and predefined competencies in the academic portion of their legal education.

The FLSC observed that accrediting bodies in peer jurisdictions use one of two approaches to determine whether an applicant for admission meets the necessary academic requirements: either successful completion of specified courses or passage of a substantive law bar examination. The Task Force noted what it took to be an increasing focus on learning outcomes rather than prescriptive input requirements.¹⁸ It proposed a national requirement expressed in terms of competencies in basic skills, awareness of appropriate ethical values, and core legal knowledge that law students can reasonably be expected to have acquired during the academic component of

In general terms, CCLD is of the view that the current situation, where Canadian law schools enjoy a margin of maneuver to set those requirements, subject to the general policies of their universities, produces satisfactory results. While the requirements imposed by each law school are broadly similar, we note that the liberty they currently enjoy is used to tailor their programs to specific situations or to implement initiatives that are designed to respond to the increasingly diverse needs of the legal profession. There is no evidence that this flexibility threatens the protection of the public in any way. Accordingly, we would urge the task force not to recommend the adoption of any stringent standards with respect to those issues.

See Federation of Law Societies of Canada, Task Force on the Canadian Common Law Degree, *Final Report* (October 2009) at 38-39, Appendix 6, online: <[http://www.flsc.ca/_documents/Common-Law-Degree-Report-C\(1\).pdf](http://www.flsc.ca/_documents/Common-Law-Degree-Report-C(1).pdf)>. Lorne Sossin was a member of the CCLD at the time of the submission.

15. This group of law schools included Osgoode Hall Law School, whose Faculty Council passed a motion opposing the initiative in the spring of 2009.
16. Federation of Law Societies of Canada, *supra* note 14 at 47.
17. See generally *Ibid.* See also Sorenson, *supra* note 13.
18. Federation of Law Societies of Canada, *supra* note 14 at 4. The Task Force appeared to be influenced in particular by a report by the Carnegie Foundation. See William M Sullivan et al, "Educating Lawyers: Preparation for the Profession of Law" *Carnegie Foundation for the Advancement of Teaching* (San Francisco: Jossey-Bass, 2007), online: <<http://www.carnegiefoundation.org/publications/educating-lawyers-preparation-profession-law>>.

their education. The recommendations were adopted by each of the provincial and territorial law societies in the spring of 2010. Subject to the recommendations of an implementation committee struck in the summer of 2010, new entrants to the Bar would fall under this scheme commencing in 2015.¹⁹

There are three areas of required competencies. The first area of competency is skills-based, which includes problem solving, the ability to conduct research, and the ability to communicate orally and in writing in one of the two official languages, as these skills would be relevant to legal practice.²⁰ The second area of competency relates to an awareness and understanding of ethics and the legal profession, which must be provided in a stand-alone course. The third area of competency relates to substantive legal knowledge²¹ of the foundations of law,²² the public law of Canada,²³ and private law principles.²⁴ In listing the substantive competencies, the Task Force emphasized that these are *competencies*, not *courses*, and that law students should be able to satisfy them in a number of ways that may differ from competency to competency and from law school to law school. However, the FLSC expressly indicated that civil procedure, one of the formerly required courses, would not be included as a required competency:

The Federation has deleted civil procedure as a required competency. It is important for law students to understand the principles that govern the resolution of disputes in the Canadian common law system; it is not essential for them to learn specific

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19. Federation of Law Societies of Canada, *supra* note 14.
 20. In general the Task Force recommends that the FLSC leave it to law schools to determine how their graduates accomplish the required competencies. The Task Force justified the requirement of a stand-alone course for ethics and professionalism because they “lie at the core of the legal profession. It is important that students begin to appreciate this early in their legal education.” *Ibid* at 4. However, the FLSC did not stipulate any particular pedagogy for such a course, or whether it is taught in a descriptive, normative, or expressly critical fashion.
 21. In determining the required substantive legal knowledge, the Task Force considered the continued relevance of the current first-year curriculum of the sixteen Canadian law schools offering a common law degree, the importance of students having foundational knowledge in both public and private law, the competency research undertaken by various law societies in Canada, the regulatory approach in other comparable common law jurisdictions, and the importance of ensuring that the requirements do not interfere with the flexibility and innovation in current law school education.
 22. This includes principles of common law and equity, the process of statutory construction and analysis, and the administration of the law in Canada.
 23. This includes constitutional law (including federalism and the *Canadian Charter of Rights and Freedoms*), human rights principles, the rights of Aboriginal peoples of Canada, Canadian criminal law, and the principles of Canadian administrative law.
 24. This includes contracts, torts, property law, and legal and fiduciary concepts in commercial relationships.

practice rules in law school. Students should be exposed to the principles while learning the foundations of common law.²⁵

The reasons for removing civil procedure from the list of “core” courses are not entirely clear. While it was formerly included among the list of courses that are now captured in a list of “substantive legal knowledge” competencies, it is clearly different from them. It is understandable, therefore, that it would be thought suitable to be captured in the heading “foundations of common law.” Moreover, it may not have been obvious to the Task Force that topics such as “ethics and professionalism” are currently taught in context in the course on procedure. In this way, the newly added requirement of a stand-alone course on ethics and professionalism may wind up capturing in some measure the discussions currently pursued in the stand-alone civil procedure course. In this sense, there are larger, systemic reasons that might provide more compelling explanations for the apparent elimination of procedure as a required course. To the extent that “civil procedure” no longer comprises a detailed study of the technicalities of the rules, as it once did, a formal acknowledgment that such a course is outmoded simply operates to give official sanction to the current curriculum. Otherwise, the proposal would seem to be misguided.

Despite the significant evolution in the law school curriculum in other areas over the decades, Canadian law schools around the country have continued to teach civil procedure, with a number of these schools folding it into a broader course on “Legal Process,” which also introduces students to alternative dispute resolution and other forms of legal process (*e.g.*, public inquiries) and some schools offer it as an upper year course. Given the significant evolution—even to the point of changing the name of the course—there is no indication that the persistence of the course is a result of a perfunctory sense of obligation to adhere to the original list of required courses. Civil procedure remains more widely taught than some areas that are slated to become required competencies, such as fiduciary duties in commercial settings, under the FLSC standards.

It might not be obvious to those from outside Canada why civil procedure is taught instead of criminal procedure, why one court’s rules are taught rather than another (*e.g.*, the Federal Court, provincial Family Courts, Small Claims Courts, et cetera), and why litigation is emphasized in the face of the rise of other forms of dispute resolution. Despite this, and despite the varying contours of the course in terms of topics and teaching formats, the teaching of procedure has remained a substantial feature of every law school curriculum in Canada. Perhaps ubiquitous

25. Federation of Law Societies of Canada, *supra* note 14, Appendix 5.

familiarity with the core content of the course caused it to be taken for granted—just as the formal study of English grammar might seem superfluous to educators in Anglophone countries. Indeed, the FLSC’s prescribed competencies include “an awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public.”²⁶ Such awareness would be possible only with a basic understanding of the litigation process. Indeed, much of “ethics and professionalism” would seem abstract if it were studied without reference to the litigation process.

In the end, the FLSC competencies are unlikely to have a significant impact on the approach taken in well-established law schools to the teaching of procedure. The FLSC Task Force’s *Final Report* prescribed *competencies*, not *courses*, and the traditional course on civil procedure has long been left behind in many law schools in favour of a broader introduction to civil justice and dispute resolution. It remains to be seen whether there will be any effect of the implicit suggestion that the teaching of procedure be infused in various required courses throughout the curriculum, rather than taught as an independent subject. Nevertheless, this suggestion highlights how attending to the experience of the impact of teaching procedure in other legal systems might give valuable context and perspective to the value of identifying procedure as a discrete subject at this important juncture in the history of legal education in Canada.

C. ENGLAND AND WALES: THE STORY OF THE LEGAL SERVICES ACT (THE ACADEMY AND THE PROFESSION—WORLDS APART)²⁷

The teaching of procedure in England and its relationship to the legal profession can be sharply contrasted with the situations in Canada and the United States. Whereas in the United States top law schools may boast about the quality of their procedure scholars, such scholars are less common in England and tend to live in the shadows of their more illustrious private law colleagues working in property or contract, for example, or public law scholars working in the fields of human rights or criminal law. English procedure scholars usually spend most of their time teaching subjects other than procedure because so few law schools include procedure on the syllabus, either as a core subject or as an optional subject.

In contrast to Ontario, where to gain the right to practice law once required passing through a building known as Osgoode Hall, in England there have been no clear paths to practice, let alone a single path. Even today, many English lawyers have not studied law at university, but found their way into practice after

26. *Ibid* at 9.

