TEMPERING JUSTICE WITH MERCY

THE TRIAL
by Lindsey P. Dew
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Reviewed by Edward L. Kimball

The subject of constitutional rights in criminal procedure and of legal ethics are mature ones for an LDS novel. In *The Trial* they are handled in the context of an engaging story. The book is a short one, easily read in one evening. It should hold the reader's interest because the writing is generally good, with a fast pace, witty dialogue, interesting characters, intriguing issues, and unexpected plot turns.

The book opens with the court appointment of John Lindsey, an attorney who is also a Mormon bishop in a fictional Utah town, to represent a murderer. The story centers not on who committed the crime, but on the lawyer's struggle to give his guilty client the procedural rights guaranteed by the law. In the process, Lindsey must wrestle with his own and others' distaste for the fact that, because essential evidence of guilt was obtained by abusive police conduct, the legal system might end up setting a coldly calculating psychopathic killer free, perhaps to kill again.

For the most part the characters are believable. Bishop Lindsey, who tells his own story, is a good man and a capable lawyer who fumbles a bit in dealing with a difficult situation. But on the whole lawyers come off rather badly, with significant flaws of character or judgement: for example, the prosecutor proceeds with a weak case out of political motivation and barely resists the temptation to present perjured testimony. The out-of-town lawyer for the co-defendant is skillful, but bossy and insensitive and prepared to let his client commit perjury. Though the judge is said to be fair in the courtroom, she is egotistical, plays favorites outside the courtroom, and acts out of concern for how the case may effect her career ambitions. And when people in the community scorn Lindsey for representing a guilty client, other lawyers are slow to come to his support.

Not only lawyers look bad. Two of three medical people are guilty of conscious malpractice, the psychiatrist and reporters are unprofessional, a realtor rationalizes perjury in "a good cause," one of the police is a "redneck" liar, and most townspeople are petty.

From all this one might expect the book to have a negative feel, but it does not, because, while the author rightly shows that even basically honorable people sometimes rationalize and bend the rules, he also portrays these fallible people as capable of change. They can learn, they can apologize, they can forgive.

People and situations are portrayed as mixtures of good and bad. I would quarrel only with the proportions. While the people are not real, they are realistic. The same can be said of the Mormon environment portrayed in the story. Mormons will recognize what goes on as based on real experience, where people's spiritual lives entwine with their daily problems.

The story manages to include, at least in passing, a variety of significant social issues– obedience to unlawful orders, police harassment of hippies, racial stereotyping, internment of Japanese in World War II "relocation centers," the danger of jumping to conclusions, the effect desired outcome can have in memory, lying for a good cause. The presence of these issues adds a feeling of depth.

The author still struggles a bit with style. Assuming the reader's familiarity with Mormon culture makes the book seem a bit parochial. Passages about law have a slightly preachy tone and explanation of constitutional rights sounds textbookish. Lawyers no doubt sometimes talk that way, but it makes torpid reading. While many authors use too little dialogue, this book errs in the other direction. Since the book is written as the protagonist's narrative, dialogue ought to be used only when it furthers the story. The author also overuses the device of quoting one person's explanation to another when direct exposition would work better.

Of the many questions about lawyer ethics posed in the book, the major one is whether a conscientious lawyer can represent a person he knows to be guilty with the same vigor he would display in representing an innocent person. Everyone knows the orthodox answer, but nothing gives laymen more trouble. People have difficulty accepting that the criminal defense lawyer plays a special role, deliberately divorced from direct responsibility for the outcome of a particular case. The system we rely on leaves decision in the hands of the judge and jury, recognizing that if defense counsel tries to be both advocate and decision maker by concerning himself with guilt or innocence, he will prove ineffective in both roles.

Can a lawyer decline appointment to represent a criminal defendant because of his distaste for the case? Lindsey would like to decline, but feels obligated to accept the appointment. A lawyer should not decline simply because the defense will be repugnant or personally costly, but only if, for some reason, he is incapable of giving good representation.

What should a criminal defense lawyer do if his client insists on testifying and committing perjury? The rule varies, but the present rule in Utah, where the story takes place, seems to be that a lawyer is not *obliged* to do any thing, though he is *free* to tell the court what is happening at the point his client begins to commit perjury. Traditionally the lawyer avoids becom-

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ing personally involved in the perjury by letting his client testify without the guidance of counsel's questions and by avoiding any reliance on the client's perjured testimony when he argues the case to the jury. In *The Trial* Lindsey tells his client, "If you try lying to the court. . . I'll stop the proceedings, demand to be excused from the case, and leave you high and dry." While Lindsey could properly ask the court, in private, to relieve him of representing the client, in all likelihood the court would require him to continue, rather than have the trial disrupted.

A new set of ethical rules proposed by the American Bar Association is under consideration by several states and the most debated provision deals with this issue. In the version likely to be adopted very soon in Utah a lawyer would *not be permitted* to reveal the client's intent to commit a crime unless it involves "substantial bodily harm," and perjury obviously does not. However, the lawyer's refusal to present or use the perjured testimony would signal to anyone knowledgeable what is afoot. In a 1986 decision the United States Supreme Court concluded that a defendant is not deprived of his constitutional right to counsel if his attorney threatens to withdraw if the client insists on perjuring himself. The justices suggested that the attorney had acted in the only proper way.

