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Review of "Military Justice is to Justice as Military Music is to Music," By Robert Sherrill

Howard T. Brinton
Illinois Bar Association

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Events have already dated some of the discussion in this volume. Amendments to the federal law are pending which will extend the federal prohibition against billboards to all signs "visible" from the highway, and the amount of the federal financial penalty for noncompliance is to be considerably reduced. To the reviewer's knowledge, the present statutory penalty—ten percent of a state's federal highway allocation—has never been invoked. Studies are also under way which will fill prominent gaps in another vital area of advertising control: the regulation of on-premise advertising signs. And the Highway Research Board has sponsored detailed studies of the legal problems in compensating for the removal of advertising signs, which are soon to be released. Hopefully, accumulating experience and renewed interest will yet bring us the definitive treatment of advertising regulation which the subject clearly deserves.

DANIEL R. MANDELKER*

MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC. By Robert Sherrill. New York: Harper & Row, 1970. Pp. 225. $6.95.

There are certain difficulties which beset a lawyer and apparently do not beset some journalists or authors. Few lawyers have been commercially successful even when they have desired to write for profit. Lawyers seem to bore the normal book reading audiences with their attention to detail and tiresome attempts to see both sides of an issue. Even the most strenuous *avocat* tempers his written criticisms and comments in a brief directed to his adversary, out of respect for the opponent's skill and the reviewing judge's keenness. Unfortunately, Mr. Sherrill's attention to being a commercially successful author wins out over objectivity, fairness and accuracy.

Military Justice Is To Justice As Military Music Is To Music could have been a fine book, which put forth some weighty theses and offered some solutions, but, as is, it is unpalatable. The book is written in a tabloid style with shocking statements and generalities liberally sprinkled through its pages. Mr. Sherrill takes a position that because we have a citizen's army, which in turn subjects millions of men to military justice, we are destroying the fabric of our democracy by the inadequacies of the military's system of justice. He never attempts to

* Professor of Law, Washington University School of Law.

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prove this thesis. Rather, we are bombarded with a "parade of horribles", which, when not inaccurate, are based upon individual cases, any of which could have happened under any state or the federal system of justice in this country. He concludes that the military justice system should be destroyed and all military men be tried by state or federal courts for their crimes.

A review of some of Mr. Sherrill's overreaching inaccuracies seems necessary. After a number of vicious and innuendo-filled attacks upon the Court of Military Appeals (the military's highest court) which tail off into "guilt by association" techniques in his treatment of appointments to the court,[1] Mr. Sherrill concludes that George Latimer, a former member of the court, was "slow to see command influence" when on the court. In fact, in 1953, long before the Military Justice Act of 1968, the Court of Military Appeals reversed a theft conviction for command influence in an opinion written by the same Judge Latimer, in which he said:

> The conviction and sentence in this instance are the production of a trial not founded on those fundamental rights and privileges granted to one tried in the military system. The accused was convicted and sentenced by a court-martial which was not free from external influences tending to disturb the exercise of a deliberate and unbiased judgment. The attempt to enlighten the court members may have been prompted by the highest ideals but the method of presentation was steeped in prejudice.[2]

That does not appear to be a "slow" realization of command influence.

Sherrill makes a point of expressing outrage at the failure of the Court of Military Appeals to follow decisions of the Supreme Court of the United States. He is apparently unfamiliar with the military's role in providing counsel for accused men long before the majority of states did so. He also fails to mention that the Court of Military Appeals scrupulously followed the letter and intent of *Gideon* and *Miranda*.

At another point Sherrill condemns the military system for its failure to give out sentences with "predictability". What does Mr. Sherrill wish predictable, the length—all predictably short or predictably long? Do we throw out consideration of the nature of the offense, character of the person committing it, including his past offenses, and allow a computer

1. R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 213-214 (1970) [hereinafter cited as SHERRILL].

2. United States v. Littrice, 3 U.S.C.M.A. 487, ____, 13 C.M.R. 43, 52 (1953). *See also* United States v. Dubay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967) wherein many convictions were remanded for hearings on the extent of command influence at Fort Leonard Wood, Missouri.

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to judge? If Mr. Sherrill thinks "unpredictability" of sentences is a problem resting solely with the military, he need only examine the workings of a federal district court in a large metropolitan area. That would give him sufficient "disparity" of sentence per offense to satisfy him. It would seem that Mr. Sherrill is out of touch with the maxim that the punishment must not only fit the crime, but the criminal.

Also, he seems to draw no distinction between officers and enlisted men in his discussions. Without discussing the philosophical (and practical) questions of a system which creates its leaders by an act of Congress as opposed to a vote of the men, there is a functional difference. Two of the cases which he discusses at length involve officers who challenged the system—Captain Levy, convicted of failure to obey an order, and Lieutenant Howe, convicted of the use of contemptuous words against his commander in chief and conduct unbecoming an officer.[3] Captain Levy and Lieutenant Howe assumed some of the responsibilities of an officer when they received their commissions as officers, along with their assumption of the higher pay, greater privileges and more day-to-day freedom. They were not *drafted* as officers, they *chose* to be officers. Howe, in fact, voluntarily participated in the Reserve Officers Training Corps in order to be an officer and at the time of his arrest had served twelve months as an officer.[4] They accepted the system and its privileges; they were not forced into it.

