

# The Teaching of Procedure Across Common Law Systems

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What difference does the teaching of procedure make to legal education, legal scholarship, the legal profession, and civil justice reform? This first of four articles on the teaching of procedure canvasses the landscape of current approaches to the teaching of procedure in four legal systems—the United States, Canada, Australia, and England and Wales—surveying the place of procedure in the law school curriculum and in professional training, the kinds of subjects that “procedure” encompasses, and the various ways in which procedure is learned. Little sustained reflection has been carried out as to the import and impact of this longstanding law school subject. Through a comparative approach, this series of articles explores what difference the approach a particular jurisdiction has chosen to adopt makes for legal education, legal scholarship, the practice of law and the profession, and to civil justice reform in our legal system.

En quoi l'enseignement de la procédure civile modifie-t-il les études juridiques, la recherche juridique, la profession d'avocat et la réforme de la justice civile? Ce premier de quatre articles sur l'enseignement de la procédure dresse le tableau de l'approche actuellement utilisée dans quatre systèmes juridiques – aux États-Unis, au Canada, en Australie, en Angleterre et au Pays de Galles – et se penche sur la place qu'occupe la procédure dans le programme des facultés de droit et dans la formation professionnelle, les matières qui constituent la « procédure » et les diverses façons d'apprendre la procédure. L'importance et l'incidence de cette matière traditionnelle des facultés de droit ont fait jusqu'ici l'objet de fort peu de réflexion en profondeur. Par le biais d'une approche comparative, cette série d'articles examine en quoi l'approche adoptée dans ces pays modifie chez nous les études et la recherche juridiques, la pratique du droit, la profession d'avocat et la réforme du système de justice civile.

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## I. INTRODUCTION

**WHAT DIFFERENCE DOES IT MAKE** to teach “procedure”<sup>1</sup> as an academic subject in the law school curriculum? In this article, the first in a collection on teaching procedure, we compare the current approaches to the teaching of procedure in four legal systems—the United States, Canada, Australia, and England and Wales—surveying the place of procedure in the law school curriculum and in professional training. We compare the kinds of subjects that procedure encompasses in each country (such as pre-trial and trial practice, alternative dispute resolution (ADR), advocacy, ethics, and professional responsibility), and the various ways in which procedure is learned (such as lecture/discussion and tutorial teaching, problem-based and experiential programs, clinical and community programs, and competitive advocacy). We consider both how each legal system has arrived at its current approach to teaching procedure in the context of its objectives for legal education and any current issues or signs of change or development. This comparative survey establishes a useful foundation for further critical evaluation in the more specialized analyses that follow.<sup>2</sup>

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1. Janet Walker, “The Impact of Teaching Procedure” (2013) 51:1 Osgoode Hall LJ vii-viii.  
 2. See Janet Walker et al, “Thoughtful Practitioners and an Engaged Legal Community: The

In particular, aware that the existing approach to teaching procedure is itself influenced by other factors shaping legal education and legal practice, we begin by comparing some key features of legal education and professional training in each legal system that play a role in distinguishing some aspects of the teaching of procedure. This background contextualizes the distinctions between the approaches to teaching procedure. It helps to explain how these differences are more than mere expressions of preference, or the result of historical accident, even if they might need to be reconsidered in the years to come. This overview of the way in which procedure is taught in each system serves as a key reference point in the other articles in this collection as we evaluate the direction that the teaching of procedure might take in the upcoming years.

## II. THE UNITED STATES

### A. THE POST-BACCALAUREATE NATURE OF AMERICAN LEGAL EDUCATION

In the United States, virtually all legal education for those planning to qualify as lawyers is offered as post-undergraduate professional education in law schools leading to the Juris Doctor (J.D.) degree. The J.D. usually requires three years of full-time study, but can also be completed at some schools in four years of part-time night study. There is no formal barrister/solicitor distinction.

As of 2013, there are 203 accredited law schools in the United States, 176 of which are members of the Association of American Law Schools (AALS).<sup>3</sup> Most but not all law schools in the United States are associated with a private or public university. There are, however, several free-standing law schools, such as Hastings in San Francisco and Southwestern in Los Angeles, and a few for-profit institutions.

The study of law and advanced research about law are generally carried on within institutions that aim at training students for the practice of law. A majority

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Impact of the Teaching of Procedure on the Profession and on Civil Justice Reform” (2013) 51:1 Osgoode Hall LJ 155; Beth Thornburg et al, “A Community of Procedure Scholars: Teaching Procedure and the Legal Academy” (2013) 51:1 Osgoode Hall LJ 93; David Bamford et al, “Learning the ‘How’ of the Law: Teaching Procedure and Legal Education” (2013) 51:1 Osgoode Hall LJ 45 [Bamford et al, “Learning”].

3. Law schools are accredited by the American Bar Association’s Section on Legal Education. For a list of currently approved schools (four are only provisionally approved), see American Bar Association, “ABA-Approved Law Schools,” online: American Bar Association <[http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html)>; “What is the AALS?,” online: The Association of American Law Schools <<http://www.aals.org/about.php>>.

of law-school graduates enter private law firm practice, although significant numbers work as sole practitioners, as government lawyers, or for pro bono organizations. Most of the students who establish careers in private practice do counselling and transactional work, with little involvement in litigation. Some who get the J.D. degree never practice, even if they become members of a bar; and a good many who practice law early in their careers move on to other fields such as business, politics, or, for some, the judiciary.<sup>4</sup>

Most instructors in American law schools are themselves law-school graduates with the J.D. degree.<sup>5</sup> Many entry-level law professors today hold research degrees in other disciplines, although an advanced law degree beyond the J.D. (an LL.M. or an S.J.D.) is not generally a required credential for the legal academy in the same way a Ph.D. is in many other university departments, and as an advanced law degree is in some other nations.

Law is largely taught as part of a post-baccalaureate degree program. While individual courses in law-related subjects may be found in the undergraduate curriculum, law is not a subject in which undergraduate students can major. The law courses taught as undergraduate electives are usually taken by students specializing in other areas, such as political science. These courses are often taught by faculty who do not have law degrees.

Further, in contrast to science requirements for those seeking to enter medical school, which is also a post-graduate professional program, no undergraduate courses or concentrations are required for law-school admission. It is not expected that students entering law school will have taken “pre-law” courses. Historically, many American law-school students have been social science or liberal arts majors. However, the American J.D. student population is increasingly varied, including those with other backgrounds such as engineering or biological sciences, which can be useful for those interested in the currently popular area of intellectual property.

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4. Unlike the judiciary in civil law countries, a judicial career in the common law is not a civil-service professional track upon which begins a career but a mid-career change. See Gillian K Hadfield, “The Quality of Law in Civil Code and Common Law Regimes: Judicial Incentives, Legal Human Capital and the Evolution of Law” (Paper delivered at Yale Law School, March 2006), online: <[http://www.law.yale.edu/documents/pdf/The\\_Quality\\_of\\_Law\\_in\\_Civil\\_Code.pdf](http://www.law.yale.edu/documents/pdf/The_Quality_of_Law_in_Civil_Code.pdf)> at 2.2.
  5. The Juris Doctor degree, despite containing the word “doctor,” is not a research degree like a Ph.D. See Brian Leiter, “Paths to Law Teaching” (August 2009), online: The University of Chicago Law School <<http://www.law.uchicago.edu/careerservices/pathstolawteaching>>.

## B. QUALIFYING FOR BAR MEMBERSHIP AND LAW PRACTICE

Membership in a state bar is required for the practice of law, whether representing clients in court or advising on non-litigation matters. To qualify for bar membership, one must usually be a J.D. graduate of an accredited law school. However, a few states currently allow Canadian J.D. holders and foreign lawyers with the one-year LL.M. degree from an American law school to qualify for the bar exam as well. In addition, applicants to the bar must satisfy certain character requirements, and pass a state bar exam. All states but one rely in part on the multiple-choice Multistate Bar Exam (MBE), which will include Civil Procedure as a required subject starting in February 2015.<sup>6</sup>

In contrast with the practical training required for a medical practitioner after obtaining a degree, the successful completion of the bar exam is sufficient to qualify for general practice in one's state, both in and out of court. As a practical matter, of course, many forms of informal apprenticeship take place, such as assisting counsel in a supporting role (*i.e.*, second chair) in courtroom work, associates reporting on research or drafting projects to partners, and training programs in public defenders' offices and the like. The National Institute for Trial Advocacy and other organizations also offer practical training programs.<sup>7</sup> Finally, many states require continuing legal education (CLE) programs for lawyers to remain in good standing.

## C. TEACHING CIVIL PROCEDURE IN UNITED STATES LAW SCHOOLS

### 1. WHEN OFFERED

Civil Procedure is a required first year course in almost every three-year law program, and it is required no later than the first semester of the second year in four-year part-time programs. Other required first-year courses include Contracts

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6. See "Comprehensive Guide to Bar Admission Requirements 2013," National Conference of Bar Examiners and ABA Section of Legal Education and Admission to the Bar, online: <[http://www.ncbex.org/assets/media\\_files/Comp-Guide/CompGuide.pdf](http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf)> at 25; Debra Cassens Weiss, "Gulp! Civil procedure will be added to Multistate Bar Exam" (8 March 2013), online: ABA Journal <[http://www.abajournal.com/news/article/gulp\\_civil\\_procedure\\_will\\_be\\_added\\_to\\_multistate\\_bar\\_exam/](http://www.abajournal.com/news/article/gulp_civil_procedure_will_be_added_to_multistate_bar_exam/)>. The MBE now examines only criminal procedure. In addition, the National Conference of Bar Examiners' Multistate Essay Examination (MEE), given in slightly over half the states, includes coverage of Federal Civil Procedure. See "MEE FAQs," online: National Conference of Bar Examiners <<http://www.ncbex.org/about-ncbe-exams/mee/mee-faqs/>>; "About NCBE Exams," online: National Conference of Bar Examiners <<http://www.ncbex.org/about-ncbe-exams/mee/>>.
  7. See National Institute for Trial Advocacy, online: <<http://www.nita.org/>>.

and Torts, and in most US law schools, Constitutional Law, Criminal Law, Legal Writing, and Property.<sup>8</sup>

## 2. WHEN AND HOW MUCH

At most American law schools, Civil Procedure is a one- or two-semester first-year course with four to six semester credit hours.<sup>9</sup> Full-time first-year students generally earn about thirty credit hours, so Civil Procedure constitutes about one-seventh to one-fifth of their course load.

## 3. WHO TEACHES THE COURSE

Nearly all of those who teach basic Civil Procedure are tenured or tenure-track faculty subject to the usual expectations of scholarship as well as teaching. Many who regularly teach the course conduct a significant amount of their research and scholarship in the area, although others teach Civil Procedure to help their schools provide needed coverage and do most or all of their scholarship in other areas. It is unusual for a practitioner to teach basic Civil Procedure or, for that matter, any “core” substantive course. Adjunct faculty, however, often teach advanced offerings.

