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The Law School as a Center for Policy Analysis: On the Comments

Arthur Selwyn Miller

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ON THE COMMENTS

BY ARTHUR SELWYN MILLER

I.

THE Editors have sent me the commentaries of Professors Bowers, Gilmore, and Baram on my paper. I wish to respond.* I do not wish to alter my paper in any way. Nothing said by those gentlemen leads me to believe that my perception of the nature of the problem confronting man and my proposal for law schools to become centers for policy analysis are invalid.

In what follows I must again speak in short, declarative sentences of a dogmatic nature, simply because time and space do not permit me to do the job I would like. I shall not try to engage in a mutual exchange of dogma, but will endeavor to point out where the three commentators are in error. Nor will I engage in the puerile *ad hominem* verbalizations of Professor Bowers, for that surely would not advance the dialogue. However, I will mildly suggest that my paper must have indeed touched a raw nerve for him to have had such a violent reaction.

First, Professor Bowers: It will serve no useful purpose to refute what he says on a point-by-point basis. That can be done quite easily. Rather, I will content myself with attempting to point out how his ideas are not in accord with some fairly well-known observers.

(1) The idea that universities must remain centers of *objective* analysis runs squarely against the teaching of such people as Bridgman, Polanyi, and Myrdal, not to mention Fulbright and Ridgeway. It appears as though Bowers has not taken cognizance, or does not know, what those writers (among many others) have to say. We must, in other words, carefully examine just what objectivity means (and where it is possible). If the commentary of Bowers is an example of scientific objectivity, I fear that we are indeed in trouble. I happen to believe, with Myrdal, that an indispensable requisite of *all* scholarships is to "face one's valuations"; universities, and individuals within them, have not done this, but the need grows more obvious as time goes by.

(2) Bowers obviously did not read my paper carefully, for nowhere in it did I advocate that universities become political arenas or soapboxes, "where any kind of rhetoric goes." I did suggest the need for facing valuations (per Myrdal) and also for striving for a right to a decent environment, which as Little Abner would say, "any fool can plainly see" is something other than what he attributes to me.

* Professor Miller was unable to attend the conference, and his paper was presented by Professor Ernest M. Jones of the University of Florida College of Law.

(3) He manfully confesses ignorance about what I am talking about, although that is quite apparent from the tenor of his remarks. But when he questions whether I know what I am talking about, he is making a statement that is unworthy of a professor at Cornell. I think that if he would give a little thought to what I said in my paper, he might then readily perceive that the statement he quotes has been proffered by so many people that it has become almost commonplace.

(4) If Bowers wishes to disagree with Robert Gomer and John Platt and Alvin Toffler and Don Price and Ralph Lapp, among many others, by asserting that, "It isn't true that technology is producing changes so awesomely rapid," he of course has a full first amendment right to do so. The first amendment merely protects freedom of expression; it contains no requirement that the statement be valid. So if Bowers wants to ally himself against many others, scientists and otherwise, of course he may. But he should realize also that he is likely dead wrong.

(5) The same may be said for his notion that "it is not true that society has never faced problems of that magnitude before." But he fails, utterly, to give any historical examples. The Industrial Revolution is merely the beginning of the modern scientific-technological revolution. He should have gone back even further than the nineteenth century, for our perspective must encompass the entire range of history (Just how barbed wire is relevant escapes me.).

(6) Whether the problems of poverty, population, and pollution can be corrected, "given time," as Bowers says, is something we can all fervently hope for. Surely even a professor of physics can see that I would not suggest formation of centers for policy analysis if I did not believe that such problems possibly are correctable. But I would like to see some hard evidence, particularly on the question of population. His is a touching, even pious, faith; a faith that we can all hope will come into fruition.

(7) He says that he is impatient to get to the question of moving universities to deal realistically with social problems. But, if so, why doesn't he suggest something?

