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CIVIL PROCEDURE
Cases and Problems

*Third
Edition*

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Civil Procedure

Cases and Problems

Third Edition

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our better halves.*

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Preface

As we go to press, the nation is on a war-footing and faces the profound question whether due process is an impediment to security or a condition of liberty. At the same time, perennial debates about the adversary system and concerns about the trajectory of American civil litigation have provoked a new cycle of procedural reform. These twin developments come together in the case that opens the new edition — a case in which traditional principles of due process meet arguments of exigency, national security, and executive authority.

The basic structure of the book, tracking the contours of a civil suit from pleading through preclusion, and most of the core cases, remain unchanged. As before, we begin with constitutional due process, both to frame the principal themes of the course and to lay a proper foundation for the study of jurisdiction. We continue to believe there is no better place to start because the study of due process invites sustained reflection about the enduring values that define procedural law: the belief in the power of rules to constrain government decision-makers and fellow citizens; the commitment to equal access to law; the peculiarly American zest for adversarial exchange; and the belief in meaningful participation in decisions affecting one's substantive legal rights.

For this third edition we have deepened readings assessing the merits of the adversary system, adding selections on how adversarial litigation compares to the administration of justice in other countries, the history of early efforts to reform civil litigation in the United States, and the problem of ensuring equal access to law in a system that assumes litigants should “pay to play.” And we have expanded the treatment of emerging doctrines governing the burgeoning phenomena of transnational litigation and the growth of a digital, global economy. Widespread financial accounting scandals have refocused attention on the role of attorney-client counseling in the shadow of litigation and competing allegiances to confidentiality and transparency in a legal system that relies upon both for legitimacy. We have addressed these issues through the lens of the attorney-client privilege, the crime-fraud exception, and professional standards on obstruction of justice and discovery abuse.

Increases in the discretion of the trial judge over both litigants and the jury have caused us to renew our coverage of some old favorites, including more extended treatment of the 1986 trilogy of summary judgment decisions by the Supreme Court, *Walker v. City of Birmingham* on pre-judgment remedies and contempt, and discussion of the inherent powers doctrine. Finally, we canvass recent efforts by Congress and the Supreme Court to clarify the scope of federal jurisdiction, and to charge lower federal courts with the task of managing increasingly complex, multiparty litigation.

Throughout the text we have sought to place greater emphasis on empirical studies of the practical consequences of procedural change, as well as the relationship between procedural rules and both ethical and social understandings of the lawyering role. We are also delighted to welcome a new coauthor, Norman W. Spaulding, who has taken the laboring oar for this new edition. Indeed, there would not be a new edition except for his desire to continue to teach civil procedure in this way from these materials. For Professor Babcock, *Emerita* now, and Dean Massaro, it is especially pleasant to have our collaboration extended into the future by the dedication of this brilliant young scholar.

For the new edition, terrific assistance with research was provided by Esther Kim, Melanie Wachtell, Kathryn Johnson, Nancy B. Leong, and Naomi Ruth Tsu. Ms. Leong and Ms. Tsu dedicated especially long hours, thoughtful comments, and close editing to enrich the final product. For outstanding administrative support, we thank Donna Fung. We are also grateful to the editors at Aspen for supporting a new edition. Special thanks are due to John Devins, our patient development editor, Vincent Nordhaus, our diligent copyeditor, and Peter Skagestad, our ever-scrupulous manuscript editor.

Over the years we have been uncommonly fortunate in the support others have provided to the production of this book at both Stanford and Arizona. The exceptional research support of Robyn Kool and Joanna Grossman was instrumental in the first and second editions. Laura Gomez, Kara Mikulich, Jason Richards, Lisa Sitkin, Joseph Vigil, Matthew Gowdy, Jill Harrison, Katherine Wilson, Mary Jensen, Beth Smith, Melinda Evans, Susan Hightower, Maureen Lewis, Julie Loughran, Melinda Mattingly, and Amy Ruskin also contributed much appreciated research assistance.

As always, we are deeply grateful to our fellow procedure teachers who have offered new ideas and input to improve the book. We are particularly indebted to Professors Mary Twitchell and Barbara Atwood for their extremely insightful substantive suggestions, and to Paul Carrington, whose book decades ago started us on this course. He

remains our intellectual mentor, still raising fresh insights, even as we preserve much of what he has left behind.

Thanks to all for the inspiration.

Barbara Allen Babcock

Toni M. Massaro

Norman W. Spaulding

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