Teaching Civil Procedure: A Retrospective View

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I have taught Civil Procedure in American law schools for forty years. The course I taught in 1999 bears only a very loose resemblance to the one I taught in 1960. My 1960 course bore scant resemblance to the one I took from Austin Scott in 1952–53, and virtually none to the course he took from James Barr Ames in 1907. Scott taught with a twinkle in his eye that enabled him to pillory students without their thinking his motive was other than to help them clear the cobwebs from their thinking. The content of his material mattered little. And apparently this was even more true for the teaching of Ames, of whom Scott said to me, “I did not need a course in legal ethics because I knew James Barr Ames.”

The Demand for Civil Procedure: Competence

If there is a traditional law school curriculum, it has no author. In its structure, it expresses no coherent premise. In its details, it is the result of myriad responses of teachers to their students, and that is as true of Civil Procedure as of any other course. While students are seldom aware of the power they exercise, they hold their teachers in the same thralldom that other audiences impose on artists performing before them. Moral cowardice tends to be the standard of such industries. For this reason if no other, the curriculum, like other legal institutions, is the product of experience, not logic.

This is not to say that individual teachers have no power to decide what to teach. We teachers have power over our classroom agendas and are to some degree free to choose what sort of Contracts or Civil Procedure course to present to our students. But we have considerably less freedom than teachers of literature, for the reason that there is but one law applicable to the deeds and misdeeds of our fellow citizens, and it is not made, selected, or necessarily approved by us, and our students know that. Our students come to see Shakespeare, and it won’t do to perform Ibsen, however much better Ibsen may or may not be. In this important respect, there is no canon in the law curriculum comparable to the high fashion in literature courses that has been the object of recent concern and debate.

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To the extent that there is a traditional curriculum, Civil Procedure has not always been a part of it. The subject was irregularly taught in university law departments before the twentieth century. Perhaps the reason was the one in the mind of Albert Venn Dicey when he affirmed that "English law must be learned and cannot be taught, and that the only places where it can be learned are the law courts or chambers." English civil procedure was not amenable to intellectual discourse. In any case, it seems that nineteenth-century students studying law in universities did not necessarily expect instruction in civil procedure.

But then it was not until the latter part of that century that Americans in number began to enroll in university law schools for the purpose of acquiring saleable Competence. Students now expect to acquire Competence, i.e., professional status associated with information that can be sold in exchange for a suitable income. If this were not otherwise the case, the high price of today's legal education requires that it be so. We teachers deny students satisfaction of that appetite at the peril of rejection, potentially acute rejection, which no performing artist will withstand for long. It is this student demand that dictates the teaching of Civil Procedure as a basic course, and no teacher of the subject will long resist it. The demand is, however, easily satisfied by teachers of Civil Procedure because students uninformed about the mechanics of civil justice are unlikely to be able to employ usefully any information they might assimilate about other legal texts and traditions of private law or public.

Yet few who devote their careers to law teaching are pleased to think of themselves as mere fillers of passive vessels or as trainers of Hessians. In the first place, we know (if we are realistic) that teachers are largely dispensable in the acquisition of the information our students seek. For that purpose, for the most part, students could as well go straight to Gilbert's Outline or any of its competitors and bypass their teachers. CALI and others now provide excellent means of autoinstruction. Moreover, if legal education were purely human capital, most of us who provide it would as soon do something else, such as maximize our own wealth rather than that of our students.

The Suppliers: Civil Procedure and Truth

As members of the academic profession, we are prone to align ourselves with a different pursuit than the pursuit of Competence. The academic profession's preference is the search for Truth. Fortunately for us, Truth is at least sometimes useful. Our students generally bring to law study a profound misconception of the nature of law. It is their original sin to suppose that one who assimilates a sufficient number of legal rules or principles is thereby made a lawyer. They start with the ignorant assumption that rules of court bind judges to a ceremony that leads to the correct application of law to discerned reality. While a knowledge of court rules and statutes such as a commercial outline can provide is not as useless as some sophisticates may believe, it is chiefly wisdom and moral judgment, or prudence as Anthony T. Kronman

would have it,\textsuperscript{2} that makes a lawyer competent to render service valuable to paying clients. Effectively to endow students with that insight and to elevate their professional judgment is, in a sense, to lead them on a pursuit of Truth.

Even this joint service to Truth and Competence is not always welcomed by those to whom it is provided. We now live and work in an age of consumerism, driven in part by high tuitions. Unfortunately, because law students seldom bring to their enterprise a sound opinion about what it is they need to learn, teachers are at risk of disserving their students by giving them what they think they want. This problem may be especially acute for teachers of Civil Procedure because of the high level of indeterminacy in much adjective law. Teaching Civil Procedure therefore sometimes requires us to gauge just how much Truth our students are willing to stand.

On the other hand, there is also a finite limit to the amount of Truth that is available to share with law students. Most of the great truths about law were fully revealed by the time of Justinian. Moreover, the system of civil procedure we teach rests on the assumptions of the Enlightenment. Our premises are that it is possible to discern reality about past events and to apply legal texts to resolve disputes arising out of those events. It is not useful to students to reexamine those premises, or seriously to contemplate a different system resting on different premises.

For these reasons, if there were a Nobel Prize in law, it would be a great challenge to identify a credible nominee. In that respect much law resembles gross anatomy, a subject that must be mastered by novice physicians but must be taught by teachers who have no greater chance of discovering a new truth in their field than would a modern explorer of discovering a new continent. While Holmes called upon us to employ "the lightning of our genius,"\textsuperscript{3} Thomas Cooley, a man with his feet more firmly on the ground, cautioned those of Holmesian genius that law is of little value or effect if does not express "the common thoughts of men."\textsuperscript{4} At least with respect to civil procedure, Cooley was plainly right and Holmes wrong. Ours is a humdrum discipline not easily adapted to the role of genius engaged in a soaring search for Truth.

