REVIEW ARTICLE
JUDGING MURPHY'S WORDS AND DEEDS

DAVID WEISBROT*

By pure chance, this review is written exactly one year after the death of former High Court Justice Lionel Murphy on 21 October 1986. In that brief period, three books about Justice Murphy have already appeared, and no doubt more are planned.

Lionel Murphy: The Rule of Law [1] and *The Judgments of Justice Lionel Murphy* [2] are both collections of edited High Court judgments by Justice Murphy. Apart from some prefatory and explanatory material, both books leave the words of Justice Murphy to speak for themselves. The books are so similar that they beg direct comparison (below). *Lionel Murphy: A Radical Judge* [3] is a collection of essays highlighting important aspects of Justice Murphy's legal, political and judicial careers, as well as drawing out Murphy's contributions to various parts of Australian jurisprudence and dissecting the "Murphy Affair" which was to effectively end his tenure on the Bench, and his life.

The Rule of Law is edited by Drs Jean and Richard Ely, noted writers and campaigners for civil liberties and equal educational opportunities. The Elys' personal and professional contact with Justice Murphy was heightened by their involvement in *Attorney-General for Victoria (ex rel. Black and others)* v.

*Associate Professor of Law, University of New South Wales.

1 J. and R. Ely (eds), *Lionel Murphy: The Rule of Law.* Sydney: Akron Press (1986). 312 + xx pages (hereinafter *The Rule of Law*).

2 A.R. Blackshield, D. Brown, M. Coper and R. Krever (eds), *The Judgments of Justice Lionel Murphy.* Sydney: Primavera Press (1986). 332 + xx pages (hereinafter *Judgments*).

3 J.A. Scutt (ed.), *Lionel Murphy: A Radical Judge.* Melbourne: McCulloch Publishing, in association with the MacMillan Company (1987). 275 pages (hereinafter *Radical Judge*).

The Commonwealth[4] in which the plaintiffs challenged Government provision of public funds to private (particularly "church" or "denominational") schools, under s.116 of the Constitution. Not surprisingly, *The Rule of Law* ends with Justice Murphy's solitary dissent in that case.

Judgments is edited by four leading legal academics: Tony Blackshield of Latrobe University, David Brown and Michael Coper of the University of New South Wales and Richard Krever of Monash University. The interests and expertise of the editors are neatly complementary, covering such areas as jurisprudence, criminal law, constitutional and administrative law, and taxation.

Considering the undoubted rush to publication, both books are produced to a very high standard. *Judgments* features a very attractive cover in two-tone grey and pink (a colour scheme which would be the envy of the trendiest inner-city restaurant) with pen (being mightier than the sword) rampant. *The Rule of Law*'s cover is based on V. Vasselly's graphic "Etude De Mouvement", which is at once reassuring and threatening (is one outside the reach of the vortex, or inevitably being drawn into it?) and was probably chosen for that very tension.

The Rule of Law uses bolder, larger print on glossier, heavier paper, but the layout is somewhat less satisfactory. In *Judgments* there is a clearer break-up of the introductory, editorial material (which is italicised) and the actual case extracts. Both indexes are adequate, but could be improved. *The Rule of Law* provides a general index with thirty-one topics, which should be more detailed. For example, it would not answer the question (I was recently asked), "[w]hat was the name, again, of that case where the Aboriginal man got six months' gaol for spitting at an official in Queensland?"[5] The index to *Judgments* would answer that question (see "spitting") and is generally more detailed, but references are to the case number rather than the more helpful page number.

More substantively, *The Rule of Law* contains forty-two judgment extracts organised into eight broadly thematic chapters, such as "The Accused and the Rule of Law" and "Law and Social Change". *Judgments* contains extracts from sixty cases and brief notes on twenty-two more, organised somewhat more logically into twelve chapters, such as "Trial by Jury", "Tax Avoidance", "Marriage and the Family", and "The British Connection". On this basis alone, it may be that you get more Murphy for your money with *Judgments*. The scene-setting notes before each extract are also somewhat more clear, even where more concise.

