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Rethinking the Teaching of Civil Procedure

Elizabeth N. Schneider

The dialogue that Paul Spiegelman's materials, *The Lawyer's Role* has generated is not really about whether or how to integrate Alternative Dispute Resolution (ADR) into the first-year civil procedure course. Rather, this dialogue concerns competing visions of how to teach civil procedure and reflects ongoing efforts by civil procedure teachers around the country to rethink the goals, content, and pedagogic methods of this important course. In a number of recent meetings—the AALS Mini-Workshop on Alternative Dispute Resolution,¹ the AALS Workshop on Professional Development for Women in Legal Education,² and the Ninth Annual Conference on Critical Legal Studies³—civil procedure teachers have met to critique the way in which civil procedure has been traditionally taught and to share ideas about how to reconstruct it. For some, concern with ADR has triggered this process, and widespread interest in ADR has certainly assisted these efforts.⁴ But interest in ADR and a focus on dispute resolution generally should be understood as only part of a larger process.

This is an enormously exciting time to teach civil procedure. We are in a period of much innovation and change in our experience of procedure, reflected in recent amendments to the Federal Rules of Civil Procedure and the burgeoning of various alternative dispute resolution forums. Moreover, a variety of movements within legal education, clinical education, law and society, Critical Legal Studies and feminist jurisprudence is both directly and subtly influencing the way legal scholars think about and teach civil procedure.⁵ Some of these themes are reflected in Paul Spiegelman's, Bryant Garth's, and Lisa Lerman's comments, and in my own and several of my

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1. AALS Mini-Workshop on Alternative Dispute Resolution, small group discussion on civil procedure, AALS Annual Meeting, New Orleans, Louisiana, January 1986.
 2. AALS Workshop on Professional Development for Women in Legal Education, New Orleans, Louisiana, October 1984.
 3. Ninth Annual Conference on Critical Legal Studies (Feminist/Critical Legal Studies Conference) Chestnut Hill, Massachusetts, May 1985.
 4. See generally, Paul D. Carrington, *Civil Procedure and Alternative Dispute Resolution*, 34 *J. Legal Educ.* 198 (1984); Martha Minow, *Some Thoughts on Dispute Resolution and Civil Procedure*, 34 *J. Legal Educ.* 284 (1984).
 5. For a discussion of the similarities and differences in some of these perspectives, see Martha Minow, *Law Turning Outward* (forthcoming in *Telos* 1987).
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colleagues' efforts to teach civil procedure. But rather than advocate any particular approach, I want to situate my own perspective, outline some of the strands of the critique, and briefly touch on some of the alternative approaches that are being developed.

Paul Spiegelman, Bryant Garth, Lisa Lerman, and I share a common dissatisfaction with the traditional way in which civil procedure has been taught. Civil procedure has been divorced from its social and human context. It has emphasized an adversarial and litigation-focused perspective and it sends a message to students that what lawyers do is simply litigate. The focus on appellate opinions, abstract rules, and legal doctrine divorces civil procedure from a real-life context. The traditional approach to civil procedure has been inadequate because it reflects a kind of halfway, neither theoretical nor practical, "worst of both worlds" approach.

Dissatisfaction with civil procedure is rampant among students and law professors. It is commonly perceived as the most difficult and elusive course in the first year. I shared these feelings myself as a law student; civil procedure was one of the courses I least enjoyed. Indeed, I did not learn to love procedure until I spent several years as a litigator. My sense of the importance of civil procedure was underscored by my experience as a clinical teacher. In working with students on litigation, I was constantly reminded of the critical importance of developing students' sensitivity to procedural contexts and perspectives. Consequently, I grew determined to try my hand at teaching procedure. I hoped to reach students in the first year with a different set of messages about the legal system and legal practice, help students develop a greater sensitivity to the normative dimensions of procedure, and help them understand how procedure affects human lives. Nonetheless, I was warned by colleagues that it was a terrible course to teach—technical, dry, and boring, and that it exemplified the worst vocational education vices of law school.