And even those striving to discern and reveal smaller truths about civil justice are imprisoned by the reality that the only law we have is made by persons holding appropriate commissions—persons who must themselves negotiate and compromise their utterances. What matters in reality (as our students know at the outset) is what those persons do and say, and a curriculum taking leave of the texts to which those persons pay homage is disseminating neither Competence nor Truth. There being only one body of adjective law applicable to the resolution of civil disputes, it is unsurprising that all law teachers from one school to another tend to teach more or less the same stuff.

\textsuperscript{2} The Lost Lawyer: Failing Ideals of the Legal Profession (Cambridge, Mass., 1993).

\textsuperscript{3} Address of Chief Justice Holmes at the Dedication of the Northwestern University Law School Building, Chicago, Oct. 20, 1902, in Collected Legal Papers 272, 276–77 (New York, 1920).

\textsuperscript{4} Harvard University, A Record of the Commemoration, November Fifth to Eighth, 1886, On the Two Hundred and Fiftieth Anniversary of the Founding of Harvard College 95 (Cambridge, Mass., 1887).
Nevertheless, the desire to escape the doom of being an academic pedestrian at least partly explains the impulse of many law teachers to seek the intellectual excitement and status of more abstract and hence more honorific disciplines. Such teachers might, if their own preferences were the only consideration, prescribe a first-year law curriculum of, say, Public Choice, Game Theory, Hermeneutics, Distributive Justice, and Ascriptive Metaphysics (a subject I think I just invented as a candidate for next season's intellectual fad). While there may indeed be unrevealed Truth at the bottom of these several wells, we cannot convince first-year students of Civil Procedure that they need to drink from them as a precondition to becoming lawyers. However, while good law teaching cannot be a search for previously unrevealed Truth, even Ascriptive Metaphysics probably has some illumination that it can shed on the ceremonies of civil justice. The teacher can therefore indulge herself in occasional forays into such marginalia without betraying her students' ambition to understand what courts actually do.

Civil Procedure and the Public Good

Competence and Truth are not the only available themes or purposes of instruction in Civil Procedure. University law departments, unlike the proprietary sort, were created not by teachers, or by students, or by those chiefly concerned with the welfare or amusement of either of those groups or even with the social status associated with academic or professional credentials, but by those who imagined that law teaching would serve the public interest. The hope was that those favored with such education would find themselves under a duty to serve the public.

The need for such a profession abides. Even if students pay tuition equal to or greater than the operating cost of today's professional school, there are real social costs associated with our operations to be kept in mind by those who benefit. We ought not forget that we take three years of our students' lives, causing them to forgo income and incur debt; that this time-serving requirement restricts the delivery of legal service to persons willing and able to invest in human capital, a willingness not evenly distributed across the population; that professional incomes are heightened by our exclusivity, but so are the costs of legal services paid by those who need them; and that we nurture intellectual arrogance and class bias by being who we are. The public should not be asked to suffer our continued existence if all we do is to indulge the student demand for Hessian training in the form of costly information transmission valued for its effect in separating them from the lumpenproletariat, and/or to indulge our own desire for academic status.

The founding purpose of American legal education was not to impart Competence, nor to reveal Truth, but to foster Virtue in the institutions of democratic government. Toqueville found American lawyers to be like European aristocrats not because of their pretensions of social status, but because of the stabilizing role they played in democratic government.5 It was to

promote that role that law teaching emerged in America in the eighteenth century.6 While this founding purpose has been confounded by students seeking competence and academics pursuing truth, public virtue remains needful and law teachers are the group having the best opportunity to nurture it.

Teachers who perform their duty to foster virtue can enhance their students' understanding of the moral duties of officers exercising power over fellow citizens in a democracy.7 A polity served by a profession understanding those moral duties has a good chance of remaining a republic; a polity lacking such a profession, our ancients believed, is unlikely to be self-governing for long. Civil Procedure is the premier opportunity for teachers to conduct such moral education.

Curricular choices are made with a mix of these purposes in mind; competence, truth, and virtue compete for place in Civil Procedure as in other courses. Within the parameters of a single course conducted by a single teacher, we are free to respond to the uninformed student demand for competence as little as we think we can get away with; we can pursue truth for a few orbits around the planet; and we can try in different ways to initiate students to the demanding moral discipline of public virtue. The mix of these aims is, hour by hour, the freedom and responsibility of the law teacher. No subject is better suited to the simultaneous pursuit of competence, truth, and virtue than Civil Procedure.

A Short History of the Civil Procedure Course

Nevertheless, the two of our forebears in American law teaching who had the best opportunity to shape a curriculum in law omitted to teach Civil Procedure. They came to this common failure from opposing positions.

The first of the two was George Wythe, who had an open choice at the time of his appointment as professor of law and politics at William and Mary in 1779. Wythe understood his mission to be the nurturing of public virtue. Although a scholar of repute, he was not an academic person in the contemporary sense: he was a sitting judge while also a teacher. And it was not his purpose, nor did he seek to attract students, to prepare them to appear in court. He was preparing his students for public life in the Commonwealth of Virginia. He had his students for a single academic year, and he was their only law teacher.8

Wythe was constricted in his choices of content by the availability of reading materials. His lectures were in part a guide to Blackstone, the one generally

7. I have tried to develop this theme more fully in Stewards of Democracy: Law as a Public Profession (Boulder, 1999).
8. See Carrington, Revolutionary Idea, supra note 6, at 533–38.
available and readable law book. His students read not only those parts of Blackstone depicting the English law of contracts and property and the common law of crimes, but also the account of the English constitution, which Wythe apparently employed as an occasion to extol the greater virtues of the Virginia constitution he had helped write. He also lectured on Roman law, a subject on which he was acknowledged to be the most learned American. He introduced his students to the literature of political economy, notably the then recent works of Adam Smith and Baron Charles Montesquieu. He also conducted moot courts and fortnightly meetings of his students organized as a legislative body.

Wythe’s successor, St. George Tucker, followed a similar pattern and at the conclusion of his teaching career, in 1805, published an Americanized edition of Blackstone, eliding Blackstone’s royalisms and adding an extended treatment of American constitutional law based on Tucker’s own lectures. The Transylvania University Law Department, perhaps the most important in antebellum times because of the large number of its graduates who participated in our national public life, followed Wythe’s leadership in emphasizing public law, comparative law, and political economy, while also affording access to Kent’s Commentaries on American Law, a work, like Blackstone’s, giving short shrift to adjective law.

