Winter 1989

Book Reviews

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc
Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation

This Book Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.
BOOK REVIEWS


In the mid-70s, the neo-Darwinian idea that genetic programming influences human behavior to some extent was spotlighted in an academic best-seller called Sociobiology: The New Synthesis, by Edward O. Wilson. The idea caused a spate of consternation at the time for complex academic and political reasons. The controversy has died down and now the proposition that genes have some degree of influence on behavior seems to be seeping into all areas of human affairs where an understanding of behavior is important. Martin Daly and Margo Wilson's book, Homicide, represents the application of this concept of evolutionary biology to psychology, in general, and criminology, in particular.

Contemporary Darwinians, like psychologists Daly and Wilson, hold that behavior has been shaped by natural selection to predispose animals, including humans, toward behavior that leads to the proliferation of genes they carry within them. When we have children we obviously proliferate our genes, but the principle reaches into all areas of human activity. When we help other people we can be promoting the proliferation of our genes because exact copies of those genes can be found in others. The closer the “blood” relative, the larger the percentage of genetic overlap, generally speaking. Thus, natural selection has predisposed us to aid close relatives before aiding strangers, everything else being equal. This principle is called kin selection by natural scientists.

How does homicide fit into such biological ruminations? In this context, harming is the flip side of helping. If one is inclined to aid close relatives before strangers, one should also be less inclined to

---

1 See Sociobiology Examined (A. Montagu, ed. 1980) and a summary of the controversy in C. Lumsden and E. Wilson, Promethean Fire 23 (1983).
2 See, e.g., the semi-annual journal, Politics and the Life Sciences, which has been devoted to the political implications of the subject.
physically harm the relatives, given the same provocations. This and many similar hypotheses that emerge from sociobiological thinking are tested by Daly and Wilson with homicide data they collected from Detroit and Canadian police files and with other cross-cultural and historical studies. The authors find substantial support for various established sociobiological hypotheses. They also come up with new hypotheses that are suggested by the data. The author’s expressed objective, however, is not to test “some monolithic Darwinian Theory”, but to encourage people who are interested in the operation of the human mind to analyze behavior, like homicide, in terms of evolutionary history. Daly and Wilson are convinced, and make a convincing case, that the human psyche has been shaped by natural selection.

An example of how lawyers and others concerned with homicide may find interesting, and perhaps useful, insights in evolutionary analyses is provided by the authors’ treatment of data from 35 societal studies worldwide showing that, in each society, 93% or more of “same sex” homicides involved males killing males. Women kill each other very infrequently compared to men. Daly and Wilson trace the evolutionary biological explanation of why men would be so much more violent to one another. Their explanation is complex and not easily summarized. But a central part of the explanation can be stated as follows: It takes an egg and sperm to create a human being. As fertilizable eggs in the population are exceedingly rare compared to sperm and as gestation takes place in females, males have evolved to compete in various ways among themselves for access to the “limiting resource” in females, and that will often lead to violence between the males. On the other hand, during evolutionary history females have found it comparatively easy to obtain the necessary inseminations for reproduction as sperm is abundant and “cheap.” Thus, it has evolved that there is considerably less pressure for females to compete among themselves, violently or otherwise, for access to males.

Daly and Wilson, like most current Darwinians, are at pains to point out that sociobiological explanations of this sort, if correct, do not mean that resulting behavioral inclinations cannot be “conditioned out” of people. And therein lies the value of evolutionary insights for criminologists. Knowing the explanations—possible or probable—behind behavior considered undesirable, is the best preparation for combatting that behavior.

---

4 Id. at 13, 297.
5 Id. at 147-48.
Lawyers looking for specific suggestions from Daly and Wilson as to law reforms that could help to combat society's homicide problems will be disappointed. The authors are duly cautious in this regard, partly, I suspect, because they are not lawyers. Occasionally they come close to criticizing the legal system from an evolutionist's standpoint, as when they note that revenge and retribution are in low repute as justifications for punishment in North America and suggest that "the retributive component of justice warrants acknowledgement and respect." They are referring here to the desire for revenge in the kinfolk of homicide victims. They feel that the revenge motive has evolved to have a deterrent function ("don't do that again or you'll get this again"). To the extent that organized society does not, in its collectively imposed punishments, satisfy private revenge urges, the authors suggest that the victims' kinfolk, and the killers themselves, are being disserved. The suggested negative effect on the killers when society does not punish them "properly" is not spelled out, but the authors presumably are referring to possible private retribution by victims' kin to compensate for any deficit they might perceive on a "tit for tat" balance sheet. The chapter devoted to retaliation and revenge contains no specific reform suggestions beyond one's distinct impression that the authors would like to see punishment schemes carried out that are generally satisfying to the relatives of homicide victims.

