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A "Capacity for Outrage": The Judicial Odyssey of J. Skelly Wright and On Courts and Democracy: Selected Nonjudicial Writings of J. Skelly Wright

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A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT. By *Arthur Selwyn Miller*. Westport, Conn.: Greenwood Press. 1984. Pp. xiv, 242. \$29.95.

ON COURTS AND DEMOCRACY: SELECTED NONJUDICIAL WRITINGS OF J. SKELLY WRIGHT. Edited by *Arthur Selwyn Miller*. Westport, Conn.: Greenwood Press. 1984. Pp. xvi, 291. \$29.95.

During a thirty-seven year tenure as a federal judge, J. Skelly Wright has drawn both criticism and acclaim for his views on the role of judges and their use of discretion in adjudication. His personal roots are in the deep South. It was there that he started his legal career as an Assistant U.S. Attorney in 1936, a position he attained largely because of the influence of a relative who was a New Orleans politician. However, Wright's association with the political elite of Louisiana was shattered when he insisted, as a young district judge, that the New Orleans school district racially desegregate its school system in order to conform with the Supreme Court ruling in *Brown v. Board of Education*.¹

The desegregation cases brought Skelly Wright to the attention of John Kennedy, who later appointed him to the Court of Appeals for the District of Columbia Circuit in 1962. Arthur Selwyn Miller² believes that Wright has come to be "the best known of all federal judges, except, of course, those on the Supreme Court" (p. xiv).³

A "*Capacity for Outrage*" is structured so that Skelly Wright's (and Miller's) views on different areas of substantive law and the challenges facing American society are discussed one at a time. Racial equality, the constitutional role of administrative law in modern America, the rise of the "National Security State" after the Second World War, personal autonomy, and crime are each addressed separately. Yet these separate chapters are only convenient pigeonholes for grouping together similar cases or disputes. The book's main themes are developed continuously and transcend the discrete categories found in the table of contents.

The central focus of the book is, not surprisingly, Judge Wright's judicial activism and his related concern for social justice. Miller argues that judges have more discretion than the formalities of the

1. 347 U.S. 483 (1954).

2. Arthur Selwyn Miller is Professor Emeritus of Law at George Washington University and Adjunct professor of Law at Nova University Center for the Study of Law. He has previously published *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* (1981); *THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION* (1976); *SOCIAL CHANGE AND FUNDAMENTAL LAW: AMERICA'S EVOLVING CONSTITUTION* (1979); *THE SUPREME COURT: MYTH AND REALITY* (1978); and *TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT* (1982).

3. All parenthetical page references are to *A "Capacity for Outrage."*

American legal system appear to provide for them (p. 19). He rejects the assumption that "principled reasoning" and reliance on community consensus are honest approaches to jurisprudence. He refers to this reliance on abstract notions of law as "intellectual dishonesty" because it only shrouds personal predilections that are always at work in a judge's decisionmaking process (pp. 32-35).

Miller cites as an example of the traditional "restrained" judicial approach the first of two cases that J. Skelly Wright argued before the Supreme Court. In *Louisiana ex rel. Francis v. Resweber*,⁴ Wright represented a black teenager on a petition for habeas corpus after a botched execution failed to kill him. The primary target of Miller's wrath is Justice Frankfurter, who voted for a second execution attempt after concluding, in Miller's words, that "abstract principles of federalism outweighed the facts of a bungled execution" (p. 33). Miller also chastises Justice Jackson for rejecting his personal opinion about the case in the name of judicial restraint and for asserting that judges should be guided by "society's law." Unlike the more classical positions of Blackstone and Holmes (pp. 20-23), Miller stresses that the determination of what society's laws should be was the very issue before the Court and should not have been ignored by the Justices (p. 31).

