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

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† 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

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

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over a third were sent to prison.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{6} Id.

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. 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. 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.

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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." 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?