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Volume 1974 | Issue 2

January 1974

Review of "Justice Under Fire: A Study of Military Law," By Joseph W. Bishop, Jr.

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Recommended Citation

Aaron S. Condon, *Review of "Justice Under Fire: A Study of Military Law," By Joseph W. Bishop, Jr.*, 1974 WASH. U. L. Q. 381 (1974).
Available at: https://openscholarship.wustl.edu/law_lawreview/vol1974/iss2/12

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calling for the interconnection between law and morality because he does not want to be pushed into Fuller's camp. Like Dworkin, Professor Bodenheimer seems to be an uneasy positivist. He leans toward the idea of law-morality but refuses to embrace it head-on. Yet his students and his readers may take the plunge. There is, these days, a great revival of interest in moral philosophy, and the best works build upon the advances to linguistic precision that logical positivism has fostered. Ironically, that very precision now seems to be undermining positivism itself, much as Wittgenstein foresaw in his *Philosophical Investigations* (1953).[20] In this context, *Power, Law, and Society* may be seen as an important bridge between the older style of positivism and the new concern for morality. The humanistic, wide-ranging examples brought forth by the author attest to the morality that Fuller argues cannot be separated from law.

ANTHONY D'AMATO*

JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW. By Joseph W. Bishop, Jr.[1] New York: Charterhouse Books, Inc., 1974. Pp. xvi, 315. $8.95.

> If there is a lack of scholarly treatises on military law, there is none of popular polemics on the subject.
>
> J. BISHOP, JUSTICE UNDER FIRE xii (1974)

> [C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. . . . [A] military trial is marked by the age-old manifest destiny of retributive justice.
>
> O'CALLAHAN v. PARKER, 395 U.S. 258, 265-66 (1969) (DOUGLAS, J.)

If, as widely believed, experience is the best teacher, certainly Justice William Douglas offers unimpeachable credentials in the pure art and high science of the detection of legal systems which are "singularly inept in dealing with the nice subtleties of constitutional law." His

20. *See* H. PITKIN, WITTGENSTEIN AND JUSTICE 50-70 (1972).

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recorded opinions over the past thirty-plus years disclose that he has discovered just such ineptness, with a fine impartiality, in virtually all of the fifty states, the federal district and circuit courts, and even among his colleagues on the Supreme Court itself. Although it is not always clear in matters of opinion who leads and who follows, there can be no doubt that this unwavering consistency, coupled with the prestige of his record-breaking tenure in office, have made Justice Douglas the most brilliant luminary in a constellation of critics bitterly hostile to existing practices and procedures in the administration of criminal justice in this country. And nowhere has this antagonism shown itself with more passionate intensity than in the recent assault on the institutions of military law.

Joseph W. Bishop, Jr., professor of law at Yale University, undertakes in *Justice Under Fire: A Study of Military Law* to enter this emotional maelstrom on a vehicle of outraged objectivity. With painstaking accuracy and commendable brevity, he offers the concerned reader an authentic insight into the practices, problems, vices, and virtues of the American military establishment in its law-related activities.

> [M]ilitary law, like other fields of law, raises serious problems that are more likely to be solved intelligently if politicians and voters have a better knowledge of the facts than they are likely to get from such sources as *The New York Review of Books.*
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> J. BISHOP, JUSTICE UNDER FIRE xiv (1974)

The legal problems besetting the military in its internal aspect prove to be generically no different from those present in any system of criminal justice: creation of courts, delineation of jurisdictional boundaries, description of prohibited conduct, selection of court personnel (judge, counsel, and trier of fact), rules of procedure, rules of evidence, prescription of penalties, appellate review, and (often most crucial of all) insulation of the system from improper pressures (from inside and outside, from above and below). Since the resolution of these problems has been the task of American lawyers, rather than soldiers, it is hardly surprising that the end product is not wholly alien to "traditional notions of fair play and substantial justice," and that, as the author points out, there is less difference between American civilian and military law than between the Anglo-American system and other systems of justice that have long served the rest of the civilized world. But differences

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there certainly are, and differences there must be, as the Supreme Court recently reaffirmed:

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."
>
> PARKER v. LEVY, 94 S. Ct. 2547, 2555-56 (1974) (REHNQUIST, J.)[2]

In his conclusion, Professor Bishop offers specific suggestions designed to strengthen the position of justice in the military:

1. Creation of permanent military courts, with three- and five-judge panels to replace line officers as triers of fact in all cases.[3]

2. Making mandatory the current practice (already nearly universal) of providing qualified lawyer-counsel for all trials; and creation of separate divisions of the Judge Advocate General's Office to which both prosecution and defense counsel are severally and solely responsible.

