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Book Reviews

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BOOK REVIEWS

THEY CALL IT JUSTICE: COMMAND INFLUENCE AND THE COURT-MARTIAL SYSTEM. By Luther C. West. New York: The Viking Press, 1977. Pp. xii, 302. $12.95.

*Reviewed by Daniel H. Benson**

Luther West makes a statement at the end of his book that probably should have been placed at the beginning: "I have found in the trial of military cases that juries composed of officers and enlisted men, when completely severed from command interests, render fair and just verdicts."[1] Any critical discussion of military justice must avoid what might be called overkill and acknowledge those aspects of the court-martial system that are good. Otherwise one runs the risk of being misunderstood and categorized as a misguided zealot dealing in stereotypes of the kind so ably caricatured by Joseph W. Bishop, Jr., in his 1974 book on military justice:

> In the eyes of professional staffer of the American Civil Liberties Union . . . the typical court-martial is a kangaroo proceeding in which a wretched conscript is dragged before a panel of sadistic martinets, convicted on the basis of perjured evidence and his own confession (which has been extracted by torture), and sentenced to fifty or sixty years of solitary confinement, chained to the wall of a subterranean dungeon, and fed on bread and water.[2]

Misunderstanding Luther West in this manner would be unfortunate, for he has written a valuable and instructive account of the most serious defect in the American system of military justice: unlawful command influence.[3] West does avoid overkill in his book,

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1. L. WEST, THEY CALL IT JUSTICE: COMMAND INFLUENCE AND THE COURT-MARTIAL SYSTEM 286 (1977). The author served as an enlisted man in the United States Navy during World War II and then served for seventeen and a half years as a military lawyer in the Judge Advocate General's Corps of the Army. He now practices in Baltimore. He was educated at Birmingham Southern College (A.B. 1948) and George Washington University (LL.B. 1950).

2. J. BISHOP, JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 19-20 (1974). Professor Bishop rightly acknowledged in his next sentence that the stereotype of the A.C.L.U. he had just presented was itself "somewhat inaccurate." *Id.* at 20.

3. The distinction between lawful and unlawful command influence should be noted, although the term command influence is used in this review to indicate unlawful command influence unless the contrary is stated. Military commanders may properly exercise *lawful* influence upon the administration of military justice within their commands so long as they function within prescribed statutory limits. West is concerned with *unlawful* command influence, which occurs when a commander exceeds the limits of legitimate military authority or when a commander deviates from statutes and regulations pertaining to military justice. For

and he does acknowledge those aspects of the court-martial system that are good, but he nevertheless presents a stinging indictment of the entire system by simply explaining the nature and extent of unlawful command influence.

What is unlawful command influence, and what forms can it take? The answers to these questions are as numerous as the number of persons serving in the United States armed forces and situations in which they can become involved with their superiors. When any commander, senior officer, or noncommissioned officer attempts to alter or otherwise affect the outcome of any military judicial process or procedure in any manner other than through the normal operations of the court-martial system as provided in the Uniform Code of Military Justice[4] and the regulations promulgated thereunder, he or she may be engaging in unlawful command influence. A senior commander, for example, can give lectures or direct others to give lectures to court members[5] or to potential court members concerning the findings and sentences desired in any particular case or class of cases. Similarly, a commander or a Staff Judge Advocate[6] can put pressure on the military attorneys defending a given case or class of cases to attain whatever results may be desired (conviction, severe sentence, failure to call defense witnesses, failure to obtain needed psychiatric examinations of defendants, or agreement not to raise certain issues during trial of the case). A commander, a Staff Judge Advocate, or a senior judicial officer likewise can bring pressure to bear upon a military judge[7] to influence unlawfully the judge's actions in the trial of a given case or class of cases or upon military prosecutors to influence unlawfully the manner in which a given case or class of cases will be prosecuted (or in some instances *not* prosecuted in order to protect certain persons from trial and conviction).[8] The possibilities for command influence are limitless. The forms taken by command influence and the ways in

a discussion of this distinction and the issues surrounding it, see H. MOYER, JUSTICE AND THE MILITARY 677, 685-86 (1972); Schiesser & Benson, *A Proposal to Make Courts-Martial Courts: The Removal of Commanders from Military Justice,* 7 TEX. TECH L. REV. 559, 563-65 (1976); Sherman, *The Civilianization of Military Law,* 22 ME. L. REV. 3, 42-43, 58, 87-97 (1970).

4. 10 U.S.C. §§ 801-940 (1970) (originally enacted as Act of May 5, 1950, ch. 169, 64 Stat. 108).

5. Court members are the military equivalent of jurors. *See* 10 U.S.C. § 825 (1970).

6. The Staff Judge Advocate, or Legal Officer as he is termed in the Navy, is the military lawyer with the responsibility of advising the commander on all matters of military law. *See* 10 U.S.C. §§ 806, 834, 861 (1970).

7. A military judge presides over sessions of a court-martial much as a civilian judge presides over civil or criminal trials. *See* 10 U.S.C. § 826 (1970).

8. *See* notes 22 & 23 *infra.*

which it is accomplished are as broad and as numerous as the ingenuity and guile of the persons engaging in it. Because the United States Court of Military Appeals[9] has taken corrective appellate action in a number of command influence cases,[10] most military commanders and Staff Judge Advocates now realize that some forms of overt command influence will be detected and condemned. Accordingly, the techniques employed to accomplish unlawful command influence are now more discreet and subtle than during the first years of the Uniform Code of Military Justice.

The essence of all of this, and the point that West makes so clearly in his book, is that, by the very nature and structure of the military system, military personnel very easily can be influenced. Military officers periodically are rated by their superiors on the efficiency of their performance, and these efficiency reports determine in large measure what an officer's next assignments will be, where the assignments will be, and whether they will represent progress in the officer's career development. An officer's promotion also depends upon these efficiency reports. Anything that he does or fails to do may displease his superiors and may be reflected in the officer's next efficiency report. Hence influence can be exerted without calling a military lawyer into the Staff Judge Advocate's office, closing the door, and announcing "I shall now attempt to exert unlawful command influence upon you." A casual word at lunch, at the officers' club in the evening, on the golf course, or anywhere else from a Staff Judge Advocate to a military lawyer under his command ordinarily will suffice to communicate to the junior officer the desires of the senior officer. An ostensibly friendly comment from a senior officer to a junior officer about the junior's next assignment and about the importance of "not rocking the boat" in order to get a particularly desirable assignment can accomplish unlawful command influence. West makes especially clear the extent to which this kind of subtle pressure affects a military lawyer's thinking, his considerations about the welfare and needs of his family, and his prospects for promotion and retirement.[11] Significantly, *all*

9. The United States Court of Military Appeals was created with the enactment of the Uniform Code of Military Justice in 1950. *See* 10 U.S.C. § 867 (1970). For discussions of the Court's history and functioning, see Benson, *The United States Court of Military Appeals*, 3 TEX. TECH L. REV. 1 (1971); Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 (1972).

10. *See, e.g.*, United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967). According to Moyer, *DuBay* affected almost 100 other court-martial cases on command influence issues. MOYER, *supra* note 3, at 768.

