

Book Reviews

Miranda Revisited

Miranda: Crime, Law and Politics. By Liva Baker. New York: Atheneum, 1983. Pp. 463. \$22.95.

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From a lawyer's perspective, appellate court decisions, particularly those of the Supreme Court, generate principles; they are the carriers of rules to guide us in the future. The litigants are incidental. Thus, a lawyer views *Miranda v. Arizona*¹ not as a crisis in the life of a disadvantaged, crime-prone young man or of the teenager he abducted and raped, nor even as a vignette about the personalities and performances of the lawyers trying the case; rather it exists as a set of rules that grants one in custody certain heretofore unannounced rights. In the typical law review article, *Miranda* and its offspring are evaluated primarily in terms of their consistency with one another. "Is this latest decision a faithful application, or a novel departure?" the lawyer asks. How *Miranda* collided with rooted police practices and values and how implementation varied from the public's expectations are not generally the lawyer's concern.

There are good reasons for this apparently disinterested attitude toward the social impact of judicial decisions. Lawyers are not social scientists; they lack the skills (and inclination) for empirical investigation, particularly if it involves mathematics and measurement over time.² Moreover, the results of such research, even when conclusive (which is uncommon), may be irrelevant to the lawyer's ongoing work in negotiating pleas and making final settlements.

But the law is nonetheless a body of influential social information, and

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1. 384 U.S. 436 (1966).

2. See Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38, 43, 45. For an outstanding empirical study of the impact of a Supreme Court decision by a lawyer who is also a political scientist, see W. MUIR, *PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE* (1967).

judicial decisions do have consequences both for those involved in the particular case and for society as a whole. To the layperson, the important questions about *Miranda* are likely to be: "Has it worked? Are suspects treated better? Have the police lost effectiveness?" The rest is seen as lawyers' musing—fussing about with precedent.

The merit of Liva Baker's energetic book is her attention to these neglected matters.³ From her, we learn about Ernesto Miranda's life, we track the evolution of the decision from complaint to final appeal, and we see the case as fodder for national political debate about law enforcement and crime control. For Baker, *Miranda* is *the* window for an historical look at the politics of civil liberties and crime control, and the characters include Earl Warren, Richard Nixon, and Warren Burger.

On the whole, Baker's approach works. *Miranda* does provide a useful filter for exploring the principles and contradictions of our approach toward crime and punishment. The challenge of fashioning a system that balances the restraints on both the governed and the government is perhaps nowhere more apparent than in the stationhouse confrontation between police and suspect.

From Baker's account, Miranda emerges as a stereotypical felony defendant—a disadvantaged member of a minority, unsuccessful, undisciplined, a repeat offender. At seven, his mother was dead and his family was disintegrating around him. He was a "throw-away," a kid nobody much cared about, forced to look after himself. It is thus no surprise that between the ages of fourteen and eighteen, Miranda was arrested six times and went to prison for four of those offenses. By the time he reached his twenties, he was a suspected armed robber, a proven sex offender, and a dangerous drifter.

Whether there was much more to him is unclear from the record. After raping his teenage victim, Miranda told her: "Whether you tell your mother what has happened or not is none of my business, but pray for me."⁴ A manipulative ploy surely, but was it a stirring of conscience as well?

As to Miranda's conviction, it was, at least from one perspective, simply the product of good police work. Miranda's victim, a pathetically shy girl, was so slow and easily confused that she appeared to be lying even when truthful. There were also observable discrepancies in her account. The doctors insisted that she wasn't a virgin. When Miranda was placed in a lineup with only two others, she could not positively identify him. But the detectives, convinced nonetheless that her story was true, tricked Miranda.

3. L. BAKER, *MIRANDA: CRIME, LAW AND POLITICS* (1983) [hereinafter cited by page number only].

4. P. 5.

Miranda Revisited

When, following the lineup, he inquired of them, "How did I do?," they replied, "You flunked."⁵

Then the questioning began. As interrogations go, it was a mild event—short, lasting two hours, conducted in mid-day and by just two investigators. There was no hint of force. Miranda's own account of the interrogation essentially corroborated that of the officers. At the end, Miranda confessed to not only the rape under investigation, but to attempting a second, and to trying to rob still a third person. When his confession had been reduced to writing, the officers brought his victim into the interrogation room, and in response to a question, Miranda stated: "That's the girl."⁶

When Miranda identified his victim, he believed that she had already picked him out of the lineup; however, it was not this deception, nor was it the length or intensity of the interrogation (two hours is a very long time to one in Miranda's shoes), nor was it the failure of the police to make a verbatim record of the questioning (to avoid the characteristic swearing contest between suspect and police over what really happened), that bothered the Supreme Court three years later. Rather, it was concern that the police had not told Miranda that he had a right to counsel.

That the Phoenix detectives had not so informed Miranda was understandable. Such a right had not yet been discovered in the Constitution, and it was a rare police department that accorded suspects greater rights than the Warren Court conferred. Moreover, only a few years earlier, in *Crooker v. California*, the Court had dismissed a similar suggestion, observing that the presence of counsel would interfere with "*fair as well as unfair*" questioning.⁷

With Miranda's confession to bolster an otherwise weak case, the government proceeded to trial. Its prosecution was not much impeded by defense counsel, an elderly, court-appointed practitioner with an open distaste for his assignment: "You know," he told the jury, "perhaps a doctor doesn't enjoy operating for locked bowels, but he has to"⁸ Counsel called no witnesses and offered no evidence. He did, however, cross-examine the government witnesses, specifically asking one of the detectives whether he informed suspects "that they are entitled to the services of an attorney before they make a statement."⁹ And he did object to the admission of his client's confession on the mistaken but prophetic grounds that

5. P. 12.

6. P. 13.

7. 357 U.S. 433, 441 (1958) (emphasis in original).

8. P. 20.

9. P. 23.

"the Supreme Court of the United States says a man is entitled to an attorney at the time of his arrest."¹⁰

In contrast to trial counsel, much can be said about the skill and devotion of Miranda's appellate lawyers, John Frank and the late John Flynn, who shepherded the case from the Arizona to the United States Supreme Court. Their advocacy credits the profession, and Baker's thoroughly researched account details how they proceeded. But the prose is purplish: Her impulse is to write melodrama. Baker soars when it would be better to keep both feet on the ground,¹¹ and the overall effect is sometimes to diminish rather than highlight the real achievements of the attorneys.

As to Miranda himself, the victory in the Supreme Court brought him enduring fame, but no recognition of a practical sort. When his case was retried, acquittal seemed likely; without his confession, the government's case was thin. But the police pulled a rabbit out of the hat, locating Miranda's common law wife, to whom, during his initial incarceration in 1963, he admitted his guilt. Now, carrying a grudge against him, she readily repeated to Phoenix detectives what her husband had told her. Once again, Miranda was convicted and sentenced to twenty to thirty years in the Arizona State Prison.¹²

There he seems to have caught his balance. He became, as many in his circumstances do, thoughtful about the need for prison reform, and expressed some hope for a better future for himself.¹³ But rehabilitation eluded him. Paroled after serving nine years, he wound up on the courthouse steps in downtown Phoenix selling autographed *Miranda* cards, similar to the ones the police were by then carrying. A year later, his parole was revoked when he was found in possession of narcotics, and one year after that, in 1976, he was knifed to death following an argument during a poker game.¹⁴

As to the impact of *Miranda v. Arizona* on the crime rate, which has been spiraling since the early 1960's, an assessment is more difficult. Here Baker is the most derivative and the least satisfying. When it comes to evaluating *Miranda*, she is more cheerleader than social scientist. "Although the United States Supreme Court had vacillated, hesitated, even

10. *Id.*

11. For example, while it is true that the Supreme Court addresses important issues, it is not true that the issues are "always complex, difficult of resolution, and the consequences for a whole nation, serious." P. 64 (emphasis in original). Nor is it accurate enough to say that "crime is only another symptom of underlying rage," p. 379, or that policymakers had taken "no notice of 200 years of racial discrimination and the psychology of rebellion," *id.* But this is the way Baker writes, and the reader must not be put off by it lest he miss the value of this impressively researched narrative.

12. Pp. 192-93.

13. Pp. 381-83.

14. P. 408.

Miranda Revisited

sometimes reversed its direction during the three decades since it had for the first time, in *Brown v. Mississippi* (1936), reversed a conviction because a confession had been coerced, it had been headed all along toward [the *Miranda* decision].”¹⁵ *Miranda* was “the highest achievement of civil libertarianism as translated into constitutional terms by the U.S. Supreme Court.”¹⁶ The “lucidity” of the opinion was “surpassed only by its high moral tone.”¹⁷ After *Miranda*, “there was no longer any need for people with trouble to stand alone in front of the people with uniforms; the people with trouble now possessed the Constitution.”¹⁸

Characteristically, attempts to alter patterns of behavior bring mixed and unexpected results. Philosophy professor William Barrett speaks of “that deepest and most vexing trait of the human condition itself: that our efforts are always ineradicably a mixture of good and evil.”¹⁹ The Warren Court’s effort to introduce equality of treatment for defendants brought about much-needed, long-overdue change, but the process was not without cost. The writer must chart this tension or risk writing propaganda rather than history. Although Baker acknowledges the objections of the opponents of *Miranda*, she does so mechanically, out of professional duty rather than out of genuine interest, and does not sense that in this complicated environment, “true progress would consist in a change that did not leave behind as many advantages as it offers new ones.”²⁰ For example, one could suppose that *Miranda*’s value lies in raising our sensibility toward others, in treating those suspected of mean and avaricious acts with generosity (by informing them of the risks of disclosing the truth); yet, one might also worry that the untutored thief or mugger might think us foolish, despise us for our benevolence, and see our concern as an encouragement to more wrongdoing. But Baker does not engage in this kind of untangling, sorting out, and weighing. Ultimately the reader has the feeling of a Sir Walter Scott romance rather than a search for existential fact. In this regard, Baker rivals lawyers, advocates who through training and habit overstate their case and derogate the positions of the opposition, and courts that reach decisions, as it were, with the window closed. However

15. P. 167.

16. P. 171.

17. P. 167.

18. P. 171.

19. W. BARNETT, *THE ILLUSION OF TECHNIQUE* 25 (Anchor ed. 1979).

20. As one author notes:

Why does disillusionment follow the revolutionary victory? Simply because of the prior illusion that the overthrow of the existing regime will not affect present benefits; it will add to them the new ones desired. But once the change has been fought and bled for, it turns out that no addition but only an exchange has taken place, at great cost.

J. BARZUN, *A STROLL WITH WILLIAM JAMES* 96 (1983).

functional hyperbole and reductionism may be when settling or litigating a case, they are treacherous tools for the historian or policymaker.

But one does not have to rely on Baker's assessment to put *Miranda* into sharper perspective. Unlike most other Supreme Court decisions, *Miranda* was immediately singled out by researchers for study, and several major empirical investigations were conducted in the wake of the opinion to gauge its impact. Two of the most prominent of these, one undertaken in New Haven, the other in the District of Columbia, concluded that *Miranda* was not achieving the anticipated results: Waiver of the rights conferred—to remain silent and to be represented by counsel—was routine.²¹

According to the studies, the reason for the unexpectedly high incidence of waiver was, first, that suspects did not understand their new rights, and second, that the police, acting out of bad faith or carelessness, were not making themselves clear.²² Indeed, official compliance with *Miranda* was perceived as so lagging as late as 1970 that a *Miranda* dissenter, retired Justice Tom Clark, urged the police and prosecution to conform to the law: "Although *Miranda v. Arizona* . . . has been on the books . . . since 1966 and has been publicized more widely than any opinion of the Court since *Brown v. Board of Education* . . . the mandate of the case is followed in the breach . . . [I]t is suggested that the prosecutors enforce *Miranda* to the letter and that police obey it with like diligence . . ." ²³

Later studies, however, showed a significant change. The police exhibited greater fidelity in carrying out the assignment the Court had made to them in *Miranda*, and perhaps more important, as *Miranda* became a household word, suspects comprehended the rights it conferred.²⁴

21. Medalie, Zeitz & Alexander, *Custodial Police Interrogation in our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1394-95 (1968); Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1523, 1591 (1967).