27. Andrew Higgins took the lead in preparing this section.

studying other subjects. This phenomenon has a long history. According to David Lemmings, in the eighteenth century “there was no clear uniform pattern” as to how one became a barrister, which caused confusion amongst aspiring barristers and their families. Some favoured a preparatory spell at the university, some were apprenticed to attorneys, some paid to spend a period in the office of a special pleader, and some formed debating clubs with their fellow students. All would have grappled with introductory primers and reports in their chambers and would have visited Westminster Hall to observe barristers in action.²⁸

The university option rarely included law, which was looked down upon as a purely practical or mechanical art. In an opening lecture at Oxford as the first Vinerian Professor of the Laws of England, William Blackstone introduced his subject in an apologetic fashion: “[The study of law] has generally been reputed (however unjustly) of a dry and unfruitful nature; and of which the theoretical, elementary parts have hitherto received a very moderate share of cultivation.”²⁹ While the study of law at University may no longer be viewed as a “dry and disgusting study,”³⁰ alternative routes to practice remain popular in England. Some of England’s best known judges in the twentieth century studied subjects other than law. The most popular subject for future Law Lords was classics. Those who studied law often did it as a second degree, and some never set foot in a law school.³¹

This background poses considerable challenges for any fruitful discussion of the relationship between the teaching of a particular subject, such as procedure, and professional attitudes in England. Even if the teaching of procedure were common in law schools³² it would be difficult to speculate about its effect on the profession because many members of the profession in England have bypassed the study of law at university altogether, whether as a first or second degree.

The limited or non-existent treatment of civil procedure in the curriculum of law degrees around the country might suggest, according to this article’s title, that English lawyers and judges do not critically engage with procedural issues as much as we would like. To the extent that this is a reasonable hypothesis—and there is plenty of anecdotal evidence to support it—it may be the product of a self-perpetuating mythology. Procedure is only taught at the vocational training

28. David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford: Oxford University Press, 2000) at 108.

29. Sir William Blackstone, *Commentaries on the Law of England* (delivered 25 October 1758), s 1.

30. Lemmings, *supra* note 28 at 131.

31. Tom Bingham, “The Law Lords: Who has Served” in Louis Blom-Cooper, Brice Dickson & Gavin Drewry, eds, *The Judicial House of Lords 1867–2009* (Oxford: Oxford University Press, 2009) 122 at 123.

32. And it is not. See Erik S Knutsen et al, *supra* note 1.

stage of legal education. Therefore, like the study of law itself three hundred years ago, it is viewed as a mechanical and technical discipline only.

The view that procedure is not a subject worthy of academic study may also be partly attributable to the structure of the English legal profession. Practice and procedure has traditionally been the domain of solicitors, a branch of the profession that was populated by lawyers who were considered to be of a lower class (intellectually and perhaps even socially) than barristers. As advocates, barristers needed an excellent working knowledge of the rules of evidence (a subject that enjoys a higher profile at many English law schools) whereas issues of procedure could be left to solicitors.

It may be difficult to draw any firm links between, on the one hand, the teaching of procedure and professional attitudes towards the subject and, on the other hand, the importance of the teaching of procedure to legal thought and the administration of justice. Even qualitative surveys have inherent limitations. However, even if many practitioners consider procedure to be a technical subject with little intellectual substance, this view is not shared by the judiciary. Major judge-led reviews and reforms of the English Civil Justice system have engaged strongly with academic scholarship on procedure. These include Lord Woolf's access to justice review in the mid-1990s³³ and Sir Rupert Jackson's review of civil litigation costs in 2009.³⁴

Interest in procedure scholarship by English judges is not surprising. Judges are in large part responsible for the efficacy and fairness of the system as a whole, and hence they are likely to have a keen interest in the systemic values and constraints that are the subject of much procedure scholarship. By way of illustration, judges of the higher courts in England, including the Court of Appeal and the House of Lords (now the Supreme Court) have often engaged with the research of Adrian Zuckerman, Professor of Civil Procedure at the University of Oxford, endorsing his account of a procedural rule³⁵ or going out of their way to explain why they have not adopted an interpretation of a rule advocated by him.³⁶

A critical development worth noting is that the legal profession in England is in the process of potentially radical change. The *Legal Services Act*³⁷ overhauled the

33. The Right Honourable Lord Woolf, *Access to Justice: Final Report* (July 1996), online: <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/index.htm>>.

34. Lord Justice Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (May 2009), online: <<http://www.judiciary.gov.uk/JCO%2fdocuments%2fReports%2fjackson-final-report-140110.pdf>>.

35. *Three Rivers District Council and others v Governor and Company of the Bank of England*, [2004] UKHL 48 at para 34, [2005] 1 AC 610.

36. *C plc v P & Anor*, [2008] Ch 1, [2007] 3 All ER 1034 (CA).

37. *Legal Services Act 2007* (UK), c 29.

regulation of lawyers and in key respects de-regulated the profession with a view to promoting greater competition amongst legal service providers and greater access to justice. The reforms were driven by a belief that self-regulation of the profession was inappropriate and that self-regulation had demonstrably failed to deliver competent affordable legal assistance and access to justice to many people. In explaining the reforms, the Lord Chancellor stated his belief that this unsatisfactory position was not the product of the legal education system, but the structure of the profession. He stated:

The British legal system's excellent reputation and education, which will produce our next generation of brilliant lawyers, must be allowed to flourish.

But there are some real risks facing the legal profession. The risk that, under the current structure and regulations, too many consumers are being failed.

Pure self-regulation is not inspiring sufficient confidence among clients. People are not convinced by bodies who act as both the team manager and the referee.

And people cannot get legal advice in the way they often need it most. People don't want to have to traipse between firms, chambers, advice centres - getting piecemeal help from each. Whether it's housing, insurance, or representation in a court issue, clients want a seamless service from their providers.³⁸

In 2007, the Law Society's dual functions of regulator and union were split, and the regulatory framework was overhauled so that regulation is now focused on a set of "reserved legal activities," which presently include advocacy, conducting litigation, reserved instrument activities, probate activities, notarial activities, and the administration of oaths.³⁹ Such services can be provided only by authorized persons. There are presently eight "approved regulators" who have the power to grant such authorization.⁴⁰ Interestingly, the dispute resolution-related activities among these services are those that have traditionally been within the purview of barristers. In that sense, the barristers—the lawyers whose primary functions relate to trial practice—have retained their monopoly whereas the solicitors—the

38. Lord Chancellor, "Legal Services Reform" (Speech delivered at the St Paul Traveler's Conference: On Risk, Haberdasher's Hall London, 8 June 2005) [copy on file with the author].

39. *Legal Services Act 2007*, *supra* note 37, s 12.

40. These are The Law Society, The Bar Council, The Master of the Faculties, The Council for Licensed Conveyancers, The Institute of Legal Executives, The Chartered Institute of Patent Agents, The Institute of Trade Mark Attorneys and The Association of Law Costs Draftsmen. The regulatory arm of these bodies must be separated from the representative arm.

lawyers who would effectively be the face of civil justice to the general public in non-litigious matters and disputes in the pre-trial phase—have lost theirs. These legal services, including many types of advice work, are not now regulated as legal services at all. These include employment advice, welfare and benefits guidance, and will-writing services.⁴¹ Nothing prevents any new firm or individual from offering these services to the general public.

In addition, the *Legal Services Act* facilitated an expansion in the number and types of businesses that can apply for authorization to provide reserved legal services, and permits lawyers to enter into partnerships with other service providers, such as accountants, financial advisors, or management consultants. The *Legal Services Act* also allows partial or external ownership of legal practices, enabling general businesses, such as banks or supermarkets, to set up legal divisions, which provide legal services to their customers.⁴² The intention was that the “Tesco Law” concept⁴³ and multi-disciplinary partnerships with providers of services other than legal advice will reduce the cost of legal services and allow clients to obtain a seamless service from their providers. One of the major advocates of these reforms has been the Office of Fair Trading, which, along with its predecessor, has been arguing for much greater competition in the legal profession for decades. In 2001, it produced a report on Competition in Professions in which it stated that “the professions are run by producers largely on behalf of producers.”⁴⁴

It may be difficult to determine whether a causal relationship can be drawn between the way the English legal system reached this point and the legal profession’s view of the importance of promoting access to justice and of learning about procedure as an academic subject. Arguably, an absence of procedure as an academic discipline may have contributed to the profession’s loss of public confidence and the widening gap between law in books and law in action. A self-regulating profession, whose engagement with debates about procedural values and systemic constraints was limited, was seemingly unable or unwilling to move with the times and respond to the changing needs of the public or even engage in a discussion about what those needs are and how they could best be met.

Had there been a tradition of academic study of procedure, it might have contributed to enlightened thinking that could disrupt the profession’s vested

41. If lawyers are regulated because of their title—solicitor, barrister, notary, et cetera—then they are bound by general codes of conduct when they undertake this so called unreserved work.

42. Known as alternative business structures under the statute. See *Legal Services Act 2007*, *supra* note 37, Part 5.

43. Named after British supermarket chain Tesco.

44. John Vickers, “Competition in the Professions” *The Office of Fair Trading* (March 2001) at para 10, online: <www.offt.gov.uk/shared_offt/reports/professional_bodies/oft328.pdf>.

interest in maintaining a closed shop and cost rules permitting lawyers to either charge fees by the hour without an upper limit regardless of the outcome of the dispute or double their hourly fee as a success premium when operating on a conditional fee basis.⁴⁵ In this way, the intransigence of the profession (whether caused by a narrow approach lacking in foresight or otherwise) may have ironically prompted de-regulation based on market-oriented procedure research, which looks at increasing the number of ways consumers can access the system. It is clear, in any event, that the legal profession has changed. Legal service providers operate in new forms and are subject to new pressures and conflicts, which in turn are generating new problems for the administration of justice. These developments will warrant close study by procedure scholars.⁴⁶

D. THE UNITED STATES: THE ROLE OF THE BAR IN GOVERNANCE AND IN SETTING EDUCATIONAL STANDARDS⁴⁷

According to an old proverb, if you want a description of water, do not ask a fish. Similarly, a typical legal educator in the United States may not know how to answer the question of whether it is possible to trace a link between the teaching of procedure and the state of the profession. Legal education and the legal profession in the United States have always been highly integrated in a far more definitive way than they have been in Canada. This section describes the nature of that integration and its implications for legal education and for the legal profession.

