Candid in Camera: The Legal Writings of ***Justice Richard Neely***

How Courts Govern America, New Haven: Yale University Press, 1981 *[HCGA]*

Why Courts Don't Work, New York: McGraw-Hill Book Company, 1982 [WCDW]

Judicial Jeopardy: When Business Collides with the Courts, Reading, Mass: Addison-Wesley Publishing Company, Inc., 1986 *[JJ]*

The Product Liability *Mess:* ***How Business Can Be Rescued from the Politics of State Courts,*** New York: The Free Press, *1988 [PLM]*[1]

I

Anyone who has had the opportunity to meet Richard Neely knows the enthusiasm he has for politics and the law, two matters that he feels are intimately and inseparably related. In a legal climate dominated by positivists, he holds the singular position of being the most honest and forthright spokesman of this persuasion. Unlike many others, particularly "academic" lawyers, Neely has practical, down to earth experience; he has served in legislative assemblies as well as on the Supreme Court of West Virginia. His views of the legal process, the role of the *courts,* and the position of law in the American political order provide refreshing reading because of their candor and their clarity-Neely is candid *in camera.* One does not

'Another book of Justice Neely's that is not covered in this review is *The Divorce Decision: The Legal and Human Consequences of Ending a Marriage,* (New York: McGraw-Hill Book Company, 1984). This book reflects little in the, way of the philosophy of judicial activism, but is a straightforward and exceedingly competent examination of divorce in contemporary society. Every practitioner, judge, and marriage counselor should read this book and take it to heart.

have to agree with Neely to appreciate him; because, when one has finished his books one has a full insight into assumptions, arguments, and conclusions of the majority of the American legal profession. The inestimable value of his writings, particularly for those of us who disagree with him on almost every point, is that they are "fully informed" of what legal positivism, legal realism, and judicial activism are all about.

To understand Neely's views about the role of law and the courts, one must consider his views about the "true nature" of American politics, the legislative assemblies, the executive, the bureaucracy, and the legal profession, each of which he deals with in his writings.

For Neely, the concept of constitutional government means "the ordering of this country's economy, social structure, and political process" *(HCGA 5).* He acknowledges the presence and importance of the written constitutional documents of the national and state governments, for these documents provide the basis for the ability and, in Neely's view the necessity, for courts to govern America. As he put it, "It is by interpreting the federal and state constitutions ... that the courts achieve (their power)" *(HCGA 5;* see also: *JJ* 66-67, *PLM* 110-111). Additionally, in his view, courts provide the "flywheel" of American politics that enables the system to function despite the wide disparity between the "operational" political order and the "myth of American democracy. The operational system denotes "how things (political) really work," while the "myth" system reflects the theories, values, fears, and ideals of the population. Despite the fact that there are vast differences between the two systems, the "myth" system plays a very significant role in the life of American society, and has "a real affect on the operational system" *(HCGA* 9-10; see also *HCGA* 12-13, 17-19; *WCDW* 18-24, 134-136). Neely describes the myth system as 'the product of political theory, idealism, and a healthy fear of human lust, avarice, aggression, and self seeking" (WCDW 18). The great value of the myth system is the impact it has on the operational order because it provides a standard against which the operational order can be judged. Neely points to the fact that individuals will ardently defend the myth system and the basic values enshrined in it, even in the face of the absence of these values in guiding decisions in the day

to day world of politics. Departures from the myth system in the actions of the operational order can thus be pointed to and criticized, although, as Neely notes, such departures may not be correctable, given the reality of the conditions which prevail in the operational order, among which are financial considerations and the nature of human beings. Thus, he notes, "Throughout the entire court system, abstract principles are tugging for equal justice while practical politics urges so many exceptions that the exceptions have been known to eat up inadequately defended principles" *(WCDW20)*. The myth stem and the operational order cannot be the same, Neely argues, because, "First, people want to take bribes, help their friends, further their own economic interests, gratify their vanity, and not work very hard; second, there are always design defects in the myth system which make it *impossible* to construct a real edifice on the plan given by the myth" *(HCGA* 12).

Given this relationship between the two systems, the courts provide that vital link in American political life that allows the operational order to seem to reflect the myth system, and permits the myth system to affect the direction and content of the operational order. Were this task consigned to the legislative assemblies it would not work, nor would it work in the hands of the executive branch. The very nature of politics, which is the foundation on which legislative and executive power are constructed, prohibits their employment of the myth system except for purposes of electoral success or political advantage. As Neely observes:

> The operational system's departure from the myth system comes from lack of money as well as from the nature of the raw material of which it is composed, namely men and women. Lust avarice, aggression, and self-aggrandizement are inherently a part of the makeup of people, and these qualities are reflected throughout the operational system. Furthermore, even if natural human vices could be bred out of the personnel, there would still be architectural defects in the design of the myth system, making it impossible to engineer an operational order according to the myth system *(WCDW* 19).

However, as he points out, the system of governance in the United States has operated well, effectively, and progressively despite the handicaps he has identified. In large measure this is the result of the courts and their operation. Because the other institutions of government are not able structurally to bring the "myth" system and the "operational" order into proper harmony, this task has fallen to the courts. Neely explains this as follows, "The duty which we have unconsciously thrust upon the courts is to get the results which the myth system promises but which the operational order does not deliver" *(HCGA* 13; see also *JJ* 51-72).

In performing this balancing role, the courts are compelled to behave in a fashion that does not permit them to call attention to the disparities that exist between the two systems or to question the content of the myth system *(HCGA* 13, *WCDW* 10-11). He believes that the institutional uniqueness of the courts enables them to operate in ways the other branches of government cannot; they operate with a presumption of impartiality and fairness that is categorically denied to the legislative and executive branches. As he observes, "Courts are absolutely unlike any other structure in government, and because of their structural features, courts are the institution of government least likely to be manipulated for selfish purpose by individuals in them or by the institution as a whole" *(HCGA* 190; see also *JJ* 51-72; *PLM* 10-20; *WCDW* 15-25).

II

While political scientists and politicians both laud the effectiveness of the political process in meeting the challenges of a society, Neely is not persuaded that this is the case. He writes: That anything gets done by a political body at all is to be applauded as a miracle rather than accepted as a matter of course" *(HCGA 25;* see also: *PLM* 80, *WCDW,* 64-65, *JJ* 109-117). Politics and the political process are frozen into maintaining a given *status quo,* and to expect dynamism, change, or adjustment from such a process is overly optimistic. He is highly critical of the popular belief that the legislature is a "democratic institution" responsive to the public will.

> The widely held tenet of democratic faith that elected officials, as opposed to bureaucrats or the judiciary, are popularly selected and democratically responsive is largely a myth which gives a useful legitimacy to a system that works relatively well in a society which has come to raise the ideal of democracy to a religious creed. In fact, however, far from democratic control, the two most important forces in political life are indifference and its direct by-product, inertia *(HCGA 28;* see also *WCDW64-65).*

The political organizations that furnish the operational structure of American political life, according to Neely, clearly reflects the fact that "politics is not about ideas, but about money" *(HCGA* 115, *23-46, JJ 98-99, WCDW72-75). As* he argues, "Legislatures are interested in economic rather than social issues, because economic issues deliver the money or votes to win election" *(WCDW* 241). Consequently, the only institution capable of effecting changes or adjusting relationships so that they conform more with the "myth" system of American political life is the courts. The other two branches of government-the legislature, and the executive-are ill-equipped for thetask ofmakingadjustments inatimely and significant fashion that will permit the American political order to maintain stability and progress. They are devoted to preserving things as they are.