22. Medalie, Zeitz & Alexander, *supra* note 21, at 1394-95; Project, *supra* note 21, at 1550-54. For a summary of the findings of the various empirical studies undertaken following the *Miranda* decision, see O. STEPHENS, *THE SUPREME COURT AND CONFESSIONS OF GUILT* 165-200 (1973).

23. *United States v. Jackson*, 429 F.2d 1368, 1372-73 (7th Cir. 1970).

24. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DEN. L.J. 1, 30-31 (1970) (FBI and Colorado Springs police department honor requests to have attorney present during questioning though Denver police do not; suspects are aware of *Miranda* rights); Stephens, Flanders & Cannon, *Law Enforcement and the Supreme Court: Police Perceptions of the Miranda Requirements*, 39 TENN. L. REV. 407, 418 (1972) (detectives in each of four jurisdictions making regular use of "*Miranda* cards"). A three-year study of police interrogation practices concerning juveniles concluded that *Miranda* warnings were read in about 80% or more of the cases studied during 1974-76. T. GRISSE, *JUVENILES' WAIVER OF RIGHTS* 30 (1981); cf. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 150, 164-65 (1980) (studies may overstate degree of nonconformity with *Miranda* during transition period).

As the following anecdote illustrates, there is the possibility that at least a few suspects become more, rather than less, inclined to incriminate themselves when the police effectively warn them of their constitutional rights.

A psychiatrist employed by an institution always told his interviewees that what they told him would *not* be kept confidential from the institution; he noticed, however, that interviewees seemed to reveal more when told this. He realized that his frankness, though ethically re-

Yet the high incidence of waiver continued.²⁵

Herein lies the enigma. Why is it that so many suspects act contrary to self-interest by waiving their rights and informing against themselves?

In an earlier time, we would have linked confession to remorse. A psalmist recounts: "As long as I would not speak, my bones wasted away with my groaning all the day, . . . my strength was dried up as by the heat of summer. Then I acknowledged my sin to you, my guilt I covered not [A]nd you took away the guilt of my sin."²⁶ Confession can thus be understood as a sitting in judgment on one's self. Paradoxically, the offender isolates himself from his wrongful act by accepting responsibility for it, and his confession becomes a remedial act. It sets him straight with God and his fellow man. It reveals that he, like others, is a person with a conscience who endorses the moral order, absolves his accusers of blame, and invites the community to receive him back.²⁷ In the criminal law today, however, the link between confession and contrition seems faint. It may be that the person who comes forward to acknowledge his offense is less blameworthy, that he sees the error of his ways and is on the path to correction, but the discount he receives for entering his plea of guilty is better understood in terms of the lack of resources to bring to trial all those who have been charged.²⁸

Among the experts, there is now general agreement that *Miranda* contained a central flaw, an internal contradiction, that greatly diluted its strength: The Court made the police its messenger, and as Professor Yale Kamisar has put it, "[A]ny police officer 'worth his salt' will be sorely tempted to get the suspect to talk."²⁹ In the same vein, Dean Edward Barrett asked, "[I]s it the duty of the police to persuade the suspect to talk or persuade him not to talk? They cannot be expected to do both."³⁰

quired, was acting as a "seduction" to candor by conveying openness and honesty.

T. GUTHEIL & P. APPELBAUM, *CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW* 289 (1982) (emphasis in original).

25. O. STEPHENS, *supra* note 22, at 173.

26. *Psalm* 32:3-5 (New American).

27. "In the parables, the sheep returns to the flock, the prodigal son to his family home: Each 'was dead and is alive; . . . was lost and is found.'" Burt, *Constitutional Law and the Teaching of the Parables*, 93 *YALE L.J.* 455, 477-78 (1984) (footnote omitted). Professor Burt observes that the parables hold out "the ideal of community not simply as a morally worthy pursuit but as a haven from chaos, from personally vulnerable isolation, from the prospect of death itself." *Id.* at 477.

28. None of the recent national commissions that have studied plea bargaining mention the attitude of the offender toward his crime as a factor to be considered in the government's charging decision. See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE* 295-312 (1974); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *A NATIONAL STRATEGY TO REDUCE CRIME* 97-98 (1973); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: THE COURTS* 9-13 (1967).

29. Y. KAMISAR, *POLICE INTERROGATION AND CONFESSIONS* 85 (1980).

30. Brief of Edward L. Barrett, Jr., as amicus curiae, at 9, *People v. Dorado*, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965) (on rehearing) (cited in Y. KAMISAR, *supra* note 29, at 85).

Baker herself notes one of the "inherent weaknesses" of *Miranda*—"it allowed a suspect to waive his rights without the advice of a lawyer."³¹

This last observation has its origins, as do so many of the recommendations for change in the law of confessions, in the writings of Professor Kamisar.³² To Kamisar, *Miranda* fails in its essential purpose because self-accusation under police prodding is still the typical response.³³ His conclusion flows from the logic of the decision itself, at least if one thinks of the case in syllogistic terms. But perhaps there is another way of looking at it, a way of characterizing *Miranda* as a success or partial success, though not by its own terms.

In retrospect, it is easier to imagine *Miranda* as not only the culmination of a trend of judicial decisions but also as part of a wave of fundamental changes occurring in American life in the 1960's. *Miranda* was decided when blood was actually being spilled in the streets. There were civil rights protests in the South and civil disorders in urban areas elsewhere. On national television, black protesters were bullied and beaten, black rioters beaten and shot. *Miranda* itself looked back on a recent past of the third degree, applied particularly to blacks.

Against this violence, powerful forces mobilized, determined to preserve order by linking the emerging crime problem to racism and poverty, two of its most prominent "root causes." President Lyndon Johnson led the way, proposing a "Great Society" where there would be "an end to poverty and racial injustice,"³⁴ where both crime in the streets and police brutality would be banished.³⁵ The setting was one of great dissatisfaction with the past and soaring ambitions for the future, and in this setting *Miranda*'s arch message was less a blueprint for implementation than a general instruction that things would have to change. The Court was telling the police that the old ways were not good enough.

Within a few years of the decision, by the early 1970's, there was, at least in a technical sense, substantial compliance by the police; moreover, the police were generally more restrained in their interrogation methods.³⁶ If one takes *Miranda*, somewhat arbitrarily, as a benchmark, then this can be said: Before *Miranda*, charges of physical force, questioning in

31. P. 407.

32. Y. KAMISAR, *supra* note 29, at 223.

33. *Id.* at 222.

34. 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, LYNDON B. JOHNSON 1963-64, at 704 (1965) (remarks at the University of Michigan, May 22, 1964); cf. Caplan, *Criminology, Criminal Justice, and the War on Crime*, 14 CRIMINOLOGY 3 (1976) (discussing need for fairness in efforts at controlling crime).

35. See generally Caplan, *Reflections on the Nationalization of Crime, 1964-1968*, 1973 LAW & SOC. ORD. 583 (discussing history and effectiveness of federal law enforcement assistance program).

36. See O. STEPHENS, *supra* note 22, at 165-200.

Miranda Revisited

relays, and sustained incommunicado detention were common;³⁷ after *Miranda*, they became far less frequent.³⁸ Only a handful of nations can boast of a similar status, and of those that can—England, for example—I suspect none charted so revolutionary a course in so brief a time as here. These days we seem hesitant to acknowledge our accomplishments. We do not credit the improvement in police conduct toward the community in general and suspects in particular. But both seem real and substantial.

In short, one can track *Miranda* this way: The decision curbed the police in their historic excesses, the kinds of abuse of suspects that characterized earlier appeals to the Court, but left law enforcement officials free to obtain confessions by more tolerable methods, such as deception. Suspects are no longer greatly abused, but neither is the state losing that many cases for want of self-incriminating statements. Arguably, it is a reasonable compromise.

Still, before one endorses such a compromise, its premises should be subjected to further scrutiny. One way of doing this is to go back to the earlier critiques of *Miranda*. Is there any merit to the once popular, but now discredited, arguments of those who insisted that *Miranda* would cause crime to multiply?³⁹ Certainly, the most dire prophecies have not come true. Although crime rates have climbed dramatically, as predicted, there is no basis for isolating *Miranda* as a prime causal force. But it does

37. Such practices are sometimes classified as instances of the "third degree." The term itself has no precise usage, but typically refers to the use of force (or threatened use of force) in combination with such physical hardships as the denial of sleep and food, and prolonged questioning by a team of investigators. From the perspective of the suspect, the third degree loomed as a confrontation without limits. Unless one confessed, the questions would never cease—or so it might seem.

A review of police practices during the first half of the century leaves no doubt that the use of the third degree was common. See NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT (WICKERSHAM COMMISSION), REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931); Keedy, *The Third Degree and Legal Interrogation of Suspects*, 85 U. PA. L. REV. 761 (1937); Note, *The Third Degree*, 43 HARV. L. REV. 617 (1930). Although most of the early Supreme Court decisions dealt with police misconduct in the South where the third degree was fueled by racial prejudice and the prospect of lynch mobs, see *Brown v. Mississippi*, 297 U.S. 278 (1936), in fact the problem was national, not regional.

38. Though this observation cannot be documented by reference to particular studies, it does not seem controversial. There seems to be agreement among the judges, prosecutors and defense counsel I have consulted that abuse of suspects, psychological as well as physical, in the stationhouse has declined dramatically. Items in the daily newspapers concerning this particular type of police brutality are uncommon. Still, there are occasional well-publicized incidents that indicate that in some places at some times suspects are still abused. See Z. NEUMANN & Z. MARINOW, *THE HOMICIDE FILES* (1977) (reprinting series of articles appearing in *Philadelphia Inquirer*, Apr. 24–27, 1977). More recently, law enforcement officials in two rural counties in Texas have been charged in unrelated incidents for beating suspects and exposing them to "water torture." Department of Justice Press Release No. 1983-03 (Mar. 18, 1983); *id.* No. 1983-07 (July 19, 1983).

39. Justice White, for example, argued that many criminals "will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted," and that the effect of *Miranda* will be to return a killer, a rapist or other criminal to the streets . . . to repeat his crime whenever it pleases him." *Miranda v. Arizona*, 384 U.S. 436, 542 (White, J., dissenting); see Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L., CRIMINOLOGY & POL. SCI. 16 (1961), reprinted in *POLICE POWER AND INDIVIDUAL FREEDOM* 147 (C. Sowle ed. 1962).

not necessarily follow, as the conventional wisdom today holds (even among police and prosecutors) that *Miranda* produced no adverse consequences for public safety. The difficulty in measuring its current impact lies in the absence of empirical data.

Some clues may be gathered from the early studies evaluating the initial implementation of *Miranda*. The New Haven study concluded that "warnings were a factor in reducing the success of interrogation in only eight of the 81 cases which could be evaluated."⁴⁰ It further observed that "questioning was necessary to solve a crime in less than ten percent of the felony cases in which an arrest was made and . . . *Miranda* may have adversely affected a necessary interrogation for only 6 of the 127 suspects whose interrogations we witnessed . . ."⁴¹ A study in Pittsburgh found a reduction in confessions of seventeen percent of all cases handled by the detective division following *Miranda*, and a twenty-five percent drop in robbery cases. It also found that in twenty percent of the cases a confession was probably necessary to obtain a conviction, and that there was approximately a twenty-five percent higher conviction rate for suspects who confessed.⁴²

These studies were undertaken shortly after *Miranda* was decided, at a time when *Miranda* had not been fully implemented by the police and when the warnings were not well understood by suspects. Hence, they fail, as Professor Berger notes, "to conclusively tell us what *Miranda* would mean if followed in letter and spirit."⁴³ Probably, there would be a further reduction in convictions, perhaps a significant one.

