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The Fast Food of Modern Legal Realism (reviewing Richard Neely, Judicial Jeopardy: When Business Collides With The Courts (1986))

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THE FAST FOOD OF MODERN LEGAL REALISM†

JUDICIAL JEOPARDY: WHEN BUSINESS COLLIDES WITH THE COURTS. By Richard Neely.* Addison-Wesley, Reading, Massachusetts. 1986. Pp. xviii, 182. $19.95.

*Reviewed by Robert C. Power***

Richard Neely's newest book, a folksy jeremiad about the legal system, is directed primarily at the business community.[1] Others interested in modern judicial decisionmaking should read it too, if only because it presents a contemporary appellate judge's sustained attack on attorneys' understanding of the judicial process.[2] In *Judicial Jeopardy*, Richard Neely, a judge of the West Virginia Supreme Court of Appeals, criticizes traditional notions of the legislative, judicial, and administrative processes as he has in his previous books.[3] This new critique for the business community offers a number of sharp challenges to the way many attorneys practice law.

Judge Neely's main concern is that attorneys fail to educate judges about the social utility of probusiness decisions; he believes that for this reason industry fares poorly in the courts. He criticizes the work and methods of contemporary business attorneys by questioning the typical practice of hourly billing and the resulting demands on law firms to justify costs to clients through a paper trail, both of which provide incentive to litigate rather than to settle quickly and cheaply.[4] He characterizes lawyers as "deal-killers" because of their dire predictions about the potential legal

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[1] R. NEELY, JUDICIAL JEOPARDY (1986).

[2] A number of books by appellate judges have added to the legal profession's understanding of the judicial process. They range from Benjamin Cardozo's THE NATURE OF THE JUDICIAL PROCESS (1921) to Jerome Frank's COURTS ON TRIAL (1949) to more recent efforts such as FEDERAL COURTS: CRISIS AND REFORM (1985) by Richard Posner, our most prolific federal appellate judge, and THE SUPREME COURT, HOW IT WAS, HOW IT IS (1987) by Chief Justice William Rehnquist. Judge Neely's work stands out in two key respects: he is an elected state judge and his work is not directed to legal scholars or law reformers.

[3] Judge Neely's previous books are HOW COURTS GOVERN AMERICA (1981), WHY COURTS DON'T WORK (1983), and THE DIVORCE DECISION (1984).

[4] R. NEELY, *supra* note 1, at 166-68.

problems of any given deal,[5] and suggests that most attorneys are incapable of preparing the kind of data-rich, generally policy-oriented briefs most likely to convince courts to rule in favor of business interests.[6] Judge Neely strongly criticizes "McLaw," the form-dominated, paper-churning, unimaginative practice of most law firms.[7]

In several respects the book comes across as a petulant whine; in others, however, it constitutes a thoughtful realist critique of the legal process. Judge Neely's book includes such standard realist critiques as legislative abdication, skepticism of legal formalism, and perception of the judicial process as result-oriented and dominated by policy concerns rather than by objective legal principles and reasoning. It ends with a call for creative thinking by lawyers and their business clients in order to cope with judicial law makers.[8] Restatements of realism are commonplace in legal literature, however, and Judge Neely's major accomplishment is in writing a reader-friendly challenge to the civics class understanding of the legal process for people who have not studied the realists and their more recent descendants.

The foundation of Judge Neely's jurisprudence is that there is no "law," and therefore there is nothing to be gained from relying on "law" in legal arguments: "[l]andmark court decisions concerning business are predicated not on legal principles but rather on social, political, and economic principles that instruct judges' understandings of the public good."[9] Hence, "legal" arguments should be recast as policy statements intended to convince courts that the preferred result serves overall social utility.

Judicial Jeopardy opens with an application of this approach to the familiar story of *New York Times Co. v. Sullivan*.[10] Judge Neely dismisses the special role of the first amendment as a distinguishing factor in *Sullivan* because he believes that modern free speech law is in no way mandated by

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[5] *Id.* at 93.

[6] *Id.* at 132-33, 148-49.

[7] *Id.* at 168-74.

[8] *See id.* at 159-82.

[9] *See id.* at xiii. It is entertaining but unavailing to attempt to place Judge Neely into one neat jurisprudential category. He has a realist's education and appreciates its influence. *See infra* note 21. Some of his comments restate realist premises in clear lay terminology, such as his description of law as "partially policymaking" in which courts act on "imprecisely political principles" as well as precedent, *id.* at 9, and his suggestion that good law clerks can "cobble up craftsmanlike legal opinions justifying almost any result." *Id.* at 15. The extent of his cynicism about legal rules suggests an adherence to some of the tenets of critical legal studies, but his conclusions indicate a denial of the movement's beliefs concerning the operation of the legal system. His belief that business interests are defeated in court because their attorneys fail to convince judges of the social utility of probusiness decisions, *id.* at 14, might suggest that he is at heart a believer in the economics school, but his express disavowals of that school are convincing. *See id.* at 124.