I suspect that one of the reasons why this book contains few, if any, clues for law reform is the general attitude of Darwinists, such as Daly and Wilson, that evolutionary biology should only be used to describe how behavior came to be and not to prescribe what it should be. "Is does not equal ought" is the catch phrase. Any behavioral inclinations that may be genetically programmed in humans are alterable and one must look outside natural science to determine whether they should be altered. That should not be interpreted as meaning that evolutionary biology cannot be looked to for clues as to how alterations may be best effectuated once alterations have been decided upon for political, social, esthetic, or whatever, reasons. For example, if society should decide, for whatever reason, to tackle and try to deter the tendency of males to kill males in vastly greater numbers than females kill females, a study of the evolutionary history and evolved mechanisms of reproductive competition could be quite instructive for the criminologist/reformer who is seeking ways to attain the deterrent goal. Such use of science is

6 Id. at 240.
7 Id.
facilitative (of the achievement of goals independently arrived at) and not prescriptive.

Numerous potential facilitative uses of evolutionary biology have been identified to date in areas of the law including contracts, torts, crimes, evidence, domestic relations and property inheritance. As more lawyers become familiar with evolutionary biology, they are likely to uncover potential facilitative uses of it in virtually every area of the law. One of the many values of Daly and Wilson's *Homicide* is that it will serve to introduce more lawyers to this burgeoning scientific discipline which holds exciting potential for enlightening the legal community in its efforts.

**JOHN H. BECKSTROM**
**PROFESSOR OF LAW**
**NORTHWESTERN UNIVERSITY**


The author of this book, has, since 1971, been professor of criminology and psychology of law and director of the Institute of Criminal Sciences at the University of Muenster in Westphalia. It is one in a series of textbooks published by an old and respected house and is dedicated to the memory of Gustav Aschaggenburg, Hans von Hentig, Max Gruenhut and Herman Mannheim. It is a very impressive work, testifying to Professor Schneider's intimate knowledge of his subject and his skill in presenting it in all its aspects and with characteristic German gründlichkeit. Of textbooks on criminology that have come to my attention over the years, it is one of the best. But before looking at its content, let us look at the author and his professional career. He was born in 1928. After graduating from high school, he studied law at the Universities of Marburg, Frankfurt and Cologne and passed his first state bar examination in 1955. Two years later he received the doctorate in law at the University of Cologne. During the next decade he spent several years as notary and candidate for the higher civil service at courts and agencies of public administration in the province of North Rhine-Westphalia, passed his second state bar examination and prepared himself for a career in criminology by the study of psychol-

---

ogy, sociology and education at the universities in Freiburg, in
Breisgau and Basel, Switzerland. In 1967 he was granted a diploma
in psychology at Freiburg. He was at the University of Hamburg as
assistant to Professor Sievert until 1971, when he qualified himself
in criminology, juvenile justice and corrections, and subsequently
accepted the professorship at Muenster, where he has remained, re-
fusing two later invitations from prestigious universities.

In addition to his teaching and administrative duties, Professor
Schneider has travelled widely and has lectured at universities or
international congresses in Europe, Japan, Australia, the United
States and Central America. He was a member of the Board of Di-
rectors of the International Society of Criminology during the first
half of the present decade and has been one of the leaders in the
organization of several international congresses of victimology.

A glance at the bibliography of Professor Schneider's writings
reveals that since 1962 he has published over 150 articles in profes-
sional journals and collected works, and more than eighty book re-
views. During the last fourteen years he has written or edited a
dozen books. He is the editor of the great encyclopedia of criminol-
ogy, the fifth and last volume of which will soon be published. His
latest work is this textbook, the framework of which is somewhat
different from that familiar to American students. The text proper
fills 913 pages, preceded mainly by a very detailed table of contents
and by a bibliography, 118 pages in length, of the literature con-
sulted by the author. Following the text is a list, tailored to German
needs, of what a criminologist's reference library should contain,
and a very long subject index.

