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Tribe: God Bless This Honorable Court. Reviewed by Susan G. Kupfer

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BOOK REVIEWS

UP FROM FEUDALISM: HAROLD BERMAN ON THE CANONICAL ORIGINS OF WESTERN LAW

LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION. By Harold J. Berman. Cambridge Mass.: Harvard University Press. 1983. Pp. xviii, 367. $37.50.

*Reviewed by Richard E. Rubenstein**

In the fall of 1962, I attended Harold Berman's classes on the Soviet Legal System in the company of a few other Harvard deviants more interested in Russian Law—and in Professor Berman's unique blend of historical theory with legal "systems analysis"—than in Advanced Gift and Estate Taxation. In the arid law school atmosphere of that era, Berman's approach was a freshwater spring. After a brief period of professional disorientation, his acolytes happily learned to discuss legal rules in the context of legal institutions, institutions in the context of a legal system, and the *corpus juris* in the context of historically-conditioned systems of belief and practice. It was not just Soviet law we were studying, but law as a human activity, analytically distinguishable but historically inseparable from politics, economics, sociology, and religion. Moreover—and this theme links the course taught more than two decades ago with the *magnum opus* published in 1983—Harold Berman perceived the law as a tradition rooted in early Western social and intellectual history, influenced, to be sure, by recurrent revolutions in production and politics, but developing more or less autonomously in accordance with its own methods and values. As a result, he presented the Soviet legal system as the unstable resolution of a contradiction between specifically Western values (e.g., legal autonomy, professionalism, pluralism, and supremacy) and values associated either with Czarist despotism or with Stalinized Marxism (e.g., the law as a mere instrument of current state policy).

In *Law and Revolution: The Formation of the Western Legal Tradition*,[1] Professor Berman brings this contradiction home, arguing that the Western legal tradition is breaking down, not so much because of "external" challenges like that posed by Soviet Marxism but as a result of profound internal decay. *Law and Revolution* is an ambitious work of synthesis and interpretation done in the style of the historical school of

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[1] Hereinafter, L &R.

jurisprudence.[2] Unorthodox in method, elegaic in tone, and deeply conservative in its approach to legal development, it is reminiscent of certain products of an earlier *fin de siècle*, in particular, Spengler's *Decline of the West* and Henry Adams' *Mont-Saint-Michel and Chartres*.[3] Explicitly, and at length, it defends the proposition that the Western legal tradition was born out of the Georgian Reformation and the Wars of Investiture of 1075-1122, a period Berman calls the "Papal Revolution." Somewhat less explicitly, it argues that there *is* a coherent "Western legal tradition" embracing "legal institutions and procedures, legal values, and legal concepts and ways of thought, as well as legal rules;"[4] that this tradition has developed consciously and organically since the Papal Revolution, in tandem with social and economic change but in a manner reflecting its own "inner necessity;"[5] and that this development has reached a conclusion, or at least a turning point, due to dessication of the belief system that sustained it for eight hundred years. In the course of interpreting his own data, Professor Berman throws down the gauntlet to positivist legal theorists, nationalist legal historians, and Marxists. We shall see, however, that the "Papal Revolution" hypothesis does not necessarily lead interpretation in the direction Berman would like it to go.

What is this core hypothesis? Berman summarizes it as follows:

> In the late eleventh, the twelfth, and the early thirteenth centuries, a fundamental change took place in western Europe in the very nature of law both as a political institution and as an intellectual concept. Law became disembedded [from custom]. Politically, there emerged for the first time strong central authorities, both ecclesiastical and secular, whose control reached down, through delegated officials, from the center to the localities. Partly in connection with that, there emerged a class of professional jurists, including professional judges and practicing lawyers. Intellectually, western Europe experienced at the same time the creation of its first law schools, the writing of its first legal treatises, the conscious ordering of the huge mass of inherited legal materials, and the development of the concept of law as an autonomous, integrated developing body of legal principles and procedures.[6]

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[2] Defined by Berman as believing "that law derives its meaning and authority from the past history of the people whose law it is, from their customs, from the genius of their institutions, from their historic values, from precedents. . . ." L & R, at 12. Its leading exponents in English are Henry Sumner Maine, Sir Frederick Pollock, Frederic William Maitland, and Paul Vinogradoff.

[3] OSWALD SPENGLER, THE DECLINE OF THE WEST (1962). HENRY ADAMS, MONT-SANIT-MICHEL AND CHARTRES (1974).

[4] L & R, at 4.

[5] *Id.* at 9.

[6] *Id.* at 86.

Of course, this explosion of bureaucratic lawmaking had been noted before.[7] Berman's particular contribution is to insist that

> The primary impulse for this development came from the assertion of papal supremacy over the entire Western Church and of the independence of the church from secular control. This was a revolution, declared in 1075 by Pope Gregory VII; the papal party and the imperial party fought it out in bloody wars for almost fifty years, and it was only after almost one hundred years, in 1170, that the martyrdom of Thomas Becket sealed the final compromise in England.[8]

In other words, contrary to those who have asserted that modern legal systems were the product of the capitalist transformation of Europe, the democratic revolutions, or the genius of this or that secular state, the "Papal Revolution" hypothesis originates them in the bosom of the medieval Church. Not merchants, not secular princes, but an international class of lawyer-priests developed the first modern *corpus juris* which, both intellectually and institutionally, became a model for all subsequent legal systems: feudal, mercantile, urban, and royal. Nay, more than a model, since by giving birth to what we now think of as "legal method," the canon lawyers may be said to have fathered the single Western legal tradition of which all current legal systems are but variants.

Now, as Professor Berman well understands, it is one thing to say that the development of canon law under the influence of the Gregorian movement represented a great leap toward development of "rational-legal" authority,[9] and quite another to assert that modern legal systems may be defined, essentially, as variations on the Gregorian theme. Berman meets this objection head on by defining modernity in the legal sense, and then by attempting to demonstrate the origin of each element of the definition in the Papal Revolution. The principal characteristics of the Western legal tradition, he states, are these:

> (1) Distinction (disembedding) of legal norms and institutions from norms and institutions of religion, politics, morality, and custom;
> (2) Administration of the law by legal specialists;
> (3) Training of the specialists in a discrete body of legal learning with its own professional literature and schools;
> (4) Development of "legal science" which is used to analyze and evaluate legal decisions;
> (5) Conception of a systematic *corpus juris* using methods

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[7] See. e.g., MARC BLOCH, FEUDAL SOCIETY (1961). MAX RHEINSTEIN, ED., MAX WEBER ON LAW AND SOCIETY (1966), at 304-305.

[8] L & R, at 50.

[9] RHEINSTEIN, *supra* n. 7.

designed to reconcile contradictions and to derive general rules from particular cases;
(6) Belief in the legal system's capacity for ongoing organic change;
(7) Belief that this change is patterned, and that it reflects "an inner necessity;"
(8) Commitment to the supremacy of law over the political authorities;
(9) Existence of a plurality of diverse jurisdictions and legal systems, and
(10) Tension between ideals and realities leading to revolutions which end by renewing the tradition.[10]

Assuming, for the moment, that these ten features define the basic postulates of most modern legal systems, we can examine Professor Berman's proof of their medieval and ecclesiastical origins.