11. *See, e.g.*, WEST, *supra* note 1, at 10-12, 56-59, 72-73, 152-53.

military legal personnel, regardless of rank or type of duty assignment, are subject to unlawful command influence throughout their military careers, in spite of the statute prohibiting this unlawful influence.[12]

West writes in anecdotal fashion for the general reader as well as for lawyers and other professionals concerned with military justice. In his words, "This book is about military justice as I saw it and still see it, as I practiced it and still practice it."[13] He does not undertake to provide a scholarly, academic treatment of the subject matter in his book; the volume is free of what he calls "copious footnotes, . . . detailed case citations, law review articles, legal books, and chapter and verse of congressional hearings relating to the subject of command fraud in military justice."[14] He refers those who are interested in a more technical treatment of the subject to his 1970 law review article,[15] which "traces the command fraud involved in the trial of military courts-martial from 1775 until 1970."[16]

The article bears witness to West's competence as a scholar and to his ample knowledge of the entire field of military justice. Furthermore, it establishes the author's credentials to address the American public on this topic by demonstrating the exhaustive research that he has done on command influence as an element of the American system of military justice throughout the nation's history. I consider the article to be the definitive treatment in American legal literature of unlawful command influence and the starting point for anyone desiring to do further work in this area of the law. In addition to the 1970 article, West wrote an unpublished dissertation for the Doctor of Juridical Science degree at George Washington University entitled "The Command Domination of the Military Judicial Process,"[17] which was described by Edward F. Sherman as containing

> a detailed and documented description of improper command influence in a number of cases of which Mr. West, as an Army officer in the Judge Advocate General's office, had personal knowledge. The accounts make up a startling

12. 10 U.S.C. § 837 (1970).

13. WEST, *supra* note 1, at xii.

14. *Id.*

15. West, *A History of Command Influence on the Military Judical System*, 18 U.C.L.A. L. REV. 1 (1970).

16. WEST, *supra* note 1, at xii.

17. L. West, The Command Domination of the Military Judicial Process (Aug. 10, 1969) (unpublished dissertation in George Washington University Law School Library).

> picture of command intrigue, staff judge advocate compliance, and lower level accession to command wishes.[18]

Significantly, West presented the results of his research and experience in a scholarly and academic setting before writing the present book for the general reader. He has done his homework and although this book is offered for popular consumption, it represents far more than the casual reflections of a retired army lawyer. For that matter, West has not retired from active practice; he continues to appear in military cases.[19]

I have taken pains to describe the author's qualifications and his other work in the field of military justice because I think it important that he not be misunderstood, particularly by other lawyers. He is likely to be misunderstood to some degree even by fellow lawyers, however, because of the nature of his subject matter. This explains my comment at the beginning of this review that West's acknowledgment of the basic fairness and justice of the court-martial system when free of command influence should have appeared early in the book rather than at the end. I fear that West will be accused of being unfair to the military justice system and of being prejudicially selective in his treatment of cases and experiences in that system. In my opinion he has been neither unfair nor prejudicially selective in deciding what material to discuss, but I anticipate that this charge eventually will be made.[20]

This accusation is inevitable because in discussing unlawful command influence, one necessarily must discuss bad faith on the part of military commanders. Command influence involves the deliberate and intentional tampering with a system of justice to bring about desired results that ordinarily might not come to pass without such tampering. Command influence involves what I have called "affirmative deception" about the very existence of this kind of tampering with the military system of justice.[21] As West illustrates

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18. Sherman, *supra* note 3, at 90.

19. WEST, *supra* note 1, at xii. *See also* 3 MARTINDALE-HUBBELL LAW DIRECTORY 44 (109th ed. 1977) (West's current listing as an active practitioner).

20. Indeed one reviewer, apparently a nonlawyer, already has suggested that West allows his zeal for reform to "carry him to the opposite extreme." Roberge, Book Review, JURIS DOCTOR, April 1977, at 14. Another reviewer, an Air Force lawyer, after noting that West decided to remain in the Army long enough to complete a sufficient number of years for retirement, commented: "The fact that he stayed in the Army, feeling that it was morally corrupt, for the purpose of gaining its benefits, might open his value judgments to question." Howell, Book Review, TRIAL, May 1977, at 43, 45.

21. Benson, *Military Justice in the Consumer Perspective*, 13 ARIZ. L. REV. 595, 600-06 (1971).

throughout his book, the tampering can be for the purpose of ensuring a conviction and severe sentence or for the purpose of preventing the filing of charges or the trial of persons whom the commander in question does not want tried.[22] Tampering of the latter description is termed "reverse command influence," and its effects upon the military justice system can be most unfortunate.[23] For several reasons almost no discussion of the "reverse command infiuence"[24] problem appears in the literature of military justice. First, persons who lack experience in military justice find it difficult to believe that command influence exists. Second, military legal officers like West who actually experience unlawful command infiuence often are angered by it and from that point forward have difficulty discussing it in a cool and objective manner. Finally, the military generally takes the position that unlawful command influence is largely a thing of the past, having been effectively eliminated for all practical purposes.[25]

For all of these reasons, the writer who takes on the problem of command infiuence engages in a highly unpopular task and must assume a formidable burden of persuasion in attempting to convince readers that this sort of thing goes on in the military justice system. West willingly undertakes the job, however, and he remembers even now the reprisals of his commanders as they responded to his efforts to combat unlawful command influence in the cases to which he was assigned. He recalls that after learning that he had been "passed over" (*i.e.* not selected) for promotion to the grade of major due to low efficiency reports stemming from his efforts to combat command influence, he was "seething inside" but had to take a realistic look at his family situation and career prospects:

> I was married, with a wife and four children to support. I was thirty-six years of age and had completed ahout twelve years' military service, and needed only eight more for retirement. I had almost no friends within the Judge Advocate

22. *See, e.g.*, WEST, *supra* note 1, at 154-212 (discussion of the various techniques employed to shield high-ranking officers from the rigors of ordinary court-martial trials and sentences in the My Lai cases). *See also* MOYER, *supra* note 3, at 769-76.

23. *See* MOYER, *supra* note 3, at 775-76.

24. *See id.* at 769.

25. *See, e.g.*, E. BYRNE, MILITARY LAW 124-25 (1970); Brookshire, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71, 84-94 (1972); Douglass, *The Judicialization of Military Courts*, 22 HASTINGS L.J. 213, 216, 219-20 (1971); Hodson, *The Manual for Courts-Martial—1984*, 57 MIL. L. REV. 1, 16 (1972). *See also Military Justice—Joint Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services*, 89th Cong., 2d Sess. 54 (1966) (Army general Kenneth Hodson's statement, "I do not feel there is any command influence exercised today.").

> General's Corps, only acquaintances. For years I had looked down on most of my contemporaries, and senior judge advocates, as poor lawyers without integrity, but I had refrained from condemning them outright as morally corrupt. But at that moment [when reflecting on the situation], I resolved they were decidedly wrong in their acceptance of the status quo in military justice. I was convinced that the system was riddled with dishonesty and fraud. When I withdrew from my conference [on the low efficiency reports] with the JAG executive officer, I made up my mind. I would stay in the service for twenty years, and obtain minimum retirement benefits, but during my remaining eight years in the army I would use whatever intelligence and expertise I had, insofar as possible, to expose every dishonest judge advocate or military commander under whom I served.[26]

If West was unpopular with his military superiors while he was still on active duty, the present book will do little to improve the situation. Accordingly, I anticipate that he will be accused of handling the subject unfairly or in an "extremist" fashion, and again I assert my belief that West is entirely fair throughout his book.

As an army lawyer defending clients, West in many instances used the presence of command influence to obtain better results for defendants than would have been obtained through ordinary defense techniques. In essence this usually involved little more than taking full advantage of errors made by commanders and others in their clumsy attempts at exercising unlawful command influence, exposing those errors, or otherwise turning the situation to the defendant's benefit. One reviewer, however, takes West to task for this activity: "Having concluded that command influence is an inherent evil of the system, West apparently had no ethical problems manufacturing some more of it for the trial record."[27] That reviewer quickly betrays his understanding of trial work in criminal cases by complaining later in his review about the lay person's horror, the "legal technicality":

> [A]n effective fighting force can't do without discipline or without its supplies, but it might survive despite a few departures from the canons of jurisprudence. Military commanders, and it seems a growing number of Americans, are inclined to think justice is served if a clearly guilty person is punished, regardless of the fine points. If such a person goes free on a technicality, despite preponderant [sic] evidence of guilt, the consequences are likely to be much more severe in the Army than in civilian life. Surely many of West's clients were badly mishandled by the court martial system, but I still wouldn't want to serve alongside some of them.[28]

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26. WEST, *supra* note 1, at 73-74.