By the 1830s, there seems to have been a general understanding that an academic law program would occupy about five months of the year, and that students completing the program would be in residence two such years. Topics were often studied in alternating years. Transylvania may have been the first American university to conduct a final examination in law, given at the end of the program. Only those who passed received a degree. Most failed—which was OK, because the credential meant very little anyhow. Ante-bellum Harvard under Story and Greenleaf gave a degree to all who were present for the prescribed period. Thomas Cooley’s Michigan and Theodore Dwight’s Columbia did almost the same.

To hear systematic lectures on common law pleading in the time of Wythe or Tucker, one would have had to enroll at the proprietary school in Litchfield,

13. The first edition was published in Boston, 1825–30.
where James Gould taught the subject with élan.\textsuperscript{17} Indeed, shortly before he retired, he published his lectures on pleading; they were an extended encomium to the intricacies of the forms of action.\textsuperscript{18} But Litchfield was not a university law school; its profit-seeking aim was to market Competence, not Virtue of the sort that Wythe, Tucker, and Cooley sought to nurture.

A reason that eighteenth-century pleading may have commended itself to Litchfield as a subject to teach was its arcane character. Only a lawyer could master the difference between trespass and trespass on the case; to know that distinction marked one as anointed because common law pleading was a task for which common sense was useless. A proprietary institution selling resaleable information could hardly afford to pass up the opportunity to celebrate such a subject. On the other hand, it was a subject having little interest to most university law teachers, for much the same reason.\textsuperscript{19} The system was only marginally more rational than trial by ordeal, or the Japanese alternative of sumo, both of which were religious ceremonies invoking the will of God to resolve disputes. It had no more political content, and far less intellectual content, than other complex games such as chess.

Gould’s teaching of the subject was misguided, whatever his aim. Common law pleading was already in eclipse in England as well as America. Jeremy Bentham had likened aspects of common law pleading to a syphilis of government.\textsuperscript{20} His view was widely shared, and in the early nineteenth century there was a movement afoot on both sides of the Atlantic to discard this barbaric sport. The forms of action Gould extolled in 1832 were abolished in England in 1836.\textsuperscript{21} Among those sharing Bentham’s scorn of common law procedure were Jacksonians who regarded English procedure as just another burden the aristocracy imposed on honest folk as a means of preserving the wealth and status of lawyers.\textsuperscript{22}

New York University was founded by Benthamite utilitarians who admired the pragmatism of the new German universities and of the University of London.\textsuperscript{23} One of its first achievements, in 1838, was to open a law school

\textsuperscript{17} Marian C. McKenna, Tapping Reeve and the Litchfield Law School 81–106 (New York, 1985); see also Simeon Eben Baldwin, James Gould, 1770–1838, in 2 Great American Lawyers, ed. William Draper Lewis, 455, 458 (Philadelphia, 1907).

\textsuperscript{18} A Treatise on the Principles of Pleading in Civil Actions (New York, 1956). (1892).

\textsuperscript{19} Ashbel Stearns, the professor of law at Harvard from 1817 to 1829, may have been an exception. See Sutherland, supra note 15, at 72. Nathaniel Beverley Tucker, who was the professor of law and police at William and Mary from 1834 to 1851, may have been another. See Professor Beverley Tucker’s Valedictory Address to His Class, 1 S. Literary Messenger 597, 597–602 (1855), reprinted in Essays on Legal Education in Nineteenth Century Virginia, ed. W. Hamilton Bryson, 103, 107 (New York, 1998).


\textsuperscript{23} Theodore Francis Jones, New York University 1832–1932 at 6 (New York, 1953); on the University of London, see Hugh Hale Bellot, The University College, London, 1826–1926 (London, 1929).
under the leadership of Benjamin Butler, President Jackson’s attorney general.24 Butler proposed a three-year part-time curriculum of which the first year would be devoted to the “science” of pleading, with supplementary work on jurisprudence and constitutional law. Apparently he felt compelled to justify the attention to pleading:

Nor will the task of instructing in these branches be unworthy the efforts of an able and learned jurist. Our forms of proceeding, though generally prolix, and often encumbered with needless technicalities, are yet intimately connected with the principles of the Law. And as a general rule, he who best understands the nature and design of the instruments which the Law employs, will not only be most expert in the business of his profession, but be best qualified to look above the mere form, and to lay hold of, and appropriate to their true uses, the higher parts of his profession.25

One of Butler’s first steps was to employ David Graham, the author of an 1832 book on New York practice.26 Graham was an associate of David Dudley Field in the effort to abolish common law procedure in New York, an effort that achieved success in 1848.27 It was Graham who lectured on civil procedure that founding year. Alas, for reasons not fully known, the school closed after one year, to be reopened two decades later.28

Max Weber explained the movement uniting Bentham, Field, and Graham as a response to the Enlightenment.29 What they sought to do was to persuade those with the power to do so to delete dysfunctional formalities to assure, insofar as it is possible, that the judgments of law courts are based on the law and the facts, and are not the result of a mistep of counsel. One evident purpose in teaching pleading at New York University was to enlist support in the profession for the reforms that would be forthcoming a decade later. Timothy Walker, the founder of the Cincinnati Law School, was not a Jacksonian, but he shared the Jacksonians’ interests in law reform, and he did some teaching of pleading in the 1840s to the same reformist end.30 In the 1870s John Norton Pomeroy, another reformer, also gave attention to the subject at the Hastings College of Law of the University of California.31

Joseph Story may have been the first American law professor to teach the topics of jurisdiction and judgments. His lectures, presented in the 1830s,


25. Id. at 124.

26. Id. at 8.

27. Robert Wyness Millar, Civil Procedure of the Trial Court in Historical Perspective 43-51 (New York, 1952); Subrin, supra note 22.