[10] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

history or legal principle.[11] Rather, Judge Neely sees this decision as premised on the Supreme Court's understanding of particular problems facing the media industry, rather than as mandated by legal principles of the first amendment. In responding to the problems of the media, the Court, according to Judge Neely, created "a uniform national standard of liability with a very high threshold," and imposed special procedural rules for defamation cases.[12] Judge Neely contrasts the Supreme Court's sympathetic response to the media in *Sullivan* with the hostile treatment most industries receive in the courts and suggests that other industries would receive better treatment if they would educate judges about their unique problems.[13]

Judge Neely's approach is hardly original. When it is stated in a book directed at nonlawyers, however, it signifies the broad acceptance of realist theory today. Moreover, this is a state supreme court judge, rather than a young academic critic, who is announcing that law lacks the protective covering of logic and reason. Judge Neely is no mere exhibitionist, however, for he builds on this base an alternative view of the legal profession's role that is responsive to societal needs, and, not incidentally, to industrial interests. The role advocated by Judge Neely is shaped from the following premises: 1) business does well in legislatures, but poorly in administrative agencies and courts; 2) legislatures may be important, but for political and practical reasons, agencies and courts are where the most important law is made; 3) business can greatly improve its legal lot through skillful advocacy of legislative facts[14] before agencies and courts. Judge Neely's recommendations center on "lobbying" judges, which he convincingly argues is appropriate if recast as "public relations."[15]

In the first several chapters Judge Neely sets forth his noncivics class view of the legal process, focusing particularly on the respective roles of the legislature and the judiciary. He stresses the growing importance of the judiciary, emphasizing the courts' unique legitimacy. According to Judge Neely, this legitimacy results in "both sides" of most disputes instinctively turning to the courts for redress. His description of the courts' role in modern society is quite convincing.[16] Judge Neely attributes society's general acceptance of judicial resolution of most disputes to the judiciary's "incomparable reputation for fairness and honesty."[17] He also recognizes the subtle but significant effects on the courts' reputation of the ritual formalities and strict ethical provisions,[18] showing his clear appreciation of

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[11] R. NEELY, *supra* note 1, at xiii.

[12] *Id.* at xii.

[13] *Id.* at xii-xiii.

[14] Legislative facts are facts that help the tribunal decide questions of law, policy, and discretion. *See infra* notes 23-26 and accompanying text.

[15] *See infra* notes 32-41 and accompanying text.

[16] *See* R. NEELY, *supra* note 1, at 51-72.

[17] *Id.* at 55.

[18] *See id.* at 56-58.

some of the unique attributes of the judicial process. He bears this appreciation notwithstanding his overall conclusion that the judiciary is a political rather than a legal system.[19] He continually contrasts this growing strength of the judiciary to the growing weakness of legislatures as law makers.[20]

In any event, if, as Judge Neely believes, courts effectively hold the most lawmaking authority, this fact could cause several acute problems for business. Unlike legislative lawmaking, which is usually prospective only, judicial lawmaking is inherently retroactive and, therefore, far more destructive of settled expectations. Natural law and judicial conservatism together caused courts to move in a cautious and restrained manner, extending precedents only slightly. This allowed businesses, as well as the courts themselves, to safely rely on stare decisis, mitigating the harsh effects of retroactive lawmaking. In the present era of realism and judicial activism,[21] however, there are few impediments to ex post facto lawmaking by the courts.[22] Thus, businesses must make certain that courts appreciate the

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[19] Judge Neely is primarily concerned with appellate courts. His opinion of lower courts is suggested by the phrase "the deliberately broken machine," the title of the first chapter in his book *Why Courts Don't Work*. *See* R. NEELY, WHY COURTS DON'T WORK (1983).

[20] Chapter Five sets forth Judge Neely's general view of the state legislative process. R. NEELY, *supra* note 1, at 95-117. Judge Neely's attitude toward legislatures is one of benign cynicism, shaped perhaps by his own experience as a state legislator. His main conclusions are that legislative bodies are structured to defeat legislation, that this is a good thing for the most part, and that legislators are largely incapable of governing due to lack of experience, demands on time, and the need to address their efforts toward re-election. Chapter Five summarizes the intensive analysis in his first book, *How Courts Govern America*. *See* R. NEELY, HOW COURTS GOVERN AMERICA (1981). Two reviews of *How Courts Govern America* suggest that Judge Neely's work is best seen as a defense of judicial activism based on the weaknesses of the legislative process. *See* Gee, Book Review, 60 TEX. L. REV. 173, 174 (1981); Book Note, 57 NOTRE DAME L. REV. 616, 619 (1982).

