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Book Reviews

BOOKS REVIEWED

Abortion in a Changing World (2 vols.). Edited by Robert E. Hall, M.D. New York: Columbia University Press, 1970. Pp. 377; 220. $10.00 per volume.

These two volumes are the result of a conference conducted in November 1968 attended by eighty-seven participants from nineteen different countries. Although the conference was convened by the Association for the Study of Abortion, the preface to these two volumes claims that the purpose of the conference and of these two volumes was not to "promote abortion law reform."[1]

Although not every reader of these two volumes will agree with this disclaimer, all readers must admit that these documents contain an enormous amount of information. That information is gathered under the "ethical, medical, legal, social, and global aspects of abortion."[2] The first of these volumes contains some forty essays gathered from the material of the five plenary sessions of the conference; the second volume contains the record of ten separate panel sessions—recording a not infrequently disjointed dialogue concerning the vast implications of abortion.

It may be that no reader of a particular professional class, such as a moral theologian, jurist, or obstetrician, will be very satisfied with the material in these two volumes. The volumes present material which is somewhat familiar to anyone who has studied even a little in the area of abortion, morality and the law.

Moral theologians and jurists anxious to learn more about the implications of abortion for their particular speciality will in general be disappointed by this work. Some moral and theological problems related to abortion are covered in forty-two pages of the first volume.[3] Doctor Joseph F. Fletcher presents what is described as "a Protestant minister's view."[4] Unfortunately, Dr. Fletcher's convictions in this area do not reflect or even refer to the many distinguished Protestant theologians who are opposed on moral grounds to abortion. These Protestant theologians include Professor George H. Williams of the Harvard Divinity School, Karl Barth, Dietrich Bonhoeffer and Dr. Paul Ramsey of Princeton Theological Seminary, and Dr. James M. Gustafson of Yale Divinity School.

Unfortunately, the twelve pages[5] devoted to what is called a "traditional" and a "liberal" Catholic's view of abortion hardly begin to touch the profound implications of this subject.[6] Some observers of these two volumes may in fact infer that the editor, Dr. Robert Hall, may be operating on the supposition that

1. Hall, Preface to 1 Abortion in a Changing World v (R. Hall ed. 1970) [hereinafter cited by volume as Hall].
2. Id.
3. 1 Hall 3-45.
4. Id. at 25-29.
5. Id. at 34-45.
6. For example, these implications are developed in Williams, Religious Residues and Presuppositions in the American Debate on Abortion, 31 Theological Studies, March, 1970, at 10.

only Roman Catholics—and only *some* of them—are opposed on moral grounds to abortion.

Jurists will probably be as disappointed in these two volumes as are moral theologians. The case for the withdrawal of all criminal sanctions from the area of abortion is made by several commentators in this volume. Many of these observers simply dismiss or disregard the moral and ethical position of those who hold that the civil and criminal law of any civilized country should protect the viable fetus as well as any human being who would continue to live unless direct means were taken to annihilate its life.

The only real attempt in these volumes to justify the continuation of legal prohibitions of abortion is made by Father Daniel Granfield,[7] the author of a volume on abortion and the law.[8] Unfortunately, Father Granfield is severely limited in the amount of space available to him. He concedes that present laws against abortion "have not solved our sociomedical abortion crisis."[9] He goes on to admit that abortion is a particularly difficult area to control by legal means, and that we simply do not know "how badly the present laws function in preventing illegal abortions or how well any moderate liberalization would succeed in so doing."[10]

Father Granfield would seem to be vulnerable in his assertion, without supporting evidence, that "[t]raditional law, even though enforced with difficulty, obviously keeps down the number of legal abortions."[11] Even if, however, this supposition could be demonstrated with empirical evidence, the person who is opposed to abortion on moral grounds must confront the further question whether he has the right, as a member of a minority or of the majority, to impose his particular moral views in this area on the vast millions of people in America who do not in fact feel that there is anything immoral in an abortion if a mother decides that the termination of a pregnancy is the least unsatisfactory way of resolving her problem.

Father Granfield admits, of course, that "[t]he Catholic is free to make up his mind about abortion laws, their existence and their content."[12] Father Granfield continues that for the Catholic "as for all citizens, the justification of a criminal law is found in the need of the community to protect individuals and the whole society against harm."[13]

If this case on behalf of the retention of abortion laws seems less than conclusive, it must be said in all fairness that the advocates of total repeal are also very deficient in the probative evidence which they offer for their position.

