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How to Try a Murder: A Handbook for Armchair Lawyers. By Michael Kurland. New York, New York: Macmillan: A Simon & Schuster Macmillan Co. 1997. Pp. 202. Paperback.

Reviewed by Cristina Yu[*]

How to Try a Murder is an enjoyable, well-written book that should appeal to anyone interested in the American justice system. Written in layman's terms, the book is designed, as the title suggests, to be "a handbook for armchair lawyers," but practicing attorneys and law students should find it equally appealing.

The book centers around a hypothetical murder case. To summarize, the defendant, Mr. Lane, is accused of murdering his estranged wife and her new love interest, Mr. Johansohn. Each chapter deals with a major procedure in the prosecution of the case, from the investigation through the arrest, ending with the trial. Along the way the author provides the reader with fascinating tidbits of ancient legal lore, with documents and examples from recent trials, such as the Timothy McVeigh case (the Oklahoma City Bomber) and Theodore Kaczynski case (the Unabomber).

In Chapter One, the hypothetical crime is discovered and investigated. The two victims, Mr. Johansohn and Mrs. Lane, were found murdered in Mr. Johansohn's jewelry store. Since Mr. Lane recently separated from Mrs. Lane, he becomes an immediate suspect. He is soon arrested, and his home searched. The author does a good job of describing the significance of the police investigation:

> The first 36 to 48 hours are the most important in a mur-

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> der case, not only because the trail rapidly grows cold [but] because the person the detectives focus on in those first two days is usually the person against whom they are going to develop a case. And if it is the wrong man, and unless he can afford a top attorney capable of spotting and pointing out [any] mistakes, he is just as likely to go to prison or be executed as the right man.[1]

Kurland also demonstrates how police can destroy evidence of innocence, as well as guilt, when a crime scene is handled improperly. For example, Kurland cites a commentator on the Lindbergh baby kidnapping who described this investigation scene as "a senseless cataract of gorgeously uniformed state troopers . . . [that systematically covered] with impenetrable layers of stupidity every fingerprint, footprint, dust trace on the estate" that created doubt, even to this day, as to whether the right man was convicted of the crime.[2] Kurland also gives examples where a poor investigation has hurt the prosecution's case, mentioning the O.J. Simpson case, where poor police procedures introduced reasonable doubt into a case that might have otherwise led to conviction.

Chapter One also includes an interesting history on coroners. Every chapter contains some historical information about the legal system. In other chapters the author describes the origins of the jury system, expert witnesses, witness oaths, and the insanity defense.

The rest of the chapters are structured similarly: the hypothetical murder case continues, the procedures are explained, real world examples are given, and historical anecdotes are related. Chapter Two covers arrest and indictment, and touches upon prosecutor and defense attorney ethics. Chapter Three, "Trial Preparation," deals mainly with the definitions of various types of homicide. Chapter Four covers discovery—the process where each side gathers information about the case. This chapter also contains a good discussion of the insanity defense. Chapter Five, "The Trial Begins," contains a history of the jury system and discusses jury selection. In Chapter Six, "The Prosecution," the author covers opening statements, objections and cross examination. Chapter Seven, "The Defense," discusses expert witnesses and the

1. Michael Kurland, HOW TO TRY A MURDER: A HANDBOOK FOR ARMCHAIR LAWYERS 11-12 (1997) [hereinafter HOW TO TRY A MURDER].

2. HOW TO TRY A MURDER, *supra* note 1, at 12.

fallibility of eyewitness testimony. The final chapter, "The Verdict," contains a lengthy discussion of capital punishment.

While the book is enjoyable, it has its shortcomings. Unfortunately, the author does not detail what the police actually do when they investigate a crime, which would have been interesting since many recent advances in forensic science have emerged. For example, DNA evidence has exonerated innocent persons convicted of decades-old crimes, and has led to convictions as well. Lasers and special chemicals can now be used to develop fingerprints that in the past could not have been found. Gas chromatography, a method of identifying unknown substances, is so sensitive that it can identify a sample as small as one billionth of a gram.[3]

Another oversight is that the author does not address the type of proof needed before the government can arrest a suspect or search his home. The Fourth Amendment of the U.S. Constitution states the following:

> The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon *probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[4]

To give the reader a brief historical background, before the American Revolution, "writs of assistance" or general warrants, were commonly used in the Colonies. These allowed the police of those days to enter anyone's property, at any time and without warning, to search for anything that might be illegal, particularly smuggled goods. It was commonplace for officers, without evidence or suspicion, to burst into people's homes and businesses, and tear through them in search of contraband. In response to these abuses, the Fourth Amendment was added to the Constitution. Probable

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3. For readers who are interested in the subject, *see* David Fisher, HARD EVIDENCE (1995). *Hard Evidence* contains hundreds of mini-detective stories that reveal how the FBI Crime Lab investigates crimes. For an excellent book, about forensic anthropology, *see* William R. Maples & Michael Browning, DEAD MEN DO TELL TALES (1994). In *Dead Men Do Tell Tales,* University scientist Dr. Maples helps police by examining remains to determine identification, time and manner of death. The gruesomeness of the accounts in this book are sharply contrasted by the doctor's courtly and poetic prose. *See also* Richard Saferstein, CRIMINALISTICS: AN INTRODUCTION TO FORENSIC SCIENCE (1995).