[21] Judge Neely's discussion of changes in law teaching since the early 1960s suggests that judicial activism will become even more common in the future. He notes that "[s]tudents try to please their teachers throughout their lives; therefore, the type of education that a professional class receives influences the actions of that class for a generation." R. NEELY, *supra* note 1, at 64. Judge Neely was a student of Yale's legal realists in the 1960s but became a judge when he was only 31, before there had been any boom of realist babies on the bench. *See id.* at 65. If he is correct, future appointees will be increasingly activist and policy-oriented, for that will be the only philosophy many of them will have learned in law school.

[22] Judge Neely effectively notes a particular irony regarding ex post facto lawmaking. In charting the doctrines limiting the Constitution's ex post facto clauses to criminal law, he notes that courts use other constitutional provisions to protect settled expectations from unfairly retroactive legislation. *See id.* at 73-75. Where judge-made law is at issue, however, efforts to protect settled expectations are not made and are, in fact, impossible because interpreting law is almost necessarily

effects of judicial lawmaking, a point that sets the stage for the book's central thesis—the need for effective advocacy of legislative facts.

Although the recognition of legislative facts is primarily important in administrative law,[23] Judge Neely's concerns are with advocacy in the courts rather than procedures in the agencies. Building on several indisputable aspects of litigation,[24] he describes a legal system suffering from a lack of adequate communication between the courts and the public and underscores the seriousness of the problems by showing what can happen when a court fails to appreciate legislative facts. His primary example is a "pro-employee" tort decision that caused serious harm to the business climate in West Virginia and did not truly help many workers.[25] Judge Neely argues that the decision was written in an unduly broad fashion and discouraged business activity in West Virginia, largely because a majority of the court failed to recognize the ramifications of a broad expansion of tort liability for industrial accidents.[26] From this example, Judge Neely effectively makes several collateral points. First, poor legislative fact-finding causes serious harm in a legal system that is premised on litigating few cases and then relying on their results to resolve all similar cases. Second, inadequate

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retroactive. He cogently explains to the layperson both the doctrinal premises of retroactive judicial lawmaking and the practical need to apply changes in law retroactively in order to encourage litigants to raise new legal theories. *See id.* at 78-79.

[23] *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958) (defining legislative and adjudicative facts). The distinction between legislative facts and adjudicative facts is one factor in determining whether rulemaking or adjudicative procedures must be utilized in agency decisionmaking. *See, e.g.*, Independent Bankers Ass'n v. Board of Governors, 516 F.2d 1206, 1215 (D.C. Cir. 1975) (rulemaking is used to "resolve broad policy questions affecting many parties and turning on issues of 'legislative fact' "); Zamora v. Immigration & Naturalization Serv., 534 F.2d 1055, 1062 (2d Cir. 1976) (characterizing certain issues in deportation proceedings as involving legislative facts and therefore not subject to the usual trial safeguards); American Airlines v. Civil Aeronautics Bd., 359 F.2d 624, 633 & n.25 (D.C. Cir. 1966) (referring to Professor Davis's explanation of legislative and adjudicative facts and relying on the distinction to avoid a trial-type hearing on the impact of a Civil Aeronautics Board regulation on the airline industry), *cert. denied*, 385 U.S. 843 (1966); *see also* R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 79 (1984) (Legislative facts "are general facts that help a decision-maker decide questions of law and policy;" they are to be distinguished from adjudicative facts which "are facts that help the decision-maker establish what happened at a particular time and place.").

[24] These aspects include the dominance of settlement, the resulting importance of the few cases fully litigated, and the relative weakness of the appellate process in obtaining and processing facts. R. NEELY, *supra* note 1, at 135-39.

[25] This case, *Mandolidis v. Elkins Indus.*, expanded employers' tort liability for injuries covered under a workers' compensation scheme. *See* Mandolidis v. Elkins Indus., 161 W. Va. 695, 698-706, 246 S.E.2d 907, 910-14 (1978).

[26] R. NEELY, *supra* note 1, at 139-43.

legislative fact-finding, combined with the occasionally deceptive style of appellate court opinions, results in bad law and, of greater importance to the intended audience, unnecessary costs for business.

