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One Touch of Adonis: On Ripping the Lid Off Pandora's Box

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Erratum

With regard to "One Touch of Adonis: On Ripping The Lid off Pandora's Box" appearing in Volume 22:3, the author, Prof. Glendon Schubert, has requested that lines 10-11 at p. 861 be revised to read as follows: "John Marshall or a Mansfield would have loved—*usually* is kept most secret. It is not ordinarily published , ..." With regard to this clarification he notes assuredly that "[t]here is no question of fact concerning Tribunal Federal Publication practices—at least, not at the level of generalization, *supra*."

ONE TOUCH OF ADONIS: ON RIPPING THE LID OFF PANDORA'S BOX

GLENDON SCHUBERT*

When one has been both reading and admiring the professional writing of another person for over two decades—and I have been so following the work of Arthur S. Miller, going back to his years as faculty advisor to the then budding *Journal of Public Law* at Emory University—it is not easily or lightly that one accepts the responsibility for taking a stand at the bar of professional opinion, as both a putatively expert and an unavoidably hostile witness to something as abstract and nebulous as academic truth. So it is with more than a little reluctance and considerable regret that I turn to the task of commenting upon his essay (with D. S. Sastri) on Supreme Court secrecy, which advocates a somewhat latter-day resurrection of Wilsonian progressivism, with open judicial covenants openly arrived at. If the subject were anything other than a plea in the name of democracy for having truth emerge as a product of the Holmesian market place of ideas competing openly and freely with each other,[1] I am sure that I would have followed the wise behavioral precedent that Brandeis often preferred,[2] and suppressed my dissent.

The general impression conveyed by the paper is that it is a hastily written, not very well thought-through example of legal boiler plate. The argument, furthermore, is fundamentally illogical, both in general (as I shall explain now) and in many of its details (as I shall explicate below).[3] It is an illogical argument for Miller to make because it is so inconsistent with the premises that he simultaneously espouses: at root it constitutes a plea (and indeed, one might well say a Wechslerian, Bickelian, Kurlandian, neutrally principled plea) for

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1. Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

2. THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK (A. Bickel ed. 1957).

3. *Cf.* A. KAPLAN, THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE (1964) (especially chapter 1).

the very sort of legal rationalism that—unless I have been misreading his message since the days when we both were "mint fresh, burning with energy, and adolescently sure of our premises"[4]—Miller's public posture previously has stood most resolutely against.[5] The authors demand that Supreme Court Justices both *publicize* (in the literal as well as the figurative sense) the Court's decision-making process; and that they also *rationalize* (and again, in both the literal and figurative senses) that process for the benefit of "those who make their living"[6] professionally by Court-watching. The Justices, in other words, are advised to make decisions publicly, and to do so in such a way that the public will understand what they are doing, and why. Furthermore, as I understand the argument, the Justices are to eschew even the limited consideration that they can now find time to give to appeal briefs, certiorari petitions and counterbriefs—and whatever accouterments of the record below may have become printed and circulated among them —in favor of instruction about the case through oral argument. This is to be in phase with a transformation of their present custom of writing an average of some thirty-odd published opinions (of various types, by each justice, per term), to the proffering instead of ad-lib oral responses to counsel, each other, and the issues. Of necessity such ad hoc responses would be made without assistance, without research, and without reflection; and they would constitute a deliberate rejection of the cybernetic and other informational advantages that the twentieth century has to offer, in favor of the more austere cultural and technical amenities of the eighteenth century. In its *reductio ad absurdum,* the argument is on all fours with the proposition that we should go back to the political life of the original demes (slaves and all) because lotteries are the most democratic mode of election.

With his long standing and well-established base at George Washington University only a stone's throw (if that is the right allusion) from the White House and not very much further from the marble chamber of the Supreme Court, Professor Miller has the advantage over persons in a location as outlandish as mine because he is in a position

4. As law clerks were described by the authors, in the original draft of their essay.

5. *See, e.g.,* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication,* 27 CHI. L. REV. 661 (1960); Miller, Book Review, 39 GEO. WASH. L. REV. 166 (1970).

