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The Procedural Vision of Arthur R. Miller: A Practitioner's Tribute

Without undue exaggeration I can acknowledge that everything I didn't learn in law school,[1] I learned from Arthur Miller, via assiduous (and often last-minute) research in the pages of Wright & Miller's *Federal Practice and Procedure*. As a newly minted lawyer, I was the next best thing to a sole practitioner: I worked for a single, more-experienced lawyer, in a small general law practice in Sonoma, California. In those days, in the first dawn of online legal research, I spent many hours in the Sonoma County Law Library, which was equipped with *Wright & Miller* and the other necessary accoutrements of book-based legal research. My boss, Robert L. Lieff, an alumnus of Melvin M. Belli's groundbreaking and altogether remarkable law firm, taught me how to treat my real bosses—the judges before whom I appeared and the clients I served—with respect, deference, and civility. Largely by example, Bob Lieff conveyed the invaluable lesson that a successful life in the law depended primarily upon not acting like a jerk. I am still struggling to implement this wisdom. For matters of federal civil procedure, the other essential for a young lawyer attempting to effectively represent her clients in the federal courts, I turned to Arthur R. Miller.

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[1] I likewise acknowledge that I was provided an excellent legal education, courtesy of the People of California, by the University of California, at Boalt Hall (also known as Berkeley Law). Whether I actually received the education on offer is an open question.

From the viewpoint of one of the thousands of practitioners who have availed themselves of the guidance of *Wright & Miller* on a daily basis, the value of this monumental work lies not only in its existence (the colossal achievement of Professor Charles Alan Wright, its creator), but in its currency and accessibility. Plainly put, this multivolume work is actually readable. It is a wonder of lucid writing and clear organization. *Wright & Miller* (now mostly "Miller," albeit with important contributions and updates by other eminent proceduralists including Mary Kay Kane) is a treatise that belongs not only, or primarily, to academics, but to working judges; and lawyers, who rely upon it to guide our thinking and to provide authority for our briefs, consider it "our" book. It explains to us how the *Federal Rules of Civil Procedure* work and why they work as they do. It collects and summarizes cases, but does much more than that: it synthesizes the text of the Rules and the judicial decisions interpreting them into something that is not only a coherent and functional whole, but a whole that is greater than the sum of its parts. The Federal Rules and the judicial decisions that implement and enforce them deserve and require a logical, explanatory guide that not only summarizes but reveals and articulates the principles sometimes hidden in the Rules and cases. The *Wright & Miller* set is that guide.

Because the Federal Rules themselves, the case law that interprets them, and the *Wright & Miller* treatise coexist, and because this coexistence is not a merely parallel existence, but a symbiotic feedback system, we have, as befits our common-law legal culture, a common law of civil procedure. Our Federal Rules are both more and less than a civil code: they operate within a broad field of judicial discretion; they are subject to ongoing amendment and refinement. The *Wright & Miller* treatise assures that this evolutionary process can occur, through its constant restatement and synthesis of that progress.

There is, it appears, an animating principle, a deep legal philosophy, behind the functional genius of Arthur Miller's federal practice and procedural work: that the law should be understandable and accessible to everyone. It is no coincidence that the Miller of *Wright & Miller* is also the Miller of *Miller's Court*.[2] For years,

[2] This public television show, which began broadcast in 1979 and ran through 1988 (emanating from WCVB-TV in Boston), did not flinch from featuring a real law professor explaining the law, through the window of actual cases, to the general public. Although he is the functional equivalent of aristocracy (Queen Elizabeth II bestowed the title of Commander of the Order of the British Empire upon him last year), he is considered to be

millions of Americans woke up to his legal commentary on ABC's *Good Morning America*. Neither his popularity nor populism requires nor signifies a "dumbing down" of the profoundly democratic legal philosophy of Arthur R. Miller. Indeed, it is a challenge of the highest order to render the law, in either its substantive or procedural aspects, clear and plain. The most beautiful passage, to my mind, that exists in the *Federal Rules of Civil Procedure* also poses the greatest challenge to any legal pleading: to state "a short and plain statement of the claim showing that the pleader is entitled to relief."[3]

To articulate a "short and plain statement" of *any* aspect of substantive or procedural law, with all its nuance, discretion, and oft-times its ambiguity, is an achievement of the highest order. It is what we strive for as practitioners and advocates in our pleadings and briefs, as teachers in our classes and instructive writings, and as judges in legal decisions. Our English language with its nearly inexhaustible synonyms, similes, metaphors, redundancies, and surplusages, is as often a hindrance as a help. Yet the writing, like the speech, of Arthur R. Miller is a model of plainness, in the best, most eloquent, and most inherently democratic sense.