The need to staff the first year required course, as well as the rich upper-level offerings, creates a large group of academics teaching procedure. For example, in the 2011-2012 directory of the AALS, the number of entries in the listings for those teaching Civil Procedure one to five years was 564; six to ten years, 273; and over ten years, 579. Allowing for some double entries of those teaching both the basic course and an advanced seminar, there are well north of 1300 faculty members self-identified as teaching Civil Procedure in AALS-listed law schools.<sup>10</sup>

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8. Most of the factual assertions in text about first-year curricula rely on a document based on a 2009 survey, on file with Thomas Rowe, of forty-four US law schools (out of about two hundred). A Law Library Fellow at the University of Arizona James E. Rogers College of Law conducted the survey. The schools surveyed were largely in the upper and upper-middle tiers of American law-school rankings, and as such, may have included fewer required hours of Civil Procedure in their curricula than schools not included in the survey. Statements about civil procedure in part-time night programs are based on a 2010 exchange on a listserv for American civil-procedure teachers.
  9. One credit hour is usually seven hundred minutes of classroom instruction, or fourteen classes of fifty minutes each, traditionally over a fourteen-week semester. See “ABA Standards and Rules of Procedure for Approval of Law Schools 2013-2014,” Interpretation 304-4, online: American Bar Association <[http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2013\\_2014\\_final\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_body.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.authcheckdam.pdf)> at 25.
  10. Association of American Law Schools 2011-2012, Directory of Law Teachers, online: <[http://www.aals.org/services\\_directory.php](http://www.aals.org/services_directory.php)> [on file with the author].

In addition, clinical faculty in a number of law schools engage in teaching civil procedure, both in technical application and in raising the systemic issues that come to life in the clinic's caseload.

The AALS includes a Civil Procedure section, which provides resources and mentoring to help newer procedure scholars in their teaching and writing. The AALS website contains resources useful for all procedure teachers, including copies of pleadings from historically important cases, summaries of recent developments in procedure law, and copies of old exams and syllabi that can be used for ideas and inspiration. The Civil Procedure Mentoring project has both a list of experienced teachers who have offered to help in various areas and a listserv for real-time help and news.<sup>11</sup>

#### 4. COVERAGE

Most first-year Civil Procedure courses cover the basic stages of civil litigation and significant federalist aspects of the American civil-justice system. The stages of litigation covered are similar to those covered in Civil Procedure courses in other common-law nations—pleading, discovery, motion practice, claim and party joinder, judicial case management and ADR, aspects of the trial process, appeals, and preclusion (*res judicata*). The importance of pre-trial discovery in American civil litigation may cause US schools to spend more time on it than is devoted to the topic elsewhere. In teaching about aspects of the trial process, the use of jury trials in many civil cases no doubt results in a unique degree of emphasis on the right to trial by jury and issues of judicial control of juries.

The American federal system may be more complex in procedural terms than other federal systems, such as Australia, Canada, and Germany. Federal constitutional law governs much of state courts' personal jurisdiction authority, and the subject matter jurisdiction of federal courts is constitutionally and statutorily limited. In civil cases, that jurisdiction extends to cases involving the United States and its agencies or officers, federal law claims, and significant numbers of state law claims between citizens of different states ("diversity jurisdiction"). These limitations on federal court jurisdiction affect the division of authority between state and federal courts. In addition, there is the "*Erie* problem,"<sup>12</sup> pursuant to which state law sometimes applies in federal civil

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11. For the listserv and other resources, see Association of American Law Schools, "AALS Section on Civil Procedure," online: <<http://nathenson.org/aalscivpro/>>.

12. See generally *Erie Railroad Company v Tompkins*, 304 US 64, 58 S Ct 817 (1938) [*Erie*]. *Hanna v Plumer* sets out the broad command of *Erie* and of relevant legislation: that "federal

actions. These subjects form a considerable part of the first-year Civil Procedure course at most US law schools, no doubt in contrast to the amount of time devoted to federalism in other common law legal systems.

The order and amount of coverage of these topics varies with the number of course hours, the courses available in upper year electives, and the instructors' own preferences. The most traditional approach, still followed by many instructors, starts with the federalist aspects—personal and subject-matter jurisdiction, and *Erie* problems—and then moves on to the stages of civil litigation. However, in recent decades, many have begun covering the stages of civil litigation first and then moved to the federalist aspects. Casebooks designed for classroom teaching can ordinarily be used for either approach, or for other approaches.

## 5. MATERIALS, TEACHING METHODS, AND ASSESSMENT

The required book for the course is virtually always a casebook rather than a textbook. In addition, there is usually a supplement with current jurisdictional and procedural statutes and procedural rules. Modern casebooks are no longer just compilations of edited cases, but generally consist of a mix of principal cases that have been significantly edited, shorter case extracts and summaries, excerpts from commentary, questions, and textual notes.

In the classroom, like many other American law school subjects, Civil Procedure is ordinarily taught by a mixture of lecture, Socratic questioning of students (in many cases involving both “cold calling” and calling on volunteers), questions from students, and discussion of hypothetical problems. Sometimes there will be out-of-class writing assignments, although introductory legal research and writing is increasingly taught as a separate first-year course by specialists.

The students are assessed largely, sometimes entirely, by a single written final exam of some hours' duration, although some courses include mid-term exams and weight may be given to classroom participation. Exams are generally in essay form, asking students to apply the law they have studied to hypothetical factual situations or to discuss policy issues, but can also include machine-scoreable multiple-choice or true/false questions. Exam grading is nearly always blind, in that the professor does not know which student has written which exam, at least until a late stage at which he or she may be able to make adjustments for contributions to class discussion.

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courts are to apply state substantive law and federal procedural law.” See *Hanna v Plumer*, 380 US 460 at 465, 85 S Ct 1136 (1965). Since then, the Supreme Court has had to decide several cases drawing lines in border areas which most Civil Procedure teachers are obliged to teach.



With 203 accredited law schools and some unaccredited ones, most having a hundred or more students in each year, each offering Civil Procedure as a required course, it is not surprising that many textbooks and study aids have been published. There are dozens of basic Civil Procedure texts, each with its own approach, but each covering a very similar core of procedural issues. Many contain notes with references to the relevant academic literature for students in search of clarification or enrichment.

In addition, there are a wide variety of books designed to help students learn and analyze procedure. They include descriptive materials such as case summaries, subject outlines, and very short textual summaries. There are exercises to help students apply procedural rules to hypothetical situations (both hard copy and electronic). These aid technical mastery of the subject and raise some policy issues.

There are enrichment materials to allow professors to supplement basic US court procedure with comparative materials, ADR theory and practice, or rich contextual histories of landmark procedure cases. Proceduralists have also created texts that apply theoretical lenses such as law and economics, critical legal theory, or empirical analysis to issues raised by the civil procedure course.

For those wanting to help provide real-world grounding for their professional and philosophical discussions of procedure, some resources combine books about actual lawsuits with documents from the cases, and include discussion questions that raise both technical and theoretical questions about the underlying litigation.<sup>13</sup> This wealth of teaching materials reflects the work of the procedure community and enables its members to contribute to their own understanding of the subject and to their students' learning experience.

## 6. OMISSIONS

Several areas that may be covered in basic Civil Procedure courses elsewhere are often not covered in the course in the United States. Advocacy, at least

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13. Some of the commonly used materials include: Gerald M Stern, *The Buffalo Creek Disaster: The Story of the Survivors' Unprecedented Lawsuit* (Toronto: Random House of Canada, 1976) (referring to the suit filed by residents of a West Virginia valley against the coal company whose inadequate dams resulted in a catastrophic flood); Nan D Hunter, *The Power of Procedure: The Litigation of Jones v. Clinton* (New York: Aspen Law & Business, 2002); Jonathan Harr, *A Civil Action* (Toronto: Random House of Canada, 1995) (referring to a suit filed by residents of a Boston suburb against companies that disposed of chemicals in a way that infected the water supply and may have caused an increased incidence of childhood leukemia); Brandt Goldstein, *Storming the court: how a band of Yale law students sued the President and won* (New York: Scribner, 2005) (referring to the Yale Law School clinic suit filed on behalf of Haitian refugees detained at Guantanamo).

as a distinct topic, is generally dealt with in legal writing courses, non-credit moot court competitions, and upper year electives. Professional Responsibility has been a required subject since the Watergate scandal.<sup>14</sup> It may be included to some extent in Civil Procedure, particularly in connection with sanctions under civil-procedure rules for litigation misconduct, but is usually a required upper year course. Evidence, although a major aspect of the trial process, is usually an upper year course, taken by most students even where it is not required; little of the subject is covered in the basic Civil Procedure course. Many professors include some limited coverage of alternative dispute resolution, but it is covered in its various specific forms, such as courses in Negotiation and Mediation, in the upper years of the curriculum.

#### 7. ADVANCED CIVIL-PROCEDURE OFFERINGS

Courses in Advanced Civil Procedure, and courses with civil procedure components, are widespread in the upper year curricula of American law schools. Most are elective, with the exception of the ABA-required course in Professional Responsibility. With significant variations from school to school and year to year, one may find a wide variety of both doctrinal and more practice-oriented or clinical courses, including Choice of Law (Conflicts), Federal Courts or Federal Jurisdiction, Complex Civil Litigation, Evidence, Trial Practice, Negotiation and Mediation, and Appellate Advocacy.

#### D. CIVIL PROCEDURE'S PROMINENCE IN UNITED STATES LAW TEACHING AND SCHOLARSHIP

A mix of historical and functional reasons explains the prominent place that Civil Procedure holds in United States law teaching and scholarship: (1) a historical emphasis on pleading in law teaching; (2) the post-graduate, professional nature of American legal education; (3) the sense that students need to understand civil procedure to get a good grasp on what cases in their substantive courses stand for; and (4) the intricacies of federalism as they affect American civil procedure.

#### 1. HISTORICAL EMPHASIS ON PLEADING AND PROCEDURE

Pleading at common law and under nineteenth-century civil procedure codes was a subject of considerable intricacy. Especially at common law, it blended substance

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14. See *e.g.* John W Dean, "Watergate: Lessons for today, nearly 40 years later," online: Ohio State Bar Association <<https://www.ohioabar.org/NewsAndPublications/OhioLawyer/Pages/Watergate-Lessons-for-today,-nearly-40-years-later.aspx>>.

and procedure because writ and pleading requirements were specific to various substantive forms of action. Christopher Columbus Langdell, the highly influential Dean of Harvard Law School in the late 19th century, included Civil Procedure as one of the core first-year courses. Harvard graduates became law professors at schools around the country, spreading the gospel according to Langdell. Today, the standard first-year American law school curriculum—Contracts, Property, Torts, Criminal Law, and Civil Procedure—is basically unchanged from the curriculum Langdell instituted.<sup>15</sup> Even with the common law's forms of action long gone, Civil Procedure has survived in the first-year curriculum, in part because of this long historical lineage.

## 2. THE POST-GRADUATE, PROFESSIONAL NATURE OF AMERICAN LEGAL EDUCATION

Because legal education in the United States has long been established as a post-baccalaureate professional course of training, rather than an undergraduate major, law professors know that a large fraction of their students will be going on to become practicing lawyers. Even those students who are unlikely to be much involved in civil litigation must be able to provide advice that may include the possibility of litigation and to work with litigators should the need arise. Further, the lack of formal post-J.D. requirements for initial professional qualification, aside from bar-exam preparation and passage, means that there is no assurance of substantial and systematic instruction in civil procedure once students have graduated. Accordingly, this training must be received in law school, or not at all.

## 3. CIVIL PROCEDURE'S IMPORTANCE TO UNDERSTANDING SUBSTANTIVE COURSES

Although law faculties argue about just how many hours of Civil Procedure first-year students should take—for example, many have recently reduced the number from six to four to provide more time for other courses—there seems to be fairly wide consensus among proceduralists and their colleagues that the course is important to help students understand the cases in other courses. It can make a difference whether a case is decided on a motion to dismiss for failure to state a claim, a pre-trial motion for summary judgment, a jury verdict, or a point of

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15. See *e.g.* American Bar Association, *A Survey of Law School Curricula, 2002-2010*, by Catherine L. Carpenter (2012). Most law schools now include some Constitutional Law, and a course in Legal Research and Writing, in the first-year curriculum. See text accompanying *supra* note 8.

law on appeal. Faculty availability and other considerations can lead to the Civil Procedure course being spread over two semesters (sometimes as two courses examined and graded separately) or taught in the second semester rather than the first. Nevertheless, the general consensus that the subject is important in its own right, and that it is significant for understanding in other courses, contributes to its continuance as an early course requirement in law study.