Neely's evaluation of the legislature certainly denigrates the notion of representative assemblies designed to give force and effect to the pressing needs of society. According to Neely, legislatures, at their inception, were designed to "do nothing." Commenting on the origins and the character of legislative assemblies, he observes:

> Parliament . came into being not to initiate change but to prevent it. Parliaments were overwhelmingly concerned with the protection of the lives, liberties, property, and power of society's upper and middle classes. It is not by accident that the war cry of the magnates of the realm of Parliament during the thirteenth and fourteenth centuries was *nolumus leges anglicae* mutare-traditionally translated as "the laws of England will

> never change." Here we have an express political commitment *to* the status quo in the strongest possible sense. Any student *of* the reign *of* Henry VIII in the second quarter of the sixteenth century when Parliament temporarily in eclipse is aware of the rapacious taxation, wholesale land appropriation, and un - bridled political tyranny than an unchecked power in the executive branch caused. While Henry may have gone down in history as *a* modernizing force who made succeeding generations much better off, during his reign the common man in England suffered a significant deterioration in his standard of living, largely because there was no conservative force *(WCDW 65;* see *also: HCGA* 18-19, *64-65).*

Legislatures that are dominated by interlocking privileges of powerful and particularized interests, reflect the system of existing relations and positions of power. Consequently, the legislator's task is dictated by these facts, and he is charged with preserving the existing *status quo.* Legislative proposals threaten existing relationships, and, therefore, are viewed unfavorably at the outset. Indeed, Neely says, legislators are seldom praised for what they do best, i.e., preventing the passage of much truly predatory legislation.

> The very structure of a legislature absolutely guarantees that during his or her career a legislator will have few *positive* accomplishments no matter how hard or selflessly he or she works. Therefore, *faute de mieux,* most legislators do the next best thing politically, which is to cultivate the support of those who have money and want help preventing other legislators from doing anything. The irony of all of this, however, is that for very good reasons it is almost impossible to change the structure of a legislature without providing a cure that is worse than the disease *(JJ* 109; see also: *HCGA 55-78; WCDW 65-70).*

The activism of courts is necessitated, Neely argues, because "a legislature cannot be designed which will pass good legislation in a timely manner and simultaneously prevent the passage of dangerous legislation" *(HCGA 47-48).* Every private interest that seeks an

advantage for itselfwill cast its appeal in terms of the contribution its desire will have for the "common good." Such rhetoric is illusory, he believes, because:

> When the words *reform* or *public interest law* are used in a political context they usually connote some scheme that will redistribute the wealth from private hands to *a* public authority, either for further transfer payments (such as welfare) to a class of persons who appear to be in need or to construct public works for general enjoyment. However, trying to support the public interest is very much like trying to referee a hockey game in the public interest *(WCDW* 66)

The nature of competing interests involved in the "public interest" indicates clearly the competing avaricious groups who intend to profit from any conclusion that may be reached. When plunder is available all plunderers will seek to maximize their advantage. Because this is the operative rule of legislative activity, Neely points out that legislaturesprobably perform their most significant role in blocking more "special interest legislation" than would be the case if theywere vital and active bodies *(HCGA 48-49, PLM 80; JJ* 100-110; *WCDW* 70-71). Speaking *from* his own experience as a legislator, he observes:

> At the heart of the negative process of a legislature is a system which brings very few issues to the floor for a vote. Given that most legislation is sponsored by powerful interest groups, the preferred method of protecting the common weal is to "kill" predatory bills rather than to "defeat" them ... The difference between "killing" and "defeating" legislation is that when a bill is "killed" very few people are on record as having voted against the legislation, while "defeating" a bill entails a record vote by the entire Congress or legislature *(HCGA 52).*

Legislators pay dearly for abandoning those whose support is critical for their election and re-election. The legislature operates with internal procedures that enable it to "bury" ill-advised legislation. This "political art" enables a legislator to appear to favor a particular-

ized interest while simultaneously sabotaging its efforts to obtain a particularized benefit through the legislative process *(HCGA* 52-53; *PLM* 87-90, *JJ* 109-114; *WCDW* 70-71).

> For those with urgent political agendas who are highly accusatory when they allege that legislatures are "do nothing," it should become apparent that a legislature is **designed** *to* do nothing, with the emphasis appropriately being placed on the *word* "designed." The value of an institution whose primary attribute is inertia to politicians who wish to keep their jobs is that a majority of bills will die from inactivity; that then permits legislators to be "in favor" of a great deal of legislation without ever being required to vote on it *(HCGA* 55; *JJ* 111-112).

The one saving grace that prevents the inherent corruption and lethargy of the legislature from wreaking havoc with the American political order is the fact that although powerful legislators *may, kill* legislation, they cannot *pass* legislation in any large quantities because of the built in limitations of opposing legislators whose continued reelection is tied to their ability to kill legislation adverse to those interests they represent *(WCDW* 64-65; *HCGA* 59, *PLM* 90). These characteristics of the legislature lead Neely to conclude that, "The most valuable thing which legislators have to trade is inactivity, because that is the product which they can most easily deliver. This simple fact alone accounts, to a large extent, for the do-nothing tendency of anylegislativebody" *(HCGA* 62; JJ109-110; *PLM* 86-94).

This lethargic character of the legislature is reflected further in the negativism each legislator feels toward the "salient" interest of his fellow legislators. The very nature of electoral politics, Neely comments, "is not calculated to foster cooperation and mutual aid.. .The clash of rival ambitions and the matrix of personal friendships frequently have more to do with the product of *a* legislature than any issue in elected politics" *(HCGA* 63; see also *WCDW* 60-69).

These conditions of the electoral system that produce legislative inertia, are added to by the influence of personal animosities and jealousies *(HCGA* 65-66), and the ever-present and irremovable pressures for the legislators to act to enhance their chances of reelec-

tion (JJ 110-115; *PLM* 139-144). Finally, bi-cameralism, which is a necessary guard against successful predatory legislation, provides an institutional mechanism for legislative inertia *(PLM 89; WCDW 64-65; HCGA 47-78).*

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According to Neely, the courts' role is to provide the legislatures with an opportunity to serve some constructive role. When the court's judgement disrupts a prevailing *status quo,* he holds, it effectively creates a sort of "structural due process," which compels the entire legislature to consider newly defined and identified issues "without the let and hindrance of the legislative process's inherent negativism" *(HCGA 75;* see also: *PLM* 95-105, *JJ* 51-72). In addition, the decisions of the courts compel the legislature to come to grips with "general interest" issues that have no specific or powerful constituency supporting them *(HCGA 74-76; WCDW 60-89).* In Neely's view, although the courts are not directly involved in the "give and take" of politics, they are nevertheless able to function in the most revolutionary way:

