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## A Community of Procedure Scholars: Teaching Procedure and the Legal Academy

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# A Community of Procedure Scholars: Teaching Procedure and the Legal Academy

## **Abstract**

This article asks whether the way in which procedure is taught has an impact on the extent and accomplishments of a scholarly community of proceduralists. Not surprisingly, we find a strong correlation between the placement of procedure as a required course in an academic context and the resulting body of scholars and scholarship. Those countries in which more civil procedure is taught as part of a university degree—and in which procedure is recognized as a legitimate academic subject—have larger scholarly communities, a larger and broader corpus of works analyzing procedural issues, and a richer web of institutional support systems that inspire, fund, and shape the study of public justice.

## A Community of Procedure Scholars: Teaching Procedure and the Legal Academy

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CAMILLE CAMERON & DAVID BAMFORD \*

This article asks whether the way in which procedure is taught has an impact on the extent and accomplishments of a scholarly community of proceduralists. Not surprisingly, we find a strong correlation between the placement of procedure as a required course in an academic context and the resulting body of scholars and scholarship. Those countries in which more civil procedure is taught as part of a university degree—and in which procedure is recognized as a legitimate academic subject—have larger scholarly communities, a larger and broader corpus of works analyzing procedural issues, and a richer web of institutional support systems that inspire, fund, and shape the study of public justice.

La manière dont on enseigne la procédure a-t-elle une incidence sur l'importance et les réalisations des spécialistes universitaires de la procédure? Nous ne sommes pas surpris de déceler une forte corrélation entre le statut de cours universitaire obligatoire accordé à la procédure et l'importance de la collectivité de spécialistes et de chercheurs qu'il suscite. Les pays où l'on enseigne la procédure civile dans le cadre des études juridiques universitaires – et où la procédure possède un statut de discipline légitime – connaissent une plus forte collectivité de chercheurs, des travaux plus abondants et plus variés analysant les questions de procédure, ainsi qu'un plus riche réseau de soutien institutionnel capable d'inspirer, de financer et de façonner l'étude de la justice publique.

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I.	INTRODUCTION: THE LINK BETWEEN TEACHING AND SCHOLARSHIP.....	94
II.	UNITED STATES.....	97
	A. A Large Group of Scholars .....	97
	B. A Complex Web of Support Structures .....	99
	C. Procedure Scholarship.....	105
III.	CANADA.....	109
	A. A Multi-Dimensional Community.....	109
	B. Pure Procedure Scholarship .....	112
	C. The Scholarship of "Procedure Plus" .....	114
IV.	UNITED KINGDOM: ENGLAND AND WALES .....	118
	A. The Legal Academy in the United Kingdom—Divided, Uncertain of its Role .....	118
	B. The Dearth of People and Institutions .....	121
	C. Publications: The Strange Case of the Civil Justice Quarterly.....	124
	D. Disincentives to Procedural Scholarship: Academic Stardom, Research, and the Quest for Excellence (or Funding).....	126
V.	AUSTRALIA.....	130
	A. The Historical Place of Civil Procedure in Law Schools.....	130
	B. A Growing Community of Scholars .....	131
	C. A Growing Body of Scholarship.....	134
	D. A Very Long Way to Go.....	138
VI.	CONCLUSION .....	139
	A. Number of Teacher-Scholars.....	139
	B. Outlets for Publication.....	140
	C. The Bottom Line .....	142
	APPENDIX ONE.....	145
	APPENDIX TWO.....	152

## I. INTRODUCTION: THE LINK BETWEEN TEACHING AND SCHOLARSHIP

WHAT IS THE RELATIONSHIP between the teaching of a subject and its scholarly exploration? How does the inclusion of “procedure” among academic subjects influence the development and maintenance of an academic literature and a corpus of scholarly debate?<sup>1</sup> How might a scholarly community be fostered and sustained by its members’ shared interest in challenging students to engage with current debates on a particular subject and in furthering their critical appreciation of ongoing developments in a field? In this, the third article in this special issue on the impact of teaching procedure, we explore the link between teaching procedure and scholarship in the field.

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1. Janet Walker, “The Impact of Procedure” (2013) 51:1 Osgoode Hall LJ vii-viii.

As Knutsen et al demonstrate,<sup>2</sup> there is considerable variation among common law countries in the approach taken to the teaching of civil procedure, particularly regarding its place—or lack of a place—in the university setting. This article examines the possible consequences of those approaches for the legal academy, and seeks to document the relationship between the teaching of procedure and its scholarly exploration.

It has often been suggested that the existence of a group of scholars studying and teaching a subject facilitates the development and maintenance of an academic literature and a corpus of scholarly debate. In this article we examine the related acts of teaching and writing about procedure and how they create a community of scholars who engage each other in sustained discussions about the general and specific requirements of a civil justice system and analyze ongoing developments in the law. That scholarly engagement encourages these scholars to teach students not just to memorize but to learn. It encourages them to expose their students to cutting-edge developments in the field, and to inspire their students to seek out new information, synthesize it, and analyze it in the context of larger policy concerns.<sup>3</sup>

The teaching of civil procedure in an academic context promotes and supports the existence of a community of scholars by making possible the unified “teacher-scholar.” Educational theory posits that the “teacher-scholar is at once deeply committed to inquiry in his or her disciplinary field and passionately devoted to successful student learning through teaching and good institutional practices.”<sup>4</sup> Faculty members achieve most in both teaching and scholarship when there are “lively connections” between their role as teachers and their role as scholars.<sup>5</sup> This has a number of related causes:

- teaching requires a breadth of mastery of a field that facilitates critical inquiry and suggests subjects for research;
- teaching involves encounters with engaged learners that help to raise and highlight important research questions;
- teaching and scholarship in the same field involve a synergy reflected

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2. See Erik Knutsen et al, “The Teaching of Procedure Across Common Law Systems” (2013) 51:1 Osgoode Hall LJ 42-43 [Knutsen, “Teaching”].

3. See David Bamford et al, “Learning the ‘How’ of the Law: Teaching Procedure and Legal Education” (2013) 51:1 Osgoode Hall LK 45. Bamford et al provide a fuller discussion of the effect on teaching when civil procedure courses are included within the academy.

4. Byerly et al, “Student Learning and Faculty Research: Connecting Teaching and Scholarship” *A Teagle Foundation White Paper* (April 2007), online: American Council of Learned Societies <<http://www.acls.org>> at 3.

5. *Ibid* at 4.

in both the mundane (efficient use of time) and the imaginative (ideas born in one spark activity in the other);<sup>6</sup>

- participation in a scholarly community means that the teacher is also a learner, and engaged scholarship promotes not only up-to-date knowledge but also a spirit of enthusiastic inquiry that models for the students the value of careful research and thoughtful reflection.

The teaching of procedure can also promote the work of a community of scholars by providing a sizeable group of interested and involved people. For those who seek careers in academia, the opportunity both to teach and to write in the same area is invaluable. Accordingly, the opportunity to teach procedure encourages a greater number of new scholars to specialize in procedure as their academic calling. This in turn enables the development of community on a larger plane—sheer numbers make many things possible. When a subject is taught in the university setting, and those teachers have jobs that require them to produce scholarship, a critical mass of scholars develops, and they produce a body of research, analysis, and publications. These people and that scholarly corpus then make numerous interactions and, consequently, supportive institutions grow and thrive. When, on the other hand, a subject is not taught at all, or taught only in a single course at an introductory level, the development of a stable core of scholars is far less likely.

This article will examine the relationship between teaching procedure and scholarship on procedure in light of these theories. Is there a correlation between the place of civil procedure as an academic subject in common law countries and the existence (or non-existence) of a lively scholarly community? Do countries in which procedure is taught in the university have a more vibrant and extensive community of procedure scholars?

In the country reports that follow, we will paint a picture of each country's community of procedure scholars in an effort to get a feel for its size and strength. Who are the people who are writing and teaching in the procedure area, and how many of them are there? What kinds of institutional support for procedure scholars and scholarship exist, or what institutional barriers make the production or recognition of procedure scholarship more difficult? In addition to looking at the people, we will consider the scholarship itself: What amount and what type of research and writing results from each country's group of proceduralists? Not

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6. See Jeff Lipshaw, "Synergistic Teaching and Scholarship in Contract Law: Concepts and Metaphors" *The Faculty Lounge* (3 September 2010), online: <<http://www.thefacultyounge.org>> (describing the relationship between contracts scholars' recent scholarly projects and his teaching of first-year contracts).

surprisingly, we conclude that there is a direct correlation between the placement of procedure in the university setting and the development of a community of procedure scholars with the ability to produce an ongoing dialog that supports the legal system's quest for greater procedural and substantive justice.<sup>7</sup>

## II. UNITED STATES

### A. A LARGE GROUP OF SCHOLARS

As the first article in this collection explains,<sup>8</sup> civil procedure is a required first year course in US law schools. The need to staff required courses in some two hundred law schools across the United States has resulted in a large body of civil procedure teachers. In addition, the teaching of Civil Procedure in the first year makes possible a wide array of advanced procedure courses in the upper years, enabling those whose research interests lie in the procedure area to teach most or all of their classes in that field.

How large is the resulting group of procedure scholars? The 2010 directory of US law teachers listed 1,365 people as having taught Civil Procedure for at least one year.<sup>9</sup> This number included many who did not do their scholarship in the procedure area.<sup>10</sup> Nevertheless, a survey of publications in North American law reviews and of academic publishers indicates that since 2005, more than three hundred of those academics who list themselves as having taught procedure have published an article, chapter, or book on a subject related to civil procedure.<sup>11</sup>

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7. See *e.g.* Janet Walker et al, "Thoughtful Practitioners and an Engaged Legal Community: The Impact of Teaching Procedure on the Profession and Civil Justice Reform" (2013) 51:1 Osgoode Hall LJ 155 at 197-198 [Walker et al, "Thoughtful Practitioners"]. Walker et al provide a fuller discussion of the links between the teaching of Civil Procedure, the legal profession, and law reform.

8. Knutsen, "Teaching," *supra* note 2.

9. See *e.g.* *AALS Directory of Law Teachers 2009-2010*, online: Association of American Law Schools <<http://aals.org>>.

10. As a required introductory course, Civil Procedure generally must be taught by full-time faculty members and will be taught every year, often to multiple sections. The number of teachers is therefore quite large. As is also true of first-year subjects like Torts, Contracts, and Property; however, many of the academics who teach procedure do so as a service to the school and not because it is their area of scholarly interest. The directory also allows the reporting of courses taught only in the past, and so the lists contain the names of persons who no longer teach Civil Procedure.

11. See *supra* note 9. This count is based on an online search, using the names of self-identified civil procedure teachers as search terms in LEXIS and Westlaw law journal databases and on the websites of US legal academic publishing companies. The AALS directory lists faculty

Many have published a number of such works and have consistently done so over the course of their careers; others are just beginning. In short, the combination of the large number of law schools and the treatment of Civil Procedure as a required course have together created a critical mass of proceduralists with the motivation and resources to support a vibrant scholarly community.

In a way, the legal culture of the United States contributes to interest in the civil procedure area. Perhaps more than any other country, the United States leaves the enforcement of legal norms to private litigation, as opposed to some administrative enforcement mechanism.<sup>12</sup> On any given day, national news media report on the latest developments in litigation that will both determine the parties' rights and shape the nation's laws. Educated Americans are thus acutely aware not only of the powerful role that lawsuits play in making law but also of the role of procedural decisions in determining who wins and loses those lawsuits, the cost of those lawsuits, and the ability of parties to meaningfully participate in the process of dispute resolution. In this context, it is natural that studying the way in which the civil justice system operates would be of interest to some potential academics. In addition, many legal academics spend some time as young litigators, or as law clerks to courts at various levels of the judiciary, before turning to academia and thus have the familiarity with procedure necessary to begin to think analytically about the larger system.

A procedure teacher's decision to publish in that area is enabled by a relatively extensive array of available outlets. Almost every US law school publishes a general student-edited journal, and those journals include procedure articles in their coverage. There are, in addition, numerous specialized journals whose areas include both pure procedure and the interaction of procedure and substantive law ("procedure plus"). These student-edited journals form an accepted part of the US academic career path, and so there are few peer-review gatekeepers with a disdain for procedure standing between a procedure scholar and journal publication (although proceduralists do worry that the student editors will be more attracted

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by subject/years. Those lists are the result of a survey form that each faculty member at each member school fills out every year. Each teacher self-identifies as a civil procedure scholar by filling out the form. This search was conducted by taking each name and conducting a search through the US Law Journals database in Lexis, the JLR database in Westlaw, the websites for West Publishing, LexisNexis, Aspen/Wolters Kluwer, and Carolina Academic Press. Google Scholar searches were also conducted to ensure that no work was missed. This research was conducted by Beth Thornburg and her research assistant from May to June 2010.

12. See e.g. Robert A Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge: Harvard University Press, 2001); Stephen B Burbank, "The Roles of Litigation" (2002) 80:3 Wash ULQ 705 at 711.



by the allegedly sexier topics of constitutional law and legal controversies in the news).<sup>13</sup> Lexis and Westlaw also make the choice easier: They include virtually all of these journals in their databases, and so choice of a less prestigious journal does not limit readership to a small number of libraries.

Perhaps because many law schools are private rather than public, there are no government-funding regulations assigning rankings to law journals or official national review panels through which proceduralists are judged by non-proceduralists.<sup>14</sup> Rather, in terms of any individual academic's career progress, faculty committees solicit peer reviews of specific articles by professors chosen for their expertise in the particular candidate's area. Because of the large size of the academic procedure community, a rising procedure scholar will be able to have his or her work reviewed by knowledgeable professors in the appropriate field, and at least in theory this evaluation will be made without undue regard to the journal in which the article was placed.

All of these factors combine to encourage, or at least not discourage, the large number of civil procedure teachers to make civil procedure their area of scholarly research and writing. In addition, since many US legal academics practised as litigators or worked with courts before becoming full-time academics, there is also a large number who have the necessary practical knowledge to which they may now apply their broader theoretical concerns.

## B. A COMPLEX WEB OF SUPPORT STRUCTURES

In addition to the individual incentives discussed above, would-be procedure scholars also can tap into an extensive array of institutions that help to enrich and further their scholarly agendas. Given the number of people involved, measuring and

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13. See *e.g.* Joachim Zekoll, "Comparative Civil Procedure" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) ch 41. The essay discusses how many students and scholars view Civil Procedure as a boring subject.

14. Reviewers of individual scholars' work for purposes of tenure or promotion may be influenced by gut-level feelings about the probable quality of articles, based on similar feelings about the probable selectivity of the publishing journal, based in turn on selectivity or perceived quality of the sponsoring school. However, there is nothing that corresponds to the formal nationwide Australian/UK evaluation systems described in sections III and IV of this essay (see below). The Washington & Lee Law Library does provide a database that allows evaluation of various journals on various measures. See "Law Journals Submissions and Ranking, 2005-2012," online: Washington & Lee University School of Law Library <<http://lawlib.wlu.edu/LJ>>. However, this is used more by scholars deciding where to publish (student editing also allows multiple simultaneous submission) than by reviewers making decisions about tenure or promotion.

describing the community's support structures in a fully nuanced way is difficult. Sometimes that support manifests itself in informal, person-to-person interactions between scholars with similar interests who help each other by reading and critiquing drafts of articles, talking through difficult issues, or exchanging teaching ideas. In addition, there are more formal groups demonstrating or supporting the work of procedure scholars that are further evidence of the community's health and activity.

Some of these institutions that bring civil procedure scholars together are organized by the national group that serves as the principal representative of legal education in the United States, the Association of American Law Schools (AALS).<sup>15</sup> Many of the activities of the AALS operate through subject-matter sections, which present programs at the annual meeting, provide newsletters for their members, and facilitate other activities such as mentoring programs and email discussion lists. AALS sections meet at least annually, and those repeated in-person contacts create networks of colleagues that are then sustained through virtual communities and electronic communications. The Civil Procedure section is very large and very active, and there are also sections on Alternative Dispute Resolution, Litigation, and Federal Courts.