(8) The Morrill Act is not probative evidence to negate the idea that universities have policies of drift. It is a statute, Professor Bowers, passed by Congress. What I was talking about (I could mention Little Abner here again) is the internal governance of universities. Black studies, it is true, were more reactions to perceived crises than just a matter of drift. But that, unhappily, is what Charles Schultz once called ad-hocery, certainly not in accordance with a carefully thought out plan for the mission of the university. Bowers' dogmas are interesting, but he needs to furnish a few bits of hard evidence.

(9) If there is no reason why universities cannot be modified, then why doesn't Bowers suggest ways such modifications can be effected, as well as their details? Strange.

(10) His opposition to my views on tenure are so delphic that I cannot respond. What are those "profound" reasons that make tenure so important? To say that industry and government also have "time-servers" is not relevant to the issue. The essential question is whether the university is doing its job adequately (whatever its mission may be, and on that score surely there must be much hard thought), and whether the tenure system is helping further the proper mission of the university. What I call for is reexamination of that system under due process safeguards. As the situation is now, it is more difficult to get rid of an inadequate professor than it is to impeach a federal judge. Just what values are served by protecting the lazy and the incompetent?

In such a reexamination, there must of course be a delineation of the mission of the university. In this country we have moved into a situation of mass higher education; one in which a college degree is necessary but is becoming meaningless. When everyone has one, it loses its value. I do not advocate returning to the 19th-century concept of the university for the aristocracy alone. But our universities are being governed under principles and concepts derived from that time, while presently both society at large and its institutions, including the universities, have changed fundamentally. (The study about to be published on the role of the university in public affairs, funded by the Carnegie Corporation for the presidents of the land grant colleges, may help in setting new priorities.) Although he does not expressly say so, Bowers apparently feels that "whatever is, is right" in the universities, or, if not entirely right, is correctable. But how? In what direction? By what means? Under what criteria? It is mysterious that Bowers does not enlighten us on that score.

(11) Different perceptions of the order of magnitude of the present crisis do not make anyone "a fool" who happens to disagree with Bowers. Quite the contrary. If he thinks the thirties in general, and Europe in the thirties and forties specifically, presented more fundamental problems, he of course is at liberty to so believe and to state his opinion. But it is not worthy of a professor of physics at Cornell to label one who disagrees "a fool." That is not argument that anyone would use outside the gutter. Bowers does not define the problem and castigates his friend, John Platt, for using the term "the crisis of crises." We in the law schools tend by and large to make our dialogue at least outwardly more courteous. Without being vacillating, we at least can speak to each other in measured terms. Apparently this is becoming increasingly difficult for the hard scientists, for as I write

this the newspapers are carrying accounts of violence and name-calling at the annual meeting of the American Association for the Advancement of Science — and even, God save the mark! — of the sorry spectacle of one speaker at the AAAS convention bringing bodyguards with him, apparently to prevent physical attack. (That is physicist Edward Teller.) Where, pray, is that objectivity that Bowers says universities display and implies that scientists have? Is there something about physicists that . . . ?

(12) I find the remainder of his remarks temperate and reasonable, save for one or two instances. The paucity of experience in problem solving by universities is clearly shown by his remarks. It is thin indeed, as Bowers admits. He further admits that he does not know how to, or whether we can, apply the problem solving techniques in food supply, such as Cornell does, to other areas "of more pressing social significance." For that matter, he does not even tell us what a problem is, and that itself is a most difficult question, as I said in my paper. For example, there is no hard evidence today that the "green revolution" in food production will solve the pressing needs of the hundreds of millions of people in the world who are hungry. In simplest terms, of course we can solve low-order technological "problems"; but how do we translate that expertise into dealing with the social cancers of poverty and peace, of population and pollution? Alvin Weinberg of the Oak Ridge National Laboratory, which Bowers mentions, admits that "technological fixes" will not get the job done alone, although they can be of great help. Agreed. But please, Professor Bowers, let us have some suggestions.

