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DEATH AND THE SUPREME COURT. Barrett Prettyman, Jr. – THE TRIAL OF MEDICAL MALPRACrICE CASES. David W. Louisell and Harold Williams. – QUEST FOR SURVIVAL. Julius Stone.

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Book Reviews

DEATH AND THE SUPREME COURT. Barrett Prettyman, Jr. New York: Harcourt, Brace & World, Inc. 1961. Pp. 311. $4.95.

A young Washington lawyer, Barrett Prettyman, has taken six capital cases in which the Supreme Court has become involved and has woven through and around those cases the searching question—why? Perhaps the question is unlawyerlike because of its broadness, but in its insistence it becomes a gadfly, forcing one to re-examine his opinion as to the value to society of the death penalty in the field of criminal justice. Barrett Prettyman is, unlike so many in our profession, a good writer, and in presenting his obviously well-chosen cases, he places the Supreme Court in perspective not only as the highest court with Constitutional objectives and limitations, but as a social and human institution as well. Lawyers have come in for a great deal of criticism in recent times for their inability to write clearly and concisely, a fault long recognized by the profession itself. In this book, Prettyman makes it crystal clear that the criticism is not to be applied to him, and I for one would hope that this is not a result only of his short stint as a journalist.

No matter what field of law an attorney finds himself in, there is no doubt that he will find this book readable and rewarding. Some of the pages are grim, for after all, death is grim, even in a world where life is sometimes said to be fast and cheap. The plight of the women in Selma, Alabama, was grim when confronted with reports and feeling the forays of a rapist who climbed in and out of bedrooms. The punishment of Willie Francis was grim when, after elaborate preparations, he was strapped in the electric chair, the current applied and, after a short period, he still lived. Prettyman dresses up the grimness when he turns fine phrases such as describing Selma, Alabama, as sitting "like a mudlark beside the Alabama River." (p. 5).

One wonders why he picked the particular six cases. The Alabama rapist, the District of Columbia arsonist, the Louisiana Negro who defied electricity, the Washington card player who pleaded self-defense, the Los Angeles law student who killed his mistress, and the Georgia Negro who was convicted for the murder of a storekeeper were not, after all, the most sensational cases reviewed by the Supreme Court in recent years. For whatever reason these cases were selected, they have stimulating effectiveness.

The cases themselves are not completely illustrative of one thing Prettyman sets out to show—the feelings of the Justices on the Court on the subject of death. This comes clear only with his perspective painted in broad strokes by the use of what seems as starkly real fiction and perceptive comments on the role of the Court. And

yet, reflecting on the book, one is reminded of Justice Jackson's comment in Morrisette v. United States[1] when he introduced his long opinion in a case involving defendant's taking a few pounds of rusty Government shell cases from a long-forgotten scrap pile with "this would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in Federal criminal law, for which reason we granted *certiorari*." Of course, the conclusion cannot be escaped that in a case before the Court where death may be waiting for the outcome, it, to use Prettyman's words, "receives more attention than any other class of cases coming before the Court" (p. 43). Then why, in a case such as Williams v. Oklahoma[2] where death was really the only issue, do we find the Justices voting 8 to 1 to affirm the conviction? In that case, defendant pleaded guilty during his trial for murder, and was sentenced to life imprisonment. Less than a month later he was charged with kidnaping, pleaded not guilty at arraignment, but several days before the trial was scheduled entered a plea of guilty. He was sentenced to death. Before the Supreme Court, Williams' attorney argued that the proceedings showed "the death sentence was determined and imposed in violation of the Due Process Clause of the Fourteenth Amendment." In the Court's opinion, written by Justice Whittaker, Williams is credited with three arguments:

> [F]irst, that the trial court violated the presentence procedure prescribed by Okla Stat, 1951, Tit 22, Sections 973, 974, and 975, in permitting the State's attorney to make an unsworn statement to the court of the details of the crime and of petitioner's criminal record, and that this also denied to him the rights of confrontation and cross-examination; second, that the court in taking the murder into consideration in imposing sentence on the kidnaping charge punished him a second time for the same offense; and, third, that in any event the sentence to death for kidnaping was 'disproportionate' to that crime and to the life sentence that had earlier been imposed upon him for the 'ultimate' crime of murder.[3]

Certainly the Court was face to face with death and due process. The Court, however, in agreement with the highest court of Oklahoma's construction of the State statutes, closed out one of the arguments with the words that "the construction must be accepted" by the Supreme Court. Hard and matter of fact it seems. It is interesting to consider, as found in the opinion, the discussion of the penalty of death to be administered for kidnaping after a sentence of life imprisonment for murder. From its language, the excerpt indicates the Justices had considered the petitioner's counsel's argument concerning death and determined that death was the victor here.

