

*Lionel Murphy: A Radical Judge* edited by J. A. Scutt (McCulloch Publishing, Carlton, Victoria, 1987) pages 1-275. Price \$29.95 (hardback). ISBN 0 949646 17 2.

The volume of material recently published<sup>1</sup> on the life and judgments of Justices Lionel Murphy is testimony to his unique and challenging contribution to the Australian legal system. Few Australian jurists have succeeded in commanding as much attention as Lionel Keith Murphy. This collection of essays, edited by Jocelyne Scutt, fulfils the important role of *publicizing* the opinions of the controversial High Court judge on matters such as constitutional law, taxation, property, women's rights, family law and economic regulation, and assessing their validity and merit. With few blemishes, it accomplishes its task excellently.

The highlight of the collection is the way in which the essays — unconnected in substance — combine to present the important, underlying questions that are raised by Murphy's career. Justice Michael Kirby's foreword is brilliant in teasing out these unifying themes. As he observes, there is an

apparent clash between Lionel Murphy's principled dedication to democratic values and his assertion of the rights of unelected judges to effect reform according to their values and predilections . . .<sup>2</sup>

Several contributors to the book address this contradiction, expressly or impliedly, and stress Murphy's commitment to the democratic process and institutions. In his chapter on Murphy's approach to tax evasion, Richard Krever argues that his Honour's purposive construction of legislation was not a sign of his desire to impose his own social values but an attempt to ensure that the will of the people, expressed in Acts of Parliament, would be effected. Peter Hanks reasons similarly, in his essay on Murphy and economic regulation.

John Goldring, another contributor to this collection, would probably agree with this conclusion, but carefully raises the danger that many opponents of Lionel Murphy feared:

Judicial intervention is a double-edged sword; it can be wielded just as easily by those whose values seem disagreeable as by those whose values we commend.<sup>3</sup>

Lionel Murphy clearly regarded himself as an authentic voice of the values of the Australian public. Such a claim is, of course, very subjective. But what this book does is to question (and ultimately recognize) the legitimacy of such an approach to the judicial process. In this way, it is a worthy contribution to the greater debate over the role of our courts and the accountability of judges, despite the fact that its partisanship means some criticisms of Lionel Murphy remain unmade.

The best individual essays are those by Krever, Justice Marcus Einfeld (on Murphy and human rights) and Professor Tony Blackshield ('The Murphy Affair'). Krever's contribution is clear, well argued and irresistibly persuasive. It is by far the most successful attempt in this collection to explain the area of law under analysis. He charts the High Court's role in fostering the tax avoidance era by its adherence to a strict literalist construction of statutes, examines the social and political consequences of widespread tax evasion, outlines the opposition to this trend by Justice Murphy and attempts to explain why and how the High Court finally endorsed a purposive approach to statutory interpretation. It is at times an abrasive essay, but delivers a balanced assessment of Lionel Murphy's contribution to taxation law.

Justice Einfeld's essay shares the same virtues. It is a strong, generally well organized and argued polemic against the belief that our basic rights are adequately protected by firmly rooted democratic traditions. His Honour examines in detail the High Court's approach to matters such as an accused's right to counsel, the presumption of innocence and the right to vote, and advocates a change to the minority views expressed by Lionel Murphy. This essay highlights the consistency and vigour with which Murphy fought for human rights, and is the strongest endorsement of his views in the collection.

Professor Blackshield offers a patient and detailed account of the so-called 'Murphy affair', the criminal allegations and charges that dogged Lionel Murphy in his final years. Blackshield openly

<sup>1</sup> The edited collections of Justice Murphy's judgments, *Lionel Murphy — The Rule of Law and The Judgments of Justice Lionel Murphy*, were recently reviewed at (1987) 16 M.U.L.R. 178.

<sup>2</sup> *Lionel Murphy: A Radical Judge* 4.

<sup>3</sup> *Ibid.* 81.

admits his belief in Murphy's innocence of all criminal wrong or judicial misbehaviour, yet is objective and scrupulous in presenting the relevant facts and analysing them from all possible points of view. Never does he overstate Murphy's case. He acknowledges that evidence existed which could be given a sinister complexion by the Crown, the media or Murphy's opponents, but carefully argues for alternative explanations consistent with all the facts and the presumption of innocence. Given that the names of Morgan Ryan and Clarrie Briese have become part of recent Australian folklore, this relatively short account is of both historical and academic importance.

The attention paid to these three essays is not intended to reflect ill on the remaining contributions. Jocelyne Scutt's two essays on Lionel Murphy's contributions to family law and women's rights are both well written, and Lawrence Maher gives an excellent and balanced assessment of Murphy's achievements as Commonwealth Attorney-General. Garry Sturgess' essay on the media's role in the 'Murphy affair' is painstaking (if occasionally too savage), and is a worthy companion to Professor Blackshield's piece. The low-lights are few. Brendan Edgeworth's essay on Murphy and property law is heavy going, and quite out of character with the rest of the collection. John Goldring's contribution ('Murphy and the Australian Constitution') is excellent in parts, but otherwise disappointing; the author has attempted to cover too much material in too few words, and consequently obscures important cases and principles. However, the most severe criticism must be directed at Gordon Bryant's essay on 'Murphy the Politician'. It is woefully organized, poorly expressed, and only incidentally about Lionel Murphy. Its inclusion was an unfortunate mistake.

In my opinion, this book is an important addition to the on-going analysis of the Australian legal scene. Its chief virtues are three-fold. First, it educates readers not only in the opinions of Lionel Murphy but in the rôle that institutions such as Parliament, the courts and the media do and should play in our society. Justice Murphy often stated that Australians took too little interest in the functioning of the High Court. He was an educator and a populist. Secondly, this book debates important legal and social issues. At times, it is too partisan to its subject (*e.g.* Justice Einfeld's contribution), but it always remains interesting and informative. It sends a reader (back) to the original sources: the judgments of the High Court.

However, this collection's chief virtue is its ability to encourage. In his foreword, Michael Kirby makes note of Murphy's abundant optimism and his extraordinary capacity to share it with other people. Whether one shares Lionel Murphy's views or is irrevocably opposed to them, his boundless energy and faith in human beings shines through every essay in this collection. In this respect, his life and career is a wonderful example. As Peter Hanks states in this book:

Lionel Murphy has offered a challenge for a new generation of judges and lawyers.<sup>4</sup>

Whether his lead results in an improved Australian society must be left to the judgment of time.

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<sup>4</sup> *Ibid.* 119.

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