

# University of Michigan Journal of Law Reform

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Volume 8

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1975

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*United States Court of Appeals for the District of Columbia*

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### Recommended Citation

David L. Bazelon, *Whose Needy Children?*, 8 U. MICH. J. L. REFORM 237 (1975).

Available at: <https://repository.law.umich.edu/mjlr/vol8/iss2/2>

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## WHOSE NEEDY CHILDREN?†

David L. Bazelon\*

As an appellate judge for twenty-five years, I have been confronted daily with cases involving what we call "behavior problems." As a judge, I can tell you it is a distressing task to sift daily through the records detailing the wreckage of human lives. I do not speak only of criminal cases. I refer also to child abuse and neglect cases, welfare eligibility cases, civil commitment cases, and many others.

The one thing that makes this task tolerable is the hope that we can learn something about the reasons for this human wreckage that will help us to avert it in the future and terminate the seemingly endless cycle of pain and despair. That hope sustains me — and perhaps my sanity. Each case necessarily focuses public attention on a piece of human behavior. What better laboratory can one expect? I have always held the strong belief that each case presents an opportunity similar to that of the post-mortem procedure in medicine. Neither the post-mortem nor the trial can undo the failure which it examines, but in both instances there is a great opportunity to learn the causes of the failure — to learn *why* the failure occurred, with the hope of being able to prevent such failures in the future.

But for the most part the question of *why* the failure occurred is deemed irrelevant by the law. It is enough that a man robs a liquor store — it doesn't matter that his family was hungry. The law avoids looking into the "why" of behavior because such questions are seen as undermining the order and symmetry of the law. Decisions become vastly more complicated; facts and relevant considerations are much harder to pin down. And any qualification of the principle of individual responsibility is seen as risking erosion of a

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† This article is a revised version of a speech given by Judge Bazelon during the Children's Rights & Public Policy Conference in Ann Arbor, Michigan, on October 4, 1974. The Conference was co-sponsored by the University of Michigan School of Medicine, Department of Psychiatry, the School of Law, and by the Michigan Society for Mental Health, Division on Childhood Mental Illness & Health.

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fundamental assumption of our system of justice. Several years ago when I was on a radio program with Senator Paul Douglas talking about criminal responsibility, he said, "Apparently you believe in the French maxim that to understand all is to forgive all." I replied that I didn't know it was a French maxim, but since it's hardly likely that we'll ever understand all, we're not in much danger of being called on to forgive all.

One traditional exception to the irrelevance of the "why" of behavior seemed to be the case of a defendant who claimed he was "insane" when he committed a crime. It was simply too barbarous to hold someone responsible for something he plainly couldn't control. The traditional "insanity defense" seemed, however, to be a poor tool for finding out why a defendant had engaged in criminal behavior. For all practical purposes only the most obvious cases of "uncontrollable" behavior came within the scope of the insanity defense. Essentially, a man was considered to "know what he was doing" as long as he knew that the gun in his hand was not a toothbrush. Of course, most people who are that far out of touch with reality are identified long before they can do any harm.

There seemed to be no room for the new knowledge about human behavior that was developing. But as I just indicated I was almost obsessed with the importance of learning as much as we could about the people who committed crimes. One obvious avenue of inquiry would be consideration of any relevant information that the behavioral and biological sciences might have to offer. In 1954 my court reformulated the insanity defense solely in an effort to invite that information.

The potential of the insanity defense to focus on the question of *why* people behave as they do had never been realized — and still isn't. I won't go into the reasons for this failure — that is another speech. But as a judge — and as a human being — I was led beyond my original interest in the extreme forms of behavior we designate as aberrant. It was as if my experience in viewing the drama of the courtroom had opened a window on to the whole world of troubled people. Viewing their problems, it seemed to me that they were also the problems common to many, many individuals who for reasons of wealth or good fortune had either managed to discharge their troubles in a more socially acceptable form, or had utilized private hospitals, military schools, or private psychiatrists to bring their behavior under control. In short, the behavior problems I witnessed in the courtroom were only the tip of a vast iceberg, encompassing men and women of all classes and races who were faced with personal conflicts which seemed beyond their capacity to handle.