All that one can conclude about the present state of the question concerning abortion and the law from these two volumes is that really no new knowledge about this complex subject is being generated. At least no new resolution of the problem, which would take account of its moral, medical and other aspects,

7. 1 Hall 149-56.
8. D. Granfield, The Abortion Decision (1969).
9. 1 Hall 154.
10. Id.
11. Id.
12. Id. at 155.
13. Id.

is even being offered much less accepted. The second volume under review is particularly depressing in that all of the specialists seem to be talking along parallel lines that never meet.

From this international conference on abortion, the information, statistics and insights necessary for some moral consensus on this subject, at least in the Western world, might have emerged. Unfortunately, this does not appear to have happened. Perhaps the failure of such a moral consensus to emerge is attributable to the fact that the conferees, like so many people involved in the discussion of abortion, are unable or unwilling to confront the terribly difficult choice of exalting all human life, including viable fetal life, above every objective less than human life itself. The adoption of such an attitude calls for a reordering of priorities and the suppression of any concept of expediency or utilitarianism which would justify the termination of a fetal life in the name of some human objective, such as the convenience of the mother or of the family, or some other highly desirable objective which is less than the preservation of life.

For persons who are seeking to become thoroughly familiar with the actual background underlying the controversy over abortion and the law, these two volumes may offer additional information. For persons who are seeking a clear, comprehensive and in-depth study of the other ethical and theological implications of abortion, these volumes will have limited value.

ROBERT F. DRINAN, S.J.*

The Morality of Abortion: Legal and Historical Perspectives. Edited by John T. Noonan, Jr. Cambridge: Harvard University Press. 1970. Pp. xvii, 276. $8.95.

Few subjects are as loaded with emotionalism as the intentional direct termination of pregnancy. In medical, legal, educational and political circles ferment over various aspects of the abortion question has been continuing at an extremely excited pace for a decade. For some it is primarily a legal issue, for others it is a medical issue, a social issue, or strictly a matter of private concern. However, one cannot avoid the conclusion that, at heart, it is a moral issue. I do not use the term moral in the sense of denominational theology but in the sense that the decision making process must be rooted in the most basic values of society. When should society prohibit or permit abortion? What are the outer limits of acceptable medical practice? Which value considerations are supreme and which are subordinate? Each of these questions is ultimately answered on the basis of some moral judgment. Any answer given reflects some moral perspective. *The Morality of Abortion* is a valuable collection of essays simply because seven highly qualified contributors were brought together to consider the abortion question from the moral point of view.

The editor, Professor Noonan, makes clear in his introduction that he will not

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be diverted by the many false issues which have been introduced into the abortion discussion in recent years. He puts the issue in terms of the most fundamental of all values in our law and secular ethics—the right to life:

> [S]imple coexistence with other humans demands that the lives of some not be open to sacrifice for the welfare and convenience of others. . . . One person's freedom to obtain an abortion is the denial of another person's right to live.
>
> To answer that the fetus is not human is to join issue. Proponents of abortion, for the most part, have not cared to make this contact with their opponents. . . . They are content to bypass what strikes them as fruitless speculation of a metaphysical sort. The relativity of morals, the subjectivity of knowledge, the lack of agreement on ethical principle, all these cautionary epistemological axioms, are deployed to turn off discussion of abortion by those who pronounce with conviction on the morality of war, the rights of conscientious objectors, and the wrong of capital punishment. In not responding when the question of humanity is raised in relation to abortion, they make their own decision as to who is human. "How long can a man turn his head and pretend that he just doesn't see?"[1]

Professor John T. Noonan, Jr. of the University of California School of Law at Berkeley, the editor of this volume, is the author of the first essay, *An Almost Absolute Value in History*. In a brilliant analysis Noonan takes his reader through the evolution of Greek thought on abortion, the influence of the early Judeo-Christian ethic, the writings of the Fathers, medieval legal and theological views, the opinions of the casuists, papal legislation and rulings, theories of ensoulment, modern theological views and a discussion of exceptions to the prohibition on abortion. Proponents of indiscriminate abortion may attempt to dismiss this as Christian historical theorizing, but Noonan's presentation leaves the reader with the conviction that there are *substantial* legal reasons behind these historical developments which vitally affect the modern abortion decision:

> The most fundamental question involved in the long history of thought on abortion is: How do you determine the humanity of a being? . . .
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> . . . .
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> . . . Any attempt to limit humanity to exclude some group runs the risk of furnishing authority and precedent for excluding other groups in the name of the consciousness or perception of the controlling group in the society.
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> . . . .
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> . . . [H]uman beings with equal rights often come in conflict with each other, and some decision must be made as [sic] whose claims are to prevail. Cases of conflict involving the fetus are different only in two respects: the total inability of the fetus to speak for itself and the fact that the right of the fetus regularly at stake is the right to life itself.[2]

These are the lessons of history and no society can completely ignore them.