I have not been disappointed by civil procedure—to the contrary, I have found it a rich and exciting course to teach. Procedure introduces students to the tools of legal problem solving, both formal and informal. It plays a central role in socializing students to the litigation process, dispute resolution, and lawyering generally. Civil procedure is composed of many elements, all intertwined: the human dilemmas of disputes that give rise to formal and informal adjudication, legal ethics, legal strategy, and the critical interrelation between substance and process. It also focuses students' attention on the value of process as a social and human value in and of itself.

Precisely because civil procedure is so open-textured, efforts to rethink the way in which the course is taught have been shaped by current perspectives within legal education. These perspectives suggest a number of possible alternative approaches, only some of which are outlined below.

Civil Procedure in the Context of the Actual Case

Both Paul Spiegelman and Bryant Garth discuss the importance of tying the themes and context of an inquiry in civil procedure to what actual happens in a case—the choices, the strategies, the costs. In a sense this

approach might be viewed as deriving from a law and society perspective. As Garth suggests, this approach can still be used in a more traditional course framework. If this approach was emphasized, ADR might be a theme throughout the entire course.

Many civil procedure teachers integrate ADR in this way by using a book such as *The Buffalo Creek Disaster* as a focal point for the course, as some of us do at Brooklyn Law School.⁶ Some also use litigation documents in real cases, such as *Buffalo Creek*, or audio-visual materials focused on cases.⁷ A focus on real cases can direct student attention to the kinds of issues that Garth suggests and to the possibilities and limits of different kinds of adjudication. This real case perspective can give students a larger picture of what goes on in any case. It also emphasizes both the diversity of roles that a lawyer must play and the need for flexibility.

A Lawyering Perspective

The teaching of civil procedure can also be strengthened by developing a lawyering perspective or experiential learning component derived from the lessons of clinical education. Many law teachers in many areas are finding that different forms of experiential learning, simulation, role-playing, whether through classroom exercises, writing assignments, or document drafting, can break down the passivity and alienation induced by a classroom setting. This approach can help students learn more actively and take greater responsibility for learning.

In civil procedure this type of pedagogical work is crucial. Possible approaches include complaint drafting and motion practice and negotiation exercises. Several of us at Brooklyn Law School have given students drafting exercises such as complaints or motions and written problems. Using this approach, ADR might be introduced in a simulation format such as a negotiation problem. Two years ago, a colleague, Maryellen Fullerton, and I jointly developed an in-class simulation problem on Alternative Dispute Resolution in *Buffalo Creek* that worked well in a class of 150.⁸

This year Brooklyn Law School has an experimental first-year Seminar Section program in which some first-year teachers are working with smaller

6. Most of the faculty presently teaching civil procedure start off with Gerald Stern's book, *The Buffalo Creek Disaster* as a way of introducing students to the world of law. I know that many civil procedure teachers at other schools use it as well. I worked with Larry Grosberg of New York Law School on a set of videotaped simulations of various stages of litigation in *Buffalo Creek Disaster*, such as fact investigation and discovery, that he developed. Marc Galanter uses *Buffalo Creek* to teach about legal process and apparently enjoys it as much as I do. See Marc Galanter, *Using Negotiation to Teach about Legal Process*, 34 J. Legal Educ. 268, 271 (1984).

7. Larry Grosberg's videotapes and materials are available from him at New York Law School.

8. Maryellen Fullerton & Elizabeth Schneider, *Alternative Dispute Resolution Problem for Buffalo Creek Disaster*, Civil Procedure II (Spring 1985), on file with the University of Wisconsin Dispute Resolution Clearinghouse.

classes using a variety of experiential learning techniques.⁹ Two of these sections are in civil procedure. The work in my Civil Procedure Section is integrated with Legal Writing and focuses on a simulation of two DES cases. My colleague Kathleen O'Neill and I have developed materials for this simulation that have had students interview the client, analyze ADR alternatives, draft a complaint, draft a discovery plan, write a summary judgment memorandum and argue a summary judgment motion, write legal memoranda on issues such as Rule II and work product and write briefs on the collateral estoppel impact of the first case on the second related case as their moot court problem.¹⁰ The other Civil Procedure Section, renamed The Structure of Procedure, integrates Civil Procedure, Legal Process, and Legal Writing, and is co-taught by Margaret Berger and Ursula Bentele. Students in this Section have been given a substantial number of writing assignments and advocacy exercises such as oral argument as well.