In 1075, Berman tells us, Pope Gregory VII (Hildebrand) "proclaimed the legal supremacy of the pope over all Christians and the legal supremacy of the clergy, under the pope, over all secular authorities."[11] In so doing, he stepped up and generalized the Cluniac Reform of the preceding century, turning the movement to purify and reorganize the Western Church against the emperors and kings that had previously supported it, and unleashing a century of warfare which ended in a compromise between the new Christian "church-state"[12] and the new secular states it helped spawn. More important, under Gregory's leadership and that of his immediate successors, the canon law of the Church was rationalized, professionalized, and systematized to the point that, by the time Gratian wrote his massive *Concordance of Discordant Canons* (1140), it had become "the first modern Western legal system."[13] Berman reminds us that the legal jurisdiction of the Church, as defined by the canonists, extended to a large number of matters now considered secular, including virtually all civil and criminal cases involving the clergy, family law, the law of inheritance, contracts involving "pledges of faith," crimes of particular interest to the Church (e.g., heresy), and matters concerning Church property, which constituted perhaps one-third of the land of western Europe.[14] Furthermore, the canonists developed the constitutional law of the Church, using corporate law concepts adapted from earlier Roman, Germanic, and Christian sources.[15]

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[10] L & R, at 7-10.

[11] *Id.* at 94.

[12] *Id.* at 115.

[13] *Id.* at 116.

[14] See his informative chapter, "Structural Elements in the System of Canon Law," *id.* at 225-254.

[15] *Id.* at 205-221.

Within this broad jurisdictional sphere, Gregorian priests trained in the new law schools to be professional jurists developed the scholastic method of analyzing and synthesizing cases still used today by Western lawyers and judges. The sources of the rules they interpreted and applied were the newly-discovered Justinian Code,[16] the prior laws of the Church, and the customs of the Germanic peoples. Furthermore, the authority of popes and their legal delegates to legislate was expressly recognized. But the key to the canonists' breakthrough to legal modernity was "the theory that customs must yield to natural law," which meant, as Berman rightly points out, "that custom lost its sanctity; a custom might be binding or it might not."[17] Since the created universe was lawful, the reason of a properly trained and qualified jurist could discover the rules immanent in Creation for the proper and just ordering of nature and of human society. Thus, the Justinian materials were considered to embody the principles of natural law. These principles, torn from their context in Roman history, could then become standards for judging the validity of particular customs—the raw materials for legal analysis, just as common law principles and legislative pronouncements are the raw materials for ours.[18]

Essential to the theory and practice of natural law were two assumptions which, Berman maintains, remain keystones of the Western legal tradition. First, diverse and multifarious legal rules constitute an *order*. Insofar as they are natural, they are internally consistent, and the lawyer's job is to demonstrate this consistency by harmonizing apparently discordant rules. Second, this order is *just*. The law has a transcedent purpose, which is to purify the Church and redeem the secular world. This notion leads in time to Thomas Aquinas' teaching that an unjust law is no law at all, and, several centuries later, to the assertion that natural law gives a right of revolution against authorities that systematically violate it.[19]

Already the reader may be wondering how much of modern legal thinking, as defined in Berman's ten characteristics, is *present* in twelfth-century canon law, how much is *implicit* in it, and how much is merely *foreshadowed* (or even contradicted) by it. Professor Berman is not as clear as one would wish about this, and the confusion is not dispelled by his statement that the development of later legal institutions in the West bears the same relationship to the Papal Revolution that the growth of

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[16] *Id.* at 121-123. The materials compiled under the Emporer Justinian in the sixth century included the Code, the Novels, the Institutes, and the Digest. The Church considered these texts revelatory of natural law.

[17] *Id.* at 145.

[18] *Id.* at 204-205.

[19] THOMAS AQUINAS, SUMMA THEOLOGICA (1948), at 663, 649.

racial equality in the modern United States bears to the American Revolution.[20] The American Revolution was in considerable part the work of slaveowners whose property in human beings was indirectly guaranteed by the United States Constitution. The Civil War Amendments, which Berman's analogy presents as "culminating" the American Revolution, actually reflected the radical development of one strain of Revolutionary thought at the expense of numerous contradictory strains. Similarly, Berman credits the Gregorian canonists with originating the modern "disembedding" of law from custom, politics, and morality, when, in fact, they liberated law from custom only by embedding it in the "higher morality" of natural law. Thus, he writes that, in the West, "politics and morals may determine law, but they are not thought to *be* law—as they are in some other cultures."[21] This may be true of modern secularized law—the commands of the positive state—which positivist thinkers since Hobbes and Bentham have held to be legally binding regardless of their moral character.[22] But it is of the essence of medieval natural law to insist, with Aquinas, that

> . . . every human law has just so much of the nature of law as it is derived from the law of nature. But if in any point it departs from the law of nature, it is no longer a law but a perversion of law.[23]

In proclaiming the supremacy of natural law (and the Church's moral code) over custom (and tribal morality), the canonists may, indeed, be said to have taken a large step into the future. Professor Berman is rightly impressed by the relative modernity of their system, which exposed tribal customs like the blood feud, child marriage, and trial by ordeal to ruthless natural law criticism; developed a criminal law based on intention, and fact-finding procedures based on witness testimony; created a law of trusts ("uses"); and generated a canon law of wills, contracts, and property favoring freedom of testation, the enforceability of informal promises, and full ownership of property.[24] Moreover, the canonists *were* legal specialists, conscious of their system as a system, who used the scholastic method of legal analysis and synthesis to rationalize and systematize it further. Still, there is a theoretical problem here which is not solved by resort to metaphors that imply a linear development from canon law to contemporary law. "Organic" growth is one

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[20] L & R, at 527.

[21] *Id.* at 8.

[22] Cf. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1970), at 126; "The science of jurisprudence is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness."

[23] AQUINAS, *supra* n. 19 at 649.

[24] L & R, at 225-253.

of Berman's favorite metaphors,[25] but the centuries of socioeconomic transformation, religious wars, and political revolutions which overthrew the supremacy of the Church and its natural law and established that of the State and its positive law were no mere unfolding of some canonical bud. It is not unfair, I think, to accuse Professor Berman of systematically overemphasizing the progressive (in hindsight) aspects of the Papal revolution in order to prove his thesis of continuous, organic legal development. By the same token, he understates the contradictions between the late medieval "church-state" and the modern state-as-church, with the result that legal history is flattened out and a great paradox left unexplained: the survival of certain twelfth-century legal conceptions in the age of secularist capitalism.

What did survive, *mutatis mutandis*? Which of the items on Berman's list of essential characteristics of Western law represent genuine contributions of the Gregorian movement to later legal systems, as opposed to shadowy or anachronistic signs of things to come? First, let us set aside the shadows and anachronisms, which are to be found toward the end of Berman's list. Chief among these are the notion that the Papal Revolution established, at least in theory, the supremacy of law over the political authorities, and the related idea that "legal pluralism," which Berman dates from the same period, "makes the supremacy of law both necessary and possible."[26]

> Perhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems. . . . Legal pluralism originated in the differentiation of the ecclesiastical polity from secular politics.[27]

Berman refers here to the fact that, in the high middle ages, at least six legal systems, each of which is described in Part II of his book, could coexist on the same European territory. In addition to canon law, there existed definable, although less systematized, bodies of royal, feudal, manorial, urban, and mercantile law, so that

> The same person might be subject to the ecclesiastical courts in one type of case, the king's court in another, his lord's court in a third, the manorial court in a fourth, a town court in a fifth, a merchant's court in a sixth.[28]

And Berman might have added several others, for example, the commu-

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[25] L & R, at 9.

[26] L & R, at 10.

[27] *Id.*

[28] *Id.*

nal courts established to decide cases involving the personal status of Jews and other groups outside the Christian-feudal community.