Sherrill says it is wrong for the U.S. Army to prosecute two soldiers who made "disloyal" statements.[5] He does not tell us what statements these men were punished for, or the circumstances under which the statements were made. As a matter of fact, he avoids it. Instead, he gives you an excerpt from the brief of one of their attorneys which recites generalities. The case he is discussing involved marines at Camp Pendleton, California, awaiting transport to Viet Nam. The accused gathered the Negro troopers in a company and advised them to go to their commanding officer and say they would not go to Viet Nam because it was a "white man's war" and they would "then come back and have to fight the white man."[6] The Board of Review indicates that if the men were simply accused of making a disloyal statement there would be no ground for conviction, but the offense charged was making a

3 Sherrill conveniently fails to mention the offense of conduct unbecoming an officer under Article 133, of which Lt.Howe was charged and convicted.

4. United States v. Howe, 17 U.S.C.M.A. 165, 169, 37 C.M.R. 429, ____ (1967).

5. SHERRILL 75.

6. United States v. Harvey, N.C.M. 68-1734, 40 C.M.R. 941, 942 (1969).

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disloyal statement with *design or interest to promote disloyalty* among the troops. Certainly the Army like any government or branch thereof has a right to protect itself.

The listing of these inadequacies could go on and on, but such would serve nothing now; instead, let's look at whether something constructive can be taken from the book.

Reading carefully, we find the real thread of the problem. A military discipline system borrowed from an ancient military empire has been renamed "justice" and applied against an Army of conscripts and quasi-conscripts. Quite naturally, since the mission of the military has been limited to finding, fixing and finishing "an enemy of the country which it serves," it channels all energies toward that goal. Some individuals in the military system are opposed to anything which crosses that objective. That is why the military is controlled by civilians and, hopefully, it will remain so. By looking at extreme examples of individuals who have not understood or tolerated true justice in the military, Sherrill condemns the whole system. This is best typified by the jacket of the book which depicts a three star general with the face of a pig—a definitely unfair and unprofessional generality.

Mr. Sherrill does point out the fact that the military has been attempting for years to reform itself. These reforms were last brought forth in the Military Justice Act of 1968. The items of reform in the amendment take much of the thrust from Mr. Sherrill's arguments as they concerned right to counsel and command influence.

Mr. Sherrill would have been better disposed to expend his energies not in calling for the complete destruction of a system because of individual faults, but to give us some ideas to protect the serviceman within the framework of the system. His approach to solving the military justice "problem" would be analogous to the shifting of all state judicial functions to the federal judiciary after the Supreme Court decided *Powell v. Alabama,*[7] because of one state's improper procedures. Not only would it be harmful to the function of the States, but overload and probably destroy the federal criminal justice system.

I think the reader of Sherrill's book could ask if it be far more logical and less destructive to make the system of military justice as determined by the Congress of the United States and administered by the military, subject to direct review by the federal judiciary. Hopefully, this review would be upon application of the serviceman at the federal district court

7. 287 U.S. 45 (1932).

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level either before or after conviction. This would not only have a deterrent effect upon those military leaders who are totally onesighted in their goal, or mission, but would give a meaningful "double" review of actions of military courts. Certainly it would be no more time consuming or expensive than attempting to include the 3,000,000 plus men in our military all within the federal system for common law, statutory and *military* crimes.

HOWARD T. BRINTON*

THE NEW DRAFT LAW: A MANUAL FOR LAWYERS AND COUNSELORS. Edited by Ann Fagan Ginger. National Lawyer's Guild: Berkeley, 1970. Pp. 240. $10.00.

The highlight of this book is the back cover which depicts a realistic game for beating the system, whether one intends to delay his induction, obtain a deferment, obtain an exemption (more specifically, conscientious objection), win a criminal trial for refusing to perform a duty imposed by the Selective Service System, or win release or discharge once one is inducted.

This pictorial maze becomes a headnote for the material which relates in layman's language how to present one's case before the draft board and how to obtain the administrative review, such as it is, prior to indictment. For the discussion of the lawyer's involvement in pre-induction review of a classification, the defense of a criminal action, the obtaining of a habeas corpus for release of an inductee, and the court martial proceedings, Mrs. Ginger's material changes to legal and more technical language.

Mrs. Ginger's simplicity in language is an imperative for the registrant and his lay counselor, for the Selective Service System specifically denies the right to counsel during its administrative adjudications. The book reflects the editor's compassion and concern by detailing for the registrant the nature of prison life for one who must serve a sentence. This is of extreme importance since the decision to defy the Selective Service System must incorporate the possibility of a prison term. (In St. Louis, for example, everyone has been sentenced to five years with the exception of two Jehovah's Witnesses).

The minor problems that the editor has with her material relate to a

* Member, Illinois Bar.

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