

Tulsa Law Review

Volume 1 | Number 2

1964

Book Reviews

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Recommended Citation

Hugh V. Schaefer, *Book Reviews*, 1 Tulsa L. J. 201 (1964).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol1/iss2/11>

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BOOK REVIEWS

THE MURDER AND THE TRIAL

By Edgar Lustgarten. New York: Charles Scribner's Sons. 1958
PP. 340. Price \$5.50.

The telling of a murder story with a new twist is perhaps the best way to describe Edgar Lustgarten's analysis of seventeen famous English murder cases. The new twist is the telling of each story with an awareness of not only the interest of the layman, but that of the lawyer as well. The author analyzes the lawyers in each trial, their personalities, style and courtroom skill. Rather thorough treatment is given to the conduct of direct and cross-examination of witnesses, opening and closing arguments, and trial strategy in general with the purpose of showing how all these factors may have affected the outcome of the particular cases under study. Each trial is thoroughly reviewed by Lustgarten with a dissecting approach, not necessarily to condemn or ridicule the lawyer for his failings or shortcomings, but to illustrate the rigors and complexities of conducting a murder trial.

The book serves the usual purpose of providing enjoyable reading, but because the author is so thorough in his depiction of the role of counsel in such cases, it serves a didactic purpose as well. The lawyer-reader recognizes the many tactical errors, harmful and harmless, being committed by the most experienced and celebrated trial lawyers in the British Isles under the conditions that only a gallery packed murder trial in London's "Old Bailey" could create. Yet, oddly enough, the errors described, such as excessive questioning of witnesses, improper handling of experts, and failure to capitalize on factual inconsistencies in testimony are errors which could occur at any trial but with much more disastrous results in a murder trial. The real value of the book is readily apparent; any case, if it is to be successfully tried, must follow the same tactical and strategic principles that are applicable to all trials.

Lustgarten is careful to inform the reader of the temperaments, traits, and idiosyncrasies of the principals of each of these courtroom dramas, and how the lawyers capitalize or fail to take advantage of such factors. This is another facet of the "new twist" theme which predominates in the book. Perhaps the lay reader might fail to fully appreciate the weighty effect that the factor of human personality has in a trial; so weighty that it many times obscures the

full ascertainment of truth. To the lawyer, however, the author subtly renews the old admonition, often given but often never heeded by the trial lawyer, "know the witness, not just what he is going to say!"

This book differs in many respects from other murder stories, whether they be fictional or non-fictional, in that the author has not compromised or distorted the facts to be dramatic in a cheap fashion. However, he dresses truth up with the flair of writers of imaginative fiction. The transcripts of testimony in each of the cases were obviously studied at great length before the story was told, since direct quotations from them are present in almost every narrative. Whereas some of the cases may be unfamiliar to the reader because of their English setting, this will not deter the reader from enjoying a truly outstanding book.

The author writes with an easy style of prose which is apparently indigenous to the English writer. His ability to take musty and voluminous transcripts and to infuse them adroitly into a gripping, tense story is accomplished through his extraordinary sense of narrative.

Lustgarten also has the ability, through the simple and uncluttered presentation of a story, to relate to the reader the real anxiety and true drama of the gripping struggle of the murder trial. The book has not overlooked one minutia of the necessary ingredients to hold the reader's interest whether he be layman or lawyer.

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THE WALL BETWEEN CHURCH AND STATE

Edited by Dallin H. Oaks. Chicago: The University of Chicago Press. 1963. PP. 179. Price \$1.95 paperback; \$6.00 cloth bound.

This interesting compilation of seven monographs serves as a splendid alembic of the issues involved in the so-called "wall between church and state." The Supreme Court's attempt to set out some "bench marks" in the area of rendering unto Caesar the things which are Caesar's; and unto God the things that are God's; can be divided into three periods of activity. The first period was concerned with the free exercise clause of the First Amendment, starting with the early Mormon cases and culminating with the Jehovah's Witnesses. The second period concerned itself with the interpretation of what constituted an establishment of religion, or the so-called "separation" clause and may be measured from the seminal decision of *Everson v. Board of Education*. Thus was ushered in the third stage, or for want of a better term, Co-operative Separation. Instead of treating the "free exercise" and "estab-

ishment" clauses as separate entities the trend seems to give them a unitary accord. Instead of isolating each, the court seems more inclined to interpret them as interdependent. This book illuminates the future with the light of the past, and does a remarkable job, not necessarily in answering specific questions, but in staking out the boundaries.

Professor Dallin H. Oaks of the University of Chicago's School of Law does an excellent job with the introduction. In fact, it is a must before immersing oneself in the remaining portion of the book. Professor Oaks points out most succinctly that "The major church-state issue today is the desirability and constitutionality of governmental aid to private, and particularly parochial, schools." In much of what has been written of late, desirability and constitutionality merge into one, even though the former is a legislative question, the latter a judicial one.