Judge Neely again highlights the differences between the legislative and adjudicative processes by contrasting the volume and effectiveness of lobbying in the two branches.[27] The difficulty, as he sees it, is to obtain in adjudication the positive aspects of lobbying without the ethical problems that would result from an unthinking application of the legislative model.[28] Judge Neely makes two suggestions. One simply involves the greater use of Brandeis briefs[29] to inform courts on the sorts of facts necessary to resolve policy issues presented in individual cases.[30] Yet, Judge Neely's underlying cynicism is clear here, as he notes that few lawyers have the skill to prepare effective Brandeis briefs and that amicus curiae briefs, which sometimes contain the necessary information, are often unread by judges.[31] A more important suggestion, and really the centerpiece of Judge Neely's proposals, is that businesses sponsor seminars to "lobby" judges concerning the problems of particular industries.[32] Taking as his model a "Media and the Law" seminar he attended in 1976,[33] Judge Neely proposes that corporations

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[27] *Id.* at 146.

[28] The nearly constant ex parte lobbying of legislators is palpably inconsistent with accepted norms of the judicial process. Judge Neely clearly recognizes the importance of the limitations on judicial contact with parties interested in the outcome of individual cases. *Id.* at 57-58. He is not always so confident of the integrity of his colleagues, however. He notes that some judges breach ethical rules by contacting attorneys and encouraging them to bring certain cases, *id.* at 3, and are often unwilling to speak honestly about their decision-making processes. *Id.* at 63-64.

[29] A "Brandeis brief," named after Supreme Court Justice Louis Brandeis, who pioneered the technique, assembles as many legislative facts as possible from sources generally recognized as neutral, such as published scholarly papers, statistics provided by government agencies, and commentary from recognized treatises. The brief then supports the conclusions it wants the court to adopt with data collected from these sources. *Id.* at 148.

[30] *Id.* at 148-49.

[31] One problem with his quick, breezy style is that he races past some complex problems, delivering inconsistent suppositions and awkward conclusions. The Brandeis brief point is telling but fails to resolve two problems. First, he fails to explain the role of such documents. The most effective use of such briefs is to support the reasonableness of legislative policy judgments rather than to urge courts to adopt new policies. Judge Neely seems to presuppose its use primarily in the latter setting. Second, he fails to explain why such briefs are routinely ignored when submitted to courts by amicus curiae. In part this may be because they are often poorly prepared. *Id.* at 18, 149. There may, however, be additional reasons relating to judicial attitudes and workloads, factors Judge Neely mentions only casually.

[32] *Id.* at 149-53.

[33] *Id.* at 150 (describing a seminar sponsored by the Gannett Corporation and the Ford Foundation, "ostensibly" for the purpose of discussing reasonable standards for responsible journalism).

sponsor such events in order to communicate their problems to the judiciary.[34] He concludes that the purpose of the 1976 seminar "was to give the media an opportunity to explain its operational problems to judges—legislative facts—in the perfectly reasonable expectation that the judges would keep those problems in mind as they crafted the first amendment law on libel and rights to privacy."[35]

Two aspects of this latter suggestion require comment. As Judge Neely recognizes, the media industry does not have natural enemies,[36] but mass judicial lobbying by other industries would be characterized as a form of bribery and judges would be unwilling to attend regardless of the climate and available recreational activities.[37] Instead, industries would be required to sponsor seminars presenting various opposing views in order to avoid the suspicion that the judges would be hearing only one side of the story. Such seminars are consistent with Judge Neely's view of effective lobbying, which emphasizes fact over favoritism and in which each individual lobbyist's reputation for accuracy is critical to his or her success.[38] He emphasizes the importance of objective or balanced seminar presentations in lobbying judges. According to Judge Neely, if both sides are fairly presented, the sponsors will maintain their reputations, the judges will be better informed through a reformulated adversary process, and, accordingly, judges will be better able to perform the policy-making aspects of their job.

Simply put, Judge Neely's idea is that industries could conduct effective lobbying by inviting judges to pleasant resorts to hear balanced presentations of legislative facts on issues of importance to industry. Yet, Judge Neely nowhere questions why industry seminars for judges are not held more often, although a number of possibilities suggest themselves and require answers if his proposal is to receive serious attention. For instance even if "both sides" are presented, there may well be a perception that the financial sponsor of the seminar is purchasing influence. Legislative lobbying is often seen in this manner, as Judge Neely acknowledges;[39] even minor

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[34] *See id.* at 150-53.

[35] *Id.* at 150.

[36] *Id.* at 150-51.

[37] *Id.* at 151.

[38] *Id.* at 152. What Judge Neely describes as the lobbyists' role is counterintuitive, yet absolutely correct. Lobbyists may occasionally engage in minor forms of petty bribery, but the most important aspects of lobbying are providing accurate data on demand and having a reputation for doing so.

[39] *See id.* at 102-03. Business is prepared to bribe legislators when its arguments fail, *id.* at 102, but "illegal" bribery has been replaced by "legal" bribery in the form of gratefully received and carefully reported campaign contributions. *Id.* at 103. Free vacations, however, may result in prison terms for members of Congress. *See* United States v. Biaggi, 673 F. Supp. 96 (E.D.N.Y. 1987). Free weeks at resorts, regardless of required attendance at seminar sessions, might not be an appropriate way for sentencing judges to spend their vacation time.

concerns of this kind would present ethical problems for all judges and more serious dangers for judges who must stand for re-election.

