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Judge David Bazelon: Questioning Authority (Review Essay)

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scribed in *The Laws* was as revolutionary and forward-looking as Beccaria's.

Some day, some enterprising polygot criminologist will tackle the job of writing the history of the etiological science of criminology. It still awaits its author.

THORSTEN SELLIN

QUESTIONING AUTHORITY: JUSTICE AND THE CRIMINAL LAW. By *David L. Bazelon*. New York: Alfred A. Knopf, 1988. Pp. 325, \$19.95.

In 1986, after 35 years on the bench, Judge David L. Bazelon, one of the most thoughtful and thought-provoking jurists of modern times, retired from the United States District Court of Appeals for the District of Columbia. He has synthesized his thoughts on criminal law culled from among his many judicial opinions, law review articles, speeches, lectures and other writings and presentations. His arguments, ideas and processes are woven into a fabric of language which is easily understood by the layperson. Much more than a mere collection of earlier writings, *Questioning Authority* provides us with a history of ideas concerning the development of many aspects of criminal law. A strong thematic warp of reform era mentality woven with a weft of intellectual curiosity creates a framework for the explanations of his methods and his views on criminal law and the causes of crime.

Questioning Authority is divided into four parts, each of which analyzes different areas of the criminal law in terms of its morality. The perspective of the book, Judge Bazelon notes, "is not a popular one at this time, nor for that matter was it twenty years ago. But the problems I have attempted to address over the years remain with us today. My message is that we must never give up the search for solutions" (xxiii). Searching for solutions is the goal to which Judge Bazelon has dedicated his life. In this volume, Judge Bazelon questions morality and crime, the causes of crime and criminal behavior and the distance between rhetoric and reality in the practice of criminal justice. In the final Part, he relates legal problems to social problems. Throughout his book, and his career, Judge Bazelon has asked questions, challenged traditional wisdom and authority, and has tried to incorporate morality into the criminal law.

The relationship between morality and crime has plagued philosophers, criminologists and jurists for many years. The perspec-

tive presented here is one of a corrupt and unjust society which takes its toll on many of its members. To Judge Bazelon, the essence of law is morality. This theme is carried throughout the book. Because there is limited space, the scope of some arguments has been reduced and other arguments have been eliminated entirely. A comprehensive reading of Judge Bazelon's works, as well as the opinions of his critics, is necessary, however, to understand fully his views on morality, law and crime.¹ Contained in this exchange of ideas is the heart of the message Judge Bazelon has for us: America does not really provide equal justice under the law.

Fortunately, the material in the book is sufficiently comprehensive for the reader to appreciate the questions and some of the possible solutions which should be addressed. It is important to realize that his most ardent critics do not necessarily disagree with his philosophy, but rather with the radical solutions which he offers. Professor Stephen Morse, in his debate with the Judge on the issues of morality of crime and law concludes that "If relative poverty and inequality cause crime, then only their abolition will cure crime. To achieve this utopian solution would require a massive redistribution of wealth, a result that probably could be achieved only by means inconsistent with a capitalist and libertarian society."²

In a speech made several years earlier to a group of correctional psychologists, Judge Bazelon asked,

Why should we even consider fundamental social changes or massive income redistribution if the entire problem can be solved by having scientists teach the criminal class—like a group of laboratory rats—to march successfully through the maze of our society? In short, before you respond with enthusiasm to our pleas for help, you must ask yourselves whether your help is really needed, or whether you are merely engaged as magicians to perform an intriguing side-show so that the spectators will not notice the crisis in the center ring. In considering our motives for offering you a role, I think you would do well to consider how much less expensive it is to hire a thousand psychologists than to make even a miniscule change in the social and economic structure.³

While many will find this whole line of reasoning mired in the past, one must only be directed to William Julius Wilson's excellent book,

¹ Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976), Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976); Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. CAL. L. REV. 1269 (1976), and Morse, *The Twilight of Welfare Criminology: A Final Word*, 49 S. CAL. L. REV. 1275 (1976).

² Morse, *supra* note 1, at 1276.

³ BAZELON, *PSYCHOLOGY AND CORRECTIONAL TREATMENT* 248-342 in HAAS AND ALPERT, *THE DILEMMAS OF PUNISHMENT* 345 (1986).