All this is perfectly true, but to equate *this* sort of "pluralism" with any characteristic of a modern legal system (federalism? the coexistence of international and municipal law?) is sheer anachronism. Indeed, the authority of multiple legal systems over the same individual based on that person's ascriptive status, occupation, group affiliation, religion, or urban/rural residence was precisely what every modern legal system denied by asserting the supremacy of the state's law over all competitors on the same territory. Late medieval "pluralism" reflected both the localism of the feudal economy and the emergence of new relations of production; it was *destroyed*, not developed, by the capitalist state. Furthermore, it is only by focusing on the real multiplicity of legal authorities in the pre-capitalist era (an era of "laws," not "law") that we can make sense of the canonists' natural law and comprehend that system's relationship to our own. Natural law (like the Gregorian movement itself) grew out of a longing for unity, order, and justice in an age notably devoid of these characteristics. In a sense—and here I agree with Berman—it represented an attempt to found a "law-state" without a monopoly of force, substituting the moral authority of the Church for other forms of sanction. Thus, insofar as natural law attempted to *overcome* the chaotic multiplicity of law-systems in medieval Europe, it pointed in the direction of modern legality. On the other hand, the twelfth-century Church was a material power wedded to a *status quo* which made the achievement of unity, order, and justice impossible. Natural law made its peace with this real world in two ways: first, by declaring that deeply-rooted customs were "natural," and, second, by mystifying its own principles and procedures. Insofar as the canon lawyers adopted these strategies (which Professor Berman largely overlooks), they created a system clearly obstructive of progress toward a "rational-legal" order.

Aquinas' treatment of private property and slavery illustrates both strategies quite well. The problem is that natural law, as understood by the Church Fathers, prescribed "the possession of all things in common, and universal freedom."[29] But private property and slavery were customs both widespread and of long standing. Should they be condemned, nonetheless, as being antithetical to natural law? Of course not; the twelfth-century Church, like virtually all of its contemporary institutions, considered both customs perfectly proper. Were the Church Fathers wrong, then, in their interpretation of natural law? This was inconceivable. The only possible conclusion, it might seem, was that nat-

[29] AQUINAS, *supra* n. 19 at 643, quoting ISIDORE.

ural law had *changed*. How could this be the case, however, when it was clearly understood that "natural law is nothing else than the rational creature's participation of the eternal law"?[30] Aquinas resolves the problem as follows: natural law can not be changed "by subtraction, so that what previously was according to the natural law, ceases to be so." But it *can* be changed "by way of addition," since human reason is God-given, and it is natural for human being to innovate.[31]

> . . . we might say that for man to be naked is of the natural law, because nature did not give him clothes, but art invented them. In this sense, the possession of all things in common and universal freedom are said to be of the natural law, because, namely, the distinction of possessions and slavery were not brought in by nature, but devised by human reason for the benefit of human life. Accordingly, the law of nature was not changed in this respect, except by addition.[32]

Now, it is easy to scoff at this reasoning, and I do not intend to do that. How can a rule be changed "by addition" into its opposite? How can such change be distinguished from change by way of "subtraction"? The difficulty, in part, is that Aquinas is trying to describe *transformation* using arithmetical language. His position is no more illogical, really, than that of American constitutional lawyers who believe that the right to bear arms is perfectly consistent with gun control. Furthermore, it is a "radical" position insofar as it assumes that human reason is not fallen, but rather that humans are capable of "participating" in the development of God's law in the same way that lawyers and judges participate in developing a constitution. At the same time, however, we would have to say that this performance demonstrates the failure of natural law to generate standards for determining the validity of custom (which is to say, the failure of the Gregorian Movement to alter the medieval *status quo*). For the analogy, nudity: clothing = freedom: slavery, is not founded either directly or by way of interpretion on any pre-existing principle of natural law. It simply expresses the conviction that slavery is "for the benefit of human life," hence, that it is a morally defensible custom. How does one know this? Because it is obvious to reasonable persons. But this means, of course, that one can not distinguish between an "addition to" and a "subtraction from" natural law without first defining a custom as good or bad; or, to put this another way, that natural law represents little more than the current views of the Church on this custom or that. Moreover, if this be true, to speak of natural law as estab-

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[30] *Id.* at 618.

[31] *Id.* at 643.

[32] *Id.* at 644.

lishing the "supremacy of law" over politics and morality is mystification. Its true function was to establish the Church's political and moral opinions as supreme by declaring them to be lawful.

Harold Berman might well agree with this critique, as far as it goes. Nevertheless, he would reply, the twelfth-century "church-state" *did* rob custom of its sanctity *qua* custom; did create a legal profession and law schools; and did conceive of the law as a systematic body of institutions and principles, aimed ultimately at achieving justice, which could be changed organically by utilizing methods of legal reasoning not very different from our own. At this point, I must say that I agree with him. The first six or seven items on his list of essential Western legal characteristics represent genuine contributions of the Gregorian movement to Western law. Where Berman makes a serious mistake, in my view, is in the interpretation of this discovery, which he believes refutes Marxist jurisprudence.

Berman summarizes the Marxist position as follows:

> Underlying the Marxian interpretation of feudalism is the postulate that political rule is essentially a means by which the dominant economic class maintains its dominance; therefore, the form which political rule takes, and especially the legal form, is only an instrument of class dominance.[33]

Now, Berman argues, if significant aspects of modern legality originated in the eleventh and twelfth centuries, even before the feudal system began to decline—and in the bosom of Mother Church at that!—how could the same system serve the ideological interests of the bourgeoisie centuries later? Furthermore, if the Marxists are correct in arguing that law's primary purpose is to sustain and justify the power of the ruling class, how can it be that

> . . . law under so-called feudalism not only supported the prevailing lord-peasant power structure but also challenged it; law was an instrument not only for enhancing but also for restricting the power of the feudal lords.[34]

In fact, he asserts, the "orthodox" Marxist view that changes in the socioeconomic "base" cause changes in the ideological "superstructure," law being relegated to the superstructure, is incorrect.

> Law is as much a part of the mode of production of a society as farmland or machinery; the farmland or machinery is nothing unless it operates, and law is an integral part of its operation.[35]

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[33] L & R, at 542.

[34] *Id.*

[35] *Id.* at 557.

As a result, Berman concludes, the evolution of the legal system may be seen as relatively autonomous. Legal change is as influential, historically, as change in the mode of production,[36] and even the great revolutions have been compelled to make their peace with the Western legal tradition.[37]

The first thing to be said about this attack is that Professor Berman's data do not begin to prove his case.[38] *Law and Revolution* is a work of intellectual history, and one can not refute Marxism, which posits relationships between legal development and changes in social structure, by focusing exclusively on the former. This point becomes clear if one asks the following questions: first, what were the socioeconomic origins of the Papal Revolution? Second, *was* it a revolution, as that term is generally understood? Third, did it cause subsequent changes in secular law? And, fourth, did law under feudalism challenge "the prevailing lord-peasant power structure" and restrict the power of the feudal ruling class?

What were the Gregorian movement's social origins? Professor Berman does not tell us. He understands that

> Political changes of such magnitude could not have occurred without comparable changes in the economy and in the social structure connected with the economy,

but then declares that although "such changes did take place . . . it is difficult to determine their relationship to the political changes."[39] As a result, he gives us fewer than two pages of description of the socioeconomic upheaval taking place in western Europe during this period, including the generation of agricultural surpluses, the emergence of large cities and towns, the expansion of commerce, and the universalization of the manorial system, which involved the subjection of the formerly autonomous peasantry to feudal discipline.[40] (Compare with this his lengthy discussion of the "theological sources of the Western legal tradition.")[41] Since no concrete relationships between these dramatic social events and the Gregorian movement are suggested, even by way of hy-

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[36] ". . . the development of law in the West under what is called feudalism . . . was an essential precondition for the economic changes of the seventeenth to nineteenth centuries which Marxists have identified with capitalism." *Id.* at 543.

[37] *Id.* at 39.

[38] Professor Berman has also been criticized for ignoring the work of "sophisticated" theorists like Karl Renner and Maurice Dobb. See, e.g., Michael E. Tigar's review of L & R in 17 U. CAL. DAVIS L. REV. 1035, at 1042-1044. But Berman wants to deal with orthodox Marixism, not modern revisionism, and he is within his rights to do so.

