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Book Review: on Courts and Democracy: Selected Nonjudicial Writings of J. Skelly Wright. Edited by Arthur Selwyn Miller; a "Capacity for Outrage": The Judicial Odyssey of J. Skelly Wright. by Arthur Selwyn Miller.

Ernest van den Haag

his religion behind his back. When Henry Wallace asked Harlan Stone in 1943 if Murphy had "grown" in his job, Stone replied "He can no more grow than that stone."[30] Justice Roberts and Judge Learned Hand referred to him as "the Saint," "St. Francis," or "Jesus, Lover of My Soul."[31] But the Murphy who emerges in this fine biography was a Justice of unusual courage. He took seriously his oath to defend the Constitution and did a better job in that respect than any of his colleagues. He was not among those Justice Jackson had in mind when he penned the following ditty in 1941:

> Come you back to Mandalay
> And hear what the judges say
> As they talk as brave as thunder
> And then run the other way.[32]

ON COURTS AND DEMOCRACY: SELECTED NON-JUDICIAL WRITINGS OF J. SKELLY WRIGHT. Edited by Arthur Selwyn Miller.[1] Westport, Conn.: Greenwood Press. 1984. Pp. xvi, 291. $29.95.

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.

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In Arthur Selwyn Miller, Judge J. Skelly Wright found an ideal biographer, who shares his understanding, or, I would contend, misunderstanding, of the nature of law and of the role of judges. In turn Professor Miller has found an ideal person to write the foreword in Judge Frank M. Johnson, Jr., with whom he shares not only a misunderstanding of the function of law, but also a remarkable inability to command the English language. A few in-

30. *Id.* at 249.
31. *Id.* at 262, 266.
32. *Id.* at 263.

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stances will demonstrate no less. Beyond them, *codex ipsus loquitur.*

Judge Johnson's first sentence is "It is indeed a pleasure to have the opportunity to write about Skelly Wright as a person and as a judge to serve as a foreword . . . ." On the same page: "I do not remember the details of the discussion made by this young . . . ." Judge Johnson's English does not improve through his three-page foreword. On its last page he writes "Judge Wright will long be recognized as the role model of how members of our judiciary can and should speak truth to power, to require disinterested fairness in the face of hysteria . . . ."

Professor Miller's biography tells us practically nothing about Judge Wright's nonjudicial personality or life. Yet the preface begins by declaring that "this book is a personalized view of . . . ." His English does not improve through 200-odd pages. Miller expresses his "gratitude . . . to [his] wife, Dagmar, who caught many of my egregious errors in syntax." He should consider divorce. What else is to be done with a wife who approves of "strains . . . being leveled against constitutional mechanisms," or again "against familiar institutions," who lets him write "[h]uman behavior is too complex to be able to label anyone with a single term" or that "[j]udges must . . . choose from between these principles"? (He means, if you haven't guessed, "among these principles.") It would be tedious to give more examples. You have been warned.

Judge Wright himself usually writes tolerable English, though he does accuse people of losing interest "in the practical problem of solving racial discrimination." Miller says of Judge Wright that "[n]ot having a profound mind, Wright knows what he wants and relies upon his clerks . . . Wright gives the theme and a clerk . . . provides the language." Because I do not believe in guilt by association, I must be agnostic about Judge Wright's command of English.

Let me turn now to the substance of the books, beginning with Miller's biography.

I

The electric chair did not work properly when the state of Louisiana attempted to execute the murderer William Francis. Wright, then an attorney in private practice, argued before the Supreme Court that a second attempt to execute Francis would constitute double jeopardy as well as cruel and unusual punishment. His first argument was silly, since Francis was not tried a second time for the murder. The second argument conceivably had merit, although one may wonder how, when execution is the sentence, the pain and suf-

fering of an aborted attempt could take its place. The Supreme Court rejected the appeal. Francis was executed.

