

Panel IV

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PANEL IV PERSONAL RESPONSIBILITY IN CRIMINAL LAW

Lois Haight Herrington †

INTRODUCTION

Welcome to our discussion of personal responsibility in criminal law. My name is Lois Herrington and in a few minutes I will introduce the panelists. Last year in America, over 34,000,000 people were victims of crime.¹ Of this number, approximately 6,000,000 were victims of violent crime.² Recent statistics show that for every one hundred violent crimes committed in the United States, fifty-five incidents are reported to the police; eighteen assailants are apprehended; eleven cases are filed for prosecution; nine defendants are convicted, six are incarcerated; four go to jail and two are sent to prison.³

We have only recently focused on what happens if a criminal is incarcerated. The median time served in jail is four months.⁴ The median time served in the state prison system is seventy-nine months for murder, thirty-eight months for robbery, seventy-one months for rape, thirty-two months for aggravated assault, and

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¹ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1990, at 2 (Oct. 1991); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT CRIME IN THE UNITED STATES 2 (Mar. 1991).

² *Id.*

³ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE COMPILATION (1991) (on file with author).

⁴ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1988, at 1 (Dec. 1990) [hereinafter FELONY SENTENCES]. See also BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, CENSUS OF LOCAL JAILS, 1988, at 1 (Feb. 1990); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1990, at 593 (1990) [hereinafter SOURCEBOOK].

twenty-two months for burglary or drug trafficking.⁵ This can hardly be considered draconian by any realistic analysis or definition. In fact, it is important to note that while the population of the United States is approximately 250,000,000 people, the total state and federal prison population is approximately 771,000 people, which is a little less than one-half of one percent of the total population.⁶ During the 60's and 70's, while serious crime rose almost 400%, prison capacity rose only 27%.⁷ We had a moratorium on prison building during that time, and we are playing catch-up because of that moratorium.

At this point we will consider the government's role in the interaction between individuals in society and the criminal law. Who is responsible when a person is raped, robbed, or murdered? Throughout the history of the common law, the inquiry was focused on the actor. In twentieth century America, however, some have suggested that a wider net of responsibility be cast. In placing responsibility for crime, is it legitimate to consider the responsibility of the perpetrator's family, the educational system, the neighborhood, the environment, the victim or the system itself? Some say yes. Others argue that such considerations simply allow the actor to avoid the responsibility which is his alone. The panel will consider these competing views this morning.

Any meaningful discussion of personal responsibility in crime must necessarily examine the entire criminal justice system. Should the criminal justice system focus on other issues besides the guilt or innocence of the actor? In the pursuit of other laudable goals, such as protection of constitutional rights, should physical evidence or confessions which clearly connect the defendant to the charged crimes be withheld from the jurors ruling on his guilt or innocence? For example, the protection provided by the Fourth, Fifth and Sixth Amendments, the exclusionary rule, and *Miranda*,⁸ become open to question or analysis. Or are there other remedies which will safeguard constitutional guarantees but would not absolve everyone of responsibility?

⁵ FELONY SENTENCES, *supra* note 4, at 3; SOURCEBOOK, *supra* note 4, at 614-15; BUREAU OF JUSTICE STATISTICS, NATIONAL CORRECTIONS REPORTING PROGRAM, 1985, at 3 (Dec. 1990).

⁶ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1990 (May 1990); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS AT MID-YEAR 1990 (Oct. 1990).

⁷ NATIONAL INSTITUTE OF JUSTICE, MAKING CONFINEMENT DECISIONS (1987); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925-1986 (June 1988).

⁸ *Miranda v. Arizona*, 384 U.S. 436, *reh'g denied*, *California v. Stewart*, 385 U.S. 890 (1966).

One of the major objectives of government should be the safety and protection of its citizens, either through the military in the time of war, or through law enforcement in the time of peace. Has there been, however, an insidious change in our national thinking? Have we put the burden on the innocent citizen to stay out of harm's way, rather than requiring, as any civilization must, that people do not break the law? Some believe we have shifted responsibility for crime from those who do it to those who suffer it. We do tend to blame the innocent victims of crime. We have all witnessed it. We have seen defense attorneys in trial turn to the victim at the height of cross-examination and ask "Well, what were you doing out on that street at night, Mrs. Jones?" or "Why did you answer your doorbell when it rang?" or "Why did you drive on that street with your car doors unlocked in that part of town?" One victim eloquently stated "To blame victims for crime is like analyzing the cause of World War II and asking, 'What was Pearl Harbor doing in the middle of the Pacific anyway?'"⁹ Can it be argued that we have accepted a siege mentality in which we have no right to feel safe unless we are behind locked doors?

