Roberta Walburn: *Miles Lord: The Maverick Judge Who Brought Corporate America to Justice*

A Review-Essay
by
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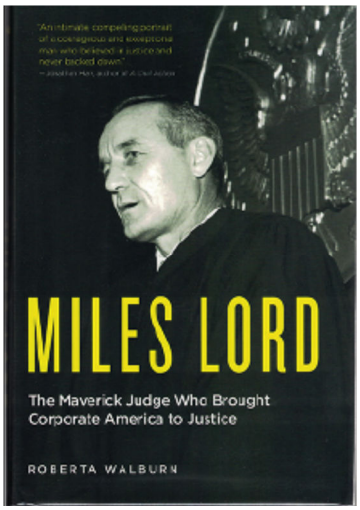
A book about discovery in federal court would not appear to be a page-turner. Roberta Walburn's recent biography of Judge Miles Lord and story of her year as his law clerk is, in significant part, about discovery in lawsuits brought by women harmed by the Dalkon Shield, an IUD marketed by the A. H. Robins Company. It is a page-turner.[1]

In 1975 the federal Judicial Panel on Multidistrict Litigation consolidated Dalkon Shield cases filed in federal courts around the country for pretrial



discovery and proceedings in the federal district court in Kansas. There the A. H. Robins company produced hundreds of documents for use in those cases when sent back for trial to the federal courts where they were filed. In late 1983 twenty-one of the Dalkon Shield cases pending in the District of Minnesota were assigned to Lord. Walburn recounts three months of frenetic activity that followed after Lord ruled he would allow the plaintiffs' lawyers to pursue further discovery in his court and to try generic issues about the IUD in one proceeding for all the cases, including questions regarding how much senior A. H. Robins officers knew about deficiencies in the Dalkon Shield. From her

[1] Roberta Walburn, *Miles Lord: The Maverick Judge Who Brought Corporate America to Justice* (Minneapolis: University of Minnesota Press, 2018).

perspective as one of Lord's law clerks, Walburn recounts the motions and arguments on these issues, the delaying tactics employed by A. H. Robins attorneys, the failing memory of A. H. Robins officers, Lord's trip to Richmond, Virginia to preside over depositions of these men, and his stern courtroom admonition to A.H.Robins officers that the Eighth Circuit Court of Appeals subsequently expunged from the record. Chapters about the Dalkon Shield case alternate with chapters about Lord's life from his childhood on the Iron Range to his private practice with his children after he left the bench in 1985. So presented, the Dalkon Shield story resembles serial publication of a novel in nineteenth century England--the reader must wait to find out what happened next.

The other chapters in the book provide brief but illuminating glimpses of him and of key stages in his life. He knew what it was like to be poor. As a child he was spellbound by the story of Cain and Abel. The admonition to be my brother's keeper stayed with him all his life. He fought school bullies and became a gritty Golden Gloves boxer. After eloping with his jitterbug partner, Maxine Zontelli, he worked day and night to support her and his children while a university and law school student and a neophyte private practitioner.[2] He

[2] Throughout this time he worked washing barrels in a meatpacking plant, as an oiler for power shovels at an ordnance plant, and as a welder. He had a brutal schedule:

"For Miles, school and work filled the day and night, with school in the morning, and then job after job after job: 1:00 p.m. to 5:00 p.m., janitor in apartment buildings; 6:00 p.m. to 10:00 p.m., clerk in the post office; 11:00 p.m. to 7:00 a.m., night watchman. " Page 42.

became a “hotshot prosecutor” in the United States Attorney’s office, an often-controversial state Attorney General from 1954 to 1960, and, in 1961, the US Attorney.

Walburn also traces the formation of the DFL during those years and the accomplishments of Hubert Humphrey and liberal DFLers, including Eugene McCarthy, Orville Freeman, and Fritz Mondale. Much of Walburn’s account of Lord’s career from the mid-40’s on is about his friendship and his family’s friendship with Humphrey and his family. Lord, six years younger than Humphrey, said “I felt very humble and proud that he would adopt me as his friend.” In his judgment “Hubert Humphrey stood head and shoulders above any man I ever met.” Page 64. Eugene McCarthy was also a close friend of Lord. McCarthy and Humphrey jointly persuaded President Johnson to nominate Lord for a federal judgeship and massaged a successful Senate confirmation in 1965. The page-turning portion of this part of the book is Walburn’s account of Lord’s contacts with both Humphrey and McCarthy during the 1968 campaign.

These personal and political experiences provided the foundation for Lord’s career in public office. When running for Attorney General in 1954 he assured voters “he would protect ‘people who need help,’ while doing all he could to hold accountable ‘wealthy, powerful, special interest groups.’” Page 86. Lord’s daughters said they heard about the “little guy” a thousand times in comments that came deep from his soul. Page 95. As U.S. Attorney, Lord called the Justice Department” pathetic” when it threatened to sue elderly and infirm Minnesotans who owed small amounts to the U. S. government from GI or farm loans. He

established a “compassion and fair play” policy and either wiped out the debt or made arrangements for small monthly payments. (Walburn points out that he made sure to get approval for this program from U. S. Attorney General Robert F. Kennedy, who had initially opposed Lord’s appointment as U. S. Attorney. They later worked together with “mutual admiration and respect.”) Page 115. As a federal district court judge, Lord proved receptive to the claims of persons who were poor or powerless and willing to exercise the power of the court to provide a remedy. Walburn aptly entitled the chapter about his appointment to the bench “The People’s Judge.”

I clerked for Lord in 1968-1969, a period that Walburn discusses in terms of Lord’s contacts with Humphrey and McCarthy. In retrospect, the courtroom activity was a rather ordinary year for a federal judge and for his clerks, a mix of criminal cases (mostly drug cases, draft cases, and the occasional bank robbery) and civil cases. The civil calendar was up to date. (The judge tried a personal injury case arising out of an accident that happened less than six months before.) On the last day of my clerkship, in June 1969, the judge took me across the street for a beer at the Sheraton Ritz. I recall nothing of the conversation except my response to his question about what I had learned during that past year. I paused, not being sure what to say, and then recalled a conversation with him in the first weeks of my clerkship. I was assigned to draft an opinion in a case the details of which are long forgotten except that it dealt with arbitration issues. His law clerks from the previous year indicated how the judge intended to rule. After a week or two, I gave up trying to find a way to do that, given two or three

Supreme Court cases that seemed directly on point. The judge read the opinions, said something to the effect that he disagreed with them, but that he had to follow them. So my response to Lord at the Sheraton Ritz bar was that I had learned that the best argument a lawyer can make to a federal district court judge is that if he rules against me he will get reversed. Lord did not appear impressed. Subsequently, as he battled with the Eighth Circuit Court of Appeals during his tenure on the bench, I often thought how feeble this response must have appeared. Perhaps not, however, because Walburn notes that Lord instructed his first law clerk to meticulously research Eighth Circuit precedent so that his decisions were "properly aligned." Walburn adds, however, it did not take Lord long to learn that the law was not black and white and that one judge could change the world. Page 141.

"Bold on the Bench" -- the Early Years

Walburn writes in depth about the Dalkon Shield cases and, in several of the alternating chapters, the Reserve Mining case. I will add only brief comments about them later. In a chapter headed "Bold on the Bench, 1969-1972," she discusses three early cases to show how Lord "wanted to go bold on the bench and make his mark." Page 211. Regarding the first, *Van Dusartz v. Hatfield,* 334 F. Supp. 870 (D. Minn.1971), she probably overstates the impact of his decision regarding public school financing. The second, involving girls who wanted to compete on boys' athletic teams, demonstrates how Lord's family influenced him. The third, an antibiotic antitrust case, was actually a large group of cases for which Lord had responsibility for years. They deserve more extensive discussion

than was possible given the structure of her book, for they demonstrate both Lord's skill as manager of large-scale litigation and his foibles.

The School Financing Case

Walburn says Lord's 1971 decision in *Van Dusartz* "helped to upend the state's system of financing public education." Page 211. The 1971 Omnibus Tax Bill[3] did upend that system, and Lord's ruling in *Van Dusartz* did help, but how much is an open question. In 2007, several key players involved in that process met for a roundtable discussion about the legislation. Steven Dornfeld reported their recollections in the *Minnesota History* magazine.[4] In 2012, Tom Berg, who served in the Minnesota House of Representatives in the 1970s, recounted in greater detail how that bill came to be enacted.[5] Walburn cites neither Berg nor Dornfeld. Nor does she discuss the legislative process that Berg related.

