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Book Reviews

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BOOK REVIEWS

PROBLEMS IN CRIMINAL LAW. By Curtis Bok.[1] Lincoln: University of Nebraska Press, 1955. Pp. 79. $2.00. This slim volume presents as conscientious a search for justice as the two earlier works of the author. *Backbone of the Herring* and *I Too, Nicodemus,* fictional accounts of a judge's quest for justice, were deservedly popular because of their felicity of style, depth of thought and warm humanity. The qualities that distinguished those works are present in these three Roscoe Pound lectures delivered last year at the University of Nebraska.

The three essay-lectures are entitled "The Trial," "The Substantive Law" and "Penology and Treatment." Judge Bok, president judge of a Court of Common Pleas in Philadelphia, has deliberately adopted a method that is exploratory rather than dogmatic. At the risk of quoting him out of context, it may be said that he has the modest aim of making certain "that something more than laissez faire is guiding us" in the fields of criminal law and procedure, which are frequently disdained by our better-known jurisprudents and legal reformers. His avowed intent is to state the problems and to set out the best arguments of the various antagonists in these areas "in the hope that some answers may emerge by themselves."[2] His approach is calm and reasoned; he strikes a delicate balance; he puts each argument quietly, gracefully, as the best advocate of that contention.

In "The Trial," Judge Bok sees as the most pressing questions of the day the future of the jury system, the adversary nature of the criminal trial, the choice of a test of criminal responsibility, and lastly, the problem of the psychiatrist in the courtroom. It is in his discussion of the last-mentioned topic that his unique gift for understanding and fairly setting forth opposing positions is most evident. He feels the frustration that the psychiatrist experiences when forced to testify within the confines of the *M'Naghten* Rule, its test of criminal responsibility grotesque and meaningless in the light of present psychological thought. On the other hand, he can sympathize with the lawyer who

> . . . is unhappy over Courtroom psychiatry because of the growing feeling that we are all at least a little mad. He fears that abandoning the simple legal test of responsibility will lead to a shifting quicksand of standards that differ from case to case; he is fearful that

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[1] President Judge, Court of Common Pleas, No. 6, Philadelphia County. Author of BACKBONE OF THE HERRING (1941), and I Too, NICODEMUS (1946).

[2] Text at 6.

> the machinery of the Courts must be unreasonably expanded to meet psychiatry's need to observe, diagnose, and testify to the condition of each defendant or bog down altogether; and he views with positive alarm the destruction of all conventional penology in favor of a vague system of indeterminate treatment. And the whole business promises to be expensive.[3]

Moreover, the lawyer recognizes that psychological theory is today only in its infancy, its methods still experimental. He fears situations such as that which occurred in a jurisdiction following the psychiatrically-oriented *Durham*[4] test, where a defendant was acquitted of a criminal charge on the ground of insanity and thereafter successfully avoided commitment to a mental hospital.

The solution to this heart-breaking failure of communication between the lawyer and the psychiatrist, Judge Bok does not completely see. Thus he is in the same position as other serious thinkers seeking to effect a closer union of the two disciplines. He does, however, feel that the great merit lying in the psychiatrist's search for the motivating factors of criminal conduct justifies a hope that progress in communication and cooperation may be made, at least to the extent of some shared training, exchange of essential medical data outside of constitutional protection, joint examination of an accused by psychiatrists testifying for the prosecution and defense, and by the establishment of better facilities for the psychological study of an accused whose mental condition is in issue.

"The Substantive Law" points up the difficulties resulting from what Judge Bok calls the "splendid jumble" of *ad hoc* penal legislation dating back to the last century.

> As a judge with the dark task of sentencing convicted persons, I can bear direct witness to the need for massive and fundamental thought, in the light of modern conditions, about the *codex criminalis*, from basic conception to final text.[5]

He goes on to consider the specific problem presented of justifying governmental regulations where criminal intent is deemed irrelevant to guilt. "To condemn without fault is a sinister idea for free people to tolerate. Yet we are tolerating it more and more. . . ."[6]

Next follows a discussion of general problems that cut across

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[3] *Id.* at 19.