If industry seminars for judges were not controversial, there would be substantial difficulties in establishing truly objective programs. Planning a balanced program is far easier than presenting a balanced program, especially when only one side is paying for it. Perhaps the answer is that industry should stay out, and that only truly objective entities should sponsor such seminars. Judge Neely suggests, for example, that there would not be any problem in attending a seminar at Duke University or one sponsored by a foundation institute.[40] An antismoking group, however, might object to a tobacco law seminar at Duke or conducted by a foundation substantially supported by the tobacco industry.[41]

Much of the book boils down to this one significant point—the need for better legislative fact-finding by courts. Judge Neely's overall conclusions concerning the need for more effective advocacy of legislative facts are well stated in his introductory comment that "the lawsuit likely to do any particular business the most damage is another business' lawsuit!"[42] This tells the intended audience that it may be damaged by cases in which it has no formal opportunity to be heard, and lays the premise for encouraging business interests to find effective avenues for communicating with judges deciding those cases. This point is made more subtly in his observation that business defendants and their industries are often at cross-purposes in litigation.[43] A particular business may attempt to escape liability by defending outrageous conduct as standard operating procedure and lose in an ambiguous or overbroad ruling that seems to expand liability in an unnecessary fashion. The industry, on the other hand, should be prepared to participate in the case to argue for a limited ruling, even if this means breaking ranks with the party on trial.[44] This discussion, however, is diminished by Judge Neely's failure to work through its implementation in sufficient detail to constitute a major contribution to judicial administration. It sounds good and goes down easily, but the nutritional effect is negligible.

If Judge Neely's description of the value and use of legislative facts represents the best of the book, the worst is his vision of the administrative process. For a book centered on an administrative law concept, *Judicial Jeopardy* evinces a hostile attitude toward administrative agencies and ad-

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[40] R. NEELY, *supra* note 1, at 150, 180.

[41] Perhaps money laundered through several generations would carry less taint. It is unlikely, for example, that anyone would challenge a civil rights seminar at Brown University merely because it was founded on wealth earned in part from the slave trade. *See* J. HEDGES, THE BROWNS OF PROVIDENCE PLANTATIONS, THE COLONIAL YEARS *passim* (1952).

[42] R. NEELY, *supra* note 1, at xvii.

[43] *See id.*

[44] *Id.* at 147-48.

ministrative law. This antipathy is not grounded in ignorance, as the book recognizes the extent of modern administrative government[45] and its importance, especially to business. Administrative law is characterized, perhaps accurately, as confused and unstructured; legal scholars writing about administrative law make similar comments.[46] Judge Neely attributes this confusion to the fact that judicial review of administrative action is legal in form but political in reality.[47] He may be correct in a number of respects, and this view is certainly consistent with his overall attitude toward judicial decisionmaking, but the nature of his analysis undercuts his credibility in several respects.

Throughout *Judicial Jeopardy*, Judge Neely's vision of administrative law leaves the courts very much in charge. According to Judge Neely, courts "are needed to supervise administrative agencies" because agencies are otherwise immune to control due to legislative ineffectiveness.[48] Judge Neely believes that elected politicians are in fact pleased by judicial control because they escape responsibility for their own and the agency's action and, therefore, suffer no political injuries from domination of the agencies by the courts.[49] No branch emerges from this discussion unscathed, although administrative agencies certainly come off the worst. Judge Neely asserts that administrative agencies "frequently operate like kangaroo courts" entering "wholly defective orders" or act "clearly contrary to a statutory mandate."[50] Perhaps, but are they so different in this regard from trial or appellate courts?

Other unexplained criticisms of administrative agencies abound. Judge Neely writes that among the "limitations or imperfections" of administrative agencies are:

> (1) the tendency of agency decisions to be dictated by illegitimate political considerations; (2) immaturity, ignorance, and lack of judgment

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[45] *See id.* at 119-21.

[46] *See, e.g.*, W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, ADMINISTRATIVE LAW xix (8th ed. 1987) (there is no "integrated, coherent, unwavering element of government that can be identified as the administrative process"); R. CASS & C. DIVER, ADMINISTRATIVE LAW: CASES AND MATERIALS xxi (1987) ("administrative law is a notoriously exasperating subject of study"); J. MASHAW & R. MERRILL, ADMINISTRATIVE LAW, THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS (2d ed. 1985) xxi-xxiii (noting the seemingly "random pieces" of administrative law pertinent to various administrative actions); *see also* Strauss, *Teaching Administrative Law: The Wonder of the Unknown*, 33 J. LEGAL EDUC. 1, 1, 2 (1983) (describing the field as "threatening" and "uncertain").