6. Miller & Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain,* 22 BUFFALO L. REV. 799, 800 (1973) [hereinafter cited as Miller & Sastri].

to have observed (and I mean directly) things about the Burger Court, notice of which has not yet filtered down to me. But I recall well the way oral argument and judicial interrogation went some years ago when I did observe the visible portion of the Court's proceedings pretty regularly, for a full term; and there is no hint as yet, in those fragments of oral argument that are excerpted in *United States Law Week,* that any revolution has occurred in that aspect of judicial behavior. What I remember and what I now read aren't all that impressive as intellectual fare from the point of view of the education of either the public, the parties and their counsel, or the Justices themselves. On the other hand, I would be hard pressed to deny, on the basis of the evidence presently available, that the televising of what now goes on in the conference room might not attract a certain amount of publicity, and consequently have some implications for public education—for example, one could imagine a weekly "Meet the Court" show that might attract and retain a good-sized audience if shown at prime time. After all, the format for the Court's performance isn't all that different from "What's My Line?"; and it seems altogether likely that, given appropriate technical guidance, the Burger Court might come on really strong, rivalling in its plasticity and versatility even such longer established (and better financed) extravaganzas as "The Nixon Family Hour" and "Agnew Agonistes."

In advocating the opening up to public scrutiny of the internal communication processes of the Court, the authors fail to point out that one inevitable consequence, of a change in scenario to focus greater attention upon the Justices as individuals and to repress their long-standing traditions of fraternity and of community as a group, will be to politicize their behavior. Instead of having an occasional politico on the Court,[7] we can expect to have nine of them, each working the year around (and not just during the term) to preempt his proper share of the limelight—for as one of them who was well-qualified to speak on the subject once remarked:

> I do not know whether it is the view of the Court that a judge must be thick-skinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is insensitive to pub-

7. *See, e.g.,* Bell, *Extrajudicial Activity of Supreme Court Justices,* 22 STAN. L. REV. 587 (1970); Landever, *Chief Justice Burger and Extra-Case Activism,* 20 J. PUB. L. 523 (1971); Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments,* 1961 SUP. CT. REV. 159.

> licity. Who does not prefer good to ill report of his work? And if fame—a good public name—is, as Milton said, the "last infirmity of a noble mind," it is frequently the first infirmity of a mediocre one.[8]

It may well be, however, that the nation would be better off—and it may even be that the bar, the lower judiciary, and the Supreme Court itself would be better off—if dramatic changes were to be made in the formal ritualization of the Court's decision making. I have neither any particular opinion nor any special expertise on this substantive issue; and to the extent that I have intuitive leanings, they happen to lie pretty positively in the direction of, rather than against, the Miller-Sastri thesis. My objection is addressed, instead, to the form in which their theme is presented, and to the structure of the argument with which they purport to support it.

The thesis of their essay is stated by the authors most succinctly as follows: "Whether the secrecy of the Supreme Court's conference need be maintained must be decided by the values furthered or hindered by that maintenance, not by flat assertion."[9] I doubt that it *must* be so decided, but I'll agree that it might better be—subject to a major qualification that Miller and Sastri ignore. They evidently believe that it is enough to set up an array of arguments claimed to support "secrecy values," buttressed incidentally by a rather ancient scholarly and legal literature, versus an opposing array of arguments claimed to support "disclosure values," resting upon virtually no support at all, thus leaving choice between the two positions to rest upon judgment concerning their logical persuasiveness. In any of the other social sciences, to say nothing of the behavioral and physical sciences, merely thus to state a proposition (hypothesis) is the beginning, not the end, of wisdom. What is required in any kind of science—including *legal* science —is an empirical investigation in which one marshals all of the evidence that he can find to *disprove* the hypothesis; what he believes in is that small residue of things that he "can't help" believing because all of the known evidence is so one-sidedly in the favor of their probable truth value.[10] Miller and Sastri make not the least attempt to do anything remotely resembling dispassionate research into the thesis that they advance; instead they proffer an advocate's brief which attempts to argue one (and only one) side of the case.

8. Craig v. Harney, 331 U.S. 367, 396 (1947) (Jackson, J., dissenting).
9. Miller & Sastri at 814.
10. J. FRANK, LAW AND THE MODERN MIND 262 (1930).

