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Abstract

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*Reviewed by Arthur S. Miller**

Martin Shapiro, a political scientist who is a member of the law faculty of the University of California at Berkeley, has done more than anyone to illumine the political nature of law. His *Law and Politics in the Supreme Court*[1] is a minor classic, even though it is largely ignored by those who edit the coursebooks used in law-school constitutional law classes.[2] His latest entry into the field of "political jurisprudence" is *Courts,* a slim volume that should be required reading for all law students. In it, Shapiro forces one to think beyond the sterile turgidities of appellate opinions that are the usual fodder of legal education, and to consider both the political and the sociological functions of judiciaries.

This he does by showing, in his opening chapter, that "courts are much less independent and adversarial" than the conventional model suggests; and "much less prone to follow pre-existing legal rules."[3] Shapiro, moreover, believes that appeal, rather than being a means of vindicating individual rights, is in fact a way by which central governing authorities extend and solidify control over the hinterlands. The remainder of the volume is devoted to testing those conclusions by analyzing the judiciaries of England, civil law systems, China, and traditional Islam. *Courts,* then, is a wide-ranging analysis of the politics of judiciaries. Tightly written, with prose more prosaic than limpid, it demands close attention to what Shapiro is saying.

What one gains is worth the effort. Professor Shapiro suggests how "uncourtlike" courts often are, "uncourtlike" in the sense that the actual judicial process often deviates from the orthodox model of what he calls a triadic structure—an independent judge applying preexisting norms in an adversary proceeding with a winner-take-all judgment. In fact, Shapiro argues, courts are not really independent but rather are

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1. M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT (1964)

2. *E.g.,* W. LOCKHARD, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS (5th ed. 1980) has no mention of Shapiro's book.

3. SHAPIRO, *supra* note 1, at *viii.*

part of the political regime, often creating their own legal rules and mixing mediation with litigation to produce compromises. Let me illustrate by quoting some passages, some of which are truistic but nonetheless ignored by the professoriate (and even by practitioners).

1. "Most courts make some law as they go along, and when they do it is usually with the assistance of the parties."[4] That situation is one of today's commonplaces, to be sure. Since the Legal Realists showed that judges make, not find, law, it is agreed that courts are mini-legislatures—and not just for the parties before the bar of a court. Courts, particularly the Supreme Court of the United States, make law for generations yet unborn; they promulgate general norms—legislative norms—the law of the land rather than the law of the case.[5] But even though a truism, this reality has not yet percolated very far into the minds of those who edit coursebooks in any area of law study. Law students, therefore, are persuaded (directly or indirectly) to believe that law preexists, and that the task of courts is to find the one rule that will fit the particular factual situation at bar. Why there is such a widespread failure to concede in teaching materials what most legal educators readily acknowledge in conversation is an unexplained mystery. I am unaware, for example, of any constitutional law book that proceeds, as it should, from Chief Justice Earl Warren's candid valedictory;[6] from Justice Byron White's equally candid observation in his dissenting opinion in *Miranda* v. *Arizona*;[7] from Justice William Brennan's concurring opinion in *Richmond Newspapers, Inc.* v. *Virginia*;[8] or from Justice William O. Douglas' assertion in *The Court Years*, his autobiography.[9] Shapiro cites none of these statements, but each buttresses

4. *Id.* at 13.

5. *See* Miller, *Constitutional Decisions as De Facto Class Actions: A Commentary on Cooper v. Aaron*, 58 U. DET. J. URBAN L. 573 (1981).

6. Retirement of Mr. Chief Justice Warren, 395 U.S. *vii, xi* (1969) (Justices bound only by the Constitution and "our own consciences"). The Constitution, of course, does not answer questions; it merely provides a point of departure for judicial lawmaking.

7. 384 U.S. 436, 531 (1966) (White, J., dissenting) (admitting that the Court always has and always will create constitutional law).

8. 448 U.S. 555, 595 (1980): "judges are not mere umpires, but . . . lawmakers—a coordinate branch of *government*".

9. W. DOUGLAS, THE COURT YEARS 8 (1980) (quoting Hughes, C.J., to the effect that ninety percent of the Justices' decisions are made on emotion with the other

his conclusion quoted above. If judges are willing to tell us that they make up the law as they go along, why shouldn't law professors be as willing to accept and act upon such a conclusion?

I do not propose to delve into the psychology of legal educators. No doubt there are reasons for professorial acceptance and defense of the orthodox model of the judiciary. Shapiro, alluding to some of them, stated: "More of the resources of legal scholarship and argumentation are spent on building up the ideology of judicial independence than on any other part of the prototype precisely because the court's basic social logic as triadic conflict resolvers rests on this element."[10] That observation, however, does not tell us why legal scholars accept the "basic social logic" of courts—why, that is, scholars do not probe deeply into the judicial apparatus and analyze its sociological functions. It is as if the Legal Realists, who forever and conclusively smashed the orthodoxy concerning judges and courts, had never existed.

2. If judges are in fact lawmakers, what does that do to the notions of "independence, preexisting legal rules, adversary proceedings, and dichotomous solutions?" Says Shapiro:[11]

> [L]awmaking and judicial independence are fundamentally incompatible. *No regime is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints.* To the extent that courts make law, judges will be incorporated into the governing coalition, the ruling elite, the responsible representatives of the people, or however else the political regime may be expressed.