1. THE GOVERNANCE OF LEGAL EDUCATION AND THE LEGAL PROFESSION

The study of law in the United States did not begin as an academic subject but as a response to a public concern about professional competence and the standards of the practising bar. Dissatisfied with the results achieved by the informal learning derived from the practice of having young lawyers become apprentices to established members of the legal profession, lawyers sought to improve the knowledge and skills of new members of the profession by creating law schools in the mid-nineteenth century and by instituting examinations as part of the process of being admitted to the bar. Perhaps even more significantly than this, the concern to maintain public confidence in the competence of lawyers brought about the creation of the

45. These costs rules were one of the main subjects of Jackson's review and came in for stinging criticism. See Jackson, *supra* note 34 at ch 10.

46. Legal Services Board, "Market impacts of the Legal Services Act 2007 - Baseline Report (Final) 2012, para 1.17

47. Janet Walker took the lead in preparing this section.

American Bar Association (ABA) in 1878. Since that time, the ABA has played an integral role in shaping the law school curriculum.

The distinction between the US and Canadian models of professional regulation in respect of legal education is subtle but significant. In both countries, the professional association and the body responsible for admitting new members are separate entities. In Ontario, for example, the body responsible for the regulation of the profession is the Law Society of Upper Canada (a body that, as mentioned above, is independent of both the government and the judiciary) and the body responsible for the welfare of the profession is the Ontario Bar Association, which is affiliated with the Canadian Bar Association and the bar associations of the other provinces. Similarly, in New York, for example, the New York State Board of Law Examiners (operating under the auspices of the New York State Court of Appeals) is responsible for administering the bar examination to candidates seeking admission to practise law in the State of New York.

However, the relationship that the regulators and the professional associations bear to professional discipline and to legal education in Canada and the United States is different. In Canada, the regulators (the law societies) have primary responsibility for professional discipline and for setting the standards for the legal education required for admission to the bar, whereas in the United States, the professional association (the ABA) has primary responsibility for maintaining professional and educational standards.

One other difference is noteworthy. In addition to completing an apprentice year (articles) and successfully completing the bar admission examination, until recently the Law Society of Upper Canada required each new member to take a Bar Admission Course of roughly half a year because it ceded the responsibility for providing more academic instruction to the faculties of law of the universities. In this way, the regulator was in a position to use instruction and examination to ensure that lawyers had the minimum level of required competence and was content to maintain a more relaxed attitude to the practical relevance of the teaching and learning involved in obtaining the basic law degree.

In contrast, the main requirement for entrance to the profession after obtaining an accredited law degree in the United States is successful completion of the bar admission exams. To be sure, many applicants take commercially provided bar preparation courses, but neither the profession nor the state government nor the judiciary have responsibility to provide or oversee any further education or training in the classroom or on the job. Accordingly, the keen interest of the profession in playing a direct role in shaping legal education in the context of the basic law degree, and the profession's direct responsibility to the public

for ensuring that the basic law degree equips members of the profession to practise in a way that will not require the ABA to discipline misconduct, is as clear today in the United States as it was a century and a half ago when the law schools were first created.

It is little wonder, then, that the question of whether a link can be drawn between legal education, legal practice, and the state of the profession is puzzling to Americans. The body responsible for establishing and maintaining the academic standards of the basic law school curriculum for accredited law schools is also responsible for advocating for and regulating the standards of the legal profession on behalf of the public.

2. ESTABLISHING AND MAINTAINING STANDARDS FOR LEGAL EDUCATION

In sharp contrast with the long history of minimalist standards for legal education in Canada, in the United States the process of establishing and maintaining standards for legal education is extensive and the standards themselves are detailed and comprehensive.

Any law school wishing to gain or maintain accreditation for its program must comply with the standards established by the ABA.⁴⁸ Each law school must provide the ABA with an annual questionnaire, self-study, site evaluation questionnaire, and any other information required by the Accreditation Committee and Council. There are detailed protocols for the annual site visits, including the preparations that should be made, the conduct of the visit, and the format of the report. There is extensive and ongoing discussion and consultation over the details of the standards and the methods by which they are assessed, and there is lively debate over the objectives of the standards and whether they are appropriately framed. As may be expected, issues about whether the best features of legal education can be reduced to specific criteria and whether their provision in a given law school can be evaluated accurately in objectively measurable ways are discussed with interest.

In addition to the routine engagement between the ABA and legal educators, there are, from time to time, periods of more fundamental reflection on the purposes of legal education and the possible need for fundamental reforms. One example of this was the 1992 "Report of the Task Force on Law Schools and the Profession:

48. See American Bar Association, Section of Legal Education and Admissions to the Bar, "Accreditation," online: <www.americanbar.org/groups/legal_education/resources/accreditation.html>. These standards are reviewed by the US Department of Education but the ABA is the recognized accrediting agency.

Narrowing the Gap.”⁴⁹ This report, and the scholarly debate surrounding it,⁵⁰ reflects a continuing engagement embedded in the culture of legal education over the tension between the role of legal education in equipping graduates for a successful career in practice and in fostering their intellectual curiosity about the law.

This debate has many striking features. Perhaps most notable is that it plays out within the law school and the legal academy, and not between the legal academy and the legal profession. The tension between rigorous professional training and scholarly exploration of larger themes is regarded as an integral feature of legal education—a question that permeates both the broad contours of curricular design and the specific features of course content and pedagogical method. However, the implications of this tension are also telling. Accepting the centrality of the tension means accepting the significance of the role played by legal educators who specialize in areas that are relevant to practice. It also means encouraging all legal educators to have regard for the aspects of their concentration areas that are relevant to practice. Over time, it also arguably promotes a career path for legal educators in which pre-law pursuits in other academic fields are prized and post-graduate pursuits are more often directed at further study of law and clerkships rather than practice.

It might be imagined that a limited interest in post-graduate legal studies would undermine the legal academy’s capacity to produce groundbreaking scholarship. However, the reverse seems to be true. The close relationship between legal education and the profession in a legal system in which legal practice is a prominent and popular career aspiration fuels the demand for legal academics, thereby increasing the scale and energy of academic engagement on questions of law. Moreover, coupled with an economic model in which law schools are supported primarily by tuition fees and private donors, the competition between them to recruit better faculty and students, and generally to enhance the standing of the law school and support the career aspirations of their students, drives up the standards for scholarship so that the ABA standards are readily met in most institutions. All in all, the close relationship between the study and

49. American Bar Association, Section on Legal Education and Admissions to the Bar, “Report of the Task Force on Law Schools and the Profession: Narrowing the Gap” *Legal Education and Professional Development – An Educational Continuum* (July 1992), online: <[http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_macrate_report\).authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_macrate_report).authcheckdam.pdf)>. This report has come to be known as the “McCrate Report.”

50. See Carrie Menkel-Meadow, “Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being” (1994) 69:3 *Wash L Rev* 593; Roy T Stuckey, “Education for the Practice of Law: The Times They Are-A-Changin’” (1996) 75:4 *Nebraska L Rev* 648.

practice of law in the United States makes the implications for both so pervasive that it could well be hard to know where to begin or end in describing them.

E. AUSTRALIA: AN INCREASING INTEREST IN PROCEDURE AS AN ACADEMIC DISCIPLINE⁵¹

The origins of the Australian legal system and profession lie in the structures, practices, and procedures of early nineteenth-century England. Until the mid-nineteenth century the pathway into legal practice was through a form of apprenticeship. Prospective lawyers would receive workplace training as articled clerks. The delivery of legal education was undertaken by the legal profession and admission to legal practice was controlled by the courts. In the 1850s, the first inroads into this model came with the foundation of the University of Sydney Law School. The university in each state followed suit, with Queensland being the last when the University of Queensland established its Faculty of Law in 1935.⁵²

By 1962 the transition from apprenticeship to university-based legal education had advanced significantly. A government report into the future of tertiary education (the Martin Report in 1965) found that the majority of lawyers in most states were university graduates.⁵³ Up until the 1970s, the law schools emphasized doctrinal study delivered in large part by legal practitioners and supplemented by a very small number of legal academics.⁵⁴ The 1960s and 1970s saw a significant expansion in the number of law schools⁵⁵ and a significant increase in government funding that enabled the establishment of a cohort of full-time legal academics. In addition to attaining a critical mass, the new academics were imbued with the enthusiasms of the time—critical studies, feminism, and generalized radicalism. This development was not necessarily welcomed by the profession or by the courts. As the president of the New South Wales Bar Association and later judge of the New South Wales Supreme Court complained:

In the whole of Australia ... there are only one or two academic teachers of any real value in real property, in contracts or in torts, yet there are about seventeen [sic] law schools. There are, to be sure, multitudes of academic homunculi who scribble and prattle relentlessly about such non-subjects as criminology, bail, poverty, consumerism,

51. David Bamford took the lead in preparing this section.

52. Nikolas J James, "A Brief History of Critique in Australian Legal Education" (2000) 24:3 Melbourne U L Rev 965 at 967.

