

# State Civil Procedure Plea

William R. Slomanson

Law schools can do a better job of fulfilling our various missions and our obligation to prepare our students for practice.<sup>1</sup> One can no longer assume that the basic civil procedure course satisfies these goals. We can better prepare our students for actual practice if more law schools offer a state civil procedure elective. Sixty percent of the state bars test on state civil procedure,<sup>2</sup> while only 40 percent of law schools offer a state civil procedure course.<sup>3</sup> A 1986 survey showed that only two-thirds of the states still modeled their rules after the Federal Rules of Civil Procedure. Sixty-two percent of the nation's population was then governed by nonfederal rules of procedure.<sup>4</sup> As of 2003, the federal rules have dimmed from beacon to flicker: "Federal procedure is less influential in state courts than at anytime in the past quarter-century."<sup>5</sup>

Various factors have limited the vitality of state-oriented procedure courses, especially in states not testing on state procedure, evidence, or other local subjects. States promptly embraced the 1938 federal model for creating, amending, and interpreting their codes. Law school publishers have always preferred casebooks for a national audience, and that has inhibited the development of materials for state practice courses.<sup>6</sup> Many professors are not

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1. Standards for Approval of Law Schools and Interpretations, Standard 301 (a) provides: "A law school shall maintain an educational program that prepares its graduates for admission to the bar and to participate effectively and responsibly in the legal profession." See ABA Standards at <<http://www.abanet.org/legaled/standards/standards.html>>. Note the irony of my having to cite this requirement. It has not yet achieved the status of hornbook law.
2. Per BARBRI Digest, National Bar Exam Information (2003 ed.), 30 of the 50 states test on state civil procedure [hereinafter BARBRI Digest]. Further detail is available in National Conference of Bar Examiners and A.B.A. Section on Legal Education and Admission to the Bar, *Comprehensive Guide to Bar Admission Requirements* (2003).
3. See State Civil Procedure Survey at <<http://home.att.net/~slomansonb/statesurvey.html>> [hereinafter State Procedure Survey].
4. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367, 1428-31 (1986).
5. John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 Nev. L.J. 354, 355 (2003).
6. There have been only three published state procedure casebooks, for only two states, California and New York. But this basis for not producing state-oriented materials is evaporating. For details on WestGroup's Custom Publishing, see <<http://www.thomsoncustom.com>>, click Press Room, then Become an Author.

members of the bar in the state where they teach; understandably, they minimize the local state law in their teaching.

The California Committee of Bar Examiners' letter to deans dated October 17, 2002, contains a provocative response to the comparative dearth of state civil procedure (and evidence) courses:

The law school's role is education, not public protection, and the law schools prefer that they be allowed to carry out their function as unfettered by outside considerations as possible. On the other hand, the Committee is a regulatory agency charged with protecting the legal services consuming public from persons who have not demonstrated a sufficient level of competence on a written examination to warrant the issuance of an unlimited license to practice law.

...

The Committee is strongly of the opinion that lawyers who are not familiar with California rules of evidence and civil procedure put their clients at risk and also create problems for judges and opposing counsel thus impairing the administration of justice.<sup>7</sup>

Why teach state civil procedure? I begin with what should be—but is not—obvious: state civil procedure is different from federal civil procedure. It cannot be commingled with the existing federal procedure course. Experienced federal civil procedure teachers no doubt experience anxiety when covering the many areas of their course where the procedural rules in their state are the polar opposite of federal rules. The California Bar Examiners' 2002 announcement that state civil procedure would be added to the bar exam claimed:

[T]he differences [between state and federal rules] were not so great that including the California rules would require law schools to significantly alter their courses in civil procedure and evidence. Further, the Committee believed that most law professors note instances where the California rules differ from the Federal rules and that certainly the bar review courses would.<sup>8</sup>

As a teacher of both state and federal procedure, and author of four books on procedure, I know that *nothing* could be further from reality. Authors of supplements for federal procedure casebooks often include comparative code provisions from a number of states. They may disagree with my creating a distinct state procedure course. I did so precisely because of my ill-fated attempts to identify the many substantial differences in my federal procedure course. This educational Niagara Falls inevitably resulted in confusion for my federal procedure students.

7. Jerome Braun, CBE Memorandum: Change in Scope of the California Bar Examination Effective July 2007, at 6–7, announcing the addition of California civil procedure (and California evidence) to the July 2007 bar examination.