> Often the courts serve the function of anarchists--they throw a bomb on the assumption that if the status quo is disrupted, the new status quo, reflecting the new consensus, must necessarily be better. Unfortunately, since courts have become accustomed to using the fiction of an objective, immutable, principled Constitution to accomplish this goal, they frequently foreclose the legislature form rethinking the problem creatively. In a different context, Professor Guido Calabresi of Yale has written extensively on "structural due process," by which he implies the very phenomenon of overturning the status quo which I have been discussing. The advantage of adopting this new term for our purposes here is that it may permit courts to bring to a conscious level their anarchist function, take pride in it, and leave the development of the new status quo to the legislative process *(HCGA 74-75).*

In these ways the courts "become a useful aid to the democratic

process rather than a substitute for it" *(HCGA* 75). Neely approvingly cites the late Chief Justice Warren's comment that "the primary political function of the courts was to break the impasses that are inherent in any structure of balanced power" *(PLM 5).* The seizure of political power is not opposed by large segments of the population:

> There has been a wholesale shift in the center of political power towards the courts and away from the legislatures; executives, and administrative agencies. But this shift in the center of political power has not gone unnoticed by actors in the political process outside the court system', or by the community at large. Furthermore, it does not require unusual brilliance to perceive that much of the courts' political strength proceeds from the fact that judges have many of the endearing attributes of military juntas in banana republics. For many constituencies that are frustrated by the slow pace of change and the apparent indifference or corruption of other institutions in the democratic system, the courts offer the possibility of an alternative government -- a government independent of elected legislators and executives *(PLM* 152).

In his opinion, the courts seldom spawn the policies, which political predators routinely seek from legislative politics. However, he does make a concession in referring to the outcome of the Supreme Court's opinions on affirmative action, and points to the fact that such policies have become "predatory" *(HCGA* 71; *JJ* 68-70). Neely's attitude, which will become more evident when his explanation of the court is fully considered, is revealed in the following statement:

> Certainly a majority of the educated elite, as reflected by the attitudes of the faculties, trustees, and student bodies at major universities, consider affirmative action, although predatory, morally justifiable. It is just as certain, however, that a majority of Americans disapprove. There is no theoretical justification for continued court support of affirmative action other than the elitist one that the courts know from their superior education that affirmative action is necessary in the short run to achieve

> the generally applauded end of equal opportunity in the long run. That is probably not illegitimate, since judges are social science specialists and have available to them more information and have pursued the issue with more thought and diligence than the man on the street. Courts should probably be accorded as much deference in their decision over means as medical doctors,profess ionabrchitects,orplumbers *(HCGA 74).*

IV

In this he reveals a fundamental premise of his attitude toward the courts, and the nature of the American scheme of governance. He is an elitist. Unlike other elitists, such as those described in the above quotation, he is candid in his admission of this elitism and the value he attaches to the role elites play. Indeed, he credits the elitist features of the federal courts with the wisdom to conquer every social ill through judicial fiat. For example, he lauds the purifying affect of the Supreme Court's reformulation of criminal law throughout the United States *(WCDW* 125-163), with removing state control of the welfare of its citizens through libel laws *(PLM* 103-105), and he believes that the solution to problems presented by the law of product liability can be resolved constructively and intelligently by the federal courts *(PLM passim).*

Neely's attitude toward federalism is consistent with the great faith he displays in the federal judiciary. He pictures three "paradigms" of federalism-historical, result-oriented, and practical *(PLM 106).* Historical federalism, he argues, has "been repealed by history" *(PLM* 108). The dynamism and compelling necessities entailed in the growth of a dynamic nation, make the arguments associated with "historical" federalism, really anachronistic: "Whatever theory of decentralized government prompted the original constitutional vision, all of the practical conditions that underlay that vision have changed so dramatically that historical federalism no longer makes any sense. Ordinary citizens...look to the national government for help" *(PLM* 110).

"Result-oriented" federalism results from the fact that given congeries of power in a particular state find their interests at odds with centralized control and power, and, therefore, urge the adoption of a "states rights" position in order to defend their particularized and parochial interest. According to Neely, there is no unifying principle undergirding this particular defense of federalism; rather, arguments in its defense are directly related to particular issues. "Result-oriented" federalism, he says, "is simply a matter of political muscle combined with some conclusions about whose ox is being gored. Although result oriented federalism is of enormous practical concern, it is unworthy of being taken seriously in terms of legal principles" *(PLM* 112).

Neely's concept of "practical federalism" fits well into his analysis of American law and politics. The beneficial affect of this type of federalism, he says, is that it "inspires competition among *governments* in the same way that free enterprise inspires competition among private *businesses" (PLM* 112). Neely feels that states compete with one another to attract business and economic growth. Consequently, there does not exist a permanent coalition of economic power in given states. The everchanging "distributional coalitions" energize American society and facilitate continued economic development and growth *(PLM* 113-116). In addition, "practical-federalism" is more efficient in the handling of administrative details, than is centralized direction *(PLM* 116-122).

In summary, given the changing nature of American society from the days of the founding to today, federalism has no principled defense. Its defense and its credibility, according to Neely, is purely a pragmatic one, and as he observes: "As administrative units, the states have proven highly successful, and federalism as a practical principle has proven remarkably resilient" *(PLM* 127).

If states are left free, however, to fashion their own remedies and responses to economic, social, and political matters, unfortunate things will happen. This point is highlighted in his defense of the federal courts fashioning a national standard for product liability law, and his desire to remove the role of the state courts in defending their citizens from defective or dangerous products *(PLM* 53-56,169-174).

Such an important matter as this, Neely maintains, results in a "competitive race to the bottom" *(PLM 57-79).* Neely uses the *Pennzoil v, Texaco* case to illustrate the "damage" that is done to national businesses by local state courts operating under their respective state standards *(PLM* 34-37, *62-63).* On this score, he comments: "But when each state's system is in the business of redistributing wealth from out-of-state defendants to in-state plaintiffs, as in the *Texaco* case, the caprice of an infinitely flexible set of principles becomes hazardous to our commercial health" *(PLM 45).*

Neely's solution is to propel *all* product liability into the federal court system. His contention is that federal judges uniformly are better educated and more competent, and, in addition, he feels that this is recognized by all litigants "[both] big and small, [who] flock to the federalcourts because of their professionalism and superior administration appear to produce a better brand of justice" *(PLM 38;* see also: JJ *28).*

Neely feels that uniform, consistent, efficient, and equitable standards can only be fashioned through the action of the federal courts. Independently operating state courts, he contends, create uncertainty and a lack of uniformity that is contrary to sound economic practice. "Where there is no nationally imposed unity," he writes, "state judges are victimized by the race to the bottom by being forced to do things that they know are wrong both from the perspective of sound national and sound state policy" *(PLM 75).* Consequently, remedy of this situation must come from a national source, and Neely is convinced that it cannot come from the legislature. Therefore, he concludes:

> Whether any particular area of business-related law should federalized is not a question of political philosophy or legal principles; it is entirely a question of fact. When the sociological dynamics of separate, unrelated court systems makes it *impossible* for courts to follow a rational, national industrial policy, then the Constitution's commerce clause implies that federal control of the subject-either through the courts or Congress is appropriate. But because .. it is eminently unlikely that

> useful legislation will come from Congress, the burden of law unification-implying as it does at least an implicit industrial policy-must fall on the federal courts *(PLM 79).*

Proceeding from the assumption that a "national industrial policy" is both desirable and possible, Neely feels that the best way for the handling of product liability issues would be for Congress to enact a law allowing the "federal courts to establish a national law of product liability" *(PLM 169).* He believes that the federal courts are best equipped for this type of "national supervision," and notes approvingly the benefits that have been bestowed upon all of us by virtue of comparable developments in the fields of criminal procedure and the law of libel. After citing the disparities between the myth system and the operational order which characterized the administration of criminal justice prior to the 1960s, he points admiringly to the role the federal courts, and particularly the Supreme Court of the United States played, in removing some of the most glaring disparities. He writes:

> In summary, then, a quantum leap was made in the whole administration of the criminal justice system from *1960* to 1980 as a result of the development of constitutional standards through the creative imagination of the courts. None of this was mandated by the U.S. Constitution itself... The reason for their [federal courts'] success *was* that they *took* institutions which were performing badly and made them perform better *(HCGA* 161-162).

