

Lascher at Large
By Edward L. Lascher
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This outing will be devoted to Lascher's Wednesday Review of Literature for Languishing Lawyers. It wasn't particularly my idea; this just seems a month when writing by, about, or of interest to, lawyers seems the rage. That's kinda odd, when you think about it, because this is more the time for coffee-table and gift books than stuff about lawyers.

What's Leading Whom How?

The first item is of the type known (far and wide, at least on our block) as a blind review. That is to say, I'm touting a work I've never read. (I know that happens in some other publications, too, if not quite so blatantly, but hang on a minute.) Matter of fact, I don't even know its name, but I know about it and that's enough, under the special facts of the particular case (as we lawyers rarely say).

I learned about the book by virtue of a fact of which I am at least ornately proud: I frequently run into Bernie Witkin at conventions, seminars, panels, dialogues, monologues (you'd better believe!) and such. That's a distinction I share with only 72,673 members of the California Bar. Every time I've encountered him the last three years, Bernie's bent my ear – and there is nobody short of an otologist who does that more effectively – over his magnum opus: the first book that tells judges how to judge! Allegedly, all the material comes from their Honors themselves, with only a little help and organization from the Bard of Berkeley. Some help! Some organization! And thank goodness for it.

Last time I tweaked him, Witkin bridled. Seems it already has been released – but only to judges. In plain brown wrappers, I presume. Don't despair, though. I understand C.E.B., of whom you may have heard, is soon to place the masterpiece on the market for us mortals.

Mandatory Injunction

Buy it! Even though you don't know what's in it (any more than I do), buy it! Anything that goes out to all judges informing them how to ply their trade must be on every lawyer's desk. Hell, we all should commit it to memory, and maybe have it put on tape and played under the pillow at night. It would be malpractice not to.

All that I aver to without reference to the book's content. The

content doesn't matter. The essential fact is that it is the content. If the Judi Council or CJER or The Witkin Foundation or whoever is behind this bibliographic bombshell tells the judiciary that the secret of effective judging can be found in "Barefoot Boy With Cheek", "Mary, John and Spot Visit the Zoo", or pages 43 through 97 of the Keokuk phonebook, then the reasonably prudent lawyer under the circumstances is going to master the contents of precisely those tomes.

By the way, if I'd thought of putting out this first and tied up the rights, you wouldn't find me selling it for 50 bucks or whatever, postpaid. You'd have to send a liveried messenger with certified (big) check and a donation of Roederer Cristal to get hold of a copy. And you wouldn't see Ed writing any briefs or going to silly old courts any more, either. I'd be rich as Art Bell. Ah, why don't I ever think of things like that?

Judicial Review

On the other hand, there is a book I did buy and read. (You and I seem to be the only Californians who didn't get to sneak a pre-publication peek at it, by the way.) Having thus advised myself fully in the premises, you are hereby ORDERED, DECREED AND DIRECTED, to run, not walk, forthwith, to your most proximate bookseller (who needs the business this trickle-down year) there and then to procure a copy of "Judging Judges: The Investigation of Rose Bird and the California Supreme Court" by Professor Preble Stolz of Boalt, priced (the book, not the prof) at \$19.95.

This, too, is required reading. Indeed, it's a preventative for citizen malpractice. I think it would be impossible to represent oneself as being a reasonably informed and responsible member of the legal profession without digesting – and ruminating over – this treatise.

There has been a lot of pro and con about the book, which I happen to think is a lot better done and more important than the over-touted "Brethren" of a couple years back, but most of the talk concerns Stolz's account of The Great Investigation itself, which seems perhaps the book's least important part, except as background for and illumination of the conclusions he reaches.

Backtalking the Foreword

A unique feature is the foreword by the justly renowned Anthony Lewis (of the New York Times and some of the best writing about the judicial system in our time), who takes both umbrage and issue with Professor Stolz. This greatly disappointed me, since it amounts to airy strident allegations that the L.A. Times failed to live up to Lewis' standards of journalism when it aired the charge that the Supremes delayed opinions

for political purposes, and consequently that Stolz should have excoriated the reporters and acquitted all the justices, whose behavior Lewis seems to regard as unarguably beyond cavil. The first point seems beside the point – the book concerns lessons to be drawn regarding the judicial branch, leaving analysis of the fourth estate’s performance to another commentator – while the latter conclusion appears both non sequitur and unsustainable by the record.