8. *Id.* at 4. The CBE then added insult to injury. A sensible, but preordained result—that state procedure should be tested on the bar—was accompanied by the bar's failure to consider input from California's law deans (representing a large pool of teachers in the state with, by far, the most law schools). The CBE smugly acknowledged that "all ABA deans opposed including the California rules in Evidence and Civil Procedure [courses]." *Id.* at 5.

Giving students what they need for practice is not the *raison d'être* of the traditional federal procedure casebook. State procedure should be spun off as a distinct elective, especially because of the recurring movement away from the federal model. The essential reasons for adding a state civil procedure elective follow.

### Local Specialization

Throughout the country a significant percentage of law students will take the bar examination in the state where they graduate. At Mississippi College School of Law, for example, between 71 and 79 percent of the graduates take the Mississippi bar exam.<sup>9</sup> If your state tests on state civil procedure, but your school does not offer a course on it, is the school adequately serving those students who will remain in the state? A second procedure course would also benefit high-risk students at an institution concerned about its local bar results.

The national character of many student bodies, and the intricacies of diverse state laws, are all-too-convenient bases for ignoring my proposal.<sup>10</sup> The following representative response to my LawProf listserv survey in spring 2003 unabashedly rejected the notion of a state practice elective: “We have no state practice courses at all—don’t have enough of a mass of students going to a single state to warrant doing so.”<sup>11</sup> This is presumably the rationale of schools like Columbia and Cornell, which do not offer a state procedure course—possibly because most of their graduates practice exclusively in federal courts.<sup>12</sup> Yet the local bar examination tests primarily on New York civil practice rather than federal civil procedure.

If you happen to be in a state whose bar automatically admits graduates of law schools within its borders, you should still consider offering a state procedure elective. Your graduates will not have the opportunity to review civil procedure for a bar examination (unless they migrate). This is one of

9. Statistics for the years 1999–2002, provided by Associate Dean Phillip L. McIntosh, in response to a LawProf survey related to this article. My fall 2003 LawProf inquiry yielded no other statistics, nor any convenient method for obtaining them.
10. But see Bethany Rubin Henderson, *Asking the Lost Question: What Is the Purpose of Law School?* 53 *J. Legal Educ.* 48, 48 (2003), on student complaints “that the issues addressed and the skills taught in law school are far removed from the everyday problems lawyers encounter.”
11. E-mail response sent privately to author. This was the extent of my research on the availability of state-oriented electives *other than* civil procedure. The general survey response did not indicate that many such courses were being offered, except at Louisiana State University because of Louisiana’s civil law regime. There is some provocative literature on point, however. See, e.g., Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 41 *J. Legal Educ.* 243 (1991); John S. Bradway, *Family Law Should Be a Required Course in Law Schools*, 31 *B. Exam.* 59 (1962); Arthur Earl Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 *Tex. L. Rev.* 95 (1982); Judith Welch Wegner, *Imagining the World Anew: The Course in State and Local Government Law and the Future of Legal Education*, 3 *Wash. U. J.L. & Pol’y* 741 (2000).
12. Cornell’s Web site indicates that certain courses may contain state procedural content: *Advanced Civil Procedure* (regarding international human rights), and *Comparative Civil Procedure* (regarding common law and civil law). Columbia’s Web site does not list any course that seems to include state procedural content. (Web sites visited Sept. 2, 2003).

Marquette's reasons for offering a three-unit Wisconsin state procedure course. New York schools not currently offering a state procedure elective may soon have a similar motivation to do so, because life without the bar exam is now a distinct possibility. As an alternative to taking the bar exam, applicants to the New York bar may be able to work for three months in the local civil courts.<sup>13</sup> A state civil procedure course would directly benefit those selected for such programs.

Because few non-New York schools offer a New York procedure course,<sup>14</sup> bar review courses attempt to fill the gap. They offer out-of-state bar exam instruction, just for New York bar takers, in nineteen states.<sup>15</sup> Why should feeder schools to the New York bar collectively foist this educational responsibility upon a commercial enterprise? If they took it upon themselves to support their students properly, their graduates would have greater motivation to support the schools.

State bars that test on local law do so more for civil procedure than for any other subject area. If a significant percentage of your graduates routinely migrate to other states, you should think about adding an out-of-state procedure course. Some schools offer state procedure courses to serve the needs of their migrant populations. Mississippi College School of Law offers a number of state law electives for its students who will practice in Louisiana.<sup>16</sup> Michigan's Thomas M. Cooley School of Law offers state practice courses for students who will take the Florida and New York bars. Rutgers—Newark similarly serves the needs of its New York-bound graduates.