Section meetings do more than provide networking opportunities, although those are important for the strength of the scholarly community. Their presentations highlight important procedural issues, and allow established and emerging scholars alike to create a dialogue about those issues. Increasingly, the presentations are the result of a call for papers and are published in law journals following the annual meeting. Some examples of the section topics may help to illustrate the kinds of subjects presented. At the 2011 annual meeting, the Litigation, Civil Procedure, and Professional Responsibility sections combined to present a panel called "Current Issues in Judicial Disqualification." Past section programs have included "Revisiting Discovery," "The Future of Summary Judgment," "E-Discovery: A Litigation Revolution," "The Changing Shape of Federal Pretrial Practice," and "The Role and Future of the Federal Rules." Every few years, the Civil Procedure section also sponsors workshops where specialists can come together and consider cutting edge topics in the definition and content of the field. In 2010, for example, the workshop confronted pedagogical challenges ("Charting Your Course in a Changing Field"), while an earlier year focused on the varying approaches to procedure topics ("The Many Faces of Contemporary Civil Procedure").

Perhaps even more telling evidence of the pervasive influence of civil procedure scholarship can be found in panels presented by sections that are *not* nominally

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15. Information about the AALS, its sections, and its programs, is available on their website. See The Association of American Law Schools, online: <<http://www.aals.org>>.

about civil procedure. Issues of access to justice, procedural legitimacy, tradeoffs between efficiency and process, and the impact of procedure on substantive rights—all staples of civil procedure scholarship—are reflected in topics such as these: “Choice of Law and Complex Litigation” (Conflict of Laws); “Tribal-State Court Cooperative Models and Agreements” (Indian Nations & Indigenous Peoples); “Global Conceptions of Access to Justice” (Comparative Law); “How Bad are Mandatory Arbitration Terms?” (Contracts); “The Federal Courts and the International System” (Federal Courts); and “The Many Faces of *Iqbal*: Pleadings, Supervisory Liability, and *Bivens*” (Civil Rights).

The Civil Procedure section also provides resources to help mentor newer procedure scholars in their understanding of the field and in their scholarship. The website contains resources useful for all procedure teachers, including copies of pleadings from historically important cases and summaries of recent developments in procedure law.<sup>16</sup> 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. The section itself also has a separate listserv, on which members of the scholarly community debate the significance and meaning of recent developments, share resources, and comment on both scholarship and teaching.<sup>17</sup>

In addition to these forums for scholars to test their ideas and compare thoughts about the field, opportunities abound for making the kind of personal connections that allow members of subject-specific communities to strengthen the bonds between them. One such institution is the Field Family Forum, a loosely organized group of procedure scholars (named after nineteenth-century procedure reformer David Dudley Field) who meet for dinner, debate, and conversation during each AALS annual meeting. While the topics for debate are silly (*Beignet*

16. See “Section on Civil Procedure” *The Association of American Law Schools*, online: The Association of American Law Schools <<http://nathenson.org/aalscivpro/>>.

17. Scholars sometimes acknowledge the helpful effect of the listserv in initial footnotes in their writings. See e.g. Thomas D Rowe, Jr, “Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job In Its Erie-Hanna Jurisprudence?” (1998) 73:4 Notre Dame L Rev 963. Rowe writes: “I am indebted to participants in a lively and extended e-mail discussion ... via the medium of a listserv for civil procedure professors.” (*Ibid* at 963); James R Pielemeier, “Why General Personal Jurisdiction over ‘Virtual Stores’ is a Bad Idea” (2009) 27:3 Quinnipiac L Rev 625. “The author also thanks Professors Tom Rowe and Joel Friedman for participating in a discussion on this topic on the Civil Procedure listserv, which contributed to my thinking on it.” (*Ibid* at 625); Suja A Thomas, “The New Summary Judgment Motion: The Motion to Dismiss Under *Iqbal* and *Twombly*” (2010) 14:1 Lewis & Clark Law Review 15. “I also benefitted from discussions on the *Iqbal* topic on the civil procedure listserv.” (*Ibid* at 15).

*v Burritos*, *Apples v Oranges*), the relationships formed are not, and they can result in co-authored scholarship, opportunities to present work at other schools, and mentoring of young procedure scholars.

As with the AALS, the influence of the civil procedure community is seen in its members' involvement in bringing procedure topics to more general groups and conferences. One of the Collaborative Research Networks of the Law and Society Association is devoted to "Civil Justice and Disputing Behavior," and this community of scholars "seeks to connect those in the Law and Society/Sociolegal Studies community with the segment of the growing Empirical Legal Studies community that focuses on civil justice issues."<sup>18</sup> The annual Conference on Empirical Legal Studies also regularly includes multiple presentations on courts and procedure, and the Journal of Empirical Legal Studies frequently publishes articles reporting on the impact of various court processes.<sup>19</sup>

Another indicator of community activity comes from a different centralized source: the Social Science Research Network (SSRN). In addition to posting recently published work and works in progress, SSRN facilitates community awareness and dialogue through its subject-specific e-Journals, which publicize recent postings in weekly emails. There are several in the procedure area, all of which have a significant number of entries. These include Law & Courts (5,751 entries); Law & Society: Civil Procedure (1,571 entries); Law & Society: Courts (2,371 entries); Litigation & Procedure (6,296 entries); Litigation, Procedure & Dispute Resolution (1997-2000 archive) (692 entries); and Negotiation and Dispute Resolution (2,732 entries).<sup>20</sup>

In annual meetings, conferences, and symposia, interest in procedure is also shown in procedure plus scholarship, which considers the effect of procedure

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18. "Collaborative Research Networks" *Law and Society Association*, online: Law and Society Association <<http://www.lawandsociety.org>>.

19. See e.g. Margaret S Williams & Tracey E George, "Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation" (2013) 10:3 J Empirical Legal Stud 461 [Williams & George, "Complex Civil Litigation?"]; Theodore Eisenberg et al, "Does the Judge Matter? Exploiting Random Assignment on a Court of Last Resort to Assess Judge and Case Selection Effects" (2012) 9:2 J Empirical Legal Stud 246.

20. Counted as of 1 November 2013. The same article may be included in more than one e-Journal, and so these do not reflect 18,721 separate articles. Download data also reflects the extent of the influence of procedure scholarship. For example, articles from the Law & Courts e-Journal have been downloaded 709,320 times. While scholars from any country can post to SSRN, an impressionistic survey of these e-Journals shows that a majority of the authors are from the United States. This result, however, may be skewed by the fact that journals in other countries may refuse to publish articles that have been previously posted, or may refuse permission to post a copy of a published article.

on some area of substantive law. In early 2011, for example, one law journal sponsored a conference on “Civil Litigation as a Tool for Regulating Climate Change.”<sup>21</sup> Cutting across legal disciplines, conferences and colloquia reflect on topics such as the impact of procedure rules governing pleadings, discovery, class actions, and summary judgment on enforcement of antitrust law, securities law, civil rights law, consumer law, and patent law.

Other support structures reflect the work of individuals who have created venues for community conversation. There are, for example, at least three procedure-related blogs written by and for the civil procedure scholarly community (as well as interested lawyers, judges, and law students): Civil Procedure & Federal Courts Blog,<sup>22</sup> Federal Civil Practice Bulletin,<sup>23</sup> and Mass Tort Litigation Blog.<sup>24</sup> The influence of these conversations on scholarship can be seen in the increasing tendency to cite them in law review footnotes.<sup>25</sup>

Individual professors, with the support of their law schools and often of their school's law journal, also organize conferences or symposia on procedure-related topics. For example, in one recent period of a year or so, proceduralists at multiple law schools have organized symposia to analyze the US Supreme Court's problematic new pleading standards,<sup>26</sup> two more to discuss the allocation of legislative power between state and federal governments,<sup>27</sup> as well as two on aggregate litigation,<sup>28</sup> with others on procedural reform generally, US

21. James R May, “Civil Litigation as a Tool for Regulating Climate Change” (Paper delivered at the Valparaiso School of Law, Valparaiso University, 18 February 2011), (2012) 46:2 Val U L Rev 357.
22. *Civil Procedure & Federal Courts Blog*, online: <<http://lawprofessors.typepad.com/civpro>>.
23. *Federal Civil Practice Bulletin*, online: <<http://federalpracticebulletin.blogspot.ca>>.
24. *Mass Tort Litigation Blog*, online: <[http://lawprofessors.typepad.com/mass\\_tort\\_litigation](http://lawprofessors.typepad.com/mass_tort_litigation)>.
25. See e.g. Hillel Y Levin, “*Iqbal*, *Twombly*, and the Lessons of the *Celotex* Trilogy” (2010) 14:1 Lewis & Clark L Rev 143 at 144–45, n 6 and n 8.
26. Justin Kirk Houser, “Reflections on *Iqbal*: Discerning Its Rule, Grappling with Its Implications” (Paper delivered at the Dickinson School of Law, Penn State University, 26 March 2010) (2010) 114:4 Penn St L Rev 1143; Edward Brunet, “Pondering *Iqbal*” (Paper delivered at the Lewis & Clark Law School) (2010) 14:1 Lewis & Clark L Rev 1.
27. Jay Tidmarsh, “Erie Under Advisement: The Doctrine After *Shady Grove*” (2011) 44:4 Akron L Rev 897; Patrick J Borchers, “Symposium on *Shady Grove Orthopedic Associates v Allstate Insurance*: A Collection of Opinions” (2010) 44:1 Creighton L Rev 1.
28. Manuel A Gomez & Deborah R Hensler, “The Globalization of Collective Litigation” (4th International Conference on the Globalization of Collective Litigation, Lecture delivered at the Florida International University College of Law, 10 December 2010), [unpublished]; Roger H Transgrud, “Aggregate Litigation: Critical Perspectives” (Paper delivered at the George Washington University Law School, 12 March 2010), (2011) 79:2 Geo Wash L Rev 293; Mike Allen & Tom Metzloff, “Evolution or Revolution? American Civil Procedure in the 21st Century” (Paper delivered at the Southeastern Association of Law Schools Annual

court structure,<sup>29</sup> and on the twenty-fifth anniversary of the landmark article, “Against Settlement.”<sup>30</sup>

Civil procedure scholars were also significant contributors to a conference designed to help guide the Advisory Committee on the Federal Rules of Civil Procedure in grappling with the challenge of making rules to govern modern litigation.<sup>31</sup> And proceduralists frequently present their works in progress to faculty colloquia at other schools, at the invitation of fellow procedure scholars or other academics who find their work important and interesting.

The US civil procedure community also reaches out to its global siblings through both institutionalized and individual efforts. The American Law Institute’s joint project with UNIDROIT, resulting in the Transnational Rules of Civil Procedure, involved the collaboration of proceduralists from many nations.<sup>32</sup> International conferences on comparative procedure, aggregate litigation, court collaboration, online dispute resolution, court costs, and litigation financing are only a few examples of the ways in which the scholarly community in the United States both demonstrates its own existence and is enriched by interactions with procedure

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Meeting, Hilton Head, South Carolina, 24 July 2011), [unpublished].

29. See e.g. Mark R Kravitz, “Civil Justice Reform: A Symposium” (2010) 87:2 Denv UL Rev 213; S.L. Strong, “Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration” (Paper delivered at the Center for the Study of Dispute Resolution, University of Missouri School of Law, 21 October 2011), (2012) 2012:1 J Disp Resol 1; Suja A Thomas “Symposium: Originalism and the Jury” (Paper delivered at the Ohio State University, 17 November 2009), (2010) 71:5 Ohio St LJ 883; the Association of American Law Schools “Weighing in on Wal-Mart: The Implications of *Dukes v Wal-Mart* for the Future of Employment Discrimination and Class Action Law” (Panel discussion delivered at the Association of American Law Schools annual meeting, San Francisco, 7 January 2011) [unpublished].
30. Howard Erichson, “*Against Settlement*: 25 Years Later” (Paper delivered at the Fordham Law School, Fordham University, 3 April 2009), (2009) 78:3 Fordham L Rev 1117.
31. For the conference agenda and information on the Advisory Committee, see US Courts, *2010 Civil Litigation Conference*, online: <<http://civilconference.uscourts.gov>>. For a fuller discussion of the relationship between the procedure community and procedural reform, see also Walker et al, “Thoughtful Practitioners,” *supra* note 7.
32. See e.g. “ALI/UNIDROIT Principles of Transnational Civil Procedure” *International Institute for the Unification of Private Law*, online: ALI / UNIDROIT <<http://www.unidroit.org>>. See e.g. Geoffrey C Hazard, Jr et al, “Principles and Rules of Transnational Civil Procedure: Introduction to the Principles and Rules of Transnational Civil Procedure” (2001) 33:3 NYUJ Int’l L & Pol 769; Carla Crifò, “Book Review, The Future of Transnational Litigation: English Responses to the ALI/UNIDROIT Draft Principles and Rules of Transnational Procedure” (2004) 23:3 CJQ 421; Louis F Del Duca, “Globalization of Civil Procedure—The ALI & UNIDROIT Principles and Rules of Transnational Civil Procedure Symposium: Introduction” (2006) 25:2 Penn St Int’l L Rev 495.

scholars from other countries. These group activities as well as academic visits across borders allow proceduralists from different countries to come together, share ideas about fundamental concepts of civil dispute resolution, and use the resulting insights to further the conversation both in their own countries and internationally.

### C. PROCEDURE SCHOLARSHIP

The most significant evidence of the existence of a scholarly community is, of course, the scholarship itself. Any count of procedure scholarship in the United States will be impressionistic, because the numbers are sufficiently vast to make a complete count daunting. Instruction in civil procedure has been part of US legal education virtually from the beginning,<sup>33</sup> and its teachers have been publishing books and articles for over a century.<sup>34</sup> As noted above, student-edited general law journals, which began as teaching tools but became the dominant medium for academic law publishing in the United States, exist in almost every one of the two hundred US law schools, providing outlets for the research and writing required of academic lawyers.<sup>35</sup> What follows is therefore intended as a sketch of the quantitative and qualitative scope of procedure scholarship.

There have been hundreds of law review articles on procedure topics since their advent in the late nineteenth century. But a better sign of the health and impact of the current community of procedure scholars is recent rather than historical output. There are a few ways to try to get a snapshot view. For example, one might search the names of the most senior teachers of civil procedure (those who identify themselves in the law teachers' directory as having taught procedure for ten years or more) through a database of US law journals to see what they have published on procedure-related topics since 2005.<sup>36</sup> A search of this type done in June 2010

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33. See Mary Brigid McManamon, "The History of the Civil Procedure Course: A Study In Evolving Pedagogy" (1998) 30:2 *Ariz St LJ* 397.

34. The very first issue of the *Harvard Law Review*, for example, published commentary on procedure issues such as the cost of litigation (in 1887!) and the jurisdiction of the federal trial courts. "Correspondence" (1887) 1:1 *Harv L Rev* 43 at 43-46.

35. While the comparative absence of peer-reviewed law journals raises important concerns, there are some ways in which the number of journals has allowed a rich and varied array of writings to flourish. See *e.g.* Michael L Closen & Robert J Dzielak, "The History and Influence of the Law Review Institution" (1996) 30:1 *Akron L Rev* 15; Lawrence M Friedman, "Law Reviews and Legal Scholarship: Some Comments" (1998) 75:2 *Denv UL Rev* 661; Ronald D Rotunda, "Law Reviews—The Extreme Centrist Position" (1986) 62:1 *Ind LJ* 1; Mary Beth Beazley & Linda H Edwards, "The Process and the Product: A Bibliography of Scholarship About Legal Scholarship" (1998) 49:3 *Mercer L Rev* 741.

36. Since these databases do not include all US journals and also omit books, chapters,



produced approximately ninety-five articles, while a search of the six to ten year teachers added about sixty-five more.

Another option would be to use the “Civil Procedure Law Review” database in LEXIS. We did a natural language search for selected civil procedure terms, with results sorted by relevance, from 2005 through 1 October 2010, retrieving the first 250 items. We used an extremely conservative measure, counting only articles written by full-time faculty members, and eliminating those by students (even S.J.D. or Ph.D. students), practitioners (even if they taught as adjunct faculty), judges, and non-US academics. Even this extensive pruning resulted in a list of more than 125 articles.<sup>37</sup> Many were written by national leaders in the field, while others came from emerging scholars, and yet others from non-proceduralists exploring the impact of procedure on substantive law—all signs of a healthy scholarly community. The incomplete nature of these results is illustrated by the fact that a search only for the phrase “civil procedure” resulted in many additional articles, and the use of any of the phrases individually, or different ones (such as “cost shifting” or “attorney fees” or “jury”) did the same. In addition, because the LEXIS database does not include works in progress, the extensive posting on the SSRN e-Journals, noted above, should also be considered as part of the picture.