My experience is, I think, relevant to you and your concern with the difficulties of all those about you. The problems we confront in the courtroom are *not* simply the problems of "other people." They are the problems of all of us, and are not very far removed, if the truth were known, from the rest of society's life and experience. The behavior we scrutinize through the public, dramatic focus of the courtroom reflects truths that apply to *us* and can provide an understanding of ourselves and those about us.

But maybe we don't really want to learn that much. Maybe it would be too painful. Maybe we don't want to understand that there is no simple solution — like President Ford's panacea of "swift and prolonged punishment" — not if we really believe in western civilization's fundamental value of individual human dignity. In sum, maybe we don't want our noses rubbed in reality, and perhaps for that reason we get our noses dunked instead in the pablum of "swift and prolonged punishment."

But even those who demand harsh justice are at least a bit troubled when children are involved. The law is reluctant to "blame" children, as we blame adults, for their plight. Therefore, with children, the question of "why" is even more pressing. And, incidentally, resistance to pursuing that question may be more easily relaxed. The causes of their problems are so obvious. With adults, the forces shaping behavior are obscured with the passage of time. We do not have that "cop-out" with children. And we, as adults, as a society, feel more responsibility where children are concerned. The children who come through the courts are living evidence of the failures of our society to provide the basic necessities of a healthy mental and physical life for all too many of those we call "society's most precious resource."

Our juvenile court system was originally based upon the assumption that children should not be treated as criminals, that society should take responsibility for their behavior and attempt to prevent it in the future by understanding its causes. But there is a movement afoot today to change this purpose, to give juveniles a dose of that "swift and prolonged punishment." For example, to solve the problem of "juvenile crime" in the District of Columbia, the proponents of "law and order" reduced the number of juvenile offenders overnight by simply reducing the upper age limit of children eligible for juvenile court jurisdiction. Now isn't that a nice and easy way of reducing the juvenile crime statistics if not the problem.

Another example of this "enlightened" approach is the case of an eighteen-year-old boy who was convicted of burglary and then

evaluated for sentencing under the Youth Corrections Act. This act is designed to provide special rehabilitative treatment for young offenders, instead of discarding them to the scrap-heap of adult prison. The evaluation team which examined the eighteen-year-old boy found that he had a first grade reading ability, borderline intelligence, was easily manipulated, and would act out against others only to protect himself. His criminal behavior, they found, was "the product of his intellectual and emotional weaknesses." They felt that he did have some "inner strengths" and should be in "a rehabilitative program as opposed to simple incarceration." They concluded, however, that since he "lacked the natural capabilities to derive any benefit from the Youth Center's program," he should be sentenced as an adult to some work program. In other words, the Youth Center program was not designed for young offenders whose problems include being too dumb to be "rehabilitated." Now for the *coup de grace*: the judge ultimately decided (against the recommendation of the evaluation team) that the "treatment of choice" for this boy was five to fifteen years in an adult penitentiary. This reasoning is reminiscent of the tailor whose solution for having made one pants leg too short, was to tell the customer that the pants would fit perfectly if he would just cut off a piece of his leg.

Yes, I'm *not* satisfied with what is happening. So I now come to the question I posed at the outset: What do I know about the problems of children, and what directions would I suggest? I have spent most of my professional life, to paraphrase Socrates, learning what I do *not* know. I am reminded of the story so often told about Gertrude Stein's dying words. A close friend leaned over Ms. Stein's death bed and whispered to the dying woman, "What is the answer?" The barely audible reply as Gertrude Stein passed away was, "What is the question?"

Perhaps I can raise some questions that can help us understand the problems of children. For a starter, what do we really know about treating disturbed children? The main thing I've learned from my years of interaction with people in the behavioral disciplines is how much we *don't know* about human behavior and human problems. My awe of the behavioral scientists disappeared when I discovered what I should have realized all along: the professionals have no secret wisdom or knowledge of the causes of behavior. Although that gives me some confidence to venture my own views, on the other hand it scares me to think no one may know a great deal more than I do.

