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THE CULTURE OF CHANGE IN MILITARY LAW

I.

Anyone tracing the path of military law over the last several decades will be struck by two phenomena: the extent of change that has overtaken the system . . . and the resistance to change. Much of the change has been justified—or condemned— under the rubric of "civilianization"—the "C word," mere utterance of which still makes the occasional senior military lawyer see red. A substantial body of literature has been produced in the process. [1] But all too rarely have efforts been made to step back from the immediate issues of the day and consider the evolution of military justice in light of larger themes in the development of law and legal institutions. With the lowering of voices that has characterized the stewardship of Chief Judge Robinson O. Everett on the United States Court of Military Appeals (and with fingers crossed that the court will be spared yet another spell of personnel and doctrinal turbulence), attention can usefully be turned to those larger themes.

II.

The received learning is that military justice is sui generis, springing from essentially different jurisprudential sources from those out of which criminal and civil law have emerged. The Supreme Court has repeatedly sounded the theme that the military is of necessity a separate society, with a correspondingly separate set of rules. [2] Whatever its purposes and sources, the legislative basis of military law is also different from those of the other two bodies of American criminal law. [3] Where else, after all, is the process of elaborating a code of criminal procedure left so overwhelmingly to the prerogative ***126** of the executive branch, [4] with so little actual involvement of the public, the bar, or Congress? [5]

This description is unlikely to change in the foreseeable future. There are, however, other perspectives from which the military and civilian legal systems may be considered. One of these—admittedly an elusive one—involves the process of change itself, and how those involved with the two systems view that process. On this level, the modern history of American military justice is essentially of a piece with the very culture of change in Anglo-American law over the last 150 years. This view is not at odds with the notion that military law serves different purposes, at least in part, from those served by general criminal law. It does, however, focus on an institutional dimension which, if examined, may foster greater mutual understanding between the military and civilian bars. Such an improvement in mutual understanding is desirable as a matter of public policy in a democratic society committed to civilian control of the military.

III.

Time and again since the early nineteenth century, major changes have shaken the basic doctrines, institutions, and mind-set of the law here and in England. Aspects of that history are instructive in thinking about the process of change in military law.

In 1848 the New York Legislature enacted the Field Code, abolishing the distinctions between law and equity and radically altering one of the most fundamental aspects of the common law system. Influential as it was, both in other states and in Britain, the Field Code was resisted by distinguished members of the bench and bar in both countries. Writing of law and equity, for example, Judge Samuel Seldon of New York wrote in Reubens v. Joel: "It is possible to abolish the one or the other, but it is certainly not possible to abolish the distinction between them." [6]

***127** In his History of American Law, Professor Lawrence M. Friedman wrote:

> Certainly the [Field C]ode could not destroy the habits of a lifetime, nor, by itself, transform what may have been deeply imbedded in a particular legal culture. But the stubbornness of the judges was a short-run phenomenon, to the extent it occurred. The real vice of the code probably lay in its weak empirical base. The draftsmen derived their basic principles from ideas of right reason, rather than from a careful study of what actually happened in American courts, and what functions and interests courts and their lawsuits served. [7]

Friedman also noted the effort of Dean Henry Ingersoll of the University of Tennessee, in 1 Yale Law Journal (1891), to decry the "attempt of one State to adapt a Code of Procedure prepared for an entirely different social and business condition." [8] Addressing Ingersoll's criticism of the adoption of the Field Code by North Carolina during Reconstruction, Friedman commented: "Actually, systems of procedure did not fit particular cultures so snugly. Ingersoll's diatribe mostly meant that code pleading was more easily attacked when it could be identified with an alien, and in this case, a hated culture." [9]

To what extent is Dean Ingersoll's concern about the wholesale importation of concepts from one legal climate into another pertinent to the changes that have overtaken military law in our professional lifetimes? Respected observers have counseled caution in the adoption of civilian attitudes, [10] and whether or not one agrees on any particular reform, it is certainly advice that should be taken seriously. Arguably there is a parallel between the gap that separated the New York that enacted the Field Code and the North Carolina that copied it, on the one hand, and, on the other, the gap that separates civilian and military societies and defines their views of one another and of their respective legal systems. "Hatred" is certainly too strong a term for the relationship, but would "mutual mistrust" do? Anyone who has practiced in both communities would have to acknowledge the accuracy of such a description. Worse yet, there is little prospect for bridging this gap so long as our society is content to treat the military as a separate society. "Out of sight, out of mind" seems to ***128** be the watchword. On the rare occasions when military justice is "in mind," the civilian mind—thanks in large measure to the mass media, which fixate on the perceived outrage of the moment—can conjure up little more than stereotypes.