> Petitioner's further claim that the sentence to death for kidnaping was 'disproportionate' to that crime and to the life sentence that had earlier been imposed upon him for the 'ultimate' crime of murder proceeds on the basis that the sentence for kidnaping was excessive,that the murder was the greater offense, and that the sentence for the lesser crime of kidnaping ought not, in conscience and with due regard for fundamental fairness, exceed the life sentence that was imposed in another jurisdiction for the murder.

[1] 342 U.S. 246 (1952).
[2] 358 U.S. 576 (1959).
[3] Id. at 581.

> But the Due Process Clause of the Fourteenth Amendmend does not, nor does anything in the Constitution, require a State to fix or impose any particular penalty for any crime it may define or to impose the same or 'proportionate' sentences for separate and independent crimes. Therefore we cannot say that the sentence to death for the kidnaping, which was within the range of punishments authorized for that crime by the law of the State, denied to petitioner due process of law or any other constitutional right. Nor, in view of the fact that kidnaping and murder are separate and independent offenses in Oklahoma, is there any merit in petitioner's collateral claim that what he calls 'the lesser crime' of kidnaping 'merged' in what he calls 'the greater crime' of murder and that the sentence to life imprisonment for the murder was a bar to the imposition of any sentence for the kidnaping, or at least to any greater sentence than was imposed for the murder, and that imposition of a death sentence for the kidnaping deprived him of due process in violation of the Fourteenth Amendment.[4]

I point to this case only to suggest that there are cases which do not seem to fall into the pattern of concern by the Justices which is suggested by Mr. Prettyman. On the other hand, in the Williams case, we do not see the background which was gathered with what was without doubt a great deal of noteworthy effort by Mr. Prettyman. Without that background, questions arise in connection with the Williams case, such as why Williams did not choose to present any evidence in mitigation when he had a chance prior to sentencing.

In line with Justice Jackson's prologue in the Morrisette case, DEATH IN THE SUPREME COURT explores fundamental and far-reaching questions on the administration of criminal justice under the Federal Constitution. The cases are not minor, it is true, if only because of the death penalty, but by and large, they are most important to the prisoners whose lives are at stake. Aside from the question of guilt or innocence which Prettyman, directly and indirectly carefully points out is not the issue in his cases. The basic question which the Court faces is a legal one enmeshed in the social philosophies of our time; namely, under the procedures followed was the trial fair? In this connection, Prettyman lauds the lawyer, who is not satisfied with a stereotyped theory and who tries again if rebuffed and who presents the Court with arguments which allow a just decision. Most lawyers recognize that the road to a successful decision is strewn with the carcasses of theories which were tried and failed. The energy expended by some of the attorneys as described by Prettyman was truly an outstanding example to members of the bar, especially where, for an idea, an attorney risked popular disapproval and public disenchantment. Prettyman does not make the attorneys crusaders, and I would guess they were not, but their initiative was remarkable.

There are some interesting comparisons raised by the book which are provoking: for example, the attorneys in the Willie Francis case argued that a person who had been electrocuted in the electric chair once and survived and who argued that the same ordeal by the same prisoner was prohibited as cruel and unusual punishment. How different was the ordeal of Willie Francis as compared with that confronting Baxter Griffin, who had prepared for his last dinner and three years later "after two trips to the Supreme Court and four to the Court of Appeals," he pleaded guilty to a second degree murder and was sentenced, instead of to death, to five to twenty-one years in prison. In relating the case of John Russell Crooker, Jr. v. People of the

[4] Id. at 586-587.

State of California,[5] Prettyman includes a brief history of Crooker's life, written by Crooker for inclusion in this book. While somewhat tangential to the theme of the book, the life history is one of the important parts of it and serves deftly to explain in forty pages a case history of rehabilitation. Wisely it seems, Prettyman has chosen not to limit himself to trying to explain all the facets of the Supreme Court's dealing with capital cases and presents the reader with material to contemplate in forming a conclusion on the value of punishment, particularly capital punishment.

What was left out? After finishing the book, an easy answer would be more of the same. But then there would be the possibility of repetition, for Barrett Prettyman has written well the fascinating story of the Supreme Court coming to grips with the death penalty. His cases do not include citations, but of real value, he presents a truly informative, uncomplicated perspective of the place of the Court in our society and a most revealing look at the work of the Court and its individual Justices. Written primarily for the layman, Prettyman has, nevertheless, presented the lawyer with a gripping story of the law in action and, despite his description of the Court Building as a "white mausoleum," the book makes clear what most lawyers feel—that the Court is a vibrant institution where, from a muffled courtroom, a conscience is felt by the Nation.