Putting aside the numbers, there is something unsettling, though not easy to identify, in the way the researchers treat their subject. The Denver study notes that "some law enforcement objectives might be adversely affected by a nonwaivable *Miranda* right"⁴⁴ as if all that were involved was the pursuit of narrow self-raising bureaucratic goals. The New Haven Study observes that warnings were a factor in "only" ten percent of the cases.⁴⁵ And a more recent study of robbery in Oakland concludes that "[c]onfessions are relatively unimportant, being judged as essential for only 5-10 percent of the charged suspects."⁴⁶ These studies reduce crime to something remote and abstract, a string of numbers, an event that one

40. See Project, *supra* note 21, at 1563.

41. *Id.* at 1523.

42. Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 11, 15-16 (1967).

43. M. BERGER, *TAKING THE FIFTH* 131 (1980) (emphasis in original).

44. Leiken, *supra* note 24, at 50 (emphasis added).

45. Project, *supra* note 21, at 1563.

46. F. Feeney & A. Weir, *The Prevention and Control of Robbery* 48 (1974) (unpublished manuscript on file with author) (emphasis added).

reads about in the newspapers, something that happens in another part of town. There is no hint of rape as a nightmare come alive, or robbery as a ruinous matter. But this latter context seems as real as any other for judging police interrogation.

Perhaps more important, the studies treat confession in essentially individual terms. But confession is also an act with consequences for the community. This is more than just another way of asserting that there is a societal interest in the identification and reformation of criminal offenders, or that the unrepentent wrongdoer poses a continuing danger to the community. The principal value of confession may lie elsewhere, in its implicit reaffirmation of the moral order. The offender by his confession acknowledges that he is to blame, not the community. By presenting himself as a victim of his own errors, his own weaknesses, as an ordinary man who has gone astray and is anxious to make amends, he reassures us. His confession is of value, not because it illuminates the dark corners of an alien mind, but, conversely, because it confirms the existence of a shared ethical view, a common human nature.

When Father Brown, G.K. Chesterton's fictional detective, is asked to describe his method of investigation, he reports that the gist of it is that he identifies with the criminal. "I mean that I thought and thought about how a man might come to be like that, until I realized that I really *was* like that, in everything except actual final consent to the action."⁴⁷ In other words, the criminal too is a member of the community, potentially recognizable as one of us. And when *we* admit ourselves capable of committing his crime "in everything but final consent" and *he* exhibits remorse over having given "final consent to the action," we merge and are changed.

If it is true, as Father Brown asserts, that "[w]hat we all dread most . . . is a maze with *no* centre,"⁴⁸ that is, a place without moral meaning, then the contrition of the offender dispels the nightmare and contributes to our capacity to reiterate the basic distinctions between good and evil. And this is so even when the forum is the police stationhouse, and the community representatives are uniformed officers, and the confession, far from being volunteered, comes into being only after insistent encouragement.

47. G. CHESTERTON, *THE SECRET OF FATHER BROWN* 9-10 (1927).

48. G. CHESTERTON, *THE WISDOM OF FATHER BROWN* 150 (1912).

Max Weber's Philosophy

Max Weber. By Anthony T. Kronman. *Stanford: Stanford University Press*, 1983. Pp. x, 214. \$18.50.

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Max Weber is the premier social scientist of this century, having introduced a political sociology that is at once interpretive and explanatory.¹ His work stands alone in its breadth, depth, and sophistication, alone also in the power and pain of its unresolved tensions. His range was vast, with comparative work spanning continents and centuries. He studied fields as diverse as politics, economics, science, and religion. He asked deep questions about their meaning and their coming into being in the modern age. Weber's work contains the outline and content of a coherent, if controversial, sociology.

While acknowledging these accomplishments, Anthony Kronman's elegant *Max Weber*² makes the more unusual claim that Weber's sociology, and specifically his sociology of law, shares certain philosophical assumptions with the entire Weberian corpus, and that these assumptions provide a consistent model of man and society. Kronman is uniquely equipped to make this argument, having been schooled in philosophy and law, to which he brings the gift of masterful expository skills. Weber has thus found a friend, one who appreciates the density of his thought without compounding it, and who makes Weber clear by rendering explicit his presuppositions. Yet we may ask: Is this the real Max Weber?

I. THE WILL AND ITS RELATION TO REASON

A. *Weber's Philosophical Model of Man*

Weber's philosophical model of man, according to Kronman, is of a being who chooses meaning by exercising his will. Though it is their characteristic feature as humans to need and want significance, men exist in a world devoid of objective meaning. No values are given, and factual knowledge does not confer value on things. Men must therefore create

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1. Interpretive knowledge concerns the meaning of a set of social practices; explanatory knowledge concerns their causes. Interpretation (or hermeneutics or exegesis) and explanation (or causal understanding) are related but distinct kinds of knowledge; precisely how they are related is a major issue in the philosophy of the social sciences.

2. A. KRONMAN, *MAX WEBER* (1983) [hereinafter cited by page number only].

meaning by positing values. Although individuals can be joined reciprocally in social action, positing can only be done by persons as individuals, each existentially choosing what to believe. In his own beliefs, a man is autonomous: free to choose among existing values or free to choose new values. The will is the organ of this autonomy and creativity.

Kronman attributes to Weber the Kantian view that the will determines action in accordance with a rule.³ Since he maintains that Weber understands reason or “rationality” primarily to mean governed by rules or “principles,”⁴ it follows that the will is necessarily related to reason. Yet there are many different kinds of rules and hence different kinds of rationality. While they all involve “control by the intellect,” not all involve a “systematic,” “gapless and internally consistent body of rules,” and not all involve the “abstract or logical interpretation of meaning.”⁵ There is no one, objective reason. Since Weber’s work explores the meanings and origins of qualitatively different forms of rationality, it can be called a sociology of rationalisms.⁶

B. *Four Types of Legal Reasoning*

The sociology of law details four basic types of legal thought, two of which Weber calls “rational” and two “irrational.” Within the categories of the “rational” and the “irrational,” he introduces a further distinction between “formal” and “substantive” characteristics. “Formal” can mean “governed by general rules or principles” as well as the “self-containedness” of those rules, their independence from considerations external to the system. Formal rules are calculable—they can predict events. This feature is important to a model of man as an individual who can plan and control his life.⁷ “Substantive” rules, in contrast, focus on particular values and/or certain practical procedures in decisionmaking. Legal systems, then, are either “formally irrational,” “substantively irrational,” “substantively rational,” or “formally rational.”⁸

3. Pp. 20 n.**, 141, 143–45.

4. P. 73; see 2 M. WEBER, *ECONOMY AND SOCIETY* 655 (G. Roth & C. Wittich eds. 1978).

5. Pp. 73–75.

6. Cf. C. ANTONI, *FROM HISTORY TO SOCIOLOGY* 161 (H. White trans. 1959) (Weber’s studies in the economic ethics of world religions are contribution to a “sociology of rationalism”).

7. P. 94.

8. Pp. 75–78. Kronman’s examples of each are: (1) formally irrational—using means that cannot be controlled by the intellect, such as an oracle, to decide cases; formality consists in the definite rules detailing how questions are posed to the oracle; (2) substantively irrational—using ad hoc adjudication by a judge, such as a Moslem *Khadi* or an English justice of the peace, who directly applies not only legal but also ethical, emotional, or political values in his evaluation of the concrete factors of each case; (3) substantively rational—applying a general, non-legal ethical principle, such as a moral imperative or a utilitarian rule, to all cases falling under it, as in priestly or theocratic legal systems; and (4) formally rational—using general abstract legal principles into which every concrete situation is fitted by means of logic internal to the legal system itself, as in modern civil codes based on Roman

Since he defines both rationality and formality as rule-governed, three of the four types—the two kinds of rationality and “formal irrationality”—are rule-governed. Three of the four types of law can therefore contribute to modern social practices, such as capitalism and bureaucracy, which require calculable rules. The remaining type, “substantive irrationality,” is not governed by a rule, except insofar as rules specify who may perform ad hoc adjudication.

Kronman clarifies distinctions among these types and explains why they have often been confused. This clarification is important, for it has often been difficult to distinguish between Weber's first and third types, “formally irrational” and “substantively rational” legal thought. Each type occurs in systems of justice most characteristic of pre-modern legal systems, in which decisions are not made on the basis of general and self-contained rules. By showing that Weber is trying to discuss three distinct variables within the confines of only two linked pairs of terms,⁹ Kronman clears up a long-standing confusion between the two types.

So far, Weber is a relativist: He sees no preferred form of reason but rather a variety of equally valid ways of conceiving legal rules. Yet Kronman wants to argue that one mode of legal thought, formal rationality, is particularly privileged in Weber's system. To see why he thinks this, we must consider the place of formally rational thought in political authority relations.

C. *Political Authority Relations*

Political authority relations, like legal relations, are instances of social action, in which the “subjective meaning [of a person's behavior] takes account of the behavior of others and is thereby oriented in its course.”¹⁰ In relations of pure power, the subjective meaning of a person's behavior takes account of the fact that he is going to be coerced by someone else, and this knowledge provides the entire meaning of his behavior. In relations of political authority, people assent to government if they believe the powers of the rulers to be justified or legitimate. Rulers possess both the means of coercion and the means of legitimation. Political systems can

law.

9. Pp. 79-80. The two linked pairs of terms are: (1) formal and substantive; (2) rational and irrational. The three variables are: (1) the nature of the rules: general versus particularistic; (2) the evidentiary basis of the decisions: logical interpretation of meaning versus adherence to external characteristics of sense-data; and (3) the self-containedness of the system: whether it draws a distinction between legal and extra-legal norms. We can now see that “formally irrational” law uses particularistic procedures with reference to empirical data for its decisions; “substantively rational” law may use fixed extra-legal principles referring to facts and casuistry to connect those principles, but it does not use the logical analysis of meaning characteristic of formal rationality.

10. 1 M. WEBER, *ECONOMY AND SOCIETY* 4 (G. Roth & C. Wittich eds. 1978).

embody, and people can believe in, one of several different kinds of legitimacy. The modern type is legal-rational authority, in which individuals believe that political rulers are legitimate because they have been empowered to follow a body of intentionally enacted, abstract rules.¹¹ Kronman argues that this form of authority occupies a privileged position because it alone accords with Weber's general philosophical position, which presupposes the idea of an autonomous will able to choose what rules to live by.

The autonomous will as the basis of political obligation contrasts with two other types of legitimacy, which Kronman links to corresponding philosophical positions on the relation between facts and values.¹² The first contrast is to the non-autonomous will characteristic of "tradition," in which legitimacy is accorded to political rulers because they have previously been rulers; here, value flows from historical fact.¹³ Kronman argues that tradition implies not only that social practices have previously been done this way but that they have always been done this way; hence tradition involves a kind of teleological behaviorism in which the valuable grows out of the biologically natural.¹⁴ (I do not see why this necessarily follows, for tradition could have an historical origin.) The second main version of the non-autonomous will occurs in the legitimacy of "charisma," in which people assent to a leader whom they believe to be graced by the will of God. Their wills are thus subordinated to revelation, and so the inherent meaning of facts—such as people's desires and certain signs of the prophet's powers—may be said to flow from the values of a divinely inspired will.¹⁵ Throughout this discussion, Kronman reminds us that Weber thinks that all three types of authority are artificial creations of autonomous human wills. The difference between them is that only the first is acknowledged as such by the actors involved; hence people in the other systems live without self-consciousness.¹⁶

Early in *Economy and Society*, Weber mentions a fourth type of authority relation, though Kronman says its sense is "unclear."¹⁷ I think it plays a role in Weber's thought that cannot be neglected. This type of political legitimacy is based on "value-rationality," which we can now understand as akin to "substantively rational" legal thought. In both, there is an autonomous will, yet one that conforms to the rule of reason. This is the idea of natural law.¹⁸ Action is teleological but not fully predetermined,

11. P. 45.

12. Pp. 70-71.

13. Pp. 43-45.

14. See pp. 57-58, 60, 67; cf. p. 24 (discussing teleological explanations).

15. Pp. 69-71.

16. Pp. 54-55, 68.

17. P. 44 n.*.

18. See T. AQUINAS, I-II SUMMA THEOLOGICA Q. 94; cf. H.L.A. HART, THE CONCEPT OF

since it is towards a human, not an animal, purpose.¹⁹ Political authority based on "value-rationality" imports values, such as moral equality and goodness, from outside the legal system.²⁰ It is also based on a value generated from within the legal system of constitutional republics itself: the value of citizenship.²¹

Weber thinks that a fifth type of authority relation, charisma inverted in an anti-authoritarian direction, also characterizes modern mass democracy.²² Though Kronman does not mention this type, its nature partially supports his interpretation. With this fifth type, value becomes lodged in a multiplicity of wills, in the people who are empowered to elect—and hence confer recognition upon—their charismatic leaders. We might even say that charisma itself has been reclaimed by the people. But the question then arises, how does one go from an autonomous will to a collection of autonomous wills all following the same rule in a common or a general will? In other words, is Weber a social contractarian?

