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The Supreme Court: Myth and Reality

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THE SUPREME COURT: MYTH AND REALITY.* By *Arthur Selwyn Miller*. Westport, Conn.: Greenwood Press. 1978. Pp., xvii, 388. $19.95.

In *The Supreme Court: Myth and Reality*, Professor Miller of George Washington University has gathered nine essays that he wrote between 1960 and 1975. Miller's subject is a big one, as the title of the book suggests. He examines the unique place of the Supreme Court in the American political order, and tries to define the proper bases of constitutional decision. As Miller himself says, this broad view makes his perspective "basically different from most other scholarship on the Supreme Court" (p. 9).

But Miller's work lends itself poorly to anthology. The earliest essay, "The Myth of Neutrality in Constitutional Adjudication," is the intellectual kernel of this book. The five other essays from the 1960s do little more than restate, with changes in emphasis, the themes of "The Myth of Neutrality." Although any one of the six might introduce Miller's thought appropriately, their ensemble is annoying — in this nine-course feast, the first six courses are all soups, based on the same stock. Not only do the same ideas recur from essay to essay; so does Miller's picturesque wording. For instance, in four separate essays he accuses those who profess faith in judicial neutrality of practicing "squid jurisprudence" (pp. 102, 128, 162-63, 234), hiding the truth about judicial creativity "behind a cloud of impenetrable ink" (pp. 128-29, 162-63, 234).

One advantage of such monotony, however, is that the principal themes of the collection may be readily summarized. Miller's goal is to create a replacement for the classical jurisprudence destroyed by the legal realists. But first he endorses the realist tenets. The realists, says Miller, discovered in the early part of this century that the Supreme Court is different from other courts. Not even an ordinary court is an automaton that derives the result in each case from precedent as a phonograph produces music from a record; the judges' value preferences and the *zeitgeist* determine the result in close cases. But since the Supreme Court's cases are all "close cases," the Court never simply applies the law — it legislates, or at least renders decisions that are politically motivated. This "reality" contradicts the myth, which Miller imputes to the lay public, that the Justices are value-neutral technicians who deduce each result ineluctably from the Constitution.

Miller contends that public discourse about the Court should incorporate the insights of the realists, rather than preserve the old

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myth. He criticizes those scholars, notably Thurman Arnold, who exhorted the legal community to preserve the illusion of a "rule of law above men, evolved solely from Reason,"[1] so that men would not "lose themselves in an even greater illusion, the illusion that personal power can be benevolently exercised."[2] Miller argues that we need not choose between illusion and despotism; we can be realists without being obscurantists. He approves the following passage (he quotes it identically in two essays) from Morris Cohen's *Law and the Social Order*, a passage which encapsulates Miller's approach:

> [Some scholars argue that] while the contention that judges do have a share in making the law is unanswerable, it is still advisable to keep the fiction of the phonograph theory to prevent the law from becoming more fluid than it already is. But I have an abiding conviction that to recognize the truth and adjust oneself to it is in the end the easiest and most advisable course. The phonograph theory has bred the mistaken view that the law is a closed, independent system having nothing to do with economic, political, social, or philosophical science. If, however, we recognize that courts are constantly remaking the law, then it becomes of the utmost social importance that the law should be made in accordance with the best available information, which it is the object of science to supply.[3]

Miller thus accepts the work of the legal realists but says that we must transcend their efforts. No longer can we content outselves with pointing out that the Praetor has no robe; we must reclothe him in twentieth-century costume.[4]

With this purpose, Miller proposes a new kind of jurisprudence: "[t]he suggestion we make is for a *teleological jurisprudence, one purposive in nature* rather than 'impersonal' or 'neutral' " (p. 76, emphasis in original). But in Miller's new teleology, the goals recede before our grasp. Since "the results of a process of 'reasoning' depend entirely upon what premises (*i.e.*, values) are used in that process" (p. 74), Miller suggests that every Justice "set out in explicit form his value preferences as he understands them" (p. 74). Yet Miller concedes that "it is highly unlikely that any method of judicial opinion-writing can plainly and fully enunciate 'the *real* bases of decision' " (p. 74).

If Miller cannot require judges to confess their legislative values directly, he contents himself with an indirect route: he would have "operational thinking become the outward rule, rather than the hidden actuality" (p. 82). Judicial opinions, that is, should refer more

1. P. 86, *quoting* Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1311 (1960).

2. *Id.*

3. P. 87, *quoting* M. COHEN, *The Process of Judicial Legislation*, in LAW AND THE SOCIAL ORDER 380 n. 86. The same quotation appears at p. 129.