53. Michael Chesterman & David Weisbrot, "Legal Scholarship in Australia" (1987) 50:6 Mod L Rev 709 at 711.

54. *Ibid.*

55. In 1960, there were six law schools; by 1986, there were thirteen.

computers and racism. These may be dismissed from calculation: they possess neither practical skills nor legal learning. They are failed sociologists.⁵⁶

Despite such attitudes, law schools continued to develop as genuinely academic institutions with a broader perspective of their role than they had when legal education was largely an apprenticeship. In 1987, the Commonwealth Government commissioned the Pearce Report⁵⁷ into legal education. The Pearce Report has influenced the development of legal education ever since. It recommended continuation of the new approach to legal education with its emphasis on critical analysis of law, encouragement of new teaching methods, and the development of skills teaching. It also recommended increased government funding for law schools and warned against the establishment of any new law schools.⁵⁸ While there is clear evidence to suggest that the first three recommendations have been adopted by many, if not most, Australian law schools, the latter two recommendations have been ignored. The number of law schools has grown from twelve in 1987 to thirty-five in 2011 and law continues to be one of the lowest funded disciplines.

By the 1990s the divide between the legal profession and legal education had become almost complete. The dominant route to legal practice was through an accredited law degree provided by a university, followed by a period of professional legal training delivered by either universities (leading to a graduate diploma in legal practice) or specially created training institutions (*e.g.*, the Leo Cussens Institute in Victoria and the College of Law in New South Wales). Western Australia still allows for professional legal training through articles of clerkship with a lawyer.

While direct involvement by the legal profession in the delivery of legal education may have ended, the legal profession continues to exercise great influence over legal education. Recent reviews of legal education recognize that “the requirements of practice a[re] the dominant criterion for determining what should be taught at law school. The legal profession has exercised and continues to exercise considerable control over what is taught at law school, and has in the last decade indicated its desire to exercise a greater degree of control.”⁵⁹

56. R Meagher, “How Can You Learn Practice in Theory?” *Proceedings and Papers of the 7th Commonwealth Law Conference, Hong Kong* (1983), cited in Chesterman & Weisbrot, *supra* note 53 at 716.

57. Professor Dennis Pearce, Professor Enid Campbell & Professor Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth* (Canberra: Australian Government Publishing Service, 1987).

58. Eugene Clark, “Australian Legal Education: A Decade after the Pearce Report” (1997) 8:2 *Legal Educ Rev* 213.

59. Mary Keyes & Richard Johnstone, “Changing Legal Education: Rhetoric, Reality and

The universities enjoy considerable autonomy in determining curriculum and pedagogical approaches for their degrees, but the degrees need to be accredited by the authorities controlling admission to legal practice. The constitution and procedures of these authorities vary from state to state, but they are for all practical purposes controlled by the senior judiciary and lawyers in each state.

In the early 1980s the Council of Chief Justices formed a committee chaired by Justice Priestly called the Consultative Committee of State and Territory Law Admitting Authorities (the Priestly Committee) to develop uniform admission standards. By the early 1990s, the committee recommended that to obtain accreditation a law school's curriculum would need to cover eleven areas of required knowledge. These areas were the core doctrinal areas (*e.g.*, torts, property, and contract) with two procedural areas (criminal and civil procedure) and professional conduct (which included basic trust accounting). How these were to be taught was not prescribed and the content was loosely defined. The "Priestly 11" (as they came to be known) have formed the compulsory core of most law degrees. Some law schools have made certain areas of required knowledge optional topics and not prerequisites for graduation, but advise any student wishing to enter legal practice that they need to ensure they have completed all eleven areas.⁶⁰ The Priestly Committee has expanded to include representation from the Council of Australian Law Deans and has been renamed the Law Admissions Consultative Committee. It has now also prescribed twelve areas of required knowledge for professional legal training courses (although these are expressed as required areas of competency).

As Australia has no external bar examination or other external mechanism for assessing whether graduates possess the knowledge required to enter the profession, admission authorities have had to be satisfied that law schools are delivering this knowledge. There continues to be great variation from state to state in the ways in which this is done. In some states, law schools are subject to light scrutiny and are required only to report significant changes in degrees. In others there is high level of scrutiny with periodic reviews that examine everything from assessment schemes to subject guides and qualifications of teaching faculty. However, the trend over the last decade has been for the admission authorities to take a more active role in scrutinizing law school curricula.

The advent of mutual recognition of qualifications across states in the 1990s increased the need for uniformity of standards. In 2008, the Commonwealth

Prospects for the Future" (2004) 26:2 Sydney L Rev 537 at 555 [citation omitted].

60. The law degree at Monash University, for example, describes Civil Procedure as "quasi-compulsory." At the University of Melbourne, civil procedure is contained in a first-year compulsory subject called Dispute Resolution.

Government embarked on the creation of a national legal profession project with a national legal services board setting admission standards. This project has faltered because smaller states have opted not to co-operate with the transfer of responsibility from states to a national body, but the courts and legal profession continue to exercise major influence on legal education.

Within this context, civil procedure enjoys a distinctive place. The field of civil procedure saw the least reduction in the legal profession's involvement in the delivery of legal education. Regarded by many legal academics as being primarily a vocational subject, it was delivered in most law schools by legal practitioners. This continues to be the case in many law schools, but the last fifteen years has seen a steady growth in the numbers of legal academics teaching and researching civil procedure. The links between the teaching of civil procedure and the legal profession continue, but they have evolved. Full-time academics specializing in civil procedure often have professional backgrounds, and many part-time academics in the field continue to have a role in legal practice.

Traditionally civil procedure was taught as the study of the rules of court with students learning the mechanics of procedure. More recently, civil procedure courses have included broader dispute resolution topics, including the functions of civil courts, the values underpinning civil procedure, ethics of litigation, and facilitating access to justice.

Given its close relationship to the profession, it is somewhat surprising that the greatest challenge to the future of civil procedure as an academic subject now comes from the courts and the profession rather than from academia. When the Priestly Committee first drafted its uniform admission standards in the 1980s, civil procedure was not one of the recommended areas of required knowledge. While it was included in the final report on uniform admission requirements in 1992, this has been challenged. As recently as 2010, the Law Admissions Consultative Committee considered dropping civil procedure as a required area of knowledge in the law degree to make space for new areas of required knowledge (*e.g.*, statutory interpretation). While these deliberations were not public, it is possible that the committee might have been influenced by the fact that one of the required areas of competency for the professional legal training stage is civil litigation practice. The committee might have thought that this required area of competency would adequately include the teaching of civil procedure.

Yet, as will be discussed in Part II, the role of civil procedure teachers in the broader process of civil justice reform has been increasing. The development of a pool of legal academics with research interests in civil justice and litigation in particular is becoming a valuable resource for government and courts. Whether

the exposure of graduates to civil procedure in their legal education has encouraged broader engagement with civil justice reform is more difficult to ascertain.

II. THE IMPACT OF THE TEACHING OF PROCEDURE ON CIVIL JUSTICE REFORM

Having canvassed the varying relationships between legal education and the profession in the four jurisdictions, as well as the role that the teaching of civil procedure might play in those relationships, we now turn to the implications for civil justice reform as it occurs in each country.

A. CANADA: A MODEL OF BROADLY-BASED ENGAGEMENT⁶¹

Making allowances for the differences in scale, the processes of civil justice reform in Canada are not too dissimilar from those in the United States. As one of two legal advisors to the Federal Courts Rules Committee (Rules Committee),⁶² the author of this section outlines that process as it occurs in Canada's Federal Court, which may be taken to be representative of a broadly-based engagement between the courts, the profession, the public, and academics specializing in procedure.

As a preliminary note, it should be observed that the Federal Court⁶³ in Canada has a different mandate from that of its counterparts in Australia and the United States. Lacking pendent and ancillary jurisdiction, it has a statutory jurisdiction that specializes in key areas of law assigned by the Constitution to the federal government of Canada, including maritime law, intellectual property, Aboriginal law, and immigration. This means that there are specialist bars in these areas that have a particular interest in practice before the Federal Court that makes them keen interlocutors in developing reforms. It also means that many members of the provincial bars across the country will only occasionally have proceedings in the court, thereby heightening the significance of regular communications to keep the profession apprised and engaged with recent developments and emerging issues of practice and procedure. In other respects, the following process is not unlike that which occurs in reforming the rules in the provincial superior courts.

Reforms of the Federal Court's rules of procedure usually begin with issues identified by courts in judgments or by communications with the court by members

61. Janet Walker took the lead in preparing this section.

62. One advisor for the common law, and one for the civil law.

63. Or, to be more precise, Federal Courts because the separate Tax Court and Court Martial Appeals Court are also Federal Courts.

of the profession. In some cases, these reforms emerge as significant reviews of an area of practice, such as occurred in recent years in the areas of expert evidence and summary judgment, but in other cases the reforms are of a more discrete nature. In still other cases, the general evolution of practice before the Federal Court, as has occurred in recent years through advances in technology, will occasion an audit of the rules to ensure that they reflect current practice. Finally, periodic comprehensive reviews of the rules are pursued, as occurred in 1998 and as is currently underway, to identify areas of proactive reform that may be warranted to ensure that the rules best facilitate the practice in the court.