The Truly Disadvantaged.⁴ Wilson also understands the side-shows and the crises in the center ring, and argues that only structural changes in the American economy will improve our society. Unfortunately, what Bazelon has been advocating for years must continue to be echoed by others. Fortunately, the cause has been espoused by one as able and articulate as Wilson.

After only five years on the bench, Judge Bazelon engaged in a challenge and an experiment for the mental health community in a specific area of law and morality. In his decision in *Durham v. United States*⁵, he tried to “transform the role of the psychiatric expert from moral oracle to modern behavioral scientist We were sorely disappointed” (1954). The *Durham* decision was abandoned in 1972, but the *Durham* experiment and the corresponding debate resulted in questions which deserved answers—questions which had never been raised before, and have yet to be answered. While a considerable amount of space in the book is dedicated to the discussion and analysis of the insanity defense, perhaps the most important contribution made in this section is the placing of this defense and the issue of criminal responsibility in its proper perspective.

Part II includes Judge Bazelon’s views on the root causes of crime. These views continue the theme discussed above and add the question of what to do with criminals. In an attempt to reduce violent crime, do we merely “lock the bastards up,”⁶ or assure a more decent environment for people who need it?⁷ These issues encompass a variety of challenges, including the realities of the criminal and juvenile justice systems and how they are affected by the environmental factors in the lives of those who commit crimes.

When juveniles are involved, these questions strike home even among those who demand the harshest justice. Since the advent of the juvenile court, the law has been reluctant to blame children or to hold them as responsible as adults who commit similar acts. The juvenile justice system is more interested in *why* the crimes are committed than is the adult system of criminal justice. Social and behavioral science research has been more successful in pinpointing the failures of the social, economic and political institutions for youths than for adults. Perhaps it is the passing of time which obscures the identification of social forces, or perhaps our concern about the im-

⁴ WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS AND PUBLIC POLICY* (1987).

⁵ *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

⁶ See Bazelon, *Our Wrong Answer to Street Crime*, Letter to the Editor, *New York Times*, October 19, 1980 at 20E.

⁷ See WILSON *supra* note 4.

pact of these social forces fades over time.⁸

Stating the failure of the juvenile court is neither new nor startling. We are more aware of what does not work than of what is successful. There is no appropriate or established formula for treating a misbehaving youth. Bazelon, a jurist, states well what has been expressed by social scientists: “. . . Their lives on the street have destroyed their ability to empathize with other human beings . . . Such individuals feel nothing but hatred toward their victims and society as a whole There is no magic humanizing pill for these youths to take” (121). Bazelon provides examples of his ideas, which make his style very readable and expressive. He notes the lack of knowledge and resources provided to the juvenile court and has stated elsewhere, “You can’t stop trying, despite the limited knowledge and even more limited resources. But you can think twice about who should be swept into the juvenile court process.”⁹

Part III moves the discussion from the problems of crime to the problems of criminal justice. Here, Judge Bazelon presents his analysis of the distance between what the criminal justice system should be, and what it is. He views the criminal law and its sanction as having its real power when internalized, not in its ability to control the citizens with its threats of “criminal justice.” Of course, believing in the law is a simple exercise for those who have material goods or a lifestyle to preserve. It is not so easy to internalize the law when one jeopardizes so little by violating it. Further, the point is made that most street criminals do not have the knowledge or the financial means to invoke their rights when apprehended. This void leads to an economically and racially-biased system, making the right to counsel, and the right to *competent* counsel even more compelling and fundamental.

Without competent counsel, it is argued, none of one’s other rights is guaranteed properly. The line of cases defining searches and seizures is used as an example of how poverty can be used against a suspect. In *United States v. Ross*,¹⁰ the court originally distinguished between a brown paper bag and a red leather pouch. It held that a red leather pouch was a common repository for personal effects, while a brown paper bag was not a normal place to entrust

⁸ *Id.* WILSON AND HERRNSTEIN, *CRIME AND HUMAN NATURE* (1985); SILBERMAN, *CRIMINAL VIOLENCE AND CRIMINAL JUSTICE* (1978).

⁹ BAZELON, *BEYOND THE CONTROL OF THE JUVENILE COURT: YOUTH DEVELOPMENT AND DELINQUENCY DEVELOPMENT ADMINISTRATION*, 2. (1970).