In this process, the courts could overcome the rigidities and inertia of the political institutions and provide beneficial changes in the operational order, which could never have come about through the political process *(HCGA* 163-67).

Similarly, Neely praises the U.S. Supreme Court's decision in *New York Times v. Sullivan,* which overturned a state law that operated to place a damper *on* the exercise of a newspaper's power to engage in libeling citizens in the name of news coverage. Neely observes that the effect of this case *was* to remove all vestiges of "product liability" law for the media, and "opened up virtually unlimited

profit-making opportunities for newspapers, magazines, and broadcasters" *(PLM 104).* Further, state courts, operating under the standards laid down for them by the Supreme Court of the United States, are, in effect, compelled to abandon their own legal orders' standards of liability for slander and libel *(PLM* 103-105).

Thus, Neely believes that the benefits that flow from federal court supervision over a wide range of matters-including at least criminal procedure, libel and slander laws, and product liability-constitute a benefit to the nation at large, which can be provided primarily by the use of the power of federal courts.

V

In his examination of the defects of the executive branch, Neely points to the enormous gulf between the myth of American democracy and the operational order as this is evidenced in the executive branch of government. The solidly entrenched national bureaucracy has continued through administrations and, consequently, is immunized, for all intents and purposes, from direct control by the "chief executive" or the democratic process. As he observes, "The myth of democratic control becomes even more ironic when it is remembered that in addition to the ratio of elected officials to civil service employees, neither presidents nor governors select the civil service; its members are passed on from administration to administration" *(HCGA 80).*

In addition to those bureaucracies which are technically accountable to the chief executive, there are bureaucracies which are not accountable to anyone, such as the Federal Reserve Board, the Federal Trade Commission, etc. Commenting on this fact, Neely states "that one reason that the independent boards were created was *intentionally to* remove them from political control" *(HCGA* 81). He wonders, therefore, "What does this do to the theory of democracy?" *(HCGA* 81; see also, *JJ 120).* He argues for court supervision of the bureaucratic elements of government, both those which are independent of legislative or executive control and those which are technically under the direct control of the executives. Such supervision, he believes, is necessary for two reasons. First, there is no other

institutional arrangement capable of such supervision: "The incapacity of the political organs of society to control the bureaucracy has forced that function on the courts" *(HCGA* 103). Second, substantive and vitally important matters are delayed and frustrated by the very nature and ethos of bureaucratic behavior, and the institutional bias that produces institutionally created error. The courts are not prone to these *vices.* As Neely comments:

> Although courts are superior institutions for reviewing policy, they may be just as wrong as any administrative agency. The difference between a court and an agency, however, is that the court does not have any *institutional* bias; it merely has the bias of the individual men and women in the judicial system . . . [and further] .. the reason that we have entrusted the courts with administrative review is that there is a lower probability of institutional error *(PLM* 112-113).

In answering the allegation that the judiciary can be mistaken as well as the bureaucracies, and that there is, therefore, no basis to defend judicial supervision of the bureaucracy,. he argues that the "courts are not likely to be wrong as the agencies; while they are equally susceptible to human error, they are almost immune from institutional error" *(HCGA* 81; JJ.122-126), He maintains that the judiciary does not contain the inherent flaws of the bureaucracy. Bureaucracies, as he notes, grew and developed into their current powerful state as a result of two imperatives. First, to serve as a cushion for the elected legislators who were loath to pass unpopular regulatory legislation on a regular basis; and, second, to reduce the amount of governmental corruption by removing significant decisions "from the hands of elected officials who trade for their own accounts" *(HCGA* 83; see also, *JJ* 120-121).. The emergence and growth of bureaucracies, however, created a new problem, i.e., how to control and overcome the "self interestedness" that characterizes ongoing bureaucracies. Neely describes it thus: "While they [bureaucracies] are not tempted to individual self-dealing in the same way as elected political officials are, they are nonetheless tempted to institutional self-dealing, that is acting in such as way as

the further the ends of the bureaucracy as a whole" *(HCGA 83;* see also, JJ 124-126). He argues that the political agencies of government legislative and executive-are not capable or are unwilling to exercise control over bureaucracies, and, consequently, "control of the bureaucracy has forced that function on the courts" *(HCGA* 103; see also, *JJ* 119-123). Neely observes that there are problems with such judicial control. "Courts," he says, "frequently reverse perfectly legitimate and necessary actions; frequently court procedures delay government actions to the point where costs become prohibitive; and frequently courts have an insufficient arsenal of weapons to attack the most wearisome problems of bureaucracy" *(HCGA 103,* see also, *JJ* 119-132). Nevertheless, the courts provide the only operative and effective institution for the control of bureaucracy. The institutional nature of the courts provides a rational mode of review, and an ample opportunity for a full hearing of the issues being resolved. Procedural regularities within the bureaucracies do not provide this, nor does "technical oversight" by the chief executive. The courts' supervisory role enables them to reconcile the myth of American democracy with the American democracy's operational reality. Courts, unlike the legislatures and the executives, are

> particularly suited to passing certain types of general interest legislation . . . [and] courts are peculiarly suited to combatting bureaucratic self dealing. In addition, courts have historically demonstrated a peculiar competence in protecting the private, free market economy from obliteration or absorption by the government sector. Finally, courts are able to shift the responsibility for truly important decisions away from young Ivy League-trained but inexperienced lawyers and administrators into the hands of older, more experienced, and truly more representative persons from all over America who have no institutional stake in the outcome of any given issue *(HCGA* 113; see also JJ 120-122).

The institutional imperative and biases of the bureaucracy often frustrate the delivery of services and the servicing of interests for which such bureaucracies were designed. Individual citizens sel-

dom find successful redress within the bureaucracies, and it is the courts that have proven effective in breaking up this bureaucratic "log jam." In effect, the courts perform a disciplinary role for the bureaucracies, which they are unable to craft or operate for themselves. As Neely observes:

> It should be noted that all of the functions to which the courts are institutionally suited in this supervisory role over the bureaucracy are essentially "nay-saying." The court **forbids** government from involvement in the private sector; the court **strikes down** agency rules; the court **modifies** or **reverses** particular adjudicatory decrees. Although we found that in their interactions with the legislative branch, the courts were generally **positive,** to compensate for the inherent negativism of the legislature, in their interactions with the executive branch they are basically negative, to compensate for that branch's inherently **positive** orientation. The essential mission of the courts in bringing the myth system and operational system into alignment involves supplying balance. Our look at court positivism with regard to legislatures and negativism with regard to the executive should prove, at least, that courts are performing a balancing role (*HCGA* 114; see also, *JJ* 119-132).