For many years, Minnesota school districts were primarily funded by local property taxes, with only modest state aid, resulting in significant disparity in school spending between districts with a low property tax base and those with a high base. In 1970 the Citizens League issued a report calling for reduction of local property taxes and replacement of those taxes with state-collected taxes for public schools and other municipal services. Wendy Anderson supported the Citizens League proposal in his successful campaign for governor. When elected, he proposed a Fair School Finance Plan that mandated reduction of

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[3] 1971 Minn. Laws, 1st Spec. Sess., chapter 31.
[4] Steven Dornfeld, "The Minnesota Miracle: A Roundtable Discussion," *Minnesota History* 60, no. 8 (2007-08) 312-325.
[5] Tom Berg, *Minnesota Miracle: Learning From the Government That Worked* (Minneapolis: University of Minnesota Press 2012), 31-44.

local property taxes, increased state taxes by $762 million, and reduced the spending disparity between school districts. The Conservative (Republican) Caucus controlled both the House and the Senate. In the House, that caucus adamantly opposed Anderson's proposal; the Senate Conservative Caucus supported a bill more closely following the Citizens League proposal. Anderson barnstormed the state, touting his proposal and decrying high property taxes. The House majority leader, Ernie Lindstrom, followed him, calling Anderson's proposal a reckless one that would destroy the state's economy. Anderson and the leaders of the Liberal (DFL) Caucus, Martin Sabo in the House and Nick Coleman in the Senate, knew that they needed help from the Conservative Caucus to pass Anderson's proposal. They sought support from Stanley Holmquist, leader of the Senate Conservatives, who was more open to the issue. The House passed a bill making only modest adjustments in the funding system; the final Senate bill was closer to the Citizens League proposal. When the legislature adjourned with no agreement, Anderson promptly called a special session. In July, the two houses agreed on a bill that Anderson considered inadequate and vetoed. The legislature had adjourned until October 12th. Rather than call them back in session, Anderson requested that a committee of ten, six Conservatives and four Liberals, meet to try to craft a bill. This committee, chaired by Holmquist, met at the governor's residence and sought to work out a compromise.

Minnesota was not the only state with disparities in spending between school districts. During the time this committee was meeting, the California

Supreme Court ruled in *Serrano v. Priest*, a case that received widespread publicity, that a similar funding system was unconstitutional.[6] White Bear Lake residents challenged Minnesota's system in a similar case pending before Lord. He recognized the differences between the California and the Minnesota systems, but adopted much of the *Serrano* analysis when he denied a motion to dismiss:

> The issue posed by the children, here as in *Serrano*, is whether pupils in publicly financed elementary and secondary schools enjoy a right under the equal protection guarantee of the 14th Amendment to have the level of spending for their education unaffected by variations in the taxable wealth of their school district or their parents. This Court concludes that such a right indeed exists and that the principle announced in Serrano v. Priest is correct. Plainly put, the rule is that the level of spending for a child's education may not be a function of wealth other than the wealth of the state as a whole.[7]

Lord's only order at this preliminary stage was to deny the motion to dismiss. He said he would "defer further action until after the end of the current Minnesota Legislative session." Walburn suggests that Lord did so because this decision was "the judge's first opinion of this magnitude," affecting every child and taxpayer in the state. Page 211. But what further relief could he have ordered other than a declaratory judgment that the present financing scheme was unconstitutional because it denied equal protection to students in that district? However bold Lord might be on the bench, it seems improbable that he would have done anything more.[8]

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[6] 5 Cal.3d 584, 487 P.2d 1241(1971).
[7] *Van Dusartz v. Hatfield,* 334 F. Supp. 870, 872 (D. Minn. 1971)
[8] In *Serrano,* after a trial on remand that considered changes the California legislature had made in response to the California Supreme Court ruling, the court entered a judgment stating that the financing system was still unconstitutional under that state's equal protection standard. The lower court

Lord issued his decision on October 12, 1971, the date that the legislature reconvened. Neither Lord in his decision nor Walburn in her book suggest that the timing of the decision was purposeful, but it certainly may have been and probably was. Walburn credits Lord's decision with breaking the legislative deadlock:

> This was enough to spur the politicians. Within two and a half weeks, legislators passed a sweeping bill that shifted the primary source of education funding to state--not local--taxes and, to pay for this new state support, enacted one of the largest tax increases in Minnesota history: increasing the state income tax, increasing the state sales tax, increasing the state cigarette tax, and increasing the state liquor and beer taxes.

Walburn says "the judge's decision would be lauded as 'a historical marker' that 'helped change the concept of equality in financing education in the United States.'" She concludes: "The 'Miracle Case' one writer would call it."[9]

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allowed six years as a reasonable time to bring the system into constitutional compliance and allowed the existing system to remain in effect until such compliance was achieved. The judgment provided that it was not to be construed to require any particular system of school finance, only one that comported with the state constitution. *Serrano v Priest,* 18 Cal.3d 728, 749-750, 557 P.2d 929 (1976). The California Supreme Court, in its opinion affirming that judgment, said the trial court was well aware that the doctrine of separation of powers in the California Constitution dictated that the trial court could not order the legislature to enact (or not to enact) and the governor to sign (or not to sign) specific legislation. *Id.,* at 751. In a footnote, the California Supreme Court stated that the "primary relief contemplated [by the trial court], to be invoked only after passage of a "reasonable time," is an injunction prohibiting the defendant state officials from operating an unconstitutional school financing system." *Id.,* at 751, n. 25. Lord might have considered six years an unreasonable period of time, but it is unlikely he would have told the legislature what system to adopt.

[9] Citing Glen Dawursk Jr., "Minnesota's Miracle Case: Van Dusartz v. Hatfield," *www.yuthguy.com/classroom/super/vandusartzhatfield.htm.* Dawursk's one-page article mentioned nothing about the Citizens League report, Anderson's campaign, his legislative proposals, or the committee chaired by Stanley Holmquist.

Walburn places too much emphasis on the impact of Lord's decision. The "Minnesota Miracle" that put Governor Anderson on the front cover of *Time* magazine was not the product of one court decision but of a process that began more than a year before, of a recognition by many persons that the fiscal disparities in the school financing system were unfair and had to be changed, of widespread and heated opposition to property tax increases, of Anderson's ongoing efforts to garner public support for his proposal, and of the willingness of key Conservative legislators to create a bipartisan measure. To be sure, the participants in that process did recognize that *Serrano* and *Van Dusartz* helped them to achieve passage of the bill. Berg states:

> While the Lord memorandum did not come out until October 12 and the California case was not directly applicable, the threat of judicial intervention added another argument for the governor's proposal to make state aid and spending more equal for the 434 school districts.[10]

Martin Sabo, the House minority leader in 1971, was asked at the roundtable discussion in 2007 how much impact the California case had on the debate in Minnesota. He responded:

> You're talking about the Serrano case. The court said that if you didn't have a school-aid formula that treat school districts alike based on where the kids were, rather than where the money [tax base] was, it was unconstitutional. And there was another case in Texas.
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> And we had a court case of out own--Van Dusartz v. Hatfield--which, I think was trying to catch up with the parade. I don't think we passed our bill because of these rulings, but they were very significant.[11]

Perhaps the legislative result would have been different had another judge drawn the *Van Dusartz* case and granted the motion to dismiss, analyzing the issues

[10] Berg, 42.
[11] Dornfeld, 323.

like Justice Powell did in the Supreme Court in 1973, when he reversed the judgment in the Texas case Sabo mentioned, *Rodriguez v. San Antonio Independent School District*.[12] But perhaps not, for the legislators who worked together to craft the 1971 tax and school financing bill did so not because a federal judge told them they had to but because they understood that the system needed to be fixed and were willing to work together to that end. Berg summarized the process:

> Finally an agreement was reached. The legislative compromises, the staff work on the detailed fiscal impact of various options, the long negotiating sessions, and the guiding hand of Liberal governor and his Conservative Caucus friend, Senator Holmquist, had worked.[13]

At the 2007 roundtable, John Haynes, who had been Anderson's fiscal policy advisor, said that the major reform achieved in 1971 required two things--"a legislature that's ready and thinks there's a problem that needs to be dealt with" and an aggressive governor insisting upon a coordinated package.[14] A "People's Judge" like Miles Lord was helpful, but not the major player, as Walburn suggests without reference at all to these other actors.[15]

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[12] *Rodriguez v. San Antonio Independent School District,* 337 F. Supp. 280 (W. D. Tex. 1971), *rev'd* 411 U.S. 1 (1973). The school financing issue returned to the courts two decades later. In *Steen v. State,* 505 N.W.2d 299 (1993) the Minnesota Supreme Court reversed a lower court ruling that wealth-based disparities between districts violated the state constitution.

[13] Berg, 42.

[14] Dornfeld, 325.

[15] Minnesota legislators, whether liberals or conservatives, cherish their prerogatives and do not consider it a court's role to tell them what to do. Berg, at pages 173-178, discusses the tension created between the legislature and the federal court after Judge Earl Larson ruled that conditions in the state institutions violated constitutional standards. *Welsch v. Likins,* 373 F.Supp. 487 (D. Minn. 1974). This tension was brought to a head when Larson ordered state officials to employ additional staff at a state institution and enjoined all fiscal and budgetary

Girls on Boys' Teams

Lord did make his mark in May 1972 when he ruled that that two high school girls, a tennis player and a runner, had to be allowed to participate on the boys' tennis and track teams despite a contrary rule of the Minnesota High State High School League.[16] The two girls were exceptional athletes, but their schools had no girls' tennis or track teams. Lord carefully limited his decision to the narrow issue before him. He emphasized that he was not deciding whether participation in interscholastic athletics was a fundamental right, whether classification by sex required "close judicial scrutiny," or whether the High School League's rule was unconstitutional on its face or in other applications. Instead, following the Supreme Court's recent decision in *Reed v. Reed,*[17] he found there was no rational basis to apply the rule to these girls. In characteristic Lord style, he rejected the argument that that these girls' cases should be dismissed because they might hamper broader development of girls' athletic programs--these girls "should not be sacrificed upon this altar."[18]

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control provisions that would prevent them from doing that. *Welsch v. Likins,* Memorandum Order (July 28, 1976), http://mn.gov/mnddc/past/pdf/70s/76/76-WELSCH-8.pdf . The legislature retained an attorney to submit a brief in the Eighth Circuit opposing the relief Larson granted, but particularly this "financing order." The Eighth Circuit vacated that order, but held that Larson's other orders "are positive, constitutional requirements and cannot be ignored." The Court added: "We will not presume that they will be ignored." *Welsch v. Likins,* 550 F. 2nd 1122, 1132 (8th Cir. 1977). Perhaps that presumption was justified, for ultimately the legislature facilitated a settlement by closing another state institution to free up funds. Berg, 178.

