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Book Review. Star Wormwood by Curtis Bok

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Punishing criminals is a social activity which has enjoyed almost universal popularity. Perhaps this is because the deviation of the wrongdoer is an affront to the law-abiding citizen, or perhaps it is because many of us find relief from our cares in the knowledge that others, less upright than ourselves, suffer greater woes. Regardless of the cause, however, there is considerable embarrassment in the popular appeal of the practice—we blush to enjoy the suffering of others. We therefore follow the course usually taken by men doing something of which they are ashamed: we invent a duty which requires it.

The duty most often stated to justify indulgence of the impulse to punish is that of preventing chaos: if we do not punish the criminal, his victim will, and feuding results. Justice Bok here joins the protest against this institutionalized vengeance as a purpose of the criminal law. He has taken an easy case to argue, for public vengeance has little left to commend it. It may have been useful to primitive societies. But primitive punishments were swift, public, and painful, and they were most often administered by the victim or those immediately offended by forbidden conduct. Such vengeance ventilated the passions of the victim, expending unwanted bile. We are too genteel to inflict punishment with the speed and vigor needed to serve such a purpose. And our punishments are imposed behind a veil of prison walls by delegates who learn to asphyxiate their sensitivity to suffering; hence our revenge is not tempered by the compassion which was sometimes a saving grace of primitive punishment. As Justice Bok makes clear, vengeance is futile and an obstruction to any sensible approach to criminal law.

Another reviewer of this book has questioned this conclusion. He observes that most opponents of capital punishment favor an exception for Nazi war criminals and that even Justice Bok may sometimes feel the urge for vengeance. This observation is imbued with a classic irrelevance. ("Would you want your sister to marry one?") The same reviewer also observes that hell is no longer a fashionable belief, and that, if there is to be no divine vengeance, there must be a greater demand for earthly vengeance. An important cause, however, of the declining prestige of hell has been the recognition of the cruel absurdity of divine vengeance against a wrongdoer whose conduct must surely have been within the control of any divine power which would inflict the immortal punishment. This recognition of the external causes of wrongdoing is as much at war with a thirst for mortal vengeance as it is with the idea of hell. The current low fashion of hell seems evidence of less, not more, demand for public revenge.

1 Justice of the Supreme Court of Pennsylvania.
2 The Cheyenne tradition of vengeance was especially enlightened: The brave who cheated on the communal buffalo hunt was promptly beaten severely by the soldiers in charge of the hunt. His horse was killed and his goods destroyed. It was then the practice to forgive—the soldiers gave him a new horse and helped him reestablish his household as a fully rehabilitated member of the group. See LLEWELLYN & HOEBEL, THE CHEYENNE WAY chs. 4-7 (1941).
Despite the strength of his position, however, Justice Bok's polemics are not as effective as they might have been. It is not as clear as it should be that Justice Bok is protesting vengeful punishment and not necessarily all punishment. The case for punishment does not rest entirely on vengeance; it is often ennobled by the avowed end of protecting society from crime. One may sometimes doubt the candor of this avowal of purpose. Is it fear of criminals that accounts for the intensity of feeling of those who advocate stern, deterrent measures? It seems unlikely; most people share this reviewer's optimism that crime and auto accidents happen only to others. And if we are really so interested in deterrence, why do we not make the effort necessary to detect and apprehend more criminals? We seem content to leave our law-enforcement establishment so ill-equipped and undermanned that the chances of punishment are nearly always a good gamble for the criminal. But even if deterrence is not always the most genuine motive for punishment, it cannot be discounted. It is probable that some criminals may be deterred by the possibility of punishment. Because this hard fact gives trouble to modern theorists, and especially to the absolutists among them, deterrence has become the rallying flag of the hardheads in their combat against against these softheads. Justice Bok does not deal fully nor directly with the possible deterrent value of criminal punishment; his view seems to be that deterrent punishment may be useful so long as it is tailored to the particular criminal and not employed as a disguise for public vengeance.\(^4\) (p. 218) But the expression of this view comes too late to prevent the hostile reader from convicting the author, as Professor Bishop did,\(^5\) of blindness to the possible virtues of deterrent punishment. Earlier and more complete homage might have disarmed a number of critics, who are now otherwise free to dismiss Justice Bok as a softhead.