[4] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[5] Text at 28.

[6] *Id.* at 29.

the operation of the entire criminal code: the death penalty, federal review of due process, the construction of penal statutes, disparity of sentencing and the purpose and methods of penology. Judge Bok also considers proposals for a model penal code providing for, among other things, psychiatric examination and classification of criminals, elastic minimum sentences, and criteria for the sentencing judge.

Deeming it "better to suggest specifics as a basis of thought and discussion than to speak generally about trends in legal thinking that might lead to unspecified changes,"[7] the author then examines the clash between due process and efficient police practices, the proper limits of corporate criminal responsibility, the abolition of distinctions among offenses against property and among crimes of violence, and the question of the wisdom of invoking criminal sanctions against certain sexual offenders.

A brief summary of the history of penal institutions and practices introduces the lecture entitled "Penology and Treatment." The author continues with an examination of trends in the treatment of criminals today, three general attitudes about the proper handling of convicts, the spotty success of juvenile and youthful offender authorities, and recent advances in adult penology.

The principal problems facing penologists today are declared to be the need for research, the fortress character of many of our penal structures, the necessity to provide for the emotional needs of prisoners, the question of sale of products of prison labor, and the personnel problems of correctional institutions.

There is included a concise, clear description of the program at Chino, the California minimum security prison, and an acknowledgment of the expense of maintaining such establishments.

> [I]t may be that the cheaper form of new institution with its added facilities and higher quality of personnel will in sum be as expensive as the creation of the old-fashioned institution, which in itself is enormously expensive. But it makes little sense to go on spending sixty cents of the same dollar over and over again, as we are now doing with our sixty per cent recidivist rate.[8]

Judge Bok concludes with a statement of general principles, originally formulated by the American Prison Association in 1870, that he thinks should govern future developments in penology.

This is a fascinating little book, well worth the time of the busy practitioner who wants to be brought up to date on current thinking in the field of criminal law. It is compounded of realistic

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[7] *Id.* at 54.

[8] *Id.* at 76.

thought and pungent, non-technical expression. It does not fear to challenge the very foundations of the criminal law and is itself an excellent example of the fruits of the "fundamental thought" advocated by the author. Nevertheless, he evidences no desire to be startingly original or overbearing.

Though Judge Bok is scrupulously fair in laying out the differing attitudes on the problems he discusses, it is possible to discern that his sympathy lies with those who view rehabilitation of the criminal as the prime object of our penal law, though he realistically recognizes that "[P]enologists shake their heads over about twenty-five per cent of the prison population, those who seem incorrigible by any current methods and who must be safely secured in places like Alcatraz."[9] He writes approvingly:

> The public is beginning to see and to accept the notion that however vengeful the victim of a crime may feel, it is not the proper purpose of society to treat the malefactor vengefully but rather to remove his impulse to crime and replace it with an impulse to live dutifully with his fellow men.[10]

Judge Bok is correct, in the reviewer's opinion, in seeing the greatest hope for a change in public attitudes in the matter of post-trial treatment of the offender. Changes in trial procedure are, unfortunately, too much to look for in our generation. Reactions to the recent Chicago experiment with the jury system appear to be proof positive that public opinion will permit no tampering with traditional procedures at the trial level. And despite its reverence for the psychiatrist in the consulting room, the public has an unholy suspicion of the same psychiatrist in the courtroom. But public opinion has advanced to a point where it is able to agree that varied treatment and facilities are beneficial to juvenile criminals and to adult alcoholics and narcotic drug addicts. It will probably continue its advances in the penology area rather than in trial procedure, however much the latter, with its adversary and other deleterious aspects, may strongly influence the prisoner's post-trial attitudes. At any rate, the greatest strides in the criminal law in England in recent years have been made in penology, and American ideas and practices have, in the past, followed fairly closely behind the English. Thus we can hope for a continuation of progress in the extension of integrated systems of institutions, classification of criminals and individualization of treatment.