#### 4. FEDERALISM AS A COMPONENT OF THE COURSE AND A SUBJECT OF SCHOLARSHIP

As discussed above,<sup>16</sup> American federalism adds complexity to areas that are covered in most basic Civil Procedure courses and makes the subject deserving not just of practical emphasis but also of intellectual respect. These complexities are a persistent source of real-world controversy and change (by both judicial interpretation and statutory or rule amendment), as well as a fount of doctrinal scholarship. Although civil procedure scholarship is by no means limited to the federalist aspects of the area, these aspects attract considerable attention.

### III. CANADA

#### A. ENTRY INTO THE LEGAL PROFESSION IN CANADA

As in the United States, Canadian law degrees are second-degree university programs housed in academic faculties. There are currently eighteen English-speaking common law programs in Canada.<sup>17</sup> Civil procedure, or some form of it, is taught at all law schools. Also as in the United States, the law degree is now generally called a “J.D.” or “Juris Doctor” to signify it as a second degree.<sup>18</sup> The J.D. is required for entry

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16. See text accompanying *supra* note 12.

17. There are also currently six French-language civil law programs in Canada. These programs are first-degree (undergraduate) programs. See generally Barreau de Québec, online: <[www.barreau.qc.ca/fr/devenir-avocat/universite](http://www.barreau.qc.ca/fr/devenir-avocat/universite)>. For ease of comparison, this particular series of articles focuses on the common law, English language programs in Canada.

18. Designation of the Canadian law degree as the “Juris Doctor” is a recent trend. Previously, law degrees were called Bachelor of Laws (LL.B.), a nod to Canada’s Commonwealth roots. Some Canadian law programs still call their degrees the LL.B. degree. In the past, in some places, such as in Ontario, where there was an extra year of high school, some students were admitted with as little as two years of undergraduate study. However, the majority of students who were granted admission to law school had degrees and very few were admitted with only two years of undergraduate education. A three- or four-year undergraduate degree was effectively a requirement for entry. Despite its LL.B. heritage, the Canadian law degree has never been a true “first” or undergraduate degree, and many law schools have opted to

into the legal profession in the common law provinces. It is a three-year, full-time program with courses offered in the fall and winter.<sup>19</sup> At the end of the program, students must then qualify for provincial licensure as lawyers. Most provinces require a written bar exam component plus some period of articling (usually 10 months or so), in which the J.D. graduate works as a non-lawyer employee under a lawyer-mentor's supervision.

Nearly all students who apply to Canadian law schools intend to practice law in Canada in private practice, in a corporation, or in government.<sup>20</sup> The Canadian law student body is comprised of people, typically between the ages of twenty-three and twenty-seven, who have at least one university degree and who, in the main, are aspiring to practice law in Canada.

Law school programs at most Canadian universities are small compared to the United States. All but two Canadian common-law law schools admit less than 250 students per year.<sup>21</sup> Because there has been very little expansion in the number of places in law schools in the last half century, the competition for admission has steadily increased.<sup>22</sup>

Currently, the main barrier to entry into the legal profession in Canada is admission to law school, not the bar exam. Therefore, concerns about student performance on Canadian bar exams have not significantly affected law teaching in Canada, as they may have in other jurisdictions. Law school admission is typically dependent on undergraduate academic performance plus performance

formalize the requirement for three or four years of undergraduate education and to change the degree designation to "Juris Doctor" or J.D.

19. The Federation of Law Societies of Canada is in the process of implementing standards for an approved law degree in Canada. For the detailed standards, see "Task Force on the Canadian Common Law Degree: Final Report October 2009," online: Federation of Law Societies of Canada <[http://www.flsc.ca/\\_documents/Common-Law-Degree-Report-C.pdf](http://www.flsc.ca/_documents/Common-Law-Degree-Report-C.pdf)>. To be approved, a Canadian law degree program would demonstrate that its graduates could fulfill various competency requirements. Competency in procedural aspects of Canadian law is not currently listed as a required "competency." However, competency in "the administration of the law in Canada," as listed at page ten, may well be broad enough to include procedural aspects of the administration of the law.
20. A handful a year may pursue an academic career, but often after a period of first practicing law. Another handful a year may practice outside of Canada.
21. Osgoode Hall Law School presently admits three hundred students per year and the University of Ottawa admits close to four hundred per year. See "Law School Application Statistics," online: Ontario Universities Application Centre <<http://www.ouac.on.ca/statistics/law-school-application-statistics/>>. Note that statistics do not include deferred registrations from previous admissions cycles, nor do they include joint-degree students in all cases.
22. Canada has a population of approximately thirty-five million people.

on the American-based Law School Admissions Test (LSAT). There are remarkably few students who do not pass the bar admission requirements upon completion of a law degree in Canada.

The bar exam is set by the provincial law societies, who are regulators of the legal profession. Canada's legal profession is self-regulated, and only very recently has begun to take an interest in the form and content of law school programs, in response to people who obtain law degrees outside Canada and then seek entry into the Canadian legal profession. Any interest in regulating the form and content of law school programs has been done with reference to broad substantive or skills-based competencies like "tort" or "contract" or "administration of the law in Canada."<sup>23</sup> Legal academics are therefore largely free to design courses with their own pedagogical aims in mind. Despite this opportunity, there is a remarkable consistency across the country among basic content in Canadian law school courses, perhaps in part due to the limited availability of choice among casebook and teaching materials.

Most provincial bar exams have a civil litigation component, which is largely rules-based and doctrinal. The law societies provide study materials for students, and that is the material tested on the bar exams. These materials often correspond to the practical and doctrinal components of basic civil litigation practice covered in law school civil procedure courses in some fashion. Very few J.D. graduates fail these provincial exams, and few licensure applicants fail to complete the articling requirement, barring circumstances unrelated to performance. Therefore, the main barrier to entry into the legal profession in Canada is admission to law school.

## B. TEACHING CIVIL PROCEDURE IN CANADIAN LAW SCHOOLS

With a few exceptions, many of the features of teaching civil procedure in Canadian law schools are similar to the United States, in terms of who teaches the course, when it is offered, its length, the topics covered, the teaching materials, and the methods of examination.

Accordingly, civil procedure is taught as a course in the basic law school academic curriculum for Canada's English-speaking, common law programs. It may not be called "civil procedure" at every law school, but it is there in some form, and all but two law schools make it a mandatory part of every law student's curriculum.<sup>24</sup> For example, Osgoode Hall Law School and the University of

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23. See "Task Force," *supra* note 19.

24. The University of British Columbia, Faculty of Law and the University of Saskatchewan, College of Law offer civil procedure as an elective upper year course. See "Requirements for Graduation and Evaluation of Work," online: UBC Faculty of Law <<http://www.law.ubc.ca/requirements>>

Toronto Law School call the course “Legal Process.” In all schools save two,<sup>25</sup> civil procedure is taught as part of the upper year course curriculum. In all but one school, the course is a half-year program.<sup>26</sup>

In addition to the core civil procedure/legal process course, various schools also have upper-year electives on procedural topics ranging from alternative dispute resolution to class actions to specific topics in litigation, such as estate litigation and personal injury litigation. Some of the upper-year elective courses have a strong practical component, such as trial and appellate advocacy.

Some law schools also operate clinical programs, which promote experiential learning with students working on real court files with real clients. Many law schools participate in competitive mootings. The majority of these upper-year elective educational opportunities are taught by practicing law professionals who teach as sessional lecturers and are specialists in the particular field.

The English-speaking, common-law J.D. programs staff the teaching of civil procedure in a slightly different fashion from their US counterparts. During 2013–2014, most law schools had a roughly equal mix of tenure-track academic faculty and sessional instructors (often practitioners) teaching civil procedure (*i.e.*, an academic plus a sessional or two was common). However, three law schools had solely tenure-track academic professors teach the course,<sup>27</sup> and two schools had solely sessional instructors teaching civil procedure.<sup>28</sup>

In Canada, there are only a small number of full-time academics who identify themselves as having a special research interest in civil procedure. Even fewer identify themselves as proceduralists. In fact, of those full-time, tenure-track academics teaching civil procedure at Canadian law schools as part

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ubc.ca/current/jd/grad\_requirements.html>; “Upper Year Courses,” online: University of Saskatchewan College of Law <<http://law.usask.ca/students/current-students/upper-year-courses.php>>.

25. Osgoode Hall Law School and University of Toronto Faculty of Law teach “Legal Process” as a part of the required first year curriculum. See “First Year Program,” online: Osgoode Hall Law School <<http://www.osgoode.yorku.ca/programs/jd-program/first-year-program>>; “Program Requirements,” online: University of Toronto Faculty of Law <<http://www.law.utoronto.ca/academic-programs/jd-program/program-requirements>>.
26. “Legal Process” is taught as a full-year course at Osgoode Hall Law School. See “Required Courses,” online: Osgoode Hall Law School <<http://www.osgoode.yorku.ca/programs/jd-program/first-year-program/required-courses>>. However, the course incorporates Legal Research and Writing in addition to Civil Procedure.
27. McGill University, Faculty of Law; the University of Toronto, Faculty of Law; and Thompson Rivers University, Faculty of Law.
28. The University of Saskatchewan, College of Law and the University of Manitoba, Faculty of Law.

of their regular teaching, it appears that only half a dozen or so would likely be identified by their colleagues as civil procedure academics. That is not to say that those who also teach and research in the area are not identifiable—rather, those remaining academics who teach and research about areas of civil procedure often do so in conjunction with another area of law for which they are more readily known in the marketplace of ideas.

### C. APPROACHES TO CANADIAN CIVIL PROCEDURE: AMALGAM OR EXCEPTION?

The pedagogical and theoretical approaches taken by civil procedure teachers vary widely. This is true despite the fact that there is currently only one civil procedure casebook, written by authors from six English-speaking Canadian law schools.<sup>29</sup> There is no set curriculum nor is there a set pattern followed in teaching the course.

This may be explained in part by the varied interests of many of the scholars who teach and write about procedure. These scholars may be influenced by the area of law they pair with civil procedure as part of their academic work. Some of the variance in teaching procedure is also due to the fact that, at many schools, civil procedure is taught by a practitioner, not a full-time faculty member with a research mandate or a continuous relationship with the school. Unlike the majority of full-time faculty in the United States who teach procedure, most full-time faculty in Canada have graduate law degrees, often from the United States or Britain, and fewer of them have practiced law before pursuing an academic career.

The range of approaches to teaching procedure is a distinctive feature of the Canadian experience in the field and includes the following:

#### 1. CIVIL PROCEDURE AS “THE RULES”

Some teachers concentrate heavily on the content and interpretation of the applicable rules of civil procedure. This includes close reading of cases that interpret the rules, and reform of the rules. These teachers may emphasize the “Rules” and operational details of rules, or contrast one jurisdiction’s rules with another’s. A common theme in this approach is the idea that the rules are representative of the rule of law in the civil justice system.

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29. Janet Walker et al, *The Civil Litigation Process* (Toronto: Emond Montgomery, 2010).



## 2. CIVIL PROCEDURE AS PROCEDURAL SKILLS

Other teachers take a decidedly more pragmatic approach to teaching civil procedure and work towards imparting litigation skills. These may include drafting claims and defences, doing discovery, or arguing a motion. The emphasis is on the “how” of procedure and the operational questions behind the workings of the civil justice system.