The courts in their rulings may impose values, but, because they are staffed with persons with broad experience in the affairs of the society, Neely feels that these are values which are most likely to be reflective of those held by the majority of the society (*HCGA* 114). Consequently, the courts, in those instances where they review bureaucratic action, most likely reach decisions that comport with the broadly shared values of the citizenry and in this way are distinguished from bureaucracies.

VI

Courts enjoy the success they have in guiding and conditioning American democracy, according to Neely, because they establish their own parameters of action. Courts, particularly at the federal level, but also at the state level, can determine issues on the basis of

"constitutionality," and, therefore, the executive and the legislature are placed at a serious disadvantage. In such instances, when the courts speak, the legislature and the executive must either cede the power in question to the courts or effect control through the cumbersome mechanisms of impeachment or amendment. Seldom do the political branches have the will or the dynamism to effect either, According to Neely, the one effective instrument employed by the other branches in restraining court activity and authority is to keep the "number of judges very small and judicial staffs quite lean" *(HCGA* 145). In addition, the legislature has the real power to restrict the flow of money in support of the judiciary, and even though the legislature might be restrained in cutting incumbent judges' salaries, they can, and do, withhold increases, and short them on facilities and personnel. Consequently, he says; the courts' choice is to wage a guerilla war with the legislatures, realizing that there are finite limits to the amount of control they can exercise over this coordinate branch. Any direct and unequivocal challenge to the legislature would result in a hot war in which the judiciary would be the loser. As he maintains: "When the other branches begin a hot war of active resistance, however, the courts have the rifles, while the other branches have the heavy artillery" *(HCGA* 147).

Neely cites the reforms in criminal law, which were accomplished in the course of the sixties, as illustrative of the type of positive action that can be taken by the courts in directing society to practices which comport with the myth of American democracy. Judicial management in this area proved effective because of the identifiable disparity between what persons assumed civil liberties meant in the face of police action and the reality of what existed. Judicial action was needed since the primary victims of this disparity were minorities who had little recourse in the political arena. In addition, significant changes instituted by the courts could be achieved without massive expenditures of money. On top of this, there was no practical way for the other political institutions to provide a remedy, even though there was a general consensus in the society about what such reform should be *(HCGA* 168; *WCDW* 129-136). According to Neely, therefore, when the courts have available to them identifiable

standards, clear indications of the nature of the disparity between the myth and the operational order, and can provide solutions by the use of the judicial system alone, the conditions are optimal for them manage the affairs of a society. As he observes, in the area of criminal law, "The standards were clear, and while the means are certainly controversial; they were exclusively within the courts' control and did not place an impossible administrative burden on the judicial system" *(HCGA* 168; see also, *WCDW* 125-154).

The courts, Neely maintains, can institute and maintain significant reform, not only in the area of criminal law, but also in economic matters, family matters, and social issues. The relative success of courts is tied in part to the degree to which they can approach the problem and fashion remedies in ways that appear technical. As he observes, "The closer a decision comes to being purely technical, the greater the legitimacy of court action, while the closer a decision comes to being avalue judgement rather than a technical judgement, the less legitimate the court's decision" *(HCGA 43).* Other limitations affect the relative inability of the courts to deal with all social, economic, and political problems that beset the society. Obviously, the most apparent stems from the small number of judges. As Neely notes, this is not the result of oversight, but the consequence of legislative assemblies and executives who understand the potential threat that could be posed to their respective power positions by the addition of more courts. "The best way to reduce court intervention into political matters," he writes, "is to keep the number of judges so small that the work load will force them to devote their efforts exclusively to trying criminals and hearing automobile accident and domestic cases" (WCDW 25: see also, JJ 52-53). But even this would not remove courts' influence completely, for they would continue to play an important role in reformulating and refashioning the law. Moreover, he feels that even though there is a tactical disadvantage that results from a small judiciary, this is amply compensated for by the prestige that the judiciary enjoys in society.

> The force which permits the judiciary to survive popular reproach for unpopular decisions is its incomparable prestige.

> Unless a judge is remarkably cavalier about the ethics, traditions, and responsibilities of his profession, he knows that judicial prestige-acquired through a reputation for decisions made without regard to personalities or anything but the merits of the case itself-may be perpetuated only by his, and his colleagues good behavior *(HCGA* 196).

Despite individual aberrations in their conduct, most of the judges in the country, Neely believes, observe the relatively restrictive rules that govern their personal lives. These rules, among other things, restrain their social contacts and most assuredly their professional contacts. The latter are governed by formal rules that determine when, and under what conditions, judges can deal with those who practice before their courts *(HCGA 196-204).* In addition, there is little opportunity for "self-dealing" of the type that is the standard for political actors in the legislative and executive branches. The ethical code of the judiciary condemns all forms of "self-dealing," with the result that, if it occurs, it is considered an aberration and an unacceptable standard of behavior for a judge that may be dealt with through some form of disciplinary action by the judiciary itself *(HCGA* 192-193).

There is also no opportunity to build one's "power" or control" as a judge that is effective over other judges. Judges are virtually independent of all other judges. Appellate judges do have the opportunity to overturn the rulings of those at the trial level, but such an exercise ofjudgement is predicated *on* the standards mandated by the law, and not the manifestation of a superior dealing with *his* subordinate. Judges, unlike other practitioners in politics, do their own work. "The judiciary," as Neely observes, "is the only branch of government which absolutely requires that the person making a decision do his own work; the decision-maker must personally sit on the bench, hear oral arguments, listen to the testimony of witnesses, make his own findings of fact and law, and ultimately sign his own name to the order rendering a decision" *(HCGA* 201; see also, *JJ 54-58; PLM* 152). The judiciary is a completely "decentralized" institutional arrangement. Neely feels that this fact is historically explain-

able, and has significant affects on the role the courts play and the power which they possess. Regarding the historical origins of this decentralization, he observes:

> Courts, it must be remembered, are essentially medieval in origin, and they evolved--they were not made. The most important medieval quality which persists into the twentieth century is that courts are decentralized both within and among jurisdictions. We usually accept the inherited structure *of* the courts *as if* it were an inevitable feature *of any* court system, but *in* fact it is merely a historical accident. American courts followed in direct succession the English model that existed in the colonies without ever missing a stitch. After the American Revolution the development of American and English courts diverged, leaving American judges with substantially more political power than their colleagues across the ocean, but many of today's courts' strengths and weaknesses can be traced directly *to* their medieval roots (WCDW49; see also, HCGA203-204).

This decentralization; however, serves the courts' power quite well. The original model *of* the court was designed to provide *for a* "sovereign presence system in the far-flung shires *of* England" *(HCGA* 204). Consequently, judges acted as "surrogate sovereigns" and the model that was constructed and adhered to was one *of* decentralization *(HCGA* 204-205).