Nevertheless, the factors tending to hinder that advance cannot be minimized. Money for separate and segregated institu-

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[9] *Id.* at 64.

[10] *Id.* at 73.

tions and professionally trained personnel will be hard to obtain in poorer states; a system of federal aid seems to be the only possible solution there. Moreover, the prejudice against professionally trained social workers present in some administrators of penal institutions will dissipate only with the passage of time.

Impartial and reasoned analyses of the problems involved, similar to Judge Bok's, should aid the advance immeasurably. One wishes that this book would be read not only by all lawyers but by workers in allied fields who need additional proof that lawyers are vitally concerned with proper solutions to these problems and are not merely seeking to preserve a status quo favoring their own interests in criminal litigation.

One also wishes that Judge Bok had explored other topics such as wiretapping and newspaper reporting of criminal trials, though these matters lie on the periphery of his subject, feeling that his measured comments would have proven valuable. What he has said, however, is thoughtful, wise, and worthy of close reading.

*Conrad L. Kellenberg**

REGULATING BUSINESS BY INDEPENDENT COMMISSION. By Marver H. Bernstein.[1] Princeton: Princeton University Press, 1955. Pp. xi, 306. $5.00. In the introduction the author states that "the objective of the present study is threefold: (1) to evaluate critially the role of the independent regulatory commissions, (2) to develop a more realistic concept of the process of governmental regulation, and (3) to appraise the independent commission as an agent of governmental regulation at the national level."[2] His study encompasses seven independent federal regulatory commissions, namely, Interstate Commerce Commission, Civil Aeronautics Board, Federal Power Commission, Federal Communications Commission, Federal Trade Commission, National Labor Relations Board, and Securities and Exchange Commission.[3] Pro-

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1 Associate Professor of Politics, Princeton University.

2 Text, Introduction at 7.

3 Two of these agencies, the Interstate Commerce Commission and the Civil Aeronautics Board, regulate transportation carriers. The Federal Power Commission regulates electricity and gas in interstate commerce. The Federal Communications Commission regulates the telephone, telegraph, radio and television broadcasting industries. The rest regulate practices in special fields, such as the Federal Trade Commission, which seeks to prevent monopolistic and unfair trade practices, etc.; the National Labor Relations Board, which is concerned with labor practices and collective bargaining; and the Securities and Exchange Commission, which regulates the issuance of securities, securities exchanges, and public utility holding companies.

fessor Bernstein's conclusion is that the independent regulatory commission is unsuited to regulate economic affairs.

The independent regulatory commission has been and is commonly regarded as a satisfactory instrument of governmental control of business. This does not mean that it is considered an "ideal" means for securing regulation of our economy. But, this reviewer does not subscribe to the thesis espoused by Professor Bernstein, that the independent regulatory commissions are not effective instruments of economic control in those areas where Congress has seen fit to delegate regulatory control to such agencies.

Professor Bernstein observes that: "One of the reputed advantages of the independent commission is its facility for recruiting a staff of experts to handle the day-to-day tasks of administrative regulation."[4] On the very next page he asks: "Does the expertness of a commission help it make policy where a high degree of discretion is involved? Does it enable the commission to formulate a comprehensive concept of the public welfare, plan regulatory programs, and carry out judicial duties?"[5] The expertness of the staffs of independent regulatory commissions is of a very high calibre. These experts are not specially trained robot-like persons who seek to apply their skills " . . . in some uniform and impersonal fashion to matters which require variable treatment."[6] Of course, they give due weight to precedent and settled procedure, but they are also very much aware of the changing nature of the administrative process. Thus, the commissioners, the heads of an independent agency, have an available source of sound advice. A commission, that is, the members of the commission, place great reliance on the recommendations of their experts as a basis for formulating policy in the public interest. In fact, contrary to Professor Bernstein's view, it is not a *rare* occurrence for commissioners to possess " . . . the aptitude for gauging the public mind and for integrating the points of view and proposals of the experts into a policy in the public interest."[7]

Professor Bernstein is much concerned with the conflicting demands of private interests on the regulatory commissions.[8] He notes that such demands " . . . do not necessarily reduce a regulatory agency to the status of a lackey of those interests. Each agency has some potential or real capacity for developing a creative role and rising above mere acceptance of the demands of domi-

4 Text at 113.

5 *Id.* at 114.