We have laws to ensure some minimum level of behavior that is universally recognized as being essential for a civilized society. Laws reflect the values of our society. And the seriousness with which we hold these values is measured by the penalty imposed when these values are violated. Therefore, how do we in the United States reflect our values for human life and welfare when threatened by rape and murder, robbery, burglary or drug trafficking? How do we, as a civilized society, place responsibility for uncivil behavior? Who should be punished? For what reasons should we punish? What criteria should we utilize in devising appropriate penalties? Is rehabilitation still a viable goal, or is it simply "habilitation" now? What role does deterrence play, and is it feasible with our current sentencing standards? Should we, as a society, punish for the instructional value for the next generation? Some reformers today legitimize incapacitation by stating that as long as criminals are in jail and prison, they are not victimizing innocent citizens.

I believe that few subjects impact our lives more than personal responsibility in criminal law. I am pleased to introduce the very distinguished panel of experts that will address this issue. Professor Grano, is a distinguished professor of law at Wayne University, where he has taught since 1975. He received his A.B. and his J.D. from Temple University, and his LL.M. from the University of Illinois. He has been a reporter for the Michigan Supreme Court's

⁹ PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME 2 (Dec. 1982).

Committee on Rules of Criminal Procedure since 1982 and has published essays on the *Miranda v. Arizona*¹⁰ decision and other criminal law procedures. In 1988, he was Deputy Assistant Attorney General in the Department of Justice.

Mr. Adam Walinsky has practiced with the New York firm of Kronish, Lieb, Weiner and Hellman since 1971. He attended Cornell University and Yale Law School. After graduation, he clerked for Judge Hincks of the Second Circuit U.S. Court of Appeals. Mr. Walinsky worked with Robert Kennedy at the U.S. Justice Department and the U.S. Senate from 1963 to 1968. He ran as the Democratic candidate for New York State Attorney General in 1970. In 1978, he was appointed to the New York State Commission of Investigation and was its Chairman from 1979 to 1981. Since 1982, Mr. Walinsky has worked to establish the Police Corps, an organization which would allow citizens to serve four year terms as law enforcement officers in return for college scholarships.

¹⁰ *Miranda*, 384 U.S. at 436.

ASCERTAINING THE TRUTH

Joseph D. Grano†

On June 28, 1991, a group of Detroit girls beat and robbed two suburban women who were attending a fireworks celebration in downtown Detroit.¹ A bystander videotaped the attack, removing any doubt about what had occurred. Two weeks ago, as I was driving home from work, I was listening on my car radio to a panel discussion on racial polarization in the Detroit area. Not surprisingly, the discussion turned to crime and the June 28th incident. I listened to an academic express a lack of surprise that such an incident had occurred. The state, she said, had been cutting programs, and it had failed to provide "alternatives" (her word, not mine) to occupy the time and interest of the young assailants. The only thing missing from this all-too-familiar academic critique was the attribution of blame to Ronald Reagan. Individual responsibility for this brutal and senseless crime? Not in the world view of this academic.

On February 8, 1990, four Detroit boys and two adult males (ages 19 and 20) tried at gunpoint to steal the car of a fifty-three year old suburbanite who was driving home. The youths had thrown a tree limb across the road to block the path of the car. When the driver attempted to speed away, sixteen year old Kermit Haynes, who said the group wanted the car to go to a party, fired his gun and killed the driver. Haynes confessed and later pleaded guilty to first degree murder. Under state law, however, fifteen and sixteen year old offenders must be sentenced as juveniles unless the prosecutor proves they should be sentenced as adults.²

In an attempt to have Haynes sentenced as an adult, the prosecutor presented the report of a psychologist who described Haynes as sadistic, amoral, and dangerous. The psychologist said Haynes showed all the signs of a psychopath, and he offered a poor prognosis even with the best efforts of the Department of Social Services.

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¹ See Dave Farrell & Vivian S. Toy, *Mayor Blasts Media For Reports on Taped Beatings*, GANNETT NEWS SERV., July 12, 1991, available in LEXIS, Nexis Library, Omni File; *Girl, 17, Gets 15 Years in Beatings*, CHI. TRIB., Aug. 23, 1991, at M3.

² MICH. COMP. LAWS §§ 769.1(3), 769.1(5), 771.14a (1991).

Another psychologist said that Haynes showed violent tendencies and that his actions in the case were intentional and premeditated. This psychologist found no indication that Haynes could be rehabilitated.

On August 28, 1991, Dalton Roberson, who is the Chief Judge of the Detroit Recorder's Court, declined to sentence Haynes as an adult, which would have meant life imprisonment without parole. Criticizing the prosecutor for not presenting an objective account of Haynes's "rehabilitative potential," Judge Roberson placed Haynes, the confessed gunman, in the custody of the Department of Social Services until he turns twenty-one. Individual responsibility for this senseless taking of human life? Clearly not in the world view of Judge Roberson.