Professor Schneider is regarded by his colleagues as a leading
expert on North American criminology. The reason is obvious
when we examine the bibliography mentioned. One third of it lists
1200 books, of which about 700 are English-language publications
mostly issued in the United States. Slightly more than 400 are in
German and 80 in eleven other languages, half of them in French or
Polish, about evenly divided. The two thirds of the bibliography
that lists articles from journals or chapters from collected works
would probably show a similar distribution.

Finally, a word about the biographies, long or short, that pre-
cede the subject index and honor forty-eight "pioneers of Criminol-
ogy." All but two are men and all but one—Israel Drapkin—
deceased. Twenty-one are Germans or Austrians, thirteen are from
the United States and the rest from seven countries, all of which,
except for Japan and Israel, are in noncommunist Europe. No crite-
rion governing the selection is offered.
In a brief Foreword, Professor Schneider stresses some salient features of his book. First, he has tried to resolve all criminological problems in the light of a "uniform theoretical and criminopolitical concept." Biological, psychopathological and Marxistic theories and the studies they have inspired have been meticulously scrutinized but rejected for reasons specified. Psychoanalytical concepts and studies have been favored. In the main, sociological and social psychological theories have been brought to the fore.

Second, he has not confined his discussions to data about offenders and social control. He considers data about victims as equally important. Women, youth and the aged are not viewed solely as offenders. Their victimization, such as the abuse of women, children and old people, rape and the sexual abuse of children, is also discussed. When certain kinds of criminality, such as terrorism and genocide, are described, both offenders and victims are considered.

The third feature is the focus on comparative studies of criminality seen historically and in different countries. The history of criminological ideas shows their worldwide diffusion. The historical changes in the criminality of the regions where German is spoken is given special attention and, in order to gauge the characteristics of criminality in the Federal Republic of Germany, it is compared with the criminality of developing countries and of the socialistic and capitalistic nations of the German-language area.

The eight chapters of the book vary in length from fifty to 200 pages. Most have several subdivisions, one of which, at least, could properly be a separate chapter, namely, the "history of criminology," which fills fifty pages of the second chapter and deals with "criminology as a human and social science." The longest chapters, each 200 pages in length, are the third, on criminal statistics, and the fourth, on main trends in criminology. Besides the introductory chapter on some problems of criminological research and those already mentioned, the remaining four chapters deal with "criminality, sex and age;" "social causes and control of criminality;" "formal reactions to criminality" (legislation and penal sanctions); and "some aspects of political criminality" (chiefly terrorism and genocide).

Although Professor Schneider believes that the great advances in modern criminological thought are due to research on criminal statistics and the "dark number," he regards the fourth chapter as
the most important one. Its nine subdivisions have the following headings: theory, empiricism and ideology; the neo-classical school; criminal biological theories; psychopathology and clinical criminology; the multifactor matter; economic theories and Marxistic and socialistic criminology; criminal sociological theories of criminality.

Throughout the book, Professor Schneider’s analyses are thorough, cogent and persuasive. When he questions findings, his observations are usually judicious and the presentation testifies to his mastery of the subject as he defines it at length. A condensed version of that definition is given here. “Criminology,” he states, “claims that crime as an individual and criminality as a mass phenomenon are the products of social, psychological and physical causes” (p. 360). As an empirical science, it seeks to establish the causes of crime and other deviant conduct, and the means and methods of their removal and prevention. He regards victimology as belonging to criminology as well as the study of penal legislation and the administration of justice (p. 87).

The history of criminology that has been inserted in the second chapter (pp. 90-140) has several parts; a brief introduction is followed by six subdivisions: the classical school of the 18th century; criminal psychology during the 19th and the beginning of the twentieth centuries; the German-language criminology of the first half of the 20th century; post-war criminology. It is an interesting, informative and well-organized account. It is, however, amazing to find that Cesare Beccaria is hailed as the founder of criminology because he wrote “of Crimes and Punishments,” which is probably familiar to most readers of this journal.