D. *Contract as an Expression of the Autonomous Will*

Kronman argues that modern legal contracts—private ones and, by implication, the hypothetical public contract—are key political instruments in Weber's philosophy, since they provide the primary vehicle for the expression of the autonomous will.²³ He bases this assertion on Weber's distinction between "status contracts," which are thought to have characterized pre-modern times, and the "purposive contracts" characteristic of the modern age. Whereas an individual formerly contracted into an entire new status or ethical personality, the individual now enters a contract for discrete ends and retains his formally free, legal personality throughout and outside the relationship.²⁴ Kronman thus claims that "purposive contracts" have a central place in Weber's thought because only through such instruments can an individual express his "bare power or capacity . . . for purposeful action itself" while maintaining a "core identity" outside the contract.²⁵ The individual self-consciously and freely assents to a rule with one, two, or many others.

LAW 181-95 (1961) (discussing natural law and presenting a theory of its "minimum content").

19. Cf. ARISTOTLE, POLITICS 1252a15-1253a38 (man by nature intended to live and develop his faculties in polis). On teleological rationality in Weber, see Loewith, *Weber's Interpretation of the Bourgeois-Capitalistic World in Terms of the Guiding Principle of "Rationalization,"* in MAX WEBER 101, 112 (D. Wrong ed. 1970).

20. 2 M. WEBER, *supra* note 4, at 866-73 (discussing relevance of moral values external to legal system).

21. See *infra* pp. 1391-1392.

22. 1 M. WEBER *supra* note 10, at 266-67.

23. Pp. 99-100, 104-05, 112.

24. Pp. 102-04.

25. Pp. 103-04.

Kronman also argues that the most concrete embodiment of legal personality is the right of ownership; it is the basic entitlement rule which signifies that a person is not a thing but rather a being free to appropriate and to alienate things.²⁶ In this he is following Hegel,²⁷ but he does not establish why Weber would necessarily take this step. I do not think that Weber would require that the definition of a free person include his being able to own property. Weber's notion of human freedom is more spiritual, and does not require material realization: A man can be free if he believes in certain projects he has chosen.

Were ownership the basic entitlement rule in a society based on the autonomous will, citizenship would also have to be conceived as ownership—ownership in the *res publica*, the public thing or place. While this is Marx's understanding of citizenship, it is not Weber's.²⁸ In his analysis of the ancient city-state and in his prefiguration of communist society, Marx requires that the individual be considered as an owner of the sources of political power.²⁹ Weber, in contrast, conceives of citizenship as a relation of association, not appropriation. His long analysis in *The City* treats citizenship as a contractual relation not easily classified in either "status" or "purposive" terms.

Kronman might argue that, in ancient and medieval times, citizenship was a status contract of a special legal community, which Weber thinks has been superseded in the purposive contract of the liberal state.³⁰ But to talk about a state assumes the existence of national political boundaries, yet the logic of the will-centered theory leads to a universal world state. Is the existence of a political community predicated solely on its origins and on the enforcement problems that are entailed in Weber's definitions of law and the state? Or is it rather required by the very meaning of citizenship itself, which grows out of a non-will-centered theory and continues to have that significance? In this latter view, "modern" individuals enter into

26. Pp. 141, 144 n.357.

27. See G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* §§ 41-53 (T.M. Knox trans. 1952).

28. I argue this more fully in Schwartz, *Communitarian Citizenship: Marx and Weber on the City*, *POLITY* (forthcoming in Spring 1985).

29. See K. MARX, *PRE-CAPITALIST ECONOMIC FORMATIONS* (J. Cohen trans. 1965); K. MARX, *Economic and Philosophic Manuscripts*, in *WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY* (L. Easton & K. Guddat eds. 1967). For Marx, man's freedom consists in the ability to appropriate, to make the world one's own by fashioning it according to one's (individual and collective) will through the transformational activity of labor upon nature. Weber has a very different model of man and of human freedom, which does not depend upon man's interaction with nature. Freedom has more to do with man's interaction with spirit—that is, with choosing one's ultimate values.

30. Kronman does mention, p. 46, that citizenship involves membership in an organization as a precondition to the citizen's assuming rights and duties. But he does not show how the idea of membership, in some respects a non-voluntaristic notion, fits in with a will-centered theory. For suggestions as to how it might, see Mosher, *Civic Identity in the Juridical Society: On Hegelianism as Discipline for the Romantic Mind*, 11 *POL. THEORY* 117 (1983).

“pre-modern” fraternization relations, considering each other symbolic brothers and having certain unlimited obligations as members, but at the same time they know that they are also individual proprietors pursuing diverse purposes in their non-political lives.³¹ They are thus fully self-conscious, but they acknowledge that they are not fully autonomous wills.

To reverse a metaphor used in the sociology of religion, the citizen becomes a “vessel,” not a “tool”: The fellowship of association is an end in itself, to be passively received and enjoyed, not solely to be used for instrumental advantage. (Note that we are talking about the meaning of citizenship and not about its historical origins.) There is, for example, the incredible wistfulness on the last page of *The City*, where Weber describes the dialectical contests of Greek life: In war, in speech, in sports, “even the loincloth fell away.”³² The nudity of the gymnasium is neither a return to natural, spontaneous emotion nor a situation characterized by the will as “the self’s ‘point of gravity.’”³³ It is the result of a disciplined education of the emotions into a mode of beauty, based on a different theory of the soul. In the environment characterized by Socratic knowledge, which Kronman superbly contrasts to what he sees as Weber’s position, greater importance is accorded to the parts of the soul—the passions and the intellect—which are thought to surround the will. Socrates assumes that reason can come to teach the passions, that there is such a thing as right reason, and that there can be less need for the will. Maybe Kronman is correct that Weber, in his explicit pronouncements on method, insists on the primacy of the will, but surely there is also a strong yearning in Weber’s comparative writings for the synthesis, which natural law promises, of “gravity and grace.”³⁴

I want to suggest that Weber’s belief in the will’s autonomy must be seen in the context of an equally strong belief in the “givenness of things.” The *individual* will exists in a *social* situation not of its choosing or creation.³⁵ These social contexts do not come to have meaning *because* we choose them—they have meaning first, and *then* we choose them. While it is important to say, as Kronman does, that Weber believes that our value choices are not determined, it is equally important to say that, for Weber, our choices are situated in interpretive contexts which are historically given.³⁶

31. 2 M. WEBER, *supra* note 4, at 1241–50 (discussing city as fraternal association), 1321–30 (discussing city as a context within which burghers pursued their own economic interests).

32. *Id.* at 1368.

33. P. 156.

34. I take this phrase from S. WEIL, *GRAVITY AND GRACE* (A. Wills trans. 1952).

35. Kronman briefly acknowledges this, p. 21, but does not examine its implications.

36. On “situated freedom,” see C. TAYLOR, *HEGEL AND MODERN SOCIETY* 154–66 (1979).

II. CONSTRAINTS ON THE WILL

A. *Charisma and Its Routinization*

Weber's theory of the will, then, lies embedded in a larger philosophy, one which is perhaps teleological and which is certainly historical. He sought to explain how the modern world's meanings had developed, seeking "the causes of their being historically *so* and not *otherwise*."³⁷ Weber's attention to history and causality must be accorded its place in any overall characterization of his philosophy.

The role of past charisma and its routinization in constituting present meanings must especially be acknowledged. Charisma, which appears unexpectedly and is recognized by others in persons of exceptional will and spirit, determines the shape and meaning of social systems. Charisma continually yet fortuitously provides earthly centers of symbolic meaning, to which all other social actors desire access.³⁸ These social systems of new meaning are then inherited as given.

Kronman discusses charismatic authority only briefly, primarily in terms of its instability, its tendency to change into traditional or rational-legal authority.³⁹ The charismatic prophet "has the power to interpret [the] meaning [of his prophetic gift] and hence to decide the scope of his own mission."⁴⁰ Yet Kronman does not explore the ways in which the charismatic origins of social systems persist as the parameters of later meaning. Moses receives the tablets of the Law at Sinai; he comes down from the mountain and his charismatic authority is codified into countless rules. But the original Decalogue still sets the basic interpretive terms.

B. *The Role of Force*

Kronman also underplays Weber's discussion of violence. In every Weberian definition of a system of secular social relations, whether it be law, politics, or economics, there is an element of external force in addition to the element of internal belief. While Kronman is right to argue that the exciting part of Weber's interpretive sociology involves showing that people's ideas and beliefs significantly influence and cause their actions, it does a disservice to Weber as an explanatory sociologist to ignore the role of force. Since people acknowledge this role, the expectation of

37. M. WEBER, "Objectivity" in *Social Science and Social Policy*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 72 (E. Shils & H. Finch eds. 1949)(emphasis in original).

38. Eisenstadt, *Introduction*, in *MAX WEBER ON CHARISMA AND INSTITUTION BUILDING* xxx-iii-xxxiv (S. Eisenstadt ed. 1968).

39. Pp. 47-50.

40. P. 69.

violence becomes one element, though not the sole one, in people's subjective meanings.

Weber's definition of law includes both the internal aspect of belief (legitimacy) and the external aspect of coercion (force): "An order will be called . . . *law* if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation."⁴¹ Law specifies certain legal relationships, which "designate that situation in which the content of a right is constituted by a relationship, i.e., the actual or potential actions of concrete persons or of persons to be identified by concrete criteria."⁴² In any system of legal coercion, the norms specifying the rights are then said to be "formally accepted as binding."⁴³ When the norms are violated, the staff goes into action, enforcement occurring "for the norm's sake,"⁴⁴ though enforcement is usually not needed. Nonetheless, "[t]his apparatus must also possess such power that there is in fact a significant probability that the norm will be respected because of the possibility of recourse to such legal coercion."⁴⁵ The existence, or what Weber calls the "empirical validity," of a legal order stems from this probability.

Kronman says that Weber's definition of a legal system as a system of norms backed up by an enforcement staff is arbitrary, and might have been defined differently had Weber wanted, for example, to treat modern enacted law as the only real law, thereby excluding pre-modern forms of law.⁴⁶ Kronman also cites one passage which gives a more "consensual" interpretation to the coercive element.⁴⁷ But given Weber's general political philosophy, he has to include an element of coercion in his initial definition, even if it raises troublesome questions for the freedom of the will. In any event, the initial definition of law is the most useful sociologically. By including the idea of legal norms, Weber can explore the internal dynamic of a legal system in its own development, rather than merely considering it as the result of other conditions. To speak only of legal norms would leave those ideas unconnected to their source (the legal elite) and their recipients (the people); it would ignore the rules' relation to "mate-

41. 1 M. WEBER, *supra* note 10, at 34 (emphasis in original). Weber's famous definition of the state as "a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory," M. WEBER, *Politics as a Vocation*, in FROM MAX WEBER 78 (H. Gerth & C.W. Mills eds. 1958) (emphasis in original), includes both aspects of internal belief (legitimacy) and external coercion (physical force).