Are these mere anecdotes? Of course. But to the ordinary citizen, these "anecdotes" frighteningly illustrate a legal system that has ceased to work, a legal system that too rarely holds individuals responsible and accountable for the evil they perpetuate. (I use the word "evil" deliberately; it is a word that we should reintroduce into our lexicon.) The driver's widow, expressing shock at Judge Roberson's action, allegedly asserted that the sentence was a "clear message that life is cheap." Unfortunately, the street-smart hoodlums of our society understand this message as well as the hapless widow.

Many lawyers and judges sanctimoniously defend our criminal injustice system as essential to individual freedom. Similarly academics, searching for anything or anyone to blame except the individual offenders, often applaud approaches that give offenders second, third, fourth, and even more chances to commit crimes. While these people defend the system, law abiding citizens desert the city's activities, restaurants, and retail merchants.³

What accounts for the persistence of the world view illustrated by the misguided academic and judge? To a large extent, I believe it is the attitude of "there but for the grace of God go I," referring unfortunately to the offender rather than the victim. This attitude has its roots in the civil rights movement of the 1960s and in the conventional liberal ideology of the time that equated the typical criminal defendant in one courtroom with the civil rights plaintiff in another. Do not misunderstand me. I am not criticizing the civil rights revolution. Conservatives may have been correct in expressing federalism concerns as a reason for opposing the civil rights legislation of the 1960s, but the deafening silence of many of yester-

³ See Carolyn Walkup, *Detroit Blues Dogging Downtown Operations*, NATION'S RESTATEMENT NEWS, Jan. 13, 1992 (NEXIS, OMNI) (Business has dropped more than 50% in downtown Detroit since the June 28th incident and a recent rash of carjackings.).

day's conservatives about the profoundly immoral system of Jim Crow, and their concomitant failure to search meaningfully for alternative remedies to Big Brother, account in part for the albatross that contemporary conservatism still carries around its neck. This failure is in large part responsible for liberal suspicion of conservatism's legitimate objections to racial preference policies on behalf of minorities and to the liberal ideology that permeates the criminal justice system. My argument is not with the civil rights revolution of the 1960s but rather with the distorted vision that saw, and still sees, the criminal offender not as the responsible perpetrator of an evil deed but as an unfortunate victim of a racist and oppressive society.

The view that the blame for crime lies with society rather than with the individual offender did not have much popular appeal even in the 1960s, and it has even less appeal today as crime runs rampant in our cities. Moreover, the "no responsibility" social determinists always have had to confront the rather insurmountable obstacle that the substantive criminal law is premised on a foundation of individual free will and responsibility. The common law requirement of *mens rea* aptly illustrates this free will foundation. Arguments certainly have been made in support of new deterministic defenses—drug addiction, brainwashing, battered wife syndrome, post-traumatic stress, and just plain rotten social background. The fact remains, however, that the substantive criminal law has always presumed that concepts of individual responsibility and blame are valid.

The procedural system, however, offered an attractive end run for those determined to undermine the substantive law's commitment to individual responsibility. The primary target was the basic notion that the *paramount* goal (I didn't say the *only* goal) of sound procedure should be the ascertainment of truth. Individual responsibility and accountability are not easy to achieve in a system that denigrates the importance of discovering the truth. The academics provided the underlying theory; the academics, lawyers, and judges together provided an abundance of truth-defeating procedural rules.

I am not going to review or critique the numerous truth-defeating procedural rules that plague our system. Most of us are familiar with the search and seizure exclusionary rule, with *Miranda*⁴ and *Massiah*,⁵ with the rule against prosecutorial comment on a defendant's silence,⁶ and with the effort to adopt the minority rule on

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵ *Massiah v. United States*, 377 U.S. 201 (1964).

⁶ *E.g.*, *Griffin v. California*, 380 U.S. 609 (1985) (such comment violates the Self-Incrimination Clause of the Fifth Amendment.).

entrapment,⁷ which would make the defendant's guilt or innocence irrelevant. We also are familiar with liberalism's continuing, and largely successful, effort to retain these truth-defeating rules. The latest example being the organized drive, spearheaded by the often-wrong ABA, to defeat the Bush Administration's badly needed reforms in the area of habeas corpus.