27. Roberge, *supra* note 20, at 14-15.

28. *Id.* at 15. In addition to his problem with legal "technicalities," Roberge apparently misunderstands the standard of proof required in courts-martial, which is "beyond reasonable doubt" rather than "preponderance of the evidence," as he evidently thinks. *See* MANUAL FOR

That reviewer, who reports that he had "infantry experience in Vietnam" and who feels that West's successful defense of one particular client "probably did not further the ends of good order in the command,"[29] takes a position frequently encountered among apologists for military justice: the main purpose of military justice is not justice but tight discipline, and discipline is better than justice if a choice must be made between the two concepts. West discusses that position, although the reviewer in question did not evaluate West's analysis.

West insists, correctly in my judgment, that military justice actually does not affect the state of discipline in the military to the extent that commanders seem to believe it does.

> [T]he military judicial process in reality has little if anything to do with a soldier's willingness to die in battle or to fight for a military cause. At its very best, and in its most ideal setting, military justice vindicates respect for law and order in those members of our society who demand punishment for those who violate our laws. But this, it is submitted, is about as far as it goes in maintaining "discipline." The law-abiding citizen in either the military or the civilian community obeys the law basically for the same reason. He does it because he has an "urge" to do so, to submit to authority. He simply *feels* better when he obeys. This urge probably stems from a host of intangibles within the human spirit, and it centers perhaps on the hope that the authority figure to whom he has given his allegiance is just and honorable, and worthy of sacrifice. So long as there is an urge to obey, whatever the reason, and so long as this urge is shared by a majority of citizens, we shall have [a] governed society. When this urge is missing, disorder will follow and conventional judicial procedures will do little if anything to force a return to obedience in either the military or the civilian community.[30]

Behavioral scientists might express the concept in somewhat different terminology, but the point is the same: people ordinarily obey the law and conform to the requirements of the society in which they find themselves for reasons other than their rational knowledge about or fear of the legal system and its operations. This is the concept expressed so eloquently by Learned Hand:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can

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COURTS-MARTIAL ¶ 74(a)(3) (rev. ed. 1969); 40 Fed. Reg. 4247 (1975) (1975 executive order amending the *Manual*). *See also* Exec. Order No. 11,476, 3 C.F.R. 802 (1971), *as amended by* Exec. Order No. 11,835, 40 Fed. Reg. 4247 (1975) (the *Manual* as an executive order, which is its legal status).

29. Roberge, *supra* note 20, at 15.

30. WEST, *supra* note 1, at 279-80.

> even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[31]

I think that West is saying something like this about the existence of good discipline in the armed forces. That kind of discipline is not the result of courts-martial or the system of military justice currently in use, but rather is a function of the way in which most people behave most of the time. It arises, in West's language, from a "host of intangibles,"[32] not the least of which may be the leadership ability of the military commanders under whom armed forces personnel serve. If leadership were significantly absent from any given military unit or post, or if for some other reasons soldiers should become unwilling to fight and die for a particular cause or in a particular war, then the court-martial system never could restore the needed discipline. As West puts it,

> Military justice soothes the military ego and quiets the fear that lingers in the military breast against outright soldier mutiny—and it also, of course, provides a means of punishing soldiers who break the law. But . . . it does not serve as an implement of military discipline, or of instilling discipline in troops, whatever that term implies. *It has no real connection with a soldier's willingness to fight and die for a particular cause, and never did.*[33]

West concedes that perhaps "a more brutal, violent method of nonjudicial nature . . . such as wholesale summary execution of soldier and civilian dissidents, or the use of concentration camps"[34] might work to create discipline out of whole cloth, as it were, but he notes that such methods are vastly different from our present system of military justice.

If West is right on this issue, then undoubtedly he also is right in his assertion that "it is necessary to evaluate military justice on its own merit, or lack of merit, without the usual security blanket of 'discipline' that encases it from public view and criticism."[35] He argues:

> [M]ilitary justice should no longer be accepted on the basis of military necessity—i.e., that it is a necessary tool through which the military commander instills "discipline" within his command. Military justice should and must be viewed for what it is—a system of law providing for the military prosecution of *people* who violate military law. It is worthy of retention in our

31. Address by Learned Hand, "I Am An American Day" ceremony, New York City (May 21, 1944), *reprinted in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189-90 (3d ed. I. Dilliard ed. 1960).

32. WEST, *supra* note 1, at 280.

33. *Id.* (empbasis supplied).

34. *Id.*

35. *Id.*

> system of government only if it measures out to be a *fair* system of law, one that is based upon the rule of law and upon no other consideration.[36]

Many military lawyers probably will disagree with West on this issue. Military commanders in particular are not likely to change their view that courts-martial are first and foremost instruments of military discipline rather than of military justice. Professor John Henry Wigmore, a reserve colonel in the Army Judge Advocate General's Department, insisted in 1919 that "[t]he prime object of military organization is Victory, not Justice." He went on to say that "[i]f the Army *can* do justice to its men, well and good," but "Justice is always secondary; and Victory is always primary."[37] Wigmore then stated the classic military view of the court-martial system:

> Military justice wants *discipline*—that is, action in obedience to regulations and orders; this being absolutely necessary for prompt, competent, and decisive handling of masses of men. The court-martial system supplies the sanction of this discipline. It takes on the features of Justice because it must naturally perform the process of inquiring in a particular case, what was the regulation or order, and whether it was in fact obeyed. But its object is discipline.[38]

Essentially, this remains the view of the military establishment: the court-martial system is an instrument of discipline, and to the extent that it can accomplish justice as it obtains and protects that discipline, well and good, but justice is not the primary goal. A 1969 article by an army legal officer reaffirmed this view: "The aims of [the American and French] systems of military justice are the same—swift enforcement of military order and discipline while guaranteeing to the accused the maximum legal protections reasonably available under the circumstances."[39] Legal protections are to be made available, according to this view, but only to the extent

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36. *Id.* at 281.

37. Address by Professor Wigmore to the Maryland Bar Association (June 28, 1919), *reprinted in* Wigmore, *Lessons From Military Justice,* 4 J. AM. JUD. SOC'Y 151 (1921).

38. *Id.*

39. Ryker, *The New French Code of Military Justice,* 44 MIL. L. REV. 71, 93 (1969). *But see* Tenhet & Clarke, *Attitudes of US Army War College Students Toward the Administration of Military Justice,* 59 MIL. L. REV. 17 (1973) (a study that indicates that among those officers selected and being trained for senior command and staff positions in the Army, the classic view of military justice as an instrument of discipline may be changing to some extent). *See also* Hodson, *supra* note 25, at 16 (views of Maj. Gen. Kenneth J. Hodson, one of the most enlightened and progressive senior officers in the Army Judge Advocate General's Corps, who stated, "I have said many times that discipline is enhanced far more by the belief that a soldier can get fair treatment than it is by any system of iron-fisted military justice which appears to be unfair.").

that they are "reasonably available under the circumstances."

In his book West is dealing with a subject that is difficult to discuss without generating hostility, misunderstanding, and, occasionally, incredulity. He is attacking the classic military understanding of the basic purpose of the court-martial system. He asks the reader to accept his word and assurances concerning the accuracy of the problems he describes, over the assurances of the military justice establishment that all is well. In doing all of this, West joins the ranks of a small but constantly growing group of individuals who have had the courage and the persistence to tell the unvarnished truth about the realities of the court-martial system. His work as a maverick within the system is not entirely without precedent in the history of American military justice, and one of the most valuable aspects of his book is its brief summary of the work of the early reformers and of the battles they had to fight in order to be heard.