42. 1 M. WEBER, *supra* note 10, at 319.

43. *Id.* at 313.

44. *Id.*

45. *Id.* at 314.

46. P. 31.

47. P. 30.

rial and ideal interests.”⁴⁸ To speak only of a system of enforcement would mean that constant vigilance was required by that staff.

C. *The Will in Modern Social Relations*

Kronman argues that the model of man implicit in Weber’s analysis of the formal rationality of the law also underlies the significance of the other main modern social practices: economic relations, administrative organization, and political authority. The idea of man as a will who enters into purposive legal contracts is the essence of the meaning of capitalism,⁴⁹ impersonal bureaucracy, and rational-legal authority. Kronman offers his argument as one about analogous meanings, not about causality, and about logical, not ethical, significance. In considering it, we must ask whether the separation of the three enterprises—interpretation, explanation, and assessment—has been maintained, and whether they have been successfully integrated. These questions are important, for Weber wanted the sociology of law to be not only exegetical, but also to explain how different systems of law evolved.⁵⁰

On the level of meaning, Kronman shows that the will-centered legal theory has a tight, although not a unique, fit with capitalism. Capitalism is based on private ownership of the means of production and a free market of changeable contracts; its rationalization involves the use of formally rational legal instruments such as the laws of agency, negotiable instruments, and incorporation. The capitalist firm has the unlimited end of production for profit, in contrast to the household economy, where production has the limited end of use. In capitalist accounting, the end is in principle quantitatively indeterminate—“more”—and qualitatively indeterminate as long as meeting new needs increases profit. Profit-seeking entrepreneurs thus express autonomy of the will—if we understand this as freedom to choose among alternatives—and possibly also creativity of the will—if one accepts the one constraint of “profit” which defines the economic sphere itself.⁵¹ Weber acknowledges two irrationalities that impede the operation of capitalism’s formal rationality as a system which actualizes individual autonomy. Kronman seems to believe that society can

48. Cf. M. WEBER, *The Social Psychology of the World Religions*, in FROM MAX WEBER, *supra* note 41, at 280 (discussing ways in which “material and ideal interests” directly govern men’s conduct).

49. Socialism shares with capitalism the idea of man as a legally free person with rights and entitlements; however, in mandating that the worker shall own the means of production and be entitled to his job, it departs from the ideal of free and changeable contracts. Pp. 144–46.

50. Cf. Fay & Moon, *What Would An Adequate Philosophy of Social Science Look Like?*, 7 PHIL. SOC. SCI. 209, 216 n.13 (1977) (attributing to Weber view that social science must be both explanatory and interpretive).

51. P. 63.

remedy one of these, the unequal distribution of property, without discarding the system's formal rationality.⁵² But he suggests that the other constraint on autonomy, extreme discipline and specialization in the division of labor, is irremediable under formal rationality.⁵³

Kronman's argument that the autonomous will is the underlying meaning of bureaucracy is less convincing. Although it is true that, in both private contracts and bureaucratic office holding, an individual voluntarily decides to enter a contract characterized by formal rationality, the bureaucrat can neither set the rules nor change them. Indeed, his freedom is so limited because his position meets another of Weber's criteria of the modern social order: separation of the spheres of life, and hence non-ownership of his job. Since the bureaucrat has no entitlement to that position, he lacks the control which ownership brings. In private bureaucracy, the organization is owned by the stockholders and their board of directors. In public bureaucracy, the civil servant's office is owned, as it were, by the politician; the government sets and changes the rules by its deliberate enactments.⁵⁴

Does this political rule partake of legal rationality? Only if one allows *both* categories of legal rationality—formal and substantive—into the picture. Legislation cannot go in any direction; it must include certain substantive, natural law preconditions, such as the notion of moral equality.⁵⁵ Moreover, the legislators themselves have certain special qualities, of courage and passion, which "must owe their existence to some aspect of a person's character—some part of his soul—other than the will."⁵⁶ Political leaders need these qualities not only in relation to their followers, in setting examples and exhorting sacrifice, but also in their own deliberate enactment of legislation. Thus, part of the public law's legitimacy in a rational-legal system comes from something beyond its being the product of autonomous wills. Legitimacy also issues from the past actions of the people's representatives, who were wise, courageous, and passionate. Or

52. See Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980). *But cf.* p. 173 (lack of resources transforms capitalism's formal freedom into "iron cage" guaranteeing "the preservation of existing disparities in wealth").

53. Pp. 171-72.

54. 2 M. WEBER, *supra* note 4, at 1407-08, 1416-17 (importance of parliamentary control of bureaucracy).

55. Equality before the law involves a substantive precondition derived from the Christian natural law belief that the spirit of God resides in every man. Kronman derives equality from within secular reason, in the concept that every human being has, in principle, the rational capacity to understand a rule. Pp. 141-43. Yet are people really equal in that respect? How simple must the rule be to say that all people can in principle conceive it? Hart, for example, does not think that all citizens can understand the secondary rules of recognition, adjudication, and change which he thinks characterize a legal system, although they can understand the primary rule of obligation. H.L.A. HART, *supra* note 18, at 109-14.

56. P. 179.

foolish and feckless. Either way, there is an historical element to the law, as there is to a human life, which contributes to its meaning.

D. *Political History in Weber's Theory of Law*

Kronman's only chapter on causal explanation ignores the presence in Weber's work of a political history, or a sociology of political factors, which affects the shape and hence the meaning of the law. The chapter is cast in very general terms: whether capitalism caused the rise of modern law or vice versa and, even more abstractly, whether ideas influence material forces or vice versa. On these questions, Kronman labels Weber a "causal agnostic," implying both that one does not know the answer to these questions and one could not know.

Weber uses two main examples of the development of law and capitalism. In continental Europe, formally rational law, such as later Roman and canon law, fit best with capitalism, while in England, the first country to experience capitalist development, the common law had many formally irrational elements.⁵⁷ While showing that the meaning of English common law can also fit with capitalism, because of the calculability that results from its formality, Kronman skirts the question of causation. He ignores the kinds of factors—for example, political conflict between a leader and his administrative staff⁵⁸—that Weber characteristically uses to explain historical change.

In *The Sociology of Law*, Weber seeks to explain how it was that English common law developed the way it did, and he finds political factors to have been crucial. The paths followed by different bodies of law "depended largely upon factors of legal technique and of political organization. Economic factors can therefore be said to have had an indirect influence only."⁵⁹ Weber makes this point at the beginning of *The Sociology of Law*, and returns to it toward the end:

The differences between Continental and Common Law methods of legal thought have been produced mostly by factors which are respectively connected with the internal structure and the modes of existence of the legal profession as well as by factors related to differences in political development. The economic elements, however, have been determinative only in connection with these elements.⁶⁰

He suggests that the internal structure of the legal profession is itself also

57. Pp. 89, 120–24.

58. 1 M. WEBER, *supra* note 10, at 264.

59. 2 M. WEBER, *supra* note 4, at 654–55.

60. *Id.* at 889–90.

“largely dependent upon political factors.”⁶¹ The key political question is how the leader maintains his power in relation to the relevant political and social groups, one of which is the legal profession.⁶² Two political conditions—the degree of “political centralization” and “the autonomous development of the respective structures of *domination* [authority]”—account for the differences between England’s and Germany’s systems of law.⁶³

To reintroduce the question of causality into the sociology of law is to raise questions of historical origins which then constrain and shape the will, while to stress political power and political value conflicts as the decisive causal factors is to suggest that political purposes and norms are more central to humans than are nonpolitical goals. If we take seriously the claim that Weber is a philosopher, then there is significance in the fact that he chose to do philosophy through the medium of political sociology.

61. *Id.* at 883.

62. These passages would require elaboration before one had a set of causal propositions about how a legal system in a particular nation came into being. The form of these propositions might be “quasi-causal,” that is, they would not be general laws of a covering law type; rather, they would specify particular kinds of factors which are inferred to have become meaningful reasons for the actions of individuals and groups. Here, Weber suggests that access to political power has been a crucial consideration motivating the action of legal elites. On the methodological issue, see Moon, *The Logic of Political Inquiry: A Synthesis of Opposed Perspectives*, in 1 HANDBOOK OF POL. SCIENCE 182-91 (F. Greenstein & N. Polsby eds. 1975); Moon, *Understanding and Explanation in Social Science: On Runciman’s Critique of Weber*, 5 POL. THEORY 183, 190-91 (1977).

63. 2 M. WEBER, *supra* note 4, at 977 (emphasis in original).

Increasing Our Effectiveness Against Crime: Expanding the Limits of Law Enforcement

The Limits of Law Enforcement. By Hans Zeisel. Chicago: University of Chicago Press, 1983. Pp. xv, 245. \$20.00.

Charles H. Whitebread† and John Heilman‡

I.

Any book written by Hans Zeisel must be taken seriously. After all, Professor Zeisel has been one of the dominant figures in criminal justice since his work with Harry Kalven, Jr. on the American jury revolutionized academic thought about the workings of juries.¹ In his most recent book, *The Limits of Law Enforcement*,² Professor Zeisel attempts to have the same impact upon the study of criminology.

Professor Zeisel's basic thesis is that the criminal justice system, and law enforcement in particular, cannot alone solve the problem of crime in American society. He concludes that the power of law enforcement to control crime is "unexpectedly small; law enforcement is unable to reduce significantly our high rate of crime."³ According to Professor Zeisel, solving the crime problem in America requires that our society look at factors other than law enforcement itself because law enforcement is unable to respond to the well-known causes of crime: unemployment, poverty, and poor education.⁴

Professor Zeisel, of course, is correct in pointing out that law enforce-

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1. H. ZEISEL & H. KALVEN, *THE AMERICAN JURY* (1966). Hans Zeisel is professor emeritus of law and sociology at the University of Chicago Law School. His other books include H. ZEISEL, *DELAY IN THE COURT* (1959); H. ZEISEL, M. JAHODA & P. LAZARSELD, *MARIENTHAL: THE SOCIOGRAPHY OF AN UNEMPLOYED COMMUNITY* (1971); and H. ZEISEL, *SAY IT WITH FIGURES* (1947).

2. H. ZEISEL, *THE LIMITS OF LAW ENFORCEMENT* (1982) [hereinafter cited by page number only].

3. P. 4.

4. See pp. 83-88.

ment's ability to have an impact on crime is limited. His work, however, is flawed by several significant analytical problems. First, Professor Zeisel ignores the fact that law enforcement can have a significant impact on crime if we as a society are willing to forgo our civil liberties and submit to armed force to control conduct. He also ignores that, even short of a police state, law enforcement's effectiveness against crime can be increased by better police training, rule-oriented decisionmaking, and reconsideration of our treatment of crimes committed by those who know their victims. For these reasons, Professor Zeisel's conclusion that "law enforcement . . . cannot by itself significantly reduce crime"⁵ is too sweeping, especially in light of the statistical data employed by Zeisel.

Despite these difficulties, *The Limits of Law Enforcement*, and the Vera Institute Study on which it is based,⁶ are important contributions to research on criminal justice. The Vera Institute and Professor Zeisel studied dispositions of felony arrests in New York City in 1972 and 1973 to determine why most such arrests resulted in dismissals or "deteriorated" into lesser charges. Professor Zeisel supports his conclusions on the ineffectiveness of law enforcement with a number of different findings from this survey of arrests.

Lack of cooperation from the complaining witness was one of the most important reasons for deterioration and dismissal of felony charges.⁷ Some of the complaining witnesses had undoubtedly been intimidated by their assailants, but in most cases the reason for the deterioration or dismissal of charges was that the complaining witness had a longstanding relationship with the accused and did not want to proceed with criminal prosecution.⁸

Other important reasons for dismissal and deterioration of felony charges included the lack of credibility of the complaining witness, the fact that the arrest was for a first offense, or the absence of criminal intent.⁹ Professor Zeisel's work with Vera thus puts to rest the common concep-

5. P. 15.

6. VERA INST., FELONY ARRESTS, THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS (1977). Professor Zeisel participated in the Vera Institute study and the data he uses in his book were previously reported by the Institute. In *The Limits of Law Enforcement*, however, Professor Zeisel organizes the data more comprehensively, making use of his statistical ability to present numerous, superbly informative charts and graphs.