The second essay is by Paul Ramsey, Professor of Christian Ethics at Princeton University. He begins with the premise that religion is not irrelevant to the discussion of the law of abortion. I find Professor Ramsey's reasoning somewhat strained on this point. He suggests that decisions such as *United States v. Seeger*,[3]

1. The Morality of Abortion: Legal and Historical Perspectives xvii (J. Noonan ed. 1970) [hereinafter cited as Noonan].
2. Noonan 51-57.
3. 380 U.S. 163 (1965).

and *MacMurray v. United States*,[4] indicate the proposition that "any of the positions taken on controversial public questions [have] profound moral and human or value implications [that] hold for us the functional sanctity of religious belief."[5] This may be true in a situation where a statute requires a particular kind of moral test, but as a general proposition it has no legal support.

Ramsey's essay takes the simple distinction between sin and crime and briefly uses it to deal with the problem of legislating morality. He presents the person who believes that abortion is unjustified killing and the person who believes that it is immoral to prohibit abortion. He then asks if either of these persons "[c]ould . . . for purposes of jurisprudence suspend that conscience enough to open his mind to the greater desirability . . . of other possible solutions that should be admitted to the public debate? *Ought* each of these persons do this?"[6] These are important questions in the context of the current debate over abortion law and I would like to have seen Ramsey pursue them more deeply.

What Ramsey does do, however, is present a well balanced case for the unborn child. His analysis shows that in modern medicine and biology it is increasingly difficult to distinguish between the unborn child and the child after birth. The moral and legal implications of this fact are of great importance:

> In the future we are going to have to face the fact that the fetus can be made a man among men by much earlier incubator methods, and can in any case be treated as a patient while *in utero* like any other person. We are morally ill-prepared for this situation. It is possible for the practice of medicine governed only by an undifferentiated resolve to save life to create as many problems by its interventions upon life in the first of it as have been created by the undifferentiated resolve to save life in the last of it. . . . Between these two, the middle ground of the justifiability of allowing to die and the unjustifiability of taking human life needs to be restored.[7]

Professor James M. Gustafson of Yale University writes of *A Protestant Ethical Approach*. Professor Gustafson, as with so many writers on this subject, feels compelled to first examine Roman Catholic views on the subject. Many of us who have been involved in this debate for some time are tired of having every perspective of abortion set off by the framework of Roman Catholic views. With this behind him, Gustafson goes to work with the abortion decision in the most difficult of possible contexts—the choice of a single human being, a rape victim whose condition is complicated by severe social and medical problems.

Lawyers may believe that hard cases make bad law, but I suspect the moralist is correct in examining the problem of human choice from the perspective of difficult choices simply because the most difficult choice illuminates the darkest corners of the process by which we as human beings make moral choices. Gustafson is not concerned with the juridical requirement but with the problem of choice confronted by the human person. He would allow the abortion in this case. In doing so he emphasizes the "position of the persons who must assume responsibility for the decision . . . ."[8] Gustafson concludes that: "As the morally consci-

4. 330 F.2d 928 (9th Cir. 1964).
5. Noonan 61.
6. Id. at 64.
7. Id. at 99-100.
8. Id. at 119.

entious soldier fighting in a particular war is convinced that life can and ought to be taken, 'justly' but also 'mournfully,' so the moralist can be convinced that the life of the defenseless fetus can be taken, less justly, but more mournfully."[9]

Bernard Haring, Professor of Moral Theology at Accadimia Alfonsiana (Rome) attempts to approach abortion within the context of Roman Catholic tradition. His essay does not present *the* Catholic view, but *one* Catholic view. Haring is correct in saying that the theme common to all Catholic views on abortion is the "belief in the *dignity of each human being*, created to the image and likeness of God, and in man's calling to universal brotherhood in mutual love, respect, and justice."[10] It should be made clear, however, that not every Roman Catholic who addresses himself to the abortion question is speaking exclusively from this context. Because a person accepts certain theological principles does not mean that he finds it impossible to examine the subject from the viewpoint of legal or medical or social standards. Failure to appreciate this has often resulted in confusion and undue emotionalism in the current debate on the law of abortion.