Miller (and Wright?) insists that it was all Justice Frankfurter's fault: his was "the crucial fifth vote in a 4 + 1 = 5 to 4 decision." Why single out Frankfurter? I can't see how in a joint decision one vote is more "crucial" than another. (Perhaps Miller meant "unexpected" when he wrote "crucial." I wouldn't put it past him.) Anyway, four-to-four would have been enough to confirm the death sentence. But let that go. Miller writes that "[Frankfurter's] concurrence with the Court majority, rather than being a triumph of judgment over feeling, is, when coupled with his subsequent secret efforts to get executive clemency for Willie, an example of intellectual dishonesty." This comment strikes me as an example of Miller's obtuseness. Justice Frankfurter thought that the law required him to reject the appeal by Francis. He also felt that Francis should be pardoned. The law may require severity. Charity may suggest leniency. A pardon (from the French *par don*—as a gift) is something donated, not something deserved or legally due. When you give charity you do not imply that the recipient has earned it. You follow a feeling of compassion, a charitable impulse. Princes, presidents, and governors in most societies can make a gift to a criminal of life, or freedom, even when that life, or freedom, is forfeited by law. A judge, then, may properly decide that statutory or constitutional norms require him to allow a sentence of death to be executed. Yet the same judge may also feel that in the case at issue justice should be (in John Milton's phrase) tempered with mercy. He may wish to suggest as much to a governor, who has discretion in the matter, and urge him to offer executive clemency to the criminal. There was no "intellectual dishonesty" in Frankfurter's behavior. There was only a clear and compassionate mind. Miller's confusion of justice with charity speaks volumes. As will be seen, it is characteristic of Judge Wright as well.

Miller intimates, correctly I believe, that in Wright's view the truly important question about judicial decisions is: *cui bono* (to whose advantage?) The Romans asked that question to point to the motive, or interest, of a criminal suspect. A judge, however, was not supposed to ask this question about the effect of his sentence on the parties. He was to decide what claims were legally justified. I wonder whether judges excluding inadmissible evidence and thus, at times, freeing rapists and murders, ask *cui bono*? Should they? Do Miller and Wright really want them to? I have not noticed that either advocates as much. Wright himself indicates that he judges

in favor of social justice; the ultimate end of his decisions should be "goodness," which he equates with "justice."

"Justice," Miller believes, embraces "three conflicting principles: to each according to his *rights*; to each according to his *deserts*; to each according to his *needs*."[3] He comments that a sampling of Judge Skelly Wright's "opinions and articles reveals that his concern for human *needs* oft-times is at odds with what others, on and off the bench, view as *rights* justice." You can say that again. Miller adds that "what a person *deserves* can be subsumed under the rubric of what that person *needs*." Fiddlesticks.

Consider a foot race in which the winner is to get a prize of $1000. Contestant Arthur is a rich and athletic young man. He hardly needs the prize money or the prestige. Contestant Selwyn is poor and insecure and needs the prize money to pay for an operation for his aged mother. Arthur comes in first. According to the rules (laws) of the race he deserves the prize although he does not need it and Selwyn does need it. (Selwyn moreover is good, Arthur wicked.) Since Miller believes that "what a person deserves can be subsumed under the rubric of what that person needs" would he, or Judge Wright, have decided that Selwyn is the winner, or should get the money anyway, because he needs it?

The criterion of need, far from being able to "subsume" desert, is altogether irrelevant to it. Consider another hypothetical case. A rich man claims title to some real estate, or to a bank deposit to which a very poor and good man claims title as well. Or the wealthy man wants some money he lent the poor man to be repaid as agreed. Doesn't the law require courts to disregard need, or goodness, or *cui bono*, and to consider only who has a right to the land, or money, and accordingly deserves it? Otherwise, why shouldn't the judiciary be drawn from other occupations besides law? How about social workers? Psychologists?

Of course, the law can give the needy rights based on their needs; it can order that their needs be regarded as deserving something or other, for instance welfare, to which they then become legally entitled on the basis of their need. But no society is or can be organized on the basis that desert is determined simply by need. Even Karl Marx advocated need as a criterion of distribution only under communism—not under socialism. According to Marxist eschatology, only when scarcity is gone can communism be instituted.[4] Then, and only then, would the criterion of need prevail.

3. A. MILLER, A "CAPACITY FOR OUTRAGE" 8 (1984) (quoting Dr. David Miller) (emphasis in original).

4. Incidentally, Miller thinks that we have been approaching "the end" of "compara-

Marx did not confuse the need criterion with justice or desert, being smarter, in this respect, than Messrs. Miller and Wright.[5] Almost every critic of Marx has pointed out what these two gentlemen blissfully ignore. First: if need is the only criterion, achievement and merit cannot be rewarded. If they cannot be rewarded, they will occur less often. If they occur less often, the poor as well as the rich ultimately will suffer. And second: there is no nonarbitrary way of determining "needs": Do I need a vacation more than you? A car? An apartment? How does one decide? And who should do the deciding?

II

Let me leave now, not without a sigh of relief, Judge Wright's biographer to consider some of his subject's own writings collected by Professor Miller under the title *A "Capacity for Outrage."* Each of Judge Wright's essays is briefly introduced by Professor Thomas C. Grey.