The central theme of *A "Capacity for Outrage"* is that judicial "good deeds" should be embraced, not scorned. This is the judicial approach that Willie Francis' attorney later employed as a federal judge, in part, Miller suggests, because of his frustration with his experience in *Francis*. Skelly Wright himself has explained his reasons for approving of judicial discretion even to the point of relying on personal "hunches":

The judicial process forces a judge to take the short run into account. . . . [H]e must bend principles in order to produce a result he can live with. . . . The judiciary is different from the political process. It is in the nature of courts that they cannot close their doors to individuals seeking justice. [p. 35]

The full extent of Skelly Wright's activism is made evident in Miller's chapter on personal autonomy. In *In re President and Directors of Georgetown College, Inc.*,⁵ Skelly Wright approved a request by a Washington hospital to administer a blood transfusion to an adult woman who had refused the transfusion because of her religious beliefs. Wright issued the order within hours of the hospital's request after a district judge down the hall had refused to intervene (p. 179).

While this case was admittedly an emergency situation in which no time was available for detailed consideration, both Skelly Wright and Miller give questionable justifications for the intervention. Among

4. 329 U.S. 459 (1947).

5. 331 F.2d 1000 (D.C. Cir. 1964).

these are the woman's responsibility to care for her infant (p. 182), her apparent incapacity to make a rational decision (demonstrated primarily by her refusal of the transfusion) (p. 181), and the possible liability of the hospital (p. 183). In addition, Miller makes the bizarre remark that the hospital should receive the blame for the intervention since, "with overweening arrogance," it determined what was best for the patient and therefore played God (p. 185). How the hospital can be criticized for this hubris without Skelly Wright receiving equal, if not greater, blame for "playing God" remains unclear.

The true reason for Skelly Wright's decision becomes apparent from his discussions with students at a 1982 seminar. After being questioned about the legal niceties of the decision, Wright wondered out loud: "How much would you bet . . . that Mrs. Jones and her child are glad today for the decision?" (p. 186). The absence of traditional legal analysis in this statement is astounding, especially considering that both freedom of religion and privacy were involved in the case. Yet, irrespective of its ultimate persuasiveness, the rhetorical question Skelly Wright posed is powerful because of its undeniable sincerity. The appeal that the decision takes on in light of Skelly Wright's musings should cause one to consider seriously the value of traditional legal analysis, even in nonemergency situations where it is logistically possible to employ it.

What motivates J. Skelly Wright to use such nontraditional approaches when rendering his judicial decisions? Miller offers a theory that he calls "Reason-Directed Societal Self-Interest." According to this theory, aiding disadvantaged individuals benefits the entire community by bridging the chasm between different classes and thereby yielding greater social stability.

Miller finds examples of this concern for society as well as the individual in Wright's passion for equality and his awareness that equality is valuable to the advantaged as well as the oppressed. In striking down a Washington, D.C., school district scheme to group students by skill because it would result in further de facto discrimination, Wright wrote: "What supports this call is our horror at inflicting any further injury on the Negro . . . and also *our common need of the schools to serve as the public agency for neutralizing and normalizing race relations in this country.*"⁶

Although both the first and last chapters clearly indicate that this book is, in fact, about Judge Wright, it is obvious that to a certain extent Skelly Wright is used merely as a vehicle to present Miller's views on the role of judges and law in solving the continuing problems of our society.⁷ Certainly, Skelly Wright is a good choice for Miller

6. P. 58 (quoting *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967)) (emphasis in original).

7. Many of Miller's own ideas have been discussed in his earlier works. See, e.g., Miller, "Constitutionalizing" the Corporation, 22 TECHNOLOGICAL FORECASTING & SOC. CHANGE 95

since Wright appears to approximate the paradigm judge for his concept of ideal adjudication. Nevertheless, the book leaves one with the sense that the attempt to discover J. Skelly Wright got lost amidst the theoretical constructs created by Arthur Selwyn Miller. This observation is not intended to question the value of the book per se, but merely to caution the reader not to expect a report of the professional experiences of J. Skelly Wright.