Professor Haring's essay makes a valuable contribution to this book. His brief discussion of fetal biology makes clear that whether the life is a human person or not, it is at least an *individuum* from twenty days after conception onward. He stresses the obvious difference between contraception and abortion, a distinction which badly needs restatement to the general public. Finally, Haring makes a plea for legislation which will respect the moral sensitivity of medical personnel who do not wish to participate in the termination of pregnancy. He specifically is critical of the Abortion Act passed in the United Kingdom in 1967, because it does not recognize conscientious objection in certain types of abortion procedures.

Professor George Huntston Williams of Harvard University has written an essay titled *The Sacred Condominium*. Williams draws his usage of the term condominium from feudal law; it was the joint rule of two sovereigns over a given territory. He suggests that the concept has value for abortion inasmuch as "[b]oth progenitor and state have their proper responsibility for the nurture and tutelage of the child and consequently their own proper authority in the preservation of its life."[11] Williams believes that such a condominium of responsibility exists over the lives of unborn children in the "social constitution of our nation"[12] even apart from theistic considerations. Some of the ideas propounded by Williams will have little meaning for those trained in law; an example is his description of a fetus as a "protoperson." However, his concept of a condominium of responsibility for the life of an unborn child seems to me to be a most lawyer-like way of approaching a legal problem which currently seems mired in a muddy base of emotionalism. This is the problem of how the law can meet the social needs reflected in the current demand for abortion on request while still insuring due process to the unborn child.

How would the effective use of the condominium function in a conflict of rights situation? Williams sees the responsibility of the progenitors as an accountability which flows from their consent to the sexual act. He calls for legal and moral

9. Id. at 122 (footnote omitted).
10. Id. at 126.
11. Id. at 152.
12. Id. at 153.

codes based on this responsibility. Williams suggests that this requires an involvement of professionals in the abortion decision; the decision cannot be left solely to private choice. He discusses the possible role of lawyers, sociopsychiatrists, clergy and physicians in what he calls the "condominal court." Williams would allow abortion when pregnancy results from rape, there being no consent by the female progenitor. He would also allow abortion when the pregnancy is caused by incest on the grounds that the interest of society in preserving the integrity of the family is of the highest order. He allows abortion in a case of adulterous pregnancy, writing that this is "for the husband the nearest equivalent of rape for the woman."[13]

I am disturbed when Williams suggests that "the state would release full authority to the mother or the two parents"[14] when it has been determined beyond doubt that the unborn child is seriously mentally or physically defective. It seems to me that the state has the highest duty to protect each person's right to life from *arbitrary* deprivation and that nothing could be more arbitrary than depriving a person of life on grounds that he is defective.

I want to stress that Professor Williams' approach strikes me as forming a basis for an intelligent and constitutional solution to the problem of what legislative enactment should be applied to abortion.

John M. Finnis, Professor of Law at Oxford, presents an analysis of the three most commonly proposed legislative schemes for abortion. These are: prohibition of all except therapeutic abortion, permitting abortion only on medical grounds, and the legalization of all hospital abortions. He relates these schemes to various values which the penal law should achieve. Finnis concludes that "[t]he most popular schemes in current discussion happen to be compromises that muddle together aims and elements of all three model schemes . . . ."[15] Finnis asks that we begin as a civilization to clarify the ends we seek and relate these ends to the law. This is a more effective means to rational legislation on abortion than the use of compromise which now dominates the adoption of legislation on abortion. The problem with this proposal by Professor Finnis is that it relates to a world which doesn't exist. Legislatures do not deal in absolutes and I fear that this approach will have little impact on the reality of the legislative process.

The essay by Professors David Louisell and John T. Noonan, Jr., of the Berkeley Law School faculty examines the abortion problem from the perspective of constitutional law. To a lawyer this is the heart of the book. It begins with a discussion of the legal status of the unborn child. In summary form the authors examine the treatment accorded to fetal life in the law of property, the law of crimes, and tort law. This is familiar territory to anyone who has read widely in the literature, but it is worthy of the restatement it receives here simply because the sense of fair play toward unborn children reflected in our legal traditions has not been given in-depth consideration in the popular media.