The benefits *of* retaining this decentralize model, Neely writes, are evidenced by the fact that it gives life to the myth system's ideas of accessible government, which can be protective of the individual citizen's concerns and rights. As he *describes* it:

> This surrogate sovereign [the courts], unlike the real one [the legislature and executive], is available to everyone who cares to drop by the clerk s office and make an appointment by filing a complaint, and the judge will listen almost as long as an aggrieved citizen, or his lawyer, wishes to talk. That is an institutional advantage completely unrelated to the men and women in the institution--it provides institutionalized, decen-

> tralized decision making as a counterbalance to the **Washington, D.C. v. Smalltown, U.S.A.** bureaucratic deadlock.... While the decisions of the trial courts may have to pass appellate review, once they have been made the burden is on the government agency, if it has lost, to sustain its position on appeal. Frequently, no appeal is taken, and the lower court decision decides the issue *(HCGA 205).*

Even though the courts are at a disadvantage, in terms of "raw power," in any confrontation with the legislative branch, they nonetheless have "tactical" advantages that enable them to maneuver and act without arousing the ire of the electorate. First, the courts operate completely in the open. The opinions of the courts, particularly at the appellate level, are readily available for examination. The conduct of the courts is governed by knowable rules governing both procedure and use of evidence. Judges may not communicate with only one of the litigants in matter before him, and almost all of the actions and decisions of the courts are public records *(HCGA* 191-193; *WCDW43-59).* The result is that the courts appear "to be the most neutral and objective" branch of government *(HCGA* 193).

Judges are "muzzled" in that they are prohibited from speaking "out on controversial issues" *(HCGA* 194; JJ51-58). Judges' financial dealings are subject to careful scrutiny and all their affairs must be conducted with circumspection in order to avoid even the appearance of impropriety. The most critical restraint on judicial behavior and practice, Neely believes, derives from "the most important commodity which the judiciary has to sell," namely, no self-dealing." Indeed, the molding of the institution through the centuries," he maintains, has centered around that single desideratum *(HCGA* 195; see also, *WCDW 43-59; JJ* 51-72). Self-dealing among and between legislators, politicians, and their constituencies, Neely notes, is not only permitted, but indeed, is a standard avidly adhered to by all parties *(HCGA 195; JJ* 95-115). All of the factors that hedge in judicial behavior enable the judiciary to enjoy an "incomparable prestige," which reinforces the presumption that the decisions that emanate from the judiciary are nōt fashioned from self-dealing, prestige

enhancement, economic benefit, or personal biases and prejudices (*HCGA* 196-97; *JJ* 51-73).

> The force which permits the judiciary to survive popular reproach for unpopular decisions is its incomparable prestige. Unless a judge is remarkably cavalier about the ethics, traditions and responsibilities of his profession, he knows that judicial prestige-acquired through a reputation for decisions made without regard to personalities or anything but the merits of the case itself-may be perpetuated onlybyhis, and his colleagues,behavior(HCGA196; see also,PLM 18-19;JJ55-56).

The institutional arrangement of the judiciary, at both the national and state levels is such that no one judge had "real power," as this term applies to individual legislators or members of the executive branch. To be sure, individual judges may have "petty, personal, [and] vain power," which is exercised to make lawyers in their courts uncomfortable or acquiescent, but that does not translate into a power to refashion the law to suit their preferences. The institutional design of the judiciary makes such an exercise of individualized power in the "fashioning" of the law minimal (JJ 51-73; see also, WCDW 43-59). Appeals courts, and fellow members of the bar and bench, all serve as guardians of the courts. Ill-conceived or erroneous decisions can be overturned, and faulty reasoning and argument can be ridiculed (*HCGA* 200-201). Concerning the institutional strictures that operate on judges, he writes:

> It might be argued that power is one thing a judge has to gain. Individual power, in the judiciary is an illusion--the only real power is the power of the institution. A trial judge has the most individual "power," because he alone controls his courtroom, makes lawyers argue cases or present briefs on certain days, and can decide motions and cases like a tyrant. Although the trial judge can make the lives of the people actually in his court miserable, he has no policymaking power, because his decisions must follow the policy pattern dictated by higher courts. If he seeks to innovate, he must be prepared to be reversed by

> the court above him, although he may have the dubious pleasure of putting the litigants in the cases which are reversed to the expense and inconvenience of an appeal. If a trial judge has power, it is a petty, personal, vain power, exercised accord ing to personal caprice by only the most insecure, small-minded, and dim-witted judges *(HCGA* 199).

Finally, judges do their own work *(JJ* 51-72; *HCGA* 201-203). The most prestigious judgeships are characterized by the skeletal staffs they employ, unlike senators and representatives whose staffs are bloated and extended to the degree that they resemble minor bureaucracies. Judges are compelled at some point in the operation of their courts to be personally and directly involved. Although a judge may delegate considerable latitude to his clerks to do research and write opinions for him, he must be present at all hearings and conduct them alone and unaided. All opinions issued by his court are attributable to him alone, and it is presumed that it is his individual talent and judgement that finally is impressed upon the decisions that come from his court. In this connection, he observes:

> Although judges have clerks and occasionally individuals known as "masters" or "commissioners" to take testimony, analyze documents, and do wood-hewing and water-carrying in complex cases, most of the time (and always in jury trials) judges hear and read everything of importance themselves. Of course, judges have differing ideas about what is "important." But in the executive branch decisions are made by entire independent divisions, and in the legislative branch most of the voluminous technical work is, out of necessity, done by the young profes sional staff of legislative committees. The judiciary is not even subject to the normal temptations of empire building because everything must ultimately be done by the judge (JJ *59;* see also, *HCGA* 201-202).

Having said this, however, Neely goes'on to discuss the institutional weaknesses and biases of the court system. While legislatures are defective because of their lack of activity and lethargy, the courts,

he argues, "often err because they are too eager to correct one abuse without consideration of new abuses their decision will create" *(HCGA 207)*. Simultaneously, though, the courts may be wrong because their slow and deliberate processes impede necessary action *(HCGA* 207). While it seems paradoxical that the courts may err in both directions at the same time, such discretionary authority serves the courts very well because it enables them to do what they do best, i.e., to strike balances in conflicting situations.

> But courts have always been interested *in* balance, andthey have, therefore, designed different techniques for handling the prob - *lems* posed by the institutional infirmities of the legislative and executive branches, respectively. Public law litigation, with its sloppy representation, is slow-far slower than executive action, but nonetheless it is much faster than the legislature. Judicial proceedings impede precipitate executive action, but they are delaying tactics and not final prohibitions like statutory amendment by the legislature. While the courts move at about the same pace in all cases, their effect is either to delay or expedite depending upon the pace of the branch they are balancing. As all the mistakes are *not* in the same direction, the *system* usually works within tolerable limits *(HCGA 208)*.

Nevertheless, Neely believes that some court reform particularly that reform which would revamp and streamline procedures, would be beneficial. He maintains that part of the failure to engage *in* such reform stems from the failure to distinguish between commercial and criminal litigation *(WCDW passim)*. Administrative law, in particular, deals almost exclusivelywith commercial matters, and substantial reform in this area is absolutely necessary and possible. The ponderousness of administrative law and the difficulty of continuous judicial review on administrative actions, all point to the necessity of such reform that should include "an entire recodification of administrative procedures" *(HCGA* 211). Judicial review of administrative action, Neely observes, is presently

> used as a counterweight to certain limitations or imperfections

> that exist in any bureaucracy. Among these limitations or imperfections are (1) the tendency of agency decisions to be dictated by illegitimate political considerations; (2) immaturity, ignorance; and lack of judgement on the part of agency staff; (3) the tendency of agency decisions to make with a view to strengthening the power position of funding level of the agency as a whole; (4) employee laziness; and (5) agency lack of flexibility (JJ 124).