West deals with the history of the court-martial system in the following four chapters: Chapter 2, "Early Military Law, A Hyphenated System of Justice"; Chapter 3, "World Wars I and II, a Breakdown of Justice"; Chapter 6, "The First Ten Years, a Decade of Bad Law"; and Chapter 7, "The Powell Report, the Second Decade." Considering that he is writing for the general, nontechnical reader, West has provided a very clear, thorough account of the history of American military law as it relates to the problem of unlawful command influence. West begins his discussion of early military law in chapter two by pointing out that "[t]he enforcement of discipline within the American armed forces historically has been recognized as the exclusive prerogative of the military commander."[40] As noted above, the military establishment always has viewed military justice as an instrument for attaining and enforcing discipline and still views it that way. West explains:

> It is for these reasons that our nation has always maintained a separate jurisprudence for military courts-martial, and it explains why military law has never been subjected to the review power of the United States Supreme Court. From the founding of the nation, the American military has had almost unlimited control over almost every facet of military justice. The military commander has traditionally controlled the independent judical functions (i.e., verdict and sentence) of the court-martial whenever he felt it was necessary for the discipline of his command. Ultimately such practices shocked Congress into outlawing certain prerogatives of military commanders.[41]

40. WEST, *supra* note 1, at 15.
41. *Id.* at 16-17.

The American system of military justice was taken from that of Great Britain, which had been shaped according to the principles of ancient Roman military law. A congressional committee was appointed in 1776 to study and revise the Articles of War and to provide the new American nation with a functional military code, but the committee simply adopted, with minor modifications, the existing British Articles of War.[42] As John Adams, one of the committee members, put it:

> There was extant one system of articles of war which had carried two empires to the head of mankind, the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be in vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline . . . . I was, therefore, for reporting the British articles of war, *totidem verbis*.[43]

Given this background of American military law, one more readily understands West's assertion that "[c]ourt-martial law, of course, was vastly different from English and American common law."[44]

West also points out that a court-martial is not really a court of law at all but "only . . . an agent of the executive authority, . . . an instrumentality of the military commander for the enforcement of discipline within his command."[45] West cites and quotes Col. William Winthrop, whom he rightly calls "[t]he Blackstone of American military law,"[46] in support of that proposition, and indeed Winthrop does support it. Although West did not provide the full quotation in his book, examination of Winthrop's complete statement is instructive:

> Courts-martial of the United States, although their legal sanction is no less than that of the federal courts, being equally with these authorized by the Constitution, are, unlike these, not a portion of the Judiciary of the United States, and are thus not included among the "inferior" courts which Congress "may from time to time ordain and establish." . . . Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.

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42. *See* 3 THE WORKS OF JOHN ADAMS 69 (C. Adams ed. 1851).

43. *Id.* at 68. The articles of war are set forth as adopted at 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 788-807 (Lib. Cong. ed. 1906). The minor modifications referred to included deletion of expressions of allegiance to the Crown and reference to the colonists as "His Majesty's most faithful subjects." *Compare* American Articles of War of 1775 *with* American Articles of War of 1776, in 2 W. WINTHROP, MILITARY LAW AND PRECEDENTS 1478-1503 (2d ed. 1896).

44. WEST, *supra* note 1, at 22.

45. *Id.* at 23.

46. *Id.*

> Thus indeed, strictly, a court-martial is not a *court* in the full sense of the term, or as the same is understood in the civil phraseology. It has no common-law powers whatever, but only such powers as are vested in it by express statute, or may be derived from military usage. . . . It is indeed a creature of *orders,* and except in so far as an independent discretion may be given it by statute, it is as much subject to the orders of a competent superior as is any military body or person.[47]

Winthrop's analysis of this particular aspect of military law is as accurate now as it was when he made it in the last century. Courts-martial are not courts in the usual sense of that term, a fact not widely understood by the general public or by many lawyers. West discusses this aspect of the court-martial system and concludes his chapter on early military law by pointing out that "[o]n the eve of World War I the American military court-martial system was completely dominated by military commanders" and that "[r]eversal of acquittals and 'revision' [toward greater severity] of inadequate sentences were time-honored concepts."[48]

In chapter 3 West discusses the functioning of the military justice system in World Wars I and II, including the many abuses and injustices in that system. In particular, he examines the famous post-World War I Ansell-Crowder dispute in which West Point graduate Brig. Gen. S.T. Ansell took the lead in attempting to reform the system against the firm opposition of the Judge Advocate General of the Army, Maj. Gen. E.H. Crowder.[49] West comments:

> Ansell lost his magnificent battle to reform military law, and following the war he was reduced in rank to lieutenant colonel and retired. Ansell's proposed legislation to reform military law, the last of his great efforts to improve the military judicial system, was largely rejected in 1920. But long after Ansell's death his proposal was adopted almost *in toto* (in 1950) with the enactment of the Uniform Code of Military Justice.[50]

West discusses the activity toward revision of the system between the world wars and the minimal reforms of that period. He then turns to the actual functioning of the military justice system during World War II and to the subsequent finding of the Vanderbilt Com-

47. 1 WINTHROP, *supra* note 43, at 53-54 (emphasis in original).

48. WEST, *supra* note 1, at 26.

49. *Id.* at 31-35; *see* Ansell, *Some Reforms in Our System of Military Justice,* 32 YALE L.J. 146 (1922); Ansell, *Military Justice,* 5 CORNELL L.Q. 1 (1919); Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell,* 35 MIL. L. REV. 1 (1967). *See also* Morgan, *The Existing Court-Martial System and the Ansell Army Articles,* 29 YALE L.J. 52 (1919). After his vigorous efforts, and many believe *because* of them, General Ansell was reduced to the rank of Lieutenant Colonel from the rank of Brigadier General on March 4, 1919. *Hearings on S. 64 on the Establishment of Military Justice Before a Subcomm. of the Senate Comm. on Military Affairs,* 66th Cong., 1st Sess. 160-64 (1919).

50. WEST, *supra* note 1, at 35.

mittee (appointed by the American Bar Association in 1946 at the request of the War Department) that "a breakdown in military justice had 'definitely occurred.' "[51]

In chapters 6 and 7 West deals with the first ten years under the 1950 Uniform Code of Military Justice and then examines the Powell Report[52] and the second decade of operation under the Code (still disliked by the military). West emphasizes in these chapters that the new Code did not and in fact could not accomplish the full range of reforms it was designed to accomplish because of the continuing corruption of the command influence problem. He also singles out the failures of the United States Court of Military Appeals to enforce the new Code adequately, noting that Judge Homer Ferguson alone was consistent and vigorous in opposing undue military control over the system of justice operated by the armed forces. West states:

> Judge Ferguson's outspoken opposition to the practice [of command influence] would eventually become classic. He would ultimately brand SJA's [Staff Judge Advocates, or in navy terminology, Legal Officers] as common criminals in their efforts to rig military juries to render verdicts in keeping with command viewpoints. But Chief Judge [Robert E.] Quinn, with his inability to take a stand one way or the other on the question of command control, was perhaps the major reason for the court's ultimate failure to reform military law in this regard.[53]

West clearly demonstrates that the military intended to "bury the Uniform Code of Military Justice"[54] if at all possible after the Powell Committee's finding that the Code "was ineffective to support good order and discipline in the army, and that military commanders were opposed to its 'cumbersome' procedures and 'uncertain' results."[55] Another major purpose of the Powell Report was to "sink the Court of Military Appeals,"[56] even though the report, as West puts it, "paid due lip-service to the rule of law in military cases."[57]

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51. *Id.* at 43. *See also* West, *supra* note 15, at 73-78 (discussion of the origin and work of the Vanderbilt Committee, known officially as the War Department Advisory Committee on Military Justice).

52. U.S. DEP'T OF DEFENSE, DEP'T OF THE ARMY, REPORT OF THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY (1960). This report was a part of the Army's 1960 report on military justice to the Congress and was produced by a committee of nine general officers. The committee was chaired by Lt. Gen. Herbert B. Powell and included as members, among others, Maj. Gen. William C. Westmoreland, then commander of the 101st Airborne Division. For a thorough discussion of the committee and its work, see West, *supra* note 15, at 143-50.

