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The Twilight of Welfare Criminology

Stephen J. Morse

University of Pennsylvania Carey Law School

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the Criminal Law

and experienced scholars whose views are not in agreement but which will stimulate your thinking.

*The Twilight of Welfare Criminology**

A Reply to Judge Bazelon

STEPHEN J. MORSE**

LOS ANGELES

In his article, "The Morality of the Criminal Law,"¹ Chief Judge David L. Bazelon chides society for not facing the hard moral questions posed by crime and the criminal justice system. According to him, our treatment of criminals, especially poor offenders, and our doctrines of criminal responsibility have enabled us comfortably to avoid recognition of the injustice perpetrated by the criminal law and the criminal justice system.

In this response I shall focus on Judge Bazelon's answers to the following crucial questions: "What should be the standard of criminal responsibility?" and "What alternative responses to the crime problem should be made?" The

answer to these questions must be derived from an even more basic one which he considers to be the central question: "What role should moral concepts play in the administration of criminal justice?"²

To explicate the answers to these questions, the Judge describes two polar positions concerning criminal justice. They are the "law as external constraint" (the conservative "law and order") position and the "law as an agency fostering the internalization of control" (the liberal "social justice") position.

Addressing himself to the problems of criminal responsibility, Judge Bazelon asserts that the law-and-order devotee determines questions of responsibility and punishment solely in terms of the maximization of order; the outcome is said to be an immoral, repressive order. The social justice adherent, as viewed by Judge Bazelon, balances questions of order against the "moral sense": before considering what community safety requires, he considers what social justice requires.³

(continued on page 18)

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** Associate Professor of Law, University of Southern California Law Center. A.B. 1966, Tufts University; J.D. 1970, Ph.D. 1973, Harvard University.

¹ Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976) [hereinafter cited as Bazelon].

² Bazelon, *supra* note 1, at 386.

³ *Id.* at 388.

Delving deeply into the polarity stated above, however, one finds no disagreement on the fundamental moral principle that "the law should not convict unless it can condemn." Both law-and-order advocates and social justice advocates believe that a defendant should not be convicted and condemned unless the Judge's three conditions are met:

- (1) a condemnable act was committed;
- (2) the actor can be condemned because he could reasonably have been expected to conform his behavior to the law; and
- (3) society's own conduct in relation to the actor entitles it to condemn him for his act.⁴

Even so, those holding the two positions would differ in their disposition of many cases; the law-and-order advocate would consider more persons criminally responsible. But Judge Bazelon is incorrect in assuming that the difference stems from the fact that law-and-order advocates consider only order when deciding who may be condemned. The true reason for the difference is that law-and-order advocates tend to adhere to a very different model of human behavior, one that leads them to reach different conclusions about social and personal responsibility. The social justice advocate, evidently, is willing to believe that large numbers of persons have little choice regarding their behavior and should not be held responsible for it. The law-and-order advocate believes that most persons do choose their behavior and should be held accountable for it.

Models of Behavioral Choice and Criminal Responsibility

Judge Bazelon's model of criminal behavior assumes that environmental and other personal background pressures affect an actor's choice to violate the law more than society is willing to admit. Consequently, he believes that many defendants now condemned for their behavior should not be condemned, because they could not reasonably have been

expected to obey the laws they violated. As possible examples of unfree behavior choices, Judge Bazelon points to the following cases: a black youth who reacts violently to a racial taunt; a man who steals to feed his family; a drug user who buys drugs to feed his habit; and a super-patriot who burglarizes in the name of national security.⁵ The Judge believes that our criminal justice system is immoral because society is too willing to avoid facing its own responsibility for the causation of crime, and because society is too willing to condemn allegedly unfree actors to produce order.⁶

To force society to face the fundamental moral question of who may be condemned, Judge Bazelon suggests the adoption of a very broad criminal defense based upon nonresponsibility. The Judge's test instructs the jury "that a defendant is not responsible *if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act.*" His reason for adopting this test is that it directly gives to the jury the task of deciding blameworthiness according to community standards, and it would allow the jury to hear the broadest range of evidence concerning the causes, nature, and extent of behavioral impairments.

Judge Bazelon proposes that the inquiry into responsibility be broadened beyond insanity and the medical model. He now suggests that the law recognize that behavior is affected by many factors. Under his revised test, the jury properly could hear testimony and argument on *any* cause that might affect the defendant's formation of *mens rea*, or on *any* cause that affected his emotional processes and behavioral controls.