May a lawyer successively represent co-defendants? Lindsey accepts representation of his client after having previously, though briefly, represented his co-defendant. Under the circumstances he clearly should not do so because of their potentially conflicting interests. When he raises the issue with the judge, and the judge wrongly brushes his concern aside, Lindsey goes ahead without protest.

Must or may a defense attorney who knows the whereabouts of a murder weapon give that information to the police or prosecutor before the trial? The answer is no. So long as the lawyer has not in some way interfered with the ability of police to find the weapon, he must not tell the police where it is. Lindsey barely resists the temptation to notify the police where the murderer hid the gun. After the trial is over Lindsey does disclose the gun's whereabouts to the police, to prevent its being found by children who might hurt themselves, and that would be proper, unless the weapon when found might lead to another charge against the client, such as illegal possession of a firearm or commission of a different murder.

The story poses interesting non-ethical questions, too. Can the court properly order police and others who have knowledge of a crime not to talk about it until trial, so as to avoid prejudicial pre-trial publicity? The judge in *The Trial* issues such a "gag order." Even if a court can control the acts of lawyers, as officers of the court, it is doubtful that the court can control prospective witnesses. In 1984 the Utah Supreme Court held that a judge can prevent newspapers and television stations from reporting *during* the trial a defendant's alleged connection with the Mafia. But the court seemed to reject such an order regulating pre-trial publicity, saying that the problem can be dealt with by excusing jurors who are aware of the publicity.

Can reporters be excluded from a hearing on the suppression of evidence, as they are in the book? The United States Supreme Court said yes, in order to avoid publicity about evidence that has been suppressed, but that seems inconsistent with the Utah decision.

The story illustrates accurately that a prosecutor often discloses more information about his case than he is required to, that improper questioning of witnesses frequently goes by without objection, that the exclusionary rule does not apply to a prosecution for perjury which was committed during a suppression hearing, and that the parole board in deciding when to release a prisoner sometimes considers crimes for which the prisoner was not convicted.

On matters of law there are a number of bothersome minor flaws. Sometimes the lawyer-bishop protagonist acknowledges his mistakes; when he does not, it is natural to suppose that the mistakes are the author's: for example, that the state pays for judges' office expenses and for indigent defense, that first cousins once removed cannot be married in Utah, that a lawyer can earn substantial money from the county representing poor people in civil cases, that one must take formal exception to an adverse ruling, that the defense argues first at the close of the case, that a nurse who assists in surgery has no legal liability to a patient for failing to report clear surgical malpractice, that a defendant has the burden of persuading the jury of his insanity defense. As to the last, in 1982, when the fictional trial occurs, the state had to persuade the jury beyond a reasonable doubt that the defendant was sane. Incidentally, in 1983, after the attempt on President Reagan's life, the Utah legislature, along with other states, largely abolished the traditional insanity defense.

In contrast, the law connected with the murder trial itself, which is the heart of the book, is more accurate.

There are a few factual problems. The most troubling one is that the prosecutor, even though he is upset that the defendant is about to avoid a murder conviction on a "technicality," does not even think about charging the defendant with several serious crimes that he committed in an escape attempt.

One of the book's main themes is the effect of "the exclusionary rule," under which evidence obtained in violation of a defendant's constitutional rights may frequently not be used against him at trial. Though the book pays lip service to the rule's function in deterring police misconduct and thus protecting citizens indirectly from police oppression, there is much greater stress on the rule's allowing guilty persons to go free on technicalities. The book illustrates powerfully the rule's capacity to set a brutal murderer free, but the author does not adequately acknowledge that such a result is a real rarity.

How effectively the rule deters police misconduct continues to stir heated debate and the author weighs things against the rule. He cites a 1970 article by Dallin Oaks as proposing an alternative to the rule, but fails to note that Oaks' study concluded:"Despite these weaknesses and disadvantages, the exclusionary rule should not be abolished until there is something to take its place and perform its two essential functions [of deterring police misconduct and providing occasions for the courts to define boundaries of the important constitutional guarantee against unreasonable searches and seizures.]" (Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. 665, 717-719, 756-757.) His views carry weight with Mormons because of his prominence as legal scholar, president of BYU, state supreme court justice, and (since publication of this book) an apostle. The reader may well not realize from the book the position that Oaks urged and that his position is essentially the law in this country. The present Supreme Court continues to enforce the exclusionary rule because no effective alternative is in place. Those who criticize the exclusionary rule, should go on to make the point that people should work for a creation of an effective alternative control of police misconduct. Any effective alternative will cost money and the fact is that legislatures simply have not been willing to commit substantial public monies to such purposes. Consequently, the rule is likely to continue.

Utah is one of the few states which has tried by statute to limit the exclusionary rule, recently enacting a rule that evidence produced by an illegal search should not be excluded when the violation of rights was not substantial. It remains to be seen how the statute will be interpreted and applied, and whether it will be upheld as constitutional. It has been relied on

in the trial courts only a few times so far and has not been tested in an appellate court. The legislature also established a right to recover money from a policeman's employing agency for any damages caused by illegal searches (with recovery of at least $100, plus attorney fees, for even a nominal violation) if the violation is negligent. But if the violation is grossly negligent or worse, only the officer is liable, not the agency that employs him. Since officers rarely have much money, the new law adds little new in the way of remedies for police abuses.

Despite *The Trial's* weaknesses, it deserves attention. While telling an engaging story, the author challenges us with some important questions about fair procedures and the lawyer's role in the criminal justice system. At the same time, in a community largely oriented to law-and-order, even a novel should give expression to both sides.