There are two facets of their argument, in particular, with which I wish to take issue. I shall then deal with two of the empirical examples that they offer, and finally with the question of the style of their essay.

I.

In view of the circumstance that they ask their readers to accept their argument because of the persuasiveness of its logic, it seems fair to turn first to the rigor and structure of that logic. The authors state that a judicial "opinion often obscures as much as it enlightens, particularly when there are multiple opinions."[11] Whatever its validity, this position runs directly counter to the premise that full disclosure of judicial reasons—including the reasons that a judge thinks may be professionally acceptable, irrespective of his own private agreement with such justifications—is desirable in a democratic society. A considerable amount of cacophony seems to be an inescapable byproduct of the functioning of democratic discussion groups, and there is no obvious reason why we should expect it to be otherwise with democratic courts.

Miller and Sastri tell us that "the judicial opinion should provide a basis for understanding both *why* and *how* a decision was reached, as well as a means for predicting the outcome of future controversies."[12] This demand, which assumes that Supreme Court Justices can be put through some kind of confessional by means of which they reveal to outsiders the secrets of their decision making, ignores virtually everything that social psychology can teach us about small group behavior.[13] It may take a skilled (and, incidentally, a lucky) psychoanalyst weeks or months to aid even one individual in attempting to unravel "why" he made a single decision; and it is far more difficult to get agreement out of a group of persons concerning how and why they may have decided something as they did. People just don't know; to the extent that they do know, they find it difficult to articulate their reasons, even to themselves, let alone to others; and with nine participants there are nine views of what happened. What Miller and Sastri have uttered is really a disguised demand for "neutral principles." We

11. Miller & Sastri at 801.

12. *Id.* at 802.

13. *Cf.* B. BERELSON & G. STEINER, HUMAN BEHAVIOR: AN INVENTORY OF SCIENTIFIC FINDINGS (1964).

are far more likely to find out in part how group decisions are made if we approach the inquiry as an investigation of small group dynamics,[14] than if we state norms that we have deduced from philosophical principles, and then seek to get real-life groups (such as appellate courts) to conform to such (frequently, impossible) demands.

"That decisions are often hammered out on the anvil of compromise is a second reason for the failure of the judicial opinion to disclose the decision-making process," according to the authors.[15] Would they prefer a more dictatorial mode of constitutional interpretation? Subsequently, they castigate John Marshall and Lord Mansfield for their authoritarian leadership in massing their respective courts under the banner of monolithic opinions given by the Chief Justice; here they argue that the process of compromise, which is the alternative to judicial authoritarianism, is esthetically unsatisfying because opinions that are the product of compromise are less consistent, less extreme, and more ambiguous than are those that are the product of a single mind (or that are presented as such). Miller and Sastri can't have it both ways: they are in the same camp with the commentators who used to whipsaw Harlan Stone because, as Chief Justice, he permitted discussion at conference to work itself out and he failed to run as taut a ship as had his predecessor[16]—and the latter was a man with such a compulsion for order that he was reputed to have called time on an attorney, during oral argument, in the middle of the word "if"![17]

There is also the matter of the subtitle of the Miller-Sastri essay, "On the Need for Piercing the Red Velour Curtain," the implications of which are sufficiently striking to warrant comment.[18] In this age of complete candor in matter of sexuality, no one will be put off, I trust, by the perhaps excessive masculinity of the position that the authors have assumed for themselves, nor will any but the tender minded be offended by their casting of the Justices of the Supreme Court collectively in what is an unmistakably female role, and that

14. GROUP DYNAMICS: RESEARCH AND THEORY (3d ed. D. Cartwright & A. Zander eds. 1968).

15. Miller & Sastri at 804.

16. A. MASON, THE SUPREME COURT FROM TAFT TO WARREN (1958). *But cf.* Frank, *Harlan Fiske Stone: An Estimate,* 9 STAN. L. REV. 621, 629 n.31 (1957).

17. McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes,* 63 HARV. L. REV. 6, 17 (1949).

18. My own subtitle was intended to be symmetrical with theirs, and I therefore welcome their ultimate judgment (after some apparent indecision) to retain theirs. *Cf.* Westin, *Stephen J. Field and the Headnote to O'Neill v. Vermont: A Snapshot of the Fuller Court at Work,* 67 YALE L.J. 363 (1958).

of virgins to boot. I question, rather, the aptness of the metaphor, for purposes of the authors' subject and thesis: do they consciously intend to project an image of the Rape of the Court as the preferred approach to becoming familiar with the secrets of the Justices? If so, they certainly have succeeded; and I suppose that one might even argue that the Court has invited, mayhap solicited, such a response by its own policy of profligacy in the propagation of prurience. But I still doubt the propriety of the metaphor, not on grounds of morality but rather on those of logic: the democratic way implies education, mutual accommodation of needs and interests, persuasion, and ultimately a compromise. If a sexual simile is required, the one most meet to democratic premises is that of seduction, not rape.

II.

As they approach the end of their argument, the authors state that the "design of an alternative system is hampered by a lack of exact knowledge about the decisional process";[19] yet, they consistently indicate their profound distrust of the only presently available source of such knowledge, which is research in behavioral science.

The authors' eighty-five footnotes cite only three books (and no articles) reporting research on judicial process and behavior; and in this essay on the subject of the communication of the decisions of the Supreme Court there is not a *single* reference to the growing behavioral science literature on the subject. Among the most directly relevant reports of research ignored by Miller and Sastri are a book[20] stemming from a doctoral dissertation in journalism[21] and several articles[22] which make clear—as Miller and Sastri regrettably do not—that communicating with the Supreme Court is a two-way street. Again, the latter and

19. Miller & Sastri at 820.

20. D. GREY, THE SUPREME COURT AND THE NEWS MEDIA (1968).

21. D. Grey, Public Communication of U.S. Appellate Court Decisions (Ann Arbor, Mich.: University Microfilms No. 66-9017, 1966).

22. Gregory & Wasby, *How to Get an Idea from Here to There: The Court and Communication Overload,* 3 PUB. AFFAIRS BULL., Nov.-Dec., 1970; Grey, *The Supreme Court as a Communicator,* 5 HOUSTON L. REV. 405 (1968); Newland, *Press Coverage of the United States Supreme Court,* 17 WESTERN POL. Q. 15 (1964); Sobel, *News Coverage of the Supreme Court,* 56 A.B.A.J. 547 (1970). On the subject of interviewing judges see Becker, *Surveys and Judiciaries, or Who's Afraid of the Purple Curtain?,* 1 LAW & SOC. REV. 133 (1966); Glick, *Interviewing Judges: Access and Interview Setting,* 13 RESEARCH REP. IN SOCIAL SCI., Feb., 1970, at 1; Grey, *Interviewing at the Court,* 31 PUB. OPINION Q. 285 (1967).

open stance is much more consonant with democratic premises than the image of a one-way, and dead-end alley—which does not differ all that drastically from an alternative model of law-giving that has Moses coming down from Mount Sinai, casting the tablets before the people.

They quote with approval, however, an ascription of "game theory and scalogram analysis"[23]—two research approaches that have very little manifestly in common with each other. One stems from econometric research in the costs of information, and the other from socio-psychological work on attitudes and belief systems. They view these as forms of "scholarly astrology";[24] and they pontificate that "these theories merely substitute one alchemy for another . . . ."[25] I am going to be equally dogmatic, and assert flatly that neither Miller nor Sastri has professional training or competence adequate to justify undertaking to make any (let alone any such) judgment about the merits or demerits of methodologies which he has not investigated and, evidently, does not understand. On the merits of the question whether such approaches are *useful* in studying judicial decision making, one ought, I should think, to consider the views recently expressed by Judge Murrah,[26] the Director of the Federal Judicial Center, in his comments upon a report of research by a law professor who did employ similar methods in a major research undertaking.

The authors previously had lamented that "there have been few definitive studies on either the general proposition or the specific decisional areas" of the hypothesis that Supreme Court "decisions have a large impact upon American behavioral patterns and mental attitudes."[27] I am perplexed, because my impression for many years had been that Arthur Miller evidently—judging from what he has said in his articles and the works that he has cited in his footnotes—is a law professor who is especially well read in the social sciences generally and in political science in particular.[28] It is clear, of course, that Miller

23. Miller & Sastri at 803.

24. *Id., quoting* A. WESTIN, THE SUPREME COURT: VIEWS FROM INSIDE 7 (1961).