It is no small tribute to his high profile as quintessential law professor that the NYU Law Revue's 2009 animated video, "What Would Arthur Miller Do?" has been viewed nearly 40,000 times.[4] Legal scholars and/or students are not alone in asking WWAMD? Those of us who toil in the trenches of complex litigation ask ourselves this question constantly, consult *Wright & Miller*, and, when all else fails, consult the source himself for the requisite illumination.

Those of us who labor in the field of class actions owe a special debt to Professor Miller. He has argued groundbreaking cases that have shaped the courts' perception of the purpose and function of class actions as representative suits essential to provide judicial access to investors, consumers, and tort victims whose claims, if brought alone, would not survive the expense and delay of solo litigation. The cliché "too numerous to mention" was likely coined to describe the sheer number of Arthur Miller's Rule 23 briefs and arguments. Among them are such momentous decisions as *Phillips Petroleum v.*

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every American's law professor, in much the same way the late Mel Belli was every American's lawyer.

[3] FED. R. CIV. P. 8(a)(2).

[4] NYU Law Revue, *What Would Arthur Miller Do?*, YOUTUBE (Mar. 20, 2009), youtube.com/watch?v=32tS4jPTL54.

Shutts,[5] *Tellabs*,[6] *Cendant*,[7] *In re Asbestos School Litigation*,[8] *Central Wesleyan*,[9] and *Castano*.[10]

On several occasions I have had the pleasure of observing Professor Miller in inimitable courtroom action. Whether arguing a class certification motion in district court or a complex procedural point on appeal, he fascinates and educates his judicial audience with grace, enthusiasm, and an erudition that engages rather than alienates. Judges look forward to his appearances in part, I suspect, because he is that rarity, a true legal celebrity, but more because his enchantment with the law is contagious. All of us are recharged and reinvigorated as legal professionals by exposure to Arthur Miller.

These are challenging times for the courts, the rule of law, and the legal profession. Nothing less than access to the equal justice our Constitution guarantees is at stake. Judicial independence is under virulent political attack, lawyers (as always) are distrusted, and widespread cynicism that legal power correlates with economic power corrodes the public's confidence in the integrity of the law. Those among us who demonstrate joyful dedication to—and delight in—American law are thus to be especially treasured, encouraged, and honored. In the legal academic world, as in the public mind, Arthur R. Miller still heads this list.

A recent article by Professor Miller, expressing his concerns with the heightened pleading standards recently articulated by the Supreme Court in the pair of decisions now known as *Iqbal*[11] and *Twombly*,[12] provides a profound and current insight into his practical, and populist, procedural vision. This article, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, is American to its core: it employs a baseball analogy to illuminate its title.[13]

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5 Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

6 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007).

7 *In re* Cendant Corp. Litig., 264 F.3d 201 (3d Cir. 2001).

8 *In re* Asbestos School Litig., 46 F.3d 1284 (3d Cir. 1994).

9 Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177 (4th Cir. 1993).

10 Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

11 Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

12 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

13 As the article explains, "the title seeks to evoke the image of Joe Tinker, Johnny Evers, and Frank Chance, Hall of Fame Chicago Cubs infielders in the early years of the twentieth century, whose remarkable double-play skills were immortalized in a poem by Franklin Pierce Adams in the *New York Evening Mail* on July 12, 1910." 60 DUKE L.J. 1, 1 (2010).