6 *Id.* at 124.

7 *Id.* at 125.

8 *Id.* at 264-265.

nant interest groups."[9] As a matter of fact, a number of independent regulatory commissions have been accused of completely refusing to accept the point of view of regulated groups, rather than being influenced by them.[10]

The author recognizes that: "The judiciary is regarded as a bulwark against faulty administrative discretion and arbitrary or unfair administrative decisions."[11] He then discusses the efforts in the 1930's to widen the scope of judicial review of administrative action by those who distrusted the regulatory agencies.[12] But, in commenting on the efforts to widen court review he observes that the Supreme Court of the United States had ". . . developed more respect for the views of administrative experts and was less inclined to substitute its judgment for that of the regulatory agency in complicated matters of factual or legal interpretation."[13] In short, judicial review, according to Professor Bernstein, ". . . no longer seemed to promise adequate relief from 'liberal' decisions of regulatory agencies."[14] That the subjects regulated by the independent regulatory agencies still greatly depend on the courts as the tribunals in which to obtain redress for alleged erroneous or arbitrary administrative action is attested by the fact that the court dockets of several federal circuit courts of appeals, in particular, are crowded with cases involving orders of administrative regulatory bodies. These courts and the Supreme Court have not hesitated to decide against an administrative agency.[15]

In stating that the "theory of the commission [independent regulatory commission] assumes that the public interest can be discovered best in an office detached from the executive branch,"[16] Professor Bernstein points up the whole purport of his book. To him the control of economic affairs is a highly political process, and is not a matter for a regulatory commission which is independent of and separate from the executive departments under the President. But, such a separation does not mean that an independent agency is divorced from the realities of the political process, or

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9 *Id.* at 265.

10 At pages three and four of the introduction, Professor Bernstein notes: "Commissions, it is charged, are influenced excessively by the groups subject to regulation and are too easily molded into instruments to protect private interests."

11 Text at 96.

12 *Id.* at 96-97.

13 *Id.* at 97.

14 *Ibid.*

15 See, for example: United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); Federal Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348 (1956).

16 Text at 157.

from the strength and support the President can provide to an agency. As Professor Bernstein indicates, "the president designates the chairmen of all independent commissions except the Interstate Commerce Commission. Administrative responsibility is vested by law in the chairmen of the SEC, FPC, CAB, and FTC."[17]

Professor Bernstein has writen a controversial book. One may not agree with his ideas, but he presents his criticisms fairly and provides the pro and con arguments involved in his study of regulation by independent commission. No regulatory agency (or for that matter any governmental body) can afford to be complacent, and any challenge to its effectiveness as an instrument of control should be carefully studied. The purpose of creating administrative-regulatory agencies was to cope with the inadequacies of the courts and legislatures to deal with the many everyday complex problems involved in the regulation of modern business.[18] These agencies have served their purpose well. Of course, there is room for improvement. Professor Bernstein does not state what can be done to improve the regulatory process or what device can be used to replace regulation by independent commissions. But, he points to what, in his opinion and based on the opinion of other scholars, is wrong with the present system of regulation by such commissions. Perhaps some of his views may form the basis for the self-improvement which should be the goal of every regulatory body.

*Louis C. Kaplan**

THE ROAD TO JUSTICE. By Sir Alfred Denning.[1] London: Stevens & Sons Ltd., 1955. Pp. viii, 118. $1.90. Lord Justice Denning here collects addresses given by him during the last two years in Canada, South Africa and the United States. The collection is unified by a purpose ". . . to indicate the principles which must be observed in any country if justice is to be done therein," and ". . . to show . . . what is the right way to arrive at justice."[2]

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17 Text at 9.

