BOOK REVIEWS

JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW. By Joseph W. Bishop, Jr. Charterhouse, New York, N.Y., 1974. Pp. 315. $8.95.

In recent years, military justice has often been described in unflattering terms. Books with titles such as *Military Justice Is to Justice as Military Music Is to Music*,[1] are typical of current popular writing on military law. Justice Douglas, writing for the majority in *O'Callahan v. Parker*,[2] alluded to "so-called military justice" and the "travesties of justice perpetrated" under the *Uniform Code of Military Justice*,[3] commenting that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[4]

Now the tide seems to have turned. Recognition has been given to the new look in military justice that has resulted from statutory changes, judicial decisions, and innovations within the armed services.[5] Additionally, the necessity of maintaining a separate system of military justice, a subject of much controversy, has been conceded. Upholding a hotly contested court-martial conviction, the Supreme Court observed in *Parker v. Levy*:[6] "The differences . . . first between the military community and civilian community, and second between military law and civilian law, continue in the present day under the Uniform Code of Military Justice. That Code cannot be equated to a civilian criminal code."[7] The Court went on to reject a contention that articles 133 and 134 of the *Uniform Code of Military Justice*[8] are void for vagueness.

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1. R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1969). *See also* CONSCIENCE AND COMMAND (J. Finn ed. 1971); R. RIVKIN, G.I. RIGHTS AND ARMY JUSTICE: THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW (1970).
2. 395 U.S. 258 (1969).
3. *Id.* at 266.
4. *Id.* at 265.
5. For a general discussion of these developments, see Everett, *The New Look in Military Justice*, 1973 DUKE L.J. 649.
6. 417 U.S. 733 (1974).
7. *Id.* at 749.
8. The *Uniform Code of Military Justice* [hereinafter cited as U.C.M.J.] contains 140 articles and appears in 10 U.S.C. §§ 801-940 (1970). Article 133 proscribes "conduct unbecoming an officer and a gentleman," while article 134 imposes sanctions on "all disorders and neglects to the prejudice of good order and discipline" and "all conduct of a nature to bring discredit upon the armed forces." *See* U.C.M.J. art. 133, 10 U.S.C. § 933 (1970); U.C.M.J. art. 134, 10 U.S.C. § 934 (1970).

In a similar vein, Professor Bishop's book develops the thesis that military justice "does have virtues as well as vices,"[9] that the system has evolved significantly in recent years, and that there is no occasion to conform military justice in every respect to the justice administered in the civil courts. At the same time, the author gives heed to valid criticisms of the court-martial system and makes constructive suggestions for change.[10]

Beginning with a presentation of the historical and constitutional background of American military law, the book then focuses on "The Court-Martial System: How Military Justice Works." Here Professor Bishop counters suggestions that the jurisdiction of federal civil courts be expanded to include the offenses now dealt with by military justice and makes clear his belief that a need exists for courts-martial. Arguments presented in support of a separate system of courts-martial include the difficulties of maintaining military discipline "by the civilian criminal process, which is neither swift nor certain";[11] the uniqueness of military offenses, such as unauthorized absence, desertion, or mutiny, so that the "adjudication of guilt or innocence and the assessment of appropriate punishment may require experience and knowledge not commonly possessed by civilian judges and jurors";[12] and, the problems that would exist in providing for trial in American civil courts of offenses committed by servicemen overseas. In attempting to give a balanced picture of military justice, Bishop also calls attention to safeguards now provided an accused serviceman which are not available to his civilian counterpart.[13] I concur fully that there is presently no need to scrap the separate system of military justice.

After evaluating the court-martial system, the author concludes that it "differs radically from the civilian in only one respect: the role of the military commander, the convening authority, whose responsibility it is to maintain discipline in the command, who decides which cases shall be prosecuted, and who selects the 'jury' that will decide guilt and assess punishment."[14] Professor Bishop does not—and really could not—dispute the charge that there is at least a possibility of command influence and resultant unfairness under this system.[15] He feels, how-

9. J. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW at xi (1974).
10. *See id.* at 300-04.
11. *Id.* at 21.
12. *Id.* at 24.
13. *Id.* at 37, 137-38. *See also* Everett, *supra* note 5, at 663-97; Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 MAINE L. REV. 105 (1970); Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A.L. REV. 1240 (1968); Comment, *Procedural Due Process in the Civilian and Military Justice Systems*, 14 ARIZ. L. REV. 345 (1972).
14. J. BISHOP, *supra* note 9, at 43.
15. Professor Bishop, however, obviously does not consider that command influence

ever, that this could be eliminated by the assignment of appointed military defense counsel, like military judges, "to a central organization, independent of the command which convenes the court-martial. Such a change would remove both the potential and the appearance of improper command influence."[16]