3. Abolition of the bad conduct discharge, leaving the dishonorable discharge as the sole means of punitive elimination from service. The supposed distinction between them is, at present, wholly illusory.

4. Repeal of the General Articles, which proscribe without specification conduct "unbecoming an officer and a gentleman"[4] and "prejudic[ial] of good order and discipline" or calculated "to being discredit upon the armed forces."[5] These should be replaced by provisions

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2. *Quoting* Toth v. Quarles, 350 U.S. 11, 17 (1955). *See also* Burns v. Wilson, 346 U.S. 137 (1953); Orloff v. Willoughby, 345 U.S. 83 (1953); *In re* Grimley, 137 U.S. 147 (1890).

3. In practice today, about 75% of all courts-martial employ the military judge as trier of fact. This is the result of defense counsels' option to dispense with the traditional line-officer panel. *See* H. MOYER, JUSTICE AND THE MILITARY 533 (1972).

4. Article 133 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 933 (1970), provides:

> Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

5. Article 134 of the UCMJ, 10 U.S.C. § 934 (1970), provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be

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specifically denouncing acts which are forbidden to members of the military.[6]

5. Abolition of military jurisdiction over all reservists who are not on active duty.[7]

6. Repeal of the article denouncing the use by commissioned officers of contemptuous words against the President and various high officials.[8] The 1967 conviction of an Army lieutenant under this article[9] was its first application in twenty-five years, and the last to date.

7. Making appealable by writ of certiorari all decisions of the highest military appellate tribunal, the Court of Military Appeals.[10]

These proposals, most of which have been urged by responsible and sympathetic critics of the military justice system,[11] are clearly feasible and would go far toward eliminating even that "appearance of evil" on which hinges so much of what substance there is in the emotional outpourings of the system's uncompromising opposition.

Beyond the field of military criminal law, Professor Bishop deals in

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taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

6. The General Articles in their present form were upheld in Parker v. Levy, 94 S. Ct. 2547 (1974). In rejecting the claim that the General Articles are unconstitutionally vague, the Court relied principally on the clarification and limitations of the articles contained in decisions of the Court of Military Appeals, *e.g.*, United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967), and in guidelines supplied under executive order, *see* MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 213c (rev. ed. 1969). 94 S. Ct. at 2560. *See generally* Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357 (1968).

7. Although the subject is not free of doubt, in Army and Air Force practice there has been virtually no effort to assert such jurisdiction in the absence of very special circumstances. The Navy has taken a somewhat broader view. For discussion, see H. MOYER, *supra* note 3, at 73-76.

8. UCMJ art. 88, 10 U.S.C. § 888 (1970). *See generally* Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J. 325 (1971).

9. United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

10. *See Ex parte* Vallandingham, 68 U.S. (1 Wall.) 243 (1863). *See also* ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS 20-21 (1970) (recommendations of Maj. Gen. Kenneth Hodson, formerly Judge Advocate General of the Army).

11. *See, e.g.*, Hodson, *Perspective: The Manual for Courts-Martial—1984*, 57 MIL. L. REV. 1 (1972); Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3 (1970); Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971); Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181 (1962); Note, *The Discredit Clause of the UCMJ: An Unrestricted Anachronism*, 18 U.C.L.A.L. REV. 821 (1971); Note, *Taps for the Real Catch-22*, 81 YALE L.J. 1518 (1972).

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separate chapters with current issues of national war powers,[12] martial rule in domestic territory,[13] and the enforcement of the international laws of war.[14] He does not conceal his impatience with the eternal children of the Left, whose militant unconcern with hard facts he finds matched only by their strident self-righteousness in denouncing their country for its involvement in "imperialist wars of aggression."[15] But, despite yielding to the temptation to throw an occasional dart, Professor Bishop succeeds in presenting an excellent, if necessarily summary, overview of the complex and controversial questions that inhabit the borderlands of those mutually exclusive and often belligerent realms of law, policy, and morals.

Inevitably, he finds in the doctrine of "apparent necessity" an explanation both of executive (and military) jurisdictional demands and of the Supreme Court's acquiescence in such demands in time of "clear and present danger" to the national security. This pliancy stands in sharp contrast to the ringing libertarianism which emerges as each successive threat recedes. Indeed, it may very well be that the enduring strength of our democracy lies precisely in this inconstancy of judicial opinion, in the ebb and flow of constitutional ideology, in the assurance of the possibility that today's minority will write tomorrow's majority opinion. Great dangers demand great responses, and the necessity for such responses has thus far produced our greatest leaders. But national support for emergency measures has mercifully given birth to no *fuehrer-prinzip* here. The policies of Jefferson could not ultimately sustain the conviction of Colonel Burr;[16] nor those of Lincoln the military conviction of the civilian Milligan;[17] nor those of Roosevelt the detention of loyal Japanese-American Mrs. Endo;[18] nor those of Truman the seizure of crucial, strike-bound, but privately owned steel mills.[19] But in each case, the final decision was reached when the

12. J. Bishop, Justice Under Fire: A Study of Military Law 175 (1974).

13. *Id.* at 225.