Noonan and Louisell present an excellent discussion of the constitutionality of legal regulation of abortion. The authors reject the now-popular idea that abor-

13. Id. at 167.
14. Id. at 166.
15. Id. at 207.

tion regulation is an invasion of privacy.[16] Under *Griswold v. Connecticut*[17] the constitutionality of a state's intrusion into the private sexual relations between a husband and wife was questioned. But the relevance of *Griswold* to abortion statutes is doubtful if one considers the essential difference between contraception and abortion. The state's interest in protecting the life of the unborn child would seem sufficient reason to justify a state's regulation of abortion.

The most interesting part of the Noonan-Louisell essay is titled *The Constitutionality of Not Protecting the Embryo.* The authors argue that:

> It seems fair to conclude that the new abortion statutes come not as a further evolutionary step in the law's perception of the value, intrinsic dignity, and essential equality of human life. To the contrary, they confront the law's evolution with a countermovement. The unborn child, concededly morally blameless, may be sacrificed in the interest of the mother's mental health or the social interest in avoiding a defective person who might become a welfare charge, because those interests by the ethos of the day are regarded as more socially significant than the claim to life. The right to life becomes relative not only to others' right to life, but to others' health, happiness, convenience, and desires for freedom from avoidable burdens. The scales-master is to be not a neutral agent such as a court, but the person who desires to avoid the burden.[18]

I recommend this volume as an intelligent and thoughtful contribution to a confused debate.

CHARLES P. KINDREGAN*

The Price of Dependency: Civil Liberties in the Welfare State. By Robert M. O'Neil. New York: E.P. Dutton & Co. 1970. Pp. 351. $8.95.

The American people have benefited greatly from the plethora of social programs enacted by federal and state governments in the past several decades. Notwithstanding numerous justified criticisms, these programs have succeeded in ameliorating our most desperate needs in housing, welfare, education and concomitantly, as the bureaucracies swelled, employment. A disturbing consequence of this social legislation, unnoticed until recent years, has been the expanding encroachment by governmental agencies upon the liberties of the recipients of government largess.

In writing *The Price of Dependency,* Robert M. O'Neil has done us a great service by documenting the anti-libertarian measures frequently resorted to by government to professedly guard the integrity of its social creations. The governmental controls he describes typically take the form of restrictions upon the

16. See Roe v. Wade, 314 F. Supp. 1217, 1221 (N.D. Tex. 1970); Babbitz v. McCann, 310 F. Supp. 293, 299 (E.D. Wis.), appeal dismissed, 400 U.S. 1 (1970); United States v. Vuitch, 305 F. Supp. 1032, 1035 (D.D.C. 1969), probable jurisdiction postponed to hearing on the merits, 397 U.S. 1061 (1970); People v. Belous, 71 Cal. 2d 954, 963, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), cert. denied, 397 U.S. 915 (1970).

17. 381 U.S. 479 (1965).

18. Noonan 254.

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beneficiaries' right to receive or use a benefit in other than a prescribed fashion.[1] As such, the right to the continued receipt of benefits is said to be "conditioned" upon compliance with statutory and administrative regulations.

There is no doubt that these restrictions have often resulted in gross injustice. Desperately poor children have been denied public assistance because their mothers failed to meet the sexual mores of state welfare officials.[2] Government employees in non-sensitive positions have been discharged for insisting upon the exercise of their constitutional freedoms.[3] Until very recently,[4] recipients of all types of largess have been denied the most fundamental procedural protections when the government acted.

Yet it is too facile to simply advocate the removal of all controls, for government has a mandated responsibility to safeguard the interests of the national community. Having once appreciated the general nature of the problem, each variety of benefit must be separately examined to see if the restrictions associated with the program so infringe upon the substantive or procedural rights of the individual beneficiary as to make them legally impermissible. This is undoubtedly a formidable task—given the highly complex legal, social and political questions which are inextricably involved in the implementation of such vital government programs and services. Yet the author here attempts just such an analysis and it must be said he achieves it with a good degree of success.

Mr. O'Neil devotes the first two chapters[5] to carefully defining and tracing historically the legal problems of governmentally conditioned benefits. *The Price of Dependency* consists for the most part of descriptions of the various governmental programs[6] (*e.g.*, public housing, education and welfare) and a rather complete account of the numerous restrictions imposed upon beneficiaries.[7] Besides discussing the cases challenging such restrictions, the author provides us with some notion of the demoralizing and unsettling personal and social consequences which state controls foster.[8] This information, which is both socially and legally relevant, is conveyed by the comments of victimized beneficiaries,[9] from newspaper accounts,[10] and from the analyses and conclusions of governmental

1. See R. O'Neil, The Price of Dependency: Civil Liberties in the Welfare State 29-38 (1970) [hereinafter cited as O'Neil].