To facilitate the denigration of the search for truth, the academics who advocated these rules attacked the very concept of truth. We were told, for example, that any emphasis on "truth" must be simplistic, given the "plural forms and multifaceted aspects of that beguiling concept."⁸ (I often have wondered what my mother's reaction would have been had I responded to a question about whether I locked my sister in the basement by saying, "Well, the truth is multifaceted and beguiling.") This argument against truth has followed two different tracks. The first maintains that factfinding is an uncertain process because of its dependency upon the perceptions, inferences, memory, and veracity of fallible human witnesses.⁹ In Professor Goodpaster's words, the relationship between judicial truth and "'real truth,' *whatever that might be*, is indeterminable."¹⁰ The second argument, hinted at in Goodpaster's remark, more broadly maintains that the concept of truth itself has little meaning in legal proceedings. In its most modest form, this argument contends that factual guilt and legal guilt are different concepts because the latter requires an evaluation of intent and moral blameworthiness.¹¹

I will not spend time discussing the legal system's ability to discover truth, other than to note that most commentators who denigrate the discovery of truth seem to have no trouble ascertaining when the police have violated the judicially created rules that obstruct law enforcement efforts. (Nor, might I add, do they have trouble with the concept of individual responsibility for law enforce-

⁷ For an example of the minority view on entrapment, see *United States v. Russell*, 411 U.S. 423 (1973).

⁸ H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction To Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1076 (1975).

⁹ *Id.*, at 1079; Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 654 (1986).

¹⁰ Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 133 (1987) (emphasis added).

¹¹ See, e.g., Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction without Adjudication*, 78 MICH. L. REV. 463, 476-77 (1980) (but including questions pertaining to the defendant's intent as relevant to the inquiry into factual guilt); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 197-98 (1983) (this time including questions of intent as relevant to the moral evaluation of the defendant's conduct); Goodpaster, *supra* note 10, at 130-33 (denying that fact and law can be radically separated); Saltzburg, *supra* note 9, at 654; Uviller, *supra* note 8, at 1076.

ment officers.) I want to focus on the frontal attack on truth as a concept, an attack led by people such as Professor Stephen Saltzburg. Professor Saltzburg has asserted that "an estimate of the results attained through evaluations of the facts in light of governing substantive principles will be neither true nor false."¹²

Professor H. Richard Uviller has offered this example to illustrate both that factual and legal guilt are conceptually different and that "truth" is not an appropriate concept to apply to verdicts in many criminal cases:

Did the victim, moments before the defendant shot him, point a six-inch blade at the defendant and say, "I'll kill you," or did he show a two-inch knife and say, "Don't come a step closer"? That is a simple issue of factual truth, and it is quite different from the question: did the defendant act in self-defense?¹³

True enough, a homicide is justified by self-defense only when the perpetrator reasonably believes that killing is necessary to protect himself from imminent death or serious bodily injury. Moreover, evaluating the reasonableness of the defendant's fear cannot be equated with ascertaining who brandished what weapon or said what to whom. Nevertheless, I would submit that a normative judgment appropriately can be deemed "incorrect" when it rests on an incorrect factual assessment.

I should first say as an aside that the majority of criminal verdicts probably do not require such normative judgments but rather turn on factual issues. However, even in cases involving a normative judgment, such as some cases of self-defense, a verdict still can be described as correct or incorrect. Whether it is correct or incorrect will depend upon the accuracy of the underlying factual determinations.

Assume that a jury in Uviller's example makes its normative decision before deciding on the facts and concludes that it will acquit the defendant on the first version of the facts but convict on the second. Since reasonable people may disagree over the definition of reasonable, the jury's normative judgment, if within the bounds of reasonable disagreement, defines the correct and just verdict for each hypothetical version of the facts. The jury's actual verdict, however, can be "correct" only if the jury accurately ascertains the actual facts. Thus, if the jury mistakenly decides that the first factual version is true, it will render an erroneous and unjust acquittal; if it mistakenly decides that the second version is true, it will render an erroneous and unjust conviction.

¹² Saltzburg, *supra* note 9, at 654.

¹³ Uviller, *supra* note 8, at 1076.

In the example, the jury's normative judgment is not subject to assessment in terms of its truth, but factual truth is a necessary condition of a correct and just normative judgment. My point holds true even if jury nullification is factored into the analysis. Suppose, for example, that a jury is willing to nullify a draft card burning law as applied to a conscientious objector but not as applied to someone simply trying to evade the draft. If such a jury, perhaps because a trustworthy confession is excluded from evidence, unwittingly acquits a defendant who is not a conscientious objector, its act of nullification will be neither correct nor just.

To conclude, our criminal justice system—indeed, our whole society—desperately needs to rediscover the importance of individual responsibility for evil acts. One important and *necessary* step to this goal, I submit, would be the clear repudiation of arguments that deny either the existence or importance of objective truth in the administration of criminal justice. This would be important for its own sake, but I think it also would help in reducing the crime rate. This latter point, however, is an argument for another day.