The book's third chapter treats the development of court-martial jurisdiction. In it the author examines cases such as *Toth v. Quarles*,[17] in which the Supreme Court held unconstitutional a congressional attempt to subject former servicemen to trial by court-martial for offenses committed prior to separation from the armed services; *Reid v. Covert*[18] and related cases,[19] invalidating court-martial jurisdiction over civilian dependents and employees accompanying the armed forces overseas in peacetime; and finally, *O'Callahan v. Parker*,[20] in which the court ruled that, with some possible exceptions,[21] a serviceman cannot be court-martialed for conduct which is not service-connected. Professor Bishop also discusses the amenability to court-martial of certain military-civilian hybrids, such as retired regulars and reservists not on active duty. Regardless of the constitutionality of such jurisdiction, he favors its elimination or limitation.[22]

Writing prior to the decision in *Parker v. Levy*,[23] the author declines to predict the Court's disposition of vagueness attacks on articles 133 and 134. He writes, however—in a passage from which Justice Blackmun was to quote in *Levy*[24] —that:

> It is, however, fair to say that in actual practice, the articles are not nearly so vague as they look. Almost all of the acts actually charged under these articles, notably drug offenses, are of a sort which ordinary soldiers know, or should know, to be punishable.[25]

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is a frequent or typical occurrence, as is implied by some commentators. *See* authorities cited note 1 *supra*. I share Bishop's appraisal in this regard. Of course, it must be recognized that the present system permits the appearance of evil.

16. J. BISHOP, *supra* note 9, at 34-35. Partly in response to recommendations submitted in 1972 in the *Report of the Task Force on the Administration of Military Justice in the Armed Forces*, the armed services have already taken steps towards removing all military defense counsel from command control and placing them under the authority of the Judge Advocate General. *See* Everett, *supra* note 5, at 662.

17. 350 U.S. 11 (1955).

18. 354 U.S. 1 (1957).

19. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

20. 395 U.S. 258 (1969).

21. *See* J. BISHOP, *supra* note 9, at 93-99.

22. *Id.* at 78-79, 302. *See generally* Bishop, *Court-Martial Jurisdiction over Military-Civilian Hybrids: Retried Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317 (1964).

23. 417 U.S. 733 (1974), *discussed in* Everett, *Military Justice in the Wake of Parker v. Levy*, 67 MIL. L. REV., Winter 1975, at 1.

24. 417 U.S. at 763.

25. J. BISHOP, *supra* note 9, at 87-88.

. . . .

. . . In short, there seem to be few, if any, of those convicted under the general articles who can fairly claim surprise.[26]

Bishop goes on to say that "[c]onstitutional or not, the general articles in their present form seem at best unnecessary. . . . The genuine crimes usually charged under the general articles could as easily, and with much clearer constitutionality, be covered by explicit articles of the Code."[27]

In Chapter four, "The Bill of Rights and the Serviceman," Professor Bishop begins by acknowledging that the Supreme Court "has never to this day squarely held that a soldier has any constitutional rights when he is court-martialed, or indeed that he has any constitutional rights of any variety."[28] Moreover, he is convinced that the framers of the Bill of Rights "never supposed that soldiers were included within its protection."[29] The author then discusses *Burns v. Wilson*,[30] a case whose meaning is obscured by the absence of a majority opinion, but which has generally been cited for the proposition that servicemen do have some constitutional rights.[31] Although collateral attack in the civil courts on court-martial action is dealt with, the issue has lost some of its importance, as Bishop recognizes,[32] because the *Uniform Code of Military Justice*, as interpreted by the Court of Military Appeals, provides many of the safeguards that are guaranteed to civilians by the Bill of Rights. Professor Bishop also discusses the leading free speech cases decided by the Court of Military Appeals—those of an Army Lieutenant Colonel who published a book on the Korean War without obtaining the "policy" and "propriety" clearance required by military directives;[33] two Black Muslims charged with violations of the Smith Act;[34] a Navy seaman who distributed an inflammatory underground

26. *Id.* at 90.
27. *Id.*
28. *Id.* at 114.
29. *Id.* at 115. For support of this proposition, Professor Bishop places appropriate reliance on the articles of Colonel Frederick Bernays Wiener. *See* Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pts. 1 & 2), 72 HARV. L. REV. 1, 266 (1958).
30. 346 U.S. 137, *rehearing denied*, 346 U.S. 844 (1953).
31. *See* Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 187-88 (1962). The plurality opinion in Burns v. Wilson, 346 U.S. 137 (1953), would restrict collateral review of court-martial convictions by federal civil courts to those constitutional issues that had not been fully and fairly reviewed within the military justice system. *But see* Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970) (allowing a broader scope of collateral review).
32. J. BISHOP, *supra* note 9, at 137-38. Parker v. Levy, 417 U.S. 733 (1974), will probably reduce the occasions for civil court review of court-martial action.
33. United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).
34. United States v. Harvey, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970); United States v. Daniels, 19 U.S.C.M.A. 518, 42 C.M.R. 120 (1970).

newspaper at various military installations;[35] and an Army Lieutenant convicted for "contemptuous words" against President Johnson in an anti-Vietnam war demonstration.[36]