[39] L & R, at 101.

[40] *Id.* at 101-103.

[41] *Id.* at 165-198.

pothesis, one is left with the impression that, "In the beginning was the Word": i.e., that legal ideas emerged from theology. Berman's apparent conclusion that legal development is relatively autonomous thus turns out to be an assumption which controls his presentation of the data *ab initio*. This is a pity, particularly because one would like to know how the Gregorian movement and the explosion of secular lawmaking that followed it reflected (and influenced) the reorganization of the feudal ruling class in the twelfth and thirteenth centuries.

One could hypothesize, for example, that this era of Western history was similar in significant respects to the present era of world history—a period in which a still-powerful ruling class, challenged by vast economic and social changes, was compelled to reorganize itself and to develop new sources of legitimacy in order to defend its power. Then, as now, the threats to its hegemony emanated from many sources: classes wedded to an older mode of production, strongly resisting incorporation into the expanding system; classes reflecting the development of new forces or production, still relatively weak but beginning to generate destabilizing ideas and practices; and bitterly competitive groupings within the ruling class itself. Indeed, one might say of the feudal lords (including the lords of the Church), as of the modern bourgeoisie, that the principal threat to their power was not organized revolution so much as the tendency of society to become ungovernable. In this crisis, the Gregorian canonists played a dual role. As literates, ecclesiastics, and heirs to the tradition of Roman bureaucracy, they came to the fore as the *intelligentsia* of the feudal ruling class, devising new techniques of propaganda and administration. And as landowners and feudal lords, they attempted to reorganize the ruling class in such a way as to become its dominant sector.

It seems clear, in any event, that what Professor Berman calls the Papal Revolution was not a revolution in the commonly accepted sense of that term. Berman recognizes that, at least since Marx and Engels wrote *The Communist Manifesto*, political revolution has been defined as a relatively rapid and violent mass struggle that replaces an old ruling class with a new one. Which new class did the Papal "Revolution" bring to power? Berman wants us to believe that the clergy was this class, but this notion runs immediately into two obstacles. In the first place, the lords of the Church *were* feudal lords "with the same economic interests as their nonecclesiastical counterparts."[42] But a class is defined by its relationship to the mode of production, not by its *esprit de corps*.[43] According to Professor Berman, however,

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[42] *Id.* at 109.

[43] See LEON TROTSKY, IN DEFENSE OF MARXISM (1965), at 3-32, 116-142.

> . . . it was not primarily the economic interests of the clergy that gave them their class character. It was, rather, their role as producers of spiritual goods. . . .[44]

This can hardly be taken seriously. The producers of spiritual goods are an intelligentsia, and an intelligentsia is not a separate class unless it has an independent economic and social basis in a particular society. Furthermore, where the clergy *succeeded* was in creating a model of legality that, in significant respects, was adopted by the ruling class as a whole. That is, it succeeded as an intelligentsia while failing to become the dominant sector of the ruling class politically or socially. The extent of this defeat is understated by Professor Berman, who describes the Papal Revolution as ending in "compromise." But even if one accepts this formulation, whoever heard of a successful revolution ending in compromise with the *ancien regime*?

No—the Gregorian movement was not a revolution, but something akin to what the Chinese call a movement of "rectification": a reorganization of the ruling class that generates new ideological links between the rulers and the ruled. This helps us also to understand the element of hyperbole in Berman's statement that, "[t]he Papal Revolution gave birth to the modern Western state. . . ."[45] The unfortunate tendency of intellectual history which purports to explain social development is a confusion of ideas with social reality. In the first place, the "modern Western state" was not born in the reign of Henry II or Philip Augustus. Although a movement toward centralization and rationalization of secular authority gained impetus in this period, we are centuries away from the achievement of that effective political sovereignty and juridical unity which are the hallmarks of the modern state. Furthermore, the Gregorian movement did not give birth even to the limited centralization and rationalization of the twelfth-century state, if "giving birth" means *causing* these developments. Indeed, Professor Berman seems somewhat uncertain about this himself, as evidenced by his resort to a variety of other metaphors to explain the relationship between churchly ideas and secular practices. Thus, "[t]he Papal Revolution did *lay the foundation* for the subsequent emergence of the modern secular state. . . ."[46] "Law had helped to *pave the way* for this development."[47] "The development of royal law in the twelfth and thirteenth centuries *was strongly influenced by*, and indeed *was part of*, the Papal Revolution. . . ."[48] And, most

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[44] L & R, at 109.

[45] *Id.* at 115.

[46] *Id.*

[47] *Id.* at 533. Here Berman is discussing the disappearance of the manorial system.

[48] *Id.* at 535.

interestingly,

> The Papal Revolution was *like an atomic explosion* that split Germanic Christendom into two parts: the church, viewed as an independent, visible, corporate, legal structure; and the secular order, viewed as divided among various polities.[49]

The difficulty with this language, it seems to me, is that it begs the question of the relationship of ideology to social change by treating a model of change as its primary cause. Without the *philosophes*, the French Revolution might not have taken the form that it did, but can anyone contend that without them there would have been no revolution at all? Indeed, can anyone doubt that, given the socioeconomic contradictions of pre-revolutionary French society, *some* group would have played the role of *philosophes*? Harold Berman has made a convincing case that the legal ideology of the twelfth-century Church furnished secular rulers with a powerful method of extending and rationalizing their authority; but to assert that Gregorian legalism *caused* the rise of secular states is to fall into the trap of *post hoc, propter hoc*. It is likely that the same social causes, which remain unexplored in this work, generated both the Papal Revolution and the secular reorganization which (with the unwitting help of the clerical intelligentsia) defeated the Church politically.

The best of evidence of what I have called the confusion of ideas with social reality is Professor Berman's treatment of secular law under feudalism, which he maintains "gave the West its first secular experience of mutuality of obligation between persons of superior and inferior rank."[50] This was particularly true, he states, of lord-vassal relations, but even under manorial law, which did not provide for contractual reciprocity between lord and peasant,

> . . . group pressure was exerted by peasants to exact more favorable conditions, which had the force of concessions reciprocally granted on condition of loyalty.[51]

Berman strongly emphasizes the participation of peasants in the manorial courts, remarking that, "cases have been reported in which decisions were granted to peasants against the lord." His conclusion:

> The peasant remained poor and oppressed; yet he acquired rights under a system of law.[52]

And these rights, so far from being either legal fictions or mere methods

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[49] *Id.* at 531.
[50] *Id.* at 533.
[51] *Id.*
[52] *Id.*

of maintaining the feudal lords' power, established the basis for popular participation in the administration of justice and the protection of individual rights by the modern state.[53]

I must confess that this is the one point in reading Berman's otherwise stimulating book that I became genuinely angry—not that what he says is utterly false, but that it is so selective, so one-sided, and, ultimately, so complacent. It is true, of course, that legal relationships established in an earlier era to apportion power among members of a ruling class may furnish ammunition in a later era to lower-class rebels; *Magna Charta* is a good example of this as any. It is also true that virtually all forms of class domination since the rule of the ancient empires have relied on law as well as on naked force to maintain relations of domination and subordination.[54] Except in North America, even slaves had legal rights, and participated to a limited extent in the administration of their own oppression.[55] Nevertheless, it seems outrageous for Professor Berman to portray a movement which intensified and regularized oppression as essentially liberatory merely because it used the law to achieve its purposes. How can he mention the "group pressure . . . exerted by the peasants to extract more favorable conditions" without referring to the group pressure exerted by the feudal lords to render even the limited rights granted the peasantry nugatory? How (his eyes fixed on future legal progress) can he be so blind to the uses made by the feudal lords of canonical legalism? The legal ideology fashioned by Gregorian intellectuals to assert the Church's supremacy over secular authority was used by that authority to reduce formerly free peasants to serfdom and to fasten the yoke of domination more securely on existing subject classes.[56] In the period of the Papal Revolution, says Berman,

> Feudal rights and obligations become more objective, less arbitrary, more precise. They became more universal, more general, and more uniform.[57]

To be sure. But much the same thing could be said of rights and obligations under German law in the period 1933-1945.