7. Pp. 26-27; VERA INST., *supra* note 6, at 19-20.

8. Pp. 114-19. The Vera Institute's study found that the proportion of criminal defendants who knew their victims ranged from a low of 21% in auto theft arrests to a high of 83% in rape cases. VERA INST., *supra* note 6, at 19 Table D. Robbers knew their victims in 36% of the robbery arrests, and burglars knew their victims in 39% of the burglary arrests. *Id.* These statistics were consistent with the figures found in B. FORST, J. LUCIANOVIC, S. COX, WHAT HAPPENS AFTER ARREST? 24 (1977); see also C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 257-77 (1978) (citing Vera Institute figures indicating that victims' reluctance to cooperate with prosecution because of prior relationship with arrestee is one reason for reduction and dismissal of charges).

9. Pp. 109-12.

tion that institutional restraints within the system of criminal justice, such as a shortage of prosecutors or court congestion, account for most dismissals and reductions in charges. For the most part, nonevidentiary circumstances seldom result in reductions of felony charges.¹⁰

Professor Zeisel therefore concludes¹¹ that, regardless of what law enforcement does, it cannot significantly increase the number of arrests which result in convictions: "Barring radical changes in the size and structure of the police force, it cannot do much better than it now does."¹² More law enforcement will not, says Professor Zeisel, significantly reduce our high crime rate.¹³

These conclusions, however, are not a call to anarchy: "If we are serious in our concern over crime, we must look elsewhere for relief."¹⁴ Those who have long looked to better education, reduced unemployment, or better housing as the solutions to high crime rates¹⁵ will clearly find Professor Zeisel's conclusions appealing. There are, however, a number of problems with Professor Zeisel's work that call into question the reliability of his data and his conclusions.

II.

One of Professor Zeisel's major problems is his use of conviction data as a measure of law enforcement's effectiveness in combating crime. Although conviction rates are good measures of how law enforcement is responding to crimes that have occurred and been reported, Professor Zeisel does not clearly establish why conviction rates indicate anything about law enforcement's ability to prevent criminal activity altogether. He asserts that "law enforcement begins to function when it has failed[.] . . . after a crime has been reported to the police."¹⁶ But this oversimplification ignores the fact that the very existence of law enforcement has a deterrent effect on crime,¹⁷ and this deterrent effect is not necessarily related to the number of convictions per arrest.

Arrest itself, regardless of outcome, subjects the arrestee to considerable

10. P. 109.

11. Professor Zeisel actually presents his conclusions in a long first chapter which summarizes and interprets the results of the study.

12. P. 29.

13. Pp. 29-34.

14. P. 15.

15. See U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 35-38 (1967) (war on poverty, inadequate housing, and unemployment is war on crime) [hereinafter cited as *COMM'N ON LAW ENFORCEMENT*].

16. P. 15.

17. See Wycoff & Manning, *The Police and Crime Control*, in *EVALUATING PERFORMANCE OF CRIMINAL JUSTICE AGENCIES* 15 (G. Whitaker & C. Phillips eds. 1983) (Sage Criminal Justice System Annuals vol. no. 19).

hardship, some potential loss of liberty, and tremendous economic loss.¹⁸ In a drug arrest in which the police seize two ounces of cocaine in an illegal search, for example, the police win a smashing victory even if the case is never filed or is dismissed after a successful motion to suppress the illegally seized evidence. The police have (i) removed the cocaine from the street; (ii) caused a terrific economic loss to the seller; (iii) required the arrestee to pay an attorney a non-refundable fee; and (iv) either forced the arrestee to pay a bondsman or kept the arrestee off the streets for several days if he cannot readily post bond. Interestingly, the arrest may also alienate the arrestee from his friends and collaborators if they suspect that he has become a police informant to gain the dismissal. All told, the police power to arrest is a tremendous deterrent to crime whatever the outcome of the case.

In addition, police may deter crime without resort to arrest. Areas patrolled regularly and visibly by uniformed police may see substantial short-term reductions of criminal activity.¹⁹ Indeed, the police power to accost potential troublemakers and banish them from a particular area, while undeniably beyond the constitutional ideal, may have a very potent deterrent effect.²⁰ And, as in the case of the deterrent effects of simple arrests, these exercises of police discretion on the street are not necessarily related to the number of convictions that a police agency can obtain.

Professor Zeisel might have argued that, as conviction rates fall, the deterrent effect of law enforcement diminishes because criminals believe they are less likely to be convicted.²¹ While such an argument might have some merit, Professor Zeisel never makes this or any other argument to show that conviction rates are a true measure of law enforcement's effect on crime.

Moreover, Professor Zeisel's conclusion is too broad even if one assumes that conviction rates are accurate measures of police impact on crime. He argues that police cannot significantly reduce crime even with

18. See *United States v. Watson*, 423 U.S. 411, 447 (1976) (Marshall, J., dissenting) (arrest "abruptly subjects a person to constraint and removes him to unfamiliar and threatening surroundings").

19. See POLICE FOUND., *THE NEWARK FOOT PATROL EXPERIMENT* (1981); *Police Foot Patrols Reduced Crime Says Flint, Michigan Project*, 13 CRIM. JUST. NEWSLETTER, Sept. 27, 1982, at 3-4; Kelling, *Return of the Foot Patrol: Maybe Patrol Cars Respond Faster, But The Cop on the Beat Has Psychological Value*, L.A. Daily Journal, Aug. 4, 1983, at 4, col. 3. For a typical response to foot patrols in a medium-sized city, see *Police Patrols Curbing Downtown Problems*, The Sedalia Democrat, June 3, 1978, at 8A.

20. See generally Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983) (discussing constitutionality of police detentions where race is factor in decision to detain).

21. For discussion of this argument, see Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975); Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359 (1975).

Law Enforcement

greater resources.²² What he should have said, however, is that police cannot significantly reduce crime at a price that we as a society are willing to pay.

Although Professor Zeisel seems to presuppose that society is unwilling to sacrifice our individual rights and freedoms for a totalitarian state almost free of crime, such an assumption might unfortunately be wrong. Recent initiatives for criminal "reform" in various states indicate that society, or at least many in this society, will trade certain procedural protections for a perceived reduction in crime.²³ Similarly, recent legislative proposals in Congress indicate that our nation's leaders are willing to restrict the use of the writ of habeas corpus,²⁴ limit the availability of bail,²⁵ and permit the introduction of illegally seized evidence in criminal proceedings.²⁶ Thus, Professor Zeisel's implicit assumption that our society is not willing to give up various constitutional protections in exchange for a reduced crime rate is not necessarily correct, and his conclusion should have been limited accordingly.

Professor Zeisel should have also limited his conclusions to the long-range effectiveness of law enforcement over a large area. Contrary to his sweeping conclusion, law enforcement can reduce crime in a restricted area over a restricted period of time. For example, law enforcement officials frequently launch campaigns to reduce prostitution in certain areas for a limited period of time. These campaigns are often successful.²⁷ Similarly, the police response to the May Day demonstrations in Washington, D.C., in 1971 presents another example of the tremendous impact that law enforcement can have over the short run.²⁸ Thousands of protesters against the war in Vietnam descended on the Capital simultaneously. The police arrested huge numbers of people and detained them in the city's stadium and in other very large holding facilities. The mass arrests effectively ended the protest and prevented the demonstrators from engaging in what the police feared would be criminal conduct.²⁹ The cases against the

22. See pp. 83-84.

23. See *Making Criminals Pay*, L.A. Daily Journal, Sept. 27, 1982, at 4, col. 1. In California, for example, voters recently approved a so-called "Victims' Bill of Rights." *New California Anti-Crime Measure Clouds Criminal Justice System*, 13 CRIM. JUST. NEWSLETTER, June 21, 1982, at 3. This initiative, Proposition 8, amended the California state constitution to provide for preventive detention and other limits on the right to bail, lengthier sentences for repeat offenders, fewer defenses, and a reduction in plea bargaining. L.A. Daily Journal, May 21, 1982, at 1, col. 2.

24. S. 1763, 98th Cong., 2d Sess. (1984).

25. S. 215, 98th Cong., 2d Sess. (1984).

26. S. 1764, 98th Cong., 2d Sess. (1984).

27. Of course, over time in a given community, these efforts are not really successful. The prostitution or other crime either shifts to a different area or returns when "the heat is off." N.Y. Times, May 6, 1971, at A1, col. 1.

28. *Id.* at A38, col. 1.

29. Actually, the police themselves engaged in criminal activity by illegally arresting and detaining citizens. N.Y. Times, Dec. 18, 1981, at A32, col. 1.

demonstrators were abandoned,³⁰ yet law enforcement had a tremendous effect on the short-term ability of the protestors to engage in criminal behavior. Professor Zeisel should have at least acknowledged law enforcement's short-term effect.

Professor Zeisel also should have made a more convincing argument as to why his data, gathered in New York, are applicable nationwide. He notes that large American cities, including New York City, have relatively similar rates of convictions per number of arrests.³¹ From this he concludes that New York City is similar to other American cities in terms of law enforcement's effect on crime.³²

Professor Zeisel's conclusion is flawed, however, because it takes into account only arrests and convictions, not reported crimes. For example, both New York and Cleveland may have about one hundred convictions for every five hundred arrests.³³ However, if New York has only twenty arrests for every thousand reported crimes, but the ratio in Cleveland is 200:1000, then it is not appropriate to use New York's data as any indication of the effectiveness of law enforcement in Cleveland.³⁴

Moreover, Professor Zeisel's reliance on New York City data is particularly strange given that his own statistics indicate, for example, that the conviction rate in New York City is nearly eighteen percent higher than that in New Orleans.³⁵ Before concluding that New York City is similar to other cities, Professor Zeisel should explain this eighteen percent difference.

Even without the variation in conviction rates, one would guess that this conclusion of Professor Zeisel is wrong because of New York City's size, its cosmopolitan nature, and the number of strangers and tourists it attracts. In addition, New York City tolerates certain types of criminal behavior which no other city in America would countenance. Where else, for example, do drug dealers blatantly advertise their wares in a public park, as they do in Washington Square?³⁶

30. See N.Y. Times, Aug. 15, 1981, at A6, col. 6. Some of the demonstrators brought suit and eventually recovered \$2.5 million for violations of their constitutional rights. *Id.*

31. Pp. 19-21.

32. Pp. 3, 19-25. Professor Zeisel is not alone in his questionable reliance on New York City data as a predictor for the rest of the country. The Vera Institute also concluded that New York City is like other American cities, and therefore that New York statistics could be used to generalize about the deterioration of felony arrests in other American cities. VERA INST., *supra* note 6, at xii. To Professor Zeisel's credit, the Vera Institute was even less convincing in explaining why New York City is like other American cities.

33. Professor Zeisel in fact compares the rate of conviction in New York in 1973 with the rate of conviction reported for Cleveland in 1928 by Felix Frankfurter and Roscoe Pound, and concludes that the conviction rates for both cities were similar. See p. 21.

34. This is especially true given Professor Zeisel's view that law enforcement begins to do its job only once a crime has occurred and been reported. P. 15.

35. P. 22.

36. N.Y. Times, May 16, 1982, at A49, col. 4.

Yet another problem with *The Limits of Law Enforcement* is the discrepancy between Professor Zeisel's conclusions and those of his collaborators at the Vera Institute. As noted previously, the data that Professor Zeisel uses were gathered in 1972 and 1973 as a result of a study by the Vera Institute.³⁷ The Vera Institute published its findings in 1977, while *The Limits of Law Enforcement* did not come out until nearly ten years after the data were collected. This time lag alone makes one wonder whether the book's conclusions have any relevance today. Professor Zeisel himself acknowledges that after the data were collected and while the data were being analyzed, differences of opinion developed between himself and the Vera Institute concerning the scope of the study.³⁸ One's suspicions of Professor Zeisel's conclusions are only heightened by his frank admission that his original collaborators do not agree with him.³⁹ A comparison of *The Limits of Law Enforcement* with the Vera publication shows no significant difference in the data or the analysis of what factors resulted in the deteriorations of felonies from arrests. The only significant substantive difference between the two works is that the Vera Institute was unwilling to reach Professor Zeisel's sweeping conclusion that law enforcement alone is unable significantly to reduce crime.⁴⁰

III.