The discussion of potential projects for reform usually begins in one of the biannual plenary meetings of the Rules Committee, which consists of a number of judges and prothonotaries of the Federal Court and the Federal Court of Appeal, key members of the court staff together with representatives of the specialist bars that most frequently appear before the court, and the two academic advisors. The preliminary discussion of a potential area of reform may be introduced by a member of the Rules Committee or it may be based on a brief introductory discussion paper. Should the Rules Committee support the further consideration of potential reform, a Sub-Committee is usually established to study the matter further and develop with the legal advisors a more formal discussion paper for broader consultation. This will often involve research into recent reforms in the area in other jurisdictions and into any pertinent academic commentary.⁶⁴ The discussion paper will identify a series of key issues for reform, sometimes including sample drafting language to illustrate the options that might be considered. The discussion paper will usually be reviewed in the next plenary meeting and then posted on the court's website and distributed through established lines of communication with the relevant sections of the bar associations. Following a period of forty-five to sixty days for input, the Sub-Committee and the legal advisors review the comments of members of the public and prepare a follow-up report on them for the Plenary Committee together with recommendations for the direction the reforms might take.

Once the Rules Committee is confident of the nature of the reforms it wishes to pursue, the Sub-Committee and the legal advisors prepare instructions for the legal drafters and jurilinguists to prepare draft rules. It should be noted here that the entire process is bilingual. During the plenary meetings, members of the Rules Committee intervene in either French or English, the materials for the meetings

64. For examples of such discussion papers, see Federal Court (Canada), Court Process and Procedures, "Rules," online: <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Rules>.

including the various discussion papers, minutes, et cetera are provided in both official languages and, perhaps most significantly, the jurilinguists ensure that the draft rules not only fit with the language in the existing rules but also match each other in their effect. This is just one sense in which the process of rules reform in the Federal Court is a model of engagement between those with specialized knowledge: legal advisors familiar with developments in other jurisdictions and having experience in the way in which the rules fit within the broader context of procedural values, jurilinguists adept in identifying the nuances of particular words and providing expert advice on language, and judges and practitioners experienced in the practical effect of the particular cast of the rules on litigation in their matters. In many ways, the Rules Committee is a striking exception to the adage that it is not possible to draft in committee; many meetings include animated and productive debates about very specific questions of proposed rules.

Once the draft rules are prepared, a Regulatory Impact Assessment is prepared and posted together with the proposed new rules on the Federal Court's website and distributed widely for a sixty day period of notice and comment. In some reform projects, this is also a period of time in which representatives of the Rules Committee hold meetings with interested members of the bar to discuss the proposed reforms and solicit their input. The results of this consultation process sometimes give rise to the need for further refinements and the process is extended. Otherwise, the reforms are finalized and the new rules formally published.

It may be difficult to verify the precise impact of the teaching of procedure as a required subject in the basic law degree. However, the process in Canada of reforming the Federal Court's rules of civil procedure demonstrates a level of engagement with members of the profession, members of the public, and members of the legal academy that reflects a broad understanding of procedure and the potential for reform that would seem unlikely to exist in the absence of a good grounding in civil procedure throughout the profession.

Rules reform is only one part of the larger process of civil justice reform in Canada. Two other kinds of civil justice reform warrant mention for the way in which they evince a continuing and productive exchange between the profession and the academy. The first kind of reform is one in which a perceived need for change in the profession prompts a dialogue with legal educators about the law school curriculum. As was noted in the earlier discussions of the accreditation of US and Canadian law schools in Part I of this article, there is no ongoing process of setting and monitoring compliance with detailed standards for legal education in Canada. However, from time to time, as with the emergence of a need to improve the availability of alternative forms of dispute resolution and the need to ensure

lawyers have a solid grounding in issues of ethics and professionalism, the law society has consulted with the law school administrators in the province to assess the current curricular standards and, where appropriate, to encourage change. In the absence of formal processes and standards for accreditation, this consultation process has historically been a voluntary one, but it has fostered change.

The second kind of reform is the more comprehensive civil justice reform project undertaken periodically upon the emergence of a demonstrated need for change. Such projects have been completed in recent years in British Columbia, Alberta, Ontario, and Québec. The notable feature of these projects is the broadly based involvement of members of the profession that they feature. In contrast with the Royal Commissions described in this article's discussion of civil justice reform in England and Wales, these comprehensive reforms have involved a number of participants and engaged a range of perspectives that would only seem possible in the context of a profession that is universally well-grounded in the basic principles of procedure. Again, it is difficult to pinpoint the precise correlation between the teaching of procedure and the nature of the consultation process that it brings about. An awareness of the significance of the various issues raised and an insight into the various options available and the impact of potential reforms, however, would likely be possessed by more than just those with direct experience with the aspects of procedure affected only if all members of the profession had the opportunity to develop an appreciation of the issues as part of their basic law degree.

B. ENGLAND AND WALES: REFORM FROM ON HIGH AND FROM OUTSIDE⁶⁵

In England and Wales, the civil justice system is regulated at two levels. The administration of justice and jurisdictional structure more broadly is to be found in a series of Acts of Parliament.⁶⁶ The more detailed rules of court are contained in a series of Statutory Instruments, written by statutory Rules Committees.

Procedural rule-making in England and Wales has been, at least since 1833, the preserve of the judiciary.⁶⁷ The power to make the rules is today granted by

65. Andrew Higgins took the lead in preparing this section.

66. See e.g. the *Supreme Court Act 1981* (UK), c 54, s 1- 2; *County Courts Act 1984* (UK), c 28, s 1; *Civil Procedure Act 1997* (UK) c 12, s 1. The *Civil Procedure Act 1997* brought in the reforms recommended by the Woolf Report. See also *Constitutional Reform Act 2005* (UK), c 4.

67. The *Civil Procedure Act 1833* "authori[zed] eight of the Common Law judges to make rules for the reform of pleading." See William Hazlitt Smith, "Rule-Making Authority," Book Review of *The Rule-Making Authority in the English Supreme Court* by Samuel Rosenbaum (1917) 3:1 Cornell LQ 28 at 28. Sir Jack Jacob has stated:

These rule-making powers were first conferred in 1833 on the Judges of the Superior Common Law Courts in relation to pleadings only, but of course, since then, the powers have been

act of Parliament to a committee whose membership includes the Head and Deputy Head of Civil Justice; two or three judges of the Senior Courts; a Circuit Judge; one or two district judges; a Master; three persons with Senior Courts qualification, including one with experience of practice in county courts; three persons authorized to conduct litigation in the Senior Courts, including one with experience of practice in county courts; and two persons with experience in and knowledge of the lay advice sector or consumer affairs.⁶⁸

The extent to which the making of procedural rules is mostly left to the judiciary and legal professional classes in England and Wales has been considered by many to be one of the fundamental features of the English civil justice system. Indeed, the preponderant importance the judiciary has in determining the content of the entire field of civil procedure has historically placed England and Wales far apart from their European neighbours and their transatlantic interlocutors. The American academic Samuel Rosenbaum's description of the history and mechanisms of English rule-making in his 1917 book on rule-making⁶⁹ was referred to in the United States mostly in order to bolster the case for the *Rules Enabling Act* mechanism of creating the *Federal Rules of Civil Procedure*⁷⁰ in opposition to unwieldy codes of procedure written directly by the legislature.

In England itself, many of the reforms to the court systems introduced during the nineteenth century were partly⁷¹ the result of a self-conscious emulation or comparison with the all-encompassing, theory-heavy legal systems of other European

considerably extended to the whole of practice and procedure and other specified proceedings and branches of the law and to all courts and tribunals. Such extension began with the Supreme Court when it was created by the Judicature Acts 1873 and 1875. The Rules of Court so made relating to all courts and tribunals thus comprise an authoritative, extensive and wide-ranging *corpus* or body of civil procedural law, which to some extent may be regarded as the English equivalent of much of what is contained in the European Codes of Civil Procedure.

Jack IH Jacob, *The Fabric of English Civil Justice* (London, UK: Stevens & Sons, 1987) at 53 [citations omitted].

68. *Civil Procedure Act 1997*, *supra* note 66, s 2.

69. See Smith, *supra* note 67.

70. Clarke B Whittier, "Regulating Procedure by Rules of Court" (1927) 11:1 J Am Judicature Soc'y 15.

71. Some interesting rhetorical references to other nations appear in Lord Brougham's 1828 speech. See Henry Brougham, "Speech on the Present State of the Law. Delivered in the House of Commons, February 7, 1828, Volume 2" in *Speeches of Henry Lord Brougham, Upon Questions Relating to Public Rights, Duties, and Interests; With Historical Introductions, and a Critical Dissertation Upon the Eloquence of the Ancients (1838)* (Edinburgh: A & C Black, 1838) 302 at 412-13.

nations. The reforms insisted on theorizing and rationalizing civil procedure (and other fields of law) and had academically-founded, legislative rule-making at their heart. Although it is now conventional to ascribe the reforms of the nineteenth century to the “theoretical spark”⁷² provided by the philosopher Jeremy Bentham, who did indeed seek rationalization and simplification of the law, his vast influence was mostly indirectly exercised and only ever acknowledged *post facto*. Sir Jack Jacob himself, in a speech premised upon “the growing acceptance of civil procedural law as a subject for academic study and research,”⁷³ emphasized that civil procedure “is *par excellence* a subject of *practical* importance, and precisely for this reason lawyers ought to be in the vanguard of its reform.”⁷⁴

In recent years, however, a series of constitutional reforms has led to a partial reconsideration of the power to make rules of civil procedure: “The Civil Procedure Act 1997 (CPA 1997), and more recently the Constitutional Reform Act 2005, sought to regulate rule making in procedure and place it on a sounder statutory basis.”⁷⁵ Thus “the CPR are delegated legislation, made by the CPRC under the authority conferred by the CPA 1997, ss.1 and 2. ... Rules made by the CPRC must be submitted to the Lord Chancellor, who may allow, disallow or alter rules so made.”⁷⁶ The most notable absence in the statutory provision for a standing committee devoted to the review and amendment of the rules of civil procedure is that of academics in the field. On occasion, individual academics may be heard pursuant to the *Civil Procedure Act*, which requires that the CPRC “consult such persons as they consider appropriate.”⁷⁷ But this is not a regular occurrence. It is far more common for the Rules Committee to respond to judicial comments in published judgments about specific rules and their consequences. In some cases,⁷⁸

72. Sir Jack IH Jacob, *The Reform of Civil Procedural Law* (London, UK: Sweet & Maxwell, 1982) at 207.

73. *Ibid* at 1.