The *Double Play* article is Miller's paean to the *Federal Rules of Civil Procedure*, as adopted in 1938, not coincidentally in the depth of the Great Depression. As Miller describes this most monumental public work, the 1938 Rules constitute a system that "reshaped civil litigation to reflect core values of citizen access to the justice system and adjudication on the merits based on a full disclosure of relevant information."[14] Miller explains that "the Federal Rules created a system that relied on plain language and minimized procedural traps"[15] and that it opened the doors of federal courthouses across the nation to the grievances of the country's own citizens. As Professor Miller further elucidates,

> Beneath the surface of these broad procedural concepts lay several significant policy objectives. The Rules were intended to support a central philosophical principle: the procedural system of the federal courts should be premised on equality of treatment of all parties and claims in the civil adjudication process. It should abjure technical decisionmaking and "promote the ends of justice." The simple but ambitious notion was that the legal rights of citizens should be enforced. This idea was a baseline democratic tenet of the 1930s and then of postwar America with regard to such matters as civil rights, the distribution of social and political power, marketplace status, and equality of opportunity.[16]

As a plaintiff's advocate, prosecuting class actions arising under both federal statutes and state laws, I have gratefully taken advantage of this access and openness throughout my professional career, and, as the twentieth century progressed into the twenty-first, it seemed that this promise of access was ever more necessary in light of the nationalization and globalization of markets; the standardization of products and services; and the use of broadcast media—and now the internet—to communicate, market, advertise, and distribute goods and services in a market in which the consumers on which these markets depend ironically appear to have less and less power and control over the safety, quality, and integrity of the goods and services offered to them. Courts offer, often, the sole recourse of consumers when the honor system fails, and the profit motive prevails unchecked.

As Miller recounts, the Federal Rules adopted in 1938, and amended incrementally ever since (often with the direct and influential participation of Professor Miller himself, as sometime Rules Committee Reporter, and as perpetual Rules commentator)

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[14] *Id.* at 3–4.

[15] *Id.* at 4–5 (internal footnote omitted).

[16] *Id.* at 5.

were designed to erect and protect the access of citizens to the courts, in order to protect the procedural rights of citizens to effectively seek redress of grievances:

> As significant new areas of federal substantive law emerged and existing ones were augmented, the importance of private enforcement of key national policies, of litigation as an instrument of social policy, and of expanding state-based tort and consumer-protection theories came to the fore in numerous contexts. The openness and simplicity of the Rules facilitated citizen enforcement of congressional and constitutional policies through civil litigation. The federal courts increasingly were seen as an alternative or an adjunct to centralized, or administrative governmental oversight in fields such as competition, capital markets, product safety, and discrimination. Even though private lawsuits might be viewed as an inefficient ex post method of enforcing public policies, they have dispersed regulatory authority; achieved greater transparency; provided a source of compensation, deterrence, and institutional governance; and led to leaner government involvement. Without this private-attorneys-general concept, the substitution of an alternative methodology would be necessary. This probably would mean the establishment of the type of continental-style, centralized bureaucracies and administrative enforcement that many think are inconsistent with our culture and heritage.[17]

In Professor Miller's account, the Federal Rules are thus inherently, and quintessentially, American: they are democratic and egalitarian. They are there to insure that the rights of access to the free market are balanced with the reciprocity of responsibility that is the hallmark of the social contract on which we claim our government, and our society, is based. That these Rules, and this philosophy, was apparently bypassed by the Supreme Court itself in its *Twombly* and *Iqbal* decisions, is the subject of Miller's *Double Play* lament. He is not alone.

Academics, judges, and practitioners of all philosophies, and of all political affiliations and sympathies, have come to recognize modern civil litigation, as practiced under the Federal Rules, to have become increasingly costly, protracted, and oppressive. Access has been lost, and expense has been added. The system has been gamed, to the seeming advantage of those willing and able to spend the most money to buy procedure (primarily discovery and resistance to discovery) at the expense of the original intent of the Rules: to speed progress from the initiation of a case to its adjudication on the merits. A tremendous initiative is underway to reverse this trend, and to restore balance

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[17] *Id.* at 5–6 (internal footnote omitted).

within the federal litigation system, under the Federal Rules, so that, once more, the spirit and mission of the Rules, as announced in Rule 1, that "[t]hey should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding" becomes a living embodiment of the Rules in action, as opposed to a mere platitude, observed primarily in the breach. As this occurs, due credit for recognition and acknowledgement that the Rules have strayed from their original intent, and should be restored to their democratic function, must go to Arthur R. Miller, their great son, expositor, and enabler.