18 See LANDIS, THE ADMINISTRATIVE PROCESS c. I (1938).

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1 Lord Justice, Her Majesty's Court of Appeal, England.

2 Text, introduction at vii.

Directed to "those about to enter the profession,"[3] the addresses restate the basic principles of "fair trial" upon which indeed, those "already in the profession" have grave cause to reflect in our day.

Generations of lawyers and judges have been reared in the jurisprudence of John Austin. Narrowly and rigidly analytical, the Austinian approach undoubtedly contributed to exact definition of fundamental legal conceptions. Unfortunately it also rang down its own "iron curtain" between "law" and "morality." Its disciples at the bar or on the bench could thus rationalize injustice done according to law by pleading that: "It cannot be helped. The law will have it so," or, "We are only concerned with what the law is, not with what it ought to be."[4] Against this Lord Justice Denning now protests that "the legal profession, by its exponents in days past or in days present, must account for every injustice done in the name of the law,"[5] He attacks the "facile assumption" that "law is an end in itself."[6] The alternative—a remarriage between law and morality—furnishes the foundation upon which the duties of judges and lawyers in the administration of justice are restated.

Lord Justice Denning therefore faces the inevitable question "What is Justice?" He says that "the nearest we can get to defining justice is to say that it is what the right-minded members of the community—those who have the right spirit within them—believe to be fair."[7] Of course, this answer is not completely satisfactory. It does not indicate the journey's end, but at least it puts us on the road. We still ask: Who are the "right-minded members of the community"? Who identifies them? Whence come their criteria of "fariness"? There are among us those who believe that there are "slums of the mind" and would therefore require previous licensing of motion pictures designed for public commercial exhibition. Are these the "right-minded"? There are those who advocate artificial prevention of human birth. Do they or their opponents have "the right spirit within them"? Is the matter to be resolved by the *sacred democratic process* of counting heads (votes)? One recalls that the late Mr. Justice Holmes had no other criterion of the goodness or badness of laws than "what the crowd wants." Lord Justice Denning twice mentions "natural justice" and says that "people will respect rules of law which are

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[3] *Id.* at viii.

[4] Text at 1.

[5] *Id.* at 1-2.

[6] *Id.* at 2.

[7] *Id.* at 4.

intrinsically right and just and will expect their neighbors to obey. . . ."[8] No definition of "natural justice" is attempted. We are not told what makes a law *intrinsically* right and just. If the road to justice is the road back from Austinianism the way is long, slow and painful.

We are nevertheless on that road. Lord Justice Denning with the grace and charm we have come to expect in the occasional addresses of English judges, proceeds to discuss the minimum essentials we have worked out to safeguard "justice" pending a definition of it that all will accept. "Just" judges, "honest" lawyers, a "free press," and above all these an "eternal vigilance" protecting what we have thus far won, are the indispensables. "Just" judges are judges independent of outside pressures, not the product of "court packing," men who are personally beyond reproach, who hear "both sides impartially" and who give clear and convincing reasons for their decisions. These sometimes forgotten fundamentals are restated in a moral context. The story of the struggle to establish them is briefly told. One could wish that Lord Justice Denning had space in his slender volume to discuss the relations between the demands of "justice" as he defines it and the demand for "certainty" in the law. What is the function of "stare decisis"? Is adherence to precedent demanded by "justice" when men have settled their affairs in honest reliance upon cases of long standing? When and how does a "higher" justice require frustration of that reliance? The questions are met as we travel the new "road to justice" here marked out.