were part of a longer treatment of conflict of laws, a subject on which Story was the first American author.\textsuperscript{32} There was little national law on those topics until the Fourteenth Amendment was ratified in 1868.\textsuperscript{33} Story's colleague Simon Greenleaf lectured on evidence and published the first work on that subject in 1852.\textsuperscript{34} The law of evidence was largely the product of American judicial decisions accommodating the institution of the jury trial to the conditions of nineteenth-century America. Greenleaf's book would go through many editions before his subject was reworked by his former student, James Bradley Thayer,\textsuperscript{35} and then by Thayer's student, John Henry Wigmore.\textsuperscript{36} All of the works mentioned, and the teaching they expressed, were instruments of law reform. They were written in the spirit of the Jacksonian reforms of pleading and were a part of the tradition marked by Weber. The moral premise underlying the teaching of Graham, Walker, Story, Greenleaf, Thayer, Pomeroy, and Wigmore was that courts should seek in their procedures and administrative arrangements the means of providing judgments disinterestedly applying law made by a government of the people to facts, and thus to impose a resolution on disputes. Implicit in their teaching was the duty of the legal profession to support courts engaged in that enterprise. These teachers were, unlike Gould, children of the Enlightenment. They were also missionaries for a secular faith that law can be an effective instrument of popular self-government.

There is an additional reason for the stunted development of civil procedure teaching in university law schools in the nineteenth century. This was the local character of much of the applicable law. Butler's New York University was among the few schools deigning to teach the law of a state, because most schools were desperate to attract students from more than one state. This was especially true of Story's Harvard; Story had been summoned by the benefactor, Nathan Dane, to celebrate the national law, not the localisms that were dividing the Republic.

Civil procedure does not appear to have had a significant place in the curriculum of Simeon Eban Baldwin's Yale Law School or Theodore Dwight's Columbia.\textsuperscript{37} Cooley's Michigan curriculum, however, included lectures on

\begin{itemize}
\item A Treatise on the Law of Evidence (Boston, 1852).
\item A Preliminary Treatise on Evidence at Common Law (Boston, 1898). On the relationship between these works, see William Twining, Theories of Evidence: Bentham and Wigmore 5–9 (London, 1985).
\item A Treatise on the System of Evidence in Trials at Common Law Including the Statutes and Judicial Decision of All Jurisdictions in the United States, 4 vols. (Boston, 1904–08).
\item Frederick G. Hicks, Yale Law School: 1869–94 Including the County Court House Period (New Haven, 1957); Goebel, supra note 16, at 44–68.
\end{itemize}
equity, evidence, and code pleading, and it even offered instruction in trial practice through a moot court.\footnote{38}

The second important moment for the law curriculum was, of course, Langdell's. There was much that was fresh about his approach.\footnote{39} He appears to have known nothing about Wythe or those who followed him, or about any events or institutions west of the Hudson River. He did not, so far as we know, consider the possibility of teaching law to foster public virtue. He had no interest in social or political reform of any kind; a royalist at heart, he placed no value on the traditions of self-government. His charge, given him by President Eliot, was to elevate the status of the Harvard Law School by making it exclusive, apolitical, and academic.\footnote{40} Like many New Englanders more English than the English, he did not regard the Constitution of the United States or even the legislative enactments of Congress as law.\footnote{41} Law, in his view, was what life-tenure judges made while unencumbered by any texts drafted by amateurs in legislative committees and constitutional conventions. Hence he preferred to consign constitutional law to the undergraduate curriculum so that professional law students might never have their minds sullied by the vulgarities of politics.

As a part of the scheme to make a Harvard legal education more valuable in the marketplace, Langdell proposed to extend the period of study from the usual two terms of about five months to three academic years of nine months each. This decision was in no way driven by a demand of Harvard students for more instruction, or of Harvard teachers for more time in which to cover material they deemed important. The purpose, and the only purpose, was to make Harvard Law more rigorous and hence more exclusive, as President Eliot had directed. Langdell needed to provide twenty-seven months' worth of curriculum in lieu of the traditional ten, while if possible diminishing the place in the curriculum of public law or other matters soiled by politics. This created a huge vacuum for private law courses, and thus a fresh canvas to which he was free to apply his crayon. His acolyte, James Barr Ames, was the author of no fewer than nine casebooks used to fill the time created by Langdell.\footnote{42} It can be no surprise that, in Langdell's lifetime, the Harvard Law dropout rate was very high. A minority of those not excluded by the novel...


41. See Christopher Columbus Langdell, Dominant Opinions in England During the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation, or the Absence of It, During That Period, 19 Harv. L. Rev. 151 (1906). Cf. Albert Venn Dicey, Lecture on the Relation Between Law and Public Opinion in England During the Nineteenth Century (London, 1905).

examinations bothered to stay three years to imbibe such repetition, and many entered the profession with but a piece of a Harvard Law education.43

Prominent among the new courses was Torts, a subject never before taught to law students anywhere. Indeed, the first book ever written about Torts had been published as recently as 1867.44 Also added to the Harvard curriculum was formal instruction in civil procedure. Not, God save us, American procedure fashioned by such low-minded Jacksonians as David Dudley Field, but English civil procedure, the only kind worthy of study by good Anglophiles such as Langdell and Ames.

Ames, if it can be believed, taught his students at Harvard in 1880 the rigors of pleading under the Hilary Rules.45 The Hilary Rules were the first English manifestation of Bentham’s influence on procedural law reform. They were adopted by Parliament in 1836 as the result of the strenuous efforts of Henry Brougham, who challenged his legislative brethren:

It was the boast of Augustus, that he found Rome of brick and left it of marble. . . . But how much nobler will be the sovereign’s boast when he shall have it to say that he found law dear, and left it cheap; found it a sealed book, left it a living letter; found it a patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.46

Alas for Brougham, and even more for Ames, the Hilary Rules proved to be a disaster in practice and were repealed in 1852, a quarter-century before Ames began to teach them at Harvard.47 Their fault lay in the unrealistic demands they imposed on counsel—a fault to which Ames, who never in his life appeared in court, was quite blind. It is as well that the pleading course was given only a minor place in the Langdell curriculum.