In short, Professor Berman's hostility to Marxism causes him not only to overstate the role of ideology in history, but to understand quite

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[53] *Id.* at 537.

[54] FREDERICK ENGELS, ORIGINS OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE (1972); Stanley Diamond, "The Rule of Law Versus the Order of Custom," 38 SOCIAL RESEARCH 42 (1971).

[55] STANLEY ELKINS, SLAVERY (1960).

[56] Berman mentions this indirectly and almost in passing: L & R, at 101 (migrations into northern and eastern Europe); *id.* at 102 (incorporation of "autonomous landholders" into manorial system). BLOCH, *supra* n. 7, discusses it more directly.

[57] L & R, at 532.

systematically the power of legal ideology as an instrument of class domination. What he says of Gregorian legalism, in this respect, is highly suggestive:

> Lacking armies of its own, how was the papacy to make good its claims? How was it to overcome the armies of those who would oppose papal supremacy? And apart from the problem of meeting forceful opposition, how was the papacy to exercise the universal jurisdiction it had asserted? . . .
>
> An important aspect of the answers to these questions was the potential role of law as a source of authority and a means of control.[58]

Of course, the papacy *did* have armies, although they were soon outclassed by those of the secular princes. Nevertheless, if both Church and fledgling state now found legalism essential to the pursuit their ambitions, this was because the decay of earlier beliefs and customs (e.g., the sanctity of kingship), and the survival of customs inimical to their rule (e.g., the autonomy of the village) required that physical force be supplemented by psychological coercion.[59] The essence of Western legalism, at least during non-revolutionary, non-wartime periods, is that it is largely self-executing; that is, it enables rulers, by indoctrinating their subjects in legal duty and by applying physical force at symbolic "pressure points," to control large populations with a minimum of physical violence. It is thus no great surprise to discover that legalism, although originated by the medieval Church, still played a relatively minor role in the feudal world, only coming to full flower with the rise to power of the bourgeoisie. The business class, Marx stated,

> . . . finds itself involved in a constant battle. At first with the aristocracy, later on, with those portions of the bourgeoisie itself whose interests have become antagonistic to the progress of industry; at all times, with the bourgeoisie of foreign countries. In all these battles it sees itself compelled to appeal to the proletariat, to ask for its help, and thus to drag it into the political arena. The bourgeoisie itself, therefore, supplies the proletariat with its own elements of political and general education. . . .[60]

In the feudal world, legalism only supplemented the moral authority of the Church, the hereditary legitimacy of the lords, and the physical power of the knightly caste. Having destroyed all three sources of stabil-

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[58] *Id.* at 95.

[59] A pioneering study of law as internalized coercion is SIGMUND FREUD, MOSES AND MONOTHEISM (1955), a work seldom referred to by lawyers. See also A. EHRENZWEIG, PSYCHOANALYTICAL JURISPRUDENCE (1971).

[60] MARX. AND ENGELS, MANIFESTO OF THE COMMUNIST PART (1973), at 43-44.

ity, how else was the bourgeoisie to rule other than by fulfilling the promise of the Papal Revolution?

Modern Marxists do not believe, as Professor Berman suggests they do, that legalism "has no fundamental historical importance."[61] As the foregoing discussion implies, it was of considerable importance that the Western Church revived Roman legalism in a new form which assisted the bourgeoisie, once its time had come, to establish its effective dictatorship in the West and to become the dominant class worldwide. Berman focuses exclusively on the happier aspects of bourgeois legality—the rule of law, popular participation in lawmaking, and the protection of individual rights. A less one-sided perspective would explore the intimate connection between legalism and other features of bourgeois rule, including economic exploitation, racism, imperialism, and world war. Furthermore, it is important to note that Marxists do not limit their understanding of legalism to the notion that it is merely a cloak for power. They understand that a mode of production is not limited to "means" of production like farmland or machinery, but includes "relations" of production that are social—hence, capable of being expressed normatively.[62] As a rule, new relations of production do not immediately take legal form; they are new customs, as it were, which achieve expression as norms of "positive morality" long before their acceptance as positive law. Moreover, if they constitute a radical enough break with the existing mode of production, they create new social classes which can not legalize these norms except by overthrowing the ruling class.

This analysis may help us explain the paradox of Gregorian modernism. Since the twelfth-century clergy did not constitute a new class at odds with the feudal power structure, but functioned rather as a component of the ruling class *and* as its intelligentsia, it was able in a fairly short time to legalize the Church's positive morality—a process furthered by its commitment to natural law, which fused legal and moral concepts. And if these concepts were, as Professor Berman suggests, "anti-feudal" in some respects,[63] this was because the canonists were fulfilling the primary role of a ruling-class intelligentsia: to anticipate and accommodate threatening change. Thus, it is not entirely surprising that the bourgeois revolutionaries who finally wrote *finis* to feudal power found aspects of Gregorian legalism so useful.

Nor is one surprised to discover that, with bourgeois rule now threatened on a worldwide basis, the legal tradition created, in part, by

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[61] L & R, at 543.

[62] See the discussion of this point in G.A. COHEN, KARL MARX'S THEORY OF HISTORY: A DEFENCE (1978), at 231-234, with citations from Marx.

[63] L & R, at 530-531.

the feudal intelligentsia and transformed (or "completed") under capitalism is also in crisis. Professor Berman writes in the conviction that, legally speaking, we are at the end of an era.

> . . . I sense that we are in the midst of an unprecedented crisis of legal values and of legal thought, in which our entire legal tradition is being challenged—not only the so-called liberal concepts of the past few hundred years, but the very structure of Western legality, which dates from the eleventh and twelfth centuries.[64]

Because he approaches this crisis from the perspective of one convinced that legal development is largely independent of changes in the mode of production, he characterizes it primarily as a crisis of belief.

> . . . the legal systems of all the nations that are heirs to the Western legal tradition have been rooted in certain beliefs or postulates. . . . Today those beliefs or postulates—such as the structural integrity of law, its ongoingness, its religious roots, its transcedent qualities—are rapidly disappearing. . . .[65]

Moreover, the law itself, Berman asserts (giving examples), is becoming steadily

> . . . more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity.[66]

This is ultimately the result of a "crisis of Western civilization" which he believes began with World War One—a crisis whose primary characteristic is "the massive loss of confidence in the West itself. . . ."[67] What can be done about this Berman does not say, but this implicit message (as befits a work so strongly oriented toward religion) is: Return to your roots! Repent and believe!

This is a heartfelt and touching presentation—a rare eruption of personal feeling in a work of jurisprudence. Moreover, even if he does not explore the social causes of the cultural crisis he describes, it seems to me that Berman's "intuition" (as he calls it) is perfectly accurate. Nevertheless, one wishes that he had pursued the matter beyond the opaque categories of belief and cultural Westernism, particularly in view of the fact that "the nations that are heirs to the Western legal tradition" now include virtually every nation on earth.[68] I believe that a deeper analysis of the crisis he perceives would demonstrate that the bourgeoisie itself, in

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[64] *Id.* at 33.

[65] *Id.* at 39.

[66] *Id.*

[67] *Id.* at 40.

[68] The category "Western" is somewhat problematical even as applied in the body of the book to the "Western legal tradition." Professor Berman means to demonstrate that the common law and

particular, the great monopolists and their legal servitors, is primarily responsible for the deformalization and politicization of law that Berman decries. New legal systems, like new modes of production, are born in the womb of the old. It may be that, just as the Western legal tradition was conceived, in part, in the chambers of the medieval Church, its successor is now emerging (albeit greatly deformed) in the executive suites and law offices of the multinational corporations.