[16] *Brenden v. Independent School District 742,* 342 F. Supp. 1224 (D. Minn. 1972), *aff'd* 477 F.2d 1291 (8th Cir. 1973),

[17] *Reed v. Reed,* 404 U.S. 71 (1971).

[18] 342 F. Supp. at 1233-1234. Walburn points out that Lord's law clerks would draft an opinion for him and he would add some flourishes. Page 82. During my

In this case, Lord's family taught him a lesson. While chatting with his lawyer son-in-law after the case was assigned to him, Lord "wise-assed" (probably Lord's term) "Oh, I might let them be on the wrestling team." He promptly got calls from his daughter and his sister, who were furious with him. Lord acknowledged "chauvinistic blood had been coursing through my veins." In later years he would "consistently call the decision one of his proudest moments on the bench." Page 218.

Antibiotic Antitrust Class Actions

Walburn cites the Antibiotic Antitrust Class Actions as a third example of Lord being bold on the bench. Plaintiffs in more than 150 cases claimed that manufacturers of certain broad spectrum antibiotics violated federal antitrust laws. The Multidistrict Litigation Panel transferred these cases to the Southern District of New York in the late 1960s. Many of them settled, but in 1970 more than sixty remained, including some involving agricultural use of antibiotics brought in federal court in Minnesota and initially assigned to Lord. The plaintiffs' lawyers in these "farm cases" asked him to request that his cases be sent back to him. He did so informally, but the end result was that the panel assigned fifty-

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clerkship, he heard, without a jury, claims by a Minnesota company that an IBM subsidiary fraudulently misrepresented the capability of a proposed inventory control system. I drafted twenty-five prosaic pages about the facts of the case and the law of fraud and misrepresentation. As Lord reviewed my draft, he dictated, and I added, the flourishes-- the plaintiff taking "a step down a path from which there was no turning back," about "having his whole business wrapped around a spool of magnetic tape which was not in his possession and was not even his property," and having "burned their bridges behind them." *Clements Auto Co. v. Service Bureau Corp.,* 298 F. Supp. 115, 137 (D. Minn. 1969), *aff'd in part and rev'd in part,* 444 F.2d 169 (8th Cir. 1971). The prosaic analysis was not quoted in the *New York Times*, but Lord's "spool of magnetic tape" comment was. *New York Times,* page F1, April 13, 1969.

eight unsettled cases to him and Chief Justice Burger assigned Lord to the Southern District of New York to handle them. Page 212-213.[19]

Walburn focuses on the tension, indeed sometimes conflict, between Lord and the Eighth Circuit in her discussion of the Dalkon Shield and Reserve Mining cases. She cites an early instance of that tension and conflict in the antibiotic drug cases. By this time, Walburn says, Lord had become more comfortable, more active, and more outspoken on the bench:

> He began to display what would become the hallmarks in his self-professed "hands-on" approach to judging: taking an informal, waste-no-time role in discovery, appointing special masters, personally attending depositions, and offering brash proclamations of his views. Page 214

Walburn describes how Lord did indeed take charge, cross-examine at depositions, and offer brash proclamations of his views in these cases, prompting the defendant drug companies to ask him to recuse himself. Page 215. When Lord refused, they petitioned the Eighth Circuit for a Writ of Mandamus directing him to do so. (As will be noted below, Lord had by that time, over the objections of the drug companies, transferred most of these cases to the District of Minnesota.) Although clearly troubled by some of Lord's statements, the judges concluded that the facts the defendants presented "fall short of showing the bias and prejudice needed to recuse," and denied the petition.[20] They added a caveat. Walburn quotes it in full:

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[19] *In re Antibiotic Drugs,* 320 F. Supp. 586 (Jud. Pan. Mult. Lit. 1970).

[20] *Pfizer Inc. v. Lord,* 456 F. 2nd 532, (8th Cir. 1972), *cert. denied,* 406 U.S. 976 (1972). The petition was heard by Chief Judge Mathes and Judges Bright and Ross, who issued a *per curiam* opinion.

This record adversely reflects upon Judge Lord's conduct during the pretrial proceedings. Reluctantly, we have pointed out his shortcomings in this case. We demand of Judge Lord, as we do of every trial judge in this circuit, a high standard of judicial performance with particular emphasis upon conducting litigation with scrupulous fairness and impartiality. We commend to Judge Lord the Socratic definition of the four qualities required of every judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially.[21]

Walburn adds this comment:

Judge Lord still had plenty to learn on the bench. He read the Eighth Circuit's admonition. He mulled it over. "A bunch of bullshit," he decided. Page 216.

Without further comment, Walburn moves on to discuss the girls' challenge to the Minnesota High School League rule.

A reader could, and unfortunately many likely would, conclude that Lord referred to the four so-called Socratic qualities of a judge as bullshit. I say "unfortunately," because, from my experience as his law clerk and as a litigant before him, Lord listened and spoke respectfully to lawyers and witnesses. His responses to questions or arguments were likewise civil, although if he was incredulous, you knew it. He would persist to get an answer to his questions, but in my judgment, to the end that he would find out what had really happened or what was really at issue. He took the business of deciding cases seriously and, as I observed, sought in a very real sense to do justice.[22]

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[21] 456 F. 2nd at 544.

[22] Perhaps as a litigant I saw him from a different perspective because, as a Legal Aid attorney, my clients were the "little guy." Others saw him differently. One Friday afternoon while I was clerking a lawyer representing the defendant in a drug case argued a motion before Lord the details of which I have long forgotten. For some reason the issue was not resolved before court adjourned for the day, but the lawyer (and I) left the courtroom certain that Lord would deny the request. Monday morning Lord told me that he had been thinking about the issue all weekend and decided to grant the lawyer's request. Before court convened, the lawyer stepped into the law clerk office across the hall from Lord's chambers

Walburn provides no context for Lord's statement, only citing, in an endnote, "MWL dictation (March 1986)." Page 353.[23] She says nothing about what preceded "a bunch of bullshit" in that dictation.[24] In fairness to Lord, Walburn should have provided the context for his comment. In private musings or a private rant recorded fourteen years later, a year after he left the bench, he may have intended only a caustic denial of the Eighth Circuit judges' none too subtle charge that he had not been impartial, that he did not listen courteously, consider soberly, and respond wisely. Or he could have referred to other portions of the judges' opinion. Lord had called the U. S. Patent Office "the sickest institution that our Government has ever invented" and "the weakest link in the competitive system in America." These remarks the appellate judges said were "totally injudicious" and "should not have been spoken." Lord may not have changed his mind, or he may have believed subsequent developments proved him correct. Lord had also contended a proposed settlement by the federal government of its action would not serve the public interest and was inconsistent with his "game plan" for resolution of these cases. Again the Eighth Circuit judges were not subtle:

We think it appropriate to state our view that we believe fair settlement of any of the plaintiffs' claims, including the claims of the United States, will likely promote

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bitterly complaining about how unfair Lord was and how he always had his mind made up. When court convened, Lord's ruling showed this attorney that he could be persuaded to change his initial decision or predilection.

[23] In her notes on sources she states "With his ever-handy pocket recorder, the judge also left a lifetime of dictation of contemporaneous thoughts and historical recollections." Page 323-324.

[24] She also cites this dictation as the source for her account of Lord's tour of a Wall Street firm representing one of the drug companies. Pages 213, 352.

the overall public interest. Conversely, any action of Judge Lord which discourages fair settlements will contravene the public interest.

They then went on to survey, "for the benefit of the District Court and counsel," the factors to be considered in evaluating a settlement.[25] Lord's comment may have reflected his different perception of the courts' responsibility to protect the public interest. Or, possibly, but not likely, Lord may indeed have concluded that the so-called Socratic qualities of a judge were bullshit. Walburn read what Lord dictated. Her readers, both now and in the future, are entitled to know what "it" was that Lord had mulled over for a decade and a half.

The drug companies seized upon statements Lord might better have left unsaid in support of their petition for the writ in the Eighth Circuit, but their real concern was likely rulings he had made in his short tenure with the antibiotic antitrust cases, rulings that could not serve as a basis for their petition. Charles Wolfram, at that time a law professor at the University of Minnesota, in a detailed account of these cases up to 1975, described the "book" on Lord. For drug companies, it was not a pretty picture: "He was an activist, an innovator, a populist on corporate and business matters, a strong-willed and forceful judge whose two consuming passions seemed to be a docket that was kept current and doing justice to the little man."[26] Lord's rulings and actions in the "consumer

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[25] 456 F. 2nd at 542-43.