It is a rude awakening for us nonexperts to realize that the professionals have no pill or easy prescription to treat the social and

mental ills that surface so regularly in and out of our courts. But once I had this realization I began to express my doubts about the conclusions and opinions of the experts. These experts have more conclusions *without* facts than they have conclusions backed up *with* facts. I couldn't evaluate those opinions and conclusions until they told me what they actually knew and, more importantly, what they didn't know. Some behavioral scientists misinterpreted this as an attack on their integrity and their value. But I'm not the little boy shouting that the Emperor has no clothes. I'm merely pointing out that someone with so many holes in his clothes should not claim to have the latest word on fashion.

What is "treatment" anyway? Few honest experts will tell you that they know how to "treat" a misbehaving child. Let's be candid: we don't have the slightest notion of what really works, except in the most common sense way. How do we "treat" our own children? We feed them, comfort them, play with them, call the doctor for them, talk to their teachers, lecture them, swat them once in a while, and most of all warm them with our love and pride. Not many of us subject them to repeated batteries of tests and interviews, isolate them for weeks for misbehavior, make them account for every five minutes of their time, deny them privacy, censor their mail, and refuse them all contact with the opposite sex. Yet in most systems, this passes for treatment.

Someone once compared the diagnostic social services in a good juvenile court to a superhighway leading into a cowpath: complicated diagnostic labels and classifications all dressed up with nowhere to go. We have seen this before — mental health, where the choice of diagnostic labels is most impressive — but the treatment is always that elusive creature known as "milieu therapy."

What I have learned from my colleagues in the behavioral sciences is that there are no easy answers to the problems of caring for those who have committed crimes or who are suffering from a mental disability. Our knowledge of the mechanics of human behavior is too limited. But we still hold out the promise of treatment, and we still operate our juvenile courts on the assumption that we can help children with difficult problems. Perhaps we need to look again at what it is we are attempting to "treat" and to reconsider the extent to which our present arsenal of services is appropriate for the problems of children we see in juvenile court — or for any other child.

My own experience with delinquents and criminals is that their lives on the street have destroyed their ability to empathize with other human beings. It does not take an expert to guess that chil-

dren reared in the ghetto, where acknowledgement of one's own identity and worth is impossible, will develop at best a hard insensitivity to other humans. Such individuals feel nothing but hatred toward their victims and society as a whole. This lack of connection to the majority's culture and values may have nothing to do with mental disease, unless not being able to see or to *feel* beyond resentment and rage is classified as such. I suspect that none of our providers of treatment services — psychiatrists, psychologists, or social workers — have the know-how to implant middle class sensibilities into youngsters who have been actively neglected twenty-four hours a day, every day. There is no magic humanizing pill for these youths to swallow.

My experience led me to this conclusion: the way these neglected and disturbed children think we feel about them determines how they feel about us. I have a particularly vivid memory of an incident in my own experience which will help to illustrate my point. Many years back I was visiting a prison in California in order to observe certain kinds of group therapy being practiced by prison psychiatrists. A young man of about nineteen years of age spoke about all "those people out there," meaning the world at large, who hate him. "Why," I asked, "do you think they hate you?" He quickly replied, "Because they hate all of us in here — that's why they put us in here like animals." Then I asked, "Do you think 'they' have cause to hate you for what you've done?" To which he replied, "Maybe they have and maybe that's why their hatred is harder for me to bear." Then he admitted that the only way he knew of living with that hatred was to return it — to hate "them." At first he thought his pent-up hate was making him psychotic. Then he developed a ritual which saved him — when his cell door was locked each night and he was alone, he would as quietly as possible discharge his rage by shaking his fists at the window of his cell to the world outside and repeating the obscenities, "F--- you! F--- you! Just you wait until I get out of here!" He kept this up until he tired enough to fall asleep. That was his way of dealing with what he saw as his total rejection by the outside world. Children on *all* levels of society are acutely sensitive to rejection, as was this young man. Is it very hard to understand why they would react in much the same way when they feel unwanted or unloved — either in reality or in their imaginations — by their parents, the school, the society?

I believe I can best explain my concerns by describing an experience of a young psychiatrist, Dr. Joseph Perpich, with whom I worked closely last year. His experience parallels my perspective

as viewed from cases through the juvenile justice system. Joe worked in a community mental health center in Washington serving primarily poor, predominantly black families living in public housing projects. What touched him most deeply was the effects of poverty on the children. Joe described it to me this way: he saw the two- to four-year-old black child — remarkably beautiful, with a combination of physical and emotional vivaciousness. Eyes alert, facial expression often warm and open, they loved to be read to, to be played with, to be talked to. There was a zest and unquestionable curiosity. The potential was evident and, with love and care, would flourish.