Moreover, I am saddened at seeing a serious student of the legal system such as Lewis adopting the “If you can’t say nice things, don’t say anything” approach. Not that the record of the Commission’s proceedings doesn’t establish beyond peradventure that precisely such an attitude was prevalent at the time of the events reviewed in the book. Nor, I fear, that it isn’t endemic to this day.

However, I don’t think such a posture is any favor to the institution. I suspect that Professor Stolz – who is probably deemed the incarnation of evil by a number of the players in the drama – is actually a far greater friend of the judiciary than are the platoons of toadies and see-no-evilers which seem to comprise the court of too many courts.

His focus is essentially on the inherent anomaly of the American governmental structure by which the judicial branch, unaccountable to the majority, may nevertheless override the majority’s will, with the attendant, brooding danger (which has cropped up sometimes) that the majority may not always go along with the gag. Seeing the 1978-1979 confrontation as a skirmish in that 200-year cold war, Stolz urges justices to recognize and act upon the reality and consequences of that built-in tension. A major premise is that an independent judiciary is under a primary duty to preserve its own existence.

“Recognizing that judicial power is always threatened by some exercise of majoritarian power is debilitating only if the justices believe they have mandate to govern by virtue of their office. Phrased differently, trimming is a problem only if there is a program to be diluted. If the court has no program beyond fair process and if its fundamental principle is to do its best to understand, articulate and promote the policy preferences of others, then judicial power should endure . . . Ultimately the issue is whether the California justices are willing to accept this limited vision of their function.”

In getting to that clarion conclusion, the good prof sounds like he’s been consulting some base sources – maybe even as lowbrow as this column. (In point of fact, he expressly confesses the sin of reading these offerings, described them as “amusing if opinionated”. I’ll settle for that.) For instance, he observes that “if Supreme Court justices persistently talk

about their colleagues as if they were unprincipled fools, the message eventually will trickle down the judicial hierarchy”. At another juncture, he sounds like he’s also been eavesdropping at meetings of the Appellate Academy when he talks about the fact the Supreme Court apparently attempts to pay as little attention as possible to the briefs and arguments of counsel – an offense in which that court is far from alone.

“There are several major consequences of persistent disconnection between counsel’s arguments and judicial opinions. Once the court stops thinking of counsel as a primary audience to be addressed, it feels less and less obliged to respond to all the arguments presented. Perhaps the easiest way to reach a conclusion in an opinion is not to discuss good arguments [that stand] in the way of the desired result . . . Over time this kind of judicial behavior will have an impact on the bar. If the court refuses to deal with good arguments, it becomes less important to make them.”

Food for Nocturnal Musing

If I were a justice, I would sit and think a long, long, long time about these and other lessons which Stolz suggests; they might interfere with the quality of my sleep. I am by no means convinced he is right in all the meaning-drawing which goes into his conclusions, but I sure think there’s enough possibility he is to make it reckless for jurists or administrators or the like to knee-jerk themselves into rejection and opposition without prior soul searching. Reflective, not reflexive, response is clearly needed.

As the real parties most in interest, we of the bar should also be doing plenty of cogitating about Stolz’ views – whether the moguls want to (or want us to) or not. That’s why you are hereby enjoined to read it. There’s a bonus (besides the fact it is atypically easy and fast reading): I don’t think I have anywhere encountered as succinct, readable and informative a capsule history of the California judicial branch over the last 40 years as Stolz sets forth.

Clouted

Finally, there’s a ten-page article in the December issue of California Magazine (nee New West) by Jonathan Kirsch, a conspicuously astute observer of our state’s legal scene, entitled “Clout!” It deals with “California’s most powerful lawyers – and how they run your life”. There is the obligatory ten-most-influential list which (if you can bring yourself to believe this) starts with Seth Hufstedler and includes Warren Christopher and Bill Smith, but from there on isn’t nearly as predictable as most of them. Who is Bill Smith? Why just plain, old, jolly William French – as those closest call him. Come to think of it, I doubt if anybody “calls” him

anything; I suspect you have to address him. But I digress.)

It also contains a couple of interesting sidebars, including a peek into what life is like behind the green curtain (not emerald like the Wizard, more like Bureau of Printing and Engraving green) at O'Melveny's and PM&S. Who says there's no difference between the biggies? O'M sends summer clerks it's trying to romance on free trips to Disneyland, whereas Pillsbury lays on river rafting forays.

I know that one of these things comes out every five months, but this one's better than most. I commend it to your attention. Oddly enough, you may even find, with me, that you're a lot happier with your own lot after reading about some of that lot.