[26] Wolfram, Charles W., "The Antibiotics Class Actions," 1976 *American Bar Foundation Research Journal* 252, 344 (1976)(available on line in the Cornell Law Faculty Publications at https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2292&context=facpub.) Lord traced the history of these cases and noted actions he took in the consumer cases in his opinion authorizing disbursement of settlement funds and

cases" (also referred to as the "human consumption cases"}, in which antibiotics were purchased directly by individuals or paid for on their behalf by state welfare programs, counties, cities, union benefit funds, or insurance companies, exemplify how he sought to ensure that justice would be done for the little man. Walburn notes briefly how he handled consumer cases from six states, emphasizing the successful distribution of a settlement ultimately reached. Pages 219-220. I provide more detail here.

There were consumer cases in all fifty states. Before Lord was involved, the drug companies made a global offer of settlement of $100,000,000 for those claims and others. Judge Inzer Wyatt, from the Southern District of New York, approved the settlement ultimately reached. In his opinion he related in detail the controversy surrounding broad spectrum antibiotics back to the 1950s, the process by which the settlement agreement was reached, the complex agreement itself, and plans for allocation of $100,000,000 among the several groups of claimants. The pertinent issues here relate to the notice to class members required by Federal Rules of Civil Procedure 23(c)(2). The agreement provided that this notice would be given to the consumer class members by publication on July 1,1969 in every daily English and Spanish newspaper of general circulation in the forty-three states that were parties to the agreement. Class members were given until August 1st to opt out of the class and until August 16th to make a claim by filing a "verified statement or a statement certified by the supplier." The notice also stated that persons not making an individual

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payment of attorneys' fees for those cases. *In re coordinated pretrial proceedings in antibiotic antitrust actions*, 410 F. Supp. 706 (D. Minn. 1975).

claim would thereby authorize the state Attorney General "to utilize whatever money he may receive as your representative for the benefit of the citizens of your State in such manner as the Court may direct." Only forty-two members of the consumer class opted out. About 38,000 filed claims for a total of $16,500,000. Under the overall settlement allocation plan, individual consumer class members were entitled to $37,000,000, leaving more than $20,000,000 to be conferred upon consumers as a whole.[27] Seven states chose not to accept this settlement--California, Hawaii, Kansas, Oregon, Utah, Washington, and North Carolina. North Carolina litigants later chose to have their case transferred to a federal court there.[28] Lord's actions and rulings in the six state consumer cases that remained led to a significantly better result for individual consumers than in the Southern District of New York settlement.

Lord did not waste time. In February 1971 he tentatively certified a class for each of the states of "purchasers within the state who, during the period 1954 through 1966, purchased or paid for broad spectrum antibiotic products at the retail level for human consumption, including the state on account of payments made therefor for the benefit of recipients of welfare programs."[29] The drug companies, opposing class certification, contended that each one of millions of purchasers would have to testify before a jury about when and where they

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[27] *West Virginia v. Chas. Pfizer & Co.,* 314 F. Supp. 710, 724-728 (S.D.N.Y. 1970), *aff'd,* 440 F. 2nd 1079 (2nd Cir. 1971).
[28] After trial to the court, the defendants prevailed in North Carolina. *North Carolina v. Chas. Pfizer & Co.,* 384 F. Supp. 265 (E.D.N.C. 1974), *aff'd,* 537 F. 2nd 67 (4th Cir. 1976).
[29] *In re Antibiotic Antitrust Actions,* 333 F. Supp. 278, 284 (S.D.N.Y. 1971). *See also In re Antibiotic Antitrust Actions,* 333 F. Supp. 291 (S.D.N.Y. 1971)(final order as amended).

purchased the drug and how much they paid. Both Walburn (page 213) and Wolfram (page 344) state that one of the defense attorneys said it would take 8,000 years to try the case. Walburn observes: "The judge was blunt in his reply. 'There are no unmanageable cases," he would say, 'only lazy judges.'"[30] The manageability issues, however, were real ones that Lord had to and did address. In his preliminary order, he said he had reached a *tentative* conclusion that each state, as the class representative for all the absent class members in that state, would present evidence to establish the total amount of damages those class members likely incurred as a result of the defendants' pricing practices.[31] Then, if the plaintiffs prevailed, the absent class members could submit claims against this fund. Lord reasoned:

> It is far simpler to prove the amount of damage to the members of the class by establishing their total damages than by collecting and aggregating individual damage claims as a sum to be assessed against the defendants. And it is the court's tentative conclusion that this can be done without sacrificing the rights of the defendants. The questions of the amount of overcharge paid by retail consumers, variations in that overcharge within the state and certain affirmative defenses to the claims of retail purchasers, such as reimbursement from an insurer or welfare program, are common to substantial groups of retail consumers within each state. These questions could be resolved through subclass litigation which would preserve the defendants' right to jury trial and due process without necessitating the expensive and unnecessary relitigation of these questions in individual cases. Individual claims would then be made against the judgment awarded to the class.[32]

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[30] Walburn cites a *Time* magazine article from March 1974. Neither she nor Wolfram indicates how Lord responded to the 8,000-hour statement in court. Whenever and wherever he made that comment, Lord did not endear himself to his brothers and sisters on the bench.

[31] Wolfram asserts Lord's ruling that that a state could serve under rule 23 as the litigating class representative of all its resident consumers who had been injured by the same antitrust conspiracy that had allegedly inflicted injury on the state was unprecedented. Wolfram, 341-342.

[32] 333 F. Supp. at 281.

Lord also rejected the defendants' contention that Rule 23 requires each class member to come forward with his or her claim prior to trial:

> It would seem far better to defer the filing of proof of claims by the individual members of these classes until after these cases have gone to trial and judgment. If the representatives of these classes are successful on behalf of the absent class, the members will know that their efforts in proving their individual claims will be rewarded. On the other hand, should the defendants prevail, there will be no need for the class members to search their records for proof of purchases of antibiotic drugs during the relevant period. The court is unwilling to impose so great an expense and burden on the absent members of these classes at this time.[33]

The defendants argued that this process could lead to a large fund against which a small number of claims would be made, leaving the remaining amount for the state as class representative, not injured consumers. Lord was certainly aware of what happened in the cases that had already settled. He countered that he wanted a notice process that would ensure a large number of claimants who would receive most of the judgment. He reserved judgment as to what to do if that did not happen. He rejected the defendants' basic contention that this class action could not be managed to ensure a fair and effective adjudication:

> This perspective is particularly important in the present cases where the defendants, after reciting potential manageability problems, seem to conclude that no remedy is better than an imperfect one. The court would be hesitant to conclude that conspiring defendants may freely engage in predatory price practices to the detriment of millions of individual consumers and then claim the freedom to keep their ill-gotten gains which, once lodged in the corporate coffers, are said to become a "pot of gold" inaccessible to the mulcted consumers because they are many and their individual claims small.[34]

Wolfram's "book" on Lord was well founded.

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[33] 333 F. Supp. at 282.
[34] 333 F. Supp. at 282-83.

Reasonable people could believe that Lord's mind was made up regarding his "tentative" rulings. But in addition to being "strong-willed and forceful," as Wolfram described him, he was also savvy. In this preliminary ruling on class certification he specified that no Rule 23(c)(2)(B) notice to class members should be made until the plaintiffs in the case answered fourteen detailed questions about manageability of the class and the defendants had an opportunity to respond.[35] Lord did not cite law review articles or discuss the recent changes

[35] 333 F. Supp. at 284-85. These questions reflect a thorough and thoughtful effort to respond to the defendants' claims that a class action would be unmanageable:
"(1) The approximate size of the class each plaintiff seeks to represent and the manner in which that size was determined;
(2) Any *factual* information they deem relevant to the determination of manageability;
(3) Any proposals for limiting the size or increasing the manageability of the classes;
(4) How, in general outline, these cases should be administered, from the present date through the award of damages to the class and the processing and payment of individual class members' claims;
(5) Whether subclasses should be designated and, if so, on what basis and by whom represented;
(6) A specific itemization of all costs which the plaintiffs can reasonably expect to incur (including attorney's fees) in the prosecution of this case from the filing of the complaint through the award of damages to the class and including the cost of any procedure suggested for the processing and payment of individual claims from the damages awarded the class;
(7) A specific itemization of any other expenses which might reasonably be incurred by plaintiffs' class in proving their case and damages;
(8) An itemized approximation of the expenses which might reasonably be expected to be incurred by the "average" member of the plaintiffs' class in submitting his claim under the plaintiffs' proposed procedure;
(9) An itemized approximation of how much in damages the "average" member of the plaintiffs' class might reasonably be expected to ultimately prove;
(10) As a matter of law and practice, at what point or points in the course of this case notice should be sent to the members of the class;
(11) Proposed means of notifying the other members of the class at each point in the course of this case where notice, if appropriate, together with an itemization of the cost of each notice;

made in Rule 23. Rather, starting from the premise that many persons may have been harmed by what the defendants did, he proposed a process that would enable those persons, if their class representative prevailed on liability, to receive compensation. He did cite *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 570 (2d Cir. 1968), in the form then controlling in the Second Circuit, and concluded: "Accordingly, it seems appropriate to require that before notice is sent to the members of the consumer class plaintiffs must demonstrate that these actions are sufficiently manageable and that satisfactory notice to the class is possible."[36] The defendants requested Lord to certify this preliminary order, Class Action Order 71-5, for interlocutory appeal to the Second Circuit. He refused to do so because he retained the discretion to alter the order and because no controlling issue of law was involved.[37]

As might be expected, the defendants vigorously contended that class certification was unwarranted. They objected to Lord's tentative decision to have class representatives prove up the damages for the class as a whole. Lord responded:

The defendants have raised many and varied objections to the court's proposal, most of which have obscured rather than clarified the issues. The most misleading of their arguments characterizes a class-wide recovery as a "pot of gold" which the plaintiffs and their counsel are somehow not entitled to receive. If we assume that a price-fixing conspiracy is proven at trial, however, the

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(12) What type of notice is required in these cases to give other members of the plaintiffs' class notice consistent with Rule 23 and the due process clause;
(13) How much of the cost of preparing and communicating the notice each plaintiff would be prepared to bear;
(14) Any other information relevant to the issues implied by the foregoing which plaintiffs desire to bring to the attention of the court."