2. O'Neil 280-84. See also King v. Smith, 392 U.S. 309 (1968); Graham, Civil Liberties Problems in Welfare Administration, 43 N.Y.U.L. Rev. 836, 905-10 (1968).

3. See generally O'Neil 58-114.

4. See Goldberg v. Kelly, 397 U.S. 254 (1970) (due process standards at welfare hearings); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970) (due process standards at eviction hearings); Reich, The New Property, 73 Yale L.J. 733 (1964).

5. O'Neil 13-57.

6. Id. at 115-55, 223-91.

7. Id.

8. See, e.g., id. at 259-65 (the discussion of the means test for welfare eligibility).

9. See, e.g., id. at 97 (members of Peace Corps protesting government reprisals against those Corps members who made antiwar statements); id. at 254 (comments of welfare mother to Civil Rights Commission on the effects of AFDC requirements on martial stability).

10. See, e.g., id. at 224 (N.Y. Times report on public housing); id. at 255 (N.Y. Times report on welfare).

bodies.[11] The result is a highly readable study which has the inevitable effect of causing the reader to be greatly disturbed at the loss of our liberties.

One must criticize some of the technical aspects of this book. While the author probably didn't intend to provide an in-depth legal analysis of the problems of conditioned benefits, he did venture into many of the legal issues involved.[12] Having opened the door, it is incumbent upon him to provide the reader with the materials necessary for deliberate legal scrutiny. Unfortunately, he doesn't. Too often the reader is told only of a court's conclusion and is left speculating as to the rationale behind it.

Attorneys who are interested in expanding their knowledge of the law surrounding government restriction of social programs may well find this book inadequate and frustrating. If, however, Mr. O'Neil was not attempting to produce an analytical work for the benefit of the legal profession, but rather a call to the American people to beware of the loss of their freedoms from overly restrictive government, he has surely achieved his end.

NEIL H. MICKENBERG*

Military Justice Is To Justice As Military Music Is To Music. By Robert Sherrill. New York: Harper & Row. 1970. Pp. 234. $6.95.

Major General Kenneth J. Hodson, the Army's Judge Advocate General, recently observed that "[i]t's become very popular to be critical of anything military, whether it's military music . . . or military justice."[1] It's not a difficult guess that, when the head of the Army's 1,900 man military law firm made that statement, he did not have Robert Sherrill's penetrating new book far from mind. Had he read the book, however, he would have known that military music fares reasonably well, the only reference to it being contained in the title, an old remark usually attributed to Clemenceau. Instead Robert Sherrill's book is a first-rate, in-depth critique of what the Army considers a system of justice "as good or better than the justice in 48 of the 50 states."[2] If the Army's claim is true, the reader will be outraged by the thought that criminal defendants in 48 of the 50 states fare worse than did "the Presidio 27," a group of soldiers charged with mutiny and court-martialed for breaking formation at a stockade work lineup, for singing songs and demanding to see lawyers and the press, and to have an audience with the stockade commandant.[3]

11. See, e.g., id. at 227, 240, 261 (excerpts from the Report of the President's Commission on Civil Disorders).

12. See, e.g., id. at 47-57 (constitutionality of conditioned benefits); id. at 156-94 (the college and the Constitution); id. at 251-91 (public welfare and private rights).

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1. Newsweek, Aug. 31, 1970, at 22.

2. Id.

3. R. Sherrill, Military Justice Is To Justice as Military Music Is To Music, 4-62 (1970) [hereinafter cited as Sherrill].

The Presidio "mutiny" is one of three major incidents about which Sherrill, the Washington editor of *The Nation*, has structured his analysis of military justice and military prisons. The other two are the widely reported court-martial of Captain Howard Levy in 1967 for disobeying an order to give medical training to Special Forces troops,[4] and the conviction in 1965 of Second Lieutenant Henry Howe, Jr. for using contemptuous language against President Lyndon B. Johnson.[5]

Sherrill does not purport to have written an objective, scholarly analysis of the cases and conditions discussed, and he has not done so. His is a partisan book—at times irritatingly so, as when he writes that Colonel Earl Brown, the military judge in the Levy case, was sent down from Washington "to steer the Levy court-martial successfully to its conclusion."[6] In fact, Brown was selected because he was one of the Army's best, not one of its most prejudiced. Others were far better suited for the role of hanging judge. Still, as a book designed to arouse the public over what Sherrill considers to be the unconstitutional trial procedures and inhumane punishment that hang over the heads of the 3.8 million men currently in uniform, it is far from unpersuasive.