## 3. CIVIL PROCEDURE AS LEGAL PROCESS

Still other teachers may take a macroscopic approach toward civil procedure by presenting the subject as a broad system of processes designed to resolve disputes. This is the “thirty-thousand-foot view” of civil procedure, concerned with how procedural rules interact with alternative dispute resolution, administrative law, and rights-based judicial decision making. The emphasis is on law as fluid process, not just as procedural rules.

## 4. CIVIL PROCEDURE AS ACCESS TO JUSTICE

Some civil procedure teachers present the subject in terms of how the civil justice system serves the needs of a varied population. One such need is for citizens to be able to access the system when disputes need to be resolved. This approach focuses on how the system succeeds or fails to meet the needs of those who seek access to a system to vindicate their rights. Particular emphasis is placed on the disadvantaged in the legal system and what can be done to make the civil justice system more just.

## 5. CIVIL PROCEDURE AS META-PROCEDURE<sup>30</sup>

Finally, some civil procedure teachers focus on meta-procedure, the theoretical issues of procedural law that transcend the individual rules and doctrine. These teachers use social science, political philosophy, international materials, and academic writings to teach students about the larger academic and theoretical context of civil procedure, such as how the court system invigorates public discourse or how public interests are fostered through the civil justice system.

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30. The term “meta-procedure” is borrowed from Linda S Mullenix. In her study of Robert M Cover, Owen M Fiss & Judith F Resnik, *Procedure* (Mineola, NY: The Foundation Press, 1988), Mullenix describes “meta-procedure” as the emphasis on legal theory over procedural doctrine. See Linda S Mullenix, “God, Metaprocedure, and Metarealism at Yale” (1989) 87:6 Mich L Rev 1139 at 1140.

These approaches to teaching civil procedure in Canada are by no means the only approaches and, in fact, civil procedure teachers may (and most likely do) identify with a combination of the above approaches. But the fact that these five approaches are at least identifiable as trends in a country that boasts few law schools tends to lead one to conclude that civil procedure in Canada is indeed a malleable and ubiquitous topic, and one that is integral to the training of legal professionals at academic institutions.

The gulf between the legal academy and legal practice in Canada has not historically been as wide as in the United States or United Kingdom. Canadian courts, especially at the appellate level, often rely on academic scholarship in judicial decisions. Many legal academics play integral roles in law reform efforts, and many assist in litigating leading cases. While this is not true in all instances, Canadian academics have had a profound influence on the charting of the positive law in the country.

Indeed, the fact that procedural topics are taught at Canadian law schools by both practicing lawyers and full-time academics signals that there is, at best, some comfort in Canada in mediating between substance and practice. In the end, perhaps there are merits to training future lawyers using both approaches.

## **IV. AUSTRALIA**

### **A. ENTRY INTO THE LEGAL PROFESSION IN AUSTRALIA**

The right to control admission to legal practice in Australia has become a highly contested issue. Traditionally, entry to legal practice has been a matter of state responsibility rather than federal responsibility, and in various combinations, state law societies and the courts have set and administered admission standards.

The last decade has seen a concerted effort to create uniform rules governing legal practice, including the admission and supervision of lawyers and the accreditation of law courses. The most recent model created and reposed responsibility for the legal profession in a National Legal Services Board, but it has run aground with only two states, New South Wales and Victoria, agreeing. As a result, the legal profession remains a state responsibility, but most jurisdictions have moved to adopt much of the proposed uniform legal profession legislation.

Reflecting the move from an apprentice-based training system to an educational system, the major requirements for admission to legal practice are an approved law degree and the satisfactory completion of an approved practical (now increasingly called professional) legal training course. Australia

has never had an equivalent of a bar examination; graduation with a degree from an approved course meets all the academic requirements for admission.

There is one minor exception to this picture. In New South Wales, the Supreme Court, and subsequently the Legal Profession Admission Board of New South Wales, sets examinations, the successful completion of which entitles one to entry to legal practice. To help prepare examinees for the examination, the Board developed a course of lectures and flexible delivery materials. Although it has no power to award degrees nor does it have university status, the Board nevertheless awards a Diploma of Law to those who complete the course, and this is regarded as equivalent to a degree from an approved university course.

Most Australian law degrees are undergraduate first degrees. However, over the last decade, government policy has seen significant deregulation of tertiary education, creating a competitive market. This has encouraged private providers to enter the sector, as well as sector-wide attempts to distinguish products and create market opportunities.

One of the more controversial developments has been the attempt by some universities to move legal education, wholly or partly, into the arena of “second-degree” education.<sup>31</sup> Whether called a Master of Law or a Juris Doctor program, these degrees are intended for those seeking to enter legal practice. This move has been driven largely by the fact that government policy allows universities to charge fees for graduate courses but not for undergraduate courses. As the benchmark set by the admission authorities does not distinguish between undergraduate and graduate courses, there have been doubts as to the value of these graduate degrees compared to the undergraduate programs. This question is highlighted particularly in those law schools where undergraduate and graduate students attend, in effect, the same classes. This overlap has led to difficulties trying to fit these graduate programs into the government’s framework for educational standards.<sup>32</sup>

The current system for admission to legal practice sees admission authorities in each state jurisdiction administering state-based admission standards. The admission authorities are increasingly statutory bodies with membership representing the court, the profession, the universities, and occasionally the public. These bodies

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31. *E.g.* Monash University, University of Melbourne, and University of Western Australia.

32. See Donna Cooper et al, “The Emergence of the JD in the Australian Legal Education Marketplace and its Impact on Academic Standards” (2011) 21:1 *Legal Educ Rev* 23; Nicola Berkovic “Dean warns Gillard regulator threatens education of lawyers,” *The Australian* (3 August 2012), online: <<http://www.theaustralian.com.au/archive/business/dean-warns-gillards-regulator-threatens-education-of-lawyers/story-e6frg97x-1226441738754>>.

approve both academic and legal-professional legal training courses. When seeking admission, an applicant has to satisfy the Supreme Court in their state that they have graduated with an approved degree. The Supreme Court admits applicants to legal practice through a formal ceremony in court, during which oaths are taken and the bar roll is signed.

The move to a national legal profession with the National Legal Service Board is unlikely to make much difference to admission to legal practice. For the last twenty years, there has been a quasi-national set of admission standards. In the 1980s, the courts and the state admission authorities were careful to avoid significant differences in admission standards. The Council of Chief Justices established the Law Admission Consultative Committee (Committee) to address this concern. The Committee developed a set of standards for both academic and legal professional training that has been adopted by State and Territory admission authorities across Australia. The need for national standards increased following a High Court of Australia decision in 1992 that found a constitutional mandate requiring mutual recognition of admission to legal practice.<sup>33</sup> Admission in any one state therefore automatically entitles the lawyer to admission to legal practice in any of the other Australian states.

The Committee has developed content standards for law degrees and competency standards for legal professional training courses (usually graduate diplomas). Named the “Priestley 11” and the “Priestley 12” after the chair of the Committee when these were first articulated, they were a compromise between prescription and academic freedom. The content standards for law degrees are described as “areas of required knowledge” and thus constitute the core courses in most law degrees. The standards do not prescribe how the courses are to be taught, nor do they insist that the required areas be taught as discrete subjects.

What is important for the purposes of this article is that one of the required areas of knowledge in an approved law degree is civil procedure. This requirement appears in all the standards for approved law degrees in Australia<sup>34</sup> and contains eleven topics that need to be covered to meet requirements, from “Court adjudication in an adversary system” to “Enforcement.” As with all the required areas of knowledge, an alternative is provided:

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33. *Street v Queensland Bar Association*, [1989] HCA 53, 168 CLR 461.

34. See *e.g. Rules of the Legal Practitioners*, South Australia: Education and Admission Council, 2004, Appendix A.

Topics of such breadth and depth as to satisfy the following guidelines.

The topics should embrace the general study of the rules of civil procedure relevant in the State or Territory. Rules concerning jurisdiction, the initiation and service of process, the definition of the issues through pleadings and judgment and enforcement should all be included.<sup>35</sup>

For legal professional training courses, the standards outline a number of areas of competency that relate to civil procedure. The most significant is the area of Civil Litigation Practice. The general descriptor calls for graduates of the course to be able to demonstrate skills necessary for an entry-level lawyer to “conduct civil litigation in first instance matters in courts of general jurisdiction, in a timely and cost-effective manner.”<sup>36</sup> The admission rules then outline six specific collections of competencies ranging from “Assessing the merits of the case and identifying the dispute resolution alternatives” to “Taking action to enforce judgments or settlement agreements.”<sup>37</sup> The competency-based approach underpinning the legal professional training requirements means the requirements are very demanding for course providers. Within the sub-heading “5. Negotiating Settlements,” for example, students must have:

- conducted settlement negotiations in accordance with specified principles;
- identified any revenue or statutory refund issues; and
- properly documented any settlement reached.<sup>38</sup>

The sort of legal practice in which one is entitled to engage on admission varies across the States and Territories depending on the structure of the local profession. Some jurisdictions have a divided profession: barristers, who enjoy the right to appear in the higher courts, and solicitors, who provide the broad range of legal services to the public and usually have the right to appear in the lower courts. Others have a fused profession, where admission to legal practice entitles one to practice as both solicitor and barrister.

Where there is a separate bar, additional requirements are prescribed for those seeking to practice as barristers. New South Wales, for example, requires students to pass three bar exams before entering the Bar Practice Course and then undertaking a period of pupillage with a barrister. The subjects examined

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35. *Ibid.*

36. *Ibid.*, Appendix B.

37. *Ibid.*

38. *Ibid.*

are “Practice and procedure for barristers,” “Aspects of evidence,” and “Ethics for barristers.”<sup>39</sup>

In looking at the paths for entry to the legal profession in Australia, we see that civil procedure is given significant weight at every level. It is a required area of knowledge in approved law degrees and legal professional training courses.<sup>40</sup> The rigidity of the content-based requirements for approved law degrees has led to some calls for change. Major areas of contemporary legal practice are not “areas of required knowledge,” though family law, intellectual property law, and revenue law may be candidates for future inclusion. However, the greatest pressure for change has been from superior courts seeking to have statutory interpretation prescribed as an “area of required knowledge,” preferably taught as a discrete topic.

One of the responses from law schools has been to point out that because the curriculum is already crowded, serious consideration would need to be given to removing one or some of the current areas of required knowledge. The required area of knowledge that has been suggested in discussions as being the most likely candidate for removal from the standards is civil procedure. These calls, coming largely from senior appellate judges, appear to be based on a lack of understanding about the way civil procedure is now taught. It reflects an older view of civil procedure as a vocational, practical subject that is not really entitled to a place in the academic firmament. An examination of civil procedure teaching in Australia will show that this old view is no longer valid. Instead, civil procedure is establishing itself as an important academic field in its own right, and it is making a valuable contribution to the development of civil justice in Australia.

## B. TEACHING CIVIL PROCEDURE IN AUSTRALIAN LAW SCHOOLS

For most of the last two hundred years, teaching Australian civil procedure has been the preserve of practicing lawyers. Even after the move from legal apprenticeships to university-based legal education, civil procedure continued to be taught by practicing lawyers. As a result, its standing and presence in the academic curriculum has been limited. Yet, as we have seen, Australian law schools were required to teach civil procedure if they wished to gain accreditation from the admission authorities.

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39. See “Bar exams in a nutshell,” online: New South Wales Bar Association <[http://www.nswbar.asn.au/docs/professional/prof\\_dev/exams/overview.php](http://www.nswbar.asn.au/docs/professional/prof_dev/exams/overview.php)>.

40. All current Australian law degrees and legal professional training courses have been approved. The reality is that a university would not offer a law degree unless it had received approval from the admission authorities.