The introductions to both books have merit. In *Judgments*, Professor Blackshield relates that the process of going through all of the Murphy judgments was, for the editors, stimulating, provocative and invigorating even though they did not necessarily always agree with his reasoning or his

4 (1981) 146 CLR 559 (hereinafter *State Aid (D.O.G.S.)* Case).
5 *Neal* v. *The Queen* (1982) 149 CLR 305 (hereinafter *Neal*).

outcomes. Blackshield makes another interesting and important point: while Murphy had an "image ... as a radically non-conformist judge",[6] he recorded a dissent in only 137 of 632 cases, or just over twenty per cent. In *The Rule of Law,* the great historian Manning Clark provides a one paragraph Foreword which is as elegant and moving as it is brief. Clark neatly encapsulates the spirit which moved Murphy:

> [h]e has devoted his public life to the abolition of ignorance, superstition and tyranny. He belongs to the great tradition of those who believe human beings had the capacity to abolish every form of domination, of class over class, parent over child, man over woman, woman over man, of race over race, and spiritual bully over sceptics and agnostics. All his life he has had an eye for the humbugs and the moralisers. Perhaps that is why the conservatives have never felt comfortable with him...The victims and the oppressed will read [his judgments] as the words of a man who gave them hope.[7]

Clark's words are also reminiscent of the motto of the late United States Supreme Court Justice William O. Douglas: "I am for the individual over government, government over big business, and the environment over all else."[8] Douglas was another great, progressive judge who faced constant challenges from those forces which refused to recognise the legitimacy of his judicial philosophy and which recoiled at his willingness to associate with the *hoi polloi* — defence counsel, law students, greenies, women and other dangerous characters.

A small, but inevitable, weakness of both collections of judgments is that in presenting Murphy's writings only, the reader misses the opportunity to contrast Murphy's style and reasoning with that of his colleagues on the High Court. For example, the ordinary, decent Australian may find it unremarkable to read judgments: asserting the right of a person to be represented by counsel in a serious felony trial;[9] opposing the retention of the archaic doctrine of "civil death";[10] affirming that the presumption of innocence means a person acquitted at trial should be regarded as certifiably innocent, and not merely the beneficiary of some technical weakness in the Crown case;[11] placing an obligation upon the Crown Prosecutor to disclose material favourable to the defence;[12] and arguing against strictly literal interpretations of tax legislation which allow patently artificial avoidance schemes to run round the obvious intent of the Parliament.[13] Our ordinary, decent Australian might be surprised, however, to find that Justice Murphy

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6 Note 2 *supra,* xix.
7 Note 1 *supra,* xvi.
8 See B. Woodward and S. Armstrong, *The Brethren* (1979) 44.
9 *McInnis* v. *The Queen* (1979) 143 CLR 575 (hereinafter *McInnis*).
10 *Dugan* v. *Mirror Newspapers Ltd* (1978) 142 CLR 583 (hereinafter *Dugan*).
11 *R.* v. *Darby* (1982) 148 CLR 668 (hereinafter *Darby*).
12 *Lawless* v. *The Queen* (1979) 142 CLR 659.
13 *Federal Commissioner of Taxation* v. *South Australian Battery Makers Pty Ltd* (1978) 140 CLR 645 (hereinafter *South Australian Battery Makers*); *Federal Commissioner of Taxation* v. *Westraders Pty Ltd* (1980) 144 CLR 55 (hereinafter *Westraders*).

was on the losing side on *all* of these issues, and indeed was the sole dissenter in most of those cases.[14]

Our ordinary reader would also learn, as have a generation of lawyers and law students, that Justice Murphy's writing differed from his colleagues not only in political orientation but also in clarity of expression and organisation; in its overt, rather than covert, articulation of social and policy concerns; and in the use of persuasive authorities from the United States, Canada and other common law jurisdictions besides Britain. For these reasons the presentation of Murphy's own words in a concise and accessible format is a useful and important contribution to the literature on Australian legal and political thought.