Our estimate of 125 articles is conservative for a number of reasons. The results are limited to articles by full-time academics, which understates the extent and impact of the procedure community. Ignoring the contributions of professors from other countries discounts the energizing and productive comparative procedure conversations taking place across borders, evidenced by the publication in US journals of articles by and about procedure in other countries. Ignoring the contributions of judges and lawyers discounts the very fine articles that academically-inclined practitioners sometimes write. And ignoring students’ contributions discounts the evidence student work provides that they are affected by and a part of the scholarly conversation, including hundreds of case notes and comments on procedure topics. While such a conservative count is

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monographs, and others types of writings, this understates the quantity of scholarship. These findings also do not include works by authors who have taught Civil Procedure for less than five years—in some ways the group most likely to have engaged in law review scholarship.

37. See Appendix A for a list of these articles. We used the following search terms as a string of alternatives: heightened pleading, rule 8, discovery, case management, rule 16, class action, aggregate litigation, summary judgment, and civil procedure. This search method results in a number that is merely suggestive, for a number of reasons. First, going beyond the first 250 search results would have resulted in yet more articles even for this query. Second, this choice of topics eliminates other issues in civil procedure and thus other articles. Third, it ignores publications not in the LEXIS database. We offer the results, then, merely as one indicator of the flow of scholarship and not as the likely total of procedure scholarship.



sufficient to demonstrate the existence of a robust scholarly community, it nevertheless undercounts the scholarship traceable to the activities of procedure scholars.<sup>38</sup>

What types of scholarship has the community produced? The academic corpus is large and diverse. One way of considering the quality of the scholarship is to consider those works that have been the most influential in the field. An informal poll of proceduralists resulted in a list of about fifty works.<sup>39</sup> Some critically examine steps in the pre-trial process.<sup>40</sup> Others consider procedural requirements in light of their history,<sup>41</sup> while others undertake empirical examinations of the impact of procedural choices.<sup>42</sup> Some articles take positions on the policy choices underlying a shift to case management, to a preference for settlement, and to other methods of dispute resolution.<sup>43</sup> The interdependence of procedure

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38. The pruning eliminated only a few articles by non-US academics and by Ph.D./S.J.D. students and a few more by judges and practitioners. There is, in addition to the works in this database, a large body of practice-oriented writing by practitioners and judges in bar journal publications (similar to those in law society publications in other countries). The largest group of non-counted articles is student work. Generally speaking, the student staff members of US law journals are required to write one or more case notes or comments, and each journal publishes a few of them in each issue. This practice results in the publication of a large volume of student-written work, and some of it addresses procedure or procedure plus topics. We chose not to count these since the practice of publishing (or not) student work varies considerably across countries and journals and thereby introduces more variables in cross-country comparisons. It also reflects only indirectly the impact of the community of academic proceduralists on the body of procedure scholarship.
  39. See Appendix B for a list of these articles and monographs. The list was compiled through a survey of participants in the Civil Procedure listserv in October 2010.
  40. See *e.g.* Paul D Carrington, "Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure" (1989) 137:5 U Pa L Rev 2067; Edward H Cooper, "Directions for Directed Verdicts: A Compass for Federal Courts" (1971) 55:5 Minn L Rev 903; Linda S Mullenix, "Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking" (1994) 46:6 Stan L Rev 1393; Christopher M Fairman, "The Myth of Notice Pleading" (2003) 45:4 Ariz L Rev 987.
  41. See *e.g.* Stephen B Burbank, "The Rules Enabling Act of 1934" (1982) 130:5 U Pa L Rev 1015; Stephan Landsman, "The Civil Jury in America: Scenes From an Unappreciated History" (1993) 44:3 Hastings LJ 579; Edward A Purcell, Jr, *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958* (New York: Oxford University Press, 1992) ch 1; Stephen N Subrin, "Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules" (1998) 39:3 BCL Rev 691.
  42. See *e.g.* Wayne D Brazil, "Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses" (1980) 5:4 Am Bar Foundation Research J 787; Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1:3 J Empirical Legal Stud 459.
  43. See *e.g.* Owen M Fiss, "Against Settlement" (1984) 93:8 Yale LJ 1073; Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100:6 Yale LJ 1545; Carrie

and substance also means that some of the classics fall into the category of procedure plus.<sup>44</sup>

Another way to analyze the collective work of US proceduralists is to consider the many lenses through which they scrutinize the components of procedure. Some are primarily doctrinal, clearly and helpfully systematizing the operation of each rule as well as clarifying jurisdictional requirements.<sup>45</sup> Proceduralists have used the methodology of economics,<sup>46</sup> psychology,<sup>47</sup> political science,<sup>48</sup> and linguistics<sup>49</sup> in their scholarship. A range of analytic theories also make appearances: comparative law,<sup>50</sup> empirical methods,<sup>51</sup> feminist theory,<sup>52</sup> critical race theory,<sup>53</sup> and even religious concepts such as reconciliation or atonement

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Menkel-Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or 'The Law of ADR' (1991) 19:1 Fla St UL Rev 1; Judith Resnik, "Managerial Judges" (1982) 96:2 Harv L Rev 376; Frank EA Sander, "Varieties of Dispute Processing" in A Leo Levin & Russell R Wheeler, eds, *The Pound Conference Perspectives on Justice in the Future* (St Paul, Minnesota: West, 1979) at 65.

44. See e.g. Janet Cooper Alexander, "Do the Merits Matter: A Study of Settlements in Securities Class Actions" (1991) 43:3 Stan L Rev 497; Derrick A Bell, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation" (1976) 85:4 Yale L Rev 470; Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89:7 Harv L Rev 1281.
45. There are, for example, two must-read multi-volume treatises on federal civil procedure. See James William Moore et al, *Moore's Federal Practice* (New York: M Bender, 1948); and Charles Alan Wright, Arthur Miller & Andrew D Leipold, *Federal Practice and Procedure* (Eagan: Thomson/West, 2013).
46. Robert G Bone, "Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness" (2003) 83:3 BUL Rev 485.
47. Dan M Kahan, David A Hoffman & Donald Braman, "Whose Eyes Are You Going to Believe: *Scott v. Harris* and the Problem of Cognitive Illiberalism" (2009) 122:3 Harv L Rev 837.
48. This is particularly common in studies of judicial behaviour. See e.g. Tracey E George, "Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals" (1998) 58:5 Ohio St LJ 1635. In addition, public choice theory, blending political science and economics, has also made inroads. See Jonathan R Macey, "Judicial Preferences, Public Choice, and the Rules of Procedure" (1994) 23:2 J Legal Stud 627.
49. Elizabeth G Thornburg, "Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System" (1995) 10:2 Wis Women's LJ 225.
50. John H Langbein, "The German Advantage in Civil Procedure" (1985) 52:4 U Chicago L Rev 823.
51. Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31:1 UCLA L Rev.
52. Elizabeth M Schneider, "Gendering and Engendering Process" (1993) 61:4 U Cin L Rev 1223.
53. Roy L Brooks, "Critical Race Theory: A Proposed Structure and Application to Federal

are used to analyze litigation.<sup>54</sup> This diversity of viewpoints helps illustrate the possibilities of civil procedure as an academic pursuit when conditions are right to help it grow and thrive.

However the vitality of the community of proceduralists in the United States is measured, the evidence is that it represents a thriving scholarly community in the legal academy. This is in no small measure attributable to the country's strong commitment to teaching procedure as a required academic subject in law schools. From that foundation spring multiple advanced procedure courses, large numbers of teacher-scholars, and extensive networks of support, all of which reinforce the community's important work shedding light on the workings of the civil justice system.

### III. CANADA

#### A. A MULTI-DIMENSIONAL COMMUNITY

The legal academy in Canada (excluding Quebec) is proportionately smaller than in any of the other four common law countries discussed in this article (the United States, England/Wales, and Australia) because Canada has the smallest number of law schools, law students, and legal academics.<sup>55</sup> Accordingly, it should not be surprising to learn that there are less than a handful of academics in Canada who would likely identify themselves as purely "proceduralist" scholars. Procedure has generally been regarded as a compulsory law school subject in Canada in all common law, English-speaking law schools except two.<sup>56</sup> This is despite the fact that the regulators of the legal profession have not mandated a stand-alone civil

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Pleading" (1994) 11:1 Harv BlackLetter LJ 85.

54. Andrew W McThenia & Thomas L Shaffer, "For Reconciliation" (1985) 94:7 Yale LJ 1660.

55. See Knutsen, "Teaching," *supra* note 2.

56. 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 University of British Columbia, "J.D. First Year Curriculum," online: <<http://www.law.ubc.ca/>>; and University of Saskatchewan, "Upper Year Courses," online: <<http://law.usask.ca>>. However, it has for many years been the practice among the remaining twelve common law Canadian law schools to require students to complete a course in civil procedure before graduation. There is no indication that this would shift despite the fact that the most recent report of the Federation of Law Societies of Canada attempting to define national standards for an "approved" Canadian law degree does not specifically mention Civil Procedure among its compulsory law school competencies. It does, however, mention "administration of the law in Canada" as a compulsory competency, within which Civil Procedure certainly might fit. See "Task Force on the Canadian Common Law Degree—Final Report" *Federation of Law Societies of Canada* (October 2009), online: <<http://www.flsc.ca>> ["Task Force"].

procedure course for Canadian law schools, nor is it listed as a required competency for entry to the legal profession.<sup>57</sup> Civil Procedure is also taught in the upper-year curriculum in all but two law schools.<sup>58</sup> Procedure has historically been taught by an equal mix of full-time academic faculty members and adjunct faculty members from the legal profession.<sup>59</sup> There is likely a general aspiration among Canadian law schools that all mandatory courses be taught by full-time academics, but this goal appears to be rarely achieved with respect to Civil Procedure courses in most law schools.

Why this situation exists is a mystery. Perhaps it is because, in the predominant Canadian context at present, there is an expectation that the typical civil procedure course should include at least some rules-focused or practical component in addition to more doctrinal and theoretical components. This can be a challenge to pull off for an instructor whose academic focus is not, at least in part, civil procedure. One must become familiar with the latest permutation of the applicable civil rules and procedural reforms.<sup>60</sup> The requirement of currency demands a degree of up-to-the-moment technical precision that may not be demanded in other areas of law teaching. Why and how pleadings operate, for example, requires some technical knowledge about what pleadings look like and how they are drafted. Few tort law teachers may have actually represented a client in a tort claim but such experience is not prerequisite to successfully teaching torts in the Canadian context.

The situation may be a bit different for civil procedure. The demands of teaching civil procedure may be evidenced by law schools' utilization of adjunct instructors who typically have immediate and ongoing civil litigation

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57. The Federation of Law Societies of Canada is in the process of implementing standards for an approved law degree in Canada. The standards are detailed in the Federation's "Final Report: Task Force on the Canadian Common Law Degree" (*ibid*). An approved Canadian law degree program must ensure graduates fulfil various competency requirements. Competency in procedural aspects of Canadian law is not currently listed as a required "competency" (though competency in "the administration of the law in Canada" is listed at page ten of the report and may well be broad enough to include procedural aspects of the administration of the law) (*ibid* at 10).

58. Osgoode Hall Law School and the University of Toronto Law School teach "Legal Process" as a part of the required first year curriculum. See Osgoode Hall Law School "Required Courses," online: <<http://www.osgoode.yorku.ca>>; and University of Toronto Faculty of Law "Program Requirements," online: <<http://www.law.utoronto.ca>>.

59. See Part III B-C below, for more on this topic.

60. For example, Ontario's Rules of Civil Procedure were recently overhauled in 2009 by Ontario's Civil Rules Committee as a result of a sweeping review of the civil justice system written by Coulter M Osborne J, QC. See "Civil Justice Reform Project" *Ontario: Ministry of the Attorney-General* (November 2007), online: Civil Rules Committee <<http://www.attorneygeneral.jus.gov.on.ca>>.

experience. Even those full-time faculty members who teach civil procedure in Canada have typically had (or continue to have) some practical experience in civil litigation that enables them to convey the subject with the immediacy and technical precision it demands. Historically, when Canadian law schools hire legal academics, there has been greater emphasis placed on advanced law degrees than on experience in practice. Accordingly, the need for practical expertise to convey procedure as taught in most Canadian law schools has tended to reinforce the use of adjunct faculty to teach procedure.

Increasingly, however, procedure courses are being offered by full-time members of the academy. This is largely a group of scholars who identify themselves as having a strong academic interest in procedure but also a strong academic interest in another subject as well, which may or may not be obviously related to procedure. Even if civil procedure is not what a teacher describes as his or her “core area,” the fact that it is taught as an academic subject can influence scholarship in the field. Furthermore, the fact that many teachers’ core areas of academic interest are concentrated elsewhere appears to have shaped the growth of the community of proceduralists in Canada. One might describe this academic community as focused on procedure plus. Because the interests of Canadian proceduralists are often multi-disciplinary, the vibrancy of the differing scholarly approaches to the topic may well act as a better buttress for maintaining the Canadian procedure community than any procedure-related institutions that exist.

There are, in fact, very few Canadian procedure-related institutional supports for the academic study of procedure. Those that do exist are concentrated predominantly on access to justice issues for middle class or disadvantaged litigants. The Canadian Forum on Civil Justice,<sup>61</sup> for example, is perhaps the largest, and concentrates its efforts on organizing research about the civil justice system and the public, including the plight of self-represented litigants, the costs of civil justice, and the communication barriers in accessing the justice system. It partners with Canadian academics to assist with this research. Provinces have various law reform commissions, which may from time to time examine topics of a procedural nature. Provincial governments may also commission specific studies to address a procedural problem. The studies are most often targeted at specific access to justice issues, such as the recent study in Ontario on Ontario Civil Legal Needs.<sup>62</sup> Legal academics are often appointed the researchers for these projects.

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61. See Canadian Forum on Civil Justice, online: <<http://www.cfcj-fcjc.org/>>.

62. See Ontario Civil Legal Needs Project Steering Committee, “Listening to Ontarians: Report of the Ontario Civil Legal Needs Project” (May 2010), online: <<http://www.lsuc.on.ca>>.

As in the United States, there is a symbiotic relationship between teaching procedure and pursuing scholarly inquiry about procedural issues. There is a strong correlation between scholarly interests and the content of a procedure course, and the teaching climate for civil procedure in Canada has tracked a renewed rise in varied scholarly focus on civil procedure. In the past, civil procedure courses were often rules-based and often dealt mostly with doctrinal, practical issues. Today's civil procedure course often also includes international and global issues, is taught with a perspective of civil procedure as a process or system, and often also contains ethical or professionalism components.<sup>63</sup> Again, much of this may be traced to the fact that Canadian legal academics often combine the study of procedure with the study of another area of law.<sup>64</sup> Linking procedural study to that academic's interest in international, public law, or legal ethics topics enriches the learning environment and, at the same time, creates a diverse set of approaches to teaching civil procedure in Canadian law schools.

The content of the course, in turn, supports the further development of a body of writing that considers procedure through various theoretical lenses. Teaching global, systemic, and professional issues embedded within the study of civil procedure prompts law teachers to find ways to convey and apply complex theoretical issues in an accessible form for students. This, in turn, furthers scholarly inquiry and sharpens academic acumen. Having to explain not only the "what" questions of civil procedure but also the "why," "how," and "why not" questions often inspires further scholarship. Indeed, classroom discussions can be fertile sources of ideas for future study.

## B. PURE PROCEDURE SCHOLARSHIP

There is no imposed formal ranking of scholarly outlets that dictates where a Canadian legal scholar should publish his or her work. Although there may be informal norms, these tend to dissipate as one develops a scholarly reputation. Thus,

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63. An example is the co-authored standard Canadian civil procedure text edited by Janet Walker. See Janet Walker et al, *The Civil Litigation Process*, 7th ed (Toronto: Emond Montgomery, 2010). This book is co-authored by procedural academics from six law schools across Canada and includes chapters on professionalism, highlights global procedural issues in a comparative context, and has a strong litigation-as-system focus, particularly with materials on mediation and case management.