Because Langdell’s Harvard was promoting university legal education as the route to Competence rather than Virtue, it sought to overcome the disadvantage of being a national institution and to solve the problem of filling out three full years of instruction by offering specialized third-year courses on local practice in the states to which the largest numbers of its students went. Generally these were taught by practitioners from the several states involved.48

Civil Procedure and Judicial Law Reform

The teaching of civil procedure received a powerful impulse from the Progressive era. Roscoe Pound, then the dean at Nebraska, made a celebrated address to the American Bar Association in 1905 signaling the beginning of a

44. Francis Hilliard, The Law of Remedies for Torts, or Private Wrongs (Boston, 1867).
45. Millar, supra note 27, at 45–46.
48. 2 Warren, supra note 15, at 448, 452.
new era of reform.\textsuperscript{49} Pound was joined in leading this endeavor by his sometime colleague at Northwestern, Wigmore.\textsuperscript{50} By the time of Pound's address, the 1848 Field Code had been transmogrified by the New York legislature into the Throop Code, one of the most elaborate and least workable schemes ever devised for the resolution of disputes.\textsuperscript{51} Disenchanted by the propensity of American legislatures to ornament procedural systems with dissonant provisions favorable to the interests of whatever faction or interest group held their attention at the moment, the Progressive reformers favored court rule-making as the mechanism for reform.\textsuperscript{52} This was an English innovation of 1873 expressed for the first time in America in the Wyoming Constitution of 1890.\textsuperscript{53} The Progressives also promoted enactment of the early precursors of long-arm legislation, \textquotedblleft merit selection\textquotedblright of judges,\textsuperscript{54} more thorough merger of law and equity, and liberal joinder of parties and claims.\textsuperscript{55} Among the most passionate advocates for procedural reform was William Howard Taft, a man not otherwise given to radical ideas.\textsuperscript{56}

This Progressive reform movement was taking shape at the same time that the academic legal profession was emerging as a group somewhat apart from the practicing bar. A whole generation of the newly minted career law teachers was imbued with an interest in civil procedure and a keen sense of the promise of reform to make civil law enforcement more effective. Among those who were active in reform efforts and who influenced the teaching of civil procedure in the era after World War I were Charles Clark at Yale,\textsuperscript{57} Edson R. Sunderland at Michigan,\textsuperscript{58} and Arthur Vanderbilt at New York University.\textsuperscript{59}

49. The Causes of Popular Dissatisfaction with the Administration of Justice, 40 Am. L. Rev. 729 (1906).
55. The concept was proposed by Albert Kales of Northwestern University and was promptly adopted as the chief cause of the newly organized American Judicature Society. Michal R. Belknap, To Improve the Administration of Justice: A History of the American Judicature Society 40--41 (Chicago, 1992).
56. Millar, supra note 27, at 98--142.
59. See The English Struggle for Procedural Reform, 39 Harv. L. Rev. 725 (1926); A Reply to Senator Walsh, 6 Or. L. Rev. 73 (1926); The Regulation of Legal Procedure, 35 W. Va. L.Q. 131 (1927); The Grant of Rule-making Power to the Supreme Court of the United States, 32 Mich. L. Rev. 1116 (1934).
Also influential as teachers were Austin Scott of Harvard, and Jerome Michael at Columbia. Casebooks prepared in that era integrated for the first time the teaching of pleading with the teaching of jurisdiction and the basic features of the civil jury trial. Their presentations were uniformly historical in their orientation; students were taught to appreciate the difference between the forms of action and code pleading, and to prepare themselves for further reforms along the lines of those appearing in the Federal Rules promulgated in 1958. Much of the teaching of procedure in those decades was done in the upper-class years, although an introductory first-year one-semester course was not uncommon.

Many teachers of procedure became active reformers of legal institutions. The most important success was achieved by Clark and his associates, including Sunderland, who were responsible for the promulgation of the Federal Rules of Civil Procedure in 1938. Clark was the principal proponent of summary judgment and notice pleading; Sunderland can be said to have invented the pretrial conference. Vanderbilt also enjoyed dramatic success in leading radical reform of the legal institutions of New Jersey. But there were numerous others. Harold Medina of Columbia took up the cause of reforming the municipal courts of New York City. Single-handedly he took on Mayor LaGuardia in legislative chambers at Albany. Thurman Arnold at the University of West Virginia began to gather empirical data to inform efforts to improve the administration of civil justice.

The 1938 rules were a hit. Examined in a cold light today, they were no triumph of professional draftsmanship. In fairness, they were not presented at the time as a permanent solution to the problem posed by Rule 1 of achieving speedy, just, and efficient disposition of every civil case. Even the reformers of 1938 were aware of the iron law of unintended consequences, and they were mindful that vigorous advocates would exploit any weakness they might find in the structure created. But the new rules lent unaccustomed strength to the traditional purpose of discerning the truth with respect to disputed facts;

61. Scott joined the Harvard faculty in 1909 and is best known for his work in trusts. But he was a magnetic teacher, and his casebook, *A Selection of Cases and Other Authorities on Civil Procedure in Actions at Law* (Cambridge, Mass., 1919), was a creative work. See also Austin Wakeman Scott, *Fundamentals of Procedure in Actions at Law* (New York, 1922).

62. Michael's work was primarily devoted to evidence, which led him, like Wigmore, to a study of psychology and to a long association with Mortimer Adler. His tightly crafted casebook for a first-year introductory course was widely adopted and is worthy of examination today. The Elements of Legal Controversy: An Introduction to the Study of Adjective Law (Brooklyn, 1948).


64. A brief account of Medina's career is Goebel, supra note 16, at 287–88.


more than a few malefactors made generous settlement offers rather than face
the horrors of a "deposition upon oral examination." The new rules also
obliterated some arcane distinctions, such as the false dichotomy made in
English law between law and equity, and thus made it harder for unjust
litigants to take refuge in technicality. By liberalizing joinder, they fostered
comprehensive resolution of disputes. And the rules were drafted with studied
looseness of text to free judges from the duties to observe procedural niceties
that impeded their efforts faithfully to apply the substantive law. Procedure
became more a servant, albeit not a slave, to substance.