Consider the words of Justice Murphy on the role of the jury:

> [t]he jury system is the main social defence against governmental or other oppression, the main instrument for preserving the liberties of the people. The trend to extend the number of offences triable without jury (sometimes punishable by imprisonment for lengthy periods such as two years) and to provide very heavy maximum terms for the same offences if the defendant insists upon trial by jury shows that, unless some serious meaning is given to s. 80, the evils against which trials by jury protect the public will be unchecked. Those not affected tend to assume that they will never be affected by the erosion of civil liberties. History shows otherwise.[15]

On the increased use of commissions of inquiry in the place of or alongside judicial proceedings:

> [t]he authority given to the commissioner to exercise such an important ingredient of judicial power as finding a person guilty of ordinary crimes, is in itself an undermining of the separation of powers. It is a fine point to answer that the finding is not binding and does not of itself make the person liable to punitive consequences. It is by fine points such as this that human freedom is whittled away. Many in governments throughout the world would be satisfied if they could establish commissions with prestigious names and the trappings of courts, staffed by persons selected by themselves but having no independence (in particular not having the security of tenure deemed necessary to preserve the independence of judges), assisted by government selected counsel who largely control the evidence presented by compulsory process, overriding the traditional protections of the accused and witnesses, and authorized to investigate persons selected by the government and to find them guilty of criminal offences. The trial and finding of guilt of political opponents and dissenters in such a way is a valuable instrument in the hands of governments who have little regard for human rights. Experience in many countries shows that persons may be effectively destroyed by this process. The fact that punishment by fine or imprisonment does not automatically follow may be of no importance; indeed a government can demonstrate its magnanimity by not proceeding to prosecute in the ordinary way. If a government chooses not to prosecute, the fact that the finding is not binding on any court is of little comfort to the person found guilty; there is no legal proceeding which he can institute to establish his innocence. If he is prosecuted, the investigation and findings may have created ineradicable prejudice. This latter possibility is not abstract or remote from the case. We were informed that the public conduct of these proceedings was intended to have a 'cleansing effect'.[16]

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14 Justice Jacobs also dissenting in *South Australian Battery Makers, id.*, on technical grounds; Justice Wilson also dissented in *Westraders, id.* In the other four cases mentioned Justice Murphy was alone in dissent.

15 *Li Chia Hsing* v. *Rankin* (1978) 141 CLR 182, 198; note 2 *supra*, 41; note 1 *supra*, 277.

16 *Victoria* v. *ABCE and BLF (No. 1)* (1982) 152 CLR 25, 110-111; note 2 *supra*, 48-49.

On the over-use of conspiracy charges:

> [t]he overzealous use of conspiracy charges proves embarrassing and costly not only to the accused but ultimately to prosecuting authorities and the courts. It brings the administration of criminal justice into disrepute. This is happening in Australia. History shows that the administration of justice will be well served if courts keep a tight rein on the spawning of conspiracy charges.[17]

On the meaning of the presumption of innocence and the effect of a "not guilty" verdict:

> [t]he assertion in *Shannon* that acquittal does not amount to establishment of innocence has been said to be a very dangerous principle...It is worse than that. It is subversive of one of the most important constitutional principles on which the freedom of our society depends. If adopted by this Court and allowed to stand, it will be the greatest setback to human rights and individual freedom in the history of this Court.
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> The history of human freedom is largely the relationship between the individual and the State (that is the Government or the Crown) in the administration of criminal justice. The fundamental feature of that system in Australia, and until *Shannon* in England, is that a judgment of acquittal is, as between the State and the accused, a complete clearance of the accused from the charge. It was no mere immunity from further prosecution as might be obtained by a pardon. It was a judgment of innocence. If this were not so, once a person is charged, he can never be cleared; there is no way in the criminal justice system to establish his innocence. Although he would be presumed innocent until verdict, if he is acquitted his innocence becomes questionable.[18]