[47] R. NEELY, *supra* note 1, at 119.

[48] *Id.* at 119-20.

[49] Judge Neely writes: "The average elected politician, therefore, watches the interplay between administrative agencies and courts with the same sense of concern with which Churchill watched Germany invade Russia." *Id.* at 121.

[50] *Id.* at 122.

> on the part of the agency staff; (3) the tendency of agency decisions to be made with a view to strengthening the power position or funding level of the agency as a whole; (4) employee laziness; and (5) agency lack of flexibility.[51]

He notes that for every carefully considered case, "there are countless thousands of cases that involve nothing but agency laziness or gross screw-up."[52] Bureaucratic empire building and other real problems are discussed[53] but always with an air of superiority that suggests Judge Neely's inability to appreciate the dynamics of administrative government and the constraints faced by its personnel and not an accurate understanding of a serious problem. In Judge Neely's world, government employees are cartoon character villains who are incapable of performing real work; judges and private citizens are real people doing the best they can in difficult occupations.

Judge Neely's attitude toward agencies may explain his unusually broad view of judicial review of administrative action and approval of judges' occasional decisions to "pervert the statutory mandate" in order to impose their own views of public policy.[54] His example is the *Vermont Yankee* litigation,[55] which he describes as a confrontation between the appellate court's "instinctive hatred of nuclear power" and the Supreme Court's opposite predilection.[56] This gross over-simplification demeans the courts involved and erroneously implies that the legal issues had nothing to do with the outcome of the cases. The *Vermont Yankee* cases do reveal something about judicial visions of public policy, but these cases have more to do with conflicts over required administrative procedures and the interpretation of

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[51] *Id.* at 124.

[52] *Id.* at 126-27.

[53] *Id.* at 131.

[54] *Id.* at 81.

[55] Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976) [hereinafter *NRDC I*], *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n, 685 F.2d 459 (D.C. Cir. 1982) [hereinafter *NRDC II*], *rev'd sub nom.* Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87 (1983). In *NRDC I*, the D.C. Circuit held that the Commission had used inadequate rulemaking procedures to resolve certain issues relating to nuclear power plant licensing. 547 F.2d at 641, 653-55. In *NRDC II*, the court concluded that the agency had erroneously failed to consider certain relevant factors in rulemaking procedures relating to nuclear waste. 685 F.2d at 494. In *Vermont Yankee*, the Supreme Court insisted that courts have no common law authority to expand rulemaking procedures provided by statute. 435 U.S. at 523-24, 540-49. In *Baltimore Gas & Elec. Co.*, the Court concluded that the agency's findings were reasonable and entitled to deference by the courts. 462 U.S. at 104-06.

[56] R. NEELY, *supra* note 1, at 81 n.3.

statutory requirements than with any strong feelings about nuclear energy. Both D.C. Circuit decisions exemplify judicial concern that the agency was not reaching its decisions in an appropriate fashion.[57] If this represents hostility, it is directed toward the agency's competence and not toward nuclear power. The Supreme Court's decisions may represent unduly formalistic notions of the separation of powers, but if they signify any secret agenda, it is concern over undue judicial intervention into the administrative process rather than any automatic approval of nuclear power. Moreover, the Supreme Court's decisions were unanimous. Unanimity on the Court concerning the "law" of the administrative process is noteworthy; unanimity concerning whether nuclear power is a "good thing" is unimaginable.[58]

Judge Neely's preference for closer judicial review of administrative agency actions is also exemplified by his analysis of the reasons for overturning administrative action. At one point he describes the abuse of discretion standard as "[t]he vaguest and yet occasionally the most useful theory (because one can mobilize it when all else fails). . . ."[59] At other points he notes that courts routinely give misleading reasons for their decisions, not only because of their political leanings or the lack of other applicable theories, but simply to deter appeals.[60] Judge Neely's final analysis of the role of the courts in reviewing agency decisions is that "[t]he felicitous smoke screen of what is called 'administrative law' serves the purpose of keeping appeals to the courts within manageable numerical limits."[61] This statement alone convicts the courts of misconduct at least as egregious as that of the bureaucrats he attacks throughout his chapter on administrative agencies.[62]

Indeed, Judge Neely essentially reverses the roles of the administrative and judicial branches. In his vision, the courts, rather than assure that agencies use proper procedures and rational considerations in exercising *their discretion*, act as the policy-making body. Such a stark revision of administrative law requires more than the bald assertions that are generally the only support provided. As with his analysis of legislative facts and more general aspects of the legal process, the inaccurate acid of Judge Neely's vision of the administrative process obscures some valuable insights. His discussion of *International Harvester v. Ruckelshaus*[63] graphically and in-

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[57] *See supra* note 55.

