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A Tribute to Arthur Miller

Arthur Miller is a man of many talents who is widely admired for his varied achievements. He is an author of the leading casebook and treatise on civil procedure. He served for six years as the Reporter for the U.S. Judicial Conference Advisory Committee on Civil Rules (and then as a member of that Committee for a like period), and he is an accomplished litigator.

But if you took a poll in the legal community and asked which word comes first to your mind when Arthur's name is mentioned, "teacher" would almost certainly be the overwhelming choice. The Article I contribute to this Symposium is dedicated to Arthur as a teacher who is always seeking new ways to help his students unravel the mysteries of civil procedure.

Law students almost universally find Civil Procedure to be their most challenging course. They have some intuitions about criminal law, torts, and even contracts, but procedure baffles them, and not just because most of us begin the course with two topics that no one who has not been to law school has even heard of: personal and subject matter jurisdiction. Everyone who has taught procedure has his or her own way of dealing with this seemingly intractable problem, none of which is the equivalent of the Rosetta Stone, but all of which provide insights that open some previously closed doors.

The Article offers one insight that is embraced in Arthur's approach to civil procedure: rules must be practical, they must serve social purposes, and they must provide solutions to real problems with all the tradeoffs that those solutions entail. Despite what most students believe, the primary purpose of the *Federal Rules of Civil Procedure* is not to confuse or annoy students. Rather, they were

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created to solve specific problems in achieving justice in civil litigation in the federal courts. Moreover, students should realize that the Rules are part of a system. Thus, if one Rule is changed, it is likely to affect others, and hence the potential ripples of a change need to be considered. Finally, and this is the focus of my Article, procedural rules are more than mechanical instructions based on eternal truths as to how cases are to be litigated. Instead, they involve significant tradeoffs that must be recognized in order to understand what the Rules do and to decide whether another alternative to a particular Rule would be preferable. Students learn fairly quickly that the substantive law embodies many such tradeoffs, but the inevitable tradeoffs in procedural rules are less obvious.

Tradeoffs come in two basic types. First, there is a choice between a bright-line rule—for example, providing twenty-one days under Rule 12 to answer a complaint or allowing "timely" interventions under Rule 24. The Rules do not opt for one alternative but include some of each, and students need to understand why different situations call for different answers. A Rule that provides a clear, direct answer avoids litigation, which is good because it reduces delays and expense, but it does so at the cost of having less flexibility to decide what the "right" or most "just" answer is on the facts of the particular case. The drafters of a Rule must make a choice as to what type of Rule to write, and students should understand what tradeoffs are involved in making that decision.

The second set of tradeoffs is the more common one, in which the Rule must balance interests of the relevant parties. Those parties include plaintiffs and defendants, but also in some cases third parties such as witnesses, class members under Rule 23, judges, jurors, and other litigants waiting their turn to have their cases heard. The easiest example for grasping this tradeoff is Rule 8 and the level of specificity required for a plaintiff to avoid a motion to dismiss: if the threshold is low, more plaintiffs will have an opportunity to take discovery and prove their case, but at the cost of forcing defendants to litigate claims that may be dismissed before trial (often after costly discovery, which is another area rife with tradeoffs). Students should recognize both the necessity for tradeoffs and the nature of them for each Rule in order to understand what the Rule does and how it should be interpreted.

Although I am a novice in events such as this, I imagine that many authors would worry about whether the honoree would be pleased with his or her offering. I am fortunate to know the answer to that

question because this Article was made available at the May 2010 Civil Litigation Conference at Duke Law School, in which Arthur and I participated. Arthur read the Article and was kind enough not only to tell me he liked it, but also to offer his help in finding a law review to publish it. I doubt that he envisioned that a tribute to him would be the vehicle for doing so.

Arthur has had a major impact on the teaching and implementation of civil procedure for both federal and state courts in the United States. I am honored to be a small part of this celebration of his work as teacher, drafter, litigator, treatise and textbook author, and much more.