I am not suggesting that each school offer a state procedure course for every state to which its students migrate. George Washington, for example, would not be a prime candidate for offering a state procedure course. An equal number of its graduates take the New York, Virginia, and Maryland bar exams. A healthy number take the California and Florida bars. Some take the D.C. exam. No one would expect the school to provide six state procedure courses, especially because most of its graduates practice federal law.

Any thought of adding to the curriculum raises questions about subtracting. What must your law school give up if you push for a course in state procedure? How many of your graduates practice in other states? The larger that number, the more reason to create a state civil procedure course. Do any of those states yield comparatively poor bar results that may be pulling down your school's bar pass statistics?

13. Victoria Rivkin, *Bye-Bye Bar Exam?* A.B.A. J., Feb. 2003, at 16. New York would then be the only state with this alternative method of bar admission (if it is adopted). An administrator comments: "The pilot proposed here is not seen as a substitute for, or as a replacement of, the current exam but, rather, simply as another way in which an applicant's competence might be assessed." *Quoted in Rivkin, supra.*

14. See State Procedure Survey, *supra* note 3.

15. BARBRI Digest, *supra* note 2, at 36.

16. Louisiana is a special case. LSU's core curriculum necessarily includes a number of state law courses; students assimilate both the common law and civil law regimes needed for state practice.

### Augmented Knowledge of Civil Procedure

Creating a state civil procedure elective would allow you to plug gaps in your initial civil procedure course. One can also use a state civil procedure elective as the springboard for integrating a doctrinal procedure course with clinical and externship programs. Students tend to take courses that will help them on the bar exam rather than courses that will advance their careers. California's Hastings College of the Law offers a model that could put your academic estate in a better position vis-à-vis the "practical" courses. At Hastings, student externs working in local civil courts must first take California Civil Procedure. (The prerequisite for federal extern students is Federal Courts. Family Law is required for students wishing to work in that division of the Superior Court.) This approach achieves an advantage for Hastings students who seek placement in these courts and gives them an improved résumé for subsequent job searches.

### Alternative to the Alternatives

Our students do not promptly absorb state civil procedure after they leave law school. They must learn it as they practice, at a time when they have scant opportunity for contemplative study. The modes of learning, which all have their drawbacks, include apprenticeship in Delaware, Vermont, and possibly New York;<sup>17</sup> trial observations in South Carolina; nationwide bridge-the-gap and CLE programs, which serve an inexpensive and readily digestible menu for the masses; and the latest craze—"renewable" bar admissions.<sup>18</sup> The Inns of Court movement seeks to fill the gap created by the many American law schools that de-required the Trial Practice course (given the accreditation pressure to maximize elective offerings).<sup>19</sup> The contemporary majority of jurisdictions unwittingly perpetuate the reality that nothing other than fear of a malpractice suit or a disciplinary proceeding—or some modicum of conscience or good sense—precludes the bar passer from taking on any client, representation, or complex matter.

Law schools hope to place their graduates in law firms with high starting salaries. But such employers now require more productivity, faster, and from fewer associates. As our graduates face a declining job market, they will have to hone their practice skills to be competitive. The various CLE abbreviations are insufficient to meet their needs. According to a major study, such short-term

17. Rivkin, *supra* note 13. On the problems with apprenticeships, see ALI-ABA Committee on Continuing Professional Education, *A Model Curriculum for Bridge-the-Gap Programs: Discussion Draft 19* (Philadelphia, 1988) [hereinafter *A Model Curriculum*].

18. My proposal suggests that CLE courses do not adequately integrate new law and required procedure into a lawyer's practice. But "[u]npleasant as the prospect may be . . . re-examination is as necessary for lawyer specialists as it is for medical specialists." Jayne W. Barnard, *Renewable Bar Admission: A Template for Making "Professionalism" Real*, 25 *J. Legal Prof.* 1, 1 (2001).

19. See Nora C. Porter, *Enriched by Colleagues: How Lawyers are Learning from Each Other and Enjoying Social Camaraderie Through Membership in the American Inns of Court*, *Penn. Law.*, July-Aug. 2002, at 20; Douglas Moll et al., *The American Inns of Court: Mentoring Professionalism Among Goals of Growing Movement*, *Hous. Law.*, Mar.-Apr. 2001, at 10.

fixes “simply do not respond as fully as they might to the early practice needs of new lawyers.”<sup>20</sup> They are minimalist postgrad solutions for balancing the needs of the profession and the public, given the tradition-bound limitations of law school education.

