

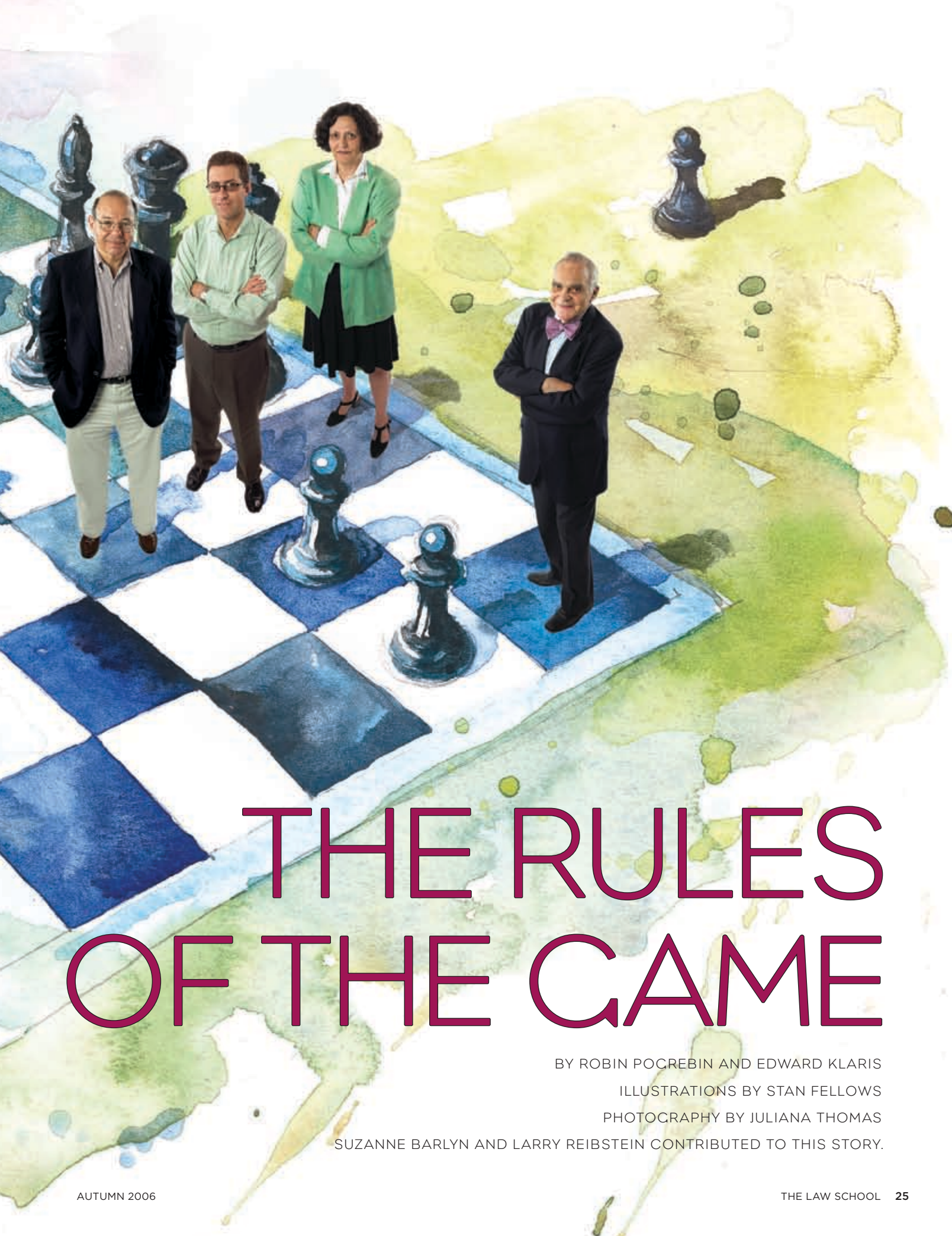


SCHOLAR'S MATE

**GRANDMASTERS, ALL:**

The NYU School of Law civil procedure faculty.  
For a key to who's who, please see page 35.





# THE RULES OF THE GAME

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Every first-year law student is required to take Civil Procedure, a daunting course with a massive, 1,200-plus page textbook on the Federal Rules of Civil Procedure. The temptation to treat this foundation course like bitter medicine—just learn the rules, please—is strong. But at the NYU School of Law, the faculty is passionate about civ pro—as teachers, as scholars and as lawyers. They call it “the lawyer’s toolbox” or “the keys to the kingdom,” and they even compare it to a certain cerebral board game....

When Michael Gordon '91 thinks back to his first year as a student at the New York University School of Law, one memory that still makes him smile is of his Civil Procedure class with Professor Samuel Estreicher. The professor would pick one student for questioning and would stick with him for what sometimes seemed the entire two-hour class. “Mr. So-and-So, today is your day in the sun,” Gordon recalls Estreicher’s words. The prospect of being called on motivated Gordon to study hard. Estreicher’s “scholarship was so impressive you wanted to be able to communicate on the same level,” says Gordon. “His rigorous standards challenged you to be a better legal thinker.” As it happened, though, Gordon, now a partner at Katten Muchin Rosenman in New York, was never called on, so if the class was a nail-biter, at least he became quite proficient. He says, “One of the reasons why civ pro has stuck with me was that I treated it as my top priority.”