In addition to its questionable documentation, *The Limits of Law Enforcement* is flawed by numerous errors of omission. In light of his sweeping conclusions, Professor Zeisel should have provided the reader with a more comprehensive discussion of the exclusionary rule, falling crime rates, and the benefits of the discretion that enforcement officials now possess.

Professor Zeisel barely discusses the exclusion of evidence as a reason for deterioration or dismissal of charges,⁴¹ despite the hue and cry regarding the impact of exclusion⁴² and the Burger Court's attack on the exclusionary rule.⁴³ He does acknowledge that, in order to enhance their

37. See *supra* p. 1400.

38. P. 6 n.5.

39. *Id.*

40. See VERA INST., *supra* note 6, at 146. ("[W]e must look principally to the streets of New York—to the ways citizens behave and the ways police patrol and investigate crime—rather than to our court process, if we wish to change the basic pattern of dispositions.") (emphasis added).

41. See p. 111 Table 2. Professor Zeisel lists the evidentiary reasons for dismissal, but does not include probable exclusion of evidence as a possible reason.

42. See Welsh & Collins, *A Matter of Evidence*, N.Y. Times, Jan. 7, 1983, at A25, col. 1; N.Y. Times, Jan. 18, 1983, at A26, col. 4; Wicker, *In the Nation: Attack on the Fourth*, N.Y. Times, Mar. 4, 1983, at A31, col.1 [hereinafter cited as Wicker, pt. 1]; Wicker, *In the Nation: Attack on the Fourth*, N.Y. Times, Mar. 8, 1983, at A31, col. 1 [hereinafter cited as Wicker, pt. 2].

43. The Burger Court has significantly limited the scope of the exclusionary rule. See, e.g., *United States v. Havens*, 446 U.S. 620 (1980) (defendant's statements on cross-examination can be

records, police officials frequently "overcharge" an accused individual,⁴⁴ and that prosecutors frequently reduce such charges during the plea bargaining process.⁴⁵ But Professor Zeisel does not discuss reductions of charges or dismissals that result from the prosecutor determining that evidence was illegally seized, and would thus be excluded at trial.⁴⁶ Had Professor Zeisel and the Vera Institute explored the deterioration of felony arrests caused by probable exclusion, the study might have provided a valuable supplement to recent findings that exclusion of evidence rarely changes the outcome of a criminal trial.⁴⁷

Another issue which Professor Zeisel should have explored but did not is the fall in America's crime rate during the 1980's.⁴⁸ Given the fact that he waited so long to publish his results, Professor Zeisel should have at least attempted to explain the demonstrable drop in crime and discuss whether it had any bearing on his view that police are unable to reduce significantly our crime rate. Law enforcement officials might argue that the falling crime rate is a result of better police practices and more com-

impeached by government with illegally obtained evidence that is inadmissible as substantive evidence of guilt); *United States v. Calandra*, 414 U.S. 338 (1977) (grand jury witness may not refuse to answer questions because questions are based on evidence obtained from unlawful search and seizure); C. WHITEBREAD, *CRIMINAL PROCEDURE* § 2.03, at 18-30 (1980) (discussing diminishing scope of exclusionary rule); Burkoff, *Exclusionary Rules*, in 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 719-23 (1983) (summarizing criticism of exclusionary rule's effectiveness as deterrent to illegal police conduct and protector of judicial integrity). The best summary of the Burger Court's current view of the exclusionary rule is Chief Justice Burger's dissent in *Bivens*:

[T]he exclusionary rule does not ineluctably flow from a desire to insure that government plays the "game" according to the rules. If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule. Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government.

Bivens v. Six Unknown Named Agents, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting).

The Court has also affirmatively sought arguments as to whether it should create a good faith exception to the exclusionary rule. Wicker, pt. 2, *supra* note 42; Wicker, pt. 1, *supra* note 42; *N.Y. Times*, Jan. 21, 1983, at 26, col. 1; *see also Illinois v. Gates*, 103 S. Ct. 2317 (1983) (Court expressed desire to reach good faith exception issue).

44. Pp. 195-96.

45. Pp. 195-96.

46. *See* pp. 21-25.

47. *See* NAT'L INST. OF JUSTICE, *THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA* (1982); COMPTROLLER GEN. OF THE UNITED STATES, REP. NO. GGD79-45, *IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS* (1979); K. BROSI, *A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING* 18-20 (1979); *see also* C. SILBERMAN, *supra* note 8, at 263-65 (except for drug cases and "victimless crimes," few convictions are lost due to the exclusionary rule). *But see* Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 257 (1973) (exclusionary rule permits many defendants with criminal records to escape punishment). Most research on the effects of the exclusionary rule has focused more on its deterrent effect on police behavior than on its effect on prosecutorial decisions. *See* Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POL. Q. 57 (1977); Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 JUDICATURE 398 (1979); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

48. 1982 FBI UNIFORM CRIME REPORTS, *CRIME IN THE UNITED STATES* 43 Table 2 (1982).

Law Enforcement

munity participation in attempting to halt crime.⁴⁹ But the decline in the crime rate may instead be a result of a change in public attitude toward more vindictive, more retributivist criminal justice. Or perhaps the falling crime rate stems from the maturing of the baby boom generation. As Professor Zeisel notes, it has long been known that young men commit most crimes.⁵⁰

Obviously, Professor Zeisel must attribute the drop in crime to factors other than law enforcement; otherwise, he would contradict the central theme of his book. Whatever the real reasons for the decline, the reader is entitled to know what Professor Zeisel thinks, especially since the decline in crime occurred at a point when one would have expected an increase: During the late 1970's and early 1980's, the economic and environmental conditions in this country were precisely those which, according to Professor Zeisel, contribute to increased crime. One hopes that Professor Zeisel and others will analyze and discuss the falling crime rate soon.

Professor Zeisel also fails to mention that the discretion in the criminal justice system which results in charge reductions and dismissals is necessary to achieve equity in the treatment of arrestees. The case histories examined in *The Limits of Law Enforcement* certainly indicate the appeal of such discretion.⁵¹ For example, an accused with a record of continuous criminal assaults on strangers and a first-time offender who assaults a passing acquaintance in a barroom brawl present two quite different cases.⁵² And according to both Professor Zeisel and the Vera Institute, the first-time offender would in all likelihood have his charges dismissed.⁵³ In contrast, "[w]here crimes are serious, evidence is strong, and victims are willing to prosecute, felons with previous criminal histories ended up with relatively heavy sentences."⁵⁴ Professor Zeisel apparently believes that this differential treatment of individuals based on the nature of their prior records is healthy.⁵⁵ One wonders why Professor Zeisel was not more

49. E.g., Hollingsworth, *INCERT, The Citizen/Police Connection*, FBI L. ENFORCEMENT BULL. Sept. 1982, at 12 *passim*.

50. Pp. 77-80.

51. E.g., pp. 150-51. Compare case 6 (on police overcharges of aggravated assault, harassment and trespass, defendant receives 15 days on sole conviction of harassment) with case 7 (after refusing plea bargain of maximum 4 year sentence on gun and narcotics charges, defendant receives 4 years on sole conviction for narcotics charge).

52. See VERA INST., *supra* note 6, at 136-37.

53. P. 113, at Fig. 29; VERA INST., *supra* note 6, at 135-37.

54. VERA INST., *supra* note 6, at 134.

55. Professor Zeisel notes:

The question is whether [nonevidentiary considerations such as the minor character of the offense or the defendant's lack of counsel] ought to affect the [prosecutor's] decision to dismiss rather than be taken up by the sentencing judge after conviction. If we were to conclude that the prosecutor ought to consider such nonevidentiary circumstances, the second question arises: Whether these considerations should remain in his unfettered discretion or be controlled at least by internal guidelines

forceful in discussing the broader implications of this discretion. If prosecutorial discretion in the system results in a sense of rough justice being done, then attempts to eliminate other forms of discretion in the system must be considered.

IV.

A more important problem with *The Limits of Law Enforcement* is that it offers few concrete suggestions as to what society can do to combat crime.⁵⁶ Given Professor Zeisel's conclusion that law enforcement alone is helpless to reduce crime, one would expect that he would present some concrete proposals for combating crime. But Professor Zeisel's suggestions, such as they are, are vague and sometimes even flippant.

For example, he writes in a footnote that perhaps Hank Aaron and Willie Mays should be asked to become school principals as part of the educational reform necessary to combat crime.⁵⁷ Baseball players may be good role models for some children, but they do not have the managerial or teaching skills necessary to run a school. While advocating educational reform, Professor Zeisel unwittingly trivializes the importance of the educational system and its leaders.

Professor Zeisel's vague suggestions about educational reform are useful, however, because they highlight the need for greater interdisciplinary research and for coordinated proposals to solve the problems of juvenile delinquency and adult criminal conduct. Because educational reform is supposedly a major concern of the Reagan Administration,⁵⁸ it may be a good time for Professor Zeisel and others who share his views to offer some specific proposals to eliminate crime. Otherwise, they run the risk of being labeled "all talk and no action."

One interesting point which Professor Zeisel makes regarding crime prevention is that better lighting reduces theft.⁵⁹ What Professor Zeisel ignores, however, is that local law enforcement agencies often led the efforts for better lighting, as well as those for neighborhood watch associations and improved security devices.⁶⁰ If these efforts by law enforcement

Thus, there is some leeway for more vigorous prosecution, although the costs of obtaining convictions in these cases are likely to exceed those of the average case.

P. 28.

56. Pp. 83-88.

57. P. 88 n.80.

58. President's Remarks at the National Association of Secondary School Principals 68th Annual Convention and Exhibit in Las Vegas, Nevada, 20 WEEKLY COMP. PRES. DOC. 182, 183 (Feb. 7, 1984).

59. P. 85.

60. A. REISS, *THE POLICE AND THE PUBLIC* (1971); *Another Way to Fight Crime*, N.Y. Times, Aug. 8, 1982, § 11 (N.J. Weekly), at 26 (discussing effectiveness of crime prevention programs in Morris County, New Jersey).

agencies to prevent burglary and other theft-related crimes have been effective, Professor Zeisel should at least give credit where credit is due. Of course, to do so would call into question Professor Zeisel's main point that law enforcement cannot have a significant impact on crime.

Professor Zeisel also fails to acknowledge that better training of law enforcement officials can have a significant impact on their handling and obtaining of evidence. The push for better training began in the 1960's when the Supreme Court called national attention to the dramatic disparity between the conduct of state and local police and the constitutional ideal.⁶¹ High on the agenda of the Warren Court was controlling the conduct of what they perceived as poorly educated, undertrained, unprofessional police. The law enforcement community has responded with a concerted effort to upgrade the training, education, pay, and professionalism of state and local police.⁶²

Better-trained police can gather stronger evidence, improve community relations, and fight crime more effectively. Even if law enforcement has only a limited effect on crime, more sophisticated training can substantially expand law enforcement's limits.

Another factor that Professor Zeisel should have explored is the need for courts to make clear the rules governing police conduct. For example, the clarity of the *Miranda* rules allowed police to use the warnings routinely soon after the decision itself,⁶³ and today few cases are lost as a result of noncompliance with *Miranda*.