The Explicit Exploration of Social and Political Themes

Traditional civil procedure courses have explored such issues as the values of process and the costs of adjudication. Yet, as Martha Minow has powerfully observed, ADR can highlight important political themes in the study of procedure, and make them more explicit.¹¹ Presenting civil procedure as an aspect of a broader system of adjudication focuses attention on important values and requires us to ask fundamental questions about the value of different forms of process and the value of process itself. This approach may be coupled with a greater emphasis on legal theory. For example, the theoretical contributions of Critical Legal Studies, focusing on underlying political values, sharpen these issues.

From the ongoing discussions among civil procedure teachers I have a strong sense that some or all of these approaches to teaching civil procedure are being explored by many teachers around the country. A generation of civil procedure scholars and teachers have now come to teaching the course with views shaped by experience in practice as well as experience as law students in clinical education. In addition, the increase in the number of women law teachers, a significant number of whom appear to be teaching in

9. Our Seminar Sections are limited to approximately 35 students and are being taught this year in contracts, torts, property, criminal law, constitutional law, and civil procedure. Each student in the first year will have the opportunity to have a Seminar Section in one first-year course that is integrated with Legal Writing or have some lawyering component. CUNY Law School's entire first-year curriculum is organized around simulation.
10. These materials, Elizabeth Schneider & Kathleen O'Neill, *Simulation Materials for Civil Procedure: The Cases of Ellen Warren and Marian Fleming* (Fall 1986-Spring 1987), will be on file with the University of Wisconsin Dispute Resolution Clearinghouse. In order to assist students with the simulation, I am using Haydock, Herr and Stempel, *Fundamentals of Pretrial Litigation* (St. Paul, Minn., 1985) in conjunction with the casebook, Landers and Martin, *Civil Procedure*.
11. Minow, *supra* note 4.

the area of procedure,¹² may have an impact on the way in which civil procedure is taught. An informal meeting of women procedure teachers at the AALS Workshop on Professional Development for Women in Legal Education showed remarkable consensus on all three pedagogical approaches.¹³ Indeed, all three approaches might well be seen as linked to the influence of feminist theory and practice on legal education.¹⁴

Ultimately, the ferment, energy, and dialogues among civil procedure teachers can have only a positive effect. We can hope that a new generation of law students, exposed to the powerful socialization messages of a reconstructed civil procedure, will experience and evaluate the legal system and the roles of lawyers in more critical and reflective ways.

12. An informal meeting of civil procedure teachers at the AALS Workshop for Professional Development for Women in Legal Education suggested that a significant number of women entering legal education are teaching in the area of procedure. A large number of women at gatherings of the Section on Women in Legal Education also seem to teach in the area of procedure. One reason might be that women are entering law teaching after several years of litigation practice (as opposed to the traditional clerkship route), and are thus viewed as strong candidates to teach procedure.
13. In this discussion, involving perhaps 20 or 25 women procedure teachers, there was a shared sense of the inadequacies of traditional civil procedure teaching. A large number of the women had used all or some of the approaches I have described.
14. A growing literature explores the impact that women's experience, feminist theory, and feminist jurisprudence might have on legal education in emphasizing each of the approaches mentioned here. See Carrie J. Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 *Berkeley Women's L.J.* 39 (1985); Carrie Menkel-Meadow, *Critical Legal Studies, Feminist Legal Theory and Legal Education or the "Fem-Crits Go to Law School"* (forthcoming in *Telos* 1987); James R. Elkins, *On the Significance of Women in Legal Education*, 7 *ALSA Forum* 290 (1983); Gould, *The Paradox of Teaching Feminism and Learning Law*, 7 *ALSA Forum* 270 (1983). This literature poses the question whether women law teachers are more likely than their male colleagues to share a common perspective on legal education which emphasizes social and human context, experiential learning, and explicit questioning of underlying values.