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Lois Haight Herrington

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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

† Former President's Correspondent to the United Nations Congress on the Prevention of Crime and the Treatment of Offenders. A.B. University of California at Davis; J.D. University of California, Hastings School of Law. Assistant Attorney General 1983 to 1986; Chairman of the White House Conference for a Drug Free America 1987. The author has also served as Chairman of The President's Task Force on Victims of Crime, as a United States Delegate to four United Nations Conferences, and as Deputy District Attorney of Alameda County, California. In addition, she has practiced in the private sector for Herrington & Herrington and is currently a Trustee of the Federalist Society.

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.