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civil law systems have common roots and share common postulates, but he does not discuss the fate of the tradition in the countries that "received" it either through imitation or colonization.

GOD SAVE THIS HONORABLE COURT

HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPE OUR HISTORY. By Laurence H. Tribe.[1] New York: Random House. 1985. Pp. xix, 153. $17.95.

Reviewed by Susan G. Kupfer[2]

With the recent news of the nomination of Associate Justice William Rehnquist to be Chief Justice of the United States Supreme Court and the nomination of Anton Scalia to fill Justice Rehnquist's seat, the appropriate qualifications for appointment to the highest court in the country once again become a matter of public concern and debate. Laurence Tribe, Tyler Professor of Law at the Harvard Law School, author of a renowned constitutional law treatise and frequent appellate advocate before the Court, has written a book, primarily for a lay audience, which explores the parameters of discussion concerning the ascension to this "citadel of public justice," as *The Federalist* would have it.

God Save This Honorable Court contains several strands of argument woven to support Tribe's thesis. It is, first, a quick tour through substantive constitutional doctrine to inform the presumably unaware audience of the importance of Supreme Court decisions and their impact on everyday life in these united states. It is also a somewhat abbreviated historical study of appointments to the Court, which illuminates the political context of presidential appointments and weighs the importance of constitutional decision-making in a framework of historical factors. It then becomes a brief, but clear, description for the non-academic of theories of constitutional adjudication, intended to raise the stakes in theory on the appointment issue. Finally, the argument culiminates in an appeal that a nominee share an openness to constitutional decision-making.

Tribe's thesis is simple. He approves of the non-interpetivist position of constitutional adjudication in which the judge is not constrained by the boundaries of the document itself. He subscribes to the liberal theory that the Supreme Court is the necessary protector of individual rights and feels that, by and large, judicial activism has been responsible for an expansion and redefinition of civil rights and liberties when Congress and the state legislatures have not been responsive. Further, he recognizes that the "greying of the Court," the current situation which finds a majority of the justices over the age of 70, will present a president

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[1] Tyler Professor of Law, Harvard Law School.

[2] Professor of Law, Antioch School of Law; J.D. 1973, Boston University; A.B. 1969, Mt. Holyoke College.

who does not share his political philosophy with an opportunity to control the substantive business of constitutional doctrine through timely appointments.

Tribe's dilemma in this book is to construct his argument about the scrutiny of judicial appointees broadly. He is too persuasive an advocate to consider couching his thoughts in straight political terms. Liberal political theory, too, leads him to attempt to garner a consensus about the *substance* of the constitutional doctrine to which the Court has contributed, a consensus which would support acceptance of his notion of the role of the Court and its continued mandate to guard civil rights and liberties. Although the book is of general interest to lawyers and law students, much of the explanation of both substantive constitutional law and historical circumstances surrounding court decisions or appointments is better directed to concerned citizens. Tribe does this for a reason since this is a document of advocacy and his audience is ultimately members of the Senate who conceivably might intervene in withholding approval of a presidential nominee. Tribe's larger endeavor is to educate the public about both the importance of the Supreme Court and the potential for political pressure so that the Senate will respond to public comment on the issue of appointment.

There is much to admire in Tribe's approach. He holds, in accordance with his previous writings that the Supreme Court has been an elightened body, generally supportive of individual rights and constitutes an essential check against the political pressure of the state legislatures. Particularly in the areas of first, fourth, fifth and fourteenth amendment freedoms, the Court has been the branch of government which fleshed out the rudimentary framework of the general language in the Bill of Rights. In fact, the discussion of substantive constitutional doctrine early in the book sets the stage, by example, for a sense about what the Court can accomplish in the area of civil rights and liberties.

On the other hand, the political context of this book is the agenda of the current President of the United States argues for an explicit repudiation of these constitutional doctrines. The right to abortion, affirmative action in employment, gay rights, freedom of the press, separation of church and state, the establishment clause and rights of criminal defendants stand as examples not, as some of us would have it, of effective extension of constitutional freedoms to contemporary situations but of misuse and abuse of power in the hands of a few un-elected justices. The Reagan administration has looked at constitutional precedent in these areas and has argued (in briefs, in Justice Department policy statements) that these decisions should be overturned or limited.

Tribe's view is that this expansion of individual rights can, and

should, be sustained by a proper view of the role of the Court in interpretation of the Constitution. The thesis of the book is that it is the process of qualification for judicial appointment which is the vehicle for determining whether potential aspirants to the Court are suited to serve to enforce this ideal.

The development of the argument is both historical and abstract on this point. Tribe does contribute an historical examination on an elementary level of previous appointments to the Court, their effect on judicial decision-making, the hopes of the president making the nomination and the work of the Senate in assessing the president's choice. Tribe is at his best when he focuses on the political context of these choices and the parallel impact of the political arena on the legal decision. Because he believes that strict constructionism in constitutional interpretation is neither functionally possible nor advisable, those seeking to leave decisions set in the contemporary world to choices made or discerned in the "intent" of the framers of the constitution are not pursuing the better view of constitutional adjudication. He would make it a criteria for selection to the bench of the Court that a Justice be willing to make the difficult choices necessary to resolve modern constitutional questions.

Given this premise of Tribe's analysis, he argues that the court should continue to be open to social change through adjudication, and that liberal political theory which looks to individual rights as the source of constitutional content is appropriate. However, a rights-based analysis depends upon justices willing to listen to theories which develop the "open-ended" clauses of the Constitution: "equal protection of the laws," "freedom of speech," "due process of law."

Tribe does intend to articulate his theories in terms of standards for judicial appointment which can be stated abstractly. To a large measure he succeeds. He names the obvious criteria for appointment, which include intelligence, scholarly potential, temperament, prior judicial experience, which comprise a functional job descriptions. Beyond that, Tribe seeks to define a standard of quality of constitutional decision making. By that he means an open-mindedness, a quality of vision in a sense, which seeks to implement the spirit of the constitution rather than the letter. This is the most difficult portion of his argument; to the extent his standards are process-oriented, they are equally applicable to nominees of differing substantive political beliefs. To the extent that the political right develops an articulated theory of conservative constitutional doctrine, an achievement that those who are faithful readers of legal journals cannot fail to note, it is difficult to see this as the limiting factor in evaluation of nominees to the bench.

Tribe's prescription for scrutiny of judicial appointees involves es-

tablishing standards to be applied by both the president in the initial nomination and the Senate is considering the impact of the nomination. While he recognizes that presidents, particularly presidents with large popular majorities who have strong agenda about the role of the court in substantive constitutional areas, will pretty much try to appoint judges who reflect similar views on political issues important to this constituency, he argues that the Senate will be the only effective check to prevent an unsuitable nominee being cleared for confirmation.

Tribe explodes two of the myths about Supreme Court appointments: "The Myth of the Surprised President," and "The Myth of the Spineless Senate." He argues that these myths lead to both a sense of inaction by the Senate and the political organization of the public. These myths engender the view that nominees should not be opposed, on the one hand, because it is not clear how they will act in the future, and, on the other, because the Senate merely rubber-stamps the presidential choices and should only oppose clearly unqualified nominees, those not meeting the initial criteria for appointment. Tribe demonstrates that these "fables" are both historically inaccurate and philosophically unwise. They are, in fact, the opposite of the active consideration of nominees he feels is required.