[36] 333 F. Supp. at 283.

[37] 333 F. Supp. at 285.

defendants will certainly have no right to the "pot of gold" created by their illegal activities. And the success of their scheme and the size of the "pot" would certainly be no basis for leaving the money in their hands.[38]

Later Lord stated “The defendants have not argued that damages cannot be accurately computed by reliance on sales figures, and the court has concluded, on the basis of information developed to date, that they could not so contend.”

He added:

Most important management decisions in the business world in which these defendants operate are made through the intelligent application of statistical and computer techniques and these class members should be entitled to use the same techniques in proving the elements of their cause of action. The court is confident that they can be successfully utilized in the court-room and that their application will allow the consumers to protect their rights while freeing the court and the defendants of the specter of unmanageability. In these circumstances the court cannot conclude that the defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages.[39]

Of course, he had noted, if the defendants prevailed, there would be no need to secure any individual damages claims.[40]

The defendants also contended there were conflicting claims asserted by different plaintiffs in the consumer cases--insurance companies and union welfare plans sought damages on the basis that consumers passed on their damages to them. Lord acknowledged the threat of conflicting recoveries posed if

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[38] 333 F. Supp. at 287

[39] 333 F. Supp. at 289. Judge Jack B. Weinstein referred to Lord’s ruling as a “well-conceived pretrial decision” because the due process issue did not rest on the specific manner in which the defendant’s liability was determined but on “the accuracy with which the damage calculation reflected the defendants' total liability.” Weinstein’s decision in the case in which he made that statement was reversed on appeal, but the Second Circuit did not disagree with his treatment of Lord’s ruling. *Schwab v. Phillip Morris USA, Inc.,* 449 F. Supp. 2nd 992, 1258 (E.D.N.Y. 2006), *rev’d sub nom. McLaughlin v. Philip Morris USA, Inc.,* 522 F.3d 215, 232 (2008).

[40] 333 F. Supp. at 287.

insurance companies prevailed on their claim that consumers' damages were passed on to them and those same consumers obtained relief in a class action on their behalf. In his judgment, however, "this problem relates more to the sequence of trial in these cases than to the plan for class-wide proof of damages. And the court is seeking, with the help of counsel for all parties to evolve a trial plan which will eliminate this threat."[41]

In response to the defendants' argument that "no class actions of this magnitude have been authorized by any other court," Lord stated:

> It is obvious, however, that the only manner in which the plaintiff class can ever prosecute their claims is by a Rule 23 class action and the court cannot simply close its doors to these litigants because their actions present novel and difficult questions. Instead the court and the parties must use their ingenuity to conduct this litigation in a manner which will guarantee the rights of both sides.[42]

At this point Lord did cite a law review article stating that "imagination and even daring may be required of counsel and courts in devising abbreviated but fair procedures leading to hand-tailored relief which may well be quite novel in form."[43]

Lord concluded that the best Rule 23(c)(2) notice practicable under the circumstances was direct mailing to every household in the state. He did not explicitly reject providing that notice to class members by publication, as had been done for consumer classes in the previous settlement, but he referred to that case as an example of less demanding notice being authorized and

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[41] 333 F. Supp. at 288-289.
[42] 333 F. Supp. at 289.
[43] 333 F. Supp. at 289, *citing* Benjamin Kaplan, "A Prefatory Note," 10 *B.C. Ind. & Com. L. Rev.,* 499-500 (1969).

approved on appeal.[44] He was a little bit too ingenious or imaginative, however, when he authorized use of the court's franking privilege to mail it:

> The court is of the opinion that the notice should be directed from the Clerk of Court to the class members and its mailing should be handled in the same manner as other mailings by the Clerk. Accordingly, the court has authorized the states to print the mailers and postcards with the Government frank. The court anticipates that the cost of franking these notices, which has been minimized by the use of mailers and postcards, may eventually be taxed to the parties as a cost of the litigation.[45]

Both the Administrative Office of the U. S. Courts and the Post Office objected, although after the fact. The Administrative Office let it be known this use of the franking privilege would not happen again. Each state agreed to refund the Post Office out of any damages award or settlement. The Post Office was reimbursed $375,000 when the cases settled in 1975.[46] After making his final order certifying the class action, Lord denied the defendants' renewed motion that he certify it for appeal to the Second Circuit. The defendants' challenge to that order by petition for a writ of mandamus from the Court of Appeals was denied with an admonition from the court that if these cases were ever going to be resolved the defendants would have to quit seeking appellate review of every order.[47]

Lord responded to the defendants' contention that the consumer cases were unsuitable as class actions because of overlapping claims by stating that these conflicts could be dealt with through scheduling of trials. But once the

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[44] 333 F. Supp. at 290, *citing West Virginia v. Chas. Pfizer & Co.,* 440 F. 2nd 1079 (2nd Cir. 1971).
[45] 333 F. Supp. at 290.
[46] Wolfram, 343; *In Re Coordinated Pretrial Proceedings, Etc.*, 410 F. Supp. 706, 721 (D. Minnesota 1975).
[47] *Pfizer, Inc. v. Lord,* 449 F.2nd 119, 121 (2nd Cir. 1971).

pretrial proceedings were completed by the judge assigned by the Multidistrict Litigation Panel, these cases were to be returned to the district in which they were filed. Lord dealt with that problem by what Wolfram termed a "judicial tour de force of the kind Judge Lord relished."[48] He ordered all the parties involved in the consumer cases to show cause why all those cases should not be transferred to the District of Minnesota for trial. The defendants objected strenuously. They claimed that 28 U.S.C. section 1407 empowered the Multidistrict Litigation Panel to transfer cases solely for pretrial proceedings, not for trial. Lord responded that he had the authority as a judge assigned to the to Southern District of New York to transfer cases as any federal district judge could under 28 U.S.C. section 1404. The defendants also contended the various factors that courts are to consider for section 1404 transfers weighed against a transfer to Minnesota. Lord analyzed these factors differently. In all likelihood, the defendants' main concern was that the transfer meant that Lord would be in charge, an argument they could not make. Lord transferred the consumer cases to the District of Minnesota and refused to certify that ruling for appeal to the Second Circuit. The defendants sought review there by writ of mandamus; the Second Circuit denied the writ stating that Lord had the authority to make the transfer and was "fully justified" in doing so.[49] Subsequently, Lord also transferred the farm cases to the District of Minnesota.[50]

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[48] Wolfram, 310.
[49] *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 299 (S.D.N.Y. 1971), *mandamus denied, Pfizer, Inc. v. Lord,* 447 F. 2nd 122 (2nd Cir. 1971).
[50] *In Re Antibiotic Antitrust Actions,* 333 F. Supp. 309 (S.D.N.Y. 1971)

The drug companies obtained an almost six-month hiatus in pretrial proceedings by requesting Lord to recuse himself and seeking a writ of mandamus in the Court of Appeals when he refused.[51] Wolfram said "after the chastening by the Eighth Circuit, Judge Lord became relatively inactive in the case." Lord also stated at hearings that he would not (and did not) write elaborate opinions in support of his orders because they only got him in trouble in the Court of Appeals.[52] But he did write, although not publish, a lengthy memorandum in April 1974 approving the settlement reached in the consumer cases, and in June 1975 he wrote and published an opinion approving a plan distributing the proceeds of that settlement and approving an award of attorneys' fees.[53] In what may well be a pointed response to the Eighth Circuit lecture about allowing parties to settle their lawsuits, Lord highlighted in both of these opinions the difference between what these states would have received had they participated in the settlement reached in 1970 in the Southern District of New York and what they would receive in this settlement.[54] Those differences were striking:

State	1970 Settlement	1973 Settlement
California	$10, 511,500	$28,140,000
Hawaii	$267,300	$351,000
Kansas	$1,392,000	$3,570,000
Oregon	$791,000	$2,177,000
Utah	$339,300	$1,143,000
Washington	$1,549,900	$4,235,000

[51] Wolfram, 318.
[52] Wolfram, 321.
[53] Wolfram, 354-356; *In re COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS,* 410 F. Supp. 706 (D. Minn. 1975).
[54] Wolfram, 354; 410 F. Supp. at 709.

Lord also noted that the 1970 settlement amounts were subject to a twenty percent holdback relating to insurance payments for a portion of these amounts, but the 1973 settlement amounts were not subject to any.