Lord Justice Denning candidly discusses the three basic charges against lawyers—abuse of privilege, distortion of truth and excessive costs. The historic instances given but confirm the conviction that canons of legal ethics, however detailed, are only the "outer fortress" against these abuses. The "inner fortress" must always be the advocate's own conscience. "The more one thinks about the administration of justice, the more one realizes that it depends on the quality of the men who are ready to undertake it."[9] Ours is still an adversary system. Nothing in Lord Justice Denning's book suggests its abandonment. In the battle between skilled advocates, each championing his client's cause, we have thought that truth can best be discovered, taking men as they are. The importance of courage in the advocate, best illustrated perhaps in the forensic career of Lord Erskine in times not less troubled than our own, is cited by the author. Where then is the line to be drawn between the duty of the ad-

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[8] *Id.* at 3.

[9] Text, introduction at viii.

vocate fighting with fortitude for his client in an adversary system like ours and the duty he owes to "justice" and to courts which administer it? Certain general principles of guidance can be given, but in a rapidly changing legal system the question arises again and again in new forms. It is interesting to note in this connection Lord Justice Denning's discussion of the ethical problem presented by the current extension of legal aid to the indigent by statute in England. Will cases which heretofore certainly would be settled after a nice calculation of the chances of recovery, balanced against the amount of costs, flow in increasing numbers into the courts now that costs and fees are to be paid by the state?

We all face the resolution of the conflict between the demands of the "free press" and the demands of an orderly and "fair" trial in the courtroom. How far should the press be "free" to report the incidents of a trial now in progress? How far should the court's power to limit such reporting be extended in the interest of fairness to the accused? The English rules are discussed by Lord Justice Denning. They go farther than our own in limiting the press. Are they desirable in this country? Those confronted with the problem will find the Lord Justice's discussion most valuable.

Likewise pertinent to the problems of the American lawyer and judge is the discussion of the law of "obscenity." Says Lord Justice Denning:

> The truth is that a book should not be condemned simply because it may fall into hands that are not fit to hold it. It should be judged according to the intention of the publisher. For whom did he cater? If he seeks to appeal to young people or to other susceptible or irresponsible folk with lewd or filthy matter which may tend to deprave or corrupt them, then he is guilty of an offence and the book should be destroyed: but if he is only catering for mature minds which may be presumed strong enough to recognize evil and to withstand it, then he can publish it, running his risk as to whether any of them will think it worthwhile to read it. He should of course not be allowed to escape with a facile excuse "I only meant it for mature people." If he should take a classical or scientific work and pick out lurid passages and publish them in a cheap edition dressed up in painted covers suggestive of vice, he should be guilty of an offence, although the entire work properly presented would be unobjectionable.[10]

Like any other test the difficulty is in its application. We shall face once again the question whether the matter is "one of law" or "one of fact." In either case the findings must represent what the "right-minded members of the community," what those "who

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[10] *Id.* at 84.

have the right spirit within them" believe. We are remitted to the questions with which we began.

We can only mention a few of the other topics discussed, *e.g.*, the introduction of the doctrine of "comparative negligence," the problem of "horror comics," the reconciliation of "freedom of religion" with the Church's demand that marriages with those outside the fold be accompanied by a promise that the children shall be reared in the Church's creed. There is a brief discussion of the conflict between the "closed shop" and the "right to work," a problem waiting resolution among us. Lord Justice Denning quotes the strong statement of Mr. Charles Geddes, Chairman of the Trade Union Congress, criticizing the closed shop principle:

> I do not believe the trade union movement of Great Britain can live for very much longer on the basis of compulsion. Must people belong to us or starve, whether they like our policies or not? Is that to be the future of the movement? No, I believe the trade union card is an honour to be conferred, not a badge which signifies that you have got to do something whether you like it or not. We want the right to exclude people from our union if necessary and we cannot do that on a basis of "Belong or starve."[11]

The *Road to Justice* is a significant book. The repudiation of Austinianism, coming from one so highly placed, must lead to a new evaluation of the law in the light of its moral attributes and purposes.

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11 *Id.* at 103, quoted in London Times, May 21, 1955.

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*Reviewed in this issue.