For at least the last thirty years, in most Australian law schools, civil procedure has been a compulsory subject normally taught in the later years of the law degree. There are exceptions to it being made compulsory—some law schools believed that civil procedure was insufficiently academic to justify being required for the law degree. Alternatively, these law schools wanted to create an “academic” degree for those not wanting to practice law.

In those cases where the course rule does not require passing civil procedure to graduate, the law schools stress that its graduates will not be able to seek admission to legal practice unless they have completed a civil procedure subject. They all offer civil procedure as an optional subject. In their course rules, civil procedure is sometimes described as falling into the category of “quasi-compulsory” topics.<sup>41</sup>

In keeping with the vocational emphasis noted above, civil procedure courses have traditionally focused on teaching the court rules and the mechanics of litigation. Starting with jurisdiction and ending with enforcement or appeals, students are taken through the various stages of litigation, learning the relevant legal rules and timetables. It is perhaps not surprising that civil procedure has not been seen as a particularly stimulating subject. This somewhat dismal picture has begun to change dramatically.

## 1. THE GROWTH OF ACADEMIC PROCEDURALISM

The most important factor driving this change is that a growing number of Australian academics are taking an interest in civil procedure, which is changing the way it is taught and its contribution to academic literature. A number of factors are stimulating this growth. These include the growing concern over the challenges to litigation that have led to very significant changes in civil procedural systems.<sup>42</sup> These changes have been driven by both government and courts and have created the need and opportunity for research into civil justice. Governments have commissioned large reviews of litigation, providing an opportunity for academics to contribute to policy formulation.<sup>43</sup> Associated with these procedural changes has been the growth of the broader dispute resolution

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41. See *e.g.* “Undergraduate Handbook: Bachelor of Laws,” online: Monash University <<http://www.monash.edu.au/pubs/handbooks/courses/2708.html>>.

42. Bobette Wolski, “Reform of the Civil Justice System two decades past – implications for the legal profession and for law teachers” (2009) 21:3 *Bond L Rev* 192.

43. See *e.g.* Australian Law Reform Commission, *Managing justice: A review of the federal justice system* (Canberra: JS McMillan Printing Group, 2000).

discipline and significant growth in the teaching of dispute resolution, either in conjunction with or as a complement to civil procedure.

The growing presence of academic staff in civil procedure subjects has seen significant interest develop in pedagogical issues involved in teaching procedure. In the last twenty years, government funders and university administrations have placed significant emphasis on teaching quality. In many universities, new academic staff are required to complete tertiary teacher training courses as part of the probation requirements, and extensive staff development programs expose longer-standing academic staff to contemporary ideas and approaches to tertiary education. This was not a requirement of practicing lawyers in the past. The increasing scrutiny of teaching along with growth in assessment loads may have contributed to the decreased contribution by practicing lawyers.

## 2. SUBSTANCE AND SKILLS

One of the clearest directions for the future of legal education is the move away from an overwhelming emphasis on content to a focus on essential academic and professional skills. This trend can be seen in the reports of four major Australian inquiries into legal education since the late 1980s.<sup>44</sup> The most recent of these inquiries is the report by Kift and Israel on minimum teaching and learning thresholds for legal education. Their report sets out six minimum threshold outcomes for law degrees under the federal government's regulatory framework. The first of these relates to "Knowledge." The remaining five cover "Ethics," "Thinking Skills," "Research Skills," "Communication and Collaboration," and "Self Management."<sup>45</sup>

Australian civil procedure teachers have been at the forefront of the move to complement knowledge by adding the development of academic and professional skills to the learning objectives of their subjects. Civil procedure lends itself to the blending of theory and practice as well as any—and better than many—other subjects at law school. Some law schools have invested significantly in developing interesting teaching methods

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44. Dennis Pearce, Enid Campbell & Don Harding, *Australian Law Schools: a discipline assessment for the Commonwealth Tertiary Education Commission* (Canberra: Australian Government Publishing Service, 1987); Craig McInnis, Simon Marginson & Alison Morris, *Australian Law Schools after the 1987 Pearce Report* (Canberra: Australian Government Publishing Service, 1994); Richard Johnstone & Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A report commissioned by the Australian Universities Teaching Committee* (Canberra: Higher Education Group Department of Education, Science and Training, 2003); Sally Kift, Mark Israel & Rachel Field, *Bachelor of Laws: Learning and Teaching Academic Standards Statement* (Sydney: Australian Learning and Teaching Council, 2010).

45. *Ibid.*



to foster both academic and professional skills. An example of this kind of initiative is the Litigation-in-Action project at the University of Melbourne Law School.<sup>46</sup> Similarly, at Murdoch University, civil procedure has been used to develop groupwork skills<sup>47</sup> and at Flinders University, to teach self-reflection and negotiation skills.<sup>48</sup>

### 3. COURSE STRUCTURES

The freedom to introduce new content and pedagogy has been made possible by the way in which the admission authorities have prescribed the areas of required knowledge. As described above, law schools are not required to deliver stand-alone civil procedure courses, nor is the length of the course prescribed. As a result, law schools have experimented with a variety of models. The variations include combining criminal and civil procedure in a single semester-long topic (*e.g.*, University of Sydney), combining civil procedure with dispute resolution (*e.g.*, Australian National University), combining civil procedure with ethics (*e.g.*, University of Adelaide), or teaching civil procedure as a discrete subject (*e.g.*, University of Queensland).

Some law schools have sought to free up some of the curriculum by combining civil procedure with something else. There is a risk that combining civil procedure with other subjects or incorporating it in a broader dispute resolution subject can lead to a diminishment of the civil procedure component. In some courses, the civil procedure component may have been covered in less than half a semester. Nevertheless, there are clear advantages in some of these combinations. They can enable a more contextualized approach to be taken to the study of civil procedure, and emphasize the contemporary role of lawyers as dispute resolvers rather than simply adversarial litigators. It is still too soon to get an accurate perspective on how well this is being done.

### 4. TEACHING RESOURCES

A mark of the development of civil procedure as a discipline has been the growth in the academic literature on Australian civil procedure. There are now two national textbooks and a casebook that are used by Australian teachers. Regarded as the “bible” on the technical details of the rules, Bernard Cairns’ *Australian Civil*

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46. See Jacqueline Horan & Michelle Taylor-Sands, “Bringing the Court and Mediation Room into the Classroom” (2008) 18:1&2 Legal Educ Rev 197.

47. See Kate Lewins, “The Groupwork Experience in Civil Procedure” (2006) 13:1 Murdoch UEJL 225.

48. See Kathy Mack et al, “Developing Student Self-reflection Skills through Interviewing and Negotiation Exercises in Legal Education” (2002) 13:2 Legal Educ Rev 221.

*Procedure* is the oldest text of its kind and is now in its ninth edition.<sup>49</sup> The other textbook, David Bamford's *Principles of Civil Litigation*, is a more recent arrival and takes a contextual and functional approach to the field.<sup>50</sup> In addition, a major contribution to the teaching of procedure and a welcome arrival was Stephen Colbran et al, *Civil Procedure: Commentary and Materials*, now in its fifth edition.<sup>51</sup>

The periodical literature also has an increasing number of journals publishing articles on civil procedure. From the long-established Australian Law Journal to the most recent Journal of Civil Litigation and Practice, this growing list of journals is providing civil procedure teachers with teaching materials and with opportunities to publish their research.

To have continued with the former mechanical and vocationally focused model of civil procedure teaching would have hastened its end within law degrees. The Australian pathway to practice now includes a vocationally oriented legal professional training course with its compulsory subject, civil litigation practice. It would have been difficult to resist the argument that that was a better place to locate civil procedure had it remained narrow and technical. The combination of the growing number of academic proceduralists and the revitalized approach to the content and teaching of civil procedure means it is likely to remain an important part of the law school curriculum and to promote interest in and concern about the delivery of civil justice in the next generation of lawyers.

## V. ENGLAND AND WALES

There is a widespread perception that civil procedure suffers from academic neglect in the education of legal professionals in England and Wales. This section seeks to establish the veracity of that understanding through primary research conducted via questionnaires and a web survey. The findings show that civil procedure is taught at the undergraduate level in only a minimal fashion. At the masters level, the subject is studied predominantly in the context of international law. The impact on legal education of a lack of procedural teaching at the academic stage is explored elsewhere in this issue.<sup>52</sup>

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49. BC Cairns, *Australian Civil Procedure*, 9th ed (Sydney: Thomson Reuters, 2011).

50. David Bamford, *Principles of Civil Litigation* (Sydney: Thomson Reuters, 2010).

51. Stephen Colbran et al, *Civil Procedure: Commentary and Materials*, 5th ed (Chatswood, NSW: LexisNexis Butterworths, 2012).

52. See Bamford, "Learning," *supra* note 2.

## A. TRAINING LEGAL PROFESSIONALS: CONTEXT

In order to better understand the place of civil procedure in the education of practicing lawyers in England and Wales, it is first necessary to provide some context in relation to the nature and regulation of the legal profession. The practicing legal profession in England and Wales has, from its origins, been divided. Lawyers practice either as solicitors or as barristers.<sup>53</sup> Barristers specialize in advocacy, although solicitors have recently gained rights of audience in the higher courts.<sup>54</sup> Barristers provide specialist legal opinions, whereas solicitors are responsible for the conduct of litigation and may act on behalf of their clients in concluding agreements and signing contracts. Traditionally, the judiciary have been chosen from amongst the barristers; however, solicitor advocates may also now be appointed to the bench.

Hence, there are two professional bodies responsible for the regulation of the training of legal professionals<sup>55</sup> in England and Wales: the *Solicitor's Regulation Authority* (SRA)<sup>56</sup> and the *Bar Standards Board* (BSB).<sup>57</sup> Students must meet the educational and training requirements of the Solicitor's Regulation Authority in

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53. Legal executives also practice in particular areas of law: Regulated by the Institute of Legal Executives, they receive a narrower training than solicitors but may develop expertise in a specialist area. Solicitor firms also employ paralegals, who may or may not have legal qualifications, to assist in legal work. This article explores the training in relation to barristers and solicitors only. However, the highest qualification available to students who opt to enter the profession as a legal executive is the Level 6 Professional Higher Diploma in Law and Practice, which is set and assessed at the honours degree level. This comprises a number of units, some of which are academic in nature (*e.g.*, Contract and Land Law) and some of which are considered "practical" (*e.g.*, civil litigation), as well as two compulsory professional skills units. Students are only required to complete one practice area and may, therefore, not study civil litigation at all.
54. See *Courts and Legal Services Act 1990* (UK), c 41.
55. The phrase "legal professionals" in this section refers to lawyers in practice, *i.e.*, barristers and solicitors rather than academic lawyers.
56. The Solicitors' Regulation Authority (SRA), previously known as "The Law Society Regulation Board," was launched in 2007, and is the independent regulatory body of the Law Society of England and Wales. "The Society of Attorneys, Solicitors, Proctors and others not being Barristers, practicing in the Courts of Law and Equity of the United Kingdom" was founded in 1825, with the aim of improving the reputation of attorneys and solicitors. It changed its name to "The Law Society" in 1903. See "Our history," online: The Law Society <<http://www.lawsociety.org.uk/about-us/our-history/>>.
57. The BSB was established in 2006 as an independent regulatory board of the Bar Council. See "About the Bar Standards Board" (May 2012), online: Bar Standards Board <[https://www.barstandardsboard.org.uk/media/1435766/section\\_2\\_-\\_about\\_the\\_bar\\_standards\\_board\\_final\\_2013.pdf](https://www.barstandardsboard.org.uk/media/1435766/section_2_-_about_the_bar_standards_board_final_2013.pdf)>. The General Council of the Bar (or Bar Council) was founded in 1894 to deal with matters of professional etiquette. See "Our history," online: The Bar Council <<http://www.barcouncil.org.uk/about-us/what-is-the-bar-council/our-history/>>.

order to qualify as solicitors or the requirements of the Bar Standards Board to be admitted as barristers.