On the right to counsel in criminal proceedings:

> [e]very accused person has the right to a fair trial, a right which is not in the slightest diminished by the strength of the prosecution's evidence and includes the right to counsel in all serious cases. This right should not depend on whether an accused can afford counsel. Where the kind of trial a person receives depends on the amount of money he or she has, there is no equal justice...
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> Often courts cannot remedy denial of human rights which occurs outside the judicial system, but there is no excuse for tolerating it within the system. It is useless to pretend that the rule of law operates throughout Australia when a basic human right is denied in a State Supreme Court, its denial confirmed there on appeal, and then tolerated by this Court. The case is of general public importance because an indigent accused has been convicted of serious crimes after a trial which was unfair because he was denied representation and because such an unfair trial is not exceptional, at least in Western Australia.[19]

On racism in the legal system:

> [i]n its supervision of the criminal justice system of the State, the Court of Criminal Appeal has a duty to see that racism is not allowed to operate within the judicial system. It should have disapproved of the unjudicial manner in which the Magistrate dealt with sentence.
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> That Mr. Neal was an 'agitator' or stirrer in the Magistrate's view obviously contributed to the severe penalty. If he is an agitator, he is in good company. Many of the great religious and political figures of history have been agitators, and human progress owes much to the efforts of these and the many who are unknown. As Wilde aptly pointed out in *The Soul of Man under Socialism,* 'Agitators are a set of interfering, meddling people,

17 *The Queen* v. *Hoar* (1981) 148 CLR 32, 41; note 2 *supra,* 90; note 1 *supra,* 26.
18 Note 11 *supra,* 686; note 2 *supra,* 93; note 1 *supra,* 24-25.
19 Note 9 *supra,* 583, 593; note 2 *supra,* 104, 114; note 1 *supra,* 55, 66.

who come down to some perfectly contented class of the community and sow the seeds of discontent amongst them. That is the reason why agitators are so absolutely necessary. Without them, in our incomplete state, there would be no advance towards civilisation.' Mr. Neal is entitled to be an agitator.[20]

On the relationship between the courts and Parliament:

[t]he New South Wales Court of Appeal suggested, and it was also suggested during argument before this Court, that it should be left to the legislature to supersede the unmeritorious common law rule. The answer is that legislators are engaged in serious economic and social problems. It is well-known that legislative programmes are so full that many important proposals are delayed sometimes for years. Legislators have more to do than poring through law reports to see which outmoded judicial doctrines should be abolished, and might well resent their attention being distracted in order to do what the courts themselves could do but neglect to do. In my opinion, it is an abdication of responsibility for the courts to decide to maintain an unjust, inhumane rule invented by their judicial predecessors and to justify their inaction by the excuse that the legislature can abolish it.[21]

On artificial tax avoidance devices making tax "optional for the rich":

[i]t has been suggested, in the present case, that insistence on a strictly literal interpretation is basic to the maintenance of a free society. In tax cases, the prevailing trend in Australia is now so absolutely literalistic that it has become a disquieting phenomenon. Because of it, scorn for tax decisions is being expressed constantly, not only by legislators who consider that their Acts are being mocked, but even by those who benefit. In my opinion, strictly literal interpretation of a tax Act is an open invitation to artificial and contrived tax avoidance. Progress towards a free society will not be advanced by attributing to Parliament meanings which no one believes it intended so that income tax becomes optional for the rich while remaining compulsory for most income earners. If strict literalism continues to prevail, the legislature may have no practical alternative but to vest tax officials with more and more discretion. This may well lead to tax laws capable, if unchecked, of great oppression.[22]

On the concentration of economic power and "industrial serfdom":