But Gordon also laughs at some of the cases discussed that at the time seemed so complex. If someone is served a summons on an airplane, for instance, what is the

jurisdiction for purposes of being sued? How quaint that seems today. Now, the Internet, technology and globalization have made a mishmash of the idea of jurisdiction. “You can solicit via a BlackBerry,” Gordon says. “You can solicit via the Internet. Somebody can click on a Web site that you’ve created and thus, you can expect that someone in Ohio will see it and want to do business with you.” Where do you go in a dispute? And then of course there are discovery issues, such as email, and electronic intellectual property disputes that weren’t contemplated when Gordon was a student. What to do about a Greenwich, Connecticut, hedge fund whose failed assets are overseas, or a U.S.-based corporation that is accused of despoiling the environment abroad, or a U.S. citizen accused of being an enemy combatant and held at an American military base in a foreign country? No wonder some might yearn for the days of the airline case.

And yet, as the Law School faculty preaches, the basic civil procedure doctrines are the same. *Pennoyer v. Neff*, which set physical presence as the guiding factor in jurisdiction, still matters as a starting

point. Whether a plaintiff has a right to a jury trial matters. How plaintiffs can aggregate their claims through a class action matters. The key to civil procedure, suggests Professor Samuel Issacharoff, is to think of it as a chess game with an expanding universe of choices—any of which can make or break your case. “A good player always considers the implications many moves down the road,” he says. “And a weak player sees only the immediate issue. In this way, what students are being trained for is very similar to how you train chess players.”

That description largely captures the mission of the civil procedure core faculty at the Law School, a group of professors regarded as the strongest in the nation. While teaching the doctrine to first-year law students, professors—from Oscar Chase to Helen Hershkoff, from Samuel Issacharoff to Burt Neuborne, and from Geoffrey Miller to Linda Silberman—are preparing their students to use this basic subject in a rapidly changing world. In addition to teaching, the professors have also participated in some of the most significant cases or projects in civil procedure recently, including Neuborne, who won an historic settlement in the cases of Holocaust survivors suing Swiss banks; Silberman, as part of a U.S. State Department delegation involved in the negotiation of an international treaty on jurisdiction and judgments for transnational custody disputes; and Miller, who is teasing out statistics that measure the efficiency of class action suits and arbitration.

Furthermore, several professors, including Rochelle Dreyfuss, Samuel Estreicher, Barry Friedman, Andreas Lowenfeld and Nancy Morawetz, teach clinics, seminars and upper-level courses that deepen the students’ understanding of the subject and push the boundaries of civil procedure. To cite a few examples: Dreyfuss is working on jurisdictional issues in intellectual property law; Estreicher is one of the leading supporters of arbitration in employment



“Procedure is the most wonderful law school course to teach.... The subject matter—which [students] suspect is going to bore them—actually deals with some of the most fundamental issues they will face as they begin to think about law as an institution.” **JOHN SEXTON**, President, New York University





**GEOFFREY MILLER**, Stuyvesant P. Comfort Professor of Law; **SAMUEL ISSACHAROFF**, Bonnie and Richard Reiss Professor of Constitutional Law

disputes; and Morawetz is breaking new ground in applying the rules of habeas corpus to immigration rights cases.

"The NYU civil procedure faculty is a magnificent group," says Arthur R. Miller, a legendary Harvard Law School civil procedure professor himself who has firsthand knowledge of the faculty as a long-time visiting professor at the NYU School of Law. "Collectively, they probably have about 150 years of classroom experience in the field and subspecialties in complex, transnational, constitutional, civil rights and commercial litigation as well as empirical work on the subject," he says. "In my opinion, it's the best group in the law teaching business."

Harvard Law School Professor of Law Emeritus David Shapiro, an "icon in federal courts jurisprudence" who has also visited the NYU School of Law several times, drills down even further: "Burt teaches from the perspective of an experienced litigator. Sam Estreicher is primarily involved in labor and employment law. Rochelle Dreyfuss is involved in technology. Silberman's perspective is within an increasingly international sphere and Sam Issacharoff's is primarily class actions and aggregate litigation." Says Neuborne, "There isn't any place—any place—that comes close to NYU."

## SETTING UP THE BOARD

John Sexton, dean of the Law School from 1988 to 2002 and now the president of NYU, likes to tell the story of how he got hooked on civil procedure. When he was a 1L at Harvard in the '70s, he took a civil procedure class with Arthur Miller. Miller (no relation to NYU colleague Geoffrey Miller) put Sexton on the spot for the entire class—just like Estreicher has done with his students—including some heated exchanges. Miller later said he "never enjoyed a class this much." Sexton felt the same way, and later taught Civil Procedure for 20 years beginning in 1981.

"To me, Procedure is the most wonderful law school course to teach," Sexton says. "First, you're getting the students when they are just beginning to think seriously about law. Second, the subject matter of the course itself—which they suspect as they enter is going to bore them—actually deals with some of the most fundamental issues that they will face as they begin to think about law as an institution."

Sexton isn't the only one to have come under Arthur Miller's spell. Miller, who first taught Civil Procedure at the University of Michigan Law School and then for the

past 25 years at Harvard, is known by every lawyer in the country for coauthoring the leading multivolume treatise on civil procedure, *Federal Practice and Procedure*, which was first published in 1969 and to which he continues to contribute. Every law student knows him for coauthoring one of the leading civil procedure casebooks, and for his study guides for civil procedure exams and the bar exam. He is familiar to a general audience, too, for moderating the Fred Friendly roundtables on PBS for many years.