[58] A pure "politics as usual" explanation of the *Vermont Yankee* litigation is also entirely inconsistent with decisions such as Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190 (1983), in which the entire Court upheld California's economic regulations that effectively blocked the construction of nuclear plants.

[59] R. NEELY, *supra* note 1, at 47.

[60] *See id.* at 121-22.

[61] *Id.* at 122.

[62] *See id.* at 119-33.

[63] 478 F.2d 615 (D.C. Cir. 1973).

sightfully explains the interplay of agencies and courts with respect to business regulation. He suggests that the Environmental Protection Agency and the reviewing court in that case worked as a "good cop/bad cop" team, putting heat on the automotive industry to work on environmental problems but avoiding unfortunate consequences to society by not enforcing unmeetable environmental guidelines.[64]

Judge Neely also provides solid examples of the sorts of erroneous decisions agencies are prone to make. One illustration involves hospital regulation. Here the New Jersey Department of Health rigidly enforced regulations that prohibited the construction of new hospital facilities where existing beds were not filled.[65] The reviewing court concluded that the agency had not considered all of the relevant factors.[66] The agency, which is naturally focused on specific issues, did not have a sufficiently broad outlook to evaluate all ramifications of the problem. Judge Neely's point is that the court, which is able to see the larger issues, recognized the relevance of factors other than the number of hospital beds in the area.[67] Another common administrative failing is the indefinite suspension of agency decisions pending the redrafting of regulations.[68] This example provides Judge Neely with a rarely taken opportunity to note a positive aspect of the way agencies operate. He admits that lack of flexibility can be a blessing because "discretion is likely to be abused for political purposes rather than applied objectively and even-handedly."[69] Curiously, he finds no similar problems in unfettered judicial discretion.

The underlying fault with this book is that the points are sketched too sparingly and assertion and caricature too often replace analysis. Moreover,

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[64] R. NEELY, *supra* note 1, at 125-26. Judge Neely praises the court for openly accepting the responsibility for resolving the policy issues relating to emission control requirements in this case. *Id.* at 126. The court claimed to be doing no such thing. It pointed out that its action was "judicial review, and not a technical or policy redetermination" and recognized the need for "deference to the expertise of an agency that provides reasoned analysis." 478 F.2d at 641. Judge Neely is correct to suggest that the effect of *International Harvester* was that the agency was able to be harsh on the automotive industry, thereby sparking some private action to deal with air pollution, because the court was able to step in and prevent the undue effects of the agency's action through judicial review. It may be, however, that this fortuitous pas de deux occurred only because the court, acting within the limited review function envisioned by administrative law and congressional intent, recognized that the agency had failed to meet its burden of proof in refusing to suspend the emission standards. This is at least what the court claimed to be doing. 478 F.2d at 647-50.

[65] R. NEELY, *supra* note 1, at 128-29.

[66] Irvington General Hosp. v. Department of Health, 149 N.J. Super. 461, 465-68, 374 A.2d 49, 51-53 (N.J. Super. Ct. 1977).

[67] R. NEELY, *supra* note 1, at 129.

[68] *Id.* at 128-29.

[69] *Id.* at 129.

much of the text consists of entertaining digressions that detract from the substance of Judge Neely's worthwhile observations and recommendations.[70] The loose style, editing problems, and overblown argument make it seem almost a parody in some respects.[71]

Still, while this book was not intended to be a parody, neither was it intended to be legal scholarship. Consistent with its theme that business should communicate with judges on a political plane, this book is a political statement rather than a legal brief. The intended audience of business executives may or may not read it, but if they do they will understand and appreciate it in ways they might not if *Judicial Jeopardy* were a more traditional piece of legal scholarship.[72]

Judge Neely's fine talent for metaphors and similes strengthens the book in this respect. For example, he compares substantive and procedural law to a water pipe equipped with a valve to regulate waterflow. He states:

> The pipe is the substantive law, and the valve is the procedural law. It makes very little difference how big the diameter of the pipe is if the

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[70] Judge Neely's description of government economists belongs in this category. *Id.* at 121-24. Stuck between serious comments on judicial review generally and the *International Harvester* case in particular, it provides comic relief but distracts the reader and weakens the thrust of Judge Neely's forceful analysis of the dynamics of the agency-court relationship. The description of today's government economists as party animals who "never had one moment's interest in the great [problems of the economy]," *id.* at 123, would have made a superb footnote.