The basic argument of the book is also weakened by frequent digressions expressing the author's views on such related problems as the indeterminate sentence, the reliability of confessions, and insanity as a defense. These views are often sound and always provocative, and I do not regret their presence. It is, however, unfortunate that Justice Bok expressed his ideas as a single fabric without a seam—everything seems to follow from his general approach, whereas in fact many of his ideas are quite independent of his protest against vengeful punishment. The reader who does not discern this for himself is left to accept or reject the book as a package. And some of the collateral thoughts are quite exposed to rejection.

\(^4\) On page 148 he asserts that "the protection of society as a single objective is better than the porridge of punishment, correction, rehabilitation, and social protection which we now serve up in the same dish." This leaves undefined the role of punishment, as a method, in serving that single objective, and greatly confuses the issue by using the word punishment to describe the objective of revenge. This careless use of the term is unhappily repeated elsewhere. Obviously, revenge requires punishment, but punishment might logically serve other purposes. The two terms cannot properly be treated as synonyms. Justice Bok seems to recognize this on page 150 when he says, "I am careful not to say let us abolish punishment, for the word has the root sense of penitence, but let us abolish a criminal system of laws and sanctions based on vengeance." But see Bishop, supra note 3, at 196 n.23.

\(^5\) Id. at 198–99.
For example, Justice Bok expresses his view that we must ultimately recognize the inadequacy of the adversary jury trial as a device for determining sanity. "[T]he proper place of psychiatry in the law," he asserts, "is not in Court but in the prisons." (p. 151) We should abandon mens rea and return to a mechanical law of crimes which imposes on the judicial process only the task of determining deeds, and leave to the behavioral scientists the determination of the appropriate consequences to be suffered by the wrongdoer. This is an advanced opinion which I do not share and which will be challenged by many readers. It must be granted that the problem of communicating science to juries is difficult and perhaps insuperable. It is apparently impossible to fit intelligent medical testimony to the dogma of M'Naghten's Rule, even though that definition of insanity is perfectly comprehensible to most laymen. It is perhaps equally impossible for reasonable jurors to relate the Durham Rule, which is comprehensible to the psychiatrist, to their experience and judgment. This is a dilemma for which Justice Bok offers a solution. But there is ample room for doubt that this would be an improvement. It is implicit in the very existence of the criminal statute that a judgment of criminality will carry moral stigma even though the "treatment" is a stay at "The Homestead at Hot Springs, with golf, tennis, and psychiatry . . . ." Fairness therefore requires that no one should be adjudged a criminal who is not morally responsible for his act. Indeed, for this reason, it would probably be an unconstitutional departure from the requirements of due process to abolish the defense of insanity. It is clear that a legislature may not retain the defense and delegate jurisdiction over it to an administrative process, for this would plainly deprive the defendant of his right to jury trial. And even if this were constitutional, many would regard it as unwise to submit such a question of basic human right to the decision of specialists. The wiser solution would permit both the jury and the state psychiatrist to pass upon the question of the defendant's responsibility, with the defendant benefiting from a favorable decision by either. This is the effect of practices prevailing in many states at the present time. One may approve this solution without rejecting Justice Bok's principal contention. The basic protest would therefore have gained strength if the independence of the two ideas had been made more clear.

Despite these collateral weaknesses, Justice Bok is amply persuasive that vengeance is a luxury that even an affluent society should forgo. His argument, standing alone, however, is not likely to have more effect than like essays which have appeared during recent centuries. The idea has heretofore failed of acceptance not for want of an effective spokesman, but because the opposing spirit of vengeance is immune to blandishments of reason.

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6 It should be noted that the problem is much broader than the question of insanity. Many types of cases require the jury to consider technical evidence which is beyond the real comprehension of ordinary laymen.

7 Bishop, supra note 3, at 100.

Justice Bok has, however, made an artful effort to overcome this obstacle to understanding with a very good piece of fiction which provides points of departure for his essays. It is the fiction which makes this a good book, for it confronts the vengeance motive along its most vulnerable dimension. Justice Bok tells us a tale of the crime, trial, and execution of an adolescent boy who was charged with raping and murdering a thirteen-year-old girl, and eating her forearm. The story is told with a compassion which will place many readers on the seat of judgment with the unfortunate defendant. The result is that those who are not masochists must lose their thirst for vengeance despite their revulsion for the defendant's crime. The antibody which affords the immunity to reason is thus destroyed.