25. Miller & Sastri at 804.

26. Murrah, *Implications for Judicial Policy,* 10 OSGOODE HALL L.J. 257 (1972).

27. Miller & Sastri at 800.

28. Miller, *Notes on the Concept of the "Living" Constitution,* 31 GEO. WASH. L. REV. 881 (1963); Miller, *Some Pervasive Myths About the United States Supreme Court,* 10 ST. LOUIS L. REV. 153 (1965); Miller, *Technology, Social Change, and the Constitution,* 33 GEO. WASH. L. REV. 17 (1964); Miller, *The Constitutional Law of the "Security State,"* 10 STAN. L. REV. 620 (1958); Miller, *The Impact of Public Law*

changed his mind in recent years about the virtue of behavioral science, in an oscillation that was (by what is no doubt merely a happy coincidence) right in phase with the rise of new left radicalism among law faculties,[29] a move that found its counterpart among political scientists in a strong moral impulse among many to vie for place in becoming identified with what they tended to call *post*-behavioralism.[30] In Miller's case the switch clearly had begun by 1967,[31] and within another three years we find him agonizing that "[a]t a time when the human race is about to fall on its face, what we seem to get [in addition to latter-day Blackstone] is some unreadable, at least largely unread, behavioralism (which tends to be half-Freud and half-fraud)."[32] One suspects that here he was simply swept away by the compulsions of alliteration and symphony because, however cute the remark may seem, at least the initial characterization is demonstrably wrong. Not only Freudianism but also clinical psychology generally have been notable chiefly for their failure to motivate either political science work in judicial process and behavior, or sociological studies of law and courts utilizing behavioral approaches, during the past twenty years at least. For Freudian judicial behavioralism one must turn to the earlier writings of Jerome Frank[33] and Harold Lasswell[34]—both of whom qualify as jurisprudes in Miller's taxonomy; so at least from an empirical point of view, that half of judicial behavioralism consisting of Freudian analyses turns out to be an empty set. Similarly, his assertion here, that nothing much has been done in the way of research on impact analysis as yet, is simply and patently false. Such a remark cannot be based on anything other than sheer ignorance of the publication record, in political science at least, during the past half dozen years or so, as evidenced by the fact that it requires some eight pages of text to discuss

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on Legal Education, 12 J. LEGAL EDUC. 483 (1960). In the latter article see especially the section at 500-02 entitled *A Closer Connection with Political Science Departments. See also* A.S. MILLER, THE SUPREME COURT AND AMERICAN CAPITALISM (1968), which was published in the series "The Supreme Court in American Life" under the general editorship of political scientist Samuel Krislov (who, until very recently, was the editor of LAW AND SOCIETY REVIEW).

29. *See* Wasserstrom, *Lawyers and Revolution,* 30 U. PITT. L. REV. 125 (1968).

30. *E.g.,* Schubert, *The Third Cla't Theme: Wild in the Corridors,* 2 PS 591 (1969).

31. Miller, *Science and Legal Education,* 19 CASE W. RES. L. REV. 29 (1967).

32. Miller, *The Law School as a Center for Policy Analysis,* 47 DENVER L.J. 587, 590 (1970).

33. J. FRANK, LAW AND THE MODERN MIND (1930).

34. H. LASSWELL, POWER AND PERSONALITY 59-88 (1948); H. LASSWELL, PSYCHOPATHOLOGY AND POLITICS (1930).

the thirty-odd references on impact analysis (including half a dozen books) that are directly in point and that are listed in a bibliographical essay that was published last year.[35] Among the older articles listed is one by Professor Miller, entitled *On the Need for "Impact Analysis" of Supreme Court Decisions.*[36] It was no doubt more conveniently at hand at the time he wrote the present essay than some of the other items listed in the bibliography.