If Judge Bazelon's model of behavioral choice were correct, then his instruction would indeed force society directly to decide whom it may morally and justly condemn. But it is

⁵*Id.* at 389.

⁶*Id.*

⁷*Id.* at 396, quoting *United States v. Brawner*, 471 F.2d 969, 1032 (D.C. Cir. 1972)(Bazelon C.J., concurring in part and dissenting in part) (emphasis in original).

⁴ *Id.*

my view that, with few exceptions, there is no reason to believe that persons are not responsible for their behavior. If this is so, the defense of nonresponsibility should be narrowed rather than broadened.

Are persons as “unfree” as the Judge believes they are? The Judge does not enter into the metaphysical and unresolvable complexities of the ceaseless debate about free will, nor does he define what he means by free and unfree. Instead, he adopts, along with lawyers in general, an intuitive, common sense approach to free choice. The examples of unfree choices⁸ he cites probably are cases where the reasonable person would agree that there was a high likelihood that the particular crime in question would be committed.⁹ But does this “high likelihood” compel the conclusion that the actor was unfree?

A common sense and intuitive view would hold that although all of us choose our behavior, we are all the victims of various pressures affecting our choices. All environments affect choices and make some choices easy and some choices hard. The pressure on a person to break the law is certainly greater if all friends and neighbors do it than if they do not. On the average, it will be harder for the person who lives in a “criminogenic” subculture to obey the law than for the person who lives in a crime-free subculture. Yet it is clear that the environment is not all-determinative: it interacts with intrapersonal factors. The majority of persons in the most criminogenic subculture are law-abiding and there are members of law-abiding subcultures who break the law.¹⁰

⁸ Bazelon, *supra* note 1, at 389.

⁹ It should be noted that the Judge’s analysis focuses particularly on crimes of violence.

¹⁰ PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT – AN ASSESSMENT 70-71 (1967); see U.S. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 55 (1974) (total crime index represents only a small fraction of the population).

Even if we assume that the actual crime rate exceeds the reported crime rate by 200-300%, and even though crime rates may be higher for some groups than for others, it is still true that the majority of persons in any identifiable group do not commit crime.

A person’s behavior is a matter of harder choices and easier choices. But behavior is a matter of choice.¹¹ Judge Bazelon obscures the question by use of the words “free” and “unfree,” and thus masks the complex relation between compulsion and condemnation.

The Judge wishes to admit into evidence all possible testimony about the causes of the defendant’s behavior so that the jury can decide whether the defendant was unfree and not deserving of condemnation. This view *assumes*, of course, that a vast range of factors made a defendant’s choices so hard that it is unjust to condemn him. But which choices are too hard? There is no bright line between free and unfree choices. Harder and easier choices are arranged along a continuum of choice: there is no scientifically dictated cutting point where legal and moral responsibility begins or ends. Nor is there a higher moral authority which can tell society where to draw the line. All society can do is to determine the cutting point that comports with our collective sense of morality. The real issue is where society ought to draw the line of responsibility – and by whom it should be drawn.

Although condemning and punishing insane or otherwise unfree criminals may increase the general deterrent effect of the criminal law, this is *not* the principle reason the law-and-order devotee calls for the punishment of those Judge Bazelon wishes to excuse. Because the law-and-order devotee does not believe that the choice to commit crime is usually an unfree one in any absolute sense, he wishes to punish everyone who violates the law, or almost everyone.

When the law-and-order adherent is convinced that a choice to offend is sufficiently unfree, he does not wish to punish the offender. He is simply not convinced that those Judge Bazelon considers unfree are, in fact, faced with sufficiently hard choices to justify acquittal. Although the choice to obey the law may

¹¹ This statement is, of course, a statement of belief and values rather than a statement of fact. While it cannot be empirically proven, neither can it be empirically disproven. Cf. J. WILSON, THINKING ABOUT CRIME 43-51 (1975) [hereinafter cited as THINKING ABOUT CRIME]. In any case, the belief that behavior is a matter of choice is a necessary foundation of the criminal law.

be very hard in some cases, the law-and-order adherent believes that where there is choice, it is both moral and respectful to the actor to hold the actor responsible. Because the vast majority of persons faced with the hardest choices obey the law, no scientific or moral reason compels exculpation.