64. For example, Professor Janet Walker of Osgoode Hall Law School is a leading national expert not just in civil procedure but also in conflict of laws, as the co-author of the leading Canadian treatise on the subject. See JG Castel & Janet Walker, *Castel and Walker: Canadian Conflict of Laws*, 6th ed (Markham: LexisNexis Butterworths, 2005).

where to publish becomes negligible at a certain stage in a scholar's career. For the branch of procedure scholarship focused on the functional aspects of procedure, it can be advantageous to include practitioner/adjuncts in the academic community. Canadian civil procedure scholarship is generated by a small but dynamic corps of scholars who benefit from the strong ties between the academy and the practising bar in Canada, particularly in procedural matters. Lawyers and judges read procedural scholarship. Courts, particularly appellate courts, cite to academic writing in their judgments.<sup>65</sup> Many legal academics maintain solid relationships with the practising bar in a variety of ways: through participating in continuing legal education initiatives, through judicial education programs, through law reform committees and procedural rules committees at a variety of levels, and through consulting on actual cases with practising lawyers. Historically, the academy and the practising bar in Canada enjoyed a mutually beneficial relationship. While this relationship may have been somewhat eroded in other areas of law in Canada, it continues to be vibrant in procedural law.

Scholarly writing on purely procedural issues is, however, somewhat limited. Publication outlets for Canadian procedural scholarship are few. There are about a dozen Canadian law school peer-reviewed generalist law reviews, which publish two to four issues per year. Submissions on procedural law must compete with other submissions touching on all subjects. The peer-review process is blind and publication is not limited to full-time academic authors. There are a number of academically-inclined legal practitioners who also submit articles for publication in these law school law reviews. This has resulted in many superbly written procedural law review articles from not only authors who are full-time academics but from authors in the practising bar as well. The Canadian Bar Review, a peer-reviewed generalist journal with a strong academic focus, also publishes the occasional procedural article. Few specialty law reviews consider procedural topics, with the exception of the peer-reviewed Canadian Business Law Journal, which often

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65. A 2003 Supreme Court of Canada case relied on Garry D Watson's article on duplicative litigation. See *Toronto (City) v Canadian Union of Public Employees Local 79*, 2003 SCC 63 at para 23, [2003] 3 SCR 77, citing Garry D Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990) 69:4 Can Bar Rev 623. As well, a 2010 Ontario Court of Appeal case relied on a number of Janet Walker's writings about jurisdiction. See *Van Breda v Village Resorts Ltd*, 2010 ONCA 84 at paras 54-55, 78, [2010] OJ 402 citing Janet Walker "Muscutt Misplaced: The Future of Forum of Necessity Jurisdiction in Canada" (2009) 48:1 Can Bus LJ 135 [Walker, "Muscutt Misplaced"]; Beyond Real and Substantial Connection: The *Muscutt* Quinter" in T Archibald & M Cochrane, eds, *Annual Review of Civil Justice*, 2d ed (Toronto: Carswells, 2003) 61; Janet Walker "Must There be Uniform Standards for Jurisdiction Within a Federation?" (2003) 119:4 Law Q Rev 567.



publishes academic pieces as well as some practitioner-oriented writing. A few other practice-oriented law reviews such as the Canadian Class Action Review and the Advocates Quarterly specialize in procedural matters, and the topical reporter Carswell's Practice Cases occasionally includes case notes.

However, a scholarly article in one of these practitioner-oriented journals can have remarkable impact on the law and procedural thinking, as these journals are widely read by courts, lawyers, and academics alike.<sup>66</sup> Because the Canadian legal publishing market is small, experienced readers know where to look for material. This has the effect of raising the level of sophistication of the discourse in many practitioner-oriented journals. Practitioner-published pieces in any of the above publication outlets can be of high quality and very influential, even if not written by a full-time academic in an academic peer-reviewed publication. By the same token, academic authors writing about procedural law benefit from the high-quality discourse from the practising bar.

### C. THE SCHOLARSHIP OF "PROCEDURE PLUS"

Because Canadian procedural writing is largely driven by the procedure plus model, it is difficult to track the precise output of procedural scholarship in Canada. Clearly, though, there are fascinating articles published each year that have, as one component, an important procedural contribution.<sup>67</sup> The procedure plus approach fosters procedural literacy among the larger community of Canadian scholars who also contribute, if indirectly, to the scholarly corpus of procedural writing. They may do so by writing about issues in international law that have a procedural aspect, or about professional ethics where a procedural element is at the heart of the debate (e.g., the ethics around solicitor-client privilege). Although there are less than a handful of Canadian academics in the eighteen common law, English-speaking law schools who would identify themselves as purely "proceduralists," there are

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66. See e.g. *Pro-Swing Inc v ELTA Golf Inc*, 2006 SCC 52, [2006] 2 SCR 612 at para 17. This relied on Jeff Berryman, "Cross-Border Enforcement of Mareva Injunctions in Canada" (2005) 30:4 Advocates' Q 413; see also *Chilian v Augdome Corp* (1991), 78 DLR (4th) 129, 2 OR (3d) 696 (Ont CA) at para 57. This relied on Joan M Gilmour, "The Right to a Certificate of *Lis Pendens*" (1983) 4:3 Advocates' Q 280.

67. See e.g. Trevor CW Farrow, "Globalization, International Human Rights, and Civil Procedure" (2003) 41:3 Alta L Rev 671 [Farrow, "Globalization"]; Lorne Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007) 40:2 UBC Law Rev 727; Adam M Dodek, "Reconceiving Solicitor-Client Privilege" (2010) 35:2 Queen's LJ 493; Alice Woolley, "Time for Change: Unethical Hourly Billing in the Canadian Profession and How to Fix It" (2004) 83:3 Can Bar Rev 859 [Woolley, "Time for Change"].



perhaps less than a dozen or so who would identify as engaging in some form of “procedure plus” scholarship.

The tendency of Canadian procedural scholars to overlay procedural issues on other areas of the law promotes the view that, at least in Canada, civil procedure is a subject concerned with the civil justice system as an integrated system that, by its very nature, impacts other areas of law. For example, one procedural scholar may be known for work on conflict of laws and the international procedural issues that arise from multi-national litigation.<sup>68</sup> Another may be known for work that combines litigation, international issues, and professional ethics philosophy.<sup>69</sup> Still another may study the impact of litigation reforms on tort and insurance cases.<sup>70</sup> This trend of procedure plus in the legal academy makes sense if one views the procedural system as fundamentally integrated with the substantive law and with broader questions of the administration of justice in a variety of ways. It is procedure seen through the lens of other pressing issues and other issues seen through the lens of procedure. The connection is inevitable.

Scholarship that deals with procedure plus, which implicates other substantive areas of law, allows and requires a cross-pollination of ideas. Procedure plus mediates and energizes scholarly output. For example, if an article is written about mass tort class actions issues and problems with class certification for a class action, the piece will be read not just by procedural law scholars but by tort law and environmental law scholars as well. Similarly, an article about procedure often cannot help but deal with the underlying substantive law, sometimes just as a source of examples and sometimes as a way to illustrate the impact that procedural choices have on substance. For example, an article about pleadings

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68. See the work of Janet Walker for further scholarship on this subject. This includes Walker, “Muscutt Misplaced,” *supra* note 65; Janet Walker, “Recognizing Multijurisdiction Class Action Judgments Within Canada: Key Questions—Suggested Answers” (2008) 46:3 Can Bus LJ 450; Janet Walker, “Coordinating Multijurisdiction Class Actions through Existing Certification Processes” (2005) 42:1 Can Bus LJ 112 [Walker, “Coordinating Multijurisdiction”]; Janet Walker, “Crossborder Class Actions: A View from Across the Border” (2004) 2004:3 Mich St L Rev 755.

69. See *e.g.* Trevor CW Farrow, “Sustainable Professionalism” (2008) 46:1 Osgoode Hall LJ 51 [Farrow, “Sustainable Professionalism”]; Trevor CW Farrow “Dispute Resolution, Access to Civil Justice and Legal Education” (2005) 42:3 Alta L Rev 741; and Farrow, “Globalization,” *supra* note 67.

70. See *e.g.* Erik S Knutsen “The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada” (2010) 36:1 Queen’s LJ 113 [Knutsen, “Costs of Costs”]; Erik S Knutsen “Keeping Settlements Secret” (2010) 37:4 Fla St U L Rev 945; and Erik S Knutsen, “Auto Insurance as a Social Contract: Solving Automobile Insurance Coverage Disputes Through a Public Regulatory Framework” (2011) 48:3 Alta L Rev 715.

or *res judicata* typically requires some legal examples from other areas of law to talk about the procedure; pleadings in insurance cases will be different than pleadings in corporate-commercial disputes; class actions brought by investors will be different from class actions alleging environmental harm and different yet again from class actions alleging abuse at residential schools. Procedure in the abstract is comparatively rare.

Canadian scholarship in procedural law has experienced heightened interest in the past few years. Scholars had, in the past, focused in large part (with exceptions, of course) on the doctrinal or descriptive issues regarding civil procedure. Recently, however, in academic writing there has been an increased interest in theoretical questions of procedural law.

This interest may have come from three external influences:

1. an increased interest in global and comparative law issues generally as a result of globalization;
2. an interest in the academic study of dispute resolution as a result of the continuing challenge of civil justice reform; and
3. a renewed interest in the academic study of professional responsibility, as a result of the internationalization and diversification of the practice of law.

The global and comparative law influence likely arose because a high proportion of Canadian scholars entering academic positions in law tend to complete academic graduate work in countries other than Canada.<sup>71</sup> This, in conjunction with Canada's bijural nature and relative comfort with multiculturalism, has prompted a number of Canadian scholars to take a comparative approach to their scholarship and to refer regularly to procedural advances in other jurisdictions.<sup>72</sup> This is also supported by a general trend to more comparative analysis, even in the American marketplace of ideas (to which Canada often looks), where legal scholarship has seen an increased focus on global issues in all areas of legal study.

The interest in studying dispute resolution arose because a number of Canadian jurisdictions began to introduce mandatory mediation and alternative dispute

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71. Most recent academic hires have earned their advanced degrees primarily from law schools in the United States and the United Kingdom. In Canada, nearly all newly hired legal academics have at least some graduate study in law while the doctorate in law (such as a Ph.D. or Doctor of Juridical Science (S.J.D.), as distinct from a J.D.) has recently become the norm for entry into the Canadian academic market.

72. See *e.g.* Farrow, "Globalization," *supra* note 67; Walker, "Coordinating Multijurisdiction," *supra* note 68; and Knutsen, "Cost of Costs," *supra* note 70 (comparing the Canadian, English, and United States' experiences with fee shifting).

resolution (ADR) procedures into the litigation system.<sup>73</sup> This prompted a number of academics to study the effect of a mandatory dispute resolution mechanism running concurrently with the court system.<sup>74</sup> More importantly, however, it prompted a renewed interest in examining the civil justice system as a multi-faceted process (as opposed to a system, the main purpose of which was to get disputes to court). The resulting scholarship examined civil procedure as an entire legal process, of which court proceedings were just one component.

Finally, the renewed emphasis on studying legal professionalism has prompted a number of Canadian academics to examine topics related to both civil procedure and professionalism. The professionalism movement in Canada, if it can be called as such, likely gained ground because the then-Chief Justice of the Court of Appeal for Ontario, the Honourable Roy McMurtry, established an Advisory Committee on Professionalism in Ontario in 2002, comprised of not only judges and lawyers but also academics. This Committee hosted a conference twice a year at which new academic works written by professionals and scholars were presented on varying topics of legal professionalism. The conference provided a number of Canadian scholars with a welcome forum to present their work. It also spawned an informal network of scholars interested in the concept of professionalism and legal practice. Since the inception of the conferences and this committee, Canadian scholars have begun to examine a variety of professionalism topics in new ways, while often also incorporating important doctrinal and theoretical issues about civil procedure.<sup>75</sup>

The area next likely to develop in the field of civil procedure in Canada is empirical work. There is currently very little empirical study done on the

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73. Ontario, for example, introduced mandatory mediation in 1997. See *Rules of Civil Procedure* O Reg 575/07, r 24.1.

74. See e.g. D Paul Emond, ed, *Commercial Dispute Resolution: Alternatives to Litigation* (Aurora: Canada Law Book, 1989); Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008); Julie Macfarlane, "Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model" (2002) 40:1 Osgoode Hall LJ 49; Julie Macfarlane, "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation" (2002) 2002:2 J Disp Resol 241; Trevor CW Farrow, "The Negotiator-as-Professional: Understanding the Competing Interests of a Representative Negotiator" (2007) 7:3 Pepperdine Dispute Res LJ 373.

75. See e.g. Adam M Dodek, "Canadian Legal Ethics: A Subject in Search of Scholarship" (2000) 50:1 UTLJ 115; Adam M Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 46:1 Osgoode Hall LJ 1 at 27-28 (where Dodek lists the recent scholarly contributions of Canadian academics interested in professionalism); Lorne Sossin, "The Public Interest, Professionalism, and Pro Bono Publico" (2008) 46:1 Osgoode Hall LJ 131; Farrow, "Sustainable Professionalism," *supra* note 69; Woolley, "Time for Change," *supra* note 67; and Alice Woolley, "Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer" (1996) 9:1 Can JL & Jur 61.

Canadian civil justice system.<sup>76</sup> There are so many aspects ripe for empirical study; however, data may not be readily available because there is little publicly available information in Canada about most civil justice processes. As the procedure community continues to develop, however, we anticipate that expanding networks made possible by the procedure plus model will also bring together scholars interested in procedure, law and society, and empirical legal studies, as has been true in the United States.

Although comparatively small in size, the community of procedural scholars in Canada is maintained as a result of two dynamics: first, a symbiotic scholarly relationship with an academically-inclined practising bar that contributes to teaching and scholarship, and second, the procedure plus model, which allows a small number of full-time academics to contribute to not just the discourse and teaching of procedure but to other substantive areas of law as well. These dynamics keep the Canadian procedural landscape fluid and multi-disciplinary while also grounding it, at the same time, in traditional elements of legal practice.

#### IV. UNITED KINGDOM: ENGLAND AND WALES

##### A. THE LEGAL ACADEMY IN THE UNITED KINGDOM—DIVIDED, UNCERTAIN OF ITS ROLE

A large number of British institutions offer degrees in law (undergraduate or graduate). *The Guardian* newspaper league table lists ninety-five law schools.<sup>77</sup> Universities UK, the umbrella group for higher education institutions, publishes a summary of data regarding the numbers of students in full-time, undergraduate first degree legal education at university in the United Kingdom: out of a total 1,146,550 students in the United Kingdom, 54,850 are enrolled in full-time Law degrees.<sup>78</sup> An additional 13,295 are enrolled in graduate full-time, and 8,355 in part-time law courses, which may include, conversion courses, and diploma and vocational training

76. But see Russell Brown & Moin Yahya, "Respecting Civil Juries" (2005) 30:1 *Advoc Q* 110.

77. See "University Guide 2012: Law" *The Guardian* (17 May 2011), online: Guardian News and Media Limited <<http://www.guardian.co.uk>>. Eleven are in Scotland (Edinburgh, Edinburgh Napier, Heriot-Watt, Robert Gordon, Aberdeen, Dundee, Stirling, Glasgow, Strathclyde, Glasgow Caledonian, and West of Scotland) and two in Northern Ireland (Ulster and QU Belfast).

78. "Higher Education Facts and Figures" *Universities UK* (Summer 2010), online: Universities UK <<http://www.universitiesuk.ac.uk>>. See also Phil Harris & Sarah Beinart, "A Survey of Law Schools in the United Kingdom, 2004" (2005) 39:3 *The Law Teacher* 299 (surveying law schools' curricula and providing an empirical look at delivery methods).

when this is undertaken in a higher education institution.<sup>79</sup> Law is one of the most popular degree choices for young people leaving high school in the United Kingdom.

Nevertheless, the legal academy in the United Kingdom<sup>80</sup> is subject to a series of stresses, which reflect the relatively recent entry of Law (Common Law) into the academic curriculum, from the purely practice based, or conversion-course, route that prevailed well into the twentieth century. Law itself has struggled to gain acceptance in the English academy. According to Professor Panu Minkkinen:

Historically speaking the university jurist's full membership in modern academia is a relatively new phenomenon. Unlike her colleagues in most other disciplines in the humanities and social sciences, she has traditionally led a hybrid existence in the cross-pressures of an academic vocation and the more practical concerns of the profession.<sup>81</sup>

The question of the self-identification of the university jurist as having a theoretical rather than a practical outlook is particularly relevant to the obstacles facing the establishment of a permanent community of civil proceduralists in the United Kingdom.