By contrast, the unpredictability of case-by-case decisions makes it difficult for police to determine the proper standards for their conduct and leads to cases being lost because police do not know what they are allowed to do in a given situation.⁶⁴ The appropriate geographic scope of warrant-

61. See, e.g., decisions establishing exclusionary rule in state and federal criminal proceedings. *Gilbert v. California*, 388 U.S. 263 (1967) (identifications); *United States v. Wade*, 388 U.S. 218 (1967) (lineups); *Miranda v. Arizona*, 384 U.S. 436 (1966) (confessions); *Mapp v. Ohio*, 367 U.S. 643 (1961) (searches and seizures).

62. Among the most successful educational efforts has been the Federal Bureau of Investigation's National Academy Program. Each year, some 1200 state and local officers attend a three-month program at the FBI's college campus in Quantico, Virginia. The officers take classes in law, psychology, behavioral science, business, forensic science, weapons training, and education. The program includes speakers and teachers from outside law enforcement in an effort to challenge stereotyped thinking. Residential living offers extensive opportunities for informal discussion while freeing the students from the pressures that beset many on-duty, intradepartmental training programs. The program is designed not only to improve the effectiveness of each student, but also to benefit his or her department as a whole when the graduate returns to work. The National Academy also serves as a model for states establishing their own educational and training programs. See U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, POSTGRADUATE EVALUATION OF THE F.B.I. NATIONAL ACADEMY (1984); U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, TRAINING NEEDS ASSESSMENT F.B.I. NATIONAL ACADEMY (1984).

63. See LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 320-33 (1982).

64. See Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger*

less searches incident to a lawful arrest provides a classic example of the need for clear rules to guide the police.⁶⁵ From 1950 until 1969, the Supreme Court, while suggesting a geographic limitation on such searches, refused to articulate a guiding principle as to what the limit was.⁶⁶ Instead, each case was to be decided on its own facts long after the warrantless search occurred, thereby encouraging defense attorneys to claim that the search in their particular case was beyond the permissible scope. Because the police and lower courts had no reliable way to know what was permissible, the courts wasted time on needless litigation and the police wasted effort in pressing charges that later proved to have no admissible evidentiary support.

In 1969, the Supreme Court finally defined the permissible geographic scope of warrantless searches incident to lawful arrest: When someone is arrested, the police may search the arrestee and areas into which he might reach to grab a weapon or destroy evidence.⁶⁷ Like all rules, the "wing-span" rule has fuzzy margins, but any police officer now knows that if you arrest a person in his front hall you may not search his attic incident to that arrest. When the police know more clearly what they may and may not do, the state will lose fewer cases due to police errors. Professor Zeisel seems to have ignored how clear-cut rules can help police perform in a manner which is likely to lead to stronger cases.

In addition to better police training and rule-oriented decisionmaking, Professor Zeisel's work also suggests that a crucial step in reducing crime is rethinking how we deal with violence between individuals who know one another, especially those within the family.⁶⁸ Both Professor Zeisel

Courts' Competing Ideologies, 72 GEO. L.J. 185, 243-44 (1983); LaFave, *supra* note 63, at 321-23 (1982); Note, *Entrapment Through Unsuspecting Middlemen*, 95 HARV. L. REV. 1122, 1131-40 (1982); see also Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 813-14 (1970) (due process requires "uniform, usable and regular" rules of law, but judicial system cannot control police practices at the lowest levels).

65. Another good example is the confusion relating to automobile searches. Compare *Robbins v. California*, 453 U.S. 420 (1981) (warrantless search of closed container in car impermissible) and *Arkansas v. Sanders*, 442 U.S. 753 (1979) (warrantless search of personal luggage in car impermissible) with *United States v. Ross*, 456 U.S. 798 (1982) (warrantless search of passenger compartment and containers permissible, if probable cause exists with respect to concealment of contraband) and *New York v. Belton*, 453 U.S. 454 (1981) (warrantless search of jacket and closed container in passenger compartment of car, contemporaneous with custodial arrest, permissible). See C. WHITEBREAD, *supra* note 43, § 7.01-.06, at 141-52; *id.*, § 7.02-.04, at 29-35 (Supp. 1982); *Katz*, *United States v. Ross: Evolving Standards for Warrantless Searches*, 74 J. CRIM. L. & CRIMINOLOGY 172 (1983); Moylan, *The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987 (1976); Note, *Drawing Lines Around the Fourth Amendment: Robbins v. California and New York v. Belton*, 10 HOFSTRA L. REV. 483 (1982); see also Arenella, *supra* note 64, at 234 n.259 (Burger Court willing to promote ad hoc balancing test to judge the reasonableness of police investigations).

66. See *Chimel v. California*, 395 U.S. 752 (1969) (overruling *United States v. Rabinowitz*, 339 U.S. 56 (1950)).

67. *Chimel v. California*, 395 U.S. at 768.

68. As the Vera Institute's study explains:

and the Vera study demonstrate that, when a prior relationship exists between victim and assailant, the assailant sometimes received lesser punishment, but often received none at all.⁶⁹ While some of this disparity arises because victims who know their assailants frequently drop the charges upon resolving the dispute which led to the arrest,⁷⁰ it is also clear that the criminal justice system treats disputes between those who know each other differently than it treats disputes between strangers.⁷¹ For example, police are often less likely to arrest someone when they are responding to a domestic disturbance, because in some instances they are able, at least temporarily, to resolve the situation which led to the criminal conduct.⁷² In other cases, the police are unwilling to make an arrest because they feel that the complainant will not follow through with prosecution or because they do not view a domestic dispute as sufficiently serious to warrant an arrest. In recent years, many have criticized the police for failing to intervene and take domestic violence seriously.⁷³

Professor Zeisel should have discussed whether the criminal justice system's differential treatment of prior-relationship crimes is the proper response from a policy standpoint. We should, for example, attempt to determine whether individuals who commit crimes against people they know

Our penal laws make no mention of the prior relationship factor. This study does not purport to resolve the question of whether the high fallout of personal relationship crimes is to society's good or detriment; nor does it indicate what happens after the victim and defendant leave the courthouse and go home. Do prior relationship assaults return to the courts as prior relationship homicides, or do the individuals live happily ever after? How often do assaults on family members within the home escalate to assaults on strangers in the streets? Clearly there is a need for research in these areas.

VERA INST., *supra* note 6, at 136.

69. *See id.* at 28; p. 114.

70. Pp. 114-15.

71. *See* Buchanan & Hankins, *Family Disturbance Intervention Program*, FBI L. ENFORCEMENT BULL., Nov. 1983, at 10; *see also* Bruno v. Codd, 4 FAM. L. REP. 3095 (1978) (12 battered wives brought suit against the police for failing to arrest men when they beat their wives), 67 A.D.2d 582, 407 N.Y.S.2d 165 (1978) (dismissing suits), *aff'd on other grounds*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

72. *See* Sorichetti v. City of New York, 95 Misc. 2d 451, 408 N.Y.S.2d 219 (1978), *aff'd*, 417 N.Y.S.2d 202 (N.Y. App. Div. 1979); *see also* Loving & Quirk, *Spouse Abuse—The Need for New Law Enforcement Responses*, FBI L. ENFORCEMENT BULL., Dec. 1982, at 10-11 (describing one police force's rejection of crisis intervention approach to spouse abuse, which emphasized reconciliation and arrest avoidance). The authors make the interesting point that some law enforcement officers may be reluctant to respond to domestic disputes at all, given the "physical danger these calls pose for all police officers." *Id.* at 10.

73. *See* C. FLAMMANG, *THE POLICE AND THE UNDERPROTECTED CHILD* (1970); Field & Field, *Marital Violence and the Criminal Process: Neither Justice Nor Peace*, 47 SOC. SERV. REV. 221, 226-30 (1973); Parnas, *The Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914, 916-22, 940-42. *But see* Buchanan & Hankins, *supra* note 71 (describing Washington D.C. police force's crisis intervention program, which has reduced assaults on trained officers and improved police attitudes toward intervening in domestic situations).

Interestingly, in cases where a victim has a prior relationship with the perpetrator, it is frequently easy for the police to make an arrest. Generally, the victim will know where the assailant lives, or will at least be able to make a positive identification of the assailant. Of course, although it is easy to obtain an arrest, it is frequently difficult to obtain a conviction on any charge.

also commit crimes against strangers.⁷⁴ One might suppose that a person who steals from his grandmother or his neighbor would have no compunction about stealing from a stranger.⁷⁵ Perhaps treating prior-relationship cases more seriously would thereby also reduce crime between strangers. Professor Zeisel, however, does not seriously deal with this issue.⁷⁶

Perhaps the only effective way to reduce or eliminate crime is to rethink our attitude towards prior-relationship cases. Indeed, one could argue that violence between people involved in a relationship is more serious and more threatening than violence or criminal activity between strangers. Individuals in a close relationship, whether familial or otherwise, are in a relationship which requires trust and support. That trust and support is the very fabric of our social order. Those who violate that trust by engaging in crime or violence may damage our society more seriously than the stranger who knocks someone down and steals a purse or wallet. So long as we tolerate a great deal of criminal activity against us by those we know, we tacitly approve the behavior they engage in and thereby approve the same sort of behavior towards strangers. Furthermore, numerous studies have indicated that children who come from homes where there has been abuse or violence often become abusive and violent parents.⁷⁷ It would not be surprising to learn that these children also become abusive and violent toward strangers and everyone else.

Perhaps we should start treating prior-relationship cases more seriously than we currently do, given that the Vera study indicates that prior-relationship assaults generally involve more serious injuries.⁷⁸ In addition, such assaults more frequently involve the use of weapons than do assault cases involving strangers.⁷⁹ In light of these facts, it would be appropriate for law enforcement officials to treat prior-relationship cases as seriously as other cases. In conjunction with this change in official attitude, law

74. Professor Zeisel does recognize that arrests and convictions refer to people, and do not necessarily correlate to reported crimes which relate to events. In other words, a person may be arrested and convicted for one crime, yet be responsible for other reported crimes. P. 17.

75. Of course, certain crimes done in "the heat of passion" generally occur only between people in some sort of romantic or familial relationship. Cf. W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 76, at 575-76 (1972) (in adultery cases, most jurisdictions classify the intentional killing of an adulterous spouse as voluntary manslaughter).

76. The Vera Institute's book, in contrast, concludes that, by processing interpersonal disputes, the criminal justice system has less time to deal decisively with "real" felons. VERA INST., *supra* note 6, at xxv.

77. See L. PELTON, THE MYTH OF CLASSLESSNESS—CHILD ABUSE AND NEGLECT 20 (1978); Kempe, *The Battered Child Syndrome*, 181 J. A.M.A. 18-19 (1962); Steele & Pollock, *A Psychiatric Study of Parents Who Abuse Infants and Small Children*, in THE BATTERED CHILD 103 (R. Helfer & C. Kempe eds. 1968). Greater police intervention here should lead to fewer future cases, in addition to achieving the primary goal of preventing current child abuse and neglect. *But see* Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975) (arguing for less state intervention in the family).

78. VERA INST., *supra* note 6, at 29-30.

79. *Id.* at 30-31.

Law Enforcement

enforcement officials could begin to direct public attention toward the seriousness of prior-relationship cases, and toward the need for cooperation by witnesses and complainants in prosecuting individuals who perpetrate crimes upon people they know. This program might be a first step toward overcoming the violence rampant in our homes, our families, and our society in general. A program of this sort might also eliminate some of the public outcry about lenient judges who coddle criminals.⁸⁰ Considering the number of prior-relationship cases, the real coddlers of criminals are the victims and our society for tolerating so much criminal activity among people who know each other.

Rethinking how we handle prior-relationship crimes is just one way in which law enforcement can have an effect on crime rates in this country. Better police training and greater clarity in procedural rules may also produce a demonstrable increase in convictions. This is not to say that Professor Zeisel is incorrect in directing attention to the causes of criminal activity. Undoubtedly our real hope for eradicating criminal activity lies with eradicating the causes of crime. But in negating the ability of law enforcement to reduce crime significantly, Professor Zeisel overstates his case.

80. See TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 3 (1976); E. VAN DEN HAAG, PUNISHING CRIMINALS 158-66 (1975).