4. U.S. CONST. amend. IV.

cause is the central premise of the Amendment and can generally be defined as trustworthy firsthand information that would lead a reasonably cautious person to believe that a crime has been committed where a person is to be seized or that the property to be searched for is at the place designated. The right to be secure in one's home is so important that even with a search warrant, police are not allowed to rummage through everything in a person's home; they are only authorized to search for the *particular* items listed in the search warrant. Yet, illegal drugs and documents are often listed in search warrants. Since these types of contraband items can be very small and easy to hide in almost any part of a suspect's home police can justify searching almost everywhere. It would have been interesting if the author had included this background to address whether this type of search has, in effect, revived the "general warrant" of Colonial times.

Also absent from the discussion is the Exclusionary Rule, which is closely tied to the Fourth Amendment. Since police officers rarely are charged with burglary for illegally searching a home or detaining someone, the Exclusionary Rule developed in an attempt to safeguard peoples' Fourth Amendment rights. Under this rule, evidence obtained as the result of an illegal search or arrest generally cannot be used against the person whose rights were violated. This rule has met with a lot of criticism. On one hand, it discourages only the honest officer who wants the evidence to lead to conviction; corrupt officers who merely want to harass are not deterred. Similarly, the rule does nothing to protect the truly innocent citizen who will not be charged with any crime, and, therefore, does not need evidence against him suppressed. On the other hand, the public tends to look at the rule as a technicality that allows the guilty to escape punishment. It would have been appropriate for the author to address this issue.

Although the author does not proselytize any point of view, some themes do emerge. Every criminal defense lawyer is asked at some point, "How can you defend someone you know is guilty?" However, even when a client admits guilt, one cannot be sure he is not lying to protect someone else. This often happens because the client cares for the real criminal or, more often, because he fears him. Many people who understand and believe in our criminal justice system

believe that it is not up to criminal defense attorneys to decide whether a client is guilty or not. They feel that it is up to the jury to decide innocence and guilt, and that our justice system will not work if lawyers appoint themselves judge, jury and executioner. That is why the law presumes criminal defendants innocent. The author does not share this view, as he shows with a historical anecdote:

> It may be worth noting, in view of the insistence of many lawyers today that it is their ethical duty to defend a client no matter how heinous they may personally believe his actions to have been, that Lincoln did not share this view. An early Lincoln biographer, Frederick Trevor Hill, tells that one time when Lincoln discovered that a client was guilty of fraud he walked out of the courtroom and refused to continue the case. The judge sent a messenger asking him to return. "Tell the judge that my hands are dirty," Lincoln told the emissary, "and I have gone to wash them."[5]

It is common to criticize defense lawyers who refuse to co-opt the prosecutor's role. However, in this country we have an *adversarial* system, where two sides, the prosecution and the defense, vigorously present facts and arguments that support their version of events. An impartial jury of citizens then decides which side is more persuasive. By contrast, an inquisitorial system is one where professional judges listen to evidence, ask questions, and then determine guilt or innocence. Our system is established with the expectation that each attorney will be a vigorous, partisan advocate for his or her side. This is the duty of a defense attorney.

Kurland also missed the opportunity to discuss the disparities between the quality of representation rich people versus poor people receive in this country. He touches upon this subject obliquely by stating that "[a] talented defense attorney with an experienced staff and some capable private investigators - and the financial resources of a rich suspect to draw on - can easily *equal* the amount of investigation and preparation that the District Attorney can devote to even the most important case."[6] It is disturbing that in our adversarial system, only the rare wealthy defendant can afford to *equal* the prosecution's resources, and yet the author's obser-

5. HOW TO TRY A MURDER, *supra* note 1, at 116.
6. HOW TO TRY A MURDER, *supra* note 1, at 16 (emphasis added).

vation can almost be construed as a criticism of the wealthy defendant who hires excellent lawyers and investigators. After the acquittal of O.J. Simpson, many commentators, believing him guilty, angrily claimed that he "got off" because he was rich. Why is there no nationwide outrage when an innocent person who cannot afford a "dream team" is *wrongly* convicted?[7] How often does the quality of representation really affect the verdict? These would have been excellent questions for Kurland to explore.