With vision thus cleared, the righteous reader can see what he has perhaps not seen before: that we cannot understand criminal conduct, or appraise methods to prevent it, simply by introspective examination of the law-abiding citizen's reactions to temptation. Understanding requires that we project ourselves not only into the immediate situation of the criminal act, but also into the experience and environment of each accused. This is the basic premise of modern penology and of Justice Bok's argument. It is a difficult idea to house in the same shelter with a feeling for public vengeance.

This lesson has a value, if not an urgency, which can be most clearly seen in the growing need for a solution to the narcotics problem. There is considerable evidence that the problem has been most directly caused not by the social conditions which nurture addiction, but by the vengeful policies of our lawmakers and administrators. Narcotics addiction has never been a serious problem in other Western nations, and it was not a problem in this country until we embarked upon a campaign of punishment of addicts and the storekeepers and doctors who supplied them. This drove the whole operation of addiction and supply underground where it has since festered and grown to be a grave social cancer. The addict was forced into a life of crime in order to secure his supply; he became the victim of the professional peddler, who, with the incentive of huge black-market prices, has engaged himself in a successful effort to expand his market. He has been assisted in this endeavor by the fact that narcotics have now become the forbidden fruit, greatly attractive to rebellious adolescents. The rebel who thus expresses his rebellion is thenceforth enmeshed in the affairs of the underworld. The narcotics trade is therefore a powerful sustent of the underworld, assuring it a ready supply of cash and manpower. The reaction of our lawmakers and administrators to this situation has been puritanical and exceedingly foolish. They have chosen to increase the penalties for violation of

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9 For an excellent discussion, see King, Narcotic Drug Laws and Enforcement Policies, 22 Law & Contemp. Prob. 313 (1957).
10 The campaign dates from the Harrison Act, 38 Stat. 785 (1914), as amended, 26 U.S.C. §§ 4701-76 (1958). Congress apparently did not intend to initiate such a campaign; it seems to have come about through operation of Parkinson's Law on the Narcotics Bureau. For the curious history of the act, see King, supra note 9, at 116-24.
narcotics laws, thus demonstrating their firm opposition to sin, and thus also aggravating the problem. The present spiralling trend might support the prediction that we will soon impose capital punishment on first offenders of the narcotics laws, and thereby become a nation of hop-heads and mainliners.

The only escape from this spiral seems to be a general recognition of the truths which Justice Bok espouses. The solution to the narcotics problem cannot be found in greater punishment, but only in greater understanding of the individual offender and his personal difficulties. As applied to narcotics addiction, the proof of Justice Bok's assertions can be found in the experience of other countries. With respect to other problems of criminal conduct, the consequences of an appreciation of the futility of vengeance are open to conjecture. It is, however, as Justice Bok demonstrates, a promising possibility.

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BOOK NOTE


To today's lawyer, the term "estate planning" usually evokes immediate mental images of tax-code sections, complex trust instruments, and the like. Mr. Wormser's latest book will provide relief from this occupational disability; if the harried practitioner does not find the solution to all his problems within the 161 pages of Wormser's Guide to Estate Planning, at least he will benefit from the author's adroit portrayal of the broad objectives toward which any successful estate plan must aim. And, indeed, no valid criticism can be made of Mr. Wormser's superficial treatment of this difficult subject matter; his avowed purpose is not to tell "the reader how to get to various ends," but rather to help "the reader to decide where he wants to go." (p. v)

Thus, the absence of technical material should not dissuade the profession from regarding this work with interest. Too often estate plans, however perfect their draftsmanship, fail in their consideration of the testator's individual needs. This is not always the fault of the lawyer; rather the blame is often to be laid upon the client's lack of comprehensive thought as to what his desires are. Mr. Wormser's folksy approach to these problems emphasizes that the tail of tax advantages should not wag the dog of the client's personal requirements. For example, infant accumulation trusts under section 2503(c) are frowned upon despite the favorable gift-tax consequences involved, since their

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