¹⁰ *United States v. Ross*, No. 79-1624, slip. op. at 2 (D.C. Cir. April 17, 1980)(*Ross I*); *id.* at 1 (Bazelon, J., concurring and dissenting), *vacated and rev’d*, 655 F.2d 1159 (D.C. Cir. 1981)(*Ross II*).

intimate personal possessions. Bazelon notes, "my dissent, and the subsequent opinion of the full court, concluded that the paper bag was equivalent to the red leather pouch for Fourth Amendment purposes" (147). The important message, as Judge Bazelon tells us, is that "By remaining constantly sensitive to the realities of social and economic deprivation, to the promise of genuine equality, and to the fundamental values underlying the Bill of Rights, the law can help society see the imperative of linking criminal justice with social justice" (157).

One way to achieve social justice is to assure that our constitutional protections are provided equally to all our citizens. Bazelon warns us, "if the price of a truly constitutional trial becomes too great, we have two alternatives: we can reduce the number of trials by limiting the scope of the criminal sanction, or we can make the defendant pay the price by denying him protections that the Constitution guarantees. When we tolerate ineffective assistance of counsel, we are actually choosing the second alternative" (170). If it is the cost which is too great to pay, then we have a society with inappropriate priorities. If it is that we can not define effective assistance of counsel, or choose not to enforce its requirement, then we have a relatively easy solution. In one of the more interesting examples of what Judge Bazelon called "an egregious example of inequality of representation" (196), he attempted to find a workable solution.

The battles of criminal justice are fought in the trenches of the trial court, and it is here, says Judge Bazelon, that each defendant must receive competent representation. "No defendant can be said to have had his day in court unless he had effective assistance of counsel" (197).

One of Judge Bazelon's much admired intellectual traits is his insightful questioning of people, both inside and outside of the legal profession. During the several years of discussion concerning *United States v. Decoster*,¹¹ Judge Bazelon continued this type of questioning. He explored the issue of competent counsel with many individuals.¹² These conversations resulted in other exchanges of information and other intellectual processes which, in turn, influenced the Judge's opinions. Ultimately, he accused inadequate defense attorneys of being "walking violations of the Sixth Amendment,"¹³ and said that, "We must structure our approach to eliminate the gross

¹¹ *United States v. Willie Decoster*, 487 F.2d 1197 (D.C. Cir. 1973).

¹² I was one of the fortunate persons to discuss at some length these issues with the Judge. See, Alpert, *Inadequate Defense Counsel*, 7 AM. J. OF CRIM. LAW 1 (1979) and Alpert, *Effective Assistance of Counsel*, 17 CRIM. L. BULL 381 (1981).

¹³ Bazelon, ". . . And Justice For All" (Speech presented to the Annual Conference of

disparities of representation that make a mockery of our commitment to equal justice. We must institutionalize and enforce standards of attorney competence designed to assure adequate representation for *all* defendants."¹⁴ While *Decoster* did not lock articulable standards into a meaning of effective assistance of counsel, or provide defendants with "decoater warnings,"¹⁵ it did encourage the right sort of debate, the right kinds of questions and a framework for courts and scholars to use when examining the issue further (197).

In the final section of *Questioning Authority*, Judge Bazelon asks, "What is the Question?" Social scientists are reminded daily that *how* a question is asked influences *how* it is answered. Attorneys and policy makers often have to be reminded about that relationship. Bazelon again links the questions asked by the criminal law and the knowledge on which the law is based to its morality. Further, he links legal problems and social problems. He informs us that science and technology have left a considerable lag in the law, and that we must utilize as much information as possible in creating legal and social solutions to our problems. "[t]o choose rationally . . . society must be informed about what is known, what is feared, what is hoped, and what is yet to be learned" (216). Using the examples of mental health law and, to a greater extent, the prison system, Judge Bazelon demonstrates the results of asking tough questions concerning morality and the administration of justice.