Lord said "it is doubtful such a fruitful settlement would have been possible" without the economic and statistical analysis of damages claims by the states' experts and the experts he employed. California retained a team of economists and statisticians even before its case was transferred to New York. When California filed an economic brief in support of damages in June 1971, Lord hired his own economics and statistical experts to review it. During 1971 and 1972 these experts conducted informal conferences with experts from both sides. California filed a revised damages study, as did the other states and the defendants.[55] Wolfram, in a detailed analysis of the settlement process and terms, agreed that these economic and statistical studies made Lord's proposal to prove damages for each state class as a whole less speculative and prompted settlement.[56]

In the concluding pages of his June 1975 opinion, Lord addressed naysayers, both defense counsel and others, who contended that the case was an unmanageable as a class action:

> In approving the plan of distribution and allowance and disallowance of claims, the Court takes note of the ongoing argument on manageability of fluid class actions. The Court has been hearing for years that this type of settlement, and this type of class action, are unmanageable and will not work. It has strenuously been argued for years that the consumers were not interested in such litigation and that they would not come forward to "lay claim" to the proceeds. At the

[55] 410 F.Supp. at 711.
[56] Wolfram, 347.

hearing to approve the fairness and adequacy of this settlement counsel for the defendants suggested that a distribution of such magnitude was not manageable:

> If, for example, California can come into Court against us with the weight of possibly 10,000,000 purchasers, and in fact it turns out that the active, interested members of the class consist of 30,000 or 40,000 people, it seems to me that the author ought to consider the question of public policy of whether the scales of the adversary contest have not been unfairly weighted on the side of the plaintiff in that sort of suit. The real hard question between us, I think, and these negotiations and the question that kept us, at least this defense counsel, awake at night was not trying to assess the odds on liability, that lawyers do all of the time, but this great unknown mass of consumers. T. p. 51, February 13, 1974; 4-71 Civ. 435, 4-71 Civ. 392, et al.

This prediction of 30,000 or 40,000 consumers has been proven wrong. The question was removed from the arena of judges', lawyers' and scholars' minds and put to the test in the only practical way possible. The consumers themselves were asked to come forward and express their interest. Instead of 30,000 or 40,000; nearly 1,000,000 showed their interest by filing a claim. Claims were filed even though the amount to be recovered was small and known to be small. Speculation and conjecture need no longer cloud our thoughts on this question. The consumer is in fact interested. Fluid class actions on behalf of consumers insofar as the interest of the class is concerned are as viable and "real" as any other type of litigation and should be treated accordingly.

With the use of computers and the other disciplines, along with the assistance of very capable lawyers, this class action has proven to be not only manageable but a great benefit to the consumers involved. The Court again states that this case has always been and continues to be manageable.[57]

Lord made similar comments in the concluding paragraph of his opinion

approving the consumer case settlement and his opinion approving the

settlement of the “farm case.”[58]

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[57] 410 F. Supp. 721-722.

[58] Wolfram, at 356; *In Re Coordinated Pretrial Proceedings,* 410 F. Supp. 659, 668-669 (D. Minn. 1974). There Lord wrote:

> Even though the Court has found the classes would be manageable in the specific context of these actions, it notes generally that class size alone should never by used to permit wrongdoers to retain the fruits of their unlawful actions. Neither the asserted complexity of the issues nor the magnitude of the claimants and the asserted damages can be allowed to preclude the fair administration of justice. A judicial system which places a higher premium on convenient administration than on redress of grievances soon ceases to be just. Moreover, from the viewpoint of judicial administration there probably is greater efficiency

A million claims didn't just happen. Lord appointed a special master (Minneapolis attorney David Lebedoff) to oversee distribution of the settlement funds. Walburn describes what Lord termed Operation Money Back:

> The judge hired experts to conduct market research and authorized a multifaceted outreach effort: a media blitz, with ads in print and on radio and television; a direct mail campaign in English and Spanish to ten million households; and a school-based effort, with claims information distributed for kids to take home to their parents. Pages 219-220.

Claim Form A was sent 10,000,000 households in the six states. On this form, no proof of purchase was required for claims less than $150. A total of 980,851 were filed. Form B was sent to persons who could submit some form of proof for a larger amount. A total of 122,528 of these forms were filed. (In the 1970 settlement for forty-three states, claims were filed by only 38,000 individuals.[59]) Form A was checked for fraud and errors. Persons who did not live in the state or who were too young to have purchased drugs during the damage period were rejected, as were persons who did not complete the form correctly or sign it.[60] Lebedoff doubted that few people were cheating: "Few people are willing to sign their name to fraudulent information on a form that states they are signing under oath and that bears the signature of the state attorney general and a federal

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achieved on a "per claim" basis in a major national class action than through dealing with claims on a piecemeal basis. [Footnote omitted in which Lord acknowledged he had made no finding of liability in this case.]

[59] 314 F. Supp. at 726.

[60] 410 F. Supp. at 713.

judge."[61] A committee scrutinized Form B, leading to reductions or rejections. In both instances there was an appeal process.[62]

Operation Money Back got favorable press coverage. A *New York Times* article on October 27,1974, while the settlement distribution was in process, described a huge room in a San Francisco office building where seventy-five temporary workers opened letters from one million people seeking reimbursement from the settlement fund. The *Times* reported that California benefited from refusing the 1970 settlement, that the bulk of the settlement funds then went to state treasuries not individuals, and that interest on 9.75% certificates of deposit had paid for the cost of administering the settlement.[63] Walburn quotes *Washington Post* columnist Nicholas von Hoffman stating Lord was "vulnerable to removal on the grounds of gross competence and excessive fairness." That column appeared on May 10, 1976, a few months after the Eighth Circuit removed Lord from the Reserve Mining case. In more measured terms, the consumer case class actions demonstrated that courts can work to provide millions of persons an opportunity to seek redress for wrongs if, as Lord said earlier, the court and parties use their ingenuity to conduct litigation in a manner that will guarantee the rights of both sides.

The settlement of these consumer cases and the settlement of two other groups of class actions, the veterinary cases and the farm cases, went well, but

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[61] Melissa Mathison, "David Lebedoff Has a Problem: How to Give Away $25 Million," *People* (October 14, 1974).
[62] 410 F. Supp. at 713.
[63] Lord said a year later that interest "nearly" covered the total cost of distribution. 410 F. Supp. at 712. That wouldn't happen in 2018.

the denouement of the antibiotic drug cases did not. In 1974 Lord decided to try together the two groups of the antibiotic cases that remained--actions by the United States, insurance companies, union health and welfare funds, and a California medical group (more consumer cases) and actions against the drug companies by their competitors (the competitor cases). The Eighth Circuit described his plan:

> The "game plan" was to try the cases together until completion of the evidence in the competitor cases and have the one jury dispose of that case. The "consumer" cases would then go forward with the second jury. The theory was that while the evidence in the competitor cases was common to the consumer cases, the reverse was not true. If the two juries heard the evidence together in the competitor cases, that evidence would not have to be rehashed in separate consumer cases. The plan was an innovative one.[64]

Wolfram described the scene in the courtroom with two jury boxes and lawyers all around. He said "the innovation of double juries is only one of several remarkable developments in the ongoing history of the antibiotics litigation." Writing in late 1975, he said it had been hoped that the cases tried to the double jury would be done in early 1976, but speculation then was that it would be months later.[65] By December 1975, however, all the cases had settled except the action brought by the United States. So far so good.

Walburn comments briefly about the events that followed. The government attorneys appeared in no hurry to move along. Lord asked the drug companies for their best offer for settlement. At $76 million, it was far greater than the $14.3

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[64] *United States v. Lord,* 542 F. 2nd 719, 721 n.5 (8th Cir. 1976)
[65] Wolfram, 253-254.

million offer that Lord scuttled in 1971.[66] But the government rejected the offer and refused to budge when pressured by Lord. Walburn says Lord, who had been working on the antibiotic litigation for more than five years, as well as handling his regular cases and Reserve Mining, “was no longer in his *no-unmanageable-cases, only-lazy judges* mindset.” (In a speech he made some years later to the Iowa Association of Trial Lawyers, Lord said “I couldn’t stand it any longer. Damn near killed me.”) He effectively called a halt to the proceedings. In early April 1976, the defendants moved for a mistrial on the basis that the jurors would have learned of the settlements made in the competitors case and that the introduction of evidence not germane to the government trial prejudiced the defendants. Lord seemed inclined to grant the request. Page 288.

From that point on, I follow the chronology given in an order issued in early August by the Court of Appeals.[67] Lord called the jurors back in late May to permit the parties “to examine the jury for the purpose of whatever light can be shed upon their ability to go forward as fair and impartial jurors in the light of what (settlements) publicity has transpired." He interrogated each of the jurors individually and determined that some of them could not be fair and impartial.[68] As a result of this interrogation, the number on the combined jury was reduced to

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[66] Wolfram, 316, n. 23. That settlement offer also included an agreement to dedicate the tetracycline patent to the public.

[67] *United States v. Lord,* 542 F. 2nd 719 (8th Cir. 1976)

[68] The Court of Appeals included transcripts from two interrogations in footnote six. The court criticized Lord for suggesting, without foundation, that some of them failed to disqualify themselves because they would receive jury payment in addition to payment from their employers. The court also referred back to the ruling in 1972 on the petition for a recusal order.

ten, five from each of the original juries. The defendants refused to stipulate to having the case heard by less than twelve jurors.