(13) In sum then, Professor Bowers appears to be violently opposed to my perception of the nature of the problem but — I hope I am not misreading him — tends to agree in large part with the need for the university, if not the law school, to become a center for policy analysis. On the details of the latter point, there is room for reasonable argument and compromise. The need is for the establishment of such centers. I suggested the focus of the law school, not for mere reasons of parochial guildism, but because at some time, in some way, law must be used instrumentally as a means of bringing desired changes into being. Lawyers, inept as they are, still are about the best problem solvers, in a social sense, that America has. But that, as I say, is arguable, and I quite agree with Bowers that the need is to move the dialogue along and to get some programs under way.

As for his emotional reaction, principally to my use of Platt and others, the less said the better. I find it faintly amusing. Not amusing at all are the tactics of the gutter, in descending to asinine name-calling. But that is his hang-up, not mine.

Next, Professor Gilmore: Inasmuch as Gilmore says he agrees with Bowers, what is said above must perforce apply to him. As for the remainder of his remarks, I am willing to accept his characterization of it as being "rambling." So it is. But he does raise some interesting questions; one, that must be analyzed, is about centers for policy analysis. He gives some basis for further discussion.

One thing is puzzling: He tends to equate policy analysis with systems analysis. Perhaps this is understandable, for he is an economist with obvious familiarity with some of the benefits and pitfalls of systems analysis. Quite obviously, the two terms are not synonymous. He should know better.

Finally, Professor Baram: His comments are mercifully brief, temperate, and to the point. I think that there is plenty of room for honest disagreement about such matters as the need for more centers of policy analysis.

Again, however, I am puzzled by his view that the District of Columbia provides an excellent milieu for such a center, but that Boston or Denver do not. Since Baram is closely involved in a multi-disciplinary, multiuniversity teaching program in the Boston area — one that looked in the summer of 1970 to health care for that area — I am unable to grasp why Boston or Denver or Grand Forks, North Dakota, or any other place, cannot be such a center, or at least begin to move in that direction. After all, this is a time when cries for "participatory democracy" are heard through the land, when there is growing distrust and even fear of the federal government, and when the inadequacies of state and local governments are becoming ever more obvious. In this connection, I see no reason why what Baram calls "interdisciplinary or clinical programs" cannot be established *for teaching purposes*. If they are, then the result, as he says, will be policy analysis.

II.

These comments have been written under pressure of time. I have not sought to document every statement in detail; nor did I in my principal paper. There I presented a position, a point of view. Extensive documentation or footnoting would have been superfluous, even though they might have lent an aura of "scholarship" (pseudo-scholarship is a better term) to the paper. If anyone, including Bowers and Gilmore, thinks that these problems are easy of solution or that there is one solution, he should read Ernest Nagel's fine book, *The Structure of Science: Problems in the Logic of Scientific Explanation* (1961). There are more ways to truth (however that slippery concept might be defined) than the scientific method, whatever it is, and it is high time that the scientists, natural and social and behavioral, awakened to that fact.

ADDENDUM

Since writing the foregoing I have come across a statement on the nature of the situation facing modern America (Davie, *Futurology*, The London Observer, Jan. 3, 1971, p. 25):

[M]y next call . . . was at the celebrated Stanford Research Institute, where I saw a high-powered electrical engineer named Norman McEachron (I knew he was high-powered when he told me he had been to Cambridge, as a Churchill Fellow, and had found the electrical engineering "about 30 years" behind the times). McEachron, who had a trim beard and a high quiff of hair, told me he worked partly as an astrophysicist and partly as a futurist. He was trying, as part of a group, to think about alternative futures for the U.S. The American government was financing the research.

McEachron explained that his own task was a small part of the whole project, yet grand in scope, nevertheless. He was trying to answer the question: what is the social situation in the U.S.? To this end he had drawn a number of graphs "measuring" the social scene, and they were leading him to conclude that the U.S. was in a crisis "in the medical sense: the patient may collapse."