The broad acceptance with which the Federal Rules were received led to a
further round of reform at midcentury. Many states adopted variations on the
national rules, and some even adopted them in haec verba. Among
the major state reforms was a renovation of the New York Civil Practice Act in
which Jack Weinstein, then of Columbia, was instrumental. Characteristic of
these reforms of state practice was the merger of law and equity, i.e., the
abolition of the ancient traditions of the English Court of Chancery as a
distinct feature of American law. The learning of equity scholars like John
Norton Pomeroy became substantially obsolete, and teachers such as Zechariah
Chafee retired, not to be replaced. Much of the reform of state procedures
was effected through the participation of teachers of civil procedure.

Discourse over the possible improvement of the Federal Rules was mainta-
ined by the presence of the Advisory Committee whose work was conducted
out of the offices of James William Moore at Yale, and then of Benjamin
Kaplan and Albert Sacks at Harvard. Interest in empirical testing of proce-
dural institutions was manifested in the career of Maurice Rosenberg at
Columbia and in the establishment in 1966 of the Federal Judicial Center.

Through the 1960s, much of the most respected scholarship in the field of
civil procedure illuminated and criticized rules of court. Premier work was

68. On the history of the act, see 1 Jack B. Weinstein et al., The New York Civil Practice (New
69. Pomeroy, A Treatise on Equity Jurisprudence as Administered in the United States of
America, Adapted for All States and to the Union of Legal and Equitable Remedies Under
the Reformed Procedure, 5 vols. (San Francisco, 1941); Chafee, Cases on Equity Jurisdiction
and Specific Performance (Cambridge, Mass., 1934); Chafee, Some Problems of Equity: Five
Lectures Delivered at the University of Michigan, April 18, 19, 20, 21 and 22, 1949 (Ann
Arbor, 1950).
70. Robert M. Cover, For James Wm. Moore: Some Reflections on a Reading of the Rules, 84 Yale
L.J. 718 (1975).
71. Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the
72. Mary Kay Kane, The Golden Wedding Year: Erie Railroad Co. v. Tompkins and the Federal
73. See Paul D. Carrington, Maurice Rosenberg, 95 Colum. L. Rev. 1901 (1995).
74. Joseph L. Ebersole, The Federal Judicial Center: A Nontraditional Organization in the
done by Moore\textsuperscript{75} and by Charles Alan Wright at Texas,\textsuperscript{76} but also significant were narrower and sometimes more penetrating treatments such as the thorough job done on requests for admissions by Ted Finman of the University of Wisconsin;\textsuperscript{77} on directed verdicts by Edward H. Cooper, then at Minnesota;\textsuperscript{78} on judicial notice of foreign law by Arthur Miller, then at Michigan;\textsuperscript{79} or on summary judgment by Martin B. Louis of the University of North Carolina.\textsuperscript{80}

No sooner were the new rules promulgated in 1938 than the Supreme Court decided \textit{Erie R.R. v. Tompkins}.\textsuperscript{81} For generations of teachers and students, this would prove to be a great moment in the life of the law. If given the full range of application favored by Justice Frankfurter,\textsuperscript{82} \textit{Erie} would have killed the new rules and remanded the federal courts back to the ancient practice of conforming their procedure to that of local state courts. The line between substance and procedure, between what is properly a matter of state law and what is a matter of federal practice, or between what is properly a subject of a rule enacted by the Supreme Court rather than Congress, evoked a rich literature and a formidable line of Supreme Court decisions culminating in \textit{Hanna v. Plumer} in 1965.\textsuperscript{83} America was aboil in national procedural issues.

Also a continuing issue with high visibility was the federal constitutional limits on state court jurisdiction over persons and property. By the mid-1960s, most states had adopted extended long-arm legislation, often extending the reaches of their courts to the outer limit allowed by the Fourteenth Amendment.\textsuperscript{84} Much scholarly writing was devoted to this subject, and many teachers introduced their course with a treatment of the due process limits of state court jurisdiction, beginning with \textit{Pennsylvania v. Neff},\textsuperscript{85} and proceeding through \textit{International Shoe Co. v. Washington},\textsuperscript{86} to \textit{Hanson v. Denckla}.\textsuperscript{87}

Another enlarged element of instruction centered on the text of the Seventh Amendment. The interface of the new rules of court, merging law and equity and allowing liberal joinder of parties and claims, with the ancient


\textsuperscript{77} The Request for Admissions in Federal Civil Procedure, 71 Yale L.J. 371 (1962).

\textsuperscript{78} Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn. L. Rev. 903 (1971).


\textsuperscript{81} 304 U.S. 64 (1938).

\textsuperscript{82} Guaranty Trust Co. v. York, 326 U.S. 99 (1945).


\textsuperscript{84} 1 Robert C. Caspary, Jurisdiction in Civil Actions, 2d ed., §§ 4-5 to 4-10 (Salem, 1991).

\textsuperscript{85} 95 U.S. 714 (1877).

\textsuperscript{86} 326 U.S. 310 (1945).

\textsuperscript{87} 357 U.S. 255 (1958).
distinction embedded in the 1791 text proved to be an intractable problem that still troubles the Supreme Court.88 This has proved to be one area in which legal history has continuing and direct pertinence to the disposition of contemporary litigation.89 State courts have struggled with similar issues arising under the texts of state constitutions, but the decisions of the Supreme Court have dominated discourse.90

Numerous other procedural issues arising in state court litigation have been found in recent years to be subject to parameters established by the Fourteenth Amendment. Among these are adequacy of notice of proceedings,91 the right to notice before provisional remedies are granted,92 applicability of statutes of limitations,93 res judicata,94 the right to be represented by counsel,95 the right to proceed in forma pauperis in some proceedings,96 allocation of the burden of proof,97 peremptory strikes of jurors,98 and, most recently, the settlement of class actions.99 Although all these topics have been constitutionalized by the Supreme Court, they have been left to the instruction of civil procedure teachers.