74. *Ibid* at 4.

75. Adrian Zuckerman, “Rule making and precedent under the Civil Procedure Rules 1998—still an unsettled field” (2010) 29:1 CJQ 1 at 2.

76. *Ibid*.

77. *Civil Procedure Act 1997*, *supra* note 66, s 2(6).

78. See *e.g. Hodgson and Others v Imperial Tobacco Ltd*, [1998] 1 WLR 1056 at 1069, All ER 673 (CA), citing Sir Jack Jacob as the presumed author of a note in *The Supreme Court Practice, A, B and Others v Leeds Teaching Hospitals NHS Trust In the Matter of the Nationwide Organ Group Litigation*, [2003] EWHC 1034 at para 7, 3 Costs LR 405 (QB), citing work by Professor Adrian Zuckerman referred to in the Woolf Report; *Leigh v Michelin Tyre Plc*, [2003] EWCA Civ 1766, [2004] 1 WLR 846 at para 24, citing an article by Professor John Peysner on cost estimates. See also the discussion of a point made in Professor Zuckerman’s 2003 book on civil procedure in *Akram v Adam* [2004] EWCA Civ 1601, [2005] 1 WLR 2762 paras 37-43; Adrian AS Zuckerman, *Civil Procedure* (London, UK: LexisNexis, 2003).

references that are made in argument to a commentator's note may lead to judicial discussion.

Procedural reform in England, in actual fact, does not take place for the most part through the day-to-day changes in individual rules or blocks of rules by the Rules Committee. Writing in 1974, Sir Jack Jacob identified a pattern that has guided virtually every effort at reform of civil justice and procedure from the nineteenth century to his day:

[W]hen sufficient interest or pressure was aroused for changes to be made and could no longer be stemmed, the government of the day would decline to form its own political judgment as to whether any and if so what reforms should be made. Such a question would be removed from the area of party politics; and the government would profess to be interested but neutral about the problems of change. It would accordingly set up a commission or committee consisting mainly of judges and of members of the legal profession, with an occasional sprinkling of lay members, to enquire into the problem, and to make recommendations as to what changes were necessary or desirable, with terms of reference which were generally limited, though quite often implicitly containing a hint or two as to the general direction of change. The commission or committee would take "evidence" from interested bodies and persons, and then publish its report with its recommendations for changes to be made. The government of the day would consider the report and its recommendations, and would adopt or adapt such of them as it thought fit and would implement such recommendations by proposing the necessary legislation in the form of statute or statutory Rules of Court. Thereafter a pause would ensue, as though the legal profession and the system of civil justice required to absorb the new changes and adapt themselves to the new conditions. The pattern has thus been, commission or committee – report and recommendations – legislation – pause. Almost every single change made since 1800 to this day in the organisation of the civil courts and in civil procedure has followed this pattern.⁷⁹

Royal Commissions can be defined as "ad hoc independent committees, appointed by the government—ostensibly by the monarch—for a specific investigatory and/or advisory purpose. After they report, any further action must be taken by the Executive or Parliament."⁸⁰ They are variously praised for having "significant effect on the outcome of the policy-making process," and criticized for being "essentially undemocratic regardless of their outcomes."⁸¹

79. J Jacob, 'Civil Procedure since 1800' in *The Reform of Civil Procedural Law* (London, Sweet & Maxwell 1982) at 209.

80. Barbara Lauriat, "The Examination of Everything: Royal Commissions in British Legal History" (2010) 31:1 Stat L Rev 24 at 25. According to Lauriat, the zenith of Royal Commissions "corresponded with a period when utilitarian, rationalistic ideals of law reform prevailed" (*ibid* at 27).

81. TJ Cartwright, *Royal Commissions and Departmental Committees in Britain: A Case-Study in Institutional Adaptiveness and Public Participation in Government* (London, UK: Hodder

This method of proceeding has continued to be used uninterruptedly to the present day with regard to the reform of civil procedure,⁸² with the Woolf Report⁸³ and Jackson's recent review of civil litigation costs.⁸⁴ This may be due in part to the absence of a permanent review body concerned with civil procedure on a level more general than the necessarily technical approach taken by the Rules Committee. In turn, reform by episodic "commission – report and recommendation – legislation" steps leads to a consequently uneven opportunity for relevant academic analysis and input into the process. Indeed, a blunt comparison of the introductions to Lord Woolf's and Lord Justice Jackson's respective reports demonstrates the vast differences between approaches, interest, or desire to acquire an academic perspective into the problem at hand, and even the differences in the personality of these judges. Both conducted long, though eventually limited, consultation exercises in England and other jurisdictions. Lord Woolf specifically relied on work done by academics, including an international conference held in Florence.⁸⁵ Lord Justice Jackson, who had participated in Lord Woolf's survey, resorted to an international fact-finding tour in which a Task Force travelled the world in search of insight from abroad. Additionally, he had meetings and follow-up correspondence with a number of important academics in the field and relied on work done at the Centre for Socio-Legal Studies at Oxford.⁸⁶ He relied particularly on empirical and law and economics research (much, though not all, of it transatlantic) relating to the different costs rules and litigant behaviour.⁸⁷

The different style of research and evidence gathering (and, consequently, outlook) demonstrates the major failing with this type of reformist endeavour. The research, and the scope of the enquiry, is necessarily piece-meal and dependent on the individual in charge. Neither judge, in short, was able to take advantage of the breadth of research and continuous analysis that, say, the Law Commission could provide. The Law Commission was created in 1965 as an independent statutory body "to keep the law under review and to recommend reform where it is needed."⁸⁸ Whether by inattention or by design (possibly because it was convinced that the Rules Committee would fulfill

& Stoughton, 1975) at 3; AP Herbert "Anything but Action" in Ralph Harris, ed, *Radical Reaction: Essays in Competition and Affluence* (London, UK: Hutchinson, 1961), cited in Lauriat, *supra* note 80 at 35.

82. Sometimes Commissions whose terms of reference did not comprise civil procedure saw fit to recommend the immediate establishment of commissions dedicated to that goal. See JA Jolowicz, "'General Ideas' and the Reform of Civil Procedure" (1983) 3:3 LS 295 at 295.

83. Woolf, *supra* note 33.

84. Jackson, *supra* note 34.

85. Woolf, *supra* note 33, Introduction.

86. Jackson, *supra* note 34 at 6-7, 101, 344-45, 347.

87. *Ibid* at 499-502.

88. Law Commission, Home, online: <<http://www.justice.gov.uk/lawcommission/index.htm>>.

that function with regards to civil procedure), the Law Commission did not decide, upon its inception, to deal with civil procedure.⁸⁹

However, partly to remedy this omission, the Civil Justice Council was established under the *Civil Procedure Act 1997*.⁹⁰ It is an advisory body sponsored by the Judicial Office whose functions include “keeping the civil justice system under review, considering how to make the civil justice system more accessible, fair and efficient, advising the Lord Chancellor and the judiciary on the development of the civil justice system, referring proposals for changes in the civil justice system to the Lord Chancellor and the Civil Procedure Rule Committee, and making proposals for research.”⁹¹ And while the statutorily required composition mirrors that of the Rules Committee, two of its members as of 2011 (term expiry in January and April 2012) were professors of law (respectively with expertise in class actions and in socio-legal research) in prestigious UK universities. There is much to be hoped for from the coming of age of the Civil Justice Council as a possible substitute or alternative to Law Commissions or permanent advisory bodies in other jurisdictions. Professor John Anthony Jolowicz has identified as one of the causes of popular dissatisfaction with the administration of justice “the lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which gives us petty tinkering where comprehensive reform is needed.”⁹² In order to have great ideas it is necessary to have an informed knowledge of the totality of the field. A continuous, consistent review of the law surely is the best way of achieving such a result.

C. THE UNITED STATES: A MODEL OF CONTINUOUS ENGAGEMENT⁹³

This section is about those processes of civil justice reform in the United States in which the author of this section happens to have been significantly involved. About six decades ago, Chief Justice Arthur Vanderbilt of New Jersey observed that civil justice reform is “no sport for the short-winded.”⁹⁴ The author wholeheartedly agrees with this observation.