Indeed, Miller can count more than one member of NYU's first-class civil procedure faculty among his former students. Linda Silberman, the Martin Lipton Professor of Law, is a former student of Miller's from Michigan. She started teaching at the NYU School of Law in 1971.

Silberman now stands as one of the most senior members of the civil procedure faculty. Of the current crop, only Andreas Lowenfeld, who arrived in 1967, has been teaching civil procedure longer. Silberman was followed by Neuborne, who started as a full-time professor in 1974, and then by Estreicher in 1978, Chase in 1980 and Dreyfuss in 1983. Jump ahead to 1995 and the arrival of Geoffrey Miller, wooed from the University of Chicago Law School, and

Hershkoff, who was in the legal trenches for almost 20 years. Just last year came the latest big catch: Samuel Issacharoff, recruited from Columbia Law School.

As it happens, this is a pretty collegial bunch. Starting in the spring of 2005, the professors began meeting on Tuesdays for lunch in the faculty library. The impetus was to take advantage of the presence of Arthur Miller and David Shapiro, both visiting that term from Harvard. There was no schedule, no pressure from the dean to meet—just an impromptu, bring-a-sandwich lunch gathering that has turned into a semiregular Tuesday event. “It’s an occasion when law nerds can talk to each other without risking public humiliation,” Issacharoff says drily. Indeed, the topics have included the “broader implications of Rooker-Feldman doctrine—a subject so obscure that it is not clear that it exists,” says Issacharoff, joking. (As a refresher, that’s the doctrine that concerns when federal courts may revisit the judgments of state courts.) Other topics include class actions and the scope of federal authority in doctrines such as federal preemption. “At some level of abstraction they’re all interesting,” he says, laughing. “At the level of detail they’re discussed, they would drive anyone to drink.”

## OPENING MOVES

Like many law schools, NYU’s has evolved in the past four decades from professional, practically oriented teaching to a more academic, theoretical program—“much more like a graduate school model,” says Silberman. Faculty usually take one or the other view of what a law school should be. But ask the civil procedure faculty today about the practical versus theoretical issue, and the answer is fairly uniform. “If you don’t successfully learn the theory, you can’t provide the rule in a practical way,” says Oscar Chase. Helen Hershkoff sees in civil procedure “a convergence of theory and practice.” Indeed, Silberman’s casebook, coedited with two of her former students who are now procedure professors themselves—Allan Stein ’78 at Rutgers University and Tobias Wolff of the University of California, Davis—is entitled *Civil Procedure: Theory and Practice*.

While each teacher approaches the subject differently, their courses generally cover several areas. By the end of the semester, the professors want their students to grasp the basics of civil procedure, such as subject matter jurisdiction (the basis for the court to hear the case), personal jurisdiction (whether a court can require a person

to appear before it) and the Erie Doctrine, which says that one must apply state law when a federal court has diversity jurisdiction (with parties from different states).

Professors cover other procedural aspects of civil litigation, depending on their particular interests. Some professors spend time with the Federal Rules of Civil Procedure, examining, say, summary judgment and dismissal, and joinder (which allows a party to combine multiple claims in one lawsuit) or class actions. Other professors spend time on questions of finality, which refers to the binding effect of judgments. Many cover all of these topics.

But beyond picking and choosing which procedural devices they want to include, professors also use the five hours a week that students are in their classes to impart different philosophical approaches to the law.

Samuel Issacharoff and Geoffrey Miller, for example, are proponents of law and economics—an influential perspective in the academy. Issacharoff, the Bonnie and Richard Reiss Professor of Constitutional Law, is regularly retained as a consultant or an expert in mass aggregate litigations and class actions, such as for the diet drug fen-phen (which caused dangerous side effects affecting the heart) and tobacco, and





is deeply involved in the dispute over political gerrymandering. Miller, the Stuyvesant P. Comfort Professor of Law, also directs NYU's Center for the Study of Central Banks. In integrating economics into civil procedure, they emphasize that the system cannot treat every litigant equally; that time, money and manpower must be allocated judiciously; and that different cases merit different levels of attention.

"There's a finite amount that you want to invest in any potential piece of litigation, and that means that you have to judge how much fairness we need, given the resources we are putting in," says Issacharoff. "So if somebody is sitting on death row, we as a society throw a lot of resources at that. We allow habeas challenges, we allow a second round of appeals, we allow for a broad series of legal protections. Whereas, if somebody has a simple contract dispute with somebody else, the parties have an important interest in getting it done and getting it done cheaply, and getting it done commensurate to what's at stake."

He teaches a case involving the city of Chicago's policy of giving parking ticket violators limited trials and no appeals. A suit was filed claiming infringement of due process rights. But an opinion by Judge

Richard Posner soundly rejected that notion. Recounts Issacharoff: "He says, 'No. You get only as much process as what is justified by what's at stake here. These are \$50 tickets.' We can't put a policeman as a witness on the stand every time there is a parking ticket dispute," Issacharoff adds, invoking Posner's reasoning.

Geoffrey Miller has adopted a sophisticated empirical approach to civil procedure, undertaking extensive studies of attorney fees in class actions and state court decisions, for example. He is one of the leading proponents of empirical analysis of legal issues, which has recently seen a dramatic growth in popularity, despite being around since the 1970s and '80s. The legal community is embracing the empirical approach, he says, because "if it's done right it doesn't attempt to argue for or against any moral or social objective, but to figure out how the law functions in practice—what its consequences really are. [Empiricism accomplishes this] without being speculative but by actually counting and observing."