4. *Cf.* p. 100 ("The upshot is that it is high time for general acceptance of the fact that the Emperor has no clothes.").

explicitly to "the *effects* of a given decision" (p. 82). This would help create, he says, "a sociology of judicial decision-making" (p. 82). "Disputes are and should avowedly be settled in terms of the external consequences of their application — with those consequences spelled out in some degree of particularity" (p. 83). Judges should evaluate these consequences "in terms of the realization or non-realization of stated societal values" (p. 83). But alas, "[w]hat those values might be, we do not now set forth" (p. 83).

Apparently feeling uncomfortable with a teleology completely lacking goals, Miller recounts with approval two attempts to provide a set of "societal values"; neither is credible. First, M.S. McDougal's proposal for a law of "human dignity" seems impossibly vaporous, at least in Miller's one-paragraph summary. McDougal would have judges seek "to promote the greatest production and widest possible sharing, without discriminations irrelevant to merit, of all values among all human beings."[5] Second, Alexander Pekelis's "jurisprudence of welfare" seems a thinly disguised tautology: "[a]lthough welfare is 'an ambiguous concept,' 'it assumes as its end the ethical and political ideals professed by our society and attempts to find in the arsenals of judicial doctrine and social science the means for their realization.' "[6]

Finally, Miller seems to conclude that the search for goals, earlier postponed and then shunted to other scholars, must now be abandoned:

> A teleologically-oriented jurisprudence is not, it should be stressed, a device to provide the answers to a given set of circumstances. Rather, it is a method — a mode of inquiry, a way to approach constitutional questions. It is opposed to a mechanistic view of the social and judicial processes. It seeks to provide purposive direction to the flow of social events. By asking the welfare or the human dignity question, the judge must think in terms of consequences and will help in providing some guiding lights for the attainment of the democratic ideal. [P. 85.]

Miller's teleology is thus a call for purposiveness-without-a-purpose. It stands only in opposition to mechanistic theories of jurisprudence, and requires those theories as a polemical prop.

Robert G. McCloskey's general criticism of the excesses of legal realist thought could as easily have been directed specifically at Miller's extension of the realist approach:

> [Some] "[l]egal realists," impressed by the discovery that the Supreme Court [is] more than a court, [are] sometimes prone to treat it as if it were not a court at all, as if its "courthood" were a pure façade for

5. P. 83, *quoting* McDougal, *Perspectives for an International Law of Human Dignity*, 53 AM. SOCY. INTL. L. PROCEEDINGS 107 (1959).

6. P. 84, *quoting* A. PEKELIS, *The Case for a Jurisprudence of Welfare*, in LAW AND SOCIAL ACTION 33, 37 (1950).

> political functions indistinguishable from those performed by the legislature. Such a view bypasses everything that is really interesting about the institution. . . .
>
> . . . The Court's claim on the American mind derives from the myth of an impartial, judicious tribunal whose duty it is to preserve our sense of continuity with the fundamental law.[7]

For McCloskey, the myths surrounding the Court have arisen out of an inherent contradiction: the Court must preserve both the ideal of the rule of law above men and the ideal of popular political sovereignty. To end the myth would be "to align the judicial power squarely with the legislative power and to erase the differentiation of function that is the Court's basis for being."[8] Miller ignores these subtleties and defines myths simply as "erroneous or false" beliefs that hide the unambiguous "reality" (p. 14). But if, in fact, myths continue to shape our thoughts and actions despite our doubts about their ultimate truth, legal scholars should try to understand why myths persist before they propose, as Miller does, that we renounce them.

One must admit, however, that Miller asks fundamental questions, and asks them in a lively manner sure to continue the debate about the Court's place in government. Perhaps, ultimately, we can excuse Miller's impatience with ambiguity; it may serve as a necessary antidote to complacency. And in later essays, he has moved beyond the debate about neutral principles. Chapter seven calls for more sociological evaluation of the effects of the Court's work. Chapter eight criticizes the adversary process as an inadequate means of channeling technical information to the court. Chapter nine examines what Miller sees as "a diminution in the confidence people have in judges" (p. 315). Chapter Ten concludes that the Court protects the right of privacy "only when the fundamental interests of the State are not jeopardized" (p. 343). These later essays abandon the rhetoric of teleology; instead they acknowledge the problems of a judiciary required to perform legislative functions.

One only wishes that Professor Miller had compressed the arguments of his earlier essays into one or two brief chapters. Instead of making vague exhortations for a purposive decision-making, he might have studied the institutional constraints that have produced the existing "myth." His later work would have benefited from such a study. His book would have been slimmer, but more compelling.

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7. R. McCloskey, The American Supreme Court 20 (1960).

8. *Id.* at 21.