INDIVIDUAL AND MORAL RESPONSIBILITY IN CRIMINAL LAW

Adam Walinsky†

Think of the numbers that our moderator gave us; and then understand that 47% of violent crime is reported. Also consider clearance rates, which have been going down very sharply. For example, the clearance rate on homicide was never, in the past, lower than 90%: it is now down to 67% nationally.¹ The clearance rate on robbery, which is the archetypal street crime, is now 25% nationally.² Only half of all robberies are reported. And of those reported, 25% are being cleared by an arrest.³ A reasonable number of convictions result from those arrests, but 98% of the convictions will be by plea.⁴ Therefore, the whole elaborate superstructure of trials, decisions, and appellate opinions actually only address about one-quarter of one percent of what is really happening in the world. While much of the discussion here perhaps does no active damage, it likely does very little good. We would do better to focus on the larger phenomenon.

Discussion of individual responsibility in the criminal law ought to start with an understanding that “criminal law” is a misleading phrase. The criminal law is, in reality, the fundamental social code: you may not hit your neighbor over the head and take his goods. We must accept that this is an individual responsibility to do more than refrain from malign action. Criminal law also goes beyond the question, “What is the moral responsibility of someone else to refrain from crime?” The real question, particularly in a room like this, is “What is our individual responsibility to come to the aid of

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¹ FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 1990, CRIME IN THE UNITED STATES 165 (1990).

² *Id.*

³ *Id.*

⁴ John D. Woolright, *The Impact of Jurisdiction Size on Guilty Plea Rates in 569 State Courts*, 74 SOC. & SOCIAL RES. 40 (1989) (finds great variance in guilty plea rate between 60% and almost 100%).

others?" Otherwise, we are just here to agree that we are each isolated and alone, with no community or commonwealth. The professional lives of lawyers may be built on the proposition that we should advance the interests of a single client at the expense of the entire world: let justice, as we call it, rule until the heavens fall. Nevertheless, even lawyers have to understand that bringing down the heavens is not really our mission in life.

One focus must be the conditions of the underclass because this is the breeding ground for the violence that has spread like a stain across every part of this country. Ten years ago, Saul Bellow told us that:

children born outside the law and abandoned by their parents can be eaten by dogs. Eaten by dogs or brought up without humanity. Nobody teaching the young language, human usages or religion, they will go back to the great ancient forests and be like the wild beasts of Orpheus. None of the great compacts of the human race respected. Bestial ventry, feral wanderings, incest and the dead left unburied. . . . Except, of course, that there are no longer any great forests to go back to.⁵

This description is not mere poetry. It is a description of life in which children are growing. We are conservatives. If there is anything for which the conservative tradition stands, it is that the most important human responsibility is to teach the young. By teaching children, we establish the fundamental conservative proposition that there is a past which is important and that there will be a future for which we have a responsibility. Otherwise, we are mere animals lost in the desert of present time.

We must question what we are going to do individually, what responsibility will we take for our fellow citizens, for children who otherwise will grow without the capacity for moral judgment? We can visit upon them as many pains and penalties as we wish; we can kill them in large numbers; we can imprison them in greater numbers, but we are raising more and more of these monsters every year.

Is there evil? Of course. But we ought to ask ourselves: "Why is it that in our country we have so much more evil today than we did twenty, forty or fifty years ago?" If educated people do not ask this question, then no one will, and we will not answer it.

There are several ways in which we can take the individual responsibility to act in the truly conservative sense: the observation of the fundamental moral code. One is as participants in government. As participants in the process of government, in the exercise of

⁵ SAUL BELLOW, *THE DEAN'S* DECEMBER 251 (1982).

power, you can use your position and your access to call the government to its fundamental responsibility. I think it is foolish, even laughable, to blame President Reagan for everything that is wrong in the country. It would, however, be a grave error not to recognize that our government has been truly irresponsible in allowing the continuation of these conditions and in failing to extend the fundamental protections of law and the Constitution to all of the people of the United States. One thing you all can do is not let people forget their responsibilities by making yourselves nuisances or burrs. Force attention to these issues.

Second, we can attempt to create institutions and mechanisms to enable citizens to participate in the establishment and the protection of the law. Some of us have been working to establish a Police Corps. In this Corps, citizens would fulfill a civic duty and serve as police officers on an ROTC principle; to accept, as part of the price of their education, the obligation to share directly in the enforcement of the law and the extension of safety, security, and decency to people trying to raise their children.⁶ In this effort, the dedication of one of your founders, Peter Keisler, has been essential.

Third, for those who think that the government is too much with us, there is always room for individual action. The perfect model for individual responsibility in the criminal law are the Guardian Angels; perhaps Curtis Sliwa should be standing here. Some of you may think this example is overdrawn; you are, after all, *lawyers*. You may be thinking "Where does he get off talking about that kind of physical danger, much less the obligation to devote enormous efforts to the change of these conditions?" In response, I want to remind you what some of our responsibilities might be.