"Since 1960," he said, "the curves on my graph are exponentially different. By whichever measure I take, the trend is up: illegitimate births, production and import of handguns, the rate of inflation, loss of worktime through strikes, divorce, juvenile drug arrests, adult drug arrests, assaults on policemen, incidence of adult and juvenile crime — all of them." He showed me graphs; the line always rose, and in some cases shot up alarmingly towards the top right-hand corner of the paper. "Rates of pollution would probably show the same trend. Then there's the economy; we're into a crisis that will be very hard to turn around. No one knows what to do about it. And there's the ecological crisis."

He expanded his theme of crisis, and then said that its central fact was a conflict of values. "A society works when there is a correspondence between the values of its citizens, the social structure, and the environment surrounding the society. But now they don't correspond."

He talked of the clash of values between the young, the hardhats, the blacks, and the Middle America whites. "We have a system whose values developed in response to a given situation. Now we have a changed situation, and the values are no longer appropriate. We have to change. Mainstream culture simply doesn't have the answers to our problems. In fact, the old value system actually increases the problems — the notion that the pride of families and the power of nations are to be furthered, as in the past, by population increase; the notion that any technology that can be applied should be; a system of economics based on an ever-increasing GNP and expenditure of irreplaceable resources; the belief that experts know best.

"And a shift in the values-system does seem to be emerging. There's a really strong movement towards religion and drugs, though the actual word religion is not often used. There is, for instance, a move towards seeing life more as a Christian vocation than like a job; that switch is really fundamental, more fundamental for the person who makes it than getting rid of a wife. People seem to be striving for a kind of revitalization of themselves and the culture, to try to find a new basis for progress. One thing I've noted: it's amazing how often Huey Newton, the Black Panther leader, cites the Constitution; it

seems to stem from a feeling that the U.S. has betrayed its ideals. The Declaration of Rights is a more revolutionary document than MARX."

Not all these ideas were new to me, but I had never heard them so neatly fitted together. Before McEachron appeared, I had picked up a house magazine advertising a show called "On A Clear Day You Can See Forever." He seemed to be having a clear day.

"We simply have to change direction, but no one has any idea of which direction to go in, therefore everyone has to be listened to. What's most dangerous is the increasing tendency of different groups not to listen to the others. They can't even agree to disagree. They regard each other as inhuman. It's like primitive man who, as soon as he hears a growl outside his cage, says 'Give me my club.' I end up my work thinking: if we don't listen, we won't make it. The chances of our survival may have passed: who can ever tell?"

He showed me a chart his group had drawn up, showing "alternative futures" for the U.S. It was like a tree, with the present as the roots and the possible futures as the tips of a dozen branches. Each branch, when it reached the year 2000, had been given a label, ranging from the desirable goal of "exuberant democracy" to increasingly gloomy and appalling alternatives, ending up bleakly with "Caesarism" and "collapse".

"The easiest paths to take," said McEachron, "all head into what we've called a slough of despond: recession, confusion, apathy. It turns out that, so far as we can see, it will be very hard to get to the desirable future, what we've called exuberant democracy, and much easier to get to an authoritarian form of state concentrating on social control, what we've called 'Caesarism'."

Driving back down the freeway from Palo Alto to San Francisco, among the solid shoals of cars and the neon signs; I reflected on the report that McEachron and his colleagues had sent to Washington, under contract no. OEC-i-7-7-071013-4274. The report said bluntly that desirable future histories were scarce and that it was "paramount" for the developed world to change its values — not that the Washington of Nixon and Agnew was likely to pay any attention.

Nota bene: I emphasize that quoting McEachron does not "prove" the proposition, but it does indicate that those who toil in Ithaca, New York, might well be advised to become *au courant* with what such people are saying. To ridicule them, to shrug them off, is to emulate the classic ostrich. Bowers, of course, is free to do so; but does it help?