The book's fifth chapter concerns the War Power. Professor Bishop first notes that the threshold issue of defining "war" is obscurred in an era when hostilities may be conducted for years without any formal declaration of war. Then, he discusses *Youngstown Sheet & Tube Co. v. Sawyer*[37] and the limitations on the President's ability to act without congressional authorization, even in waging war. In this connection, Bishop concludes that, "[t]he plain fact is that the Supreme Court's willingness to apply constitutional brakes varies in exact proportion to the degree of the emergency in which the Commander in Chief acted and the distance of the decision from that emergency."[38] The author's comparison of *Ex parte Vallandigham*,[39] decided in 1864, with *Ex parte Milligan*,[40] decided after the Civil War had ended, supports his conclusion. Similarly, he believes that the decisive difference between *Milligan* and *Ex parte Quirin*,[41] which in 1942 allowed an ad hoc military commission to try seven German saboteurs who had landed on American shores, "is that the former was decided after the last army of the Confederacy had surrendered, and the latter when the nation was waging war with enemies who seemed uncomfortably near to winning."[42] In this chapter, Professor Bishop also deals with the Japanese Exclusion Cases,[43] the Pentagon Papers,[44] and challenges to the draft.

Since "government has, on occasion, resorted to the use of military force in its own territory, and against its own citizens,"[45] the author devotes his sixth chapter to martial law.[46] After describing sections 331, 332, and 333 of title 10 of the *United States Code*, which provide a

35. United States v. Priest, 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972).
36. United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967). The accused also was convicted under U.C.M.J. art. 133, 10 U.S.C. § 933 (1970), which prohibits conduct unbecoming an officer and gentleman.
37. 343 U.S. 579 (1952).
38. J. BISHOP, *supra* note 9, at 188.
39. 68 U.S. (1 Wall.) 243 (1864).
40. 71 U.S. (4 Wall.) 2 (1866).
41. 317 U.S. 1 (1942).
42. J. BISHOP, *supra* note 9, at 196. Professor Bishop finds support for his conclusion in Duncan v. Kahanamoku, 327 U.S. 304 (1946). In *Duncan*, decided long after the last gun had been fired in World War II, the Supreme Court reaffirmed *Milligan* and held that the military trial of civilians in Hawaii was unjustified when the courts were open and able to function.
43. *Ex parte* Endo, 323 U.S. 283 (1944); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).
44. New York Times Co. v. United States, 403 U.S. 713 (1971).
45. J. BISHOP, *supra* note 9, at 225.
46. As Professor Bishop observes, the Constitution contains no express reference to martial law, but it does contain provisions that provide a basis for martial law. *Id.* at 227.

statutory basis to use troops to enforce the laws and suppress domestic violence,[47] Professor Bishop discusses cases in which the Supreme Court has imposed limitations on the use of martial law.[48]

Chapter seven, "The International Law of War," is only loosely connected to that which has preceded. In it, the author attempts to retrieve the distinction between illegality and immorality. Refuting sweeping charges about American war crimes in Viet Nam, he casts the discussion of war crimes in terms of violations of "international *law*—those rules which most nations have agreed . . . to obey and enforce."[49] The tone of Bishop's discussion may be illustrated by this sentence: "The fuzzy notion that every citizen of the United States (except the saints and martyrs of the anti-war movement) is guilty of the war crime of My Lai—that the unfortunate Lieutenant Calley was merely a scapegoat—is, to a lawyer, nonsense, and pernicious nonsense at that."[50] In connection with the Calley trial, the author also observes:

> In practice, of course, the common types of war crime, such as mistreating or killing prisoners of war, or noncombatants, are also violations of domestic law and can be tried as such by whatever ordinary courts have jurisdiction. Lieutenant William Calley, for example, was not tried by military commission for a war crime, but by a general court-martial for premeditated murder in violation of the Uniform Code.[51]

Noting that punishment of those who have commited war crimes is the most difficult problem, Professor Bishop believes that on some occasions the international law of war authorizes military jurisdiction that otherwise would be lacking. In his view, admittedly a minority one,[52] a former serviceman could, under proper circumstances, be tried by a military court on charges of violating the law of war, although, apart from the law of war, military jurisdiction would cease with discharge from the armed services.[53]

In his conclusion, Professor Bishop acknowledges that he favors neither "abolition of the separate system of military justice, nor even complete elimination of the military commander's role in it,"[54] but he recommends some changes in the present system. He would expand the role of the independent military judiciary by creating permanent mili-

47. *Id.* at 227-33.
48. Duncan v. Kahanamoku, 327 U.S. 304 (1946); Sterling v. Constantin, 287 U.S. 378 (1932).
49. J. BISHOP, *supra* note 9, at 261.
50. *Id.* at 293.
51. *Id.* at 262.
52. *Id.* at 292.
53. *See* Toth v. Quarles, 350 U.S. 11 (1955).
54. J. BISHOP, *supra* note 9, at 300.