There can be little doubt that Shapiro is correct. Although this is neither the time nor the place to expand on that statement, two bits of evidence—one a scholarly study and the other a recent Supreme Court decision—are in order. In *The Politics of the Judiciary* (for some inexplicable reason not cited by Shapiro), Professor J. A. G. Griffith concludes: "The judiciary in any modern industrial society, however composed, under whatever economic system, is an essential part of the system of government and . . . its function may be described as under-

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ten percent supplying reasons for supporting predelections).

10. SHAPIRO, *supra* note 1, at 19.

11. *Id.* at 34.

pinning the stability of that system and as protecting that system from attack by resisting attempts to change it."[12] Griffith wrote principally about the British experience, but his observations have wider relevance. He effectively shows that a legal system cannot be regarded as operating in a political vacuum. Both Griffith and Shapiro conclusively demonstrate that the State and the legal system, including the judiciary, are closely intertwined. That, again, is a sociological truism admitted by all who think about it but not purveyed to law students—no doubt because of the prevailing ideology of "legalism."

The other example is *Dames & Moore* v. *Regan*,[13] the Iranian hostage case decided in July 1981 by the Supreme Court. There the Court, speaking through Justice William Rehnquist, upheld President Carter's hurried agreements with Iran to obtain release of the fifty two hostages. Although crafted in familiar lawyers' language, Rehnquist's opinion reeks with the odor of compromise forced by necessity. Principle, as usual, gave way to *realpolitik*. The Justices, in the last analysis, had no choice save to sustain the validity of the executive agreements. The Court, quite obviously, was in fact (though not in theory) an arm of the political branches of government. To paraphrase one of Machiavelli's principles ("A republic or a prince should ostensibly do out of generosity what necessity constrains them to do"),[14] a republic—the United States—should purport to do under the law what political necessity requires that it do. Said even more bluntly, *Dames & Moore* is a pure example of a political Hobson's choice: the Justices not only had to take the first horse in Mr. Hobson's livery stable, it was the only horse there.

Furthermore, to speak of judicial independence and impartiality is to forget, once again, the teaching of Mr. Oliver Wendell Holmes who in 1873 wrote forcefully and persuasively about the noneutrality of law and of courts: the notion, he said, that law was neutral, impartially imposed by judges, "presupposes an identity of interests between the

12. J. GRIFFITH, THE POLITICS OF THE JUDICIARY 213 (paperback ed. 1977). *See* Miller, *The Politics of the American Judiciary*, 49 POL. Q. 200 (1978).

13. 453 U.S. 654 (1981). For discussion, *see* Miller, *Dames & Moore v. Regan: A Political Decision by a Political Court*, 29 U.C.L.A. REV. — (1982).

14. N. MACHIAVELLI, THE DISCOURSES 325 (Walker trans. 1950). (This was originally published in 1531).

different parts of a community which does not exist in fact."[15] We may hope, he went on to say, that compassion will temper self-interest, but "all that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the de facto supreme power in the community."[16] If Holmes was correct, as surely he was (and is), then the liberal theory of the rule of law is thoroughly discredited. As Holmes said, law is "a means by which a body, having the power, puts burdens which are disagreeable to them on the shoulders of somebody else."[17]

Shapiro does not mention Holmes, nor does he inquire into the question of who the "de facto supreme power" in a given community might be. This is not to fault him; rather, it is merely to say that he has opened the door to more comprehensive analyses of the politics and sociology of courts. One hopes that others will pick up from where he ends, and go on to produce a complete sociology—a political sociology—of how courts, in the United States and elsewhere, operate—and who benefits from their decisions.

3. Despite the common belief to the contrary, the civil law system does not differ in any marked respect from the common law. "Far from being a complete set of preexisting legal rules, civil law nations like common law nations, depend on their courts to legislate many of their legal rules as they conduct litigation."[18] On reflection, it is readily seen that things could scarcely be otherwise. There is no possible way for a code, however detailed, to anticipate all the many disparate factual situations concerning disputes among litigants. This conclusion, it is worth noting, makes nonsense out of the insistence in Louisiana that since it is governed by the Code Napoleon it differs from the other states. It can call itself a civil law state, but that does not mean that either its law or its legal system is not basically the same as, say, the systems in force in Texas or South Dakota.

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15. Holmes, Comment: *The Gas-Stokers' Strike,* 7 AM. L. REV. 582 (1873). For discussion, *see* Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies,* 57 TEX. L. REV. (1979).

16. *Id.*

17. *Id.*

18. SHAPIRO, *supra* note 1, at 155.

II.

I do not suggest that this is all Professor Shapiro has to say in *Courts*. There is much more. In my judgment, he makes a persuasive case for his model of the judicial process. If he is accurate, as surely he is, then the traditional model—what he calls the prototype—must not only be completely reexamined, it must be replaced by a model more in accord with political and sociological facts. *Courts* presents a challenge to all law and political science professors; one that must be met if ever there is to be an adequate conception of law and of judging. I am not at all sanguine on that score: Speaking generally, law schools are reverting to what they were before the Legal Realists.[19] As such, and again speaking generally, they are not even very good trade schools. *Courts* does not give all the answers or even pose all the questions, but it is a solid first step toward a greater understanding. The prose tends to be muddy, and there are too many typographical errors, but those small faults are unimportant compared to the very real service Shapiro has accomplished.

19. *Cf.* Tushnet, *Legal Scholarship: Its Causes and Cure,* 90 YALE L.J. 1205 (1981); Miller, *Reductionism in the Law Schools,* 16 SAN DIEGO L. REV. 891 (1979).