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CIVIL PROCEDURE
Doctrines, Practice, and Context

*Third
Edition*



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CIVIL PROCEDURE

**Doctrine, Practice,
and Context**

Third Edition

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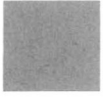
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Dedication

I dedicate this book to over three decades of
Northeastern Law students who have insisted that intelligence,
compassion, and justice must go hand in hand, and to Joan,
who has done the same — and then some.

—**Stephen N. Subrin**

I dedicate this book to Harvard Law students who have, since 1981,
helped me to make procedure more civil, and to Joe Singer,
who inspires accessible casebooks and other improvements of daily life.

—**Martha L. Minow**

I dedicate this book to my late father, Herman Brodin,
who instilled in me a keen sense of justice and equity;
and to my student and friend, Arthur C. Harris, whose untimely
death deprived us of a mighty voice for social justice.

—**Mark S. Brodin**

I dedicate this book to my parents, who always seem to
know the way, and to Paula, with whom I read maps.

—**Thomas O. Main**



Preface to the Third Edition

Gratified by the success of the first and second editions, we have made every effort to build on the strengths of those books with revisions that are targeted to the need of civil procedure teachers and students. Our principal goal is unchanged: to provide a book that meaningfully integrates the doctrine, practice, and context of civil procedure. And in achieving that goal, we are grateful for the many excellent suggestions that we have received from our teacher and student colleagues.

Of course this new edition updates all of the chapters to reflect recent developments in procedure. From Chapter 1, with new material on enemy combatants and due process, through Chapter 11, with new material on the Class Action Fairness Act, the casebook offers a rich array of contemporary subjects to study the enduring themes of our discipline. New material on pleading, summary judgment, electronic discovery, subject matter jurisdiction, and other areas have also enriched this edition. Mindful of the enterprise of actually teaching the course, we have also selected and edited material to keep the text a manageable size.

With this new edition of the book, the authors have still more persons to thank for their assistance in making this effort possible. To our many adopters who have shared their experiences and insights, we are most appreciative; we will continue to work with you to develop the ideal teaching tools. We also thank students, librarians, and colleagues at each of our four institutions for providing important research and technical assistance; in particular, Martha Minow thanks Taki Flevaris, Zoia Hinson, and Kristin Flower. To our friends and colleagues at Aspen, and particularly, Carol McGeehan, Melody Davies, Eric Holt, Carmen Corral-Reid, and Julie Nahil, thanks again for your work, insight, patience, and support. And finally, we express our gratitude to our

family, friends, and other persons providing administrative and other assistance. Once again, our final product is truly a collaborative effort.

Stephen N. Subrin
Martha L. Minow
Mark S. Brodin
Thomas O. Main

June 2008



Preface to the First Edition

The impetus for this book grew out of our own experience as law students and professors. We find that students learn most effectively when legal doctrine, its context, and how doctrine actually works in practice are integrated. Empirical and theoretical research support the notion that we learn and remember at our best as a result of intense, sustained experiences in which we must perform concrete tasks that call upon a number of our faculties. Many of our deepest learning experiences have come from teaching a new course, helping a client solve a problem, or writing an article or a book — experiences that call upon a combination of knowledge, insight, values, clarity, advocacy, judgment, and endurance. These are the lessons that stick.

We wanted a civil procedure course that created a more unified learning experience. Civil procedure doctrine can seem remote from the reality of torts, crimes, contracts, and land. And yet perhaps no other legal subject so calls into question the major issues of law and practicing law in the United States: separation of powers, federalism, the adversarial relationship, efficiency, fairness, power and powerlessness, justice, and fees. In a civil procedure course one finds, for example, the conceptual challenges of *Erie*, the ethical dimensions of discovery, and the practical necessities of hard and fast rules. Moreover, this is a field in flux, and studying the underlying values and historical context of procedure helps one make some sense of the inherent uncertainty and change.

Often students say that they know the doctrine, yet (frustratingly) they cannot meaningfully apply it. We wanted to develop a course in which students applied the doctrine they were learning. Seven years ago, Steve Subrin and several of his students at Northeastern University School of Law confronted the challenge of creating a more unified civil procedure course. They put two real cases, with practice-oriented exercises, at the center of a contextual, philosophical, and multidisciplinary study of civil procedure. They reprinted fewer

opinions, but retained more of the procedure and factual context by not severely editing them. They also reprinted longer excerpts of pertinent articles to demonstrate the flow of an extended argument. The students were given challenging questions to contemplate or answer, but they were not given questions that required additional reading or expert knowledge. Finally, they employed *orientation essays* to illuminate certain doctrines and to elucidate the contextual and practical environments that influenced, and were influenced by, those doctrines.

We have remained true to the vision of Steve Subrin and his students — the vision of creating a civil procedure course that not only taught the doctrine but also applied it and illuminated the integral role of civil procedure in every substantive area of the law. Many features of this book promote that vision:

- Orientation essays that focus on doctrine, practice, or context, or a combination of these.
- Pleadings and files of two real cases are threaded throughout the book.
- To maintain a manageable size yet cover all of the essentials, the authors have carefully edited the book's cases.
- There is complete integration of contextual materials and practice exercises.
- Thomas Main helped design the founding materials as a law student, and became a co-author of this text as he entered practice and added a law-practice perspective to this course.
- Martha Minow and Mark Brodin brought original materials and different perspectives that contributed to this effort to reinvent a course in civil procedure.

We are grateful to those who aided and abetted this project. In particular, Jeff Stern, a distinguished trial lawyer at Sugarman, Rogers, Barshak & Cohen in Boston, Massachusetts, helped us develop the materials for the wrongful death action involving the roll-over of a Jeep. Jane Picker, Ken Kowalski, and the Fair Employment Law Clinic at Cleveland-Marshall College of Law, Cleveland State University, helped us develop the materials for the Title VII class action against the Cleveland Ohio Fire Department. In both cases, we have changed the names and, in a few instances for pedagogical purposes, certain facts.

Many Northeastern University School of Law students and graduates inspired Steve's vision for this book, and participated in its initial preparation and later iterations. He gives special thanks to Mary Azzarito, John Becker, David Brenner, Kent Brintnall, Kevin Brown, Shawn Bush, Stephanie Cucurullo, Rachel Dimitruk, Genna Carver, Liz Goldstein, Amy Hubert, Vik Kanwar, Dovie King, Amber Klinge, Aileen Lachs, Mark McGrath, Laura Matlow, David Plotkin, Judy Prosper, Joel Rosen, Sasha Rosebush, Nicole Voigt, Jason Walta, Angela Wessels, and Debra Williams.

Martha thanks Laurie Corzett, Katie Cook, Naomi Ronen, and many generations of civil procedure students.

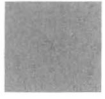
Mark thanks the hundreds of civil procedure students over the years who, he insists, have taught him far more than he has taught them.

Thomas thanks Grace Petrola, Sandy Heffley, and countless others who contributed time and expertise to this project. He also thanks Hill & Barlow, Boston, Massachusetts, and Platinum Equity Holdings, Los Angeles, California, who wittingly shared (and in important respects shouldered) his commitment to this text.

All of the authors sincerely thank Greg Pingree for helping to clarify the collective voice of this book. The authors also thank Bernard Johnston, Melody Davies, and Jay Boggis of Aspen Publishers for their assistance and patience. And finally, the authors thank Carol McGeehan, our Acquisitions Editor, for her support, guidance, and belief in this project. The final product is truly a collaborative effort.

Stephen N. Subrin
Martha L. Minow
Mark S. Brodin
Thomas O. Main

February 2000



CIVIL PROCEDURE



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