IV.

Law reform was at least as controversial in England as it was in this country. For example, "[w]hen in the early nineteenth century the barrister Henry Brougham persisted in his proposals for law reform, solicitors threatened a professional boycott." [11]

One of the great judges (and pedants) [12] of the last century was Baron Parke, who served on the Court of King's Bench and Court of Exchequer for many years. In 1855, not long after New York passed the Field Code, Parke resigned. One view is that his resignation was age or health related (he suffered from gout). [13] Another—surprisingly, in light of his reputation as "a zealous laborer for the removal of all useless formalities in legal proceedings" [14] —is that the resignation was in reaction to passage of the Common Law Procedure Acts of 1854 and 1855. [15] Until federal judicial pay is raised, U.S. judges may quit the bench because their salaries are too low, but few leave the bench over matters of principle such as that which, on this view, stimulated Parke's departure. [16] Parke's view may seem hopelessly old-fashioned by today's standards, [17] but it shows how deep feelings can run.

***129** The cultural implications of the merger of law and equity—a development every lawyer now takes for granted—must not be discounted. For example, when, in 1875, England took a similar step in the Judicature Act, it was unprecedented that Lord Lindley, who had "taken silk" (i.e., become a Q.C., or Queen's Counsel) only three years earlier as a chancery practitioner, was promoted to the common law bench. Lindley's long career—he died in 1921, at the age of 94—highlights the last century's reshaping of the English legal system. While not a university graduate, he was a distinguished practitioner and highly-regarded judge, serving on the Common Pleas Division of the High Court, as a Lord Justice of the Court of Appeal, and as Master of the Rolls.

At his death Lindley was the last surviving English serjeant-at-law, [18] the group that had for centuries been the source of judicial appointees and enjoyed a monopoly over practice in the Court of Common Pleas. In 1846 the Common Pleas bar was expanded to non-sejeants, [19] and only twenty-two years later the last nonjudicial serjeants were created. One wonders how Lindley felt about the changes that overtook his profession during his lifetime, but it would not be surprising if he, like others, [20] thought of the earlier stages of his career as, in some sense, "the good old days."

Perhaps the same was true of Dr. T.H. Tristram, who died in 1912. He was the last Civil Law "advocate." [21] These lawyers, known as "civilians," had a separate status from the serjeants, who practiced ***130** in the higher common law courts. Until the nineteenth century they enjoyed a monopoly over matrimonial, divorce, probate, admiralty, and chivalry cases. "Military law was . . . from old time within the civilians' province." [22] In time, the willingness of Lord Mansfield to use Roman law, the law of nations, and opinions of foreign civilians "helped to level the barriers that had once separated the lawyers at Doctors' Commons as their quarters were called from the rest of the legal profession," [23] but their last preserve—practice before the Court of Admiralty—remained closed to the ordinary bar until 1858. [24] Did Tristram and the other members of Doctors' Commons look upon the loss of that monopoly with equanimity, much less enthusiasm? Would it have been churlish of them to feel they had been unjustly ousted as custodians of these doctrinal areas? [25]

V.

The last 150 years have been a period of transformation, consolidation and—to a degree—homogenization of doctrinal areas that for a long while had been the peculiar preserve and responsibility of special segments of the civilian bar. [26] The evolution that has over-taken military law since 1950 is of a piece with that historic pattern. The Uniform Code of Military Justice itself reflected civilian doctrines; the idea of a real judiciary was added in 1968; and the Rubicon was irrevocably crossed in 1980 when the Military Rules of Evidence were promulgated. How many old-time military lawyers, schooled in the 1951 Manual for Courts-Martial or even the Articles of War, felt the way serjeants-at-law or Civil Law advocates once did as they watched the erosion of the doctrinal differences that had long set military law apart?

Unlike some of the other historical changes mentioned here, in military law there has been no formal bar monopoly to dismantle. Nonetheless, military lawyers, unlike the serjeants-at-law and the ***131** Civilian Advocates of English tradition, continue to bear unique responsibility for the development of military legal doctrine. There are relatively few trials or appeals in which civilian counsel play any role, [27] and the civilian bar has not been notably aggressive, independent, or effective in troubling itself with respect to military justice. Of course, the civilian judges of the Court of Military Appeals play a key role, [28] but through the courts of military review and, above all, custodianship of the Manual for Courts-Martial and ancillary service regulations, uniformed practitioners and judges are capable of exerting a far more pervasive influence. [29]

The question is, what will the military bench and bar do with that power? As a single—but far from trivial—illustration, will that bench and that bar continue to tolerate a clearly inferior and user-unfriendly military justice case digesting system simply to provide unneeded additional support for the largely undisputed proposition that the body of military jurisprudence remains different from others in key respects? More profoundly, how long will the military system be permitted to rely on trial and intermediate appellate benches the judges of which lack the minimal protection of fixed terms of office, however brief the duration? At a time when every other major system of justice in America has taken steps to institutionalize the process for systemic study and improvement in the administration of justice, why is there still nothing remotely approaching a National

Institute of Military Justice that could draw on all of the law-related social sciences? Why are ideas like these[30] so slow in becoming a subject even of debate?