But on entering school and with unmitigated poverty grinding relentlessly, havoc was wreaked on this child of promise. With each succeeding year the attributes of humaneness and interest slowly died and withered away. Without nurturance the dream was aborted. Joe observed the personality change from openness to distrust, from interest to apathy, from warmth to hostility. By adolescence the attendant curses of drugs, alcohol, and delinquency led down the dismal road to the door of the juvenile court or the mental institution. The “man-child in the promised land” was lost, probably forever.

I, too, have seen the battered deprived child of today become tomorrow’s vengeful, brutal, and callous adult criminal. Behavioral science has made explicit what many of us “nonexperts” have known intuitively — the battered child becomes the battering parent. Spiritual and physical mutilation in childhood cannot be washed away. We cannot expect a viable adult to appear, arising like a phoenix out of the ashes of an aborted childhood. The embers of hatred and revenge glow too brightly.

What does one do in such a situation? Joe’s first response was to help strengthen the home — find better living quarters, provide for comprehensive health care, and ensure that the mother was receiving the maximum amount of public assistance to which she was entitled.

He next became involved in the schools. And here he was faced with the conflict between the needs of the school — besieged with problems and overcrowding — and the needs of the children. The schools sought psychiatric evaluation and diagnosis. Children labelled “hyperkinetic” or “unsocialized aggressive reaction” obviously must be treated; according to the school authorities, treatment in a hospital would be preferable. Rather than focusing on how the school might fashion a program to meet the needs of the child — or eliminate conditions creating the child’s problems — the focus invariably was on “the problem child.”

If Joe refused to diagnose and label a child and prescribe medication, the schools' response was to refer the child to the juvenile court. In the juvenile court the child is shown to have a poor school record, truancy, poor grades, misbehavior with teachers and classmates. His miserable record had followed him from teacher to teacher and become its own self-fulfilling prophecy.

The juvenile court in light of the record refers the child for an evaluation to the mental health center. He is seen once again by Joe who saw him in school! Only now it is the interests of the court — not the school — which dominate.

Armed with a psychiatric evaluation and now given a legal label as well — “person in need of supervision” — the court may place the child on probation. And you can now envision the final scenario for this script. Coming full circle, the probation officer would recommend psychiatric evaluation and treatment, and the child would be sent back to Joe. This time it is the interests of the probation department that dominate.

The score on this referral game of child disposal was institutions: 3, the child: 0. We look to psychiatry to resurrect the innocence and love of the three-year-old who is run through the educational, legal, and psychiatric gauntlet and then pummeled beyond recognition. In every case, the institutions created to serve the child rejected those who could not fit in the assembly line or conveyor belt and left it to the “expert” to deal with the rejects.

So now we have come full circle: the “experts” admit that they do not know what to prescribe for the disturbed child and the institutions which could help that child struggle from under the burden of a brutalizing environment can seemingly do nothing but refer the child to court or back to the “experts.” Our promise of treatment and the assumptions of the juvenile court are thus doubly unfulfilled. I am reminded of the promises made by a certain gubernatorial candidate who made plainly impossible campaign promises to enlist election workers. On winning the election his aides asked him how they should respond to demands that he fulfill his promises. The Governor's face darkened for a moment. Then he suddenly brightened and exclaimed: “I have it! Just tell them I lied!” We lie to children who have never been “habilitated,” much less rehabilitated.

So where do we go from here? You must sense the depths of my doubts about a single-minded “therapeutic” approach and whether that approach can ever really deliver as much as we expect of it. We simply do not know enough about “treatment.” I do not mean to turn my back on our long tradition of providing goods and ser-

vices to society's victims — the poor and the minorities — and to its rejects — the delinquents, criminals, addicts, mentally ill, and retarded. But if we want to make sure that our efforts are really constructive we must examine our expectations much more carefully. For several years now, children have been the Number One priority of the National Institute of Mental Health, not only because it seems right to help children first, but also because it's sensible to try to prevent problems before they start, or at least catch them before they become serious. But despite all the rhetoric, Community Mental Health Centers said they could not provide the specialized services children need without extra funds. So new legislation was passed (called Part F) to provide these extra funds. Centers immediately began sending in applications for money to fund children's services, especially as other service money grew scarce.