While this interrogation was going on, the government attorneys telephoned the Court of Appeals seeking an order requiring Lord to stay any final order discharging a juror to enable them to petition for a Writ of Mandamus. (Lord refused to stay that action himself.) The Court of Appeals denied the request for a stay on the grounds that it was moot because the number of jurors had already been reduced to ten. The government then petitioned the Court of Appeals under the All Writs Act for a writ prohibiting Lord from (1) discharging the jury panel in the event he should grant a mistrial and (2) from discharging any individual juror prior to review by the Court of Appeals of any order granting the defendants' motions for a mistrial and for transfer back to the Southern District of New York. In these circumstances, an appellate court would ordinarily first consider whether proceeding under the All Writs Act is appropriate. Without even mentioning that issue, however, the court ruled:

> We refuse to prohibit Judge Lord from discharging the jury panel or from discharging individual jurors, but do prohibit him from transferring the action to another District Court in the event he should declare a mistrial. We also direct that the action be tried and decided promptly.[69]

One of the government's contentions was that Lord wanted rid of the case:

> The government also asserts that Judge Lord is determined to end his participation in this case and to do so in a way that precludes effective review by this Court. It suggests that he intends to either discharge at least five more jurors for prejudice and then grant a mistrial or grant a mistrial for one or more of the reasons stated below and immediately discharge the jury panel. It suggests that, in either event, he will then transfer the case out of Minnesota.

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[69] 542 F. 2nd at 720.

The court responded:

In view of this opinion[*sic*], we are unwilling to accept the government's theory that Judge Lord will discharge additional individual jurors without good reason. We are equally unwilling to accept its theory that he will grant a mistrial without good reason and then discharge the jury panel to avoid review. Our unwillingness is strengthened by the fact that we cannot say, on the basis of the record before us, that Judge Lord will abuse his discretion if he granted a new trial on one or more of the grounds advanced by respondents, namely: (1) cumulative errors in the admission or rejection of evidence; (2) error in permitting the consumer and competitor juries to be combined into a single jury; and (3) error in permitting the trial to proceed with less than twelve jurors. Contrariwise, we cannot say at this point on this record that Judge Lord would abuse his discretion by completing the present trial with a consolidated jury with less than twelve.

And then added:

We must accept the government's contention that it would be a clear abuse of discretion on the part of Judge Lord to transfer this case out of Minnesota or to delay the final disposition of it.[70]

In support of its determination that it would be an abuse of discretion for Lord to transfer the case, the Court cited the reasons Lord had given five years before for transferring the antibiotic cases to Minnesota and the affirmance of that action by the Second Circuit. The Court reminded Lord that he accepted the responsibility for trying the case. Once again, in dealing with Lord, the Eighth Circuit was not subtle: “In fulfillment of that responsibility, he [Lord] expressed such strong disapproval of a tentative settlement of the case that settlement was abandoned.” The court went on to cite again its opinion on the disqualification petition in 1972 and to remind Lord they had told him he lacked the power to approve or disapprove of that settlement. (The Eighth Circuit referred to settlements of actions between two parties, not settlement of a class action. Lord,

[70] 542 F. 2nd at 723-724.

of course, had not only the power but the obligation under Rule 23 to determine whether a proposed class action settlement was reasonable.) The court concluded:

In summary, we refuse to prohibit Judge Lord from discharging individual jurors on the jury panel. We do, however, specifically direct and order him not to transfer this matter to another jurisdiction and direct that the matter be disposed of promptly in accordance with the views set forth in this opinion.[71]

Walburn notes that Lord promptly granted a mistrial.

The government asked Lord for a bench trial. Lord agreed. He reasoned:

There has been one and a half years of trial already in this action. The issues are complex and difficult to understand. The Court has been exposed to them once, and has what it considers to be a good grasp of the evidence presented to date. The jury would have to be impaneled, educated, and as happened before, kept away from the publicity which has already caused one mistrial. Many of these problems could be avoided if this case is tried to the Court. A trial to the Court will also significantly shorten the litigation and be a more effective exercise of judicial economy.[72]

Lord certified his order for appeal. The Eighth Circuit reversed, holding that it was an abuse of discretion for Lord to hear the case without a jury because of his active involvement in settlement negotiations. Once again that Court mentioned that Lord had thwarted settlement of the federal government's case years before. The Court said nothing about whether Lord should try the case on remand, simply stating "Reversed and remanded for further proceedings."[73] On April 10,

[71] 542 F. 2nd at 724-725 (8th Cir. 1976).
[72] *United States v. Pfizer, Inc.,* 560 F. 2nd 319, 322 (8th Cir. 1977)(*quoting Lord's opinion*).
[73] *Ibid.*

1978 the case was transferred to the Eastern District of Pennsylvania.[74] Lord did not complete his game plan.

The antibiotic antitrust class actions were far more complicated than this relatively detailed recounting of a portion of them shows. While Lord did not complete his game plan with the cases mentioned here, he did demonstrate that class actions can be managed to provide modest damage awards for a large number of persons. He also articulated cogent reasons for his actions. The settlements of the consumer cases for the six states also demonstrated that relief could be provided for more persons than had been done for persons in the other forty-three states. It seems that at the heart of the tension between Lord and the Court of Appeals in these cases is Lord's judgment of what a fair and reasonable settlement could be and his reading of the view expressed by that court in 1972:

> We think it appropriate to state our view that we believe fair settlement of any of the plaintiffs' claims, including the claims of the United States, will likely promote the overall public interest. Conversely, any action of Judge Lord which discourages fair settlements will contravene the public interest.[75]

At that time, the court also spoke approvingly of the settlement reached for the forty-three states. My guess is that Lord was thinking about these issues as he picked up his hand-held recorder in March of 1986.

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[74] The Eastern District of Pennsylvania court ruled for the defendants on Count 1 (fraud on the Patent Office) of the government's complaint. The Third Circuit affirmed. Neither the district court nor the court of appeals indicated why or how the case was transferred. The district court only noted the date the case was transferred. The court of appeals stated: "This action was originally filed in the District of Columbia. It reached the Eastern District of Pennsylvania via a circuitous path not relevant to our purposes." *United States v. Pfizer,* 498 F. Supp. 28, 33 (E.D.Pa. 1980), *aff'd* 676 F.2nd 51, 53 n. 8 (3d Cir. 1982).

[75] 456 F. 2nd 532, 543.

The Dalkon Shield case

"Do you know what the standard for discovery is in this court?" Lord asked a young lawyer from a New York or Washington law firm one morning in 1969. "I believe so" was the somewhat hesitant response. "Well, let me tell you," said Lord. "In my mind, if the plaintiff's lawyer has enough interest to ask for the documents, he ought to get them." The lawyer was objecting to a request by the plaintiff's lawyer in some sort of an antitrust action for records six years back. He gamely attempted to argue for a few more minutes about how many hundreds of hours it would take his client to amass them. Lord then turned to the plaintiff's lawyer: "I'll give you three years now. If you can show me then that you need earlier records, I'll give you more."[76] I watched similar arguments in my year as Lord's law clerk--interesting enough, but hardly the discovery trip that Walburn had clerking for Lord as he dealt with the Dalkon Shield cases.

Walburn identifies the issues, describes the process, and adds fascinating details about Lord, counsel for the parties, and the day-to-day events in a judge's chambers and his courtroom. She tells a riveting, sometimes amusing, but often outrageous story of the capacity of lawyers to resist doing what Lord thought essential--get all the facts out so that a just result will be had. She tells of Lord's game plan for the Dalkon Shield cases. She describes his trip to Richmond to oversee depositions and his courtroom lecture to A. H. Robins officials. And she relates that the A. H. Robins lawyers were so anxious to get out from under Lord's aegis that the settlement of the last one of his Dalkon Shield cases

[76] Lord's practice was to rule on discovery motions from the bench.

required A. H. Robins to continue to produce documents required by Lord's order and make them available for plaintiffs' attorneys around the country. Page 200. She describes the ongoing search for documents that continued to the day that the A. H. Robins Company filed for bankruptcy, bringing to a halt all lawsuits for injuries caused by the Dalkon Shield. Walburn also provides a succinct account of the Eighth Circuit response to Lord's speech (expunging his widely publicized comments from the official record)[77] and the related hearing on charges by A.H. Robins of judicial misconduct. A fascinating story, adroitly presented. Law professors should consider assigning it for outside reading in a civil procedure course.

Walburn devotes a page and a half of her five-page "Afterword" to the bankruptcy proceedings that continued for a decade and a half before all claims were paid from a $2.7 billion Dalkon Shield Claimants' Trust created by American Home Products, the conglomerate that bought out A. H. Robins, and Aetna Insurance. More than two hundred thousand valid claims were filed. The Robins family lost control of their company, but, as Walburn states, fared very well, receiving $300 million in the American Home Products acquisition, but ordered to pay only $10 million for the claimants. The bankruptcy proceeding in the Eastern District of Virginia was controversial, some calling it "a sham" and others saying it was "the most successful settlement from any product liability case in history." Most women received compensation without going to trial or needing an attorney, with payments ranging from several hundred dollars to several million, based on

[77] *Gardiner v. A. H. Robins Co., Inc.,* 747 F.2nd 1180 (8th Cir. 1984).

the severity of injuries. Lord, she said, had mixed feelings--many women got significant payments but "I didn't teach corporate America that crime does not pay." Pages 317-318.