VI.

Now back to history. The lesson to be drawn from the progress of law reform since the nineteenth century is one of patience and toleration. We lawyers are a nostalgic lot. Symbolism and tradition count for much among us. As a result, it is important to take the longer ***132** view suggested by these historical analogies when addressing proposals for change and considering the resistance to change in military justice. The new should not be embraced merely because it is new. Nor should those who seek to preserve older approaches be derided as fuddy-duddies or worse for counseling caution or being loath to jettison institutions, modes of thought, and legal practices that they believe to be useful and legitimate and for which they view themselves as legatees and trustees.

Society ought to look to the custodians of military jurisprudence for professionalism. Professionalism, in a legal context, implies an unwillingness to accept circumstances simply because they exist, if there is room for improvement in either substance or appearance. Appearance—symbolism—is critical in any system of justice. It is even more critical when the system is one in which the bulk of criminal defendants—often members of disadvantaged minorities—find themselves toward the bottom of an official totem pole, and typically have little if any say in the selection of their legal representatives, either at trial or on appeal.

Professionalism also implies creativity and leadership (a good military concept) in shaping and testing new approaches while at the same time being appropriately respectful of tradition, values, and empirically demonstrable special demands of the jurisdiction. Military lawyers must explore the meaning, as applied to them, of their duty as "public citizen[s]" to "seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession."[31]

Military law is important to American society, and there is much that rightly sets it apart from the other sets of norms applied by the legal system. If a lawyer who uses his or her skills and energy to preserve the good and the practical in that system deserves praise, how much more so if those efforts are also informed by the lawyer's zeal for intelligent innovation where justified?

The old gospel song asks: "Will there be any stars in my crown when at evening the sun goeth down?" When the history of American military law is written, will there be any stars in its crown?

Footnotes

a Partner, Feldesman, Tucker, Leifer, Fidell & Bank, Washington, D.C. B.A., Queens College, 1965; LL.B., Harvard Law School, 1968. This article is adapted from the author's remarks at the Twelfth Criminal Law New Developments Course. The Judge Advocate General's School, Charlottesville, Virginia, on August 17, 1988.

1 E.g., Sherman, The Civilianization of Military Law, 22 Me. L. Rev. 3 (1970).

2 E.g., Schlesinger v. Councilman, 420 U.S. 738, 757 (1974); Parker v. Levy, 417 U.S. 733, 743 (1974).

3 See generally Cook, Courts-Martial: The Third System of American Criminal Law, 1978 So. Ill. U.L. Rev. 1.

4 See Uniform Code of Military Justice art. 36, 10 U.S.C. § 836 (1982); Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

5 For several years the Defense Department has, as a matter of policy, 47 Fed. Reg. 3401 (1982); see 32 C.F.R. § 152.4(c) (1988), published notice of the availability of proposed MCM changes in the Federal Register, e.g., 51 Fed. Reg. 4530, 31164 (1986), but very few members of the bar or of the public seek copies of the proposed changes or submit comments. Public and bar attendance at open meetings of the Code Committee is almost unheard of. See generally Fidell, Military

Justice: The Bar's Concern, 67 A.B.A.J. 1280 (1981). For its part, Congress has never taken any interest in MCM changes and basically involves itself in military justice matters only in response to initiatives by the Defense Department.

6 13 N.Y. 488, 493 (1856).

7 L. Friedman, History of American Law 394 (2d ed. 1985).

8 Ingersoll, Some Anomalies of Practice, 1 Yale L.J. 89, 91 (1891).

9 L. Friedman, supra note 7, at 396.

10 E.g., Gasch, Who is Out of Step?, The Army Lawyer, June 1978, at 1; E. Byrne, Military Law 12 (3d ed. 1981).

11 D. Pannick, Judges 107 & n.8 (1987). The solicitors' threat seems not to have had much effect: Brougham wound up as Lord Chancellor. See generally A. Simpson, Biographical Dictionary of the Common Law 79-82 (1984).

12 J. Baker, An Introduction to English Legal History 173 (2d ed. 1979) (quoting Lord Hanworth, Lord Chief Baron Pollock 198 1929)).

13 15 Dictionary of National Biography 226 (repr. 1921-22).