53. WEST, *supra* note 1, at 85.

54. *Id.* at 95.

55. *Id.* at 96.

56. *Id.* at 98.

57. *Id.* at 96.

Congress did not accept the Powell Report. Even Chief Judge Quinn, West reports, "simply termed the Powell Report as 'appalling,' " and said that its adoption would return the military justice system to the conditions that required the enactment of the Uniform Code of Military Justice initially.[58] The significance of the Powell Report, however, is, as West points out, that it confirmed that the armed forces really had not accepted the ideas of justice embodied in the Code and wanted to return to the old style of military justice. The generals actually had advised Congress that because of the Code, "the state of army discipline [was] on the brink of destruction in 1960."[59] None of the changes recommended by the Powell Report was enacted into law by the Congress, and the army and the other branches of the armed forces managed to continue their operations.

In the remaining chapters of his book West gives example after example of the techniques of unlawful command influence and its corrupting results in cases litigated in the military justice system. His discussion of the problem of reverse command influence as practiced in the My Lai cases is particularly interesting and valuable.[60] One of the most corrupting influences in any system of justice, whether military or civilian, is that resulting from unequal treatment of equal cases. Absolute equality is not attainable, of course, and might not be entirely desirable. A fundamental principle of justice, however, is that like cases be treated alike to the maximum extent possible, so that there is not one rule of law for the rich and powerful and another for the poor and weak. When the senior military commanders involved in the My Lai cases walked away with minimum or, in many instances, no punishment while Lieutenant Calley was charged, tried, convicted, sentenced, and required to serve time in prison, serious questions about the internal fairness of the military justice system necessarily were raised in a very immediate and pressing way. Basically the issue is whether military commanders ought to have the power and authority to insulate in selected cases members of their commands from the ordinary processes of criminal justice. West thinks not. I certainly agree with him and believe that the problems he discusses in this area, as well as the overall problem of command control of the military justice system, will not be corrected until commanders are removed from

58. *Id.* at 98.
59. *Id.*
60. *See* note 23 *supra.*

the military justice system entirely.[61]

West's proposal to remedy the command influence problem is to place the operation of the military judicial system "in the hands of civilian administrators, preferably under the control of the attorney general of the United States."[62] West insists on a large measure of civilian control:

> Civilian trial lawyers and civilian judges should fill the roles presently filled by military legal officers in every branch of military justice, and convening authorities who insist upon tampering with military juries should be prosecuted in United States District Courts. The investigation of criminal offenses within the military community, the preferring of court-martial charges against military defendants, and the referral of those charges to trial should be under the control of civilians.[63]

Then West makes one of the most important points to be made about reforms in military justice:

> Our lesson from history in this regard is that lesser procedural reforms designed to leave the military judicial system in the operational control of military commanders are reforms in name only. Only when reform changes the very basis of the system and removes the system completely from military control will the possibility of command influence be significantly reduced in courts-martial practice.[64]

From a realistic and practical viewpoint Congress is not likely to

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61. For a proposed comprehensive revision of the Uniform Code of Military Justice to remove commanders from their roles in the military justice system, see Schiesser & Benson, *supra* note 3. Colonel Schiesser and I believe that removal of commanders from their present powerful roles in military justice would deal effectively with the problem of unlawful command influence. We do not think it necessary to substitute civilian personnel for military personnel to the extent that West does. We do agree with West that ultimate opportunity for review of decisions of the United States Court of Military Appeals by the Supreme Court of the United States is absolutely necessary, although we would reach such review by a different means than that proposed by West. West proposes appeals from the Court of Military Appeals "for good cause shown" to the various United States Courts of Appeals, with the circuit depending upon the geographical location of the offense involved and thence, again for "good cause shown," to the United States Supreme Court. WEST, *supra* note 1, at 287. Colonel Schiesser and I would provide simply that cases in the United States Court of Military Appeals could be reviewed in the Supreme Court of the United States by (1) writ of certiorari granted upon the petition of any accused after rendition of judgment by the Court of Military Appeals or (2) certification at any time by the Court of Military Appeals of any question of law in any pending case for which instructions are desired (and upon certification, the Supreme Court could give binding instructions or require the entire record to be sent up for decision of the entire case). In any event, and by whatever method, review by the Supreme Court is necessary. The present method of bringing military cases into the federal court structure is wholly unsatisfactory. *See* Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities,* 54 MIL. L. REV. 1 (1971).

62. WEST, *supra* note 1, at 285.

63. *Id.* at 285-86.

64. *Id.* at 286.

introduce civilian control to the degree suggested by West at any time in the immediate future, if ever. I have said the same thing about the proposals that Col. Schiesser and I made concerning the removal of commanders from the military justice system and the elimination of the convening authority in military law.[65] Adoption of any major reforms in military justice cannot be anticipated at this time. Congress ordinarily concerns itself with reform of the military justice system only after a hue and cry has been raised following a major war or other military operations such as Korea and Vietnam. Ample complaints about military justice arose during the Vietnam war,[66] but those complaints apparently have subsided with the termination of the war and with the general public's obvious desire to forget everything connected with Vietnam as rapidly as possible. No major reform proposals relating to military justice are pending in Congress at this time. Even so, those who are interested in reform of military justice must continue their efforts. When Congress, for whatever reason, once again actively becomes concerned with military justice, adequate analyses of the problems and appropriate proposals for effective reform must be readily available. West's work, both in his *U.C.L.A. Law Review* article and in his present book, represents a substantial contribution to the effort to improve military justice.

The problem of command influence is peculiar to the military, in the forms in which it is usually encountered, because of the military structures of command control and the provisions of the Uniform Code of Military Justice giving commanders so much discretion over the functioning of the military judicial system. The problem is *not* peculiar to the military. I have concluded, based upon my own experience, that military commanders are not essentially corrupt or necessarily insensitive to concepts of due process. Unlike other people in our society, military people simply are locked into a system that provides a much greater opportunity for expression of corrupt practices in the realm of criminal justice than their civilian

65. *See* Schiesser & Benson, *supra* note 3, at 560 n.9. The convening authority is the military commander empowered to convene courts-martial (*i.e.* bring them into legal existence as courts; no court-martial can exist until it is officially convened by a convening authority) and to refer cases to them for trial. 10 U.S.C. §§ 822-824 (1970).

66. F. GARDNER, THE UNLAWFUL CONCERT (1970); A. JENSEN & M. ABRAMSON, THE TRIAL OF CHAPLAIN JENSEN (1974); R. RIVKIN, GI RIGHTS AND ABMY JUSTICE: THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW (1970); R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1970); CONSCIENCE AND COMMAND: JUSTICE AND DISCIPLINE IN THE MILITARY (J. Finn ed. 1971).

counterparts. Attempts to influence courts and lawyers improperly certainly are not confined to the military. As Moyer expresses it,

> [t]he problem of outside influence is, of course, one with which all judicial systems must cope. Political or social pressures may be sources of distortion in the operation of civilian judicial systems. Military rank and command, however, are found only in military courts.[67]

Military justice is important; it ought to be as good as we can make it. West certainly is correct in arguing for "a court-martial system worthy of public trust and esteem."[68]

THE TRANSFORMATION OF AMERICAN LAW, 1780-1860. By Morton J. Horwitz. Cambridge, Mass. and London: Harvard University Press, 1977. Pp. xvii, 356. $16.50.