Beccaria was a great reformer and his influence is still manifest, as shown in American penal legislation during the past two decades, but he was not concerned with the causation of crime but in its repression by punishment that, through its deterrent force, would be the best means of preventing crime. His opposition to capital punishment that has earned him the reputation of being the first abolitionist was due to no moral revulsion but to a desire to replace it by a more terrible punishment that would have the deterrent force that he found lacking in the death penalty.

Even if one adopted the criterion used in nominating Beccaria, his selection would be questionable. Lucas de Penna, the 14th-century Neopolitan legal scholar could be a candidate. He is said to have “anticipated . . . the postulates of Beccaria.” Plato could, as well, be claimed as the first criminologist. The penal system he de-

---

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


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,

---


\(^2\) Morse, *supra* note 1, at 1276.

The Truly Disadvantaged. 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, he tried to “transform the role of the psychiatric expert from moral oracle to modern behavioral scientist . . . . We were sorely disappointed” (985). 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,” or assure a more decent environment for people who need it? 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-

---

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.
impact of these social forces fades over time.\textsuperscript{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."\textsuperscript{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 \textit{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 \textit{United States v. Ross,}\textsuperscript{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

\textsuperscript{8} \textit{Id.} \textsc{Wilson and Herrnstein, Crime and Human Nature} (1985); \textsc{Silberman, Criminal Violence and Criminal Justice} (1978).

\textsuperscript{9} \textsc{Bazelon, Beyond the Control of the Juvenile Court: Youth Development and Delinquency Development Administration, 2.} (1970).

\textsuperscript{10} \textit{United States v. Ross}, No. 79-1624, slip. op. at 2 (D.C. Cir. April 17, 1980)(\textsc{Ross I}); id. at 1 (Bazelon, J., concurring and dissenting), \textit{vacated and rev'd}, 655 F.2d 1159 (D.C. Cir. 1981)(\textsc{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, Judge Bazelon continued this type of questioning. He explored the issue of competent counsel with many individuals. 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,” and said that, “We must structure our approach to eliminate the gross

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 "decoster 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

---

\(^{14}\) *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 than 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.

JEFF ALPERT
UNIVERSITY OF SOUTH CAROLINA COLLEGE OF LAW

THE TREE OF LIBERTY. By Nicholas N. Kittrie and Eldon D. Wedlock, Jr.

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-
sions of terrorism, and the fight for human rights under totalitarian regimes.

The authors have done yeoman work in collecting and editing the original sources. These primary materials include statutes, case decisions, letters, speeches, proclamations, trial transcripts, newspaper stories, press conferences, debates, interviews, diaries, international conventions, resolutions, petitions, constitutions, declarations, government reports, communiques, and manifestos of every sort.

*The Tree of Liberty* not only brings unknown chapters of American political crime to light but also breathes new life into well-known chapters. For example, while most readers will be acquainted with the general contours of the Boston Tea Party, how many will have previously read the "Sons of Liberty Resolutions on Tea"? As for the unfamiliar, how many will have known of the Mormon rebellion against the United States that forced President Buchanan to send 2600 federal troops to Utah in 1858?

The authors do more than select, edit and print the material. They introduce every chapter with a descriptive and analytic overview of the period. Moreover, they introduce each piece of source material with a brief paragraph or two that places the document in context.

If the authors had done nothing more than what I have already described, they would have deserved our thanks for putting together the most comprehensive set of political crime materials in print. The scope of similar ground-breaking works, such as David Weber's excellent 1978 compendium, *A Documentary History of Civil Disobedience in America*, pale by comparison. Kittrie and Wedlock have produced a bible of political dissent.

This book is not simply a presentation of the cold record of history. There is a message to this book, spoken not only in the prefatory words of its authors, but one that emanates simply from its existence. The message is "The law, as an objective reality independent of human needs and desires, is a myth."