tary courts consisting only of full-time, independent military judges. Military accused would be provided with defense counsel, responsible only to the Judge Advocate General and not to military commanders in the field. Bishop also recommends that some of the full-time judges and defense counsel be civilians, rather than, as at present, only military officers.[55] The author would abolish the bad conduct discharge and allow dishonorable discharge to be imposed only by a military court. He would repeal articles 133 and 134 of the *Uniform Code of Military Justice* and replace them by more specific criminal prohibitions.[56] Military criminal jurisdiction over certain hybrids—reservists not on active duty and retired regulars—would be eliminated or greatly curtailed. Article 88 of the Uniform Code, prohibiting an officer's use of contemptuous words towards the President or certain other officials, also would be abolished.[57] Decisions of the Court of Military Appeals would be made subject to review by the Supreme Court upon petition for certiorari.

Several of these recommendations are desirable and, to some extent, are being implemented. For instance, defense counsel are being insulated more thoroughly from influence by a military commander in the field. Use of a full-time military judge, now required by statute for the general court-martial,[58] is becoming more widespread in special courts-martial. I also favor Professor Bishop's suggestion that some civilians be employed as military judges and defense counsel. I doubt that such a proposal would prove palatable to the Judge Advocate General, however, who might view it both as an implied criticism of present military judges and defense counsel and a diversion to civilians of opportunities needed for career judge advocates.

I have reservations about some of Professor Bishop's other proposals, however. At this point, I am not convinced that it would be wise to abolish the military jury and have cases disposed of solely by military judges. Although the high percentage of waivers of trial by the court-martial members—military jurors—signifies that a large number of cases are already being tried by a military judge alone, cases may arise in the military, just as in civilian life, where the broad experience of jurors

55. Under the present provisions of the Uniform Code, only commissioned officers can serve as appointed military defense counsel or as military judges. See U.C.M.J. arts. 1(13), 26(b), 27, 10 U.S.C. §§ 801(13), 826(b), 827 (1970). However, a civilian may be a member of a Court of Military Review. U.C.M.J. art. 66(a), 10 U.S.C. § 866(a) (1970).

56. J. BISHOP, *supra* note 9, at 302. Professor Bishop would eliminate article 133 entirely.

57. *Id.* at 302-03. He comments that "the very rarity of its invocation shows that it is not needed to preserve military discipline. Soldiers ought to have as much right as civilians to cuss out the Government, so long as they obey its lawful orders." *Id.* at 303.

58. *See* U.C.M.J. art. 26, 10 U.S.C. § 826 (1970).

could make a significant contribution to the fact-finding process. For example, in the trial of an alleged combat offense, military jurors with combat experience might better understand the events involved than military judges, who might lack such experience. Concerning the proposal by Professor Bishop—and by many others—that direct review be available in the Supreme Court for opinions of the Court of Military Appeals, I have mixed sentiments. Occasions arise when a legal issue might be more promptly resolved if it could be considered directly by the Supreme Court upon a petition for certorari, instead of wending its way to the Court through the process of collateral attack in the federal civil courts. On the other hand, the availability of petitions of certiorari from the Court of Military Appeals might noticeably add to the Court's crowded docket.[59]

Professor Bishop's introduction recites that his "purpose in writing this book is to give to general readers, and to the many lawyers who lack familiarity with military law, a concise account of that law . . . ."[60] For this task, he is exceptionally well qualified by his experience as a member of the Judge Advocate General's Corps during World War II, legal advisor to a board of inquiry investigating alleged war crimes by members of a German SS division, and as Deputy General Counsel and Acting General Counsel of the Army in the Korean War period. Along with this background, he brings a writing style that is readable, indeed entertaining. As stated on the book's jacket cover, the result of Professor Bishop's labors "can and will be read with interest by the lay reader and by those who have a professional concern with law and the military."

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59. The number of petitions for certiorari might depend, in part, on the availability of appellate defense counsel for purposes of preparing such petitions and the extent to which such counsel felt ethically obligated to submit a petition whenever the accused requested. *Cf.* U.C.M.J. art. 70, 10 U.S.C. § 870 (1970). Article 70 provides for appellate defense counsel to represent the accused before the Court of Military Review or the Court of Military Appeals.

60. J. BISHOP, *supra* note 9, at xi.

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OUR KINDLY PARENT—THE STATE: THE JUVENILE JUSTICE SYSTEM AND HOW IT WORKS. By Patrick T. Murphy. The Viking Press, Inc., New York, N.Y., 1974. Pp. x, 180. $8.95.