The result of this apologetic distrust of the practical as insufficiently academic has been a clear division of labour between the professional bodies,<sup>82</sup> which have been responsible for training lawyers, and the universities, which have been responsible for fostering academic learning and critical thinking. As Blackstone<sup>83</sup>

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79. Knutsen, "Teaching," *supra* note 2. The analysis of England and Wales in Part V provides a detailed description of the various educational options for qualifying for a legal career.

80. Although the United Kingdom includes four nations (England, Wales, Scotland, and Northern Ireland), only England and Wales have merged legal systems. Scotland and Northern Ireland not only have their own law, they also have separate professional bodies making separate decisions about the training of lawyers. This discussion focuses on England and Wales. We believe, however, that a study of Scotland and Northern Ireland would reveal the same lack of institutional support for civil procedure scholarship that we document in the south.

81. Panu Minkkinen, "The Legal Academic of Max Weber's Tragic Modernity" (2010) 19:2 Soc & Leg Stud 165 at 166-71. Minkkinen identifies the two types of university jurists as the "legal academic" and the "academic lawyer" and writes that "reference is often made to the legal academic's alienation from the 'real world' of the law that the academic lawyer allegedly has privileged access to through her affiliation with the practice" (*ibid* at 171).

82. These bodies reinforce the tendency towards practice-oriented teaching by adopting ever more stringent professional quality requirements that focus on the technical aspects of legal practice. See the *Clementi* review, "Legal Services Review," online: <<http://webarchive.nationalarchives.gov.uk>>.

83. "W Blackstone Commentaries on the Laws of England Vol. I," online: The Avalon Project <[http://avalon.law.yale.edu/18th\\_century/blackstone\\_intro.asp#1](http://avalon.law.yale.edu/18th_century/blackstone_intro.asp#1)>. He wrote in his introduction that law can be taught as principles: "a science, which is universal in its use

put it in his apology for the teaching of law in the eighteenth century, and as Dicey did in his own inaugural lecture a hundred years later,<sup>84</sup> university courses in English law can only provide access to general principles and a system of learning. The aim of the academic teaching of law is not to replace, but to enhance the (later) vocational training. The determination to distinguish academic studies from the reality of practice that has been thought necessary to maintain a place in the larger academy may go a long way to explaining the absence of courses on civil procedure in mainstream legal academia.<sup>85</sup> Ironically, this has supported the view that a law degree is not needed to become a lawyer.

The majority of university jurists in the United Kingdom have not, or not significantly, practised law before becoming academics.<sup>86</sup> Ph.D. degrees are becoming the norm as a hiring requirement.<sup>87</sup> There are, however, very few Ph.D. holders in civil procedure, and many come from other countries (in particular other European countries, where civil procedure is an essential, and often extremely theoretical, course on the undergraduate, academic law degree). The few that do exist acquired their Ph.D. degrees, if not abroad, at one of the four institutions (Oxford, Cambridge, Birmingham, and University College London) that have courses in civil procedure. This suggests the existence of a community

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and extent, accommodated to each individual, yet comprehending the whole community," (*ibid* at 27). In addition, Blackstone wrote that the academic's course will be "a general map of the law, marking out the shape of the country, it's connexions and boundaries, it's greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet [sic]," (*ibid* at 35). Finally, Blackstone noted that "some branches of the law, as the formal process of civil suits, and the subtle distinctions incident to landed property, which are the most difficult to be thoroughly understood, are the least worth the pains of understanding, except to such gentlemen as intend to pursue the profession..." (*ibid* at 36).

84. AV Dicey, "Can English Law Be Taught at the Universities? An Inaugural Lecture Delivered at All Souls College" (London, United Kingdom: Macmillan, 1883). This lecture was delivered at All Souls College on 21 April 1883, and in Minkkinen's words: Dicey "juxtapos[es] the 'theoretical' orientation of a university education with a 'reality' that only vocational training can allegedly give access to." See Minkkinen, *supra* note 81 at 171. The shortcomings of the pure vocational learning, for which a university education can aid, are given as "fragmentariness, lack of systematicity, and waste of time and labour." See Dicey, *supra* note 84 at 10-11.

85. This is true with the notable exception of a few institutions. The institutions at which civil procedure is taught in England and Wales are extensively analyzed elsewhere in this issue. See Erik S Knutsen et al, "The Teaching of Procedure Across Common Law Systems" (2013) 51:1 Osgoode Hall LJ 1.

86. See Fiona Cownie, *Legal Academics: Culture and Identities* (Oxford: Hart, 2004) at 79.

87. See "Jobs [Job Search] UK Jobs & International Vacancies Online," online: <<http://www.jobs.ac.uk>>.

of the ex-students of these institutions, and “disciples” of the teachers at those institutions. This small community of former pupils and disciples could form the core of a larger community. However, university programs that exist because of devoted individual scholars (however prominent or accomplished) may end when the scholar leaves or retires. These programs are by definition more fragile than those that rest upon more stable factors, such as the established existence of more than a handful of university courses. There is also an inevitable whittling down of the group as even postgraduate students graduate and may abandon the field if there is no outlet for their expertise in academia.

## B. THE DEARTH OF PEOPLE AND INSTITUTIONS

The generalized, theoretical academic tendency to ignore the reality of litigation (or, as some more enlightened academics would say, the actual enforcement of substantive law) has led to a shortage of visible, recognizable experts doing research in English civil procedure.<sup>88</sup> After Sir Jack Jacob’s seminal *The Fabric of English Civil Justice*,<sup>89</sup> the only monographic publications have been a couple of main treatises (Zuckerman and Andrews<sup>90</sup>) and a handful of more in-depth works (on class actions;<sup>91</sup> access to justice and human rights;<sup>92</sup> or on comparative, subject-limited European aspects<sup>93</sup>). Although, clearly, civil procedure doctrines and institutions

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88. Scottish civil procedure fares little better. While there are a handful of procedure monographs, they are primarily written by judges and practitioners and have a very practical orientation. See *e.g.* Charles Hennessy, *Civil Procedure and Practice*, 3d ed (London, United Kingdom: Thomson Reuters, 2008); Richard Conway, *Personal Injury Practice in the Sheriff Court*, 2d ed (Edinburgh: W Green & Son, 2003); Archibald MacSporran & Andrea Young, *Commission and Diligence* (Edinburgh: W Green & Son, 1995); ID MacPhail & Tom Welsh, *Sheriff Court Practice*, 3d ed (Edinburgh: W Green & Son, 2006). One exception, involving the work of academics, is Paterson, Bates & Poustie, *The Legal System of Scotland: Cases and Materials*, 4th ed (Edinburgh: W Green & Son, 1999), which focuses on jurisdiction and legal aid.
  89. Jack IH Jacob, “The Fabric of English Civil Justice” (The Thirty-Eighth Series of Hamlyn Lectures, delivered at the University College London, June 1986) (London, United Kingdom: Stevens & Sons, 1987).
  90. Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* 2d ed (London, United Kingdom: Sweet & Maxwell, 2006); Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003).
  91. Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Oxford, United Kingdom: Hart, 2008); Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart, 2004).
  92. Hazel Genn, *Judging Civil Justice* (Cambridge: Cambridge University Press, 2009); Joseph M Jacob, *Civil Justice in the Age of Human Rights* (London: Ashgate, 2007).
  93. Mads Andenas, Neil Andrews & Renato Nazzini, eds, *The Future of Transnational*



can readily be found in a number of substantive law fields (such as family law for divorce proceedings, conflict of laws for recognition of judgments, contract law for specific performance, or equity for injunctive relief), there is no recognition of the importance of the procedural nature of these specific doctrines. Procedure, where it appears, is treated as adjectival and therefore a necessary evil, rather than an essential key to the implementation of the public policies underpinning various substantive rules.<sup>94</sup>

In addition, the numbers of self-identified pure civil procedure scholars (*i.e.*, those that would list civil procedure among their main academic interests) are very low. So ingrained is the rejection of procedure as an academic subject that there are few ways to so self-identify. One of the challenges to the creation of a more organized community is the limited number of organizations with any recognition of procedure as an academic specialty.

There are two major associations of legal scholars, the Society of Legal Scholars (SLS), and the Socio-Legal Studies Association (SLSA). The SLS, a charity founded in 1908, is “the learned society for those who teach law in a university or similar institution or who are otherwise engaged in legal scholarship.”<sup>95</sup> As of Fall 2013, it had 3,040 members (both academic and practising lawyers) in a wide variety of subject areas.<sup>96</sup> The SLSA, as its name suggests, was formed in 1990<sup>97</sup> to be a home for scholars and students with an interest in the interaction of law and society.<sup>98</sup>

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*Civil Litigation: English Responses to the ALI/UNIDROIT Draft Principles and Rules of Transnational Civil Procedure* (London: BIICL, 2004); Mads Andenas, Burkhard Hess, & Paul Oberhammer, eds *Enforcement Agency Practice in Europe* (London: BIICL, 2005); Carla Crifo, *Cross-Border Enforcement of Debts in the European Union, Default Judgments, Summary Judgments and Orders for Payment* (London: Kluwer Law International, 2009). The rather short dedicated bibliography is completed by some well-known collections of essays, either comparative works like Adrian AS Zuckerman, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford: Oxford University Press, 1999) or those spawned by conferences on the Woolf Reforms: AAS Zuckerman and Ross Cranston, eds *Reform of Civil Procedure. Essays on 'Access to Justice'* (Oxford: Clarendon Press, 1995); Deirdre Dwyer, ed, *The Civil Procedure Rules: Ten Years On* (Oxford: Oxford University Press, 2009).

94. For example, a standard Trusts textbook devotes two chapters to the remedies of specific performance and injunctions without once adverting to the fact that a vast number of the rules it discusses are procedural and therefore may have undergone some changes since the fusion of jurisdictions of the Judicature Acts. See Jill E Martin, *Hanbury & Martin: Modern Equity* 17th ed (London: Sweet & Maxwell, 2005).
95. The Society of Legal Scholars, “SLS—Home Page,” online: <<http://www.legalscholars.ac.uk>>.
96. More information on the Society is available online. See *ibid.*
97. Socio-Legal Studies Association, “Home Page,” online: <<http://www.slsa.ac.uk>>.
98. The membership of the associations, however, is also under-inclusive as an empirical measure of proceduralists. Notable names in civil procedure, such as Zuckerman, Peysner, Zander, Glasser, and Jolowicz, may belong to only one or neither.



The membership lists, conference topics, focus of official sections, and expertise directory all give an impressionistic picture of the current landscape.

Neither of these associations provides much institutional support for procedure as a specialty. While both associations host annual conferences, only at the SLSA is there a stream for presentations on civil procedure, which was started in 2013 on the back of the Jackson reforms, and has included so far only presentations on ADR processes. Until this recent development, there has been no natural home amongst the sections for the pure civil proceduralist. Among the sections with the programs and titles of past conference papers archived on the websites of these organizations, the closest would be the Practice, Profession, and Ethics of the SLS, but these presentations have been more closely associated with diversity issues than with procedure. At the SLSA, more attention is devoted to family law processes (mediation, family courts) and administrative procedure (tribunals, which have recently been structured to look more like courts and with more court-like procedure).

The generic tag “access to justice” is also more common at the SLSA, though the content of presentations rarely goes into detailed analysis of the rules of court, preferring empirical approaches to financial aid or obstacles to access. Any papers on what are considered to be classic civil procedure topics, if they were welcomed at all up to 2013, would have to sit in the open sections or in the “Lawyers and Legal Professions” sections. Although individual members may be interested or even active in civil procedure scholarship, the lack of relevant sections demonstrates the traditional lack of institutional recognition of procedure as an academic subject.

Organizational directories also provide little evidence of a community of proceduralists. As of 2011, on the SLSA website, of the roughly one thousand members whose profiles could be browsed by area of expertise, fewer than two dozen English or Welsh academics appeared under the headings of “Access to Justice,” “Administrative Justice,” “Civil Justice,” “Dispute Resolution,” “Evidence,” “Legal Aid,” and “Mediation.”<sup>99</sup> Following those links to the members’ publications, at most thirteen have actually written about civil procedure, and most of those would fall into the procedure plus category.<sup>100</sup>

Each year, the SLS publishes a directory of members, who are encouraged to update their information and indicate their “special interests.”<sup>101</sup> The 2012–2013

99. See Socio-Legal Studies Association, “Browse by Expertise,” online: <<http://www.slsa.ac.uk>>.

100. The most common topics of interest are family mediation, ombudsman schemes, employment tribunals, and legal aid.

101. Due to the lack of standardized editing, this can vary from a very detailed summary of recent

directory contains 1,973 relevant entries, and of these, only 178 English or Welsh academics list as their special interests civil litigation, civil procedure, evidence, access to justice, ADR or commercial/international dispute resolution.<sup>102</sup> As for academics in Scottish institutions, there are 178 members of whom only twenty-three list one of the subject-matter keywords. If the actual publication records of the SLSA members listing similar categories is any indication, it is unlikely that many of these 178 members have active scholarly interests in procedure *per se*. While some of the most important names in civil procedure today are not members of the SLS or the SLSA, the number of academics self-identifying as interested in civil procedure *lato sensu* is still very small.

The picture, then, is bleak from the point of view of the generalist legal academy. Some support comes from the existence of centres or institutes that run procedural projects and seminar series. Two of the most noteworthy are the Centre for Socio-Legal Studies at the University of Oxford, with its standing research topic in European Civil Justice systems,<sup>103</sup> and the British Institute of International and Comparative Law, which occasionally hosts conferences on arbitration and international litigation (under the aegis of its private international law group). At other times, it is clear from the overwhelming demand for delegates' places<sup>104</sup> that one-off events, such as the very successful "The CPR Ten Years On" conference held at the British Academy in 2008,<sup>105</sup> there is both a need and a demand for more procedure-specific conferences.

### C. PUBLICATIONS: THE STRANGE CASE OF THE CIVIL JUSTICE QUARTERLY

Despite the disheartening picture drawn from these numbers, the United Kingdom has one immensely important source of support for proceduralists: a high quality peer-reviewed scholarly journal dedicated to matters of procedure

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scholarly output to merely the subjects taught or even the conference sections attended.

102. The directory includes the institutions providing the vocational training or mixed academic/vocational qualifications, such as the BPP Law School and the College of Law in all their various branches, and this list likely overstates the number of people with an interest in publishing in their areas of declared interest.

103. Centre for Socio-Legal Studies, *Courts and Justice Systems*, online: University of Oxford <<http://www.csjs.ox.ac.uk/courts.php>>. This project has already led to two two-day conference series on costs.

104. Conversation between Carla Crifo and Deirdre Dwyer (July 2008).

105. Deirdre Dwyer, ed, *The CPA Ten Years On: Proceedings from the CPR Conference at the British Academy, London, December 2008*. The essays presented were ultimately collected and edited in a stand-alone volume, published in 2009. See Dwyer, *supra* note 93.

and process. The Civil Justice Quarterly<sup>106</sup> (CJQ) was first published in 1986, in collaboration with the School of Judicial Administration at the University of Birmingham, by Sir Jack Jacob,<sup>107</sup> who had been teaching Civil Procedure at Birmingham since the mid-1960s as a final year optional subject.<sup>108</sup>

A cursory review of the table of contents between 1988 and 2009<sup>109</sup> shows a healthy, if limited, international community of scholars. The list of contributors runs to about 320 names, from barristers and judges through established academics to Ph.D. candidates. While contributions by established academics outnumber those by practitioners, judges, and graduate students, in every year between 1999 and 2009 at least one of the longer articles has been authored by the holder of a judicial office or an experienced barrister, at least one by a Ph.D. candidate, and up to a third by non-England and Wales academics. The CJQ is an important resource and inspiration for the struggling community of civil proceduralists.<sup>110</sup>

Other than CJQ, the numbers are small. In other top-ranked generalist UK journals<sup>111</sup> a search of WestlawUK for the keyword “civil procedure”<sup>112</sup> reveals an average of four articles or case comments or book reviews per year between 2005 and 2010. Interestingly, a search for the same keyword for all the journals available on WestlawUK (including the CJQ, but also a number of practitioner-addressed and newer, less established subject-specific journals) produces some 1,800 hits in the past year alone.<sup>113</sup> The picture that emerges is that of a topic considered worth

106. Civil Justice Quarterly, online: <<http://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?productid=7028&recordid=447>>. Co-author Carla Crifò is one of the assistant editors of this journal.