Two years ago, he coauthored a study that concluded that the average price of settling class action lawsuits and the average fee paid to lawyers who bring them had held steady for a decade, even though com-

panies say the suits are increasing business costs, hurting the economy and enriching lawyers. The controversial issue was central to the heated debate over whether to place limits on class action lawsuits, as urged by Republican legislators and President George W. Bush.

The study reveals that, from 1993 through 2002, "contrary to popular belief, we find no robust evidence that either recoveries for plaintiffs or fees for their attorneys as a percentage of the class recovery increased." The average settlement over the 10-year period was \$100 million in inflation-adjusted 2002 dollars, according to the study. Average settlements were as low as \$25 million in 1996 and as high as \$274 million in 2000—a result of four settlements that year for more than \$1 billion each. "The mean client recovery has not noticeably increased over the last decade," Miller wrote with Theodore Eisenberg, a law professor at Cornell.

Another area he's studying is alternative dispute resolution. Popular literature touts the supposed advantages of arbitration and mediation (faster, more flexible), so one would assume every party would always opt to resolve their disputes that way. Yet in analyzing 2,000 major commercial contracts, Miller and Eisenberg found that companies



**LINDA SILBERMAN**, Martin Lipton Professor of Law; **OSCAR CHASE**, Russell D. Niles Professor of Law;

**ANDREAS LOWENFELD**, Herbert and Rose Rubin Professor of International Law; **ROCHELLE DREYFUSS**, Pauline Newman Professor of Law

rarely opt out of litigation, even though they have the ability to do so. “It doesn’t say arbitration is bad, but there are questions that can usefully be looked at—why don’t they choose arbitration when they have reason to do so?” asks Miller. He cautions that his empirical approach doesn’t answer the normative questions. “But,” he says, “if you do normative analysis without data, you’re basically whistling in the dark.”



Burt Neuborne and Helen Hershkoff are veterans of civil rights litigation, and often introduce that perspective to teach their civ pro courses. “You can’t do effective law reform work unless you are a master at procedure,” says Neuborne, the Inez Milholland Professor of Civil Liberties and a self-described procedural wonk. “The odds of winning a law reform case are so small, and the odds of actually moving the society through litigation are so long, that it’s almost criminal to add to the odds by falling through a procedural trap. You have to close the procedural trapdoors, or else civil rights litigation becomes an inefficient use of social resources.” Little wonder, then, that his former American Civil Liberties Union colleagues liked to call him “the plumber,” the go-to guy who specialized in procedural issues like jurisdictional standing and mootness—things that could hold up a case.

Neuborne has been involved in such hot-button cases as flag burning, the Pentagon Papers and the constitutionality of the Vietnam War, and continues to litigate cases himself and through the Law School’s Brennan Center for Justice, which he helped found and for which he serves as legal director. “The practice is important to my teaching,” he says. “I wouldn’t be the teacher I am if it wasn’t for the practice.”

In teaching class actions during first-year Procedure, Neuborne has recently used the case he filed to obtain reparations on behalf of Holocaust victims. In July 2000, a federal judge gave final approval to a \$1.25 billion accord to settle claims of Holocaust survivors who had sued a group of Swiss banks they said had hoarded and concealed assets deposited in World War II and accepted profits of slave labor illegally obtained by the Nazis. One of the critical issues was jurisdiction. “How is it that a law-

suit can be brought in the U.S. about activities that took place 60 years ago, far far away in a different galaxy?” he says he asks his students. “How is it that a court in Brooklyn is handling these cases—other than divine justice? How is it that a federal court has jurisdiction over the Swiss banks?”

The answer is a whole lesson in what Neuborne calls “probably the most important jurisdictional issue” now. In short, if the Swiss banks want to be world-class banks, they must maintain a major presence in the United States, which creates in personam jurisdiction. “The moment Credit Suisse acquired First Boston,” says Neuborne the lawyer, “I had them.” But as a professor, Neuborne probes this question further with his students. “The question is, should I have them? And that then allows me to teach what is an ordinarily arcane subject that puts students to sleep.”

Andrew Celli Jr. ’90, former chief of the Civil Rights Bureau in the Office of the New York State Attorney General Eliot Spitzer and now a partner at Emery Celli Brinckerhoff & Abady, a New York law firm, will attest to the stimulating effect of Neuborne’s personal anecdotes and “enormously creative procedural mind.” “Burt’s stories about cases such as stopping the bombing in Cambodia violated all expectations [about Civil Procedure as a course] because it wasn’t about memorization,” says Celli. “It was about understanding the power relationships behind the rules.”

Hershkoff, like Neuborne, became a professor after working at the ACLU, where she was an associate legal director for eight years. The year she left practice to join NYU, *New York* magazine included her on its annual list of the most important civil rights lawyers in the city. Her lawsuits tended to be large institutional reform cases involving the rights of groups as diverse as the mentally retarded, public school students, homeless families and union dissidents.