Graduates of the so-called lower-tier schools are particularly likely to embark on solo practice or join a comparatively small firm. They especially need whatever edge their law schools can provide to set them on a rising career path. A state procedure elective would prepare them for the ubiquitous procedural problems they will encounter. Practice-oriented teachers, of course, endure their own related demons. One is surviving the institutional pressure to publish and to accept the one-size-fits-all straitjacket of the teaching, scholarship, and service meritocracy—a mold that represses teaching innovation.

### **A Vehicle for Skills Modules**

A doctrine-based course with a skills component could replace or at least supplement the practical but labor-intensive skills training offered by your clinical program. Civil procedure naturally lends itself to skills augmentation.<sup>21</sup> A course in state civil procedure, like one in federal civil procedure, could be used to introduce skills training. Such training would not be unique to the *state* civil procedure course, but it could be conveniently introduced in that elective. It could be your doctrinal engine into which you pour experimental skills propellants as you see fit.

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Concerns about the disconnect between law school and law practice surfaced in the 1970s, when Chief Justice Warren Burger complained about the poor quality and lack of experience of lawyers who appeared in the federal courts.<sup>22</sup> Two decades later, Judge William F. Rylaarsdam of the California Court of Appeal confirmed that “[m]ost lawyers coming out of law school don’t have the foggiest idea of what kind of papers to file, or what the rules are when they get into court. . . . Many approached procedural issues as something they made up as they went along—sometimes with disastrous results for them and their clients.”<sup>23</sup>

*Why* is this the contemporary state of affairs? Consider this recent comparison of legal and medical education:

20. Foreword, *A Model Curriculum*, *supra* note 17, at x.

21. See, e.g., William R. Slomanson, *Electronic Lawyering and the Academy*, 48 *J. Legal Educ.* 216 (1998). I required students to periodically submit motions and responses, which I electronically graded via e-mail. I masked their identities to retain anonymity in grading these modules. The doctrinal portion of the course is two units. An optional third “skills” unit had to be omitted because of (then) having no accreditation authorization for online courses.

22. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 *Fordham L. Rev.* 227, 234 (1973).

23. *Quoted in* Richard C. Reuben, *A Man with a Mission: California Law Prof Touts State Civil Procedure Courses*, *A.B.A. J.*, Feb. 1997, at 34.

For many law students—and especially students at the most elite law schools—the understanding for years was that law school and licensure were only the first steps on the road to professional competence. Just as new physicians would become “real doctors” only after they completed their internship and residency programs, law students would become real lawyers only when they completed an intensive training regime at their law firms. This . . . has been assumed to be the model for the best students ever since. Of course, we know that, today, new lawyers never get this type of training . . . . Certainly the model in which senior partners line-edited their associates’ memos and the associates accompanied their partners to court for years before being given a case of their own to handle has become but a dim memory.<sup>24</sup>

By no means do I advocate the wholesale substitution of skills courses for a sound doctrinal core curriculum. If confession is good for the soul, then I too am guilty of acknowledging the need to teach students to Think Like Lawyers.<sup>25</sup> Instead, my recommendation—that more law schools offer a state civil procedure elective—is a commentary on the procedural divide caused by law schools’ leaving the fine tuning of their graduates to a diverse array of CLE options during the new lawyer’s *real* sink-or-swim first year. The more that examining authorities drive the law school curriculum, by adding state practice components to the bar, the more they take the lead in narrowing a gap which many law schools have been unwilling to plug.

My fix is at best partial. Only so much can be done with a doctrinal course backdrop. Practical training, such as Trial Practice and clinical offerings,<sup>26</sup> is at the high end of this particular spectrum. A middle ground like my proposed doctrinal course with skills modules is—at a bare minimum—a doable step in the right direction. My hope is that members of our academy, including those who do not teach civil procedure, will assess whether other subject areas are likewise suitable for this task. We could unite in our common belief that we must better address the practice needs of our graduates. We doctrinal teachers could thereby join with the clinical, legal writing, moot court, and other skills-oriented faculty to ratchet up law school training beyond the hallowed but hollow doctrinal course tradition.

24. Jayne W. Barnard & Mark Greenspan, Incremental Bar Admission: Lessons from the Medical Profession, 53 J. Legal Educ. 340, 355 (2003).

25. John C. Kleefeld, Rethinking “Like a Lawyer”: An Incrementalist’s Proposal for First-Year Curricular Reform, 53 J. Legal Educ. 254 (2003) (proposing a Concept and Practice of Law course, which can be fit into an existing program “by careful restructuring”). By monitoring valuable resources like the *National Conference of Bar Examiners* magazine, doctrinal law faculty can better grasp the invisible hand that often dictates such curriculum changes.

26. See State Procedure Survey, *supra* note 3.