14. *Id.* at 257.

15. The phrase "wicked, cruel and unnecessary war," so regularly found in these denunciations, seems to have been borrowed from the Civil War speeches of Indiana's pro-slavery, anti-Lincoln, anti-union activists, Vallandingham and Milligan. *See Ex parte* Vallandingham, 68 U.S. (1 Wall.) 243 (1863); The Milligan Case 14, 379-80, 385 (S. Klaus ed. 1970).

16. *See* United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807).

17. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

18. *See Ex parte* Endo, 323 U.S. 283 (1944).

19. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

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emergency that spawned the questioned policies was safely past; or the threat to the nation was no longer acute; or the necessity was not, or was no longer, apparent to the Court, and a more congenial libertarianism reasserted itself.

> Force, to meet force, arms itself with the inventions of art and science. It is accompanied by insignificant restrictions, hardly worth mentioning, which it imposes on itself under the name of international law and usage, but which do not really weaken its power.
>
> C. VON CLAUSEWITZ, ON WAR 3
> (O. Jolles transl. 1943)

While "apparent necessity" is a dependable and often wise adviser in the quiet chambers of the Supreme Court, it can become a bloody tyrant during military battle. The endless carnage of today's extended battlefield and the limitless destruction of life and property, as nations pursue political goals frequently obscure and remote from the personal concerns of their populations, produce, as they should, an immense revulsion in souls sensitive to the unhappy lot of man. The war itself—or rather, *our* involvement in the war—and not the cause of the war, becomes the object of execration for those who would end war while leaving the causes of war intact. And since *our* conduct of the war is the criminal act, this narrow and one-sided morality would damn without hearing every action and person involved, with the sole precondition that the defendant be either an American or a supporter and ally of Americans.

But the luxury of this simplistic view is neither available nor helpful in the resolution of practical issues surrounding the actual conduct of hostilities. Here the aim is not the abolition of war (by ending *our* half of the conflict), but the more realistic goal of mitigating war's inevitable suffering. And it is not enough to await the advent of some implausibly impartial International War Crimes Tribunal. Analyzing the Nuremberg precedent, Professor Bishop finds it virtually sui generis—a fortuitous concomitance of the triumph of the righteous cause (though not without its criminal acts and agents) over monstrous and undisguised criminality (though not without its heroes and victims). Victor's justice, yes—but, on the whole, *justice* nonetheless.

The duty of the law today is less dramatic but no less clear. As Bishop puts it, "[T]he most realistic prospect for punishing war criminals is by trial in the courts of the accused's own country."[20] Al-

20. J. BISHOP, *supra* note 12, at 290.

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though 117 Americans were tried by courts-martial, and sixty convicted of murdering civilians in Vietnam, the proceedings against the My Lai defendants, and particularly the conviction of William Calley, stand as the one public monument to the law's limited ideal.

> The record is thus very far from perfect. All that can be said is that it is a better record than that of any other nation in the world and that it lends a degree of credibility to the Pentagon's numerous orders and regulations that aim to prevent and punish war crimes by requiring a report and an investigation of such incidents, and the training and indoctrination of the troops on the subject. . . .
>
> The fuzzy notion that every citizen of the United States (except the saints and martyrs of the antiwar movement) is guilty of the war crime at My Lai—that the unfortunate Lieutenant Calley was merely a scapegoat—is, to a lawyer, nonsense, and pernicious nonsense at that.
>
> The international law of war, as it now exists, is undoubtedly very imperfect. . . . All that can be said is that it is better than no law; I think it probable that much suffering has been prevented in the last sixty years by the existence of a body of law which nearly all governments profess to respect, and which most are reluctant to violate openly and on a large scale.
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> J. BISHOP, JUSTICE UNDER FIRE 292-93 (1974)

Few undertakings are more challenging than the task of presenting to a professional audience a basic introduction to a separate system within the area of audience expertise. Negotiating the narrow channel between verbosity and sketchiness requires all the skill of a master helmsman; and in any case, the passage will be the inevitable occasion of confused cries of "Too much!," "Too little!," "Wrong way!," and "Is this trip really necessary?" From the standpoint of this reviewer, however, Professor Bishop has met the challenge most commendably. A reading of *Justice Under Fire* will go far toward providing that "better knowledge of the facts" promised in the book's introduction, in this alternately abused and neglected area of the law. And it is only the spread of such knowledge that offers the hope of rational progress toward the elusive goal of equal justice under law—whether the system in question be military or civilian.

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