[71] A few editing problems are worth noting. There are numerous jarring transitions. In Chapter One alone the book leaps from one topic to another at pages four, fifteen, and twenty-two (twice), and each additional chapter has several additional jumps. There are also unexplained inconsistencies. At one point the text states that many major suits cannot be settled without opening the door to many similar suits. *Id.* at 21 n.9. Later, using the same example of unlawful discharge actions, the text advises that such cases be settled. *Id.* at 92. There are also technical errors. The book contains the wrong citation for the first D.C. Circuit decision in the *Vermont Yankee* litigation, *see supra* note 55, citing a companion case, Aeschliman v. United States Nuclear Regulatory Comm'n, 547 F.2d 622 (D.C. Cir. 1976), which was also reversed in *Vermont Yankee* but which did not involve the referenced licensing of the New England nuclear power plant. R. NEELY, *supra* note 1, at 81 n.3. Stylistic issues are more subjective. Still, it is disappointing to read the pronoun "her" throughout the book and then find two instances of "his or her." *Id.* at 121, 152. In addition, the punctuation is sometimes fatiguing, such as the four exclamation marks in the space of three pages. *See id.* at 70-72.

[72] It is instructive to contrast *Judicial Jeopardy* with a recent Harvard Law Review article on one of Judge Neely's themes—the nature of legislative factfinding in the courts. The article, by New York University law professor Peggy Davis, is informative, learned, and exceptionally well-written. It is difficult reading for a law professor, and would be very difficult for even a well-educated layperson to read. *See* Davis, *"There is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987).

> person in control of the valve wants to cut off the water. Similarly, if one person in control of the valve is replaced by another person, the flow of the water can be changed dramatically without any modification whatsoever in the diameter of the pipe.[73]

This informs laypersons of the relationship between the two varieties of law, the importance of procedure, and the potential impact of changing the person in control of the valve, the procedure, without modifying the pipe, the substantive law.

Judge Neely also uses a very finely-honed folksiness in discussing legal and social problems. Federal courts are needed to avoid the "home cooking" served up by local judges against out-of-state parties;[74] appellate proceedings are so boring "that even judges have been known to sleep on the bench;"[75] written submissions are of limited effect because they must compete with judges' preferences "to play with their grandchildren or go to cocktail parties."[76]

Moreover, Judge Neely weaves his more abstract conclusions through vivid stories reminiscent of *Prairie Home Companion*. Most involve minor cases that gum up the law because of poor lawyering or personal examples of effective and ineffective advocacy. A good example is Judge Neely's description of a case he handled as local counsel for a major corporation in which he was able to obtain a favorable result for a low fee.[77] The story teaches that small town, solo practitioners will happily do a superb job for a small fee, and that big law firms and their clients erroneously assume that the size of the fee is directly related to the ability of the lawyer.

Judge Neely evidently believes that lawyers already know enough about legal realism and the need for effective presentation of legislative facts and therefore prefers to advise their clients, whom he believes have been poorly served by their attorneys in many cases. He also seems to be commenting on his colleagues on the bench, whom he believes to have made some bad law in some unnecessarily hard cases. In that sense, this book is an extended dissent to a number of decisions in which he believes a majority of his court failed to recognize the ramifications of its rulings.[78] It is Judge Neely's

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[73] *Id.* at 45.

[74] *Id.* at 28.

[75] *Id.* at 31.

[76] *Id.* at 133.

[77] *Id.* at 168 n.7.

[78] *Judicial Jeopardy* contains two specific "dissents." One concerns *Mandolidis*. *See supra* note 25 and accompanying text. The second concerns a school financing case. Judge Neely notes that in 1982 his court considered a challenge to property assessments under the state constitution and rendered a "political" decision unduly burdensome to taxpayers. *Id.* at 16-19. The decision, *Killen v. Logan County Comm'n*, 295 S.E.2d 689 (W. Va. 1982), contained a Neely dissent. *Id.* at 710-16. In *How Courts Govern America*, he made similar points about *Pauley v. Kelly*, 162 W.

mission, then, to communicate directly with clients of the lawyers for "his" side in the hope that they will demand changes from their attorneys.[79] In this respect, *Judicial Jeopardy* effectively communicates its main points. The clients may actually *read* this book, if only to search out the best yarns and metaphors, and thus it will serve its political purpose, regardless of the theoretical sufficiency of its analysis.

Va. 672, 255 S.E.2d 859 (1979), a constitutional challenge to West Virginia's system of school financing, which also produced a strong Neely dissent. *Id.* at 743-49, 255 S.E.2d at 897-900; *see* R. NEELY, HOW COURTS GOVERN AMERICA 16-17, 19-20, 173-76, 177, 186-88, 207 (1981).

[79] It may be that Judge Neely's yearning for the small, close-knit firm of experienced counselors with perspective on their clients' problems is unrealistic in the modern legal world. If at least some business leaders demand improvements from their attorneys after reading *Judicial Jeopardy*, however, the profession will be enriched and Judge Neely will deserve some of the credit.