107. In his obituary of Sir Jack Jacob, Professor Scott indicates that negotiations went on for about ten years before the first issue was produced. See IR Scott, “Sir Jack Jacob Q.C. 1908-2000” (2001) 20:1 CJQ 79.

108. Email from Professor IR Scott, University of Birmingham (emeritus), to Carla Crifò (22 July 2010).

109. This may understate the numbers slightly, because notes and shorter comments lacked complete author identification until 2005.

110. The Australian Research Council (prior to abandoning its project to rank academic journals in 2011) ranked it A\* among legal journals. This is perhaps because many, if not most, of the contributors are not UK-based at all, but hail from the rest of the English-speaking world and from Europe (most notably from Italy and Germany).

111. *Law Quarterly Review*, *Cambridge Law Journal*, *The Modern Law Review*, *Public Law*, *Oxford Journal of Legal Studies* or *Legal Studies* (the journal of the SLS) are among the 62 A\* journals, of which twelve are UK-based. These are all quarterly publications, except *Cambridge Law Journal*, which publishes three times per year, and *The Modern Law Review*, which publishes six times per year.

112. The most generic in the taxonomy, often added as a secondary rather than a primary keyword.

113. An informal search for “civil procedure,” performed on 5 November 2013 in WestlawUK,

writing about, but one that is more or less ignored at the high end of the generalist mainstream legal academy.

#### D. DISINCENTIVES TO PROCEDURAL SCHOLARSHIP: ACADEMIC STARDOM, RESEARCH, AND THE QUEST FOR EXCELLENCE (OR FUNDING)

Cicero, in his “In Defense of Archias,” opined that “[w]e must not conceal a fact that cannot be hidden, but we must bring it into open view: are all motivated by a keen desire for praise, and the better a man is, the more he is inspired by glory.”<sup>114</sup> The picture that emerges from the loose quantification in the preceding pages is clear: Civil procedure in England is a field whose academic practitioners are few and, with few exceptions, of which the CJQ is the most notable publication outlet. Educational and scholarship opportunities tend to be restricted to the practical or vocational aspects only. The rules of courts can be perceived as arcane, dry, off-putting, and unexciting topics for academic writing.<sup>115</sup> Even for young academics who see the intellectual rigour in civil procedure as an academic subject, many factors combine to discourage a scholarly path in that direction.

Many of the disincentives stem from the way universities are funded. Most universities in the United Kingdom are public, in that they receive most of their funding from the central government. The amount of funding received is determined through an allocation per student, and an assessment of the quality of research output based on the Research Excellence Framework (REF).<sup>116</sup> This is a controversial method by which scholarly merit translates into increased funding on the research head. The mechanisms of the next REF have been developed in a piecemeal way, particularly with regard to the controversial new criterion of “impact,” now defined as the “‘reach and significance’ of impacts on the economy, society and/or culture that were underpinned by excellent research conducted in the submitted unit, as well as the submitted unit’s approach to enabling impact from its research.”<sup>117</sup>

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Journals, for the year 2012, yielded 1863 results.

114. Cicero, “In Defense of Archias” in Kevin Guinagh & Alfred Paul Dorjahn, eds, *Latin Literature in Translation*, 2d ed (New York: David McKay Company, 1952) at 247.

115. The choice of a substantive field for a young academic may also be subconsciously due to the perception that classical litigation for classical private law (contract and tort) does not happen much anymore and therefore the study of the rules for that litigation may be irrelevant.

116. *Research Excellence Framework*, online: REF2014 <<http://www.ref.ac.uk/>>.

117. REF 02/2011, *Assessment Framework and Guidance for Submissions*, July 2011 (amended 2012). See Research Excellence Framework 2014, online: <<http://www.ref.ac.uk/>>

Its predecessor, the Research Assessment Exercise (RAE)<sup>118</sup> required every department in every institution to collect and submit up to four pieces of research from its staff. Departments could choose whether to submit all members of staff or only the best, though any selection (and consequent relative density in a given department of research-active and teaching-only staff) was made apparent as institutions were required to indicate what percentage of staff were submitted. The RAE established subject specific panels whose members (in theory) then read and graded each individual piece. The result would be a rating<sup>119</sup> per department, on the basis of which funds were granted. The quality was assessed by giving grades from “4” (the highest) down to “unclassified” (the lowest). Additional grades were allocated for research environment (such as number of graduate students in the department) and esteem factors (such as external funding obtained, prizes, and memberships of organizations).

The most important table, however, is that of the weight allocated to the respective grades when university funding is calculated:<sup>120</sup>

TABLE 1: UNIVERSITY FUNDING WEIGHTS BASED ON RESEARCH QUALITY RATING

Quality Rating (with Abbreviated Prescription)	Funding Weighting
4-star (world-leading)	9
3-star (internationally excellent)	3
2-star (recognized internationally)	1
1-star (recognized nationally)	0
Unclassified (below the standard of nationally recognized work)	0

SOURCE: Higher Education Funding Council for England, “Guide to Funding: How HEFCE Allocates Its Funds” (2010), online: <<http://www.hefce.ac.uk/pubs/year/2010/201024/>> at 45.

panels/assessmentcriteriaandleveldefinitions/>. Impact must be measurable (such as by a demonstrable shift in government policy) and impact case studies will account for 20 per cent of the funding granted. The deadline for submissions by University departments is 29 November 2013. Submissions will then be assessed during 2014, with results published in December 2014.

118. There are other summaries of the process and explanations of the result. See Times Higher Education, “Research Assessment Exercise (RAE) results, 2008” (18 December 2008), online: <<http://www.timeshighereducation.co.uk>>. See also Cownie, *supra* note 86 at 135–41 (critiquing the RAE’s impact on legal academics in general).

119. See Research Assessment Exercise, “RAE 2008 Quality Profiles: UOA 38 Law” (2008), online: <<http://www.rae.ac.uk/results/qualityProfile.aspx?id=38&type=uoa>>.

120. Higher Education Funding Council for England, “Guide to Funding: How HEFCE Allocates Its Funds” (2010), online: <<http://www.hefce.ac.uk/pubs/year/2010/201024/>> at 45.

Indeed, subsequent indications of further cuts in research funding indicate that only “internationally excellent”<sup>121</sup> and above research will be considered for any funding at all. As a result of the REF multipliers, universities and departments are encouraged to hire and recognize staff who are more likely to produce 4-star and 3-star material. Publications in “world-class” or well-known, peer reviewed journals produce better chances of good ratings than well-received pieces in lesser known, probably more subject-specific journals. Other factors also make achieving an acceptable research portfolio in the procedure area more challenging as well.

Academics are urged to diversify and submit their work to several different journals, to give it at least a rating of “international recognition.” Monographs are discouraged (although they still seem to be important for internal promotion to senior lecturer, reader, and professor status) because they are no more likely to be classed as 4-star or 3-star than an article in a well-regarded journal, but are considerably more labour-intensive. The relevance of rating the respective glory of one or the other journal, through rankings such as the RAE rankings<sup>122</sup> mentioned above, becomes more evident: In order to secure a high ranking and higher funding, staff should try to publish only in the highest ranked generalist journals. While the official policy of the RAE/REF sub-panel has always been that publications are to be judged on their intrinsic merit rather than their place of publication so long as the publication is peer reviewed, the suspicion that many are not actually read<sup>123</sup> increases the likely effect of an article’s placement.

This has several important effects on the research agendas of members of the legal academy who are considering the option of pursuing research in a less highly regarded field such as civil procedure. First, the academics who

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121. “Letter to Hefce from the Department of Business and Skills” (11 January 2013), online: HEFCE <<http://www.hefce.ac.uk>> at 4.

122. Some would say that this is merely a formalization of a pre-existing self-selection between journals. It does crystallize pre-existing disparities.

123. Although anecdotal evidence suggests this was not actually the case. See *e.g.* John Sutherland, “Do the RAE Judges Read all the Research Submitted? They couldn’t if they Tried” *The Guardian* (5 March 2009), online: *The Guardian* <<http://www.guardian.co.uk>>. This is not surprising, as panels of 10-15 full-time academics were asked to read thousands of submissions. The final report of the sub-panel for law stated that: “67 institutions (compared with 60 in 2001) submitted 1,702 full time equivalent Category A and C staff (1,452 in 2001) with a total of 6,264 outputs listed (5,326 in 2001). The size of the submissions ranged from the largest with 104 full time equivalent staff to the smallest with 2.5. In total there were 19 submissions with fewer than 10 full time equivalent staff and 12 with more than 40. The median size was 22.” See UOA 38 Law, (2009), online: Research Assessment Exercise for Law <<http://www.rae.ac.uk/pubs/2009/ov/>>.

constitute the panels, despite their excellent reputations within their own fields, are unlikely to be experts in civil procedure, and less likely to appreciate the quality of a submission relevant to that field.<sup>124</sup> In that sense, the reliance on (expert) peer review already affects subjects where there are few experts to begin with. Second, to foster the impression of elite status, work must be submitted to a well-respected journal, but the generalist journals are few and far between,<sup>125</sup> and repeated submissions to a subject-specific journal such as the *CJQ* are discouraged. The value of book chapters is discounted somewhat due to the general absence of peer review. In short, proceduralists compete for few spaces in generalist journals with better established subjects such as tort, supposedly sexier topics such as same-sex marriage, and more obviously theoretical fields such as jurisprudence.

In addition to problems with publication, young would-be proceduralists have an additional disincentive: They will not be able to do much teaching in their area of interest. To pursue an academic career in the United Kingdom, a person usually must teach two or three courses. Those whose interests lie in the academic analysis of civil procedure are required to teach other subjects, which is not only unsatisfying but also eliminates the efficiency that otherwise arises from teaching and writing in the same area. It may even mean that, in order to develop an acceptable research profile, the young academic may have to write in more conventional areas and thus have even less time to devote to their interest in procedure scholarship.

The obstacles to the development of civil procedure from the teaching end to the research end are formidable. They threaten the prospects for the emergence of a community of scholars in the field of civil procedure. If civil procedure is one of the gateways to a better understanding of law itself, then a change in academic

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124. The REF relies on “Main Panels” of experts whose role is to provide guidance, leadership, and broad criteria across a number of specific fields (Law is included in Main Panel C, with such other subjects as Architecture, Geography, Business Studies, and Sociology, amongst others). Sub-panels are composed of up to twenty academic members from the specific discipline and a number of observers from the broader social field (for Law, which is sub-panel twenty, observers are included from the Ministry of Justice, the Equality and Diversity Forum, and the police). The panels were announced in March 2011, and for present purposes main Panel C includes one respected American expert on civil procedure (Herbert M Kritzer), while sub-panel twenty includes former *Civil Justice Quarterly* authors (respectively, Trevor Buck, an expert on tribunals, and Kate Malleon, an expert on the socio-legal aspects of adjudication). See “Research Excellence Framework Expert Panels” (October 2013), online: <<http://www.hefce.ac.uk/panels/panelmembership/>>.

125. Case comments and reviews, and in general anything of a length below five thousand words, even if they might be more likely to be accepted, are not recommended for submission to the REF.

attitude and in government funding policies is required. To correct this disheartening state of affairs will also require a concerted effort towards both teaching and research outputs in the field.

## V. AUSTRALIA

### A. THE HISTORICAL PLACE OF CIVIL PROCEDURE IN LAW SCHOOLS

In Australia civil procedure has, until recently, been regarded as the preserve of the practising profession. Judges and practitioners, not academics, have dominated and shaped scholarship and teaching. Within law schools, civil procedure teaching was traditionally seen as more akin to vocational training than an academic endeavour.

As one of the so-called “Priestley 11” topics,<sup>126</sup> Civil Procedure is a required area of study for admission to practice. It is taught in all Australian law schools but is compulsory in only some. However, the fact that it is required for admission to practice has meant that most law students study civil procedure at some point in their law school career, even in law schools where it is not a compulsory subject. In the not so distant past, one occasionally heard the subject described in some law schools as quasi-compulsory. This meant that while those law schools did not require their students to study the subject in order to graduate, they had to offer it because virtually all of their students would take it in order to qualify for admission to practice law.

Entry to the profession in Australia is controlled by admission authorities, which are the supreme courts of various states and territories. There are no bar or state examinations; the admission authorities accredit law school courses and accept graduation from those courses as meeting the requirements for admission. Under mutual recognition legislation, admission in one jurisdiction enables admission in all other Australian jurisdictions.<sup>127</sup> The Priestley 11 list, which identifies eleven required areas of knowledge, was prescribed to ensure consistency in admission requirements. It has been adopted in all Australian

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126. The other Priestley 11 subjects are Contract, Tort, Real and Personal Property, Equity (including Trusts), Criminal Law and Procedure, Civil Procedure, Evidence, Professional Conduct (including Trust Accounting), Administrative Law, Federal and State Constitutional Law, and Company Law. The list was prepared in 1992 by the Consultative Committee of State and Territory Law Admitting Authorities, chaired by Priestley J. See *e.g.* online: <<http://www.olsc.nsw.gov.au>>. See Knutsen, “Teaching,” *supra* note 2. Knutsen et al provide further discussion of the Priestley 11 topics.

127. *Mutual Recognition Act 1992* (Cth) s 3(17)(1).



jurisdictions and has had a substantial impact on law school curricula and on law student subject choices. Apart from the Priestley 11, however, the profession has exercised relatively little direct, prescriptive control over the curriculum choices of Australian law schools.

## B. A GROWING COMMUNITY OF SCHOLARS

Most civil procedure publications have until recently been written by judges or practitioners.<sup>128</sup> They are equivalent to White Books, encyclopedic and descriptive of specific rules and procedures. We examined the holdings of the National Library of Australia to get snapshot views of the number and sources of civil procedure books published in Australia in two time periods, 1987–1990 and 2007–2010. For the period from 1987 to 1990, we were able to identify at least ten books. All but one of these were in essence annotated guides to civil procedure rules or guides to court practices for practitioners.<sup>129</sup> The only exception we were able to find was a book on environmental litigation.<sup>130</sup> All of these books were written by legal practitioners, not full-time academics.

This is the kind of scholarship to be expected when the relevant academy consists of practitioners whose primary affiliations are to practice. It reflects past patterns of law schools relying on practitioners to teach civil procedure, and is a logical result of the choice that many Australian law schools made to exclude civil procedure from their list of compulsory subjects notwithstanding that subject's place among the Priestley 11. That choice is in turn a reflection of the value, relative to other subjects, that Australian law schools have assigned to civil procedure.

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128. See Part II B, above, for more on this topic.

129. See e.g. Robert Lunn, *Civil Procedure, South Australia*, 2d ed, (Sydney: Butterworths, 1987); Neil J Williams, *Supreme Court Civil Procedure: Procedure Under Chapter 1 of the Rules of the Supreme Court of Victoria*, (Sydney: Butterworths, 1987); Paul Seaman, *Civil Procedure: Western Australia*, (Sydney: Butterworths, 1990); Gresley Clarkson, John Fiocco & Stephen Owen-Conway, *Civil Procedure in Western Australia: A Practice Manual for 1987*, (Nedlands, Australia: University of Western Australia, 1987); Paul Bravender-Coyle, Richard Krever & Timothy Pinos, *Victoria Civil Procedure 1987*, (North Ryde, Australia: CCH Australia, 1987); Paul Bravender-Coyle, Richard Krever & Timothy Pinos, *Victoria Civil Procedure 1988*, (North Ryde, Australia: CCH Australia, 1988); P W Young, K F O'Leary & A E Hogan, *Supreme Court Civil Procedure: New South Wales: Illustrated by Reference to the Supreme Court Act 1970 (NSW)*, 2d ed (Sydney: Butterworths, 1987); Ian McGregor Wylie, *The law and practice of the District Courts of Queensland*, 3d ed, (Sydney: Butterworths, 1989); Shane Simpson, DL Bailey & EK Evans, *Discovery and Interrogatories*, 2d ed (Sydney: Butterworths, 1990); and John Leslie, *Leslie's Equity and Commercial Practice* (Sydney: Butterworths, 1990).