89. This was apparently a “great disappointment” to Sir Jack Jacob. See “Sir Jack Jacob Q.C. 1908–2000” (2001) 20 CJQ 79 at 79.

90. *Civil Procedure Act 1997*, *supra* note 66.

91. *Ibid*, s 6.

92. Jolowicz, *supra* note 82 at 298.

93. Thomas D Rowe Jr took the lead in preparing this section.

94. Arthur T Vanderbilt, *Minimum Standards of Judicial Administration: A survey of the extent to which the standards of the American Bar Association for improving the administration of justice have been accepted throughout the country* (New York: Law Centre of New York University for the National Conference of Judicial Councils, 1949) at xix.

1. THE JURISDICTION OF THE FEDERAL COURTS AND RULE-MAKING: THE ROLE OF CONGRESS

Given American federalism, civil justice reform takes place by many means. It can vary of course from time to time, but also considerably from state to state. In some states such as Florida, for example, the state constitution as written or judicially interpreted imposes significant separation-of-powers limits on the state legislature's authority to make rules for state courts.⁹⁵ By contrast, in New York and California the legislatures have long been unquestionably involved in writing state procedure codes such as the *New York Civil Practice Law and Rules*⁹⁶ and the *California Code of Civil Procedure*.⁹⁷

Looking at the federal court system, Congress is the metaphorical eight hundred-pound gorilla of changes in federal court jurisdiction and procedure.⁹⁸ It exercises virtually sole power to determine the jurisdiction of federal courts. It does so sporadically, as it did when it expanded federal courts' jurisdiction over state-law class actions in the *Class Action Fairness Act of 2005*⁹⁹—an ideologically-contested action, but one of unquestioned constitutionality as far as the author of this section knows. Additionally, it also dictates procedure in the federal courts, as it did when it stiffened pleading standards for some securities-fraud class actions in the *Private Securities Litigation Reform Act*¹⁰⁰ of 1995, which also dealt with substance and jurisdiction. Congress can also engage in episodic efforts to determine the jurisdiction of federal courts. One example of such an effort is the Congressionally-created Federal Courts Study Committee of 1989–1990, which produced numerous recommendations,¹⁰¹ some of which Congress enacted into law.¹⁰²

95. See e.g. Jeffrey A Parness, "Public Process and State-Court Rulemaking," (1979) 88:6 Yale LJ at 1319.

96. NY CPLR (McKinney 2013).

97. Cal Civ Proc (West 2013).

98. See e.g. *Hanna v Plumer*, 380 US 465 (1965). In this case the US Supreme Court stated that "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either" (*ibid* at 472). For the Necessary and Proper Clause, see US Const art I § 8, cl 18.

99. Pub L No 109-2, 119 Stat 4 (codified in 28 USC).

100. Pub L No 104-67 109 Stat 737 (codified in 15 USC).

101. See US Department of Justice, Federal Courts Study Committee, *Report of the Federal Courts Study Committee* (April 1990), online: Federal Judicial Center <<https://www.ncjrs.gov/pdffiles1/Digitization/124270NCJRS.pdf>>.

102. Pub L No 101-650 104 Stat 5113 (codified in 28 USC).

2. THE JURISDICTION OF THE FEDERAL COURTS AND RULE-MAKING: THE RULES ENABLING ACT PROCESS

Congressional action with respect to matters of more or less pure procedure in the federal courts is not frequent (although threatened in recent years perhaps more often than in the past). Congress has delegated the lead role in making and amending procedural rules for the federal courts to the United States Supreme Court (USSC), which acts based on recommendations from a pyramid of advisory groups. Five Advisory Committees—on rules of Appellate Procedure, Bankruptcy Procedure, Civil Procedure, Criminal Procedure, and Evidence—generate recommendations that are vetted by both an umbrella Standing Committee and public comment and hearings. The Advisory and Standing Committees are appointed by the Chief Justice of the United States and consist of a majority of federal judges with representatives from the practising bar, academia, the federal Department of Justice, and the state courts. They are served by non-voting Reporters, invariably academics, who are in charge of preparing draft proposals and commentary thereon.

When they are finally approved by the Standing Committee, recommendations of Advisory Committees are considered by the Judicial Conference of the United States, the formal organization of the federal judiciary with representatives from the federal appellate and trial courts.¹⁰³ If approved by the Judicial Conference, recommended rule changes go before the USSC, which usually but not always adopts them; they take effect some months afterward if not vetoed, stayed, or changed by Act of Congress.¹⁰⁴ So the process involves the USSC acting in a legislative role under a delegation of power from Congress. A possibly significant limit on this rule-making power is that under the *Rules Enabling Act*, the rules adopted by the USSC may not “abridge, enlarge, or modify any substantive right.”¹⁰⁵ Congress itself is under no such limit, since its powers (even though not plenary) include legislating with respect to both procedure and substance. While the USSC has never given significant teeth to the substantive-rights limit on the rule-making process, the rule makers themselves are mindful of it.

The process just described is lengthy but transparent, with considerable input from interest groups and individual practitioners, academics, and judges.¹⁰⁶ The

103. See 28 USC § 331 (2006). This statute establishes the Judicial Conference and enumerates its powers and duties.

104. For a fuller description of the process for amending Federal Rules, see James C Duff, “A Summary for the Bench and Bar” (2010), online: <<http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx>>.

105. 28 USC § 2072(b) (2006).

106. Indeed, the length of the process means that sometimes when a minor mistake has

process is regularized and ongoing, with greater activity at some times than others, but not highly sporadic. It is somewhat politicized but less so than when Congress becomes involved, and more politicized than it was some decades ago. As a member of the Advisory Committee on Civil Rules from 1993 to 1999, the author of this section was impressed with the process (although not always agreeing with its outcomes), while being struck and somewhat surprised by the level of discontent in the civil procedure academy about the process and its product. Impetus for rule amendments comes from varied sources: the Advisory Committee's own considerations, academic scholarship, and suggestions by individual judges and practitioners. Congress decides not to proceed on suggestions (which are often trivial, bad, or biased) at a fairly high rate, but significant responses to problems large or small are still perceived as genuine.

3. EMPIRICAL RESEARCH IN THE RULE-MAKING PROCESS

One significant factor bearing on American federal civil justice reform is empirical work. The Rules Committees sometimes commission empirical studies of both patterns in litigated cases in areas regarded as being of concern, and of effects of recent revisions. The Research Division of the Federal Judicial Center, the education and research arm of the federal judiciary, is one significant source of such research. Another is the Institute for Civil Justice of the RAND Corporation, an independent think tank. In general, empirical legal studies—including studies of procedural matters—is an area of increasing focus for legal academia and for non-legal academics interested in the legal system.¹⁰⁷ Not all rule revisions are based on empirical research or subjected to empirical evaluation, but empirical work does play a significant part.

4. OTHER INPUTS TO CIVIL JUSTICE REFORM IN THE UNITED STATES

Again, American civil justice reform is highly multifaceted. Many other bodies such as the American Law Institute (a law-reform organization that consists of practitioners, judges, and academics and that is not limited to civil-justice matters)¹⁰⁸ and the American College of Trial Lawyers (an organization of experienced litigators)¹⁰⁹

been made, it is easier to fix it by getting a bill through Congress than by processing a recommendation for amendment to the USSC.

107. See *e.g.* the Journal of Empirical Legal Studies, launched in 2004.

108. See American Law Institute, "Overview," online: <<http://www.ali.org/index.cfm?fuseaction=about.overview>>.

109. See American College of Trial Lawyers, "President's Message," online: <<http://www.actl.com//AM/Template.cfm?Section=Home>>.

generate law-reform proposals. Some of these proposals are influential in actual rule or statutory reform while others may influence judicial decisions without being enacted into positive law. Other bodies proposing civil justice reforms include the Sedona Conference,¹¹⁰ which produces proposals for best practices concerning preservation and discovery of electronically stored information. Bar groups are also active in generating studies and recommendations on procedural and other legal topics; the ABA takes positions on a considerable range of matters, for example. And the Association of the Bar of the City of New York, to mention just one other example, has a long-standing reputation for careful, relatively disinterested study of problem areas and possible reforms.

5. PARTICIPATION IN CIVIL JUSTICE REFORM BY SECTORS OF THE LEGAL PROFESSION

Stepping back from particulars about sources of procedural reform efforts, a common characteristic of such efforts in the United States is that they tend to involve considerable participation by all major legal sectors, including the practising bar, the bench, and the academy. In particular, the scribes—those generating draft proposals and explanatory material—are usually academics. The bodies passing on the recommendations usually have large majorities of practitioners and judges, although professors are sometimes also voting members of these groups. The actual adoption of proposed reforms, of course, is by governmental bodies such as the federal Congress, state legislatures, or courts acting in legislative roles usually under power delegated by the legislative branch, but in some states inherent or constitutionally conferred authority.

D. AUSTRALIA: REFORM OF THE RULES VERSUS REFORM OF THE CIVIL JUSTICE SYSTEM—A STUDY IN CONTRASTS¹¹¹

The experience in Australia has highlighted the distinction between the reform of the rules of civil litigation and the reform of the civil justice system as a whole.