*Reviewed by Maxwell Bloomfield**

"This study attempts to challenge certain features of the 'consensus' history that has continued to dominate American historiography since the Second World War," observes Morton Horwitz in his introduction.[1] Specifically, Horwitz charges that historians sympathetic to the New Deal have been too uncritical in their assessments of earlier instances of governmental economic regulation. Eager to disprove the theory of an unbroken laissez-faire tradition, such figures as Louis Hartz and Oscar and Mary Handlin discovered in the early nineteenth century a pattern of governmental activism that seemed to them responsive to the needs of society at large.[2] In fact, Horwitz argues, an interventionist legal policy grew out of conditions of "social struggle" in the antebellum years, and benefited "men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society."[3] To demonstrate this thesis, he focuses upon changes in pri-

67. MOYER, *supra* note 3, at 677.
68. WEST, *supra* note 1, at 287.

* Professor of History and Chairman of the Department of History, The Catholic University of America. B.A., Rice University, 1952; LL.B., Harvard University, 1957; Ph.D., Tulane University, 1962.

1. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at xiii (1977)..
2. *See, e.g.*, O. HANDLIN & M. HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861 (1947); L. HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860 (1948).
3. HORWITZ, *supra* note 1, at 253-54.

vate law—in such professedly neutral areas as contract, tort, property, and commercial law—by which economic wealth and political power were redistributed to a privileged minority during the eighty years that followed the American Revolution.

Central to his argument is an appreciation of the changing role of the judiciary in national life. Prior to the Revolution, he contends, jurists drew a sharp line between legislation and adjudication. Statutes were regarded as "acts of will," embodying political judgments and shifting policy preferences, whereas common law doctrines derived from an unchanging body of natural law. The task of an eighteenth-century judge was, therefore, both limited and essentially negative: to discover and apply pre-existing legal rules in the settlement of private disputes between individual litigants. Judges seldom considered the social consequences of any particular rule since policy making of any meaningful sort was reserved for legislators. Adhering strictly to precedent in most cases, the colonial judiciary further shared power with local juries, which claimed equal expertise in identifying customary practices and regularly decided issues of law as well as fact.

The dichotomy between common law and statute law began to break down only in the postrevolutionary decades, Horwitz asserts, as new political theories transformed juristic thinking about the source of all legal obligation. The idea of popular sovereignty—a product of the revolutionary struggle—permeated the jurisprudence of the new nation and conditioned the exercise of both legislative and judicial power. For judges, separation from England eroded the bases of natural law jurisprudence by calling into question the validity of colonial precedents. Faced with a need to justify continued obedience to common law rules, jurists argued that only those customary doctrines to which the people had consented were still binding on them. The judiciary, however, as agents of the sovereign people, fell heir to the task of determining in each instance whether a principle remained enforceable. Judges thus were led inevitably to consider the social policies served by legal rules, and in the years from 1780 to 1820—a crucial transition period, in Horwitz's view—American jurists developed for the first time an "instrumental conception of law" by which they were encouraged to "formulate legal doctrine with the self-conscious goal of brining about social change."[4]

4. *Id.* at 30.

Through the rest of his book Horwitz analyzes in rich and absorbing detail the results of such judicial policy making. In each area of private law he considers, the same general pattern prevails: judges actively and successfully promoted the interests of rising financial and entrepreneurial groups by overturning the precommercial and antidevelopmental common law values of the eighteenth century. Property law, for example, traditionally protected landowners in the exclusive enjoyment of their estates, but American judges refashioned the law of riparian rights to enable mill owners to appropriate water for business purposes without regard to the damage done to neighboring lands. In contract cases courts abandoned their longstanding practice of scrutinizing the substantive fairness of exchanges and turned instead to the new doctrine of *caveat emptor* as better suited to the expansion of a dynamic market economy. Commercial transactions were facilitated by judicial recognition of the full negotiability of promissory notes, while judges sharply curtailed the use of merchant juries, arbitration panels, and other rival forms of dispute settlement. The end product of such judicial activism was the covert subsidization of economic growth through the legal system, as opposed to the more open (and presumably more equitable) redistribution of wealth that might have been effected through legislative taxation.

Fear of the egalitarian tendencies occasionally displayed by state legislatures caused the same jurists who espoused instrumentalism in private law matters to remain sturdy formalists when deciding constitutional questions. Although willing to sanction the destruction of older forms of property at the hands of private entrepreneurs, they continued to strike down every legislative intrusion upon "vested property rights" as a violation of the contract clause. This anomalous situation persisted until the middle years of the nineteenth century, when formalism triumphed again in private as in public law. By that time instrumental decision making had lost much of its attractiveness for both the business community and the bar. Businessmen, who had already benefited from a policy of judicial activism, now were eager to prevent any further tinkering with the status quo, while the legal profession sought to enhance its prestige and to disarm Jacksonian critics by transforming private law into an objective science based upon a closed system of logically deducible rules. "What came to be certified as purely 'legal,' of course," Horwitz concludes, "were those rules of law that had been established during the previous half century to implement a market regime, primarily new rules of contract, property, and commercial

law, now thoroughly exorcised of earlier protective or paternalistic doctrines and reshaped to serve the interests of the wealthy and the powerful."[5]

The argument is bold and compelling, and Horwitz presses his points with clarity and vigor. No one who reads this book (and it should be required reading for law students, as well as for law professors and practitioners) can continue to think of antebellum legal history in terms of the bland, apolitical categories formulated by earlier conservative commentators. A final verdict on Horwitz's work, however, must await further empirical studies by nonlegal experts in American political and economic history. Although he purports to deal with the redistribution of wealth effected by judicial instrumentalism, his analysis of the process is superficial at best. He never makes clear, for example, why judges favored one entrepreneurial group over another, or what kind of special relationship existed between the bench and the marketplace. At times he posits an effective collaboration between elite lawyers, big businessmen, and sympathetic judges. At other times he credits judges alone with anticipating economic trends, and occasionally he identifies legal change with the workings of an impersonal Zeitgeist.[6]

Horwitz is not to blame for most of this ambiguity. A present determination of how most nineteenth-century decisions were carried out and who ultimately benefited from them is impossible in the absence of adequate impact studies. Similarly, chiding him for not looking more carefully into the socioeconomic backgrounds of his judges and entrepreneurs would be both ungenerous and unfair since such an inquiry would involve gargantuan exertions given the state of existing research. Intellectual history, however, carries its own methodological dangers and limitations, and Horwitz's study is essentially intellectual history based upon prodigious research into court records and early legal treatises. One temptation of the genre to which he partially succumbs is a tendency to overconceptualize—to play down, or to ignore, contradictory data that otherwise would mar the symmetry of a grandly logical design. In charting the

5. *Id.* at 259.

6. *Compare* "As political and economic power shifted to merchant and entrepreneurial groups in the postrevolutionary period, they began to forge an alliance with the legal profession to advance their own interests through a transformation of the legal system," *id.* at 253, *with* "In a whole variety of areas of law, ancient rules are reconsidered from a functional or purposive perspective, often before new or special economic or technological pressure for change in the law bas emerged," *id.* at 3, *and* "By the end of the eighteenth century, however, the development of extensive markets undermined this system of customary prices and radically transformed the role of contract in an increasingly commercial society," *id.* at 173.

progress of judicial innovation, for example, he rarely steps outside the courtroom. Although he is sensitive to the subtlest nuances of forensic argument, he pays scant heed to countervailing forces in society at large. One exception occurs in his discussion of developments in commercial law, when he notes:

> But there remained throughout the first half of the nineteenth century strong elements in American society opposed to the expanding values of a market economy. Reflecting a still dominant precommercial consciousness of rural and religious America, these groups, though consistently on the defensive throughout the century, continued to constitute a powerful political force to be reckoned with. As nineteenth century courts increasingly absorbed procommercial doctrines into American private law, these groups offered intermittent resistance in state legislatures.[7]

Who were these groups? What forms of resistance did they undertake, and how successful were they? Having introduced the theme, Horwitz fails to pursue it beyond observing that certain southern and western states opposed the negotiability of promissory notes in a systematic way during the entire period covered by his study. Were these the same states that sought to curb their judiciaries after 1830, either through the elective process or by legislatively diminishing the power of trial judges vis-a-vis juries? A more thorough exploration of antagonistic interest groups might demonstrate that Horwitz's model of legal change needs to be qualified substantially to take account of regional deviations.