[d]uring this generation, there has been an accelerating trend towards concentration of economic power in fewer and fewer persons. The growth of the great national corporations, their mergers and expansion into transnationals have transformed the methods of production, distribution and exchange. The power of the greatest corporations transcends that of most governments. A reaction to the submergence of the individual worker is the demand by organized workers for some share in deciding what work is to be done, by whom and when, where, and how it is to be done. The thrust of the demand is not merely the improvement in existing pay and conditions. It extends to the protection of jobs, for themselves and other workers, but is more than that; it is a demand to be treated as more than wage-hands — to be treated as men and women who should be informed about decisions which might materially affect their future, and to be consulted on them. It is a demand to be emancipated from the industrial serfdom which will otherwise be produced by the domination of the corporations; a demand to be treated with respect and dignity.[23]

In *Lionel Murphy: A Radical Judge,* most of the authors go to pains to demonstrate that Murphy was no such thing. Notwithstanding the title, the

20 Note 5 *supra,* 316-317; note 2 *supra,* 133-134; note 1 *supra,* 131.
21 Note 10 *supra,* 611-612; note 2 *supra,* 143; note 1 *supra,* 143, 147.
22 *Westraders,* note 13 *supra,* 80; note 2 *supra,* 223, note 1 *supra,* 210.
23 *Federated Clerks' Union of Australia* v. *Victorian Employers Federation* (1984) 154 CLR 472, 494; note 2 *supra,* 261-262.

message that comes through most strongly is that Lionel Murphy was more true-believer than apostate: in the rule of law; liberal legalism; the democratic institutions of Parliament and the judiciary; the legal profession; the jury system; and human rights. That this collection of views represents a "radical" philosophy for a common law judge speaks volumes in itself.

It has been put elsewhere,[24] in a rather acidulous review, that *Radical Judge* is an exercise in judicial hagiography. All of the authors are sympathetic to Murphy's general approach to the law and there is something of an air of *festschrift* about the book. However, the authors do not always agree with Murphy's actions, judicial reasoning or proffered solutions to problems and there is far more analysis than panegyric.

Radical Judge is effectively divided into three parts. The first three chapters are devoted to Lionel Murphy the Lawyer-Politician. Neville Wran provides an engaging and affectionate portrait of "Murphy the Barrister", which affirms Murphy's stature as a lawyer and lauds his intellect and assiduosity. Gordon Bryant describes "Murphy the Politician" — the decade in opposition, the rise to Leader of the Opposition in the Senate, the establishment of the committee system in the Senate, and the brief but energetic period as Attorney-General. Bryant points out a seeming contradiction in Murphy's democratic philosophy:

> [s]trangely Murphy did not seem to regard Constitutional change through the referendum process seriously. He had a great faith in legal activism and judicial interpretation to effect change.[25]

Perhaps Murphy's lack of enthusiasm for the referendum process was a product of the dismal record of referendum initiatives in Australia, as well as the generally poor level of public debate and reporting in the mass media.

In "Murphy the Attorney-General", Lawrence Maher details the astonishing range of accomplishments during Murphy's brief tenure in office — among other things, the establishment of the Australian Institute of Criminology and the Australian Law Reform Commission, the appointment of a Commonwealth Ombudsman, reform of family law, the advent of the Australian Legal Aid Office, a new Trade Practices Act, the challenge to French nuclear testing in the Pacific before the International Court of Justice, the re-organisation of the Justice Department, the beginnings of computerisation of legal data, and the abolition of the death penalty for all federal offences.

The second (and largest) part of *Radical Judge* looks at Murphy's role (mainly as a High Court judge) in the development of various substantive areas of law. Jack Goldring writes on "Murphy and the Australian Constitution" and finds that Murphy's approach was characterised by a number of consistent features:

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24 C. Howard, "Essays from Murphy's Idolaters" (1987) *The Age* August 29, 14.

25 Note 3 *supra*, 25.

> a strong nationalism conceding and welcoming the existence of States as political (albeit subsidiary) entities; a stalwart belief in democracy and parliamentary rule; a firm support for civil liberties; and overall a 'constitutionalism' in the classic, liberal sense of seeing a constitution as not simply a legal document, but rather as a set of values shared by the community.[26]

In Australia, these features made Lionel Murphy's approach to constitutional law "unorthodox"; in the United States, Robert Bork's failure to share these values was recently judged by the Senate to put him *outside* the "mainstream" and thus unsuitable for confirmation to a place on the Supreme Court. Therein lies a tale of two constitutions, at least in modern practice.