130. Brian J Preston, *Environmental Litigation* (Sydney: Law Book, 1989).

It is only in the last ten to twenty years that a body of Australian academics with an interest in civil procedure has emerged. Some optimists believe that the field is close to the critical mass needed to establish itself; others are more pessimistic. Our second snapshot view of the Australian books on civil procedure held by the National Library offers some succor for the optimists. In the period 2007–2010, twelve books were published. Eight of these were written by legal academics.<sup>131</sup>

This major shift (in a relatively short period of time) is also evident in the increasing use of academics in the major Australian law schools to teach civil procedure. For a growing number of academics, civil procedure is a major research interest. Looking at the law schools that comprise what is described as the “Group of Eight,”<sup>132</sup> (Go8) not only do academics lead civil procedure teaching, but in six of the Go8 schools, senior academics (Associate Professors or Professors)<sup>133</sup> are engaged in civil procedure scholarship. Outside the Go8 law schools, there are also professorial level academics active in civil procedure teaching and research.

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131. Bernard C Cairns, *Australian Civil Procedure*, 7th ed (Pymont, Australia: Lawbook, 2007); Bridget Cullen Mandikos, *Civil Procedure*, 2d ed (Pymont, Australia: Thomson Reuters, 2009); Michael P Grant, *Civil Procedure Northern Territory*, (Adelaide: Presidian Legal, 2010); Stephen Colbran et al, *Civil Procedure: Commentary and Materials*, 4th ed (Chatswood, Australia: LexisNexis Butterworths, 2009); Dorne Boniface & Miiko Kumar, *Principles of Civil Procedure in New South Wales*, (Pymont, Australia: Thomson Reuters, 2009); Robert M Lunn, *Supreme and District Court Civil Rules 2006 South Australia*, (Chatswood, Australia: LexisNexis, 2010); John Tarrant, *Amending Final Judgments and Orders*, (Annandale, Australia: Federation Press, 2010); David Bamford, Alan Leaver & Mark J Rankin, *Principles of Civil Litigation*, (Pymont, Australia: Thomson Reuters, 2010); P K Cashman, *Class Action Law and Practice*, (Sydney: Federation, 2007); Vincenzo Morabito, *An Empirical Study of Australia's Class Action Regimes: First Report, Class Action Facts and Figures*, (Melbourne: Monash University, 2010); Andrew Alston, *Lawyering: Procedures and Ethics*, (Chatswood, Australia: LexisNexis Butterworths, 2008); Peter R Handford, *Limitations of Actions: The Laws of Australia*, 2d ed (Pymont, Australia: Thomson Law Book, 2007); and Jill Hunter, Camille Cameron & Terese Henning, *Litigation I: Civil Procedure*, 7th ed (Chatswood, Australia: LexisNexis Butterworths, 2005). Papers written for continuing legal education seminars have been removed from this list, as have books dealing with the field of remedies as it is normally taught separately in Australia.
  132. Australian National University, University of Queensland, University of Sydney, University of New South Wales, University of Melbourne, Monash University, University of Adelaide, University of Western Australia. See Australian Universities Guide, “Australian University Group of Eight,” online: <<http://www.australianuniversities.com.au/directory/group-of-eight/>>.
  133. Australian academic structures have five levels of academic seniority with only a very small proportion of academics becoming professors. See European University Institute, “Australia Academic Career Structure” (January 2013), online: <<http://www.eui.eu/ProgrammesAndFellowships/AcademicCareersObservatory/AcademicCareersbyCountry/Australia.aspx>>.

Signs that a critical mass may have been reached can also be discerned from the development of structures promoting civil procedure scholarship. The Australasian Law Teachers Association has an Evidence and Procedure Interest group that organizes a program at the annual Australasian Law Teachers Association Conference. Between 2005 and 2012, four symposia have been held, bringing together civil procedure teachers from across Australia—at Flinders University, the University of Melbourne, and the Australian National University. Relevant centres have also begun to appear. For example, in 2010 the University of Melbourne established a Civil Justice Research Group that focuses “on the role and operation of civil courts and tribunals, access to civil justice, and wider questions about the resolution of civil disputes” and has organized a number of seminars and conferences.<sup>134</sup>

Adding impetus to the development of academic interest in civil procedure have been the radical changes that have occurred in Australian civil procedure over the last twenty years. Almost all jurisdictions have made significant changes to their procedural rules. Many of these reforms have been preceded by significant court- and government-sponsored research. Major law reform projects have ranged from the Litigation Reform Commission in Queensland in the early 1990s<sup>135</sup> to the Australian Law Reform Commission inquiry into the federal civil justice system,<sup>136</sup> the Commonwealth Access to Justice Report,<sup>137</sup> the Victorian Law Reform Commission’s review of civil procedure in Victoria,<sup>138</sup> and the Australian Law Reform Commission study of civil discovery.<sup>139</sup> These initiatives have provided Australian legal academics with significant opportunities for research and scholarship. The Australian Institute for Judicial Administration, now based at Monash University, is another incubator for civil justice scholarship through its conferences and the publication, the *Journal of Judicial Administration*.<sup>140</sup>

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134. Melbourne Law School, “Civil Justice Research Group,” online: <<http://www.law.unimelb.edu.au/civiljustice/about/about-us>>.

135. See *e.g.* Litigation Reform Commission, *Civil Justice Reform: Streamlining the Process*, (Conference papers delivered at Carlton Crest Hotel, Brisbane, 6-8 March 1996) (Brisbane: Litigation Reform Commission, 1996).

136. See *e.g.* Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report 89 (Canberra: Australian Government Publishing Service, 2000).

137. See *e.g.* Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Canberra, Australian Government Publishing Service, 1994).

138. Victorian Law Reform Commission, *Civil Procedure Review*, Report 14 (Victoria, Australia: Victorian Law Reform Commission, 2008).

139. Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts*, Report 115 (Canberra: Australian Government Publishing Service, 2011).

140. Greg Reinhardt, ed, “*Journal of Judicial Administration*” *Thomson Reuters*, online: <<http://www.thomsonreuters.com.au/>>.

Many of Australia's full-time civil procedure academics have practised law and bring that knowledge to their academic work. In addition to their practical knowledge, however, they have brought to the civil procedure classroom perspectives such as comparative law, dispute resolution writ large, professional ethics, and considerations of broader justice issues. One result of this is that a growing number of LL.M. and Ph.D. students are choosing procedure (or procedure plus) issues for their thesis work.

This growing group of Australian civil procedure scholars is also increasingly able to do research-led teaching in their area, as their volume of research increases. This increases the profile of the subject among law students, which, in turn, might have an impact on the number of students choosing to do graduate work in the area. There has also been some success in obtaining research grants on procedural topics and the beginnings of industry linkages, both of which help to augment scholarly output.<sup>141</sup>

But proceduralists are still an undervalued and under-resourced part of the academy. This is evident in, and in turn influences, recruiting choices. Many (but not all) of the people who are actual or potential procedure scholars do not have the profiles of typical academics. Focusing for recruiting purposes on those who have published and who possess graduate qualifications risks further limiting what is already a small pool of candidates.

Reflecting its history, civil procedure has had to struggle to be accepted as a field of serious academic endeavour in Australia. While its place among the Priestley 11 may have secured its continued inclusion in law school curricula, it was not uncommon until recently to hear it referred to as a practice subject. Translated, this meant that it had to be taught because it was required for admission, not because it was thought to have any intrinsic value as a topic of intellectual inquiry.

### C. A GROWING BODY OF SCHOLARSHIP

As the community of procedure scholars has grown, the subject has begun to move beyond the descriptive and to find publication outlets suitable for its academic ambitions. Some highly-ranked Australian law journals have demonstrated a

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141. Professor David Bamford, former Dean of Flinders Law School, has been engaged in the evaluation of court programs in Victoria and South Australia. Professor Camille Cameron, formerly of Melbourne Law School and now Dean of Windsor Law School in Ontario, was leading a research project (completed in 2011), in collaboration with the Federal Court of Australia, to evaluate the effectiveness of that court's case management programs, and was awarded an Australian Research Council Linkage Grant (with Jonathan Liberman and the Cancer Council of Victoria, Australia) to study the use of tobacco litigation as a regulatory tool. Professor Vince Morabito, Monash University, Department of Business Law and Taxation, has a substantial Australian Research Council grant to conduct empirical research about class actions in Australia.

willingness to publish procedure-related articles.<sup>142</sup> Australian civil procedure academics have also chosen to publish in England's CJQ.<sup>143</sup> There are several reasons for this choice, including that journal's A\* ranking and the absence of any specialist journals in Australia. As in England, incentive structures require that articles be placed in highly-ranked journals.<sup>144</sup> The comparative lack of prestige of the civil procedure area, the comparative lack of evaluators familiar with procedure scholarship, and the small number of generalist Australian journals ranked A\* or A, considered in the light of the prevailing incentive structures, all make specializing in procedural scholarship a challenge.<sup>145</sup>

Two surveys of recent civil procedure scholarship provide some evidence of this challenge. The first is an analysis of all civil procedure articles either published by Australians or in Australian publications contained in one of the largest Australian databases—the Attorney General's Information Service (AGIS Plus Text) from 2005 to 2010. The second is an analysis of two leading generalist law journals in Australia.

Using the AGIS Plus Text database, 143 articles were identified using the search term “civil procedure,” published between 2005 and 2010, and where the author could be identified as an academic or a legal practitioner.<sup>146</sup> The publication in which the article was published was classified as academic if it

142. See *e.g.* Camille Cameron & Jonathon Liberman, “Destruction of Documents Before Proceedings Commence: What is a Court to Do?” (2003) 27:2 Melbourne UL Rev 273; Peta Spender, “Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability” (2003) 25:2 Sydney L Rev 223; Vince Morabito, “Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors” (2007) 29:1 Sydney L Rev 5. While he writes about procedure issues, Professor Morabito is on the staff of Monash's Department of Business Law and Taxation, and teaches Income Tax, Tax Policy, Tax Administration and Practice, and Constitutional Issues.

143. See *e.g.* BC Cairns & SC Williams, “Civil Case Flow in the Queensland Supreme Court” (2008) 27:3 CJQ 358; Camille Cameron, “New Directions for Case Management in Australia” (2010) 29:3 CJQ 337; Gary Cazalet, “Unresolved Issues: Costs in Public Interest Litigation in Australia” (2010) 29:1 CJQ 108.

144. See discussion of the English system in Section III, above.

145. The Australian government and Australian Research Council have recently announced a decision to end the system of assigning letter grades to academic journals. The government will instead give more authority (and discretion) to the panels that examine and assess research activities on a discipline-by-discipline basis. It remains to be seen what effect the recent retreat from and rejection of the journal rating system in Australia will have on the publication choices of academics. See Sunanda Creagh, “Journal rankings ditched: the experts respond” *The Conversation* (1 June 2011), online: The Conversation Media Group <<http://theconversation.edu.au/>>.

146. Where joint authorship existed, the details of the lead author were used to determine whether the article was written by an academic.

was a refereed journal. Of the 143 articles so identified, forty-five were written by academics. Of these forty-five articles, seventeen were published in academic journals. Legal practitioners wrote ninety-eight of the 143 articles, of which twelve were published in academic journals.

The second snapshot survey—an analysis of the content of two leading generalist journals in Australia, the University of New South Wales Law Journal and the Melbourne University Law Review—reveals a relatively small number of articles touching in whole or in part on procedural issues. From 2000 to 2010, for example, nine such articles were published in the Melbourne University Law Review.<sup>147</sup> Of the thirteen authors and co-authors involved, three were academics and the rest were judges and practising lawyers. Of the three academics, electronic searches reveal that only one identifies as a civil procedure scholar.<sup>148</sup> One interesting aspect of these articles is that three are collaborative efforts, each with an academic and a practitioner as co-authors.<sup>149</sup>

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147. See *e.g.* Dorothy Kovacs, “After the Fall: Recovering Property Jurisdiction in the Family Court in the Post Cross-Vesting Era” (2001) 25:1 Melbourne UL Rev 58 (Dorothy Kovacs was an academic but is now at the Bar); Camille Cameron & Jonathan Liberman, “Destruction of Documents before Proceedings Commence: What is a Court to Do” (2003) 27:2 Melbourne UL Rev 273 (Camille Cameron is an academic and Jonathan Liberman is a practising lawyer) [Cameron & Liberman, “Destruction”]; Richard Garnett, “Foreign States and Australian Courts” (2005) 29:3 Melbourne UL Rev 704 (Richard Garnett is an academic); Rosalind Mason, “Local Proceedings in a Multistate Liquidation: Issues of Jurisdiction” (2006) 30:1 Melbourne UL Rev (Rosalind Mason is an academic); Bernard Murphy & Camille Cameron, “Access to Justice and the Evolution of Class Action Litigation in Australia” (2006) 30:2 Melbourne UL Rev 399 (Bernard Murphy is a practising lawyer and Camille Cameron is an academic) [Murphy & Cameron “Access”]; Michael J Legg, “The United States Deposition – Time for Adoption in Australian Civil Procedure” (2007) 31:1 Melbourne UL Rev 146 (Michael Legg is a practising lawyer who has now become a full-time academic); James McComish, “Pleading and Proving Foreign Law in Australia” (2007) 31:2 Melbourne UL Rev 400 (James McComish is an academic); Michael E J Black, “The Federal Court of Australia: The First 30 Years – A Survey on the Occasion of Two Anniversaries” (2007) 31:3 Melbourne UL Rev 1017 (Michael E J Black is a judge); Stuart Clark & Christina Harris, “Push to Reform Class Action Procedure in Australia: Evolution or Revolution” (2008) 32:3 Melbourne UL Rev 775 (both Clark and Harris are practising lawyers) [Clark & Harris, “Push”]; Camille Cameron & Elizabeth Thornburg, “Defining Civil Disputes: Lessons from Two Jurisdictions” (2011) 35:1 Melbourne UL Rev 208 (both Cameron and Thornburg are academics); and Paula Gerber & Diana Serra, “Construction Litigation: Are We Doing It Better?” (2011) 35:3 Melbourne UL Rev 933 (Paula Gerber is an academic and Diana Serra was a research assistant but is now a practising lawyer) [Gerber & Serra “Construction”].

148. Professor Camille Cameron.

149. See *e.g.* Cameron & Liberman, “Destruction,” *supra* note 147; Murphy & Cameron, “Access,” *supra* note 147; Gerber & Serra, “Construction,” *supra* note 147.

For the same period of time, we found nine articles in the University of New South Wales Law Journal.<sup>150</sup> Seven of these articles appear to have been written by academics, and many of these authors are civil procedure academics.<sup>151</sup> The University of New South Wales Law Journal also published two special issues in this time period, one on class actions in 2009 and the other on costs and fees in 2004. Of the total of twenty-one articles in these two special issues, nineteen were written by judges and practitioners and two were written by academics.