A more detailed portrayal of the bankruptcy action would have required several chapters, if not an entire book, but Walburn should have described the three options for payment in the distribution plan for the Trust, a plan similar to Lord's Operation Moneyback. Option One provided payment of $725 to more than 119,000 claimants on minimal proof of Dalkon Shield use and injury. Option Two allowed claimants to receive payment of up to $5,500 in accordance with a schedule devised for different types of injuries. Option Three required the claimant to submit completed forms and medical records for evaluation by the Trust to prepare a "non-negotiable offer" for settlement of the claim, although if that offer was not accepted there ultimately could be binding arbitration or a trial. Eighty-four per cent of these offers were accepted, ninety-nine percent of the offers over $60,000. The fund was large enough and earned enough on investments to pay all of these claims with a substantial amount remaining. Accordingly, the Trust determined to make a further pro rata distribution to claimants that chose Options Two or Three of at least seventy-five percent of the original amount.[78] Walburn notes that ninety-four percent of the women making claims approved of the distribution plan. Page 318. Walburn does not discuss

[78] This brief description of the distribution process is based on *In re A. H. Robins Co., Debtor. Bergstrom v. Dalton Shield Claimants Trust,* 86 F.3d 364 (4th Cir. 1996).

whether these women received appropriate compensation for the harm done them, an issue clearly beyond the scope of her book.

Whatever the adequacy of the payments for claimants from the Trust, many attorneys received substantial fees in the process. Lord was, according to Walburn, usually generous when awarding attorneys' fees. He had, she says, mixed feelings when awarding fees to the plaintiffs' lawyers in the antibiotic antitrust cases, but he believed that lawyers who took big cases on a contingent fee basis and were willing to take that risk over years of work should be rewarded. Page 220. She does not say how he reacted to the attorneys' fees paid in the bankruptcy proceedings, including those that followed the pro rata distribution of the balance in the Claimants Trust at the conclusion of the bankruptcy case. That issue is also beyond the scope of her book, but it is important in the context of Lord's firm belief that only litigation can hold corporations accountable. Page 24. Because the supplemental distribution required little work by attorneys representing the claimants, the district court limited attorneys' contingent fees on the pro rata distribution to ten percent and informed almost 11,000 attorneys who had represented Dalkon Shield claimants of that ruling. Twenty-nine of them who had already received more than $90,000,000 in fees for claims paid in excess of $270,000,000 asked the district court to vacate the order and appealed to the Fourth Circuit when that request was denied. That court, having quoted Mercutio from "Romeo and Juliet" at the outset that lawyers "dream of fees," was not sympathetic:

The total amount of additional fees to be collected by the 29 appellants based on a 75 percent pro rata payment would be $19,875,000, if the court's limit of ten

percent is sustained. If the appellants receive a fee of one-third of the new payments, they will obtain additional fees in excess of $66,000,000. Under the district court's order, the 29 attorneys will have received total compensation of $110,000,000 resulting from the Dalkon Shield litigation, but they are appealing and assert that the district court has deprived them of due process of law by not allowing them to collect an additional $46,000,000. We find no merit to the appellants' contentions, and we affirm.[79]

Later the court characterized the litigation and appeal as “wonderful examples of chutzpah” and made an example of one of the appellant attorneys:

This firm has received approximately $54,754,000 in settlements, and with the normal contingent fee of one-third would have produced over $18,000,000 in fees. The pro rata distribution is estimated to be in excess of 75 percent, and using this figure an additional $41,000,000 in settlements will come through this law office. Under the district court's order, these attorneys will collect an additional $4,100,000 in fees, but they are demanding $13,700,000 which would result in total fees to this office of over $30,000,000.

If the total fee ($22,000,000), fees already received plus the ten percent under the district court's order, is considered at an hourly rate of $300 (a very high rate), it would require 70,000 hours of work to produce. An attorney would have to live as long as Methuselah to bill so many hours.[80]

These attorneys, as well as Robins officials, fared well in the bankruptcy proceeding. Whether their work held A. H. Robins accountable is doubtful.

Three Speeches

Lord gave three speeches that figure prominently in Walburn’s book and also provide raw material for consideration of him as a judge. In December 1975 the Eighth Circuit, en banc, considered Reserve Mining Company’s petition that Lord be recused from that case. Lord attended the hearing in St. Louis. He assured his friends and advisors that he would not seek to speak, but, at the conclusion of the argument, strode to the podium where for fifteen minutes he

[79] *Id., at 367.*
[80] *Id., at 377.*

addressed six judges who sat silent on the bench. Walburn quotes only a few statements--that he spoke both as a judge "and as a human being" of his concern for children, "these little bodies," and that "carcinogenic fibers continue to be disbursed, exposing thousands to a potential health risk." Jeffrey Brandin, in his history of the Eighth Circuit, wrote that Lord's behavior was "more Old Testament prophet than Article III judge."[81] The Court of Appeals said that Lord had "shed the robe of judge and . . . assumed the mantle of the advocate" and removed him from the case.[82]

Walburn entitled her chapter on the years following Lord's removal from the Reserve case "Fire and Brimstone," as Lord "embraced the cause of the environmentalists," "lambasted corporations," and "upbraided churches" in speeches in which he urged his audiences to be their brother's keeper. Page 286. In November 1981 he spoke to the Minnesota Council of Churches on "The Church's Claim on the Corporate Conscience: Toward Redefinition of Sin." Lord had given Walburn a copy before she started her clerkship. She quotes several salient statements including his comment that many persons "denounce crime in the streets, but few examine crime in the skyscraper" and his proposal "that the church might develop an ethic that pollution, contamination, and desecration of the environment are sins and that we should not look to the Second Coming immediately, but should plan for future generations." Pages 21, 296-297.

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[81] Jeffrey Brandin, *Establishing Justice in Middle America: A History of the United States Court of Appeals for the Eighth Circuit,* Minneapolis: University of Minnesota Press (2007) 272.

[82] *Reserve Mining Co. v. Miles W. Lord,* 529 F.2nd 181, 185 (8th Cir. 1976). The court also ruled that Lord had deliberately violated the mandate of the Court of Appeals.

Lord gave a copy of this speech to three A. H. Robins executives to read while they waited in his courtroom on February 29, 1984 before he gave a third speech addressed to them personally calling them out for their role in the production, marketing, and defense of the Dalkon Shield. The Court of Appeals would later say he excoriated them. Walburn quotes the speech at length. Pages 227-231. He did indeed excoriate them. He also pleaded with them:

> You've got lives out there, people, women, wives, moms, and some who will never be moms. Can't you move on this thing now? You are the people with the power to recall. You are the corporate conscience.
>
> Please, in the name of humanity, lift your eyes above the bottom line.
> . . .
>
> Please, gentlemen, give consideration to tracing down the victims and sparing them the agony that will surely be theirs.

The Eighth Circuit held that Lord's comments, made without a trial and without notice and an opportunity to be heard denied A. H. Robins and its officials due process and ordered it expunged from the record.[83] The speech, of course, had received nationwide publicity.

Some Final Comments

Walburn's page-turner provides a revealing portrait of Lord--his sense of humor, his love for his family and his friends, his passion for what he thought was right, and also his foibles. It is not, of course, a complete discussion of his judicial actions. She writes little of his criminal cases, mentions a few draft cases, and treats his public benefits cases with a passing reference to Social Security disability cases.

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[83] *Gardiner v. A. H. Robins Company,* 747 F. 2nd ll80 (8th Cir. 1984).

During his years on the bench he tried scores of cases that did not place him at odds with the Eighth Circuit. Walburn's book focuses on cases that did. Her account of these cases would serve well as required reading in law school or college classes about our judicial system. But not the book alone. The full text of Lord's three speeches should be provided to enable students to analyze and to critique his explication of and his justifications for the rulings he made and the actions he took. (Walburn might well have included them in an appendix to the book.) And the Court of Appeals should be heard as well; the reading list should include the full text of the opinions underlying the court's reprimands and admonitions. These required readings--a gripping account of Lord's statements and actions in and out of court, the judge's own utterances, and the rationale for the rulings and orders of the Court of Appeals--pose serious questions about the rule of law and the administration of justice. For instance:

Is Lord's contention valid "that formal rules of law and inequities in wealth and power, along with the shenanigans and skullduggery of attorneys, . . . [stand] as obstacles to fairness and justice?" Page 2.

Is there a basis for his scorn for "the very basis of American jurisprudence--the adversary system--with its blind faith in the premise that truth and justice will emerge from opposing attorneys duking it out." Page 4.

Lord made this statement to the Minnesota State Bar Association in 1966: "The federal judge is more than a mere referee. In those instances where the litigation takes a direction that makes it apparent that a miscarriage of justice will occur, it is his responsibility to take control to insure a result which is within proper legal bounds." Page 141. By what standard should a judge determine what is a miscarriage of justice and what should be proper legal bounds?

Lords said the courts can be more effective than government regulation in pressuring manufacturers to remove defective products from market: "Only the courts can make it too expensive to kill. It is the only place that corporations haven't been able to buy into government." Page 24. Do contingent fee actions work effectively and appropriately to that end?

Should a trial judge who considers enforcement of a law, adherence to precedent, or compliance with the mandate of an appellate court a miscarriage of justice resign?

Lord might very well add that attorneys and judges, not just students, should consider how the admonition to be my brother's keeper could be followed by attorneys as they represent clients and by judges as they adjudicate disputes.

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Posted MLHP: April 3, 2018.