Judge Bazelon believes his test of criminal nonresponsibility would force society to face its own complicity in the causation of crime. To end this complicity, Judge Bazelon proposes social welfare reforms as *the* truly moral solution to the crime problem. According to the Judge, society can be blameless only if it has taken aggressive steps to alleviate the social and economic causes of crime.¹² Conversely, the law-and-order adherent advocates improving law enforcement techniques and the administration of criminal justice as the most effective means of ensuring public safety. This, according to the Judge, is the amoral or immoral view and any order produced by it will likewise be amoral or immoral.¹³

The Judge argues that poverty causes crime,¹⁴ that poor criminals cannot prevent themselves from violating the law,¹⁵ and that the only moral solution to the crime problem is to eradicate poverty.¹⁶ After considering these assertions, I shall analyze his criticisms of the "get tough," law-and-order alternatives for ameliorating the crime problem.

Poverty and Crime

Throughout periods such as the 1960s when the allegedly scientific and therapeutic approach to crime was dominant, there were still

law-and-order advocates who wished to concentrate on stricter enforcement and who felt that offenders should not be coddled by the courts or prisons. Such persons were seen as hardhearted, unscientific, and wasteful. The belief was that if sufficient money were spent on the treatment of individual and social pathology, crime would be greatly abated, and in the end, there would be a net savings to society. As a follower of the liberal social science tradition, Judge Bazelon similarly believes that poverty causes crime and poverty must therefore be eliminated in order to prevent crime.

But does poverty cause crime?¹⁷ It is certainly true that there is a very strong correlation between low socioeconomic status and the sort of violent street crime that worries urban America so much. Further, we must agree with Judge Bazelon that persons of low socioeconomic status probably find it easier than others to turn to violent street crime for money, excitement, or release. Yet it is also true that the majority of poor people are not violent criminals. Poverty is neither a sufficient nor a necessary cause of crime. Poverty may make the choice to obey the law more difficult, but the poor have a choice whether to engage in crime, and the majority choose to obey the law.

Will eradicating poverty eradicate crime? Improvement in the economic conditions of poor persons does not reduce the level of violent crime. Rather, the opposite occurs — there is a rise in crime that accompanies most periods of rising wealth.¹⁸ The "poverty cure" does not work. Whether the failure is a result of poor conceptualization or insufficient resources, or both, is unknown. But neither the social nor the psychological treatment approach stems

¹² Bazelon, *supra* note 1, at 402-03.

¹³ *Id.* at 401.

¹⁴ [R]ather than focusing on what we do *not* know, I suggest focusing on what we do know. . . . [W]e know that poverty appears to be a *necessary*, though not a sufficient, condition for the occurrence of most violent crime. *Id.* at 403 (emphasis in original).

¹⁵ *Id.*

¹⁶ *Id.* The Judge's view is summed up in the following words: "[I]t is simply unjust to place people in dehumanizing social conditions, to do nothing about these conditions, and then to command those who suffer 'Behave — or else!'" *Id.*, at 401-02.

¹⁷ As we have seen, Judge Bazelon focuses mainly on violent crime, although such crime is only a small fraction of the total criminal behavior in our society.

¹⁸ PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT — AN ASSESSMENT 70 (1967). It is also true that the reason why poverty and crime are related is unclear.

¹⁹ N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 36 (1970).

the alarmingly rising crime rates²⁰ As the recognition of failure becomes widespread, many persons, including this writer, have become convinced that until the allegedly underlying causes of crime are understood, it is perhaps better and fairer to approach the crime problem by effective modification of the criminal justice system rather than relying on programs whose basic assumptions are as yet unproved. Attempting to eradicate poverty is a worthy social goal, but it is one that should be pursued for its own sake and not in the belief that it will cure crime.

Increased Social Welfare or Criminal Justice Reform?

One result of disillusionment with the poverty cure has been what Judge Bazelon has termed “get tough” measures, especially the suggestion of mandatory incarceration for certain criminals. In his critique of the get-tough position the Judge claims that get-tough measures attempt to divorce criminal justice from social justice. As I shall argue, some get-tough measures are actually sensible and fair.