While these figures offer some evidence of the still nascent state of civil procedure scholarship in Australia, they may also conceal as much as they reveal. They do not tell us, for example, how many articles dealing with procedural issues were submitted but rejected, and they do not reflect the fact that some Australian civil procedure scholars publish some of their work overseas, especially in England. And while we have chosen two mainstream journals, some civil procedure scholarship appears in other reputable journals in Australia.<sup>152</sup>

One feature of the procedure scholarship landscape in Australia that is revealed by this snapshot view of two leading Australian journals is that a few busy and high profile practising lawyers in Australia are contributing to academic scholarship, often in collaboration with full-time academics. Bernard Murphy, a

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150. Sharon Rodrick, "Open Justice, The Media and Avenues of Access to Documents on the Court Record" (2006) 29:3 UNSWLJ 90 (Sharon Rodrick is an academic); Michael Legg, "Shareholder Class Actions in Australia—The Perfect Storm?" (2008) 31:3 UNSWLJ 669 (Michael Legg is a former practitioner who is now an academic); Ann Eyland, "Legal Costs and Case Management" (2004) 27:1 UNSWLJ 231 (Ann Eyland is an academic); Annette Marfording, "Civil Justice in Crisis: Comparative Perspective of Civil Procedure" (2000) 23:2 UNSWLJ 384 (Annette Marfording is an academic); Bryan Beaumont, "Anatomy of a Federal Court Tax Case" (2000) 23:2 UNSWLJ 237 (Bryan Beaumont is a judge); Camille Cameron, "Hired Guns and Smoking Guns: *McCabe v British American Tobacco Australia Ltd*" (2002) 25:3 UNSWLJ 768 (Camille Cameron is an academic); Arthur R Emmett, "Towards the Civil Law? The Loss of 'Orality' in Civil Litigation in Australia" (2003) 26:2 UNSWLJ 447 (Arthur R Emmett is a judge); Ronnit Redman, "Litigating for Gender Equality: The *Amicus Curiae* Role of the Sex Discrimination Commissioner" (2004) 27:3 UNSWLJ 849 (Ronnit Redman is an academic); Michael Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30:3 UNSWLJ 731 (Michael Kirby is a judge); and Beth Gaze & Rosemary Hunter, "Access to Justice For Discrimination Complainants: Courts and Legal Representation" (2009) 32:3 UNSWLJ 699 (Beth Gaze and Rosemary Hunter are academics).
151. Michael Legg, Ann Eyland, Annette Marfording, Camille Cameron, and Rosemary Hunter all conduct research in the field of civil procedure.
152. See *e.g.* Michelle Taylor-Sands & Camille Cameron, "Regulating Parties in Dispute: Analysing the Effectiveness of the Commonwealth Model Litigant Rules Monitoring and Enforcement Processes" (2010) 21:3 Public Law Review 188.



senior class action lawyer and the Chairman of a large plaintiff firm,<sup>153</sup> and Stuart Clarke, a senior lawyer with one of Australia's largest commercial law firms, have both published in the Melbourne University Law Review.<sup>154</sup> Both are also active as part-time teachers of Class Actions courses and as frequent guest lecturers in civil procedure and related topics in law schools. There are others like them—judges and practising lawyers—who are contributing to publishing and teaching in civil procedure and related subjects. It is not surprising, considering the small number of procedure scholars in Australia, that there would be a place in the academy for practitioners with an academic bent. As we stated above in our discussion of procedural scholarship in Canada,<sup>155</sup> there are advantages to including practitioners and adjunct academics in the growing community of procedure scholars. In a subject that requires theoretical, doctrinal, and practical fluencies, partnerships between practitioners and academics have obvious advantages for both the profession and the academy.

#### D. A VERY LONG WAY TO GO

A comprehensive analysis of the present health and future prospects of civil procedure as a scholarly pursuit in Australia is necessarily both optimistic and pessimistic. Optimists point to the transition of the subject over time from a technical, rule-based subject taught by practitioners to one that takes a systemic approach that integrates theoretical and practical themes, that engages with policy and reform issues, and that is taught primarily by full-time academics. Optimists also note the growth over time in high-quality civil procedure scholarship, including publications in highly-ranked national and international peer-reviewed journals.

But the pessimists also make compelling arguments. Australia's community of civil procedure scholars is still very small when compared to communities of scholars in most of the other Priestley 11 subjects. The formal and informal networks that are a feature of all healthy academic disciplines—an enviable example is offered in the US section of this paper<sup>156</sup>—are largely absent in Australia. Such networks nurture scholarly communication and help to create a professional identity, but they can only exist when there are sufficient numbers of academics to create and sustain them. Creation of these networks in Australia

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153. On 13 June, 2011, Mr. Murphy became a judge of the Federal Court of Australia.

154. Murphy & Cameron, "Access," *supra* note 147; Clark & Harris, "Push," *supra* note 147. Mr. Murphy has been appointed to the Federal Court of Australia and was sworn in on 13 June 2011. See *supra* note 153.

155. See Part III B, above, for more on this topic.

156. See Part II B, above, for more on this topic.



is left to a very small number of academics, some of whom are also periodically called on to take on substantial academic leadership positions. The departure of even one Australian civil procedure academic from mainstream teaching and research has significant negative consequences for the health and development of the scholarly community. This is the enduring legacy of the historical view of civil procedure as a practice subject.

## VI. CONCLUSION

The correlations between the place of civil procedure within the academy and the existence of a community of procedure scholars producing a significant corpus of work are clear. The country reports demonstrate that two principal variables influence the health of any nation's group of academic proceduralists: the number of people and the outlets for publication. When one compares the four common-law jurisdictions, the ties between these variables and the teaching of procedure emerge.

### A. NUMBER OF TEACHER-SCHOLARS

It is not at all surprising that a larger number of academics teaching procedure leads to a larger number of academics writing about procedure. Thus in the United States, where civil procedure is both a required first year subject and a focus of numerous upper level electives, the community of proceduralists and their output is the largest of the four. In about two hundred law schools, there are more than three hundred full time academics who teach and write about civil procedure and about the interaction of procedure and substance (procedure plus). Their work is supported by an extensive network of institutions that enhance scholarly productivity and attract future proceduralists to the field.

Canada and Australia form the middle ground. Civil Procedure is required in the university setting, but it is often taught in the upper years and often by adjuncts. Canada's eighteen English-speaking common-law law schools require a course that contains a civil procedure component, but it is often taught by adjunct as well as full-time faculty, many of whom specialize in other areas. Australia's thirty-one law schools require instruction in civil procedure, but again it often comes at the end and is often adjunct-taught. In both countries an increasing number of academics are actively engaged in procedure and procedure plus scholarship. Yet, the absolute numbers are small. In Canada there are likely around a dozen or so such academics. In Australia there are at most fifteen academics engaged in such

research.<sup>157</sup> Growing these numbers would allow procedure-themed institutions and funded research to blossom, and those in turn would increase the number of proceduralists, as new graduate students specialize in the area and seek academic careers. However, in Canada and Australia, while numbers of procedural scholars have increased, they are still below what is required to develop and sustain a vibrant scholarly community.

In England and Wales, the lack of academic teaching of procedure leaves the country with a very small community of scholars. Despite the existence of eighty-three university law departments, seventy-seven of which offer masters-level programs, there may be fewer than a dozen full-time academics who do any scholarship in the procedure area, and even to get to this number, one must consider the topic of civil procedure quite broadly. Many write about procedure plus topics such as family mediation or the operation of tribunals. The number of scholars who write in a broad theoretical way about the operation of the procedure rules could be counted on one hand. Too many of the existing procedure scholars are very senior professors, and it is not clear who will take their places when they retire. Few, if any, English academics can both teach and write primarily about civil procedure. In fact, national assessment schemes reinforce the dearth of procedure academics and deter rather than encourage further introduction of procedure into the academy.

## B. OUTLETS FOR PUBLICATION

The tie between the teaching of civil procedure and the number of slots in scholarly journals for procedure-themed writing is less direct but no less real. In the United States, hundreds of generalist law journals are overseen by students, all of whom have studied procedure as one among equals in their first year course work. Even peer reviewed journals, such as the *American Journal of Comparative Law* or the *Journal of Empirical Legal Studies* regularly publish articles on procedure topics.<sup>158</sup> Further, the inclusion of litigation-related perspectives in many substantive courses makes procedure plus scholarship equally welcome. The large market for scholarly monographs and student teaching materials also creates a market for scholarship, with dozens of multi-authored casebooks and related materials published every year.

Canada's smaller numbers of procedure teachers face greater challenges in

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157. These numbers would be larger if practitioners and judges who engage in scholarship were included, and depending on how broadly one defines "civil procedure" and "procedure plus."

158. See *e.g.* Williams & George, "Complex Civil Litigation?," *supra* note 19; and Stephen B. Burbank & Linda J. Silberman, "Civil Procedure Reform in Comparative Context: The United States of America" (1997) 45:4 Am J Comp L 675.

finding a home for their scholarship. There are only about a dozen peer-reviewed generalist law reviews, and procedure must compete with other subjects for space in them. The peer reviewers, however, will have studied civil procedure as an academic subject and will consider its frequent “access to justice” theme as worthy of academic publication. In addition, the procedure plus orientation of many Canadian scholars has resulted in success in placing the writing of proceduralists in Canadian journals. The relative smallness of the legal community also makes it possible for non-academic journals to be an option even for academic writers, as their intended audience will find their work. The lack of government control over curriculum and publication also facilitates the rich development of writing-thinking-teaching involving procedure, ethics, and dispute resolution that is occurring in the Canadian procedure community.

Proceduralists in Australia and England, however, must cope both with a small number of journals and with a system that penalizes institutions and individuals for not publishing in the most elite journals. As in Canada, procedure articles must compete with all others for slots in the peer-reviewed journals. But in England and, to a lesser extent, Australia, the peer reviewers will often be people who were *not* trained in civil procedure as an academic subject and who tend to regard it as more like plumbing than jurisprudence. This is another example of the legacy of the view of civil procedure as a practice subject. Small wonder, then, that aside from the CJQ, English journals have published an average of only four articles a year that touch on procedure issues. Nor is it surprising that Australian journals appear to have published a very small number of articles about procedure (seventeen over a five-year period in the AGIS Plus Text database, and aside from two symposia, only four in two prominent generalist law journals, only one of which was written by a procedure scholar). Perhaps ironically, the CJQ has provided an outlet not only for English but also for Australian proceduralists—but in neither case can an academic sustain a career by publishing in a single journal, however highly ranked. Although in theory English universities could submit articles published in less prestigious journals as part of the REF because articles are judged on their own intrinsic merit, in practice the risk of doing so would be too high. And in theory Australian academics could choose to publish in lower-ranked journals, but only at the cost of additional teaching or administrative duties. The result is that there are few realistic opportunities for procedure scholarship to grow. (As we have noted above, time will tell whether the recent decision in Australia to reject journal rankings as a measure of research excellence will affect civil procedure scholarship.)

### C. THE BOTTOM LINE

The impact of these variables can be seen by beginning the examination with England and Wales, which have the least academic teaching of procedure. There, where civil procedure is largely excluded from the basic academic law degree curriculum, the profession's incentive structures weigh against pursuing a specialization in the field for all but those who have already achieved prominence in other areas. The one high-ranked journal persists almost as an exception that proves the rule in an academy that otherwise disdains the subject as one likely to be of interest only to practitioners, and even that journal depends largely on the submissions of non-UK academics. Those who have produced procedure scholarship are to be commended for their passion and perseverance and for the excellence of their work, particularly because it has been done in relative isolation and without the benefits of a community of individuals who share a common interest in the field. Without a core of academic *teachers* of civil procedure to form the basis of a community of scholars, and without institutional support for their work, it seems unlikely that conditions will improve.

The situation in Australia fares somewhat better. With only a handful of people writing about procedure, and the scholarly incentives driven in similar fashion to the United Kingdom, procedural scholarship continues to struggle. However, the beginnings of a genesis of scholarly output are palpable, possibly due to the lack of an entrenched interest in segregating the legal academy from issues thought to be of interest only to practitioners. It will take time, though, for the growing ranks of academic teachers of procedure to create the permanent support structures necessary to secure their emergence as respected partners in the legal academy.

In Canada, as in Australia, the community has begun to advance, as academic writing in the procedure (and procedure plus) field is beginning to take hold. While procedure has been a required course for most Canadian law schools, there are now more advanced and specialized courses, and more full-time academics with experience in practice. This has fostered a range of interesting theoretical and academic concerns about questions of procedure that are now being explored from a systemic perspective. The procedural debate has been enriched by these new academic voices that have helped to broaden the definition of "procedure" as embracing professional ethics, dispute resolution, comparative and jurisprudential analysis, and many other topics that help the community to blossom. More self-identified procedure teachers, and more forms of institutional support, are also helping to make that happen.

In the United States, the story is considerably more encouraging in every respect. The long tradition of including procedure within the academy as

a required course generated a large number of scholars with an interest in procedure. That, in turn, has led to a community of academics who aid and challenge one other in both pedagogy and scholarship, with multiple opportunities to interact in energizing ways. The strength of the scholarly community has also long been supported by its work in the reform area—as, for example, in the early twentieth century when the content of procedure scholarship, the changes in the content of the civil procedure course, and the movement to modernize federal civil procedure all went hand-in-hand. Today's civil procedure community stands on the shoulders of those who came before. It is surprising to think that it all began with a decision at Harvard Law School to make “Pleading” a mandatory first year course, but it has gone on from strength to strength since.

All in all, our comparative analyses in this article suggest a strong symbiosis between the fostering of procedure as an academic subject within the basic law school curriculum and the vitality of a scholarly community in the field. The United States, with the strongest tradition of academic teaching of civil procedure, has the largest academic procedure community and (by far) the richest literature. The emergence of a specialized literature and other indicia of scholarly communities in Australia and Canada have evolved at the same time as the growing interest in procedure within the teaching curricula of their law schools. Surely this is not coincidental. Putting more resources into the academic *teaching* of procedure has borne fruit in the academic *study* of procedure, as those fragile but growing communities there can attest.

Why does any of this matter? This question brings us full circle back to the teacher-scholar. The academic study of law needs proceduralists both for a full understanding of law and for a full education of law students. Civil procedure exists to enforce substantive rights, and the nature of those procedures can either foster or thwart citizens' ability to protect those rights in reality. The presence of procedure specialists within the academy leads to important dialogue between those proceduralists and scholars in other areas, enriching the scholarship of both. What we have been calling procedure plus is another way of identifying scholarship that discusses the ways in which substantive law is affected by procedure, and ways in which procedure should be structured to enable the realization of substantive norms. The result is that the integrated scholarship of both groups better serves society by providing a more nuanced and accurate view of law.

Both groups will carry this enriched understanding into their teaching. Law students who choose law with no wish to practise it will be better informed citizens—for example, bringing their knowledge of the civil justice system into

public debates about the cost of running the courts, or becoming business people who understand the impact of dispute resolution methods and not just the elements of a cause of action for contract breach. Those who choose to become practising lawyers may build on a richer foundation, one freed of a misleading focus on substance in isolation. In theory this goal could be achieved by asking each teacher of a substantive course to incorporate relevant procedural points into his or her course. But as anyone who has worked on curriculum integration projects knows, achieving the integration of procedural (or ethical<sup>159</sup>) content and analysis into other subjects usually fails, as lack of interest, lack of procedural expertise, and the pressure of coverage in preparation for exams squeeze out procedural “extras.”

There is a final, perhaps more crucial reason that a community of procedure scholars must be fostered. Every country needs contributions to, and critiques of, civil justice law reform initiatives. Civil procedure scholars in the academy are a primary source of these contributions and critiques, but they need not be the only source. Practitioners who have had the benefit as law students of the kind of critical civil procedure teaching and learning we endorse in this article can be another significant source. The connections between scholarship, the profession, and procedural reform will be dealt with in the next and final article in this collection.<sup>160</sup>

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159. Ethics expert Deborah Rhode, based on her observations, has repeatedly expressed a dim view of the ability or inclination of non-ethics law academics to integrate ethics into their subjects. See *e.g.* Deborah L Rhode, “Missing Questions: Feminist Perspectives on Legal Education” (1993) 45:6 *Stan L Rev* 1547 at 1561. Rhode observes that:

More fundamentally, the failure to treat ethical issues as they arise throughout the curriculum undermines and trivializes the message of any required course. Casebooks outside the field of professional responsibility rarely address ethical issues in any detail. My recent survey of some 130 texts in 14 subjects found that the median amount of coverage in each volume was 1.4 percent of total pages, much of which involved simply reprinting relevant rules. Yet faculty who decline, implicitly or explicitly, to discuss ethical matters as they arise in each substantive area encourage future practitioners to do the same. Professional priorities are apparent in subtexts as well as texts, in what is left unsaid as well as said. Every educational institution teaches some form of ethics by the pervasive method, and pervasive silence speaks louder than formal policies or commencement platitudes.

See also Deborah L Rhode, “Legal Ethics in Legal Education” (2009) 16:1 *Clinical L Rev* 43 at 54. Rhode observes that “[f]aculty are accustomed to operating as Lone Rangers, with few if any requirements concerning course content. And the history of efforts to teach ethics through the pervasive method has not been encouraging.”

160. See Janet Walker et al, “Thoughtful Practitioners,” *supra* note 7.

## APPENDIX ONE

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- "*Twombly*, Pleading Rules, and the Regulation of Court Access" (2009) 94:3 Iowa L Rev 873.
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161. Methodology: We searched LEXIS Civil Procedure Law Review Articles database using a natural language search, from 1 January 2005 through 1 October 2010 using alternate search terms: heightened pleading, rule 8, discovery, case management, rule 16, class action, aggregate litigation, summary judgment, civil procedure. We sorted the results for relevance. We set the search limit as the top 250 cases and the search returned 248. We then removed articles written by students, practitioners (even adjuncts), judges, non-US academics, along with a couple of false positives.

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