Another theme highlighted throughout the entire book is the author's opposition to the death penalty. Chapter One opens with a quotation illustrating the author's view: "Many that live deserve death. Some that die deserve life. Can you give it to them? Then do not be too eager to deal out death in judgment. For even the very wise cannot see all ends."[8] The final chapter devotes several pages to explaining how and when other countries abolished the death penalty, and how the U.S. is the only western nation with a death penalty. The author's anti-death penalty views would have been better served if he had instead included a discussion of cases where innocent people were convicted of death penalty offenses. Most Americans feel that the state should have the power to execute people who commit certain heinous crimes, yet many would probably rethink their support of capital punishment if they knew that a small, but significant, number of people sentenced to death are innocent. One can support capital punishment in theory, but oppose it in practice due to its imperfect administration. Kurland might have won over even more converts if he mentioned that, including the cost of appeals, it is usually far more expensive for the state to execute a criminal than it is to imprison him for life.

The author's explanations of law are generally adequate for a lay audience, but there are errors. His definition of the Best Evidence rule is incorrect because the rule does not require that the "best" evidence be used to prove a fact. The Best Evidence rule pertains only to documents, and it merely requires that where the contents of a document are to be proved, that the document itself be used if it is available. He

7. For readers interested in the topic, *see* Michael L. Radelet et al., IN SPITE OF INNOCENCE (1992) (containing chronicles of 400 such cases).

8. HOW TO TRY A MURDER, *supra* note 1, at 1 (quoting from J.R.R. Tolkien's *The Fellowship of the Ring*).

also gives a poor example to illustrate the concept of *malum prohibitum.* A *malum prohibitum* crime is not wrong in and of itself, but is only wrong because it is prohibited.[9] By contrast a *malum in se* crime is wrong in and of itself;[10] all crimes are either *malum prohibitum* or *malum in se.* The author's example of smoking in a non-smoking area as a *malum prohibitum* crime is confusing because many believe that second hand smokes harms others. A better example would be speeding as a *malum prohibitum* crime, and hit and run as a *malum in se* crime.

The author aptly defines the various degrees of murder and manslaughter, as highlighted below. In general, "first degree murder" is an unlawful killing which is willful, deliberate and premeditated. "Willful" means that there was intent; "deliberate" means the killer consciously thought about the decision to kill, and "premeditated" means that the intent to kill was formed before the killing happened. All these requirements can be fulfilled almost instantaneously.

"Second degree murder" requires intent, but not deliberation or premeditation. Intent can be the actual intention to kill, or it can be in the form of implied malice where the killer was so recklessly indifferent to the value of human life that his state of mind is equivalent to the actual intent to kill. For example, sometimes drunk drivers who kill are convicted of second degree murder; by drinking and driving these people show such a reckless disregard for their victims that it is tantamount to an intention to kill.

"Voluntary manslaughter" is an intentional killing under circumstances that mitigate the killing, but do not justify it. The typical example is where a person kills another in the "heat of passion," such as rage, jealousy, fear or desperation.

Finally, "involuntary manslaughter" is a killing that results from the accused's gross negligence or recklessness. The classic example is where a death occurred because of the negligent operation of an automobile.

Despite Kurland's proper definitions of the above terms, he confuses the reader by using poor illustrations of these crimes. For instance, he states that throwing bricks off an overpass would be manslaughter in the second degree if it results in a death; however, this could also exemplify murder in

9. BLACK'S LAW DICTIONARY 960 (6th ed. 1990).
10. BLACK'S LAW DICTIONARY 959 (6th ed. 1990).

the second degree if it involves a reckless indifference to the value of human life. Kurland also gives a misleading example by stating that if "Rosencrantz taunts Guildenstern about his funny name until Guildenstern, in a rage, stabs and kills Rosencrantz, that can be" voluntary manslaughter. The "heat of passion" that reduces murder to voluntary manslaughter must have been the result of such strong provocation that it would have caused a reasonable normal person to lose self control. However, this is not what is described in the Rosencrantz/Guildenstern example.

In contrast to these poor examples, later in this chapter the author does a beautiful job of discussing cross examination. Moreover, he does the reader a great service by discussing the fallibility of eyewitness testimony. He introduces the reader to the excellent work of Dr. Elizabeth Loftus, who has made a special study of the ways in which honest eyewitnesses can misremember events. He quotes her as saying,

> [m]emories don't just fade, as the old saying would have us believe; they also grow. What fades is the initial perception, the actual experience of the events. But every time we recall an event, we must reconstruct the memory, and with each recollection the memory may be changed-colored by succeeding events, other people's recollections or suggestions, increased understanding or a new context.[11]

In sum, *How to Try a Murder* is an interesting book and covers a very broad area. However, some of the legal definitions are wrong or confusing. Major areas, such as forensic science and Fourth Amendment protections, are not covered. Furthermore, the author appears to be a bit anti-defense in places, and a little less than neutral on the subject of capital punishment. This book is worthwhile reading; but, considering the shortcomings, it will hopefully not be the only book one reads in order to learn about the criminal justice system.

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11. HOW TO TRY A MURDER, *supra* note 1, at 122. For readers interested in this subject, *see* Elizabeth Loftus, WITNESS FOR THE DEFENSE (1991). Although Dr. Loftus is a consummate scientist, the book reads more like a series of detective stories where she recounts the stories of several innocent people whose lives were turned upside down after being identified by honest, but mistaken, eyewitnesses.