Especially moving is a chapter describing conditions and treatment in military stockades, a narrative which lives up to its title, "The Final Degradation." Reports of brutality and attempted suicides abound. Among the stories is the one of "Army officers at Fort Riley, Kansas, who panicked when they discovered one of their soldiers was only twelve years old and 'hid' him for three months in solitary confinement; of the Marines forced to strip to the waist and roll in fresh feces . . . and of the soldiers at Ft. Dix, New Jersey, who were sprayed with water and then pushed out into wintry weather, naked, for varying lengths of time."[7]

The book has been carefully researched, Sherrill having interviewed the participants and read the trial records of most of the incidents discussed. For example, biographical sketches are supplied for approximately half of the Presidio 27 to support Sherrill's thesis that each was unfit for military service and none should have been taken in the first place. He also discloses, in discussing the *Howe* case, that the only reason Howe was recognized as a serviceman and detained at the anti-war demonstration in El Paso, Texas, was that a filling station attendant, where Howe had stopped to ask directions, noticed an Army sticker on the car and the anti-Johnson poster in the back seat and telephoned the Military Police at nearby Fort Bliss. The provost marshal at Bliss, who had previous experiences with Howe, dispatched a few "observers" to watch Howe's participation in the demonstration.[8] This bit of evidence was buried in the pretrial papers in Howe's case. It was never developed at the trial but was men-

4. United States v. Levy, 39 C.M.R. 672 (1968), petition for review denied, 18 U.S.C.M.A. 627 (1969).

5. United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967). The reviewer was military appellate defense counsel in this case.

6. Sherrill 123.

7. Id. at 192.

8. Id. at 178-80.

tioned in oral argument on appeal before the Court of Military Appeals. Sherrill did his homework to learn of such details.

Nevertheless, inaccuracies persist. Much is made in the book over "the Army's record of getting convictions in 95 percent of all courts-martial,"[9] thereby supposedly illustrating the certainty of conviction and the sham procedures of military justice. No mention is made that the vast majority of all courts-martial consist of guilty pleas, undoubtedly popular in the military because the defendant bargains for a sentence which sets the maximum penalty to which he will be subject. If the court-martial decrees a harsher sentence, the convening authority must reduce the sentence so that it does not exceed the bargained maximum. However, should the military jury levy a sentence less than that for which the accused bargained, the defendant "beats the deal." With such an incentive for the guilty plea, great care is necessary to insure that the innocent do not plead guilty. Military judges, it should be added, in fact do a commendable job in ferreting out the insincere plea, if for no other reason than the threat of reversal by the Court of Military Appeals.

A more basic error appears in the discussion of article 88 of the Uniform Code of Military Justice, the article under which Henry Howe was convicted for using contemptuous words against President Johnson. As examples of the potential sweep of article 88, Sherrill reports that "servicemen anywhere can be punished for calling House Armed Services Committee Chairman Mendel Rivers a drunk . . . or Senator Thomas Dodd and Congressman Adam Clayton Powell cheats . . . ."[10] In fact, article 88 humbles not all servicemen but only commissioned officers and, as relates to the examples discussed, only insofar as they use contemptuous words against Congress as a body—not individual Congressmen.[11] The article is onerous enough without it being made to appear more so.

Every so often a military trial of notoriety is held and headlines are made in newspapers across the country. Such was the case when Captain Levy was court-martialed, and Lieutenant Calley's present trial for his alleged role in the My Lai massacre seems sure to be a new public sensation. After the court-martial is over the issues of military justice are generally forgotten until the next prominent case appears. Certainly anyone who reads Sherrill's book will appreciate the forces at work in a military trial and will sympathize with servicemen so unfortunate as to have spent even one day in a military stockade. They will surely question, as does Sherrill, whether the only way to truly reform military justice might not be to take away from the military the judicial process and return jurisdiction to the civilian courts.

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9. Id. at 62.

10. Id. at 182.

11. Manual for Courts-Martial, United States, 1969 (rev. ed.), ¶ 167.

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