The literature and teaching of civil procedure in the decades following World War II reflected the maturation of the legal process as a means not merely of resolving disputes, but of enforcing rights and duties. Disenchantment with the administrative process of law enforcement led legislative bodies increasingly to rely upon private law enforcement by individual plaintiffs employing modern civil procedure to bring malefactors to account.100 In this important respect, American civil litigation became unique in the world.

Localism as an impediment to teaching the national law diminished in its importance. The ascendant nationalization of the academic profession meant that law teachers absorbed in issues of local law would lose status within the

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academic discipline, so that professional considerations were incentives to teachers to direct their attention to federal practice. And the increasing mobility of lawyers gave additional weight to the attractions to students of a study of the national law on the subject.

The Modern Course Emerges

These developments all stimulated the teaching of Civil Procedure as a course integrating pleading with jurisdiction and other facets of the process, and now also as a course centered on the new body of national adjective law, much of which was rooted in the Constitution. The first casebook to present such a course was edited by Richard H. Field and Benjamin Kaplan; the first edition appeared in 1953,\textsuperscript{101} and by 1965 there was virtual unanimity that the first year of law school should include a yearlong six-credit course in Civil Procedure devoted primarily to federal practice and constitutional limitations on the practices of state courts.

Except with respect to a few matters such as the Seventh Amendment, the history of civil procedure began to fade from view. Even though many casebooks included historical material, it got short shrift from teachers because of the students' reaction. By 1975, few students wanted to know of the evolution commencing in the early nineteenth century and marked by the adoption of the Field Code in 1848 and the Rules Enabling Act of 1934. In part, this transformation was effected by a reduction in the number of first-year class hours devoted to the subject. To the extent that the purpose of reducing the number of hours in the yearlong first-year courses was intended to accommodate courses presenting a broader perspective on law, the change may in this respect have been counterproductive.

While the historical perspective has been lost, few teachers have otherwise encountered difficulty in persuading first-year law students that civil procedure is an important subject worthy of their attention. The course has what it takes to be taken seriously by preprofessional students: the understanding it imparts enlarges the possibility that students will achieve Competence. The Truth they learn along the way is that mere information about the legal texts governing the process by which civil disputes are resolved will not go far in enabling them to earn a living as a trial advocate, even though a rough familiarity with those texts is essential. Competence, students soon perceive, cannot be achieved by those who resist the Truth about the indeterminacy of many legal texts, because procedure rules are written to enable the courts applying them to reach substantively appropriate results; the law of procedure is, in Truth, handmaiden to substance.

Civil procedure also retains appeal for teachers indulging a broad spectrum of intellectual interests. A teacher interested in history, politics, economics, behavioral science, philosophy, anthropology, classics, or literature can find outlets for the expression of such interests within the reasonable ambit of a Civil Procedure course. A growing and increasingly useful body of scientific

\textsuperscript{101} Materials for a Basic Course in Civil Procedure, eds. Richard H. Field & Benjamin Kaplan (Mineola, 1953).
data is now available to evaluate procedural arrangements; while the student appetite for such information is limited, the field is one in which students can be challenged to subject the premises of discourse to empirical testing. Even the craft of literary criticism can be brought to bear, although it is somewhat deflected by the tendency of modern procedural rules to anticipate some of its insights; by acknowledging the wisdom of the precept that "tight will tear, wide will wear," the tailors of court rules have often preempted the possibilities for "dynamic" interpretation. Thus, while there is meager opportunity to discern important and previously unrevealed Truth, the academic enterprise can be pursued by one teaching Civil Procedure.

More important is the opportunity Civil Procedure affords for law teaching that aims to serve the traditional public purpose pursued by Wythe and Story, the Transylvanians and the Jacksonians. Underlying the legislation, rules of court, and court decisions marking the field are the moral premises that make democratic government an imaginable possibility. Some of those premises were synthesized by Lon L. Fuller in his lectures on the morality of law.102 Some are expressed in the text of the Fourteenth Amendment's Due Process and Equal Protection Clauses. Some are expressed in Rule 1 of the Federal Rules of Civil Procedure exhorting the courts to make decisions that are just, speedy, and economical. Together, these moral premises express the hope if not always the expectation that courts in a democratic government can and will apply the lash of the law faithfully and evenhandedly.

No sensible teacher would exhort students to believe that their system works reliably. After all, what people bring to court is the refuse of our national and community life. Mendacity, greed, brutality, sloth, and neglect are the materials with which we work, and there will never be enough justice in the world to supply the demand. It is not uncommon in 1999 to find those who despair, who hold that it is not worth the effort and cost to achieve such results as we are able to achieve. In some of its aspects, the ADR movement is a protest against law's enforcement and a throwback to pre-Enlightenment ceremonies that resolved disputes without serious regard for rights and duties.103 Often, however, those who are first heard to grieve about the failures of modern civil procedure in its effort to enforce duties and protect rights are those who have been brought to book in civil court and have suffered for their misdeeds.

Postmodern Reactions

The yearlong course is now seldom found in the curricula of the most elite law schools. Semesterization seems to have been driven less by any dissatisfaction with the content or form of yearlong courses than by the convenience of faculty coming and going on leave and by the desire of anxious students for more frequent examinations. Whatever its cause, the trend has forced teach-

ers to be more selective. Because diverse selections seem equally reasonable, there is now, I believe, considerable variation in the content of the first-year course. Most of the published course books present material that is an updated but fundamentally unchanged version of the 1953 Field & Kaplan course, but fewer students are led through the whole of the subject thus viewed.

A more creative response originally devised by Robert Cover and Owen Fiss (now joined by Judith Resnik) has been to conduct the inquiry at a more abstract level embracing problems and issues of administrative procedure as well as judicial procedure in a single intellectual undertaking. "Meta-procedure" tends to short the importance of the statutes and rules of court that are the plumbing and electric wiring of the great edifice the editors strive to erect. An exercise in the search for Truth, it risks disparagement of Competence. Linda S. Mullenix finds the approach pedantic and hopelessly snobbish, but it appeals to those teachers and the few students who are given to philosophy. Metaprocedure does not, however, address the problem of the abbreviation of the course; the editors insist that their 1,877-page work requires a full year of study.