Judge Bazelon complains that it is unfair to claim that society cannot afford social justice.²¹ He notes that in a truly egalitarian democracy, there is no alternative to the eradication of poverty and inequality. Further, because the GNP exceeds one trillion dollars, Judge Bazelon believes that there is no excuse for not meeting our obligations to social justice. Halfway measures will not do.

While this complaint is appealing, it is unrealistic. Our society already has made a massive commitment to social welfare. Perhaps we have not gone far enough to suit the tastes of some, but it is clear that even if society’s resources were reallocated to a substantial degree, there simply is not enough money to fund the type of social reconstruction envisioned by the Judge. Reality must be faced; there is not enough money for everything. The most damn-

²⁰ E. BANFIELD, *THE UNHEAVENLY CITY REVISITED* 179-80 (1974); see Martinson, *What Works? Questions and Answers About Prison Reform*, PUB. INTEREST, Spring, 1974, at 22.

²¹ Bazelon, *supra* note 1, at 402-03.

ing rebuttal to Judge Bazelon’s utopian solution to violent crime, however, is that even if poverty were erased, crime would not disappear.

Judge Bazelon’s second criticism of the proponents of the get-tough measures is that they are wrong in their belief that society should not waste precious resources attacking the underlying causes of crime, e.g., poverty, because we know so little about them.²² The Judge admits that we do not understand *all* the causes of crime, but he suggests that we should focus on what we do know. In response, one must first point out that we do not understand *any* of the causes of crime. There are various factors which have a strong positive correlation with violent crime, such as youth and poverty. But social science is not yet ready to make firm causal statements.

Judge Bazelon’s third critique of get-tough measures is based on his claim that cost-effectiveness analysis is used to divorce crime control from social justice.²³ For example, he claims that poverty is recognized as the root cause of crime, but because it is too difficult to deal with poverty, society has felt that it should focus on less deep-seated causes. This claim is incorrect. Poverty is *not* recognized as the root cause of crime; its eradication would not eradicate crime. Eradicating poverty might eradicate some crime, but it is a vastly wasteful way to do so. If poverty can be eliminated, arguably we should do so – but not because it will eradicate crime.

Cost-benefit analysis of the crime problem is increasingly attractive because solutions based on ideology unsupported by substantial, hard evidence have been so wasteful. Before allocating limited resources, it is both wise and moral to analyze rigorously the claims that one proposal or another will “solve” incredibly complex and intractable social problems. Further, cost-benefit analysis need not ignore moral questions. Every program has both moral “costs” and “benefits.” One moral cost of spending money on a worthy social welfare project is that fewer funds are available for

²² Bazelon, *supra* note 1, at 403.

²³ Bazelon, *supra* note 1, at 404-05.

other, equally worthy, projects. The moral benefit is that a worthy social goal may be achieved. One moral cost of a more repressive or intrusive law enforcement technique is that there will be increased infringement on liberty and privacy. The moral benefit is that greater public safety may ensue. No program, from any position, is free of moral costs. Moral costs and benefits should be included in the overall evaluation of any program.

Judge Bazelon assumes that the law-and-order position is explicitly amoral, because it favors more intrusive law enforcement to foster order. As the Judge admits, however, a society where citizens cannot live safely is incapable of moral development. The true question, then, is what techniques will foster order consonant with other competing moral values. To the extent that the social justice approach to crime has consistently failed to foster order, it is fair to consider further emphasis in this direction itself as immoral because other needy programs would be deferred and public safety would not be increased.

Currently, therefore, many students of the crime problem are turning to cost-benefit analyzed reforms of the criminal justice system as a means of achieving the moral goal of fostering public safety. There is considerable argument that sensible and effective law enforcement and criminal justice administration combined with certain relatively simple private preventive measures would do much to lower the crime rate.²⁴

One major suggestion has been that criminals convicted of "dangerous" offenses be given fixed, mandatory sentences, because such a program would significantly reduce the crime rate.²⁵ Judge Bazelon thinks this is immoral,

because poor criminals reasonably cannot be expected to obey the law. As I have shown, poor criminals can and should be held accountable for law violations. And mandatory sentences for those convicted beyond a reasonable doubt of committing dangerous crimes are justified not only by general and specific deterrence, but also by the moral and useful notion of just deserts. Convicted criminals are punished because they have offended and thus deserve to be punished.