The myth of law as an order scientifically determinable from legal materials alone has been in currency for at least as long as the time when Chirstopher Columbus Langdell was dean at the Harvard Law School. The myth is reluctant to admit *what* the law is, *that* the law changes, and *how* the law changes. According to the myth, the law is an objective reality, much like a table or chair, whose substance can be correctly perceived by the organized study of case opinions, statutes and the like. Following from this understanding,
the myth promotes the view that the law is changed only when one’s study of the law reveals that it is in fact possible to come closer to the true law as found in the corpus of legal thought—as if the law in law books were some Platonic ideal that reality should attempt to match. And when laws must be changed, the myth says, it is only done in one, orderly fashion—through the passage of statutes by legislatures and by the rendering of case decisions and opinions by courts. Referring to this view, the Committee on Legal Education of the Harvard Law School said in 1947:

The prevailing view came to be that law is and can be self-sufficient, that its premises are essentially legal in nature, that the process of deducing conclusions from these premises involves no recourse beyond the law itself and its own internal history.¹

The current ideology of law, reflected in the way it is taught in almost every law school in America today, holds that this view of law’s nature as self-contained is correct. Accordingly, law students study case decisions of appellate courts and codes promulgated by legislatures and government agencies. It is to these they look for “the law”—what it is and what it ought to be.

This collection is testimony to the fallibility of the myth. It exposes the myth’s limitations and its artificiality as an intellectual construct designed to explain the universe of law. In its place, it puts an understanding that the law is human first and theoretical second, that the processes of change are as gritty and disorderly as life itself. One example, that of the suffrage movement, will suffice.

As the book’s materials make clear and as our younger sisters may not appreciate today, it was not always legal for women to vote in the United States. Prior to the ratification of the nineteenth amendment in 1920, women were specifically prohibited from voting in federal elections. How did this situation change? Did the Congress take the initiative and form a study group to read the law on this question and determine what the law on this point truly was? No. Did the Congress enact the Amendment as a considered response to the simple requests of women that it do so? No. Did men go to the ballot box to replace anti-suffrage representatives with pro-suffrage ones? No.

The Amendment came about as the result of a chain of disorderly political events, not one of which fit into the traditional procedural mode. As the authors imply, the character of the activity was set by Susan B. Anthony in 1872 when she registered and voted in Rochester, New York. She was promptly indicted, tried and con-

¹ Quoted in Harno, Legal Education in the United States (1953).
victed. (A federal statute made it a crime to knowingly vote without the right to do so.) Her trial was the occasion for much public debate on the issue and it set the stage for what was to follow in the twentieth century.

Beginning in 1917, respectable middle and upper-class women began to conduct an educational picket line in front of Woodrow Wilson's White House. Wilson loudly proclaimed that Germany was stepping on the natural rights of those it had conquered while he denied the existence of those same rights in American women. The women forcefully pointed this out not only with their signs but with their very presence. But their request that Wilson support the amendment fell on deaf ears. Undiscouraged, they continued their picketing. Eventually the police started to arrest, try, convict, and jail them. When the women were sent off to the notorious Accoquan Workhouse in Virginia, national attention followed. The women capitalized on this with a hunger strike. When the press and public expressed sympathy with the women's cause, Wilson and the Congress passed the amendment in 1919.

The history of the suffrage amendment, therefore, is a laboratory case of legal change accomplished through what was then considered political crime. (Picketing was not considered a normal exercise of one's first amendment rights, as it is today.) It decidedly did not come about as the result of the study of statutes, Constitutions, case decisions or anything of the kind. It came about when women acted against the established norms.

This, then, is the message of The Tree of Liberty: law does not always spring from the head of the legislator; often it springs from the conscience of the rebel.

Full justice to The Tree of Liberty would not be done without a word about its proper place in the academy. This book is a powerful antidote to the views of right order fostered by the usual pile of textbooks students of American law are required to study. These textbooks make no effort to recognize the politics of disorder and the results—in the law—of the politics of disorder. Insofar as they fail in this respect, such texts do a disservice to students who will soon find themselves awash in real world, not ivory tower, law. Just a few chapters of this book might be the thing to teach students how the law is created. A full-blown course built around this book could shake students' assumptions at their foundations. And the acceptance of political crime in our schools as an inevitable and necessary method for law reform might result in a citizenry that understands,
accepts, and welcomes political crime in the United States as a vital element of our liberty.

CHARLES R. DI SALVO
PROFESSOR OF LAW
WEST VIRGINIA UNIVERSITY COLLEGE OF LAW