For entry into both branches of the profession, the required training is divided into three stages: the academic stage, the vocational stage, and the professional stage. Students choose which branch of the profession they wish to join during the final year of the academic stage of training when they apply to join the relevant vocational course. Also, at this point, they begin to apply for training contracts (if they wish to train as solicitors).

### 1. ACADEMIC STAGE

The academic stage of training is imperative for entry into both branches of the profession. It is governed by the Joint Academic Stage Board (JASB) of the Law Society and Bar Council of England and Wales (in practice, the SRA and the BSB).<sup>58</sup> The Joint Academic Stage Board was dissolved on 31 December 2013 but the SRA and the BSB retain a joint remit for the academic stage of training and the requirements for the academic stage remain the same. It is also expected that institutions will comply with the requirements and guidance of the Quality Assurance Agency for Higher Education (QAA).<sup>59</sup> As well as the maintenance of academic standards across the awarding institution,<sup>60</sup> the programs offered should comply with the subject benchmark statement for law, which “defines [as a minimum] what can be expected of a graduate in terms of the abilities and skills needed to develop understanding in the subject.”<sup>61</sup>

This stage is satisfactorily completed through passing a qualifying law degree (LL.B. or B.A.). The qualifying law degree is an undergraduate honours degree and is awarded on successful completion of three or four years full-time or four to six years part-time study. Students may opt to study law with another subject, but two years of the three-year course must consist of law studies.

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58. The most recent requirements of the JASB for completion of the academic stage of training are set out in the *Joint Academic Stage Handbook 2012*. See Solicitors Regulation Authority, *Joint Academic Stage Handbook*, Birmingham: SRA, 2012, online: <<http://www.sra.org.uk/students/jasb/joint-academic-stage-board.page>> [SRA, *JASB*].

59. *Ibid.*, ch 1.4(a).

60. *Ibid.*, Appendix C. See also “Institution Reports,” online: QAA <<http://www.qaa.ac.uk/InstitutionReports/Pages/default.aspx>>; “The Framework for Higher Education Qualifications in England, Wales and Northern Ireland,” online: QAA <<http://www.qaa.ac.uk/Publications/InformationandGuidance/Documents/FHEQ08.pdf>>.

61. “Subject benchmark statements,” online: QAA <<http://www.qaa.ac.uk/assuringstandardsandquality/subject-guidance/pages/subject-benchmark-statements.aspx>>.

Alternatively, students who have successfully completed non-law honours degrees (or have law degrees from other jurisdictions<sup>62</sup>) are eligible to complete their academic training in law by taking the common professional examination (CPE), most usually awarded as a graduate diploma in law (GDL). This is an intensive one-year full-time or two-year part-time course.

## 2. VOCATIONAL STAGE

The vocational stage of training is a further period of institutional education (one year full time or two years part time<sup>63</sup>) for students who intend to become solicitors or barristers. Those intending to practice as barristers take the Bar Professional Training Course (BPTC), previously the Bar Vocational Course (BVC), and those who intend to become solicitors must complete the Legal Practice Course (LPC).

## 3. PROFESSIONAL STAGE

The periods of institutional training are followed by a further practical stage. In the case of solicitors, students must complete a further two-year training contract with a firm of solicitors before they are able to qualify as solicitors.<sup>64</sup> Barristers are admitted to the bar on completion of the BPTC, but they must complete a further period of pupillage (minimum of one year) in chambers.<sup>65</sup> This usually comprises two sets of six months' training with a designated pupil master.<sup>66</sup>

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62. Students with degrees (whether law or non-law) from other jurisdictions must gain a Certificate of Academic Standing from either the SRA or the BSB in order to gain entry to the CPE program.

63. It is possible to study the Legal Practice Course in less than one academic year at one institution: The study period commences in January and continues through the summer vacation.

64. The Solicitors Regulation Authority has recently completed a pilot study on work-based learning as an alternative to the training contract. If implemented, this would replace the training contract. See "Work Based Learning Pilot evaluation report," online: Solicitors Regulation Authority <<http://www.sra.org.uk/students/work-based-learning.page>>.

65. Barristers in England and Wales are self-employed and work as sole practitioners. However, they work in sets or chambers, sharing facilities, clerks, and office expenses. See generally "Frequently Asked Questions," online: The Bar Council <<http://www.barcouncil.org.uk/becoming-a-barrister/guidance-for-applications/frequently-asked-questions/>>.

66. A pupil master takes charge of training a newly qualified barrister, who shadows his or her pupil master for the first six months. During the second six months of training the barrister may, with the pupil master's permission, offer legal services and exercise rights of audience in court. See "Pupillage," online: The Bar Council <<http://www.barcouncil.org.uk/becoming-a-barrister/how-to-become-a-barrister/pupillage/>>.

The concern in the context of this article is with the provision of institutional education. Hence, the focus will be on the current requirements in relation to the teaching of civil procedure for the academic and vocational stages of training.

## B. TEACHING CIVIL PROCEDURE IN BRITISH LAW SCHOOLS: THE ACADEMIC STAGE

Institutions offering the academic stage of training have limited freedom in relation to the content of the qualifying law degree or the CPE. The content is regulated by the legal professional bodies through the JASB, and by the QAA, which monitors the quality and standards of higher education in England and Wales.

### 1. QUALIFYING LAW DEGREE

To complete an honours degree, full-time students must achieve a minimum of 120 academic credits for each of three years.<sup>67</sup> This represents roughly the same number of contact hours as in the United States and Canada. Students who study law with another subject (joint honours) must achieve a minimum of 240 credits in law (equivalent to two years of law study) over the duration of the degree program.<sup>68</sup>

In addition, according to the JASB, students who wish to practice law must obtain a qualifying law degree by learning the “7 Foundations of Legal Knowledge,” and they must receive legal research training.<sup>69</sup> The 7 Foundations of Legal Knowledge include the study of Criminal Law, Equity and Trusts Law, European Union Law, Tort Law, Contract Law,<sup>70</sup> Land Law, and Public Law (Constitutional, Administrative, and Human Rights Law). Students who do not pass all of these subjects may be awarded a degree in law but will not have the necessary qualifying law degree to proceed to the vocational stage of training. These seven subjects must comprise 180 credits or more (a minimum of 1.5 years’

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67. One credit equates to 10 hours of study, which includes formal contact hours and personal and self-directed study. Hence, students should obtain 120 credits for each year of undergraduate study (equivalent to 1200 study hours). See QAA, *Higher education credit framework for England: guidance on academic credit arrangements in higher education in England* (Mansfield, UK: The Quality Assurance Agency for Higher Education, 2008), online: <<http://www.qaa.ac.uk/Publications/InformationAndGuidance/Documents/creditframework.pdf>> at para 22.

68. SRA, *JASB*, *supra* note 58, ch 2.1(b).

69. *Ibid*, Appendix L, 2.0.1, 8.1.5.

70. Tort Law and Contract Law are also sometimes described as Obligations (or Obligations 1 and 2).

study on the degree program), but only courses involving the study of aspects of the English Legal System count towards the 180 credits.<sup>71</sup>

Additionally, students must acquire a basic knowledge of the sources of that law, and how it is made and developed; of the institutions within which that law is administered; and the personnel who practice law. The JASB lays down no express requirement for the study or assessment of knowledge of the English civil justice system or of civil procedure in the undergraduate law degree. However, the QAA Subject benchmark statement for law requires that students “demonstrate a basic knowledge and understanding of the principal features of the legal system(s) studied.”<sup>72</sup> In particular, they “should be able to explain the main legal institutions and procedures of that system.”<sup>73</sup> While this may suggest that students should be introduced to civil and criminal procedure, it may relate only to the public law processes for passing laws and the constitutional arrangements governing the role of the judiciary. In practice, few law schools ensure that their students have more than a passing knowledge of civil and criminal procedure.<sup>74</sup>

## 2. CPE/GDL

Full-time students on the CPE program are required to study a minimum of 1620 hours over 36 weeks (in one year).<sup>75</sup> In practice, since most CPE courses are offered by universities, they also attract a credit rating, usually 180 credits, which equates to around 1800 hours of study.

The content of the course, as far as subject matter is concerned, is largely prescribed, since the JASB specifies that students study and pass the 7 Foundations of Legal Knowledge (as for the qualifying law degree).<sup>76</sup> Students are required to study one further area of law (the eighth subject) but, additionally, must pass an assessment on the English Legal System. Study for this element of the program is usually through reading material set for self-study prior to the start of the course, supplemented by lectures during an induction period. An express aim of the course is to “ensure the acquisition of knowledge and understanding of the English Legal

71. SRA, *JASB*, *supra* note 62, Appendix B, v.

72. QAA, *Subject benchmark statement: law* (Mansfield, UK: The Quality Assurance Agency for Higher Education, 2007), online: <<http://www.qaa.ac.uk/Publications/InformationAndGuidance/Documents/Law07.pdf>>, s 1 at para 6.1.

73. *Ibid.*

74. See our discussion of the university web survey findings in Part D, below, accompanying notes 105-107.

75. SRA, *JASB*, *supra* note 62, Appendix L, 2.0.4, 2.0.5.

76. *Ibid.*, Appendix L, 2.0.1.

System and process.<sup>77</sup> This knowledge must be assessed at the beginning of the year, and students who fail this assessment are not permitted to proceed to the rest of the course.<sup>78</sup>

### C. TEACHING CIVIL PROCEDURE IN BRITISH LAW SCHOOLS: THE VOCATIONAL STAGE

By this point in their training, students have chosen to pursue a career as a solicitor or as a barrister. Students who wish to become solicitors must complete the Legal Practice Course, and students who wish to practice at the Bar undertake the Bar Professional Training Course.

#### 1. LEGAL PRACTICE COURSE

Full-time students on the Legal Practice Course study 1400 notional learning hours (NLH) over one year.<sup>79</sup> The NLH are based on how long it would take a student of average diligence and ability to complete their studies.<sup>80</sup>

The course is divided into two stages. The first stage contains the compulsory elements prescribed by the SRA and the second stage comprises three electives.<sup>81</sup> The first stage takes 1100 NLH (110 contact hours) including 660 allocated to three Core Practice Areas.<sup>82</sup> Institutions have considerable flexibility in the design of their courses, and hence the allocation of NLH, to cater for the needs and expectations of students and a widely diverse range of firms.

One Core Practice Area is Litigation.<sup>83</sup> At least 165 NLH must be apportioned to this area, although institutions are able to offer up to an additional 165 NLH if they wish.<sup>84</sup> The Litigation course must cover both Civil and Criminal Litigation.

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77. *Ibid*, Appendix L, 2.3.4.

78. This requirement may be surprising since there is no express obligation for students studying to qualify for a law degree to undergo an assessment of the English Legal System and Process. Undergraduate law students must be able to explain the legal institutions and procedures of the system, but are not required to pass an assessment. See text accompanying *supra* notes 75-76.

79. Solicitors Regulation Authority, *Information for Providers of Legal Practice Courses* (Education and Training Unit, 2012) at 44-45, 85, online: <<http://www.sra.org.uk/students/lpc.page>> [Solicitors, *Information*]; Solicitors Regulation Authority, *Legal Practice Course Outcomes 2007* at 23, online: <<http://www.sra.org.uk/documents/sra/consultations/355.pdf>> [Solicitors, *Outcomes*].

80. Solicitors, *Information*, *ibid* at 71; Solicitors, *Outcomes*, *ibid* at 24.

81. Solicitors, *Information*, *supra* note 79 at 6.

82. *Ibid* at 45-46.