Your generation is uniquely favored in the history of this country. You are almost alone in this century in that you have been not called upon to fight in some foreign war. You are the first to benefit from the collapse of the communist empire—something for which Americans over the past forty years have been working, sacrificing, and even dying for. You are the inheritors of an unbelievable wealth of material richness and technology. It is now your turn to join in the sacrifice and effort. I have heard it said, "How does this come to be my responsibility?" People believe the responsibility for poor children belongs to their parents. Consider that the leading cause of death in this country for black children between the ages of one and four is fire. The leading cause of death is kids just burning up because somebody did not attend to them. How is that yours to change? The only rejoinder I have is to suggest that you go to Ar-

⁶ See 137 CONG. REC. H8153-58 (daily ed. Oct. 22, 1991) (statement of Rep. McCurdy).

lington National Cemetery and look at all of the crosses. The men and women buried there did not ask to die in battle. They simply did their duty when called to serve.

On a personal note, I was privileged to be around when this society was created; I know the impulses toward scholarship and public service from which the society was born. I urge you now not to be caught in the easy simplicities of the kinds of discussions that you had in law school. The time for those nice ideological fights is over. The question we must address is how to save our country when the very structure of law and the whole moral basis for its existence is rapidly failing. I know enough of you to be confident that you will play your proper part in this effort over the years to come.

DISCUSSION†

HERRINGTON:

Thank you very much. I have a few comments for the panelists. Professor Grano, should we abolish rules and then create a right without remedy? I hope you will discuss that a little bit, in your rebuttal. We accept a premise that we have more people in prison in the United States than in any other country in the world. I am telling you that we do not know if this premise is true. We have the most honest, open-to-scrutiny statistics of any country in the world. Many other countries skew their statistics in such a way that we do not know the truth. Instead of prisons, some other countries have instant capital punishment and maiming. They do not have prisons. Some countries have mental institutions where people go for life. They do not call these institutions prisons but inmates are never released. Other countries do not consider certain actions to be crimes. For instance, child molestation, family violence, child abuse are not crimes in many other countries. I was just reminded of an opportunity I had to meet with the Minister of Justice of China. He told me with great pride that they do not have any career criminals, they do not have any recidivists. I thought, well that is really something. How is that possible? Of course, it was due to some bureaucratic system. So, when I was walking out, I asked the interpreter to account for the lack of career criminals. He told me there are forty crimes subject to capital punishment. The United States would not have any career criminals either if we did that. Thus, we have to look very carefully at every premise. Also if we have more crime than some countries, we may correspondingly have more criminals held accountable. Professor Walinsky, in 1982, approximately 42% of victims reported crime.¹ We are now treating our victims of crime better. Since they now feel they can come forward and report, approximately 48% of the victims report crime.²

GRANO:

Well, I found it curious that Professor Morris, who says he believes in individual responsibility, would, if given a choice to focus

† Professor Norval Morris participated in Panel IV. His remarks, however, do not appear in this publication.

¹ This figure reflects reported crime without burglary. However, the percentage is higher—55%—for violent crimes with burglary. See BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1990, at 5 (Oct. 1991).

² *Id.* See also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES: 1973-88 TRENDS (July 1991).

on either individual responsibility or on societal responsibility, choose the latter. What message does he send, and what message does the legal system send when it makes the same choice? In fact, it was quite interesting to hear the words that Professor Morris used. He talked about conditions that generate crime, conditions that produce crime. Well, "generate" and "produce" are causal words. I object to using those words. Concededly there is some *correlation*. We all know, as he said, where the high crime areas are. They are usually in the low income areas, the areas of our cities that are really deplorable. But that does not mean that these conditions *cause* crime.

Professor Morris also argued that crime will remain stable, no matter what we do. This argument assumes that the criminal justice system is irrelevant to the crime problem, an assumption we have been operating on since the 1960s. Interestingly, we were also told just a minute ago that crime has increased in the last twenty and thirty years. The fact is, it has. When I was a kid, the bad neighborhoods of the city were not as bad as they are today. Why have they gotten worse? Can it be partly because of the attitude reflected in these comments, in which we blame the conditions of society rather than the individuals?