In *The Role of the Supreme Court in a Democratic Society*, Wright explains his view that "nature abhors a political vacuum," which the Court must fill if legislatures do not. The Court should "struggle with social issues" (not, *nota bene*, legal issues). If "no one [is] doing [the struggling] at all," then "the judiciary must bear [sic] a hand . . . in such situations." None of these asseverations is argued. Is "nature" a pseudonym of Judge Wright? What is a "political vacuum"? (A situation in which the legislature isn't doing the things that Wright wants done?)

Although he never fully addresses the fact that the role he envisages for the Court is legislative, nor the fact that by assuming this role, the Court, an unelected body, replaces the elected bodies meant to deal with political issues, Skelly Wright has some remarkable answers to the usual objections to his activist view. These objections, in the first place, overstress the Court's "immunity from democratic processes." How is that? Voters cannot legally oust and replace federal judges appointed for life. Wherefore federal courts are indeed totally immune from the relevant "democratic processes." For the essence of democracy is the ability of voters to oust and replace decision makers. The reason for the immunity of the courts is that it was thought that their decisions would be tech-

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tive . . . abundance" since the sixteenth century. He certainly outdoes Malthus who saw something like this in the nineteenth century, and guessed that it *will* happen. It hasn't yet happened although Miller asserts it has been happening for three hundred years. Funny I hadn't noticed.

5. *See* K. MARX, CRITIQUE OF THE GOTHA PROGRAM (1938).

nical, like those of an engineer, not political like those of a representative. It was thought that judges simply were concerned with the law—not with needs, or social problems. If they are free to legislate, then they should periodically stand for election. They should be representative not of the law but of the voters.

But Judge Wright has another even more remarkable answer to critics of judicial activism. "[T]he Congress and the executive can annul [the Court's] directives simply by refusing to execute them." In other words, Wright tells us that courts can invent laws if they like, and that the executive can refuse to enforce judicial decisions if it likes. An intriguing view of government by laws, indeed of legal government, indeed of any kind of government. President Eisenhower was misguided when, obeying the courts against his wishes, he desegregated schools. He should have annulled the Court's orders by "refusing to execute them." Can you imagine a more lawless jurisprudence?

Judge Wright also resorts to an odd *tu quoque* argument. He tells us that Congress is not an altogether majoritarian and egalitarian institution and thus not quite democratic. It does not represent the voters on a perfectly egalitarian basis and there are seniority rules, filibusters, and other antimajoritarian features. Therefore we should not be alarmed by the undemocratic character of judicial legislation. This is like saying witch doctors are not perfect, but neither are real doctors, so why not choose witch doctors? The argument is too frivolous to warrant discussion.

I am not suggesting that judging is or can be a mechanical process. In *Riggs v. Palmer*,[6] for example, existing law seemed to lead to the unjust result that a murderer would inherit from his victims. Yet the court refused to allow this. It might have been wise for the court to accept such an undesirable result in one case, thereby inviting the legislature to change the law. However, the common law tradition does give judges some leeway here, and power (absent in other legal traditions) to rest their decision on a general principle, for instance that no offender should profit from his own wrong. Inevitably, judges sometimes make law, especially when they are called upon to interpret the grand phrases of a constitution. Try as they may, they cannot wholly eradicate the influence of their prejudices. Even in construing statutes, the distinction between creating and interpreting law is not always clear. There is a twilight zone. But this has never prevented people with normal eyesight from distinguishing night and day, or a well-lit area from a dark one or, finally, the objects in the well-lit area. However, activist judges

6. 115 N.Y. 506 (1889).

do not interpret law with the equivalent of normal eyesight. For them there is only twilight, or night, never day, never a well-lit area, particularly when they don't like what is visible to persons who have all their senses. They close their eyes and discover constitutional penumbras, or discern in the fog "evolving standards" that have evolved in their own minds. They confuse the law that clearly does exist with what they find desirable, declaring it *eo ipso* legal.

III

According to Judge Wright, "the Warren Court did not bring true democracy to America." I think this is true. We had democracy for quite a while before Chief Justice Warren was born. But why does Wright believe it is the function of the courts to "bring true democracy to America"? I find no mention of this task, or of entrusting it to the judiciary, in the Constitution. If there is such a task, isn't it for the voters to accomplish?

