

BOOKS RECEIVED

Cruel and Unusual: The Supreme Court and Capital Punishment.

MICHAEL MELTSNER. New York: Random House, 1973. Pp. xii, 338. \$8.95.

In the early 1960's, several hundred prisoners populated death rows throughout the country. An average of slightly more than one per week was executed, approximately half of these in the South. And especially in the South, racism was all too apparent: the prisoners were black, their victims white. Against this background, a group of young attorneys from the NAACP Legal Defense and Educational Fund, Inc. (LDF) decided to work to bring about the abolition of capital punishment. Having gained the bulk of their professional experience from the civil rights movement in the South during the fifties and sixties, these lawyers applied that experience to effect a different institutional reform—they would themselves seek out a case and thereafter find a litigant to bring the suit. From 1963 to 1972, Mr. Meltsner (now a Columbia Law School professor) and his colleagues intervened in the cases of over 300 prisoners who had been sentenced to death.

In a reportorial style reminiscent of that of Anthony Lewis' *Gideon's Trumpet*, *Cruel and Unusual* traces the movement from its inception, when the LDF's strategy was to attack capital punishment solely on racial grounds, to the time when it decided to represent every inmate on death row who desired assistance. Believing that the only way to achieve abolition was to create some kind of national moratorium on capital punishment, LDF lawyers, most notably Anthony Amsterdam, raised all of their anti-execution arguments in each case.

At first, because the Supreme Court was unwilling to deal with the death penalty, there was little hope of success in a constitutional attack on capital punishment. If the Court did grant a new trial, it was only because that grant could be based on some other legal issue. Still, by the time LDF lawyers had decided to mount a serious challenge to the death penalty, the use of capital punishment was already on the wane, and the power of the states to impose it had been eroded. Mr. Meltsner's book examines both these developments and a line of cases, some of them setbacks, in which LDF attorneys appeared, either as counsel or *amicus curiae*.

He also demonstrates the gradual change in the thinking of the Court. The change culminated in *Furman v. Georgia*, where five of the nine justices held that the death penalty, applied as infrequently, illogically, and discriminatorily as it was, constituted cruel and unusual punishment.

Although written primarily for the layman, *Cruel and Unusual* will interest the practitioner both in its analysis of the capital punishment cases of the 1960's and its survey of the traditional attitude toward the death penalty as well as its present status. Also instructive is the discussion of how the change from the Warren Court to the Burger Court has affected and will affect the fate of the death penalty.

Appropriately, the conclusion examines in depth the *Furman* decision, the reaction of governmental and law-enforcement authorities to it, and its likely impact on the imposition of the death penalty and future Court decisions considering it.

Judge Learned Hand and the Role of the Federal Judiciary. KATHRYN GRIFFITH. Norman: University of Oklahoma Press, 1973. Pp. xi, 251. \$8.95.

This interesting biography is an interpretation by a political scientist of the philosophical beliefs of a great jurist, a man often referred to as the tenth member of the United States Supreme Court. Although the emphasis of the book is on Judge Hand's philosophy with regard to the role of the judge and the function of the federal courts, a brief but fascinating picture of the man and his times is also presented. Learned Hand is shown as a superb legal craftsman, striving above all for intellectual detachment.

The author sees Learned Hand as greatly influenced by the pragmatism of William James, a former mentor of the Judge. Learned Hand's writings are also viewed as being permeated with an outgrowth of Nietzsche's philosophy: the concept that man is "the creator of all values and all law." Thus the great legal scholar is viewed as addressing himself to the question of whether the Puritan Ethic can adequately be replaced by the tolerance of men for differing human values. Learned Hand's "philosophy of relative human values [was] nourished by tolerance, skepticism, and intellectual detachment from the burning controversies of the day."

As to the role of the federal judiciary, Learned Hand believed that the scope of judicial review should be extremely limited. He based this view on two factors. One factor was the lack of specific guidelines concerning the Constitutional authority for judicial review of Congressional decisions beyond those found in *Marbury v. Madison* or Hamilton's, *The Federalist*, No. 78. This indicates that Learned Hand believed the Supreme Court had arrogated powers properly belonging to Congress. The second factor was a pragmatic political philosophy which held that a free society had the greatest capacity for finding solutions to its problems in the absence of judicial intervention.

The author shows with considerable clarity the bases of the extremely non-dogmatic philosophy of a judge whose involvement in his profession caused his influence to be felt far beyond the Second Circuit. A deeper understanding of the bases of Judge Hand's philosophy of judicial restraint will serve today's reader well by providing a background against which activist tendencies of the modern Supreme Court will be clearly highlighted.

Real Estate Law. ROBERT KRATOVIL (6th ed.). Englewood Cliffs: Prentice-Hall, Inc., 1974. Pp. xi, 479. \$18.00.

The first edition of Robert Kratovil's handbook on real estate law appeared in 1946. That it has gone through five editions since then attests to the fact that it is addressed not only to lawyers, but also to brokers, real estate salesmen, abstracters, and college students taking their first course in real property. At least part of the book's appeal stems from the author's use of non-legal terms wherever possible and his attempt to treat every real estate problem that may arise in practical terms. Also helpful to lawyer and non-lawyer alike are the numerous examples illustrating both the application of the more important real property concepts and the jurisdictions that take exception to these general rules.

Additions to the contract and landlord-tenant chapters stress the emerging rights of tenants and consumers and also the new role that implied warranties now play in the real estate transaction. The author pays particular attention to the directions that courts are taking and are likely to take, even though some of the trends discussed have not as yet won general acceptance.

Chapters that have been added to this edition concentrate pri-

marily on land use and provide a comprehensive survey and history of building restrictions and ordinances and how courts have managed to enforce them. In those sections that deal with the new forms of ownership and development that are currently gaining favor—i.e., condominiums, cooperatives, town houses, and industrial parks—the author offers suggestions concerning sale and development to owners and sellers alike.

Although this volume purports to describe and define every aspect of the real estate transaction, it does not attempt to replace the better-known, multi-volume treatises on real property. Its references and case citations are not nearly exhaustive, and the practicing attorney will sometimes find the discussions much too basic. One quarrel which one who is engaged in legal research will have with the book is that law review articles and case citations are frequently without date or court of decision. In addition, some rather broad legal concepts are dismissed rather perfunctorily and not backed up with adequate authority. Despite these shortcomings, the attorney will find this a useful desk-top reference and should profit from the practical suggestions that are offered throughout.