But I've talked to some very knowledgeable people, both at the National Institute of Mental Health and in the field, who tell me that the figures showing big increases in services for children are inflated to convince NIMH that children are getting priority treatment. Staff may be classified as "child psychiatrists" and "social workers specializing in children" when in actuality most of their time is spent with adults. Every time an inquiry is received from a school, it may be counted as a "patient care episode" for a child and used to swell the total figure. Every time a patient asks his therapist something about his role as a parent, it may be called a "child mental health contact."

I'm not questioning the sincerity of the commitment to provide services. What I'm questioning is whether children are actually *receiving* these services being charged to them.

No one I talk to seems to know how to get at the truth behind the statistics. The last time Ralph Nader poked his nose into the tent of the Community Mental Health Centers system, he got it bloodied. We can all hope that someone else will be courageous enough to pick up the trail. There is no assurance that those in the tent will tell us what we need to know.

But even if services were being provided, the question would remain: What do children really need? Before we scrap our helping efforts or redouble them, we must have a better understanding of this question. We must reappraise our efforts, no matter how painful that may seem. But in the end such reappraisal will be cheaper and less painful than plunging headlong down the path of "treatment." A better understanding of what children need will help us answer my final question: Where should we be spending our money

and directing our energies to most effectively come to grips with the problems of children?

The only thing that my expert colleagues know for sure is that the family is the most effective child-developing agent around, when it wants to be and can be. Out of the plethora of studies of day care and early intervention, one thing stands out: a child needs most a family — it is there that he finds his roots and his education. Mothers and fathers who spend time with their child are better at it than are most organized group care arrangements. We are learning that the child-rearing practices of the poor do not differ markedly from those of the most affluent. Statistics show that with a rising income, the same mother spends more time with her child.

But the parents of children under the poverty mark have less time and energy for their families. They are easily overwhelmed simply by the struggle for survival. A frantic and harrassed mother is not a natural mother, and a father filled with failure and desperation is not a real father, and he may not even stay around long enough to try. A parent who cannot put food on the table cannot convey to his child a sense of order, purpose, or self-esteem. The poor are confronted by the same problems which confront the rich, and more of them. The difference is they simply do not have the resources or the time to cope. And when they slip, they find it all the harder to come back.

Something is just plain wrong with asking our juvenile courts or mental health care institutions to straighten out the young lives already twisted by the effects of poverty. Our first priority in distributing justice to children ought to be distributing income to their families. It is simply not right that children in this country grow up in poverty. It *is* right that families receive an income which allows them to make choices for their children. As Daniel Moynihan's recent book makes clear, there is a wide consensus on this principle, and programs implementing it have been proposed by both political parties. Commission after commission on crime, race, violence, or children has recommended some form of income redistribution as the only way to begin to solve our toughest social problems.

The advantage of distributing income directly is that government intervention in private lives should decrease. The resources and options that come with money should allow families to function without agency oversight or official intervention at every turn. An adequate income will give them the self-respect to ask for advice instead of having it gratuitously heaped on.

Of course, there are obvious limits to what an increased income

can do for the family mired in poverty or the child who is sick or in trouble. The immediate and visible effects may be few, although the lessening of the income gap between the very poor and the mainstream of society should siphon off a great deal.

It may be that an adequate family income won't guarantee a stable family life, won't eradicate the effects of bigotry, or stop crime cold, or solve the problem of schizophrenia. But I am convinced that nothing else can begin to work without it.

I earnestly submit that your greatest contribution is to be brutally honest in loudly proclaiming that the mental health care profession does not have either the knowledge or the tools or the wizardry to wipe out the afflictions of most children in our communities and institutions. It's time for all of us caretakers to stop hiding the smell of society's out-houses.

Most people who see the horrible suffering and death of children from lead paint cry out loudly and even picket for housing reforms. They do so not as physicians or social workers or volunteers, but as decent and caring human beings. You should do the same for the reforms in our society that are sorely and patently necessary to save our greatest of all resources — children, *all children*.