Recognizing that his arguments will have limited appeal to a president determined to enforce his own constitutional agenda through appointment to the Court, Tribe concentrates on articulating standards for scrutiny by the Senate. He would have the Senate review thoroughly the nominee's judicial philosophy of constitutional decision-making. He feels that a nominee must demonstrate both fidelity to constitutional precedent and a willingness to read into the indeterminate, open-ended clauses a vision of civil rights and liberties. But the inquiry does not stop there. Tribe would also have the Senate apply its own collective view of the role of the Court: he would have it consider the balance of power on the Court, a balance that would maintain a diversity of views and perspectives so the Court is not dominated by any one political ideology.

Tribe makes as thorough an argument as he can that the Court is too important an institution to be blatantly manipulated for ideological purposes. To that extent, he feels that the diversity and political accountability of the Senate make it the better forum to determine the suitability of a nominee.

One has to admire this book because it is a thoughtful, deliberate attempt to flesh out arguments that are frequently made among lawyers but rarely substantiated. Tribe creates as persuasive a plea as possible that appointments to the Supreme Court are positions of the national trust and carry with them the supreme task of giving life and breadth to a

document created almost two hundred years ago. It's not clear that this book will find its audience—an audience energized to organize politically for acceptable appointments to the Court. But it is a valiant statement, an argument difficult to make but compelling in its vision of constitutional dimension.

LORD'S JUSTICE

LORD'S JUSTICE. By Sheldon Engelmayer and Robert Wagman. Garden City, New York: Anchor Press/Doubleday. 1985. Pp. 300. $17.95.

*Reviewed by Marc P. Weingarten**

On July 9, 1984, a special investigative committee of the Eighth Circuit Court of Appeals convened to consider certain charges of "gross abuse of judicial discretion and power"(p.2) against Miles W. Lord, the Chief Judge of the United States District Court for the District of Minnesota. The first chapter, which introduces the characters of this very readable book, describes a court battle of former Attorneys General, with Ramsey Clark representing Judge Lord and Griffin Bell representing the A.H. Robins Company. Bell claimed that his clients had been denounced by Judge Lord from the bench, denying them due process. Bell claimed during the course of the hearing that his clients had not been afforded an adequate trial, that they had not been permitted to interpose any defense to the charges, that they were not given proper notice of the charges, and that they were never given the opportunity to tell their side of the story.

The second chapter gives a lively, often anecdotal history of the A.H. Robins Company. We are told much about the corporate history of the company as well as the litigation history concerning one of their products, the Dalkon Shield intrauterine device (IUD).

The struggle at the A.H. Robins Company, between the sales and medical research departments, was a struggle not uncommon in corporate America. Unfortunately for the consumer victims of the device, the A.H. Robins Company had no obstetricians nor gynecologists on its research staff. By contrast, they were reported to have one of the best sales forces of any drug company in the country. With five million Dalkon Shields having been sold during the short period of time that it was marketed, the sales department won the struggle.

On June 15, 1970, the A.H. Robins Company purchased the Dalkon Shield for sale as its own. On June 29, 1970, an internal memorandum reported a possible "wicking" tendency in the tail of the device. A copy of this memorandum was sent to E. Claiborne Robins, Jr., the chief executive officer of the company. The complicated issue of medical causation was perhaps best expressed by Judge Lord, ". . . there is a string hanging down there [on the Dalkon Shield] and [it] sucked up germs, and that once the germs get there, they cause an infection . . ."(p.141). The Rob-

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ins Company, if not specifically aware of this tendency to wick bacteria, at least knew that something might be amiss. In fact, one of the early instruction cards that it issued to physicians stated that the device should be replaced after two years following insertion. The card was later amended to remove the instruction, apparently in order to avoid sales resistance. Again, the sales department won the struggle.

The Dalkon Shield was developed as an alternative to oral contraceptives. The original intent was that the Dalkon Shield would be as effective as the Pill, but safer. The Dalkon Shield, however, turned out to be a disaster. The specific diseases and problems associated with the Dalkon Shield include Pelvic Inflammatory Disease (PID), septic abortions, children born handicapped or malformed, deaths of 22 women who used the device as well as children who died as the result of their handicaps. On August 8, 1975, the product was no longer marketed by the company, and by March of 1980 there had been seventeen deaths associated with the use of the Dalkon Shield.

The authors also cited evidence to show that the device was not even as effective as the manufacturer claimed it to be. While Robins advertised a 99% effectiveness rate, the authors quote from studies showing only a 90 to 95% effectiveness rate. Other IUDs on the market were effective from 97 to 98.5% of the time. Thus, the issue of misrepresentation of the product's effectiveness was raised in addition to false or inflated claims of safety.

The authors trace a series of misrepresentations and coverups from at least 1971 when Robins misrepresented to the Food and Drug Administration (FDA) that the copper in the device did not enhance its contraceptive qualities. FDA regulations require that if there is a drug "effect" from a product, then the product is a drug, and requires a New Drug Application (NDA) to the FDA before it can be sold. However, if there is no drug effect, then the product is a device and an NDA is unnecessary. Yet A.H. Robins circulated an internal memorandum dated June 10, 1970 in which the "drug effect" of the copper sulfate in the device was discussed (p.24). In addition, the corporate director of pharmaceutical research and analytical services circulated a memo which addresses a lack of proper testing prior to marketing. These tests included testing for stability, leeching, and accelerated aging. All of this is crucial evidence, considering the defect alleged by the various plaintiffs in the litigation.

The authors discuss at great lengths the various methods and techniques developed by defense counsel in building their case for A. H. Robins. They colorfully describe one defense as the "Three Dog Defense". This is based on the law school bromide that if one is sued for allowing one's dog to bite a neighbor, the defenses are: I do not own a dog; if I do,

it did not bite you; and, if it did, it was your own fault. As applied to the Dalkon Shield, the Three Dog Defense means: there was no defect; but if the Shield was defective, it did not cause any disease; and, if any disease was caused, then it was because of the lifestyle of the women who used it. Another defense discussed is the attempt to shift the blame for any harm to the doctor's improper insertion or improper instructions. Yet a third defense is known as the "dirty questions" defense. Here, the primary goal is to intimidate, humiliate and scare away women with the temerity to become plaintiffs. The strategy involved asking detailed, embarassing and irrelevant questions concerning sexual practices and bathroom hygiene habits. The authors also discuss the "Pinto Defense". Here the main goal was to preclude evidence by claiming that other injuries were not identical to the injury at trial and, therefore, not relevant. This defense was used in Pinto cases by the Ford Motor Company to object to crashworthiness testing by plaintiffs' attorneys.

The book also describes other techniques developed by defense counsel. These included attempts to stonewall any discovery, to repeatedly object to all evidence, and to attempt to prohibit plaintiffs' attorneys from working together. One way they did this was by requiring them to agree, as a precondition to settlement, not to handle other cases or assist attorneys also working on the litigation.

One of the ironies of the story is that Judge Lord may never have gotten involved in the case had it not been for Robins' efforts to have two attorneys in Minnesota disbarred because they advertised for clients. Because of the disbarment proceedings, the Dalkon Shield caseload in Minnesota stalled. This caused the cases to be divided between all of the Minnesota federal judges.

Approximately one-third into the book we meet the Judge, in a chapter colorfully and accurately entitled "The Warrior Judge." The Judge is portrayed as a slightly arrogant person whose primary motivation is to do what is right, even if it is not what is proper. The authors define this difference in a most interesting way by stating that the legal definition of justice is the administration of law with the judge acting as a referee, whereas in Judge Lord's courtroom justice is the administration of right with the judge virtually a participant in the process.

After being assigned his share of the Dalkon Shield cases, the Judge quickly realized that a primary defense tactic was to attempt to require plaintiffs' counsel to "reinvent the wheel" in each case. After deciding that defense counsel would not permit the cases to advance unless he intervened, Judge Lord took the unusual step of presiding over depositions of corporate officers in Virginia. During these depositions he noted, among other things, that defense counsel were using a system of body

language and signals to indicate to witnesses when they should or shouldn't answer.