Certainly his thesis best explains developments in the most rapidly industrializing part of the country—the Northeast. Since he views legal change as intimately related to changing material conditions, should not differential rates of economic growth be reflected in the jurisprudence of the several states? Especially difficult to understand is why the shift toward formalism at mid-century should have been welcomed by businessmen in frontier areas who had not yet had much opportunity to benefit from the instrumentalism of procommercial judges. Perhaps in the long run a modified version of the sectional history associated with Frederick Jackson Turner may offer the most satisfactory formula for comprehending the totality of the American legal experience in the nineteenth century.

How well Horwitz's model applies to those areas of law that he has left unexamined likewise remains to be seen. One recent study of nineteenth-century adoption law contends, for example, that

7. *Id.* at 211.

judges in child custody cases began to move *away* from formalism during the 1840's, as they became both paternalistic and instrumental in their outlook.[8] This trend stands in direct contrast to the behavioral pattern uncovered by Horwitz in his research.

A matter of chronology poses a final problem. While Horwitz's account of an emerging instrumental consciousness is persuasive, his position would be strengthened, I believe, if he enlarged his frame of reference to include the closing decades of the colonial era. As presently stated, his argument draws too sharp a contrast between colonial and postcolonial trends and exaggerates the importance of the American Revolution as a cause of change in private law. This emphasis accords with that found in another pathbreaking study, William E. Nelson's *Americanization of the Common Law* (1975), to which Horwitz refers several times in his book. Both authors, in their eagerness to prove that nineteenth-century judges were political animals, underestimate the policy-making potential available to judges under a system of natural law jurisprudence. Similarly, both writers are unusually sensitive to the presence of social conflict in postrevolutionary America, while hypothesizing a harmonious colonial society that did not exist by 1750. Would it not make more sense to view instrumentalism as one aspect of a massive shift in values that was already underway in England and America by the middle of the eighteenth century? The English at home experienced no revolution yet produced a Mansfield, whose procommercial decisions in the 1760's were more boldly instrumental than those of any American jurist prior to 1820. By adopting an earlier date for the beginning of his transition period, Horwitz would confirm the overall economic thrust of his argument and avoid the anomaly of tying his "instrumental conception of law"too narrowly to a change in political ideology.

That these reflections and others spring readily to mind after reading Horwitz's book testifies to its substance and vitality. The work is seminal in the best sense of the term and will inspire both admiration and controversy for years to come.

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8. J.S. Zainaldin, The Origins of Modern Legal Adoption: Child Exchange in Boston, 1851-1893 (1976) (unpublished Ph.D. dissertation in University of Chicato Library).

THE RULE OF REASON: A NEW APPROACH TO CORPORATE LITIGATION. By Milton R. Wessel. Reading, Mass.: Addison-Wesley Publishing Co., 1976. Pp. xviii, 221. $10.95.

*Reviewed by Donald E. Schwartz**

Milton Wessel is a respected New York trial lawyer, a partner in a major law firm, a part-time law professor, and a former government prosecutor. His background is well suited to provide him with a sensitivity to trends in the courts, and he perceives that the character and the stakes of litigation—especially corporate litigation—are changing drastically. The change, Wessel believes, requires that corporations adopt a new strategy, not only for their own sake, but for the sake of society as well. He implores corporations to pursue this new strategy, which he calls the"rule of reason" and which serves as the title of his book.

Wessel deals with a phenomenon of which businesspersons, lawyers, and legal scholars increasingly have become aware: our society is more litigious than it used to be. Federal litigation alone has nearly doubled in fifteen years,[1] and, more important, the nature of litigation affecting corporations has changed, especially since World War II. Issues of public policy, as distinct from merely private rights, are preoccupying the courts. Important questions concerning the environment, civil rights, consumer rights, and other areas previously left to legislatures now are resolved in the courts. These "socioscientific" disputes, as Wessel calls them, are the subject of his new approach to litigation.[2]

Professor Abram Chayes has written: "Perhaps the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies."[3] Chayes discussed the implications of this shift on the courts and on the judicial lawmaking process. Wessel's focus is upon the effect of this development on lawyers, principally corporate counsel representing defendants.

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1. Goldstein, *A Dramatic Rise in Lawsuits and Costs Concerns Bar*, N.Y. Times, May 18, 1977, at 1, col. 3.

2. M. WESSEL, THE RULE OF REASON: A NEW APPROACH TO CORPORATE LITIGATION 7 (1976).

3. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

Wessel's strategy is proposed as a responsible- and successful-alternative to the sporting theory of litigation, which he characterizes as "litigation by 'trick.' "[4] In rejecting the old approach to the new litigation, he looks beyond the outcome of any particular suit:

> The public may be willing to accept the "game" approach in strictly private litigations, where that method has to some extent demonstrated its value. However, the public cannot accept it where its own survival is at stake, and where the scientific issues are so complex and the ultimate judgment to be made so nebulous. In those cases the public's judgment must necessarily be based on its confidence in the decision process and the credibility of the participants.[5]

Why does the "public's" view matter? The question has the same ring as Stalin's query about how many divisions has the Pope. Wessel, as litigator and strategist, wants to win both the battle and the war. This means that the public's favor must be courted because in these cases the public has ample troops with which to make its will felt. The political process is capable of achieving fundamental changes in the economic structure if public ire is sufficiently aroused. Many corporate strategists seek to win public favor with good public relations, which often means the manipulation of images. Wessel, on the other hand, proposes a strategy aimed at reality.[6]

According to Wessel, the rule of reason is not a renunciation of the adversary system, but it does demand an unaccustomed degree of candor. Wessel summarizes the rule's requirements as follows:

> Data will not be withheld because "negative" or "unhelpful."
>
> Concealment will not be practiced for concealment's sake.
>
> Delay will not be employed as a tactic to avoid an undesired result.
>
> Unfair "tricks" designed to mislead will not be employed to win a struggle.
>
> Borderline ethical disingenuity will not be practiced.
>
> Motivation of adversaries will not unnecessarily or lightly be impugned.
>
> An opponent's personal habits and characteristics will not be questioned unless relevant.
>
> Wherever possible, opportunity will be left for an opponent's orderly retreat and "exit with honor."
>
> Extremism may be countered forcefully and with emotionalism where justified, but will not be fought or matched with extremism.

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4. WESSEL, *supra* note 2, at 9.
5. *Id.* at 10.
6. *Id.* at 20.

> Dogmatism will be avoided.
>
> Complex concepts will be simplified as much as possible so as to achieve maximum communication and lay understanding.
>
> Effort will be made to identify and isolate subjective considerations involved in reaching a technical conclusion.
>
> Relevant data will be disclosed when ready for analysis and peer review—even to an extremist opposition and without legal obligation.
>
> Socially desirable professional disclosure will not be postponed for tactical advantage.
>
> Hypothesis, uncertainty, and inadequate knowledge will be stated affirmatively—not conceded only reluctantly or under pressure.
>
> Unjustified assumption and off-the-cuff comment will be avoided.
>
> Interest in an outcome, relationship to a proponent, and bias, prejudice, and proclivity of any kind will be disclosed voluntarily and as a matter of course.
>
> Research and investigation will be conducted appropriate to the problem involved. Although the precise extent of that effort will vary with the nature of the issues, it will be consistent with stated overall responsibility to solution of the problem.
>
> Integrity will always be given first priority.[7]

Wessel amplifies the application of his proposed tactics without adopting the style of a how-to-do-it manual. He stresses the role of corporate counsel in maintaining the rule of reason, because he or she, as distinct from trial counsel, has responsibility for "the entire range of corporate affairs."[8] Because of his knowledge and experience, Wessel's tour of a corporate lawsuit from early preparation through trial, settlement, and appeal is convincing. Deserving of special emphasis is his conclusion that, although there is almost always a best foot to put forward,

> if there is simply no possible version of the facts which will evoke public sympathy or appear in the public interest—then the rule of reason demands that the corporation withdraw from the fray. Only a miscarriage of justice could help, and that should never be the objective of any responsible system of dispute resolution.[9]

Wessel also argues against extensive pretrial motions, the burden for which, in terms of delay and expense, falls generally upon the smaller firms representing plaintiffs.