> Working on juvenile cases was like picking up a damp, flat rock and finding thousands of slimy, crawling things under it.[1]

In June of 1970, a young Chicago lawyer, Patrick Murphy, became Chief Counsel of the Juvenile Office of Chicago's Legal Aid Society. For the next 3 years, he and his small staff wrote a new chapter in the story of "the rise and fall of the juvenile court."[2] They brought a series of lawsuits exposing, and often putting an end to, the harsh treatment of children and adolescents confined to reform schools, detention centers, receiving homes, mental hospitals, facilities for the mentally retarded, and other institutions of incarceration for Chicago's economically deprived, "disturbed and disturbing"[3] youngsters.

Their victories were impressive: the closing of a juvenile prison; a halt to the banishment of children to out-of-state institutions; reduction in the incidence of incarceration of runaway children; and a decision granting hearings to children, who had been taken from their parents, before the state could commit them to institutions for the mentally ill or retarded or transfer them from mental health facilities to maximum security institutions. Court rulings were obtained prohibiting the placement of juveniles in the state's "security hospital," a maximum security facility for dangerous, mentally ill adults, and limiting the use of drugs, physical restraints, solitary confinement, and other excessive forms of discipline. Private agencies receiving public funds were forced to accept minority group youngsters from overcrowded, understaffed state facilities; there was a challenge to the state welfare department's policy of coercing parents in need of social services into confessing that they had "neglected" their children and giving custody of the children to the state. Finally, there was a decision from the United States Supreme Court permitting unwed fathers to contest the removal and commitment to state custody of their children.[4]

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1. P. MURPHY, OUR KINDLY PARENT—THE STATE: THE JUVENILE JUSTICE SYSTEM AND HOW IT WORKS 15 (1974).

2. The expression is taken from E. Ryerson, Between Justice and Compassion: The Rise and Fall of the Juvenile Court, 1970 (unpublished dissertion in the Yale Law School Library).

3. This characterization of the children primarily affected by the juvenile justice system was used by Chief Judge David Bazelon of the District of Columbia Circuit Court of Appeals in an address at the Yale Law School on November 1, 1974.

4. Stanley v. Illinois, 405 U.S. 645 (1972).

Murphy has described his work in a thoughtful and compelling book, *Our Kindly Parent—The State: The Juvenile Justice System and How It Works.* The book is an excellent introduction to the juvenile justice system for those unfamiliar with its history and practice. It is also a dramatic account of the efforts of a small group of legal aid lawyers to reform that system and to rescue children from brutal treatment.

The book should appeal to a wide audience—lawyers, judges, probation officers, correctional personnel, social workers, behavioral scientists, and, happily, the general reader. Moreover, it is a particularly good book for law students, describing the day-to-day working life of practicing lawyers attempting to work within the legal system to achieve reform and justice. The book is laced with excellent descriptions of case development and preparation: how issues are presented and disputes resolved in an adversary system, how tactical and strategic decisions are made, and how ethical questions arise and are resolved.

Murphy's tone is ironic and bitter,[5] yet the story of the efforts of these lawyers to redress injustice and to relieve suffering both challenges and inspires. Murphy writes:

> Since the inception of the juvenile courts almost a century ago, a veil of secrecy has surrounded them and their activities. The alleged reasons for this secrecy is to protect the names and lives of the children and families who are "aided" by the juvenile justice system. But . . . the secrecy is perpetuated more to protect those who work within the state bureaucracies than to maintain the anonymity of those who are compelled to endure being "saved" by the system of juvenile justice. This book was written in an at-attempt to pierce that veil of secrecy and privacy, and to enlighten the public about how in fact our nation "saves" children and their parents.[6]

The Historical Basis of Juvenile Justice

As Murphy states, the events described in his book must be placed in historical context. The story actually began in Chicago more than a century ago. In 1870, 14-year-old Daniel O'Connell was brought before a superior court judge and charged with being "destitute of proper parental care, and growing up in mendicancy, ignorance, idleness or vice."[7] Although the boy had committed no crime, the judge found that he was

5. Some of the chapter titles are indicative of the author's approach: "Care, Custody, and Maximum Security: Our Battle in the Federal Courts"; "The Demise of Maximum Security"; "How to Dump Homeless Children in Out-of-the-way-Places"; "The Family-Saving Quagmire."

6. P. MURPHY, *supra* note 1, at vii-viii.

7. People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 282 (1870).

"a proper subject for commitment in [the] reform school [and that his] moral welfare and the good of society require that he should be sent to said school for instruction, employment and reformation . . . ."[8] Daniel was sentenced to the Chicago Reform School pursuant to a statute which provided that children so described were to be " 'kept, disciplined, instructed, employed and governed,' until they shall be reformed and discharged, or shall have arrived at the age of twenty-one years."[9]

Daniel's father obtained the assistance of counsel and brought a habeas corpus proceeding in the Illinois supreme court seeking Daniel's release. The court held that the laws under which the boy had been confined were unconstitutional and ordered him set free. "Why," the court asked, "should children, only guilty of misfortune, be deprived of liberty without 'due process of law?' "[10]

> If, without crime, without the conviction of any offense, the children of the State are to be thus confined for the "good of society," then society had better be reduced to its original elements, and free government acknowledged a failure.[11]