Hershkoff, the Joel S. and Anne B. Ehrenkranz Professor of Law, now serves as a codirector of the Arthur Garfield Hays Civil Liberties Program at the Law School, with colleagues Norman Dorsen and Sylvia Law, and has joined Arthur Miller, John Sexton, and Jack H. Friedenthal of George Washington University as a coauthor on their civil procedure casebook. Her scholarship focuses on the role of law and courts in supporting social change, and she has published extensively on state courts and the enforcement of state constitutional rights. She also works with organizations like the Ford Foundation and the World Bank on projects using law and litigation to reduce inequality. Not surprisingly, Hershkoff’s

teaching emphasizes the importance of civil procedure to democratic values. “Process forms an essential part of the rule of law,” she explains. Benjamin Wizner ’00, now a staff attorney in the ACLU’s national office in New York, recalls that Hershkoff always came back to a central theme: Is it fair? What’s the standard to determine what is fair? And what are the countervailing social values? This set of questions has dominated Wizner’s work, which has involved visiting Cuba to observe military proceedings at Guantánamo Bay, Cuba. Procedure dominates other aspects of Wizner’s civil liberties practice as well. For example, Wizner confronted a jurisdictional issue in a case against the government involving the rendition of a German citizen, Khaled El-Masri. The ACLU wanted to sue the then-director of the Central Intelligence Agency, George Tenet, and three private aviation companies on El-Masri’s behalf, but where? “The companies are all over the country. George Tenet lives in Maryland. The CIA is in Virginia,” Wizner recalls. He ended up suing in Virginia’s Eastern District because the CIA made what the ACLU alleged was an illegal agreement with the aviation companies, which did business in the CIA’s venue. Unfortunately for Wizner’s client, the court dismissed the case last May over concerns that public proceedings would jeopardize state secrets.

## KING OF TORTS: MASS HARM CASES

Just as the nation is divided over the efficacy of class suits to address mass harms (such as a bad drug or a defective consumer product or even stock adversely affected by corporate wrongdoing), so are NYU’s law professors. “The biggest puzzle in American procedure today is how do we deal with mass torts or other mass victims,” Oscar Chase says, “and we haven’t really worked out a satisfactory solution.”

Arthur Miller finds himself on opposite sides from his protégée Linda Silberman on the subject of class actions. “Curiously, Linda and I—as much as we love each other and have known each other for 30, close to 40 years—have diametrically opposed views about class actions,” he says. “I am a great fan of them; she finds them to be the work of the devil.”

Silberman argues that if the court is going to aggregate plaintiffs’ actions from all over the country, the court must take into account the state law that should apply for each plaintiff. She contends that the convenient aggregation of all mass claims is not what is intended by class action rules.



"The class action was designed for cases in which aggregation would not be too complicated. And if, in fact, it is too complicated, it's probably not the right device," she says. Besides, Silberman adds, if change is desired, Congress could adopt statutes to address the procedures for dealing with specific mass torts, such as a national consumer law to address products liability.

Silberman has been retained in recent class action litigations as an expert on this issue. In one case, plaintiffs claimed economic losses for property damage caused by defects in personal computers. Silberman addressed questions about which remedies the plaintiffs had in different states. Courts held that in almost all the cases, the law of the plaintiff's home state had to apply, which rendered the class unmanageable.

Miller and Silberman do have some common ground, however. "We both agree completely that the globalization of a class action, in something like pedophilia and the priest abuse cases, is an absolutely perfect utilization of the class action because it gives voice to a group of people who have no voice," Miller says. "It provided a vehicle to enable them to come forward without ever being disclosed."

Issacharoff says that, regardless of the diverging viewpoints on class actions, they're here to stay—and rightly so. He is currently the chief reporter for the American Law Institute (ALI) project *Principles on the Law of Aggregate Litigation*, for which he is examining ways to handle common issues in mass torts and other cases such as contract or common law claims. Harms that occur on a mass scale, similarly affecting so many people, require novel court procedures to resolve the claims efficiently but fairly. The project will examine the viability of complex alternatives, such as forcing claims into one mass proceeding; allowing for extraordinary procedures, such as interlocutory appeals; and even denying to some litigants the right to proceed on their own. "This is an area fraught with diffi-

culties, not the least of which is the due process concern for the rights of individuals," Issacharoff says. But he acknowledges that certain types of class actions are more problematic than others—for example, cases that address individual injuries that are not standardized, such as physical maladies related to asbestos or fen-phen. The procedure is better designed for cases involving mass economic harms, such as consumer fraud, securities and antitrust issues, he says. (For more insight into the debate over how best to litigate mass harm cases, please see "Heads of the Class" on page 36.)

## THE GLOBAL GAMBIT

Global jurisdictional issues have moved to the forefront of controversy as the world shrinks and business is increasingly conducted internationally. Yet the court system we have come to take for granted appears quite alien to people in other countries. Essential elements like the civil jury, pretrial discovery and experts chosen by the parties rather than appointed by the court are all unique to the American system, which in some cultures is still viewed with suspicion.

"You talk to lawyers in other parts of the world and they think we're nuts because we have juries in civil cases and because we have wide-open discovery—which they fear as if it were the Antichrist—and because we have reasonably broad jurisdictional notions," says Arthur Miller. He points out, however, that here and there other nations are thinking about incorporating one or more of these elements. "China is studying the class action," Miller says. "You find other nations thinking about the class action simply out of recognition of the growing frequency of injurious mass phenomena. You find some nations thinking about instituting civil jury trial. Isn't that crazy?"