A few pages later we read that "there still has been no sufficient jurisprudential effort in the United States—other than, perhaps, the policy-science or configurative jurisprudence of Lasswell and McDougal—since the legal realists first ripped the facade from the Blackstonian conception of the judicial process several decades ago."[37] Now this states what is clearly a matter of opinion, and Miller and Sastri certainly are entitled to have, and to state, theirs. It is amusing to note, however, that the only social scientist whom they acknowledge as having made a notable jurisprudential effort is one who has been teaching, for the past three decades, on law faculties; whereas in the profession where he was primarily trained, Lasswell (who has a Ph.D. in political science, and is a past president of the American Political Science Association) is not nearly so well known for his *jurisprudential* efforts as is C. Herman Pritchett, a man who grew up in the same small Illinois town, studied under the same great teacher, went to the same high school, and was a student in the first seminar (in political science, incidentally) that Lasswell taught at the University of Chicago. Perhaps this observation teaches us something about the effects of disciplinary chauvinism, a social ailment from which we all suffer more or less, but some more than others.

In any case, in their very next sentence, Miller and Sastri state that "[t]he pretense is still . . . that judges apply known law to accepted

35. Schubert, *Judicial Process and Behavior, 1963-71,* in 3 POLITICAL SCIENCE ANNUAL 1972, at 73, 160-74, 260-62, items 762-96 (J. Robinson ed. 1972). The six books include: I. CARMEN, MOVIES, CENSORSHIP AND LAW (1967); M. DOLBEARE & P. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE (1971); N. MILNER, THE COURT AND LAW ENFORCEMENT: THE POLITICAL IMPACT OF MIRANDA (1971); THE IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES (T. Becker ed. 1969); THE SUPREME COURT AS POLICY-MAKER: THREE STUDIES ON THE IMPACT OF JUDICIAL DECISIONS (D. Everson ed. 1968); S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (1970). Published subsequently to the bibliography, but also of relevance, is J. SCHMIDHAUSER & L. BERG, THE SUPREME COURT AND CONGRESS: CONFLICT AND INTERACTION, 1945-68 (1972).

36. 53 GEO. L.J. 365 (1965).

37. Miller & Sastri at 805.

factual descriptions in reaching their results . . . ." It has not been thus in political science for over a generation;[38] and given the extent to which Miller indicated his familiarity with political science research in judicial process and behavior, and with work in the sociology of law, in an article that he published some eight years ago,[39] one must assume that he knows, or at least that he once knew, that Blackstone (who was discounted long ago by skeptical political scientists[40]) has lit nobody's legal fire in social science for quite awhile. Whether Miller and Sastri's remark still applies to very many law schools I leave to others better qualified to judge; but the assertion certainly is far too broad to stand, without qualification, as a universal generalization.

III.

This brings me to the question of other empirical examples that are offered by the authors to support their thesis; and I'm going to limit my discussion to two. At one point, Miller and Sastri offer their opinion that "the penchant of American government, despite protestations to the contrary, is toward more and more secrecy." I consider this assertion to be at best dubious. Clearly in the state governmental academic institutions of higher learning with which many of us are associated, there have been widespread changes in the direction of greater democracy in decision making, and of less secrecy in high (elite and bureaucratic) places, in recent years. Even undergraduate students now regularly attend departmental (i.e., formerly, faculty) meetings. The working press as well as students and faculty now are present at meetings of boards of regents. The president of the institution where I am employed is currently a defendant in some half a dozen different lawsuits, virtually all of which are seeking to challenge what is claimed to

38. *See* Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941,* 35 AM. POL. SCI. REV. 890 (1941); J. PELTASON, FEDERAL COURTS IN THE POLITICAL PROCESS (1955); Schubert, *The Study of Judicial Decision-Making as an Aspect of Political Behavior,* 52 AM. POL. SCI. REV. 1007 (1958).