MILAN C. MISKOVSKY*

THE TRIAL OF MEDICAL MALPRACTICE CASES. David W. Louisell and Harold Williams. Albany: Matthew Bender and Company. 1960. Pp. xviii, 1022. $30.

The personal injury business is bursting into specialization with more kinds of plaintiffs and cases than ever before. Claims are bigger, and more judgments are being recorded in six figures. Nor is this stepped up quantity and variety occurring only in the automobile business. There are more airplane cases in 1961, more products liability and doctor cases. In some way or other all lawyers, as well as many other persons in the community, are being affected today by the personal injury business, although there is reason to believe trial work has become so specialized that fewer lawyers are trying the bigger cases.

Automobile cases do not lend themselves to specialization within the area. Variety is too great and classifications are not functional. Lawyers do not develop special skills for upset cases or multiple collision cases. Nevertheless, there is a new kind of lawyer appearing in the little traffic court cases. Call him the traffic lawyer if you will. He is developing special skills, and in the atmosphere of the magistrate's forum, he can lose the big case lawyer at the starting gate. Perhaps there are no specialized areas in the property maintaining and policing cases, but the lawyer in a products liability case frequently shops for help. He acts almost like a solicitor with a brief for a barrister. It is a good guess that the personal injury lawyer who reads Louisell and Williams will

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[5] 357 U.S. 433 (1958).

want to become a specialist if he tries his second doctor case. It is another good guess that he will look for a barrister when he gets the first case.

The authors have produced an unusual treatise. It is a good book for the man who wants to survey the field and who may never try a malpractice case. It is a keen tool for the specialist. It is an idea book for lawmen who are interested in the administration of justice. Perhaps it is a good book for law students, but most of us who can read it profitably are so far from the student level, at least in time, that we can no longer detect a good crutch for a beginner.

Some of the best things in the volume are the tables. They are complete on statutes of limitation and on the immunity areas affecting charitable corporations and public agencies. The appendix with its breakdown of case citations into medical classifications is better than an index. Scattered throughout the book are vocabulary aids for the lawyer who would learn to translate medical men's terminology into everyday meanings for lawmen and jurors. One of the authors is a medical man as well as a lawyer. Perhaps the best vocabulary aid is the chapter on "The Fields of Medicine." The authors have included critical chapters on *res ipsa loquitur* and discovery procedures that cut across other areas of tort and help to give the reader perspective in relating the special problems in medical cases to analogous problems in other fields of personal injury law.

It is a pity the format is so forbidding because Louisell and Williams have reached far beyond the hornbook level with this treatise. It is not a cyclopedic text. Rather it is a well written monograph on a vital and expanding area of torts. It reflects the authors' understanding of the dynamics of the law. This book deserves a spot in every law library and every good trial lawyer's office.

VERNON X. MILLER*

QUEST FOR SURVIVAL. Julius Stone. Cambridge: Harvard University Press. 1961. Pp. 104. $2.75.

Quest for Survival is a useful book because it states in simple and comprehensible terms some basic facts of life about international law. Composed of talks given by Professor Stone for a lay audience over the national radio network of the Australian Broadcasting Commission a year ago, it is remarkable in its presentation of a sophisticated analysis of contemporary problems in simple language easily understood by the lay listener or reader.

Professor Stone is one of the world's most distinguished international law teachers. He is clearly annoyed by the nonsense urged by many men of good will but lesser intellect in support of a Rule of Law as the easy answer to our current international problems. He is not opposed to law nor cynical about the ideals which these people cherish. He simply urges that they pause to consider and make explicit what it is they are talking about and how their ideal is to be achieved under contemporary conditions. These lectures do much to clarify both aspects. With economy and wit he analyzes many of the more common platitudes and fallacies.

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"interposition peace forces." All this sounds sensible, refreshingly non-apocalyptic in its vision, and constructive.

Quest for Survival is useful in getting over to a lay public why there are no easy solutions to international problems and in pouring cold water on those who make grand proposals which presuppose the underlying problems have been solved. In my judgment it is extremely important to get public support for small steps forward down a long road to the international rule of law. One ought to be able to accept the truth that it is a long road and that there are no easy solutions for difficult problems. Most importantly, we should be able to hail progress even when we know it does not itself provide a complete answer to the basic quest for survival.

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