Robert M. Hutchins, President of the Fund for the Republic and past President of The University of Chicago, leads off with *The Future of the Wall*. Its future in his hands does seem somewhat precarious. One is reminded of what McClosky wrote in *THE AMERICAN SUPREME COURT* "The difficulty [with the advice] in this field, as in so many other fields of constitutional controversy, is that the contestants are more convincing when they criticize their opponents' interpretations than when they seek to establish the validity of their own . . ."

The next two articles one might well expect in such a book. They deal with the *Problems of Church and State in the United States*, one a Protestant view by the Reverend Harold E. Fey, the Editor of the *Christian Century*, the other a Catholic view by William Gorman of the Center for the Study of Democratic Institutions. Both present their cases in an exemplary manner. Mr. Fey's article is especially good for it reviews many of the state court decisions that have remained rather obscured by the omnipresent United States Supreme Court opinions.

On the other hand, Mr. Gorman strikes as well as any that have written on the subject of what was intentment of the framers of the First Amendment when he states, ". . . the state of mind at the moment of constitutional commitment was a complex function of two things: first, the experiences and determinations of the several free and dissenting churches and, second, the convictions and aspirations of the sectarian Enlightened Deists." As he points out, the first group wanted religion free from the state, the latter group desired freedom from religion for the political community. Their patron saints are Roger Williams and Thomas Jefferson, respectively. "And their direct followers are presently the most busy at masonry. It is a strange alliance, even though they of course do guard duty on opposite sides of the wall."

In the next event we have squaring off in opposite sides of the ring Robert F. Drinan, Dean and Professor of Law, Boston College Law School, and Murray A. Gordon, a member of the Bar

of the State of New York on the respective topics of the constitutionality, or unconstitutionality, of *Public Aid to Parochial Schools*. Dean Drinan cites in the first paragraph of his monograph to *Pierce v. Society of Sisters*. It is perhaps one of the most abused citations in the history of the Supreme Court, for it has no applicability nor is any reference made to the First Amendment in the Court's opinion. Other than that, he comes off well, and states his case for public aid to parochial schools with vigor. Mr. Gordon builds well and erects a sturdy wall, with its foundations anchored to Madison's great Memorial and Remonstrance of 1785.

One of the two most provocative articles is that by Professor Paul G. Kauper of The University of Michigan Law School, entitled *The Constitutionality of Tax Exemptions for Religious Activities*. Professor Kauper is a pragmatic realist, and his critical analysis of the problems besetting us in this field should be required reading for every clergyman, legislator, and well informed citizen throughout the land. He explores the labyrinth of tax exemption from the viewpoint of Professor Kurland's thesis that the First Amendment's religious clauses state a special principle of classification that government can do nothing to hinder or benefit religion as such.

The second provocative article is by Professor Monrad G. Paulsen of the Columbia Law School on *Constitutional Problems of Utilizing a Religious Factor in Adoption and Placements of Children*. An exploration of the various state decisions and laws in this area is amazing, if one has not been exposed to current reactions. The part that religion plays in adoption and placement is no less than pervasive in a substantial number of states and to date has received no review on the part of the United States Supreme Court. Not only is this done through state statutes, but it is also an important criterion where there is no statutory requirement. Can the state use a religious test in placing children to aid religion, where it is neither a choice of the child or of the parents? This and many other questions are discussed in light of current practices in the field. Not a great deal has been written on this subject, and it is quite apparent from the article that it has been relatively free from judicial scrutiny.

The last portion of the book is by Professor Philip B. Kurland of The University of Chicago School of Law and deals with the Regent's Prayer case in *Engel v. Vitale*, and is adapted from his more inclusive survey that appeared in the 1962 *Supreme Court Review*. Nonetheless it remains a searching and penetrating analysis of the rationale of the Court's decision, and while there is an occasional look over the shoulder, it is pitched more to a look at the future.

Mr. Justice Jackson's admonition in the *Zorach* decision is recalled, "We start down a rough road when we begin to mix compulsory public education with compulsory Godliness." Just how rough the road is going to be is pointed out by Professor Kurland.

Even though the article was written prior to the Supreme Court's latest pronouncements in *School District of Abington Township v. Schempp* and *Murray v. Curlett*, they have been incorporated to a degree without detracting from the original thrust of the article.

It is indeed regretful that more responsible leaders in not only the religious community, but also in government have not taken the time to read expositive writings such as this book before they make public pronouncements on the Supreme Court's initial attempt to draw some preliminary lines of demarcation in a field that is more apt to draw a great deal of heat and precious little light. For an easy evening's reading, I don't know of a single publication that can do more to inform in such a brief period.

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