Is it immoral to ask that the cost of reducing crime be borne by the morally responsible agents who have been convicted of crimes beyond a reasonable doubt, rather than by innocent persons? If mandatory sentences of humane duration²⁶ significantly reduce the crime rate (in contrast to poverty programs which have not done so), can it reasonably be claimed that such a program is amoral or immoral? To be sure, we cannot be certain which would be more effective, increased social welfare or criminal justice reform. But given this uncertainty and the past failures of social justice solutions, it does seem clear that the social justice adherent is not entitled to claim that his position is *the* moral one, and that alternative analyses and suggestions are immoral.

Judge Bazelon is worried that cost-benefit analysis will lead to even further intrusions on the individual by the state and to further repressive order.²⁷ If newer law enforcement and criminal justice administration techniques do not work, he is afraid that more and unwelcome repressive techniques will follow. Perhaps he is right, but spending money for ineffective programs rather than for possibly effective programs is likely to encourage further increases in the crime rate, thus accelerating the demand for repression. It certainly is conceivable

²⁴ Private preventive measures refer to such things as removing the keys from parked cars, obtaining adequate locks, and avoiding walking on darkened streets in high crime areas and at riskier times of the day and night. The notion is that effective law enforcement and private measures will lower criminal inducement and opportunity, as well as deter criminals.

²⁵ AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 143-44 (1971); THINKING ABOUT CRIME, *supra* note 11, at 179-80; TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN

PUNISHMENT 15-18 (1976). *But see* N. MORRIS, THE FUTURE OF IMPRISONMENT 30, 36-37 (1974).

²⁶ Nearly all the more recent proponents of mandatory sentencing or of the increased use of imprisonment have argued for sentences that are considerably shorter than those now authorized for most offenses. N. MORRIS, THE FUTURE OF IMPRISONMENT 79-80 (1974).

²⁷ Bazelon, *supra* note 1, at 404.

able that if violent crime became so prevalent that most people felt that their security and liberty were unconscionably threatened by criminal activity, a majority of society might gladly welcome more repressive measures.

Judge Bazelon characterizes the assumption that a cost-benefit analysis will work as “heroic.”²⁸ But even the Judge must apply cost-benefit analysis to all *his* programs. For example, increased social welfare would probably necessitate increased taxation. But increased taxation, even for a moral goal, may infringe on other moral goals, such as the free accumulation and disposition of earned wealth. Social welfare and freedom of property are both legitimate, moral goals. Judge Bazelon has concluded that social welfare reform is the only moral response to crime. This conclusion must be based on an evaluation of the moral benefit to society of favoring property freedom at the cost of decreased security. In making this judgment, the Judge is engaging in his own form of cost-benefit analysis. All rational programs are conceived and asserted by comparing them to alternative programs. It is not a question of “repressive order or moral order.” Rather, it is a question of which moral values are to be promoted at the expense of which other moral values. Careful analysis of various programs helps us to decide these questions.

Broadening the class of persons who are considered not responsible for their behavior seems dangerous to public order and disrespectful to the personal dignity of individuals. I believe

that limiting the defenses of nonresponsibility would most benefit society. I propose that we constantly seek to limit these defenses in order to make clear to individuals that society views them as responsible persons who are in control of their lives and who are accountable for their actions. Self-control and moral behavior are always achieved with difficulty; but even so, the law’s presumption of responsibility will encourage the internalization of control, the type of moral control the Judge seeks, as well as general deterrence.²⁹ Finally, such a view treats all persons as autonomous and capable of that most human capacity, the power to choose. To treat persons otherwise is to treat them as less than human.

Further, current get-tough proposals are hardly very tough or immoral; they are arguably quite just. They are certainly worth trying. If they are effective, they will prevent further repression – unlike ineffective programs which will occasion such repression. Perhaps our society will be willing to absorb an appalling crime rate before instituting what most of us would consider a repressive order. But the prospect of a repressive order is not one I am willing to risk. I think that we should choose to get “tougher” before repressive order becomes a real danger. I believe that Judge Bazelon’s solutions would be likely to bring us closer to the repressive order which both he and I would detest.

²⁹ See Andenaes, *The Moral or Educative Influence of Criminal Law*, in J. ANDENAES, PUNISHMENT AND DETERRENCE 110-28 (1974).

²⁸ *Id.* at 405.