The most dramatic and heroic point in the book is when Judge Lord required three officials of the Robins Company in Virginia to come to his courtroom in Minnesota for his review of a settlement agreement. He handed the officials a copy of a speech that he made to the State Council of Churches concerning corporate sin and individual responsibility for corporate activity. In the speech, the Judge compares God's creation, man, to man's creation, the corporation, noting that unlike God's creation, a corporation has no heart, soul or conscience. He then gave them, and later read into the record, his "personal appeal to you about what you should do by way of a recall" (p. 248). The comments in the speech set the tone for Judge Lord's appeal, which he pleaded with the corporate executives to heed. In his own words the appeal was a ". . . very important, profound document which I've been working on for weeks, and I hope it burns its mark into your souls" (p.251). It was obvious that this was more than simply a rubber stamp of approval on a settlement, but rather the "day in court" for the women who had been so violated by this giant corporation.

Judge Lord reminded the chief executive officer that the company was built in the image of the Robins mentality based upon three generations of Robins family control. He reprimanded the Director of Research and Development, saying he had ". . . violated every ethical precept to which every [medical] doctor under your supervision must pledge. . . ." (p. 255). He rebuked the chief counsel for the corporation, telling him he had not brought honor to his profession. He pleaded with the gentlemen from Robins to withdraw or recall the Dalkon Shield from the marketplace. He begged them to warn any potential victims and to compensate any individuals who had already been injured by the device. Judge Lord said that he had been convinced that the three Robins officials had lied to the various governmental agencies which approved the marketing of the Dalkon Shield. He told them they were the ". . . corporate conscience. Please, in the name of humanity, lift your eyes above the bottom line" (p. 263). Moved almost to tears, Judge Lord concluded his statement by delivering the following: "Please gentlemen, give consideration to tracing down the victims and sparing them the agony that will surely be theirs. And I just want to say I love you; I am not mad at you." (p.263).

The comments by Judge Lord are important to read. They are most certainly non-judicial and are not the types of comments which one is accustomed to hearing from a Judge announcing the settlement of major litigation. It was largely those comments which prompted the July, 1984

hearing in which the charges leveled at Judge Lord by the Robins Company were heard. In December of 1984, the charges against Judge Lord were dismissed by the committee and on January 24, 1985, the Committee issued an order exonerating Judge Lord of any violation of the Judicial Conduct and Discipline Act.

Both highly readable and logically constructed, the book is written along the lines of a detective story. It uses a "docudrama" approach, quoting directly from actual words from court transcripts or documents generated in the course of the litigation or obtained through personal interviews with the participants.

The authors are both newspaper people. Mr. Engelmayer participated in the editing of Jack Anderson's syndicated "Washington Merry-Go-Round" column and Mr. Wagman has been a bureau chief for the North American Newspaper Alliance and also a producer of CBS News and "60 Minutes".

The book is clearly not intended primarily for law students and lawyers. An example of this is found in the authors' description of a question which, in their words ". . . might have qualified as an entry in the Guinness Book of World Records. Lasting about twenty minutes, it set out a series of "assumptions" Ciresi wanted Dr. Friedman to make. (p. 229). This, of course, is nothing more than a description of what attorneys know as the hypothetical question. The book does not so identify it, but rather uses the above colorful description.

Additionally, there is one technical, or perhaps merely typographical error. The authors wrote that certain Robins executives, ". . . were no longer under Robin's control, and, so, the company could compel their attendance" (p. 153-154). What they meant to say was that because those corporate executives were no longer in the control of the company, they could *not* be compelled to attend any court sessions.

There is one curious passage in the book where the authors quote from one of the plaintiffs' attorney's closing arguments. In his argument, counsel suggested that the jurors imagine that the particular disease that the plaintiff had claimed was the juror's own disease. This is a technique which in some jurisdictions could be objectionable, in others could result in reprimand by the trial court, and in yet others could result in a mistrial. Of course, a tactic is only objectionable if it is objected to and here no objection was made. At any rate, the technique is always going to be impressively effective if one is able to use it. However, there is no discussion by the authors of trial techniques with respect to their technical effectiveness or appropriateness pursuant to rules of evidence and procedure. This is most likely due to the fact that the book is for the lay reader.

There is a remarkable parallel between the history of the Dalkon Shield and the history of asbestos as it has developed in the United States Courts that is not addressed in the book. On June 30, 1972, the A.H. Robins Company wrote to a public relations firm to try to obtain a "positively written, well-placed article. . . ." (p.44). This parallels what has been known as the "Sumner Simpson" letters between various members of the asbestos industry and a trade publication back in the 1930's. Throughout the book, the theme is repeated that the company placed profit ahead of safety by not replacing the tail string once the company had determined that the string may be the cause of medical problems. This also parallels the asbestos industry's refusal to seek a safe, substitute product despite the overwhelming evidence that asbestos caused disease and death. The A.H. Robins Company suppressed a study which showed a high rate of Pelvic Inflammatory Disease in women who had been using the product for less than one year. It has been alleged in numerous lawsuits that asbestos companies attempted to likewise suppress adverse publicity. Perhaps the most astounding parallel between the Dalkon Shield and the asbestos litigation is A.H. Robin's claim that the wicking tendency was overcome by the fact that the multifilamental tail was enclosed in a nylon sheath. In asbestos litigation, this is known as the "encapsulation defense" in which it is averred by certain asbestos companies that their product was enclosed in a type of "sealant" and, therefore, could not emit dust. The parallel between the history of the Dalkon Shield and asbestos litigation is both startling and frightening.

The final chapter of the book, entitled "Aftermath", shows the results of the Dalkon Shield litigation. The authors noted (at least as of June, 1985 when the book went to print) that Robins was settling all of the cases that were coming to trial; that collateral estoppel on the issue of liability would be entered in the State of Colorado; that most judges were sustaining objections to the "dirty questions" being asked by Robins' counsel at deposition; and that on October 29, 1984, the company recalled the Dalkon Shield from the marketplace. On May 19, 1985, Judge Miles Lord stepped down as Chief Judge for the District of Minnesota and resigned from the bench on July 1, 1985.

The authors could not have foreseen that shortly after the book went to print the A.H. Robins Company would file for Chapter 11 bankruptcy protection, effectively shielding it from any further litigation or claims. On August 21, 1985, the company alleged that the $615 million fund established in April of that year would not be adequate to deal with future Dalkon Shield liability. E.C. Robins, Jr., was quoted as stating it was ". . . essential that we move to protect the company's economic via-

bility against those who would destroy it for the benefit of a few." (The New York Times, Aug. 22, 1985, at 1, col. 1)

This is an interesting contrast to a statement in the book by G.E.R. Stiles, the chief financial officer of the company. Following the creation of a $615 million reserve fund to pay settlements and verdicts against the company for Dalkon Shield cases through the year 2002, he stated, "[w]e are not [bankrupt] and we are not in danger of that." (p.13). This is the final parallel to be drawn with the asbestos litigation; in the summer of 1982 various asbestos companies including the Manville Corporation filed for Chapter 11 bankruptcy protection.

This book gives us an important picture of corporate America, the judicial system, and particularly Judge Miles Lord. The authors have done an exhaustive job of researching through voluminous court records, transcripts and discovery documents. It is also apparent that they have done their homework by talking to virtually all of the persons involved in the litigation, with the exception of the attorneys for A.H. Robins, and the corporate officials, who refused to be interviewed for the book.

The book's primary appeal might be to feminists, civil litigation attorneys, members of the judiciary, law students, investigative reporters, physicians and people concerned about corporations running rough shod over the rights and safety of individuals. It is probably equally important for corporate officials and defense counsel to read.