To give students more foreign perspective, the Law School added a course on Comparative Civil Procedure—taught regu-



larly, though not every year—usually with a professor visiting the NYU School of Law from Europe or Asia through the Hauser Global Law School Program. The global program was founded by then-Dean Sexton and Norman Dorsen, the Frederick I. and Grace A. Stokes Professor of Law and a member of the Council on Foreign Relations. Dorsen served as the Hauser Global Law School Program's founding faculty director.

"Norman encouraged faculty to introduce transnational and comparative themes into the first-year curriculum," Hershkoff says of Dorsen. "With his support, Oscar Chase, Rochelle Dreyfuss and I took early steps to collect resources in this field. And of course Oscar and Linda cotaught a course on Comparative Civil Procedure." Chase, Hershkoff and Silberman have since participated in workshops and conferences sponsored by the American Association of Law Schools on how the first-year Civil Procedure curriculum can "go global." "Students are surprised to learn that procedural systems differ from country to country," Hershkoff explains. "For example, elsewhere in the world, only a government official can serve a summons—indeed, it's a crime in some countries for a private individual to do this."

The large number of foreign students at NYU has added yet another dimension, bringing the firsthand experience of different cultures into the classroom. Andreas Lowenfeld, the Herbert and Rose Rubin Professor of International Law, is one of the giants in the field of comparative civil procedure. Lowenfeld is frequently an arbitrator in international disputes, pub-



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**ARTHUR MILLER**, visiting professor of law and Bruce Bromley Professor of Law, Harvard Law School



lic and private. He has argued before the U.S. Supreme Court, the Iran-U.S. Claims Tribunal and the International Court of Justice. Before coming to NYU, he served as deputy legal adviser of the U.S. Department of State. And he is the author of a pioneering casebook on international litigation and arbitration, which was revised just this year. In 2001, he and Silberman convened a conference on the proposed Hague Convention on Jurisdiction and Judgments, which brought together some of today's most knowledgeable theorists and practitioners on international jurisdictional issues. The two professors have edited a book based on the proceedings.

Lowenfeld and Silberman also coteach a seminar on international litigation and arbitration. Lowenfeld says they try to have half the students in their International Litigation course be foreign-trained to generate cross-cultural understanding as they write briefs and argue together. Lowenfeld also says taking civil procedure out of the national context offers students an opportunity to further their understanding of it. "If you like procedure, you'll love international litigation," he says. "The issues are not settled—they're open, they're at the frontier. We take real cases and we have the students argue them." In fact, last year the course focused on six cases that were subsequently heard by the U.S. Supreme Court.

Silberman and Lowenfeld were coreporters for the ALI on the project *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*. The project, recently adopted by the general assembly of the ALI, proposed a federal statute that would provide uniformity throughout the United States in the recognition and enforcement of judgments issued by courts in foreign countries. States currently have different laws on the subject, creating the potential for diverse outcomes based on identical facts. Lowenfeld gives an example: Suppose an American tourist

from Pennsylvania is in a car accident overseas. She is sued in that country and a judgment for damages is entered against her. Pennsylvania will not enforce the judgment according to its laws, but the tourist also has a bank account in New York, which will enforce the judgment. "It makes no sense to have different laws because enforcement of judgments is an aspect of international relations, and, therefore, is a suitable subject for legislation by Congress," says Lowenfeld.

Oscar Chase, the Russell D. Niles Professor of Law, has become something of a guru on comparative procedure. His paper, "American 'Exceptionalism' and Comparative Civil Procedure" (in the *American Journal of Comparative Law* in 2002, and also translated and published in a Russian and a Brazilian law journal), argues that our civil procedure is very unusual compared to the rest of the world's—and that we've resisted borrowing. Using juries in civil cases, for example, is unique to America, he says, and "strikes the Europeans as bizarre."

Chase has also been involved in what he describes as contextualizing dispute resolution. His recent book—*Law, Culture, and Ritual: Disputing Systems in Cross-Cultural Context*—deals with comparative law in other modern societies as well as in small-scale tribal groups, and argues that their codes are resonant with the cultures in which they operate. African communities that use oracles to try disputes make sense if you study the culture of those communities. Similarly, civil juries make sense in America because of our commitment to populism and democracy. "The idea is that there is a relationship between how societies structure their disputing systems and their underlying culture, and that you can't really understand your own system and its relation to the society where you find it unless you go outside of it," Chase says.

One effective way of going outside the American system is by inviting foreign perspectives in. To that end, Chase, Hershkoff



and Silberman are coediting a book of readings on comparative civil procedure with three scholars who have each been members of the Hauser Global Law School Program visiting faculty: Yasuhei Taniguchi, a professor of law at Tokyo Keizai University and a member and former chairman of the World Trade Organization Appellate Body; Adrian Zuckerman, a fellow at University College, Oxford; and Vincenzo Varano, a professor and former dean at the University of Florence School of Law.



"We teach students that the kind of choices you make will affect the way the whole case is seen by the other side and by the court, and will affect your ability to ultimately achieve what you want for your client."

**NANCY MORAWETZ**, Professor of Clinical Law



**BURT NEUBORNE**, Inez Milholland Professor of Civil Liberties; **HELEN HERSHKOFF**, Joel S. and Anne B. Ehrenkranz Professor of Law

## KNIGHT MOVES

Rochelle Dreyfuss and Samuel Estreicher had taught the first-year Civil Procedure course for dozens of years combined before redirecting their energies to building up the Law School's offerings in other fields of interest—namely, intellectual property and labor and employment law, respectively. But both professors never really left civil procedure behind and have made notable contributions to the legal scholarship.