The general editor of *Radical Judge,* Dr Jocelynne Scutt, also contributes two essays (as well as a brief introduction to the volume), on "Murphy and Family Law" and "Murphy and Women's Rights". As "instigator and architect"[27] of the Family Law Act 1975 (Cth), Murphy was responsible for reshaping the laws and processes in this important and invariably controversial area. After discussing the development of the law in such areas as property rights in marriage and child custody, Scutt writes that Murphy's approach to family law was:

> one strongly committed to the welfare of infants and children; to the proper ultilisation of facilities available for ameliorating distress caused by family breakdown and divorce, through Family Court resources such as counselling and specialist personnel including the judges; and to the recognition that marriage and the family are crucial units operating in our society, affecting and being affected by the society in which they operate...[28]

No Althusserian radical, Murphy was more "a compassionate traditionalist"[29] in Scutt's view. In her piece on "Murphy and Women's Rights", Scutt includes Murphy among "a few friends in high places"[30] whose advocacy assisted the women's movement in the past two decades.

Peter Hanks credits Murphy with "a remarkable contribution to expanding the scope for national control of economic activity"[31] — something that modern Labor governments seem determined to abandon. Murphy was largely successful in pushing his colleagues on the High Court to a more expansive reading of the corporations power given to the Commonwealth by s.51(xx) of the Constitution. He was less successful in his advocacy for a broader (for instance more centralist) view of the trade and commerce power (s.51(i)) and a "narrow but functionally effective" view of s.92, but his judgments have nevertheless reshaped the debate and laid the basis for future change. Similarly, in "Murphy on Taxation", Richard Krever demonstrates how Murphy's vigorous dissents in a series of tax avoidance cases served to illustrate that a purposive approach to statutory interpretation

26 *Id.*, 60.
27 *Id.*, 86.
28 *Id.*, 115-116.
29 *Id.*, 116.
30 *Id.*, 169.
31 *Id.*, 118.

"was not only intellectually desirable, but easily implemented as a practical alternative to the destructive doctrine of literalism".[32]

In "Murphy on Property", Brendan Edgeworth achieves the not inconsiderable feat of making an essay on property law readable and interesting. Murphy correctly viewed property as a social relation, taking him outside the Blackstonian orthodoxy which has traditionally seen property as a person-to-thing rather than person-to-person relationship. His commitment to political freedom and self-determination led him to assert "rights" in circumstances where his colleagues on the Bench, finding no ready equation into dollars, could find none: rights to practise a profession;[33] to engage in democratic political activities free from feudal constraints;[34] and so on.

Marcus Einfeld details Murphy's devotion to human rights and his pre-eminent position in promoting the cause during his career in politics and on the High Court. It falls to Einfeld to discuss many of Justice Murphy's most famous and passionate judgments, involving: the right to counsel (*McInnis*);[35] the use of the external affairs power to support Commonwealth anti-discrimination legislation (*Koowarta* v. *Bjelke-Petersen*);[36] the presumption of innocence (*Darby*);[37] the doctrine of "civil death" (*Dugan*);[38] the right to be an "agitator" (*Neal*);[39] the right to vote (*The Queen* v. *Pearson; ex parte Sipka*);[40] and freedom of speech (*Gallagher* v. *Durack*).[41] As Attorney-General, Murphy was unsuccessful in shepherding through his Human Rights Bill, and of all the judgments mentioned above he was in the majority only in *Koowarta*. It is ironic that conservative opposition to human rights legislation in Australia is based on the view that those "rights" are already sufficiently safeguarded by the domestic common law, yet it appears that the courts are actually only willing to occasionally ensure those rights where to fail to do so would place Australia in clear breach of its *external* (international) obligations.