In 1980, Judge Bazelon was appointed to the Commission of Accreditation for Corrections. He took his appointment seriously and saw as his role ". . . to raise difficult questions and force others to address them" (218). In 1982, after several years of attempting to open a closed system and have his questions addressed, Judge Bazelon resigned from the Commission, noting that the Commission has repeatedly refused to take meaningful steps to guarantee its independence and to insure the integrity of its decisions. The Commission has therefore broken faith with the public and has betrayed the promise of accreditation" (245). Judge Bazelon's resignation is an example of his own integrity.

Bazelon has characterized corrections as a conspiracy of silence between the administrators and the public. He noted the promise of accreditation, and placed his faith on the stated goals of the Commission which reached out for community involvement. His hopes

the National Legal Aid and Defender Association). Washington, D.C. October 21, 1978 at 16.

¹⁴ *Id.* at 5 n.11.

¹⁵ *Id.* n.12.

were short-lived because of the realities of the accreditation process and the Commission's refusal to accept public scrutiny and participation. The Commission's executive director argued that if "information about prison conditions is to be broadcast willy-nilly about the land," then "all kinds of persons will be critical" and this will "simply upset . . . the integrity of the process." Bazelon was apparently as concerned with the process as with the results. In his memorandum of resignation he states, "We must never forget that the quality of the Commission's decisions cannot be any better than the quality of the processes from which they are derived" (245). Again, the Judge stresses that social justice and morality in the criminal law go hand in hand.

The theme which flows through the book is that the essence of criminal law *is* morality. And for Judge Bazelon, that morality is based upon three principles: 1)the criminal process must be sensitive to the social realities which underlie crime; 2)there must be equal justice under law; and 3)there must exist an educational dialogue, which faces the realities of social injustice, within the community and between the community and its leaders.

Judge David L. Bazelon has provided us with some very tough questions. Because he does not permit himself easy or superficial answers, his book challenges traditional ideas and conventional wisdom. In fact, he challenges us all to draw attention to social injustices and to place these issues in their proper perspective. The law, according to Judge Bazelon, must be sensitive to the inequalities which exist in our society, and must be able to respond to and lessen the social distance among its consumers. This law must be internalized to be effective, as there are significant limits to its external control and to the criminal sanction.

While many of his ideas are not new, they are presented in a style which emphasizes their importance. Judge Bazelon is the first to admit that he has more questions than answers, but stresses that many of these same questions have been asked for more that a decade. Those who are re-reading these ideas may wonder why society's consciousness had not been raised above its current level. Those who are reading them for the first time should find the arguments stimulating and refreshing. Judge Bazelon urges us not to accept simplistic solutions to complex problems, and to expose and explore the complexities of these problems. *Questioning Authority*

reaches those lofty goals, and is a must for anyone interested in criminology, criminal law or the problems within our social fabric.

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THE TREE OF LIBERTY. By *Nicholas N. Kittrie* and *Eldon D. Wedlock, Jr.*
Baltimore: Johns Hopkins University Press, 1986. Pp. 784.
\$48.00.

This is not a book. It is a feast. The authors, two American law professors, have laid out a colorful, riotous, and insightful serving of the documentary history of political crime in the United States. Here the reader will find primary sources from every period of American life and from frequently ignored angles.

The wide scope of the book is made possible by the authors' refusal to offer a specific definition of political crime. Instead, they prefer to describe the general boundaries of political crime in terms of conflicting allegiances:

when an individual to whose allegiance the state makes a claim is confronted with an uncompromisable conflict between the demands of the state and the principles of another group or belief, an informal compromise is not possible.

From such a conflict, say the authors, arise both passive resistance (refusing to do what the state demands) and active resistance (directly attacking the state).

Kittrie and Wedlock recognize that even their broad description cannot contain all the varieties of political crime. Accordingly, they add other categories, such as state action against suspect groups (e.g., the WWII internment of Japanese Americans) and state action in upholding one side of a public policy debate over another (e.g., suppressing labor unions).

This wide-ranging approach to political crime allows the authors to traverse much ground, much of it previously uncovered by other works of this sort. What other volume could contain King Edward's Treason Law of 1352 *and* the 1984 trial statement of Eduardo Arocena, the head of an anti-Castro terrorist group? Between the two covers of this book the reader can find a wealth of material on dissent to American wars from the Revolution to Vietnam, on the struggle for equality by women, blacks, native Americans and others, the battles for union recognition, the international dimen-