While conceding that benevolent and rehabilitative purposes had motivated the statute, the court characterized rehabilitative incarceration as imprisonment, recognized the social stigma attached to such confinement, and demanded less restrictive alternatives.[12] This position would one day receive general acceptance in our jurisprudence,[13] but contemporaneous response to *O'Connell* was to criticize or ignore it. As Murphy observes:

> This decision was considered quite illiberal by the child- and family-rescuers of the day. It obviously hindered them from saving from their undeserving parents the children growing up in the immigrant ghettos that were so much a part of the nineteenth-century American city. What was even worse, the Illinois Supreme Court had looked behind the statute and into the realities of the

8. *Id.* at 281.
9. *Id.* at 283.
10. *Id.* at 287.
11. *Id.* at 268.
12. It cannot be said, that in this case, there is no imprisonment. Nothing could more contribute to paralyze the youthful energies, crush all noble aspirations, and unfit him for the duties of manhood. Other means of a milder character; other influences of a more kindly nature; other laws less in restraint of liberty, would better accomplish the reformation of the depraved and infringe less upon inalienable rights.

Id. at 287.

13. Even the notion that impoverished children and their parents would one day have access to free legal counsel in such cases saw its seed planted in 19th-century Chicago. The first true legal aid society, open to individuals of any nationality, sex, or age—The Bureau of Justice—was established in Chicago in 1888. JOHNSON, JUSTICE AND REFORM 5 (1974); R. SMITH, JUSTICE AND THE POOR 136 (1919).

> institutional life and in effect was saying that the discipline meted out to O'Connell was, in fact, imprisonment.[14]

By the turn of the century, *O'Connell* had been overturned by statute. The first juvenile court in the United States was established in Chicago in 1899,[15] as a result of the efforts of "child savers" of that time such as Jane Addams, Julia Lathrop, Louise deKoven Bowen, Judge Richard Tuthill, and Judge Julian Mack.[16] As the Supreme Court noted in its landmark decision, *In re Gault*:[17]

> The early reformers were appalled by adult procedures . . . . The child . . . was to be made "to feel that he is the object of [the state's] care and solicitude," not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable.. The apparent rigidities, technicalities, and harshness which they observed in . . . procedural criminal law were therefore to be discarded.[18]

Not only were procedural safeguards relaxed, but the jurisdiction of the juvenile court was far broader than that of adult criminal courts. Children who, like Daniel O'Connell, had committed no crimes, but were alleged to be truant, beyond the control of their parents, or otherwise "in need of supervision," were to join those children who were charged with adult criminal offenses, in receiving the care, discipline, and treatment which, the child savers claimed, they had been denied by their parents.[19]

Flaws in both the theory and implementation of the reformers' plans appeared early. Critics such as Wigmore, then teaching in Chicago, charged that the system neither rehabilitated offenders nor protected the community and disregarded the fundamental purposes of the criminal law.[20] It was not simply that society failed to provide the treatment resources necessary to fulfill the child savers' promise to reform, edu-

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14. P. MURPHY, *supra* note 1, at 4.

15. *See* Illinois Juvenile Court Act, Act of Apr. 21, 1899, [1899] Ill. Laws 131.

16. *See generally* A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Schultz, *The Cycle of Juvenile Court History*, 19 CRIME & DELIN. 457 (1973).

17. 387 U.S. 1 (1967).

18. *Id.* at 15. *See generally* THE CHILD, THE CLINIC AND THE COURT (J. Addams ed. 1925); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

19. [The reformers] were convinced that youth crime was not a problem of law enforcement but a social-psychological problem of children and their families requiring interventions of a therapeutic nature, involving state interference with and assumption of the parental function of child rearing . . . . The lack of formal legal procedures and protections for the children was justified on the ground that nothing "bad" was being done to the children, but rather something "good" was being provided for them.

Wizner, *The Child and the State: Adversaries in the Juvenile Justice System*, 4 COLUM. HUMAN RIGHTS L. REV. 389, 390 (1972).

20. Wigmore, *Juvenile Courts vs. Criminal Courts*, 21 ILL. L. REV. 375 (1926).

cate, and rehabilitate the errant and neglected children of the poor, although that was certainly the case. More fundamentally, the theory was based upon simplistic, sentimental, and authoritarian notions about child development, which have been challenged by professionals in numerous fields.

Shaw and McKay, in their famous Chicago Area Project and other delinquency studies,[21] have shown the extent to which delinquency is a function of the poverty, overpopulation, and social disorganization of urban slums. Providing a special court and institutions cannot cure delinquency; they can only protect the community from delinquent children during the period of their confinement. Psychological theory—particularly psychoanalysis—has also contradicted the approach of the child savers. Psychologists have argued that the causes of youthful antisocial behavior are deeply rooted within the personality and, therefore, cannot be treated effectively except through extended individual psychotherapy.[22] If the sociologists and psycholgists are correct, the superficial efforts of friendly probation officers, kindly judges, and humane correctional personnel are doomed to failure from the outset. Similarly, legal theorists and criminologists have joined in criticizing the theoretical assumptions of the child savers. Professor Francis Allen, formerly of the University of Chicago Law School, has correctly pointed out the inherent conflict in the juvenile justice system between legal values and rehabilitative ideal.