Academics always say, "don't go for simplistic solutions." It is always more complex, more complicated than that. All of my grandparents were immigrants and they had "simplistic" approaches to life. I think things worked better in those days. In fact, I have often been tempted to write a book (and when I stop writing law review articles maybe I will do it). The book would be *Raising Children The Immigrant Way*, without the child psychologists and related things. I think my grandparents did a pretty good job because they just used common sense. My father told me a story when I was a teenager and we were having trouble with one of our neighbors. We used to play half ball in the street. Half ball is a game where you cut a rubber ball in half and use a broomstick to hit it. We did not play in playgrounds or anything like that, but in the street. One of the neighbors complained. My father sided with the neighbor because we had been rude to her. I objected that he always sided with the neighbors and never with us. He told me a childhood story of a policeman grabbing him by the ear. His mother came out and asked what the problem was. Before the policeman could speak, my father immediately chimed in "Well, this wise guy, . . ." He never got any further, because my grandmother rebuked him for speaking that way about a police officer. The point is that there used to be rules, things that were wrong, things you did not do. I am not saying that authority figures are always right. But there were ways of proper

behavior, ways that were understood. You had no excuses for violating the rules. And these were people who grew up in the depression.

It seems to me that what Alan Keyes eloquently said in his remarks was not really so profound.³ It was moving and stirring because it is so foreign to contemporary ears, but it was not really profound. In fact, my grandparents could have said what Alan Keyes said. The question is, why is it that the academics cannot see it?

WALINSKY:

I believe we have many more people in prison than that. Visit the average housing project, whether in Chicago, New York or many others around the country: most of the decent people in those projects are themselves prisoners. We are all, in a sense, restricted in our liberty by the violence, the crime, the poison of these conditions. What disturbs me about Professor Grano's statement is the implicit notion in it that if we strike the proper attitudes, applaud at the right time and say the right things in law schools, this somehow will make things all right.

Indeed I do not understand why he used the words low income, which is really our current synonym for black. We do not want to say "black" because we are so filled with shame, guilt, and fear. We are so appalled by the horror of our racial division and what it has brought that we want to speak of it with euphemism rather than confront it directly. In comparing our present case to twenty, thirty, or fifty years ago and asking why there now is so much more evil, our unwillingness to confront this issue of race is surely a factor. For thirty years the country of which we are all citizens has basically withdrawn the authority of government from the ghettos.

The discussion of whether to hold people responsible is in some ways entirely academic, because the government hardly exists in large parts of the United States. It is only an accident when one of these repeated crimes gets dealt with in any serious way. If we are to change that, if we are to begin to re-establish order, decency, law, the very simple fundamentals of law enforcement and civilized conduct, it will require an enormous effort. It will require a great commitment on the part of each of us, that is much more than simply thinking the right thoughts. It is going to take work.

QUESTION:

I am struck by the fact that this discussion of individual responsibility and the criminal law has not raised the issue of the war on drugs and its implications for crime in America today. Professor

³ See Alan Keyes, *The Preservation of Liberty*, 77 CORNELL L. REV. 969 (1992).

Morris raised the issue of the propensities, the social conditions that contribute to—not cause—but contribute to crime. It strikes me that one of those social conditions is the war on drugs and the perverse incentives that have been created by that war. The war on drugs is really about money in the end, it is not about drugs. The money and the incentives that surround drugs has driven our crime rate sky high, has clogged our courts beyond description, and has overcrowded our prisons such that real criminals are now back out on the streets much sooner than they should be.

HERRINGTON:

You can certainly say we never focus seriously. Approximately three cents of each dollar allotted is spent on criminal justice; the rest is spent on other priorities in the United States.⁴

WALINSKY:

I think that the drug sweeps and the large scale drug enforcement attempts have been very destructive and disorganizing elements. Basically, our police have been acting as the army did in Vietnam—conducting search and destroy missions but never staying to guard the hamlets. That is one of the things that has to change.

Regarding the debate about drugs in the country, I think Professor Morris is right; everyone is evading the real issue. I think for many blacks the drug debate is the latest incarnation of the white devil theory: Ronald Reagan is to blame for our condition because he lets these evil people bring drugs into our nation's cities. For many conservatives, drugs were a way of avoiding any serious effort to cope with the social conditions. We could just send an aircraft carrier or some Green Berets off to Columbia as our national program for dealing with the chaos of the inner city. I do not know that legalization, which I understand to be the point of your comment, would make anything much better. If you are asking has all of the talk and attention on the drug menace really been an enormous distraction from reality, I think the answer is yes.

HERRINGTON:

I just want to comment briefly on one aspect of the last question regarding society's values towards drug traffickers. In 1986, the most recent statistics available, approximately one-third of the convicted drug traffickers received straight probation.⁵ About one-third of the drug traffickers were sent to jail, and approximately a little

⁴ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT, 1988 (July 1990).

⁵ BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, FELONY DRUGS TRAFFICKING IN STATE COURTS, 1986 (1990).

over a third were sent to prison.⁶ And we know about the length of the sentences.