At the same time that their course has been abbreviated, postmodern Civil Procedure teachers have also been exhorted to find a place in their course for ADR. There is a problem in doing so that some champions of ADR do not fully appreciate. It is that the issues with which proceduralists deal, such as territorial jurisdiction, notice, access to proof, right to be heard, qualifications and disinterest of the decision-maker, fidelity to legal texts, and finality of decisions, are equally present when disputants are directed to ADR. Those issues must be resolved, if crudely, and crude resolutions tend to be less respectful of rights. There is, in short, no completely satisfactory way around the law's cost and delay. Indeed, contractual jurisdiction may be a prime method for avoiding the lash of the law and favoring those who prey on the rights of others.

Postmodern teachers of civil procedure may be less interested than their immediate predecessors in the possibilities of judicial law reform. It remains the case that there are many opportunities to participate in reform activities of genuine value to the public. These seem to be somewhat neglected, particularly opportunities to work with state courts and state legislatures. It is often

106. Cover et al., supra note 104, at xi.
107. I have been engaged in ADR work as a founder in 1983 of the Private Adjudication Center, an organization I presently serve as chairman of the board. Also, I do teach in the basic course a few hours on the law governing ADR proceedings.
said that the states are useful laboratories, and certainly this could be true with respect to civil procedure. The Arizona courts are presently experimenting with sweeping disclosure requirements and with jury instructions, if more law teachers took a greater interest in promoting and evaluating such experiments, significant benefits might be achieved. It is at least imaginable that the next generation of procedure teachers will have an opportunity to promote and bear witness to extraordinary reforms exploiting the potential of the computer chip. That technology may obsolesce large chunks of what my generation of civil procedure teachers knew and taught. The opportunities for useful experiments are certain to be better in the future than they have ever been in the past. To exploit those opportunities, teachers of civil procedure would need both to participate in state government and to master and deploy the methodologies of social science. While no prudent reformer will ever forget or repeal the law of unintended consequences, there is much useful knowledge to be gained.

Unfortunately in my view, the reward system in place in the academic profession tends to direct attention away from such work. Academic recognition usually comes to those engaged in more theoretical studies; while there is still excellent work done in the field of procedural law reform, possibilities for reform are less frequently addressed than they might be. For a time, a decade or so ago, it was fashionable to write of the possibility of "nontrans substantive procedural law" as a promising direction for reform. This form of discourse seemed to derive in part from the observation that procedure rules tend to be notably indeterminate. It was apparently the hope that special systems might be devised that would be less determinate in order to favor particular classes of civil litigants, such as plaintiffs in employment discrimination cases, by constraining the discretion of judges in such matters.

A flaw in this "movement," if a few articles can be so described, is that it proceeded at a more theoretical, or architectural, a level that it missed an elementary point about the plumbing: if special rules are written for such a class of cases, they will not be written by the class of litigants whom it was the apparent aim of the proponent to advance. At least in the federal structure, any such systems would have to be enacted by Congress, for they would be too substan-


tive to be an appropriate subject for judicial rule-making under the Rules Enabling Act.\textsuperscript{116} If one wishes to advance the cause of a particular group of civil litigants, there is no way to avoid direct contact with the soil of legislative politics.\textsuperscript{117}

Moreover, although the federal courts decide a very small and diminishing percentage of the civil cases litigated in the United States, the federal courts receive almost all the attention of those law teachers who do serious scholarship on the subject. For example, in 1998 I had occasion to study the literature on the law governing judicial elections. No issue arising in the conduct of civil litigation is more important than this, but the issues pertain entirely to the conduct and organization of state courts. I did find some useful work on the subject, but I think it slights no one to say that the literature is thin. Much of what one finds is written by political scientists; while there is nothing wrong with their interest in the field, it is remarkable that there are, for example, much richer literatures in the law reviews on long-arm jurisdiction, class actions, and the role of state law in federal diversity litigation, just to pick a few topics at random.

One of the attractions of these topics of greatest interest to most civil procedure teachers is that they can be studied from an armchair. A contribution to more promising empirical literature requires training and an investment of time that law teachers, for diverse reasons, are reluctant to make. For the most part, the field has been left to social psychologists and institutions such as the Civil Justice Institute, the Federal Judicial Center, and perhaps the American Bar Foundation. One may hope that the proceduralists of the future will be more given to empirical work than the present writer.\textsuperscript{118}

The Civil Justice Reform Act of 1990 may be taken as an adverse comment by Congress on the state of civil procedure teaching and research. That enactment expanded in some measure the procedural law-making authority of district courts, encouraged the use of mandatory ADR, and called for empirical study of the results. Most academic observers scorned the legislation as impulsive and ill conceived, an assessment that I continue to share.\textsuperscript{119} But one reason for this reaction may be that those who proposed the act disregarded the available academic literature, apparently assessing it to be useless. Another may be that decentralization of procedural law-making threatens to deprive the current generation of law teachers of the livelihood they have


\textsuperscript{118} I am not completely innocent. See Paul D. Carrington, United States Appeals in Civil Cases: A Field and Statistical Study, 11 Hous. L. Rev. 1101 (1974).

acquired through a knowledge and understanding of national law. A third may be that the evaluation phase of the experiment did not envision a resort to the human resources of law schools, but of the institutions engaged in empirical work.

Prospect

It is surely possible, indeed maybe it is certain, that the achievements of modern civil procedure were oversold in the 1960s and 1970s. Just as teachers of torts may have caused a national sorrow by elevating to greater prominence our Calvinist preoccupation with blame, teachers of civil procedure may have contributed to what some see as a similar national disorder sometimes denoted as hyperlexis, that is, our alleged excessive preoccupation with the use of law to enforce individual rights to the detriment of our social duties and community relations.120 I leave that speculation to the reader unobstructed by the self-justifications of an aged proceduralist. I will, however, venture the forecast that the premises derived from the Enlightenment will abide, that whatever utility may be derived from the ADR movement and postmodern disdain for legal textualism, there will long be a need for a system that, as best we can, decides cases on the law and the facts. And it will be the privilege and the duty of those who teach civil procedure to share in the satisfaction of that public need.