A corollary to the above criticism is that *A "Capacity for Outrage"* does not focus on what Wright himself thinks. However, Miller's work provides a useful introduction to the companion volume, *On Courts and Democracy*, which does present Wright's own views directly. *On Courts and Democracy* contains nine articles written by Skelly Wright that were originally published between 1965 and 1982. While they represent less than one-sixth of his total nonjudicial writings,⁸ they are the primary articles that Miller refers to in *A "Capacity for Outrage"* and follow the same general themes pursued by Miller. Free speech in the context of campaign financing,⁹ school desegregation,¹⁰ affirmative action,¹¹ judicial review of administrative decisions,¹² and judicial activism in general¹³ are the issues presented by the articles included here — just as they are in the other volume.

On Courts and Democracy provides a convenient collection of articles that are useful if the reader chooses to evaluate Skelly Wright without either the assistance or interference of Miller. In addition, each article is prefaced by a small note that introduces the article and places it in the context of Miller's interpretation of Judge Wright's philosophy.

Nevertheless, the compilation of essays in *On Courts and Democracy* does not appear to add much to the literature about Skelly Wright. *A "Capacity for Outrage"* does create a desire for a firsthand examination of the judge's views and, in this sense, the collection of

(1982); Miller, *On Politics, Democracy, and the First Amendment: A Commentary on First National Bank v. Bellotti*, 38 WASH. & LEE L. REV. 21 (1981); Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199; Miller, *Toward a Definition of "The" Constitution*, 8 U. DAYTON L. REV. 633 (1983); see also note 2 *supra*.

8. See ON COURTS AND DEMOCRACY 283-85 for a complete list of Skelly Wright's writings.

9. P. 73, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976); p. 97, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982).

10. P. 167, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U. L. REV. 285 (1965).

11. P. 195, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213 (1980).

12. P. 137, *Judicial Review and the Equal Protection Clause*, 15 HARV. C.R.-C.L. L. REV. 1 (1980); p. 231, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974); p. 257, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

13. P. 3, *The Role of the Supreme Court in a Democratic Society — Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968); p. 33, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

writings is a natural companion to it. However, Miller's own book gives adequate direction to the original sources of the articles in this collection. As might be expected, these sources are not obscure. Furthermore, while Miller's comments about each article offer interesting opinions about Wright's views and insight into the impetus for the articles, *A "Capacity for Outrage"* already explains Miller's opinions. In the final analysis, *On Courts and Democracy* satisfies a curiosity created by *A "Capacity for Outrage,"* but a relatively easy trip to the library might serve as well.

Perhaps *A "Capacity for Outrage"* can best be described as a synthesis of earlier works by Miller¹⁴ and recent tributes to J. Skelly Wright.¹⁵ The reader who is more interested in a biography of Skelly Wright than in a theoretical evaluation of what Skelly Wright means to law and adjudication may be better off skipping Miller's book and reading instead Michael Bernick's brief outline of his life and career.¹⁶

Moreover, the book is essentially a testimonial to the career and tenacity of Skelly Wright, despite Miller's avowed intention not to "paint a portrait of 'Saint Skelly'" (p. xiii). As such, *A "Capacity for Outrage"* probably will not bridge the gap between the advocates of judicial activism and judicial restraint. However, while agreement with the views expressed by Miller will largely depend on the reader's own predisposition toward the proper role of the judiciary, *A "Capacity for Outrage"* should be recognized by all as a fine analysis of Skelly Wright as well as a solid contribution to the continuing debate over judicial activism.

— Alan M. Koschik

14. See note 7 *supra*.

15. See 7 HASTINGS CONST. L.Q. 857-999 (1980) (numerous tributes to, or evaluations of, J. Skelly Wright).

16. Bernick, *The Unusual Odyssey of J. Skelly Wright*, 7 HASTINGS CONST. L.Q. 971 (1980).