Notions of reform that relate to modes and methods of judicial selection are both unnecessary and unproductive. Increasing the size of the judiciary would, in itself, do little to correct the problems of judicial slowness *(WCDW passim).* Attempts at determining a judge's fitness by some standard of "ability" promises even less satisfactory results. Screening processes that involve interested groups, such as the organized bar associations, will slant all choices in favor of those members who reflect the general attitudes and preferences of the organization. In addition, Neely notes, there is no discernible difference in the ability or personality of elected and appointed judges. In fact, he holds, almost all judges, with a few singular exceptions, "lack a sense of their position in the overall political structure" *(HCGA 215).* Nevertheless, the institutional structure of the courts guards the entire society from the relative inabilities or biases of the individual judge: The system yields good results because in this respect it is set up like the army: an organization designed by geniuses which can, when necessary, be executed by idiots" *(HCGA 2159).*

Any sound evaluation of the courts, their prospects for performing their tasks well, as well as the issues of reform, Neely believes, must proceed from an understanding of their function."

> Once we are willing to admit that courts have political roles which are dictated by the nature of other institutions, we can begin to speak to those roles directly and not in the slave language of constitutional interpretations, statutory construction, or result-oriented standards of review dressed up as

> neutral principles. The recognition that public law litigation is vastly different from private law litigation and that the procedures should be altered accordingly will help a little. Finally, it should be recognized that we cannot really attack judicial delay across the board, but that we can incisively attack it in certain critical areas, which will go a long way toward furthering the "reindustrialization" of this country *(HCGA* 216).

VII

Neely's survey of the American political order, the role of the courts, and the interrelationship of politics and law is completed by his observations on the state of the legal profession. The economics of legal practice determine access to legal services; "It is ability to pay, not need, that determines the distribution of lawyer services, just like other services" *(WCDW* 215). Obviously, large law firms with corporate clients provide the most legal service and charge and get paid the most. As Neely writes:

> If we ask then why business gets such superior legal services to those offered either the poor or the middle class; the answer unsurprisingly is that business can afford to pay. If business comes to a big firm with a losing case, the firm processes that case with diligence, enthusiasm, and expedition because the meter is running just as it would on the best case in the world. There are few contingent fees, no efforts to minimize charges, no need to choose between demands of competing clients based on urgency, and finally, no need to postpone because of the human limits of the lawyer or the demands of his family (the firm just hires more lawyers) *(WCDW* 220-221).

His comments on "big firm" practice are both illuminating and correct. In discussing the economics and success of the large firm he remarks: "Like a Holiday Inn as compared to a small, family-run hotel, there are built-in inefficiencies. The advantage of a big firm, however, is that the client need not rely on the talents of one person.

There is an organized, collective intelligence that has perpetual life and few human failings" *(WCDW 220).* The saving grace of the profession is to be found in the small firms, or the individual general practitioner who is not a "billing hour" automaton. Their practice is certainly as hard and demanding as that of the lawyer in the "mega firm," but this smaller practice comes closer to representing the model of the legal profession. Much of what adversely affects the praētice of law in America, Neely maintains, is directly attributable to the many failings of legal education. The game of "prestige law schools" Neely contends is almost fakery. As he puts it, "Today there are few really poor law schools in the United States, and many of the previously mediocre institutions are a match for the Yale, Harvard, or Columbia of twenty years ago" *(HCGA 225).* Competition for admission to law schools is intense because of the sheer numbers of applicants. The entire process, however, is geared to assuring that the criteria employed for selecting candidates for admission penalizes well educated persons. First of all, Neely condemns the heavy reliance law schools place on the " `game type' test called the Law Boards." As he observes, these tests for the most part measure an applicant's ability to take the test," and nothing else *(HCGA 225).*

Furthermore, Neely goes on to observe, law schools admissions procedures are specifically designed to

> penalize anyone who attempts to get a real education. The only academic criterion is grade point average, which means an applicant with an "A" average in government or sociology-notoriously unstructured subjects where evaluation of performance can be very subjective-will have preference over the person with a "B" average in physics, a very objective subject at the undergraduate level. In addition, the serious government student who wants to go to law school but who feels a need to know something about physics, mathematics, and economics, dares not take a course in any one of these subjects lest his reduced natural aptitude cause him to lower his overall grade point average *(HCGA 225).*

He points to the reward that stems: from "good grades" at law schools,

which is primarily the chance to be hired by a "big law firm," which translates into "big money. The fact that law school does little in the way of preparing one to practice law, is studiously avoided by the "big firms" which rely on their size to overcome incompetence. He observes that "Lawyers who have practiced know that graduating from law school and practicing law are two entirely different matters" *(WCDW* 212). Moreover, he comments: "Usually it is assumed that when a person comes out of law school, he or she understands the legal system and knows how to get things done. In fact; this is not true; unless a lawyer develops a narrow specialty, each client's problem requires extensive study of a new body of law" *(WCDW* 213). For Neely, the real heroes of the American legal process are small firms or solo "general practitioners" whose role in the profession probably more closely approximates the role of a professional devoted to the profession, and not the economics that move large firm law practice.

> The lawyers who have most of the business are overwhelmingly generous and may actually represent as many as half their clients on a subsidized basis. In addition, good lawyers advise local charities, serve on school boards, and assist community groups. Some of this helps build a practice, but self-interest alone does not explain the hours devoted to these activities by lawyers who already have more business than they can handle. (WCDW22I).

In contrast, he observes the "big firms" serve different clients and for different reasons. To this point he writes:

> Selecting a big law firm is like selecting a Holiday Inn. Often its lawyers are not as skilled as lawyers practicing in smaller firms, but on the other hand it seldom does a truly incompetent *job.* In the same way that a traveler to a strange city chooses a Holiday Inn because its quality is standardized, a business client coming to a strange city chooses a large, established law firm *(WCDW220).*

Having surveyed the legal landscape, Neely modestly discusses the problem that we all face in dealing with an operating system

which, he feels, few understand, and even fewer appreciate. He points to the cumbersome and grossly inefficient Soviet system that dampens and destroys innovation and competence. It is a paradox, he maintains, that:

> Russian communism speaks boldly to the whole world's love of ideas and ideals in a way which I cannot duplicate in a book devoted to the greatest social, economic, and political triumph in the history of governments. It is ironic that even the young of this country resist being inspired by the totality of our evolved system and instead are attracted by the easy abstractions of both the left and the right ... Justice or equity in any social structure is inherently a function of complexity, and complexity usually involves paradoxes. Neither complexity nor paradox lends itself to successful propaganda *(HCGA* 221).

VIII

Most assuredly, Richard Neely is no propagandist. He writes all of his books from one perspective, that of a candid, outspoken, and honest observer of the legal order in which he plays a critical role. Certainly he is one of the most productive writers in the field of law who has had practical legal experience. Unlike academic writers, he has reflected in his writing a certain cynicism about the presumed nature of legal practice, but it is not adefeatism that he writes about. Rather, he is optimistic about the capacity of the American political order to function in ways that tend to bring the "myth" system and the "operational" order into some kind of harmony. Certainly anyone who teaches in the field of law should read these books and pay attention to what Neely is saying. His great value is the descriptive reality it reflects about the current state of the law. Even if one disagrees philosophically with his premises, arguments, and conclusions, his insights into the nature of the legal order, legal practice, legal education, and the abandonment of rulership to the federal courts are all worth considering.