QUESTION:

I have often read that one of the reasons we have such a high percentage of our people in prison is because we have such long prison sentences. Sociologists, however, believe that the swiftness and certainty of conviction and imprisonment are more significant deterrents than the length of the sentence. However, our system includes things such as the federal sentencing guidelines and life sentence without parole. Aside from legislating away the exclusionary rule, which I do not favor, I would like the panelists to comment on effective deterrents and how our system could effectively implement change.

WALINSKY:

We have doubled the prison population in the United States over the last ten years, mostly by lengthening sentences rather than by imprisoning larger numbers of people.⁷ Prisons are helpful to the extent that we are warehousing people who otherwise would be out committing more crimes. Imprisoning more people does not seem to act as any kind of deterrent. Unfortunately, we now have a very large subculture in which going to prison is not feared; it is a perfectly reasonable and expected part of a young man's life. The time spent in prison, whether it is three, four, or five years is passed relatively easily. In prison, there are clean cells, which may indeed be cleaner than an inmate's home. There are regular meals. As chairman of the New York State Commission of Investigation, I can assure you that prisoners get regular exercise, regular sex, and regular access to drugs. Drugs are as easily obtainable in prison, or more so, than they are on the street. Use of the prison system as some grand deterrent measure, as far as the underclass is concerned, is a delusion.

GRANO:

I think the statistics we heard regarding sentencing for crimes indicate that our sentences are not too long. American sentences are effectively shorter because you must commit about five crimes before you get sentenced to prison. So if the sentence for one crime is actually for six crimes, each sentence is not that long at all.

Second, I would like to comment on the deterrent purpose. Recall the story I told you earlier about the young boys and the two so-

⁶ *Id.*

⁷ Clemens Bartollas, *The Prison: Disorder Personified*, in ARE PRISONS ANY BETTER? TWENTY YEARS OF CORRECTIONAL REFORM 17-18 (John W. Murphy & Jack E. Dison eds., 1990) (150% increase in prison population between 1974 and 1987).

called adults, the nineteen and twenty year olds who shot a driver to death. It is no accident, no coincidence that the shooting was done by the juvenile rather than the adult. Ask prosecutors in Detroit, and I think this would also be true in other cities, and they will tell you that the shooter is always the young boy. The older boys are not afraid of prison? They want to go to prison? If so, why do they have the juvenile commit the murder? Because the juvenile is not going to go to prison for any length of time. They know it. The law affects behavior. This claim that the system does not have a deterrent effect is a myth that has been perpetuated for thirty years. Our present system may not have a deterrent effect, but we can reform it so that it does.

HERRINGTON:

Be very cautious that you look not at the length of sentences but rather the time actually served. Also, we do have some strong indications that the increase in prison population is a result of new people going to prison, not longer sentences; that is well documented. The newest Uniform Crime Report's figures show a direct correlation between the prison population and the reduction in crime.⁸ It is absolutely in synch. We cannot forget that.

QUESTION:

I was a narcotics prosecutor in New York for four years. I have been a defense attorney in Florida for fourteen years. First of all, if one looks at the criminal dockets in almost all of the cities in the United States, you will see that almost three-quarters of the crimes are alcohol or drug related. Most misdemeanors are driving under the influence of alcohol. Most felonies are drug related crimes such as possession of cocaine, burglaries, or strong arm robberies. Many of my clients, as parents, have come to me seeking help to get their kids into drug rehabilitation programs; only to be turned away because it costs about \$3,000 a month and most insurance policies will not cover the cost. We have forfeiture laws through which the federal government currently obtains hundreds of millions of dollars each year from property rightly forfeited by convicted criminals.⁹ Could we pass a law allocating 50% of the money raised by the forfeiture statutes to a program of commitment on demand by parents. A parent would then be able to get their kid into a drug rehabilitation program and, therefore, we would perhaps reduce the rising drug population which is clogging our dockets and costing us money.

⁸ U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, 1990, CRIME IN THE UNITED STATES (Aug. 11, 1991).

⁹ 18 U.S.C. §§ 981, 982 (1988).

QUESTION:

I was struck by Professor Morris's reference to social dislocation in the inner city causing crime. It seems as if the major social dislocation in the inner city is crime and the government's inability to deliver. The most fundamental basis of the social contract, the prerequisites of civilization.

WALINSKY:

I do not disagree with you in the slightest. I quote to you Congressman John Lewis, who recently said that "It is not only poverty that has caused crime . . . it is crime that has caused poverty."¹⁰ It is precisely for this reason that we must recognize that we have not enforced the law. We have not extended its protections. We have allowed violence to run absolutely unchecked through these communities for thirty years. We are now reaping the results of that failure. Your statement about violence and crime as a generating cause is absolutely correct. My only question is, now what are we going to do about it?

¹⁰ John Lewis, United States Congressman, *Statement by Congressman John Lewis* (July 12, 1989) (on file with *The Cornell Law Review*).