What is Judge Wright's notion of "true democracy"? He is not very explicit but seems to believe that democracy involves far more egalitarianism than the Constitution requires. Perhaps his remarks about the Supreme Court and the younger generation of lawyers offer a clue: "An institution [he refers to the Supreme Court] that sits back, always emphasizing its weakness and its reasons for inaction, is unlikely to be in a fighting stance when the tanks roll down Pennsylvania Avenue." He sees "no point in querulous admonitions that the Court should restrain itself from combatting injustice" because, somehow, these admonitions would make it harder to fight the tanks. This incredibly childish idea is characteristic of Judge Wright's jurisprudential thought. How would an activist court, or any court, be able to fight tanks? Tanks are most likely to "roll down Pennsylvania Avenue" once the rule of law is dead. If that time comes, lawless judges may deserve part of the blame. "[N]o amount of experience," Judge Wright avows, "will substantially dull the inspiration of the 1960's." We need scrupulous judges, receptive to experience, not judges inspired by the 1960's or, for that matter, by anything but the law.

Judge Wright quotes Anatole France's well-known sarcasm about the majestic equality of the law, which prohibits rich and poor alike from sleeping under bridges. This, according to Wright, shows "the basic fatuousness of the goose-gander approach." What it really shows is the fatuousness of Anatole France. *Of course* a law prohibiting stealing bread, or sleeping under bridges, will burden most heavily those motivated to do either, the hungry and the poor, and hardly at all those not so motivated, the rich. Similarly, a

law prohibiting drinking will burden drinkers, not teetotalers, and a law against tax evasion will only burden taxpayers. Is this deplorable? The purpose of any criminal law is to restrain those tempted to engage in crime. One would have thought that a federal judge could be expected to understand that.

Judge Wright goes on to justify preferential quotas for blacks because "we cannot overcome our history of enslaving black[s] . . . so quickly." Wherefore "I believe hiring quotas for disadvantaged minorities no more offend the equal protection clause than does the progressive income tax." The progressive income tax is indeed debatable. But the debate would be quite irrelevant to quotas. How, in Heaven's name, can it be constitutional, let alone morally just, to place a white person at a disadvantage for the sake of advancing a black one, simply because other white persons in the past placed other black persons at a disadvantage? Why does that justify disadvantaging a person who had nothing to do with this (and may not even indirectly and unintentionally have benefited from it), and advantaging another, who also was not involved (and may never have suffered from past unwarranted discrimination)?

Judge Wright's answer to such questions is to assert that "*Brown* fully recognizes, to relieve an inequality with respect to the Negro was, and is, precisely the purpose of the fourteenth amendment." Wherefore, "recognition of race to relieve an inequality [doesn't] violate the fourteenth amendment." He confuses relieving an inequality (so as to produce equality), which was indeed the point of the fourteenth amendment, at least with respect to some inequalities, with reversing it, so as to produce the reverse inequality. Preferential treatment of racial minorities, apart from being unconstitutional and immoral, is likely to make the situation worse for those meant to be helped by the remedy. You don't make men free, or equal, by making them dependent on political handouts.

According to Professor Miller there "can be no doubt that he [Judge Wright] made up the law" in the *Hobson v. Hansen*[7] decision, thinking that he was thereby serving "social justice." Here Professor Miller is right as well as candid. *Hobson* involved a public school "tracking system" instituted in Washington (as well as elsewhere) to separate the faster from the slower learners and deal with each group in the most appropriate manner. Because the tracking system left most blacks on the slow track, Judge Wright prohibited it. As a result "white enrollment . . . all but vanished,"

7. 327 F. Supp. 844 (D.C. 1971).

that is, schools became more segregated than before and "declined in quality."

Professor Miller opines, in his inimitable fashion, that "whether such a ruling [upholding tracking] would have improved the Washington schools is highly improbable." But, of course, it wasn't the court's business to make the schools better, and certainly not to make them worse, as Judge Wright did. The court's only business was to determine whether the tracking system was inconsistent with the Constitution. Judge Wright in his opinion declared that he had to pay heed to "our common need of the schools to serve as the public agency for neutralizing and normalizing race relations in this country." What is the legal source of this presumption? Where is the evidence that it is factually accurate?

It is a common mistake to suppose that a man like Skelly Wright, though perhaps gravely flawed as a judge, would make a fine Senator. That supposition is true only if we want Senators who are addicted to implausible nostrums. Note that the German schools, unsegregated for a hundred years, did not prevent the rise of anti-Semitism. But the problem in Judge Wright's case is worse than unrealistic hopes. This is a judge who believes that, by mixing the slow learners with the fast ones, he can help to "neutralize" and "normalize" race relations! Does he suppose that slow readers learn more if the teacher is trying concurrently to teach the fast readers? Does he suppose that this process will *reduce* racial stereotypes? That it will lead *more* white parents to send their children to integrated, public schools? *Cui bono* indeed.

Judge Wright has had a long career. It will take us a while to recover from it.