> We shall escape much confusion here if we are willing to give candid recognition to the fact that the business of the juvenile court inevitably consists, to a considerable degree, in dispensing punishment. . . . [W]e can no more avoid the problem of unjust punishment in the juvenile court than in the criminal court. . . . A child brought before a tribunal . . . has . . . a right to receive not only the benevolent concern of the tribunal but justice. One may question with reason the value of therapy purchased at the expense of justice.[23]

Revisionist historians of the child-saving movement have begun to question even the motivations of the reformers who had devised and promoted the special juvenile justice system. Platt[24] and Fox[25] have con-

21. C. SHAW, THE JACK-ROLLER, A DELINQUENT BOY'S OWN STORY (1930); C. SHAW, THE NATURAL HISTORY OF A DELINQUENT CAREER (1931); C. SHAW & H. MCKAY, DELINQUENCY AND URBAN AREAS (1942, 1969); C. SHAW & H. MCKAY, DELINQUENCY AREAS (1929); C. SHAW, H. MCKAY, B. HANSON, E. BURGESS & J. MCDONALD, BROTHERS IN CRIME (1938).
22. *See* Ryerson, *supra* note 2, at 128-68.
23. F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 18-19 (1964).
24. A. PLATT, *supra* note 16.
25. FOX, *supra* note 16.

tended that middle-class and conservative interests dominated the child-saving movement, and that the movement was in fact a paternalistic and class-motivated effort to control the lives of urban lower-class adolescents by imposing sanctions upon premature independence and behavior deemed unbecoming to youth. The leaders of the movement, particularly those involved with settlement houses serving immigrant populations, were prominent, often wealthy, women who advocated therapeutic strategies to achieve social control and sought to impose middle class values on the children of the poor, while creating a respectable professional identity for themselves. These reformers promoted correctional programs requiring longer terms of imprisonment for children than for adults, frequently for reasons which would not justify the incarceration of an adult, consisting of long hours of physical labor, militaristic discipline, and "the inculcation of middle-class values and lower-class skills."[26]

Thus, by exposing the abuses perpetrated by the juvenile justice system in Chicago and challenging its theoretical basis, Patrick Murphy has joined the ranks of a distinguished group of social scientists, criminologists, lawyers, and historians who represent a Chicago-centered tradition of child advocacy and juvenile justice criticism.

The Lawyer's Role in Juvenile Justice Reform

Most importantly, the Murphy book raises the question of the proper role of the lawyer in the juvenile justice system.[27] Murphy reports that when he and his associates began to bring lawsuits challenging some of the practices of state agencies and juvenile justice officials, "the shock waves in and around the juvenile bureaucracies were unbelievable. Everybody—from lawyers in the public defender's and state's attorney's offices, to the social workers in the juvenile agency—looked upon us as ogres for challenging such a benign system."[28]

This response is difficult to comprehend when one reads Murphy's descriptions of children tied, spread-eagled, to beds in mental hospitals for weeks at a time, thrown into solitary confinement "strip cells" for long periods, and kept close to unconsciousness by large doses of powerful tranquilizing drugs; of mentally competent children committed to mental hospitals or dumped in institutions for the retarded;

26. A. PLATT, *supra* note 16, at 26.

27. *See generally* W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS (1972); Weiss, *Defense of a Juvenile Court Case*, in 3 CRIMINAL DEFENSE TECHNIQUES 60.01[1] (S. Bernstein ed. 1974); Wizner, *supra* note 19. *See also* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD, ch. 5 (1973).

28. P. MURPHY, *supra* note 1, at 12.

of runaway children incarcerated in jails; of a 13-year-old child receiving an unconsented to and unnecessary hysterectomy; of thousands of children neglected and mistreated by the state in the name of child saving. As Murphy wrote: "In our work, we had been in many jails, hospitals, and detention centers . . . . I could never walk away without a feeling of severe depression at the thought of what some humans would do to others in the name of 'help.' "[29]

Ordinary bureaucratic defensiveness may account, to some degree, for the reactions of public officials to the legal challenges brought by Murphy's office, but a more complex explanation is required for the systematic retreat from reality by those public officials responsible for maintaining children in such unconscionable circumstances. This explanation may be that the juvenile justice system is a world where euphemistic labels and unrealistic pretensions substitute for reality. It is a world where an indictment is a petition; a prosecutor is a court advocate; a guilty verdict is a finding; a sentence is a disposition; a jail is a detention center; a prison is a training school; a cell is a room; and a strip cell used for solitary confinement is a reintegration or intensive treatment unit. It is a fantastic world where labels are applied to children virtually interchangeably in order to conform the children to whatever programs or placements are in fact available at a given time. When a lawyer, from outside the system, like Murphy, questions such manipulation of labels and looks behind the terminology of the juvenile justice professionals, he is threatening the world to which they have become accustomed. Rather than join with him to alleviate suffering and redress injustice, they fight back.