14 E. Foss, A Biographical Dictionary of the Judges of England 497-98 (1870).

15 15 Dictionary of National Biography, supra note 13, at 226; 15 W. Holdsworth, A History of English Law 487 (1965).

16 See D. Pannick, supra note 11, at 15 & n.81. Parke did not leave the stage of English law when he left the bench—nor was he reviled for his protest. He was given a life peerage as Lord Wensleydale, but the House of Lords refused to seat him on the ground that the Crown's power to create life peers had lapsed through disuse. The Wensleydale Peerage, 10 Eng. Rep. 1181 (H.L. 1856). In time he was issued new letters patent for a hereditary peerage in tail male. See generally 14 Holdsworth, supra note 15, at 146-47; T. Plucknett, Taswell-Langmead's English Constitutional History 555-56(11th ed. 1960). As he was quite an elderly man, and his sons had predeceased him, the effect was the same. See generally A. Simpson, supra note 11, at 402-04.

17 But see Gabriel, To Serve with Honor, Army, May 1980, at 17 (“over the last 20 years the Canadian forces have had 27 flag officers publicly retire or resign in protest; the U.S. Army has had one”), noted in Stockdale, What is Worth Resigning For, Wash. Post, Sept. 21, 1980.

18 See generally J. Baher, The Order of Serjeants at Law (1984). There are those who count Serjeant Sullivan (1871-1959) as the last serjeant. He, however, was an Irish serjeant, although he practiced for many years in the English courts. Compare J. Baker, supra note 12, at 137 & n.7; A. Simpson, supra note 11, at 313, 497. A similar dispute rages over who was the last baron of the Court of Exchequer, as the last survivor (Pollock, B.) was not the last one to have been named to that court. That honor fell to Baron Huddleston. A. Simpson, supra note 11, at 420.

19 9 & 10 Vict., ch. 54 (1846); Opening of the Court to the Bar Generally, 136 Eng. Rep. 215 (C.P. 1846). The serjeants did not willingly relinquish their monopoly. In 1840 they had persuaded the Court of Common Pleas that a royal order allowing barristers to practice there was illegal. The court allowed those barristers who had taken Common Pleas cases to wind them up. In re Serjeants at Law, 133 Eng. Rep. 93 (C.P. 1840). The report of the proceedings observes that “[d]uring the delivery of the [judgment by Tindal, C.J.], a furious tempest of wind prevailed, which seemed to shake the fabric of Westminster Hall, and nearly burst open the windows and doors of the Court of Common Pleas.” Id. at 94 n.b. It is perhaps not entirely coincidental that Parliament abolished the monopoly less than two months after Tindal died. See 136 Eng. Rep. 215 (C.P. 1846).

20 See Sjt. Robinson, Bench and Bar: Reminiscences of One of the Last of an Ancient Race (1889).

21 J. Baker, supra note 12, at 147.

22 W. Senior, Doctors' Commons and the Old Court of Admiralty: A Short History of the Civilians in England 102 (1922); see also id. at 11 (proceedings of military court of the Constable and Marshal).

23 Id. at 107.

24 Id. at 110.

25 "It is said that [when Doctors' Commons wound up its affairs] the rooks, which some held to embody the spirits of departed civilians, forthwith forsook the trees in the [C]ollege [of Advocates] garden." Id. Compare note 19 supra.

26 The process continues. At present, debate is raging in England over proposals by the Lord Chancellor that would, among other things, effectively abolish the distinctions between barristers and solicitors. See Lord Chancellor's Dep't, The Work and Organization of the Legal Profession, CMD. 570 (1989), noted in N.Y. Times, Jan. 30, 1989, at A1, col. 1.

27 Cook, supra note 3, at 7-8.

28 See Fidell & Greenhouse, A Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals, 122 Mil. L. Rev. 117, 118-23 (1988).

29 One perceptive observer suggested that this was one of the Court of Military Appeals' objectives in the mid-1970's. Cooke, The United States Court of Military Appeals, 1975-77: Judicializing the Military Justice System, 76 MIl. L. Rev. 43, 163 (1977) ("CMA is calling on the legal profession within the military to improve the military justice system and, ultimately, to run it.").

30 See also Alley, General and Special Courts-Martial as Tribunals of Continuing Existence: The Balance of Advantage, in 13 Homer Ferguson Conference on Appellate Advocacy (1988).

31 Dep't of Army, Pam. 27-26, Legal Services: Rules of Professional Conduct for Lawyers, Preamble (31 Dec. 1987); American Bar Association, Model Rules of Professional Conduct, Preamble (1983). "As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients [and] employ that knowledge in reform of the law . . . ." Id.

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