83. The other Core Practice Areas are: (1) Business Law and Practice; (2) Property Law and Practice. See *ibid* at 6.

84. *Ibid* at 15, Annex 4.



Institutions must achieve specified learning outcomes but they also have significant flexibility and are permitted by the SRA to devote the majority of the apportioned time to either Criminal Litigation or Civil Litigation.<sup>85</sup> However, there are certain minimum requirements.<sup>86</sup> Of five prescribed elements, two have particular relevance to a discussion on the teaching of civil procedure.<sup>87</sup>

Since the Litigation course is one of three required Core Practice Areas and the SRA requirements for the teaching of civil procedure are designed to prepare students for practice, the relevant elements of the course are largely concerned with technical aspects, such as ensuring that students understand the relevant rules and can draft appropriate documents; can identify appropriate fora for dispute resolution and the necessary procedural steps to prepare and conduct litigation; understand the costs consequences of different outcomes; and are aware of the court's role in the litigation process and of enforcement and appeal mechanisms.<sup>88</sup> In short, the course content is highly technical and rule-based.

## 2. BAR PROFESSIONAL TRAINING COURSE

Full-time students on this program are required to study for a minimum notional study time of 1200 hours, over a minimum of thirty weeks.<sup>89</sup> The course is divided into four elements: Professional Ethics, Skills, Knowledge Areas, and Options.<sup>90</sup> Providers are required to teach three specified Knowledge Areas, including Civil Litigation, Evidence, and Remedies. Unlike the Legal Practice Course, students study Criminal Litigation, Evidence, and Sentencing as a separate Knowledge Area, the third Knowledge Area being Evidence.<sup>91</sup>

Providers of the program are required to allocate 10 per cent of the available study time to Civil Litigation, Evidence, and Remedies, which translates to twelve credits (120 hours study time).<sup>92</sup>

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85. *Ibid* at 15.

86. Solicitors, *Outcomes*, *supra* note 79 at 12-14.

87. These are Elements 3 and 4, but see also Element 2. See *ibid* at 13.

88. *Ibid*.

89. Bar Standards Board, *Bar Professional Training Course Handbook 2012-2013*, London: BSB, 2012, online: <[https://www.barstandardsboard.org.uk/media/1435625/bptc\\_081112.pdf](https://www.barstandardsboard.org.uk/media/1435625/bptc_081112.pdf)> [BSB, *BPTC*] at 75-76.

90. *Ibid* at 13.

91. *Ibid*. While Evidence is expressly stated to be the third Knowledge Area, this appears to be subsumed, in terms of teaching, learning and assessment, into the Civil Litigation and Criminal Litigation Knowledge Areas.

92. *Ibid* at 14.

The BSB is highly descriptive in the aims, objectives and learning outcomes, as well as the content, of the Civil Litigation Course.<sup>93</sup> Students are required to have an understanding of the organisation of certain courts, the overriding objective of *The Civil Procedure Rules* (the *Rules*),<sup>94</sup> the impact of the *Human Rights Act*, procedural tracks, pre-action protocols, funding and limitation periods, as well as a detailed understanding of the practical application of the rules in the bringing of proceedings (from commencement through to costs assessment; appeals and enforcement of judgments, including interim applications and disclosure). Again, the context is practical: Institutions are informed that “teaching and learning must focus on what happens in practice,”<sup>95</sup> and a specific guideline emphasizes the “practical focus of the course,” particularly in relation to civil and criminal procedure.<sup>96</sup> A stated aim of the program is to “move the student from the classroom to the courtroom.”<sup>97</sup>

#### D. WHAT IS TAUGHT?

It is clear that the relevant professional bodies require that civil procedure be taught at the vocational stage of training and that the emphasis at that stage be to ensure that the student is prepared for practice. Furthermore, there is no requirement that civil procedure be taught at the academic stage. However, it does not necessarily follow that civil procedure is never taught at the academic stage or that it is never taught as an academic subject at the vocational stage. In order to establish what is actually taught, two surveys were conducted: The first survey was conducted through questionnaires and the second survey, which drew on the results of the first, reviewed university websites.

##### 1. QUESTIONNAIRES

Questionnaires were sent to: a) the heads of eighty-three university law departments across England and Wales offering undergraduate and masters programs<sup>98</sup> for

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93. In the BPTC Handbook, the detailed instructions for the content of the Civil Litigation, Evidence and Remedies course covers seven sides of A4 paper. See *ibid* at 24-31. On the contrast, the SRA's *Legal Practice Course Outcomes* contains less than one side of instruction in relation to the Civil Procedure aspects of the Litigation course. See Solicitors, *Outcomes*, *supra* note 79 at 12-13.

94. *The Civil Procedure Rules 1998*, SI 1998/3132 (L.17).

95. BSB, *BPTC*, *supra* note 89 at 62.

96. *Ibid* at 13.

97. *Ibid* at 10.

98. The word “program” is used throughout this section to refer to the degree or diploma.

dissemination to the relevant academic staff, b) to the directors of CPE programs, c) to the directors of LPC programs and d) to the directors of BPTC programs. Responders were asked to return questionnaires in one week.

University providers of degree programs were asked whether there were any courses<sup>99</sup> that focused on civil procedure, either offered during the first or in subsequent years (2d stage) of the program, or whether there were courses that contained an element of teaching on civil procedure. The questionnaire also requested information on any courses on civil procedure taught at the masters level. The questions sought to gain factual data on whether courses that offered teaching in civil procedure were compulsory or optional and the names of those courses.

CPE program directors were asked whether civil procedure was taught as either the eighth subject (*i.e.*, not prescribed by the JASB), as an elective or as a compulsory course, or as part of the compulsory introductory subject on the English Legal System and, if the answer to any of these three options was positive, the names of those courses.

LPC and BPTC providers were asked to provide information about the compulsory courses on civil procedure and about any electives that contained opportunities for teaching and learning on this subject.

All providers were asked factual questions about the proportion of the year devoted to the subject of civil procedure, who provided the teaching, how it was taught, what core reading materials were used, and what topics were covered. Providers were also asked to answer evaluative questions on whether the focus of any civil procedure teaching was on technical rules or on the principles behind those rules and on the impact of the subject on students and on other areas of the curriculum.

The questionnaires returned from the providers of undergraduate law programs provided useful information on the names of courses that either included elements of, or focused on, civil procedure teaching. For example, 63 per cent of questionnaires returned had first-year courses that included an element of civil procedure teaching. Typically, these courses were entitled English Legal System, Legal Process, Legal Method, or some similar title.

The questionnaire responses also provided information on the core reading material for those courses. The texts used were reputed books on the Legal System or Legal Process. They each contained chapters on the civil justice system

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99. The word "course" or "subject" is used throughout this section to refer to an individual stand-alone subject (*e.g.*, Contract Law). Such courses or subjects are sometimes referred to by institutions as "modules."

and process. As would be expected in a basic course covering the entire English Legal System or Process (including sources of law, court structure, the judiciary, and criminal justice and procedure), the chapters provided a useful but minimal introduction to the civil justice process. However, the extent and consistency of coverage in those books were sufficient to suggest that other undergraduate first year courses bearing similar names would also include an element of civil procedure teaching (albeit in the context of an introduction to the civil justice system). This conclusion is supported by the fact that a relatively recent review of the civil justice system has led to high profile radical reforms of the civil justice process that are almost certain to be discussed in any course including teaching on civil justice.<sup>100</sup>

## 2. UNIVERSITY WEB SURVEY

A subsequent review was conducted of the websites of all institutions offering an undergraduate degree in law that had not returned questionnaires, to search for courses with similar names, and to search for courses that focused on civil procedure or litigation. From this survey it was possible in most cases to establish a rough percentage of time devoted during the academic year to the courses that contained an element of civil procedure teaching and to the teaching of civil procedure as a stand-alone subject. Questionnaire responses provided similar information on masters-level courses and the subsequent web survey also searched for courses on civil procedure at this level.

## 3. UNDERGRADUATE LAW DEGREE PROGRAMS

The findings concerning undergraduate law degree programs were instructive. Sixteen universities returned questionnaires: due to the short period for responses, this was an acceptable return rate and provided useful information to support the web survey. None of the sixteen institutions returning questionnaires had first-year courses devoted to civil procedure; however, ten (62.5 per cent) had first-year programs with some element of civil procedure. In the main, this subject appeared to be taught in the context of teaching and learning on the English Legal System or legal method.

The web survey showed that forty-eight (57.8 per cent) out of a total of eighty-three university law departments (including those who had submitted responses to the questionnaire) had introductory undergraduate courses likely to include

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100. For the review, see Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: The Stationery Office, 1996). For the reforms, see generally *supra* note 98.

some teaching on the civil justice system and, hence, on civil procedure. None appeared to have first year courses devoted solely to civil procedure. However, the questionnaire responses indicated that, on average, fifteen to thirty study hours were devoted to civil procedure within the umbrella subject out of a total of twelve hundred in the year. In general, this would equate to three to six hours teaching time and ten to twenty-five hours personal study.

The focus of study, based on the coverage of the textbooks used and on the questionnaire responses, appeared to be on the recent reforms to civil procedure. Hence students were introduced to the general principles behind the *Rules* in the context of the need to reduce delay and expense for the parties, and the aim of improving access to justice (including through the use of ADR procedures). However, one institution<sup>101</sup> had a course that was skills-based in the first year. Students worked in groups to represent a party through the various stages of a dispute in an online simulation and ultimately met face to face to find a negotiated settlement. Students were introduced to the procedural rules and pre-trial and trial processes and identified procedural options during the course of the simulated dispute.

Of the universities that returned the questionnaires, only one had an advanced course devoted to civil procedure. This optional course was entitled Law in Practice, in which students chose to study either criminal or civil procedure. The course subjected practical legal experience (gained by the students through the use of simulation software) to academic scrutiny and intellectual examination. Students at one other university took a Legal Case Study course at the second stage, but this course focused on advocacy rather than civil procedure.

The web survey suggested that twelve universities (out of eighty-three) offer second-stage courses<sup>102</sup> that focus on civil procedure or may include some aspects of civil procedure teaching. For example, while it is feasible to conduct a course on ADR without referring to civil procedure, the *Rules* place courts under a duty to encourage parties to litigation to undertake an ADR procedure where it is appropriate to do so.<sup>103</sup> Hence, a course on ADR may include teaching on the role of ADR in the civil justice system and on the *Rules* approach to encouraging the use of ADR. Information received from one institution that runs an Alternative

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101. The data for all institutions is anonymous.

102. These include Civil Procedure (1 university); Civil Procedure and Evidence (1); Practice, Evidence and Procedure, Law in Practice, or similar (3); Civil Litigation (2); and Arbitration or Alternative Dispute Resolution (4).

103. See *e.g.* *Rules*, *supra* note 94, r 1.4(2)(e).

Dispute Resolution course states that ADR is taught “as a spectrum of procedures to show how non-court ‘in the shadow of the law’ ... procedures can be employed.” To this end, the rules of procedure and pre-trial processes are taught in so much as they impact on ADR, and enable students to identify opportunities for ADR.

The responses to the questionnaires indicated that the lecturers for both the first year courses that contain some element of civil procedure teaching, and for the upper year courses devoted to civil procedure, were predominantly academic members of staff, although some were practitioners prior to taking up academic appointments.

#### 4. MASTERS-LEVEL LAW PROGRAMS

The findings concerning masters-level programs were also interesting. Five of the sixteen universities who returned questionnaires reported having stand-alone courses on civil procedure in their taught masters programs. Titles of these programs included Civil Dispute Resolution; Principles of Civil Procedure; and International Commercial Litigation and Arbitration. The subsequent web survey of universities showed that seventy-seven out of eighty-three universities had masters-level programs.