Civil procedural reform in Australia has rarely been contentious. Most of its two-century history has been one of incremental change controlled by the courts through their rule-making powers, often transplanting procedural changes from elsewhere. Major revisions of the rules of the court have not been undertaken lightly and rules of court have often remained largely unchanged for three or four decades at a time. However, recent years have seen more reform. The *Federal Court*

110. Online: <<http://www.thosedonaconference.org/>>.

111. David Bamford took the lead in preparing this section.

Rules 1979 were replaced by the *Federal Court Rules 2011*.¹¹² The South Australian *Supreme Court Rules 1947* were replaced with the *Supreme Court Rules 1987* and more recently by the 2006 *Supreme Court Rules*.¹¹³ The New South Wales *Supreme Court Rules 1970* were repealed in large measure by the *Uniform Civil Procedure Rules 2005*.¹¹⁴ And the Victoria *Supreme Court Rules 1986* were replaced by the *Supreme Court Rules 2010*.¹¹⁵

For Australia, the question of the relationship between the teaching of civil procedure and civil justice reform is difficult to ascertain. While the evolution of civil procedure as an academic discipline has been discussed in other articles in this issue,¹¹⁶ the process of civil justice reform, and particularly civil procedure reform, is much less clear.

Across the nine Australian jurisdictions, with few exceptions, the process of regular review and updating of civil procedure is opaque. Most procedural reform is accomplished through amendments to civil procedure rules, punctuated infrequently with major revisions of the rules. Unlike the processes in Canada and the United States, these amendments are largely the result of the work of small groups, overwhelmingly comprised of judges, who usually deliberate among themselves without public consultation. There are two models for procedural reform operating in Australia. In the first, the legislation that establishes the court empowers the judges of the court to make rules governing the practice and procedure of the courts. This is the case, for example, in the Federal Court of Australia, and the Supreme Courts of South Australia, Victoria, and Western Australia.¹¹⁷ In most cases, the legislation provides that rules changes require the support of the majority of the judges, although in South Australia it provides that any three or more judges are authorized to make procedural rules.

In the second model, the legislation establishes a Rules Committee with broader representation. New South Wales and Queensland have adopted this model, although in Queensland the rule-making power is vested in the Governor in Council upon recommendation by its Rules Committee. Both New South Wales and Queensland have adopted uniform rules of civil procedure for all levels of courts of general civil jurisdiction and their Rules Committees have representatives from the various courts. New South Wales also includes two legal practitioners

112. *Federal Court Rules 2011* (Cth), s 1.03.

113. *Supreme Court Rules 1987* (SA), s 1.07; *Supreme Court Rules 2006* (SA), s 7.

114. *Uniform Civil Procedure Rules 2005* (NSW).

115. *Supreme Court Rules 2010* (Vic), s 1.

116. See *supra* note 1.

117. *Federal Court of Australia Act 1976* (Cth), s 59; *Supreme Court Act 1935* (SA), s 72; *Supreme Court Act 1986* (Vic) s 26; *Supreme Court Act 1935* (WA), s 168.

in its Supreme Court Rules Committee that co-exists with its Uniform Rules Committee. The legislation in Tasmania also provides for a rules committee that includes four legal practitioners, although the formal power to make rules is vested in the Supreme Court judges. Like Queensland, the judges are constrained by the legislative requirement that any rules proposed by the judges must be recommended by the Rules Committee.

From a practical perspective, the difference between the two models is not great. Even where rules can be made only on the recommendation of a Rules Committee, the lay members of all existing Rules Committees are significantly outnumbered by judicial and court officials. Furthermore, most of the courts with no legislative requirement for a Rules Committee have, in fact, created advisory Rules Committees that include representatives from the practising profession, and occasionally departmental officials. South Australia has the Joint Rules Advisory Committee for example, and each of the Victorian courts has created advisory committees.¹¹⁸

The work of procedural reform, whether undertaken by these committees or the judges themselves, is done largely in private. The process is not confidential per se, but the procedures, agenda, deliberations, and membership of the committees is either not publicly available or it is not easily accessed. Many practitioners learn of procedural amendments only upon implementation of the amendments.

It is clear from this description of the processes for procedural reform that there is little scope or role for academics specializing in civil procedure. Given the limited role of the practising profession, it is hardly surprising that no provision is made for academic involvement. This is not a criticism of the courts. Until recently there has not been strong academic engagement in the field of civil procedure more generally. Most law schools employed practitioners to teach civil procedure and only in the last fifteen years has there been a real growth in academic interest in the field.

However, the process described above reflects the ordinary incremental reform of procedure. In the last twenty years, the widespread perception of the need for urgent reform has led to major reviews of civil procedure with completely fresh procedural rules emerging as a result. These initiatives have often originated outside the courts, and have been advanced by legislatures or government departments, often as part of a broad law reform process. In Queensland, the government created a Litigation Reform Commission in the early 1990s, the Western Australia government asked its Law Reform Commission to review criminal and civil justice in 1997,

118. Victorian Law Reform Commission, *Civil Justice Review Report* (Melbourne: Victorian Law Reform Commission, 2008) at 698-700, online: <<http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf>>.

the Commonwealth government asked the Australian Law Reform Commission to conduct an inquiry into the federal civil justice system in the late 1990s, the New South Wales government created a Uniform Rules Working Party in the early 2000s, and the Victorian Government asked the Victorian Law Reform Commission to conduct a review of civil justice in 2006.

The process these inquiries adopted was generally very similar. Researchers were appointed or engaged, public submissions were sought and encouraged, discussion papers or proposals were developed, wide consultation on the proposals took place, sometimes major conferences were organised, and eventually a report with proposed reforms was provided to the government.¹¹⁹ This afforded considerable opportunity for civil procedure academics to contribute to the formulation of the proposals for reform. In many cases the commissioners of the relevant law reform commission included legal academics and, in the case of the Australian Law Reform Commission Inquiry, much reliance was placed on research by legal academics into procedural law and practice. With the most recent Victorian Law Reform Commission review, a leading practitioner turned academic, Professor Peter Cashman, was appointed to head the review. In this way, although the reform of particular procedures in the litigation process has traditionally been seen as within the purview of the courts themselves, the reform of the civil justice system as a whole has involved much more broadly based initiatives.

There is a further way in which procedural scholars have contributed to the process of civil justice reform—through their involvement with independent research centres. However, the success of research centres focusing on courts and their processes has been inconsistent. Organizations such as the Australian Institute of Judicial Administration (AIJA) have active research agendas that promote academic research into justice issues including procedural reform. For a long time hosted by the University of Melbourne, the AIJA has recently moved to Monash University. In New South Wales, the Civil Justice Research Centre did excellent work in the 1990s, but lost its main funding in the early 2000s. The Law and Justice Foundation in New South Wales has continued to promote research into justice issues more broadly. The University of Wollongong Centre for Court Policy and Administration provided graduate courses in court administration and promoted research until it closed around 2000. However, all these bodies provided avenues for academic research into civil procedure, which was regularly relied upon by the various Law Reform Commission inquiries.

119. For details of the process, see *e.g.* Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System (ALRC Report 8)* (February 2000) at 63-64, online: <<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC89.pdf>>.

The foregoing description of academic involvement in procedural reform raises questions about its overall impact. It would appear that the direct input of academics into procedural reform is largely limited to episodic involvement in major public reviews of litigation occurring outside the normal rule-making process. Is this, then, the true extent of the impact of teaching procedure on civil justice reform in Australia? Perhaps it is not. Although it is a long term consideration, it is reasonable to anticipate that the procedural issues and values considered in law schools will come to influence the thinking of the next generation of judges, and thus the rule makers of the future. It is to be hoped that instilling in these next generation judges the notion that good procedure enables courts to deliver their important public functions with integrity and legitimacy in an evolving world of social regulation, and dispute resolution will help to ensure that they will be motivated and equipped to adapt procedure to meet the challenges of the future. And, to the extent that the process of reform comes to involve a larger sector of the profession, it is to be hoped that they will be similarly motivated and equipped to contribute.

III. CONCLUSION

Does the approach taken to the teaching and learning of procedure influence the way in which practising lawyers conceive of their professions and their need to be mindful of how it might best function to serve the interests of the public? Does the expectation that all new members of the profession will engage with core procedural values by acquiring an academic grounding in the law help to ensure that they will be more thoughtful practitioners? Does it make them more mindful of the need to seek ways to maintain public confidence in the legal profession and so to justify preserving its status as a self-regulated profession?

Moreover, does the approach taken to the teaching and learning of procedure influence the way in which civil justice reform is pursued? Does the widespread engagement of law students with core procedural values in an academic setting support a more continuous and broadly-based engagement with the challenges of civil justice reform?

These are complex questions to be sure and they do not readily admit of answers that can be verified in a statistically measurable fashion. Nevertheless, the combined effect of the reflections of the authors of this article has provided a compelling account of the links that might be drawn between the academic study of procedure and an engaged legal community committed to serving the interests of the public. It remains to be seen whether such links might be recognized by those

responsible for determining the relationship between the study of procedure and admission to the profession, and those responsible for determining the subjects regarded as appropriate for the academic study of law.

To the extent that such a link may appropriately be drawn, the two topics considered in this article—the state of the profession and civil justice reform—might warrant further reflection in the reverse order. Recognizing the means for ensuring that the profession continues to provide leadership in the pursuit of reform in times of changing needs in the larger community may be critical for those who value the practice of law as a self-regulated profession to maintain public confidence in the profession, and with it the foundation for support for self-regulation. We hope that these articles will make a contribution to further discussions of these important issues.