Intellectual property has undergone more wrenching change, thanks to globalization and technology, than perhaps any other procedural area. The law in this area has grown extremely complex, especially as domestic copyrights, trademarks and patents make up a large portion of our economy. It also poses vexing problems when copyrights and trademarks come in conflict with privacy rights and the First Amendment. Dreyfuss has been at the center of the cross section between intellectual property and civil procedure since she started as an assistant professor of law at NYU in 1983. She is now the Pauline Newman Professor of Law, and has published on subjects like the

impact of intellectual property laws in science, trade secrets, privacy rights and business method patenting. She recently coedited a book, *Intellectual Property Stories*, with Jane Ginsburg of the Columbia University School of Law. She edits a casebook in international property law that has to be updated every year because of constant changes.

Dreyfuss is currently one of three coreporters of *Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes*, a project for the American Law Institute. She, Ginsburg and François Dessemontet of the Center for Enterprise Law at the University of Lausanne are developing uniform guidelines to address the conflicting results arising in international copyright, trademark and patent disputes as the Internet makes worldwide distribution instantaneous. "If there is copyright infringement, there is copyright infringement all over the world. The question is, how does the copyright holder adjudicate those cases? Do you have to litigate in the United States over the people who downloaded it in the United States, and then litigate in France over the people who downloaded in France, and then litigate in Japan,

etcetera?" It's not great for users, either, because they might be sued multiple times by copyright, patent or trademark holders.

Her research for the ALI addresses when it's appropriate to assert jurisdiction internationally and how to enforce judgments issued in one country against a violator elsewhere—if France issues a judgment against Yahoo (which happened), is that judgment enforceable in the United States? Dreyfuss also wants to introduce the principle that one suit can resolve claims all over the world. You can sue in the United States, for instance, asserting all worldwide claims—but once you've lost, you're finished.

Samuel Estreicher, the Dwight D. Opperman Professor of Law and the director of the Center for Labor and Employment Law, joined the faculty after working as a union-side labor lawyer. In addition to serving as of counsel to Jones Day, he is currently the chief reporter of the ALI project *Restatement of Employment Law* with reporters Stewart Schwab, dean of the Cornell University Law School and Boston University School of Law Professor Michael Harper. The project is looking at nonstatutory employment law regarding issues such





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as the interpretation of employment contracts, noncompete clauses, privacy in the workplace and discharge of employees for violation of public policy.

Estreicher is also one of the nation's leading experts on alternative dispute resolution and an outspoken supporter of arbitration in employment disputes. Although he doesn't take a strict law and economics stance on conflict resolution, he repeatedly hits on the theme of middle- and lower-class access to relief. "There are two kinds of claims," Estreicher says. "Cadillacs and rickshaws." Cadillacs are high-stakes claims that attract lawyers and are well handled by the courts. Routine, or rickshaw, claims are low-stakes and therefore "are the orphans of the law." "Nobody wants them, neither private lawyers nor public interest organizations," Estreicher says. "The big challenge for the U.S. civil procedure system is to create a lower-cost process that transforms rickshaws into Saturns so people with average income and education can have a mode of redress."

## ADVANCING POSITIONS

A number of upper-level courses build on the foundation laid in the first-year Civil Procedure class. Barry Friedman, the Jacob D. Fuchsberg Professor of Law, teaches one of the more significant upper-level procedure courses, Federal Jurisdiction. In it, he explores the relationship between federal and state courts, and federal courts and other branches of the federal government. "The basic Procedure course introduces students to basic issues—notice, fairness and impartial judges, for example. I'm trying to introduce them to more complex issues."

And also to more complex strategizing. Friedman's course "is about how to get into federal court and how to stay there—or how to avoid being there if you don't want to be there." States named as defendants in cases challenging the constitutionality of state law, for example, would usually prefer to have

the state court resolve the question. The preference for state or federal courts may change with the times and with the politics of the era, Friedman says, pointing out that there was a time when state courts were more sympathetic to gay rights than federal courts. "People will play to one court system or another for advantage," he says.

Friedman, Hershkoff and Neuborne—the latter two teach the upper-level Federal Courts in addition to the first-year Procedure class—all look to the Guantánamo Bay cases as ripe examples for teaching the role of the judiciary in our tripartite government. For example, they cite efforts by Congress and the White House to eliminate Supreme Court jurisdiction over proceedings filed by detainees, and the question of whether you can eliminate habeas corpus review over proceedings filed by Guantánamo detainees. "These are perfect ways to teach the relationship between the judiciary and the executive branch, about the legislature," says Neuborne. "This is an excellent way to talk about the essential function of the judiciary."

Another perspective on federal courts comes from Estreicher. Two of his upper-level classes, The Appellate and Legislative Advocacy Workshop: The Labor and Employment Docket, and Supreme Court Advocacy, give students "intense skill development," Estreicher says. In both of the seminars (he coteaches the appellate workshop with Laurence Gold, former general counsel of labor federation AFL-CIO and now of counsel to labor law firm Bredhoff & Kaiser in Washington, D.C., and the Supreme Court seminar with Meir Feder, a partner in the issues and appeals group at Jones Day and a former assistant U.S. attorney), students study cases that are pending before the Supreme Court. They write briefs, argue a side and decide the cases. "Civil procedure is about understanding the context in which a decision arises," says Estreicher. "Did the case come from a motion to dismiss? A summary judgment motion? That's a major part of a lawyer's arsenal when he gets a case on appeal."