When Murphy brought a successful suit seeking the release of "neglected" children from the detention center (jail), the number of "neglected" children incarcerated fell dramatically. Strangely, however, the number of "minors in need of supervision" confined in the same detention center increased substantially, as did the number of "mentally ill" and "retarded" children confined to mental hospitals and institutions for the retarded.[30] They were the same children; only their labels had been changed. "The fact was, whenever we put pressure on one juncture in the dumping process, the population in the other juncture would increase."[31]

29. P. MURPHY, *supra* note 1, at 139.

30. In most states children who are not in need of psychiatric care can be confined to mental hospitals as "voluntary" patients by their parents or legal guardians, whether or not the child agrees to be so committed and without a hearing or any other form of judicial scrutiny. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840 (1974).

31. P. MURPHY, *supra* note 1, at 119.

In view of the inadequate resources available to the state, the resulting dumping and neglect of children in state custody, and the substantial deprivations of liberty involved, the juvenile justice system must become an adversary one. In every realistic respect, it *is* an adversary system, and any effort to deny that fact is simply another attempt to camouflage reality by manipulating labels.

By exposing the adversary quality of the juvenile justice system, Murphy demonstrates that the proper role for the child's lawyer is the same as the role of a lawyer representing any other client in any adversary process.[32] Even if children are subject to parental or state control, even if they are not fully competent to make intelligent decisions concerning their own best interests, and even if children are more amenable to treatment and rehabilitation than adults,[33] this hardly justifies a conclusion that they are not entitled to due process of law. Those adults seeking their institutionalization must be required to demonstrate that it is in fact necessary, proper, and the best program for them, involving the least restriction of their liberty.

Nevertheless, Murphy has no illusions that lawyers can "save" children any better than social workers or bureaucrats: "The litigation helped some of our clients and gave them hope for a brighter future. But for others, although the cases we brought on their behalf may have wrought major changes in the law, they themselves were unaffected and continued on their downward slide to poverty and crime."[34] Nor does Murphy believe that juvenile courts should be abolished:

> We do need a juvenile court to prosecute youngsters charged with serious criminal offenses, to assist in resolving the problems of adolescents who can no longer live at home, and to review charges of serious physical or emotional child-abuse. But cases in which the courts are merely used as a club to enforce the views of middle-class social workers and inept regulations should be no part of a judicial system . . . . The juvenile court too often acts

32. "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*." Anders v. California, 386 U.S. 738, 744 (1967). I have benefited greatly from conversations with and written work by Steven Goode, Yale Law School class of 1975, concerning the role of counsel in civil commitment proceedings. Mr. Goode's views, and my own, appear to be somewhat inconsistent with the ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, EC 7-11, 7-12 (1971). However, as Mr. Goode has demonstrated in a Note in the *Yale Law Journal*, these provisions are so ambiguous that they could be construed to be consistent with these views. Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 YALE L.J. 1540 (1975).

33. This is a doubtful proposition. Martinson, *"What Works?—Questions and Answers About Prison Reform,"* PUBLIC INTEREST, Spring 1974, at 22, 25-27.

34. P. MURPHY *supra* note 1, at 164.

> as a rubber stamp, giving its imprimatur to the switching of children and families from agency to agency.[35]

Rather, Murphy argues for the development of what the Cahns have called a "civilian perspective"[36] as a means of reforming the public child welfare system:

> Citizens who are supposed to be assisted by the state must have some form of power over it. Many of the inequities caused to our clients were the result of irrational decisions made by lower-level state bureaucrats and stupidly upheld by their superiors. Of course, we had many of these decisions reversed, but only after expensive and time-consuming litigation. And we only represented a few of the people who had been kicked around . . . . [W]e seem to have reached a stage now where the bureaucracies run themselves without regard to political or public pressure of any sort.[37]

An essential component of the civilian perspective is the provision of competent legal counsel in sufficient numbers to challenge the decisions of the child-saving bureaucrats. But even more important is legislative reform reducing the power of the bureaucracies and of the juvenile court over citizens. One can only hope that the work of legislative reformers will be guided by the words of the Illinois supreme court, more than a century ago, in the *O'Connell* case:

> In our solicitude to form youth for the duties of civil life, we should not forget the rights which inhere both in parents and children. The principle of the absorption of the child in, and its complete subjection to the despotism of, the State, is wholly inadmissible in the modern civilized world.[38]

*Stephen Wizner**

35. *Id.* at 174.
36. Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964); Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927 (1966).
37. P. MURPHY, *supra* note 1, at 177.
38. People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 284 (1870).

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