The final part of *Radical Judge* deals with the "Murphy Affair", and is as sad and disturbing as the earlier parts of the book are optimistic and inspiring. As Gary Sturgess points out in his chapter on "Murphy and the Media", the media coverage of Murphy the Accused "completely dwarfed in volume anything formerly written about him *while* a judge".[42] Sturgess, a former *Age* journalist, does not offer a Fairfax conspiracy theory, but rather identifies "a pack element":

32 *Id.*, 143.
33 *Dorman* v. *Rogers* (1982) 148 CLR 365.
34 *Clunies Ross* v. *The Commonwealth* (1984) 155 CLR 193.
35 Note 9 *supra.*
36 (1982) 153 CLR 168 (hereinafter *Koowarta*).
37 Note 11 *supra.*
38 Note 10 *supra.*
39 Note 5 *supra.*
40 (1983) 152 CLR 254.
41 (1982) 152 CLR 238.
42 Note 3 *supra,* 211.

> [t]here was an appalling convergence of views, particularly in *The Age* and the *National Times*. These two outlets, in competition, drove each other to ever-new heights of distortion, carelessness and self-justification...their mistaken understanding of Australian institutions, particularly the High Court, permitted no reflective pauses. Their imperviousness to Murphy's legacy, especially his legacy as a High Court judge for a decade, permitted no clear understanding of the scale of the destruction in which they were engaged.[43]

Sturgess provides a paragraph-by-paragraph debunking of the Melbourne *Age's* first story on the Murphy Affair (which mainly recycled earlier pieces by other newspapers) which demonstrates that, although the front page piece was not prepared under pressure of time, it was replete with errors, distortions and crucial transpositions, and amounted to a gross breach of the Australian Journalists' Association Code of Ethics. Looking at what is left, it appears that Murphy was condemned not for what he said, much less intended or did, but rather for being on speaking terms at all with Morgan Ryan. Later coverage of the Affair is no better, with *The Age* failing to properly report those parts of the Senate Committee's and Stewart Commission's reports which questioned the accuracy and authenticity of the tapes and transcripts, while running laudatory front page stories on those "anonymous police heroes" who were involved in the massive illegal wire tapping operations and subsequent cover-ups.

The Sydney Morning Herald's political columnist Alan Ramsey recently summarised the relationship between journalists and politicians thus:

> [o]ne, nobody leaks anything in politics without a motive. And two, political journalists are always captives of their sources.
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> A third point is made obvious by the first two: politicians, if they can get away with it, will shamelessly manipulate journalists for their own advantage. Journalists, in turn, feed off the same process.[44]

Yet *The Age, The Sydney Morning Herald, The National Times* and the rest failed to ask themselves one basic question in two years of sustained coverage: out of the many thousands of hours of telephone conversations which the police illegally taped, how did we happen to come by only these few poorly transcribed pages, *and why?*

In the final chapter, Tony Blackshield provides a cogent analysis of most of the legal aspects of the "Murphy Affair": the Stewart Report on the illegal taping and subsequent appearance of "transcripts" and "summaries"; the two Senate Committees' processes and reports; the Briese allegations; the trials and appeals and ultimate acquittals on both counts; the threat of removal from office under s.72 of the Constitution; and the "final codas of farce and tragedy"[45] in which it was suggested that at least some of Murphy's fellow judges did not want him back on the Bench. Murphy did return,

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43 *Ibid.*

44 "The Making of a New Prime Minister" (1987) *The Sydney Morning Herald* August 8.

45 Note 3 *supra*, 256

nevertheless, and although desperately ill he delivered two final judgments on the day of his death.

Radical Judge also contains a Foreword by Michael Kirby and an Epilogue by Mary Gaudron — both brief, moving and ultimately optimistic. The fact that three of Australia's most senior judges (Gaudron, Kirby and Marcus Einfeld) are involved in such a book is cause for optimism in itself, and is evidence that Lionel Murphy's influence on the shape of the law in Australia did not end with his death.