Neely strips the liberal rhetoric away and describes in clear cut

detail the importance and power of legal positivism as it exists. His candor is appreciated even more when it is observed that, even though he is a judicial activist and a legal positivist, he is willing to test his philosophical assumptions and their affect on his judicial decisions before an electorate on a regular basis .[2] The people of West Virginia are satisfied with his conception of law and he explains his position very clearly in those opinions he authors. Legal positivists and judicial activists are less dangerous when they are required to obtain the endorsement of the electorate for their views. Their real danger to the constitutional order is posed by their presence in the federal judiciary. In these lifetime sinecures they are immunized from the people they presumably serve; they are oblivious to the sentiments of the public; and, for the members of the Supreme Court particularly, they live in splendid isolation from the real world and are captivated by sharing a role in the imperial government. Richard Neely, in contrast, lives in and among the good people of West Virginia. They can read his books, talk with him on the telephone, or visit him in his office. He is ready and willing to defend his position and let the chips fall where they may in the electoral process. He maybe criticized for his legal philosophy, but never for his honesty, candor, and forthrightness.

This is not to say that there are not grounds, and solid ones, for criticizing Neely's writings. The first and most obvious is his defense of elitism in governance. His analogy of the judiciary with the doctor, architect,, plumber reveals the same kind of misunderstanding that he associates with the "educated elite," namely, that most of us may "feel" something, but the "elites" "know something." Yet, on his own showing, this supposition is hard to support. Neely is fully conscious of the perilous state of legal education in this country. The pretensions of the "prestige law schools" are shattered by his own experiences at Yale Law School where the "intellectual, theoretical courses...seemed nonsense" andwere "all form and no function" (HCGA 2). He is aware, that is, of the

[2] In all fairness to Neely, one must mention that he feels that his book *How Courts Govern America* is in reality a plea for judicial restraint. This view of this book is shared by one reviewer--Chief Justice Vincent McKusic--in *The American Bar Association Journal.* Neely himself feels that this was the intent of the book, but realizes that what the author intends may not affect what the readers of his work conclude that he is saying in it.

"distance" between the conduct and substance of contemporary legal education, and what is needed for the successful practice of the law. Surprisingly, while Neely points to the problem, he does not even suggest an obvious solution, restoration of the path to the legal profession by means of apprenticeship.

There are also firm grounds for questioning his admiration for a confidence in the federal judiciary, particularly the Supreme Court. Neely's arguments for the desirability of judicial activism are highly questionable, if only because the Supreme Court in the last fifty years has exceeded the traditional boundaries of judicial authority to impose its values on society. We need only turn to his discussion of *New York Times v. Sullivan* to see how meddlesome the Court has *become.* He points out that this case, although it is predicated on free speech rationalizations, has more to do with the Supreme Court's imposition of financial and business doctrine. He observes that *the Times* case "eliminated in one stroke the only `product liability' hazard that threatens the media industry" (PLM'105; see also, *JJ* 177). The effect of the *Times* decision is that persons who are objects of the media's libelous attacks are powerless to hold them accountable in courts of law, and that if a state court system has the temerity to impose penalties for what is a standard common law tort, the federal courts, *in* obedience to the dictate of the Supreme Court, will vacate such judgments, no matter how well deserved they may be.

Another salutary effect of the *Times* ruling, according to Neely, is that it hampers "eccentric local law" *(JJ* 177; *PLM* 103), a result which he acknowledges conforms with "the Court's political agenda" *(PLM* 104-105). While legal positivists seldom speak with such candor in describing the federal courts active political role *and* agenda, Neely actually praises it. In this connection he goes on to remark that "libel and slander have implications for the political process, and although the profitability and continued survival of the news media are at stake, the issues spill over to other questions involving the society wide distribution of wealth and power that concerns the Supreme Court" (JJ 177).

His conclusion leads to the question, what business is it of *an* unelected body, whose constitutional charge is very limited, to be

concerned about the distribution of wealth and power in the country? Distribution ofwealth, unless it is a result ofpatentlyillegal activity or the result of forced redistribution schemes of the national government, are of no concern to the Court. This is particularly the case if the only criteria for the Court's decision are the eccentric and personalized views of nine persons who have found their way onto this Court by various and sundry paths.

Neely concludes that the *Times* decision was beneficial in providing for the protection of "robust free discussion *in* the press" *(PLM* 162). But it is certainly debatable whether the media provided as free and robust a forum of discussion as he maintains. Considerable information exists which indicates that the media either (1) do not present a full and detailed reportage of what they cover, or (2) exclude altogether coverage of significant and important items that are newsworthy. In addition, one can maintain that the *Times* decision diminishes the power of states to protect their citizens from unwarranted attacks on their character and career.

Neely's views regarding federalism are also debatable, to say the least. His rejection of "historical federalism," for instance, is based on a highly selective view of exactly what has transpired over the course of our history. It is reasonable to contend that history has not repealed federalism, but ratherithas been repealed by the unprincipled use of national power to achieve temporary and pragmatic political success. Moreover, this success depended on the degree to which those in power, including the Court, were willing to ignore the limiting role of the constitutional design, as well as the fact the *legitimate* "repeal" of our constitutional (historical) federalism could only be obtained through the amendment process. This view of the matter, however, is one with which Neely and other positivists have little sympathy: They reject what is for most a fundamental premise of constitutional governance, i.e., that the constitution is not a "mere law," as they would have it, but a. fundamental covenant that establishes the framework within which the political, social, and economic life of the nation is to be conducted. As such, to amend the Constitution is beyond the power of any agency, including the Court, which owes its existence to the Constitution or fundamental law.

Neely's arguments in favor of an expanding national government also seem to ignore the values associatedwith aviable federal system. He assumes, along with others who favor centralization, that personnel in the federal service are somehow more competent, more virtuous, more able, less venal, and less self-serving, than their counterparts, in the states. Such an assumption is, of course, questionable. But let us suppose that it is so. Left out of his account is the role of the federal system in providing an additional check on the abuse of governmental powers a matter of no small significance to our Founding Fathers- and that it allows the citizens a greater degree of control over those in charge of concerns that directly affect their everyday life.

In sum, it maybe said that the federal courts usurpation of power and utter disregard for the federal principle-a usurpation that has allowed them to police and censor the moral values within the states-refute Neely's claim that the courts do not question the myth system. A very strong case can be made that over the last century the courts have "rewritten" the myth system in the face of popular outrage with regard to such matters as segregation, abortion, religion,obscenity, criminal rights, etc. What is more, in these areas, it seems clear that rather than bringing the operational order into conformity with the prevailing myth system, the federal courts-and particularly the Supreme court-have worked assiduously at the task of refashioning American culture to conform with their own designs. While critics of the courts may concede that they have done some good, such as the equity that comes from striking down laws compelling segregation by race, they would argue that this good does not offset the harm done by (1) reproving the Constitution, and *(2)* issuing decrees that reverse settled principles of law and justice in the states.

While there is ample room for disagreement with Neely's position, his books deserve our attention and respect. He does not present the fanciful notions of a law professor, but the reflections of an honest and hard working jurist who candidly expresses what his views are and, most assuredly, reveals for all to see what legal positivism and judicial activism are all about.

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