39. Miller, *On the Interdependence of Law and the Behavioral Sciences,* 43 TEXAS L. REV. 1094 (1965).

40. Haines, *The Conflict over Judicial Powers in the United States to 1870,* 35 COLUM. STUDIES IN HISTORY, ECON., & PUB. L. No. 92 (1909); Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges,* 17 ILL. L. REV. 96 (1922). For a discussion of the history of "public law" in political science see Schubert, *The Future of Public Law,* 34 GEO. WASH. L. REV. 593 (1966). *See also* W. MURPHY & J. TANENHAUS, THE STUDY OF PUBLIC LAW ch. 1 (1971).

be lack of due process— and almost always also in a context of unnecessary secrecy—associated with present academic decision making. Clearly the fact that such challenges are seriously being made is testimony to the degree of lack of democracy in academic bureaucracies—a point which did not escape Veblen's attention many years ago[41]—but what is relevant here is that on-going change is consistently in the direction of *less* secrecy, *greater* respect for individual rights, and *more* decentralization and wider participation in decision making. Possibly public universities are fighting a general trend in the opposite direction; but I'd want to be exposed to more and better information than what the authors present before I could accept their assertion about the direction of change. For example, they state that "about one-third of all Congressional committee sessions are secret." So what? In order to be relevant to an hypothesis about secrecy getting worse, we need to know (minimally) what proportion of the sessions were secret five or ten years ago; if two-thirds of them were secret then (*ex hypothesi*), the datum contradicts, rather than supports, the purported finding.

The other empirical example to which I wish to direct attention concerns the openness of the decision-making procedures of the Swiss Tribunal Fédéral. It happens that I spent the entire autumn of 1970 in Lausanne, observing almost daily the sessions of the various panels of the Swiss court. I have in my files detailed notes on both the socio-psychological and the legal aspects of the more than a hundred decisions that were observed, either by me personally or by my research assistant (a local lawyer). I interviewed personally 24 of the 26 judges, and about the same number of registrars. The description provided in the present article obviously was written by someone who knows the Tribunal Fédéral through what William Gorham Rice has written about it, rather than at first hand. It simply is not true, for example, that "[p]arties or counsel do not appear before the Court to argue their cases; they are submitted by mail." I have sat through many oral arguments by counsel, and other cases in which not only both parties but sizable contingents of their friends and relatives also were present. On the other hand, it is not usually true that "[o]n the designated date for decision, the judges assemble in the courtroom, where newspapermen, lawyers, and the public are present." There are several courtrooms in use simultaneously, because the court never sits en banc;

41. T. VEBLEN, THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN (1918).

the usual occupants of one of these courtrooms were five or seven judges (sometimes three, but rarely more than seven), a registrar taking notes on the discussion, a uniformed messenger/usher, and me (or my assistant)—sticking out like a sore thumb in the handsome but virtually empty chamber. Newspapermen rarely are in attendance, and very few decisions of the court are reported in the Swiss press. Incidentally, the authors fail to point out a rather relevant fact: that the opinion of the court—which is written by the registrar, and is the very kind of single, authoritative, principled, unambiguous, per curiam statement that a John Marshall or a Mansfield would have loved—is kept most secret. It is not published, nor is it kept in a file that is open to the public. The only reason why the system continues to work reasonably well is because the Swiss public (and their guardians, the Swiss press) *ignore* the doings of the Federal Court most of the time. My own presence in the courtroom, day after day, was clearly legal but it was also clearly a great nuisance, especially to M. Dr. le Juge-Président. If the Swiss judges had to put up with very much of that sort of thing, the system would break down in short order, in my opinion. To what extent the Swiss experience shows what the United States Supreme Court ought to do, or would be likely to do if it were expected to emulate the Swiss model, is much less clear to me than it seems to be to Miller and Sastri.

IV.

Finally I come to the question of the style of their article, to which I alluded in my introductory remarks and which has been notably improved by a combination of editing and revision. No doubt it was a quibble to wonder, after having read that "[t]he Lord Chancellor sits on a woolsack in full regalia,"[42] how the Law Lords ever managed to get the woolsack adorned in such regal splendor. But the employment of "haruspication" both early[43] and late—indeed, in the ultimate line of the essay[44]—is quite another matter. This is the kind of word that Humpty Dumpty used to dominate, but only by paying it overtime wages. All of my instincts about what shreds remain of the English language cry out to me that a single indulgence in haruspication per essay is more than enough.

42. Miller & Sastri at 814. This was as the authors stated the matter in the draft upon which I was asked to comment. The subsequent insertion of "dressed" is a clarifying improvement.

43. *Id.* at 800.

44. *Id.* at 823.