Of these, fifty-three offered courses that were likely to contain a procedural element, but primarily in the context of international law: Forty-one of the courses focused on international commercial litigation, arbitration or dispute resolution. Additionally, a significant number of courses addressed procedure in the commercial context: Thirty-six centred on commercial arbitration, litigation, dispute resolution, or legal practice (mainly in the context of international law). A number of masters programs also offered optional courses on ADR (ten) or courses on conflict of laws that appeared to contain at least an element of procedure (nine).<sup>104</sup> A smaller number offered courses on mediation.<sup>105</sup>

Only four institutions had stand-alone courses that focused directly on civil procedure or procedural principles.<sup>106</sup> These appeared to focus on English civil procedure with a comparative element. One institution also included teaching on the English Legal System as part of its induction for the LL.M. program, 25 per cent of which was devoted to civil procedure.

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104. The web survey on this course was not exhaustive, so there may be a higher number of masters programs that contain course on Conflicts of Laws.

105. Two courses on mediation were included in the web survey data. However, this data does not include courses on family mediation.

106. Three of these are convened by the same professor.

The questionnaire responses indicated that the masters-level courses that focused specifically on civil procedure were taught by academic staff members with a significant degree of expertise in the field. These courses focused on the procedural principles governing civil litigation and took a comparative approach to key stages of litigation procedure. However, the web survey showed that courses on international commercial arbitration or litigation were largely taught by lawyers trained as practitioners. This was particularly true in the London universities, which have a strong representation of barristers amongst tutors for subjects such as International Commercial Arbitration and Litigation (although more recently appointed lecturers in these subjects, particularly at institutions outside London, appear less likely to be trained as practitioners<sup>107</sup>).

A significant majority of those teaching the relevant courses were designated “Dr.” or “Professor”<sup>108</sup> and were individuals who research and publish in the areas in which they teach. These courses took a theoretical approach to the issue of jurisdiction, choice of law and enforcement to enable students to critically evaluate the rules and processes, although a number of courses also aimed to provide students with the skills to practice in the area. For example, one course also included a practical element whereby students were able to apply their learning to a real dispute.

##### 5. CPE/GDL PROGRAMS

Nine out of approximately forty CPE/GDL providers<sup>109</sup> returned responses to the questionnaire. Seven of those providers had courses containing elements of Civil Procedure: In the main, these courses were entitled the English Legal System or similar (as the professional body requires students to pass an assessment in this subject at the start of the CPE program). With one exception, these courses took place in the first week of the program, comprising between thirty minutes and four hours of the week’s instruction. As with the undergraduate teaching on this subject, the focus was largely on the impact of the recent reforms on civil procedure and a general introduction to the principles behind the procedural rules.

Since all CPE providers are obliged to assess students on the English Legal System, it would seem probable that most other institutions would offer similar

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107. This reflects the fact that the current career trajectory for academic lawyers in England and Wales is most usually through an entirely academic route: first degree, masters degree, Ph.D./D.Phil.

108. In the UK system, academics with tenure are not routinely entitled “Professor.” Doctorates in Law are earned after three to four years’ work on a thesis that makes an original contribution to knowledge (typically one hundred-thousand words).

109. The number of providers fluctuates from year to year.

induction programs or set pre-course reading that contains at least a small section on civil procedure. However, one provider offered a four-week induction program. During three weeks of this time, students undertook a mock civil claim from initial interview to trial. The learning was practice-based but with the aim that students understand, at this early stage, the impact of procedural factors on the outcome of cases. One institution also had a compulsory course entitled Professional Skills and Practice, which provided instruction on Civil Procedure as part of a broader study designed to foster legal analysis skills in order to bridge gap between the content of law and its practical application.

All CPE/GDL students study an eighth subject in addition to the 7 Foundations of Legal Subjects prescribed by the JASB. Three of the nine providers who returned questionnaires permitted students to write an extended Legal Research Project. Two of these appeared to offer students a relatively free choice of topic, which could include civil procedure, while the third provided students with a choice of essay titles including an essay on the success of civil procedure reforms and another on the pros and cons of alternative dispute resolution. In addition, a significant number of other CPE/GDL providers offered students the opportunity to undertake an independent study project for their eighth subject. Some of these students would likely choose topics on civil procedure or alternative dispute resolution.

## 6. LPC PROGRAMS

Five out of twenty-seven providers of the LPC returned questionnaires. LPC programs must include Litigation, including certain elements of Civil Procedure.<sup>110</sup> Aspects covered include an understanding of the *Rules* and their application; the court's role in the litigation process (including case management powers); procedural steps prior to commencement, issue, and preparation for trial; identification of appropriate fora for dispute resolution; and identification of the costs consequences of different outcomes and the effect of different costs rules, as well as mechanisms for enforcement and appeal.

The questionnaire responses showed that the emphasis was on teaching the rules in the context of how they operate in practice. However, students were also introduced to the principles behind the rules: in particular. The overriding objective of the *Rules*<sup>111</sup> is the guiding principle behind any procedural decision (one provider emphasized the need for parties to co-operate in order to minimize

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110. "Legal Practice Course: Authorisation & Validation 2009," online: Solicitors Regulation Authority <<http://www.sra.org.uk/students/lpc.page>> at 6.

111. *Rules*, *supra* note 94, r 1.1.



delay and reduce legal costs). Students were taught by qualified practitioners and former practitioners, some of whom had teacher training and some of whom were described by their institution as academics. Additionally, two of the institutions that returned questionnaires also offered an advanced course that included Civil Procedure (Advanced Litigation and Dispute Resolution/Commercial Dispute Resolution).

A web survey of other providers showed that a significant number offered electives in Advanced Litigation, Advanced Commercial Litigation and Dispute Resolution, or Personal Injury and Clinical Negligence Litigation. These courses appeared to be designed to build on the knowledge of litigation procedures covered during the earlier course on Litigation in the context of a particular sphere of law and again the emphasis was on practice.

## 7. BPTC PROGRAMS

Two out of nine institutions<sup>112</sup> providing this program returned questionnaires. As outlined above,<sup>113</sup> students must study Civil Litigation, Evidence and Remedies, the content of which is heavily prescribed by the Bar Standards Board.<sup>114</sup> The students are taught by qualified barristers and the focus of the teaching is on the technical rules and their application in practice, although some attention appears to be paid to the principles behind the rules. A web survey of providers showed that most gave students the option to take a further advanced course in subjects such as Advanced Civil Litigation, Arbitration, and Alternative Dispute Resolution. The BSB permits students to take a maximum of two single or one double optional course. The options must build on the skills learned in the core of the course and “must be taught with a view to professional practice.”<sup>115</sup> The focus is, therefore, on civil procedure or dispute resolution in practice.

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112. The BSB website lists twelve institutions as providing the BPTC program. However, five of these providers are offered by two of the same umbrella organizations at different locations (BPP Law School offers its program in London, Leeds, and Manchester; the University of Law offers its program in London and Birmingham). See Bar Standards Board, “BPTC Providers,” online: BSB <<https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/bar-professional-training-course/bptc-providers/>>.

113. See BSB, *BPTC*, *supra* notes 90-92 and accompanying text.

114. See BSB, *BPTC*, *supra* note 89 and accompanying text.

115. *Ibid* at 54.

### E. CIVIL PROCEDURE'S LACK OF PROMINENCE IN THE ACADEMIC LAW CURRICULUM

The findings of the questionnaire and the subsequent web surveys showed that around 60 per cent of undergraduate students appear to encounter civil procedure at a minimal level in their first year programs, generally in the context of teaching on the English Legal System or Legal Method. A much smaller number of institutions have courses devoted to civil procedure during the later stages of the undergraduate degree program and of those that do, a greater number do so in the context of courses on alternative dispute resolution. Students taking the CPE course appear more likely than undergraduates to receive some instruction on civil procedure during their induction program (although the time devoted to this is generally minimal). These introductory courses generally focus on the impact of the recent civil procedure reforms and the principles behind those reforms. Students encounter the rules in a general sense and also briefly consider issues such as access to justice and the use of ADR.

The masters-level programs that offer courses in procedure generally do so in the context of international commercial arbitration and litigation. There are few courses at this level devoted to civil procedure.

The courses on civil litigation conducted at the vocational stage of training are compulsory for students on the LPC and the BPTC. These are largely prescribed and focus on knowledge of the technical rules and their application, since the aim is to equip students for practice. The providers appear to offer a number of advanced courses on litigation, but these focus on particular areas of practice and, again, appear to be technical in nature and practice based.

Hence, it is clear that civil procedure is currently studied in England and Wales, but instruction largely takes place at the vocational stage of training. While a significant number of academic institutions teach civil procedure as a small part of a first year subject on the undergraduate law degree, only a small minority offer advanced undergraduate subjects that contain some teaching on civil procedure. Hence, in the main, the academic stage of training for the legal profession largely ignores civil procedure as a subject for academic study.

In part, this may be explained by the fact that civil procedure is taught at the vocational stage, closer to the time of practice, and by the fact that the JASB does not require universities to teach this subject. While it is necessary that the procedural rules be taught in a practical manner (either at the vocational or practical stages of training), this does not fully explain why this subject is not explored from an academic perspective in the universities of England and Wales.

Possible explanations for this state of affairs are explored elsewhere in this issue, together with the impact that the lack of teaching on this subject at the academic stage has on legal education.<sup>116</sup>

## VI. CONCLUSION

This overview of the place of procedure in the law school curriculum and in professional training, the topics that the subject of “procedure” encompasses (such as pre-trial and trial practice, ADR, advocacy, ethics and professional responsibility), and the various ways in which procedure is learned (such as lecture/discussion and tutorial teaching, problem-based and experiential programs, clinical and community programs, and competitive advocacy) reveals some sharp contrasts in experience between the four common law legal systems.

The US experience is characterized by its mandatory first year course and tremendous number of full-time tenure track faculty with research obligations specializing in procedure. This is explained in part by the historical emphasis on pleading in law teaching; the graduate, professional nature of American legal education; the sense that students need to understand civil procedure to get a good grasp on what cases in their substantive courses stand for; and the intricacies of federalism as they affect American civil procedure, which make the course intellectually challenging.

The Canadian experience is characterized by the inclusion of a basic procedure course at some point in the degree, taught by a mix of full-time and adjunct faculty who often specialize in other subjects as well. Thus, despite the widespread use of a single casebook, the subject is marked by a variety of teaching styles and intellectual foci.

In Australia, civil procedure features as a requirement for entry to the legal profession and is given significant weight in both approved law degree programs and legal professional training courses. However, the fact that the content and delivery model are not mandated by oversight has led to creative ways to teach the subject in law schools. This fact, coupled with the emergence of a new wave of Australian academic proceduralists who have seized this opportunity to fuse their scholarly endeavours with new teaching techniques, has resulted in a move away from the prior practitioner-oriented approach to procedure in Australia and a move toward a melding of academic and professional skills.

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116. See Bamford, “Learning,” *supra* note 2.

Finally, the experience in England and Wales is that procedure is rarely offered as part of the academic curriculum and, instead, is taught as a comparatively small component of the vocational training programs. It is characterized by relatively little focus on theoretical questions and more on the technical aspects of procedure directly relevant to the practice of law.

This comparative survey highlights the distinctive features of the teaching of procedure in these common law systems and provides a basis for exploring the impact of the particular approach taken in each system to legal education and the law school curriculum, to the support of scholarship and the community of academics advancing knowledge the area, and to the practice of law and civil justice reform. These issues will be considered in the remaining articles in this collection.