## PRACTICE, PRACTICE

Students get to apply the rules of civil procedure and see how their actions can affect lives when taking part in some of the Law School's clinics, including the Civil Legal Services Clinic, taught by Clinical Professor of Law Paula Galowitz; the Civil Rights Clinic, taught by Clinical Professor of Law Claudia Angelos; the Employment and Housing Discrimination Clinic, taught by Clinical Professor of Law Laura Sager; and the Children's Rights Clinic, taught by Fiorello LaGuardia Professor of Clinical Law Martin Guggenheim '71. Guggenheim was recently recognized with the Livingston Hall Award from the American Bar Association's Juvenile Justice Section for his years of practice in the area of juvenile delinquency. He also published *What's Wrong with Children's Rights*, a book-length examination of the quarter-century emergence of children's rights and its impact on families and society.

One of the most contentious political topics in the nation these days is immigrants' rights. Nancy Morawetz, professor of clinical law, shares a real-life perspective on civil procedure with her students in the Immigrant Rights Clinic that she coteaches with Research Scholar Mayra Peters-Quintero '99. Students have the opportunity to appear in several forums (such as immigration court or district court), advocating on behalf of immigrants in deportation matters, including three cases before the U.S. Court of Appeals for the Second Circuit during the 2004 academic year in which the students made creative arguments in habeas corpus. Students also work on wage and hour cases and nonlitigation matters, such as legislative issues and grassroots campaigns. The idea is to reinforce what's learned in the classrooms through actual practice. "A lot of what we are doing is trying to teach students to think strategically," she says. "We try to teach that the kind of choices you make will affect the way the

whole case is seen by the other side, is seen by the court and will affect your ability to ultimately achieve what you do and don't want to achieve for your client."

Morawetz, a former class action litigator, joined the NYU School of Law faculty in 1987. She assisted with preparation of an amicus brief on behalf of Jose Padilla, respondent in *Rumsfeld v. Padilla*, filed by the Public Defender Service for the District of Columbia. Padilla is a U.S. citizen that has been declared an enemy combatant. Morawetz developed an interest in the jurisdictional reach of habeas, which she examined in *Padilla*, after reading a former student's paper on similar issues. Morawetz specifically researched whether the government, by unilaterally moving someone from one part of the country to another, could choose the court in which the case would be litigated. The Supreme Court essentially ruled that it could.

## THE ENDGAME

Law schools used to dedicate a full year to Contracts, Torts, Property and Civil Procedure. But as more subjects have been added to the curriculum—such as employment law, entertainment law and securities law, as well as interdisciplinary courses involving economics, philosophy and anthropology—top-tier law schools have reduced the first-year courses to one semester, including Civil Procedure. This has been quite controversial. Many professors believe that first-year law students take until around March to begin making sense of what they are learning. That is especially the case for Civil Procedure, which was cut back to one semester at the Law School in 2002.

Some faculty see the "semesterization" of first-year courses as emblematic of a larger shift by leading law schools away from their original vocational function of training law students to be lawyers. Instead, law schools are following the graduate school model, which is more academic and theoretical. "When I was in law school—and for most of my teaching career—a law school was thought to be a professional school, designed to prepare people for a professional life, with emphasis on the development of skills that reflected what lawyers did," says Arthur Miller. "These days, law schools do not have the same professional orientation that they once had."

Some professors at the NYU School of Law have had a tough time seeing the course truncated. Silberman initially refused to teach the shortened course for the first time in her 35 years at the school. (She also

has taught or cotaught courses in conflicts of laws, comparative procedure and international litigation, and coteaches a class in international commercial arbitration.) She acknowledges that almost every other elite law school has reduced Civil Procedure to one semester, but still argued forcefully against it. "I gave a big speech to the faculty how this ought not to be done," she says.

After a three-year hiatus from Civil Procedure, Silberman returned to the fold in the 2005-06 academic year. She says she did so because she successfully insisted that her students meet four instead of three sessions per week—without adding to the requisite five weekly course hours—to give the students more time to absorb the material. But she also clearly loved teaching the course too much to stay away. "At the end of the day, I'm really most interested in craft. How do you make an argument? What's the best argument? What does the defendant say?" she says. "I'm really focused very heavily on students getting the tools that they need to move on to be a lawyer."

That dedication—to the students, and to learning in general—is at the heart of what makes the NYU School of Law such

an exemplar of the teaching of civil procedure. Given their many years of experience, the Law School's civil procedure professors could be expected to have grown somewhat jaded about teaching a foundation course over and over again. Yet they talk about civil procedure with the enthusiasm of the newly initiated. Indeed, at the end of each year, Burt Neuborne burns his class notes to force himself to start fresh the following fall. "The only way I can be sure that I'll prepare again the next year is to be naked when I go in there and have to do it," he continues. "It's more work, but it's the joy of this life. Teaching law and teaching at NYU is just an unbelievably privileged existence." ■

*Robin Pogrebin is a staff reporter for the New York Times. Edward Klaris is vice president, editorial assets & rights at Condé Nast Publications and an adjunct professor at Columbia Law School. Suzanne Barlyn is a freelance reporter and nonpracticing lawyer who received her J.D. from Washington College of Law, The American University. Larry Reibstein is an assistant managing editor of Forbes.*

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