> The governing principle is that there must be a sound reason for making any application. That reason must be able to withstand public disclosure, if necessary, and not be for harassment, obstruction, or delay. It must outweigh the

7. *Id.* at 23-24.
8. *Id.* at 33.
9. *Id.* at 144.

> disadvantages of making the application, including expense. Simply stated, this is a presumption *against* making motions in rule-of-reason cases.[10]

Similarly, he urges that "[d]iscovery should only be conducted for some substantial reason *other* than harassment or obstruction, and the reason must outweigh probable disadvantages, including litigation costs."[11] Wessel sticks to his position, however, that none of this rejects the adversary approach. He contends that "properly viewed, the rule of reason is the most effective adversary litigation weapon of all because it is calculated to maximize the chances for litigation success."[12]

I both like and admire this book. It is thoughtfully designed to present a system of justice that can replace the current system of obstruction. In its own way, Wessel's proposal is as dramatic a change as was the move from trial by ordeal to trial by jury. In an area in which the relationships between corporations and society are honed in increasingly important ways, Wessel is calling for management to recognize that its self-interest is enhanced by conduct that they would regard as corporate statesmanship. The path is not an easy one to follow.

Despite the encouragement it has received from many quarters, corporate statesmanship runs against the grain, as I suppose statesmanship of any sort does. In 1916, for example, Henry Ford was sued by his partners, the Dodge brothers, for having reduced Ford Motor Company dividends. Ford had other uses for the money: he had grand designs to integrate his operations vertically and to pay unprecedentedly high wages to his workers. Further, he wanted to cut the prices of his auto to make it more available to more people. All of this seemed counter to the reasons for which people invest in companies. When the Dodge brothers' lawyer asked Ford what he thought was the purpose of his company, the following in-court colloquy occurred:

> Ford: Organized to do as much good as we can, everywhere, for everybody concerned . . . . to make money and use it, give employment, and send out the car where the people can use it. . . . And incidentally to make money.
> [Counsel for Plaintiff (Elliott G. Stevenson)]: Incidentally make money?
> Ford: Yes, sir.
> Stevenson: But your controlling feature . . . is to employ a great army of men at high wages, to reduce the selling price of your car, so that a lot of people can buy it at a cheap price, and give everybody a car that wants one.

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10. *Id.* at 162.
11. *Id.* at 163.
12. *Id.* at 169.

> Ford: If you give all that, the money will fall into your hands; you can't get out of it.[13]

Part of the reason for my skepticism about the business reaction to Wessel's ideas stems from the Michigan Supreme Court's response to Ford's views. Ruling against Ford, the Court stated:

> There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders. A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end . . . .
>
> . . . As we have pointed out, and the proposition does not require argument to sustain it, it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others, and no one will contend that if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders it would not be the duty of the courts to interfere.[14]

Times may be changing, however. Philip Wrigley, the late president of the Chicago Cubs, withstood a challenge to his decision not to install lights at Wrigley Field by arguing that the action was justified by a concern for the neighborhood. The Illinois Appellate Court rationalized the decision in terms of a long-range view of the corporate welfare.[15] Long-range perspectives, however, may be a luxury that courts enjoy and that mere mortal short-term investors and most managers do not share. Most businesspersons heed Keynes' observations about man's fate.

The point of this historical excursion is Wessel's reminder to us that the decision to scrap the sporting theory in favor of the rule of reason rests with the client.[16] Clients must perceive the decision to be in their best interest and by "their," one must mean management's best interest. Wessel goes to great lengths to convince readers that the rule-of-reason approach will succeed, but his notion of success may not be the same as that of management or of the trial counsel retained for the occasion. Wessel is thinking of long-term success. Society may not tolerate the great power corporations possess if it feels that such power threatens society's survival. A short-term strategy, however, is what most of us pursue, and given such limited goals, the sporting theory has achieved much success. The

13. A. NEVINS & F. HILL, FORD: EXPANSION AND CHALLENGE, 1915-1933, at 99-100 (1957).
14. Dodge v. Ford Motor Co., 204 Mich. 459, 507, 170 N.W. 668, 684 (1919).
15. Shlensky v. Wrigley, 95 Ill. App. 2d 173, 237 N.E.2d 776 (1968).
16. WESSEL, *supra* note 2, at 28.

long-term defeat that the sporting theory forebodes thus is not an entirely convincing argument. The pertinent question is whether trial counsel is likely to advise his client that the rule of reason will best achieve the short-term objective, that the corporation therefore should not harass plaintiff's understaffed counsel with motions and depositions, and that the client should not stonewall even when stonewalling is legally possible. Without in any way disparaging the integrity or responsibility of our barristers, one must be skeptical that such advice will be given. I cannot say how prevalent the rule-of-reason ethic is among the bar, but one only can guess that defense counsel like to win battles even more than they like to win wars.

How far Wessel's proposals go is not at all clear. He seems to justify his proposals by reference to cases of general social significance. He labels these cases "socioscientific" because a major part of the evidence involved in them is scientific.[17] This suggests that truly private litigation *(e.g.,* breach of a routine contract) should, or at least may, be conducted in accordance with old-fashioned rules. I find several troublesome weaknesses in this portion of the analysis. First, a bifurcation in the litigation approaches of trial counsel, corporate counsel, and management is likely to cause great confusion. Worse, great cynicism about sanguine predictions for the rule-of-reason approach is likely to result. The approach will be seen as not truly the most effective strategy for winning cases. Can lawyers really turn on and turn off their aggressive game instincts about the best way to win a case? Second, the definition of "socioscientific" litigation is not at all clear. The emphasis seems to be on the "socio" side, because Wessel at various points uses as illustrations antitrust cases in which most of the evidence is economic.[18] What else fits into this category? The public policy reasons advanced by Wessel would suggest inclusion of many securities cases, civil rights cases, patent infringement actions, derivative suits alleging breach of fiduciary duty, intentional tort claims, and some negligence cases. That *all* litigation should be conducted by the new rules would be a simpler conclusion, but one that I think is overly broad and in any case not likely to be followed.

A corollary question is whether plaintiff's counsel is to be bound by the same rules. One would think so, if the public interest is to be served by litigation. To clarify the matter, Wessel could have discussed, for example, the litigation attitude of governmental counsel.

17. *Id.* at 7.
18. *See, e.g., id.* at 13-16.

I think a good part of the problem is that the courts and the litigation process in general often are not the appropriate vehicles for resolving socioscientific disputes. The political process is better equipped to sort out the data and to make the balancing policy judgments involved. Congress, not the courts, should decide whether to build the Alaska pipeline. Whether seniority rights of some employees should prevail over equal employment opportunity rights of others is not a simple right-or-wrong proposition, and a satisfactory answer is unlikely to emerge from a lawsuit. Politicians, of course, are tempted to defer these difficult judgments to judges, and aggrieved citizens equally are tempted to pursue their rights in the courts. For these reasons, lawyers always have played a dominant role in our society. That course having been chosen, the expectation that contestants will forego their battle-tested tools may ask too much. The transference is natural. This is the problem, in my opinion, although at this point I do not know that we can do anything to alter significantly our propensity to litigate all manner of controversies.

Wessel makes deeply important suggestions about the need for corporations and those who act for them to behave with a view to maintaining, or regaining, public confidence. This is a further illustration that responsible conduct involves more than just obeying laws. No law can compel corporations to act farsightedly or even intelligently; internal controls are needed. Wessel is an optimist, and he sees a brave new world being forged. His suggestions should be seriously considered initially by lawyers and then by clients. His book sets out a challenging test of our wisdom and our discipline.