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Colloquy

Mr. Wiseman

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Ms. Rosen

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Professor Reiss

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Mr. Wiseman, Professor Uviller, Ms. Rosen, Professor Zeisel, Professor Reiss, Mr. Washington, Mr/ Carrington, Ms. Collins, Professor Tonry, and Mr. Hishta

COLLOQUY*

MR. WISEMAN: Members of the panel, although each question will be directed to a specific individual, we hope that each of you will feel free to comment whenever you wish.

My question is for Professor Uviller. The concept of deterrence has pervaded this Symposium. You have questioned the deterrent value of the exclusionary rule, which is a rule that ostensibly was designed to deter violations of the fourth amendment, not merely to deter criminal conduct. How would you respond to the criticism that the *Williams* good faith exception encourages law enforcement administrators to avoid educating police officers about fourth amendment requirements so the officers may violate these standards in ignorance and, therefore, in good faith?

PROFESSOR UVILLER: The Fifth Circuit anticipated that criticism, I think, by painstakingly pointing out that "good faith" means neither subjective good purposes nor a personally perceived sense of propriety. Good faith turns on a reasonable basis standard and that must begin with a sophisticated police officer who is trained, educated, and knowledgeable—not one whose personal moral code understands the rights of suspects and ordinary citizens, but one who is trained and experienced in the area of legal restraints. Thus, when the courts say "objectively based good faith" or "well founded and reasonable good faith," I think they suggest a higher obligation for police departments to ensure that their police officers actually understand what the courts think a reasonable police officer *should* understand.

MR. WISEMAN: How do you expect the courts to issue concrete standards under this reasonableness approach when they so far have had so much trouble doing that under fourth amendment substantive law?

PROFESSOR UVILLER: I think that they are embarking on an extremely difficult journey. If anything, the complexity of the task is compounded by the judge's duty to project himself into the mind

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* After their presentations, the Symposium participants were questioned by a five-member student panel. The panelists were: Tom Wiseman, *Vanderbilt Law Review*; Marcia Rosen, Women Law Students Association; Kevin Hishta, *Vanderbilt Journal of Transnational Law*; Wilbert Washington, Black American Law Students Association; and Pat Collins, Vanderbilt Legal Aid. The following is an edited account of the question-and-answer session.

of an individual police officer and determine what that officer should have known, should have recognized, or should have heen aware of. I do not think that the good faith standard is everything it purports to be. Since the reasonableness standard is so flexible and ad hoc, police never know from one case to the next what restraints will be placed on their behavior. On the other hand, judges must apply an after-the-fact determination of where the community's tolerance ends. It may well be that we cannot refine the notion of police legality beyond the abstract expectation that police officers will share the community sense of appropriate restraint. Indeed, I really think that has been the experience with the exclusionary rule.

Ms. ROSEN: Professor Zeisel, would you respond to Mr. Carrington's suggestion that increasing the cost of crime correspondingly will reduce the gain realized by criminals?

PROFESSOR ZEISEL: We are ruled by economists and I hope that their theories are correct—otherwise, we are in a lot of trouble. Not even businessmen are moved solely on the basis of cost-benefit analyses, and what little I know about criminals suggests that they are not either. In the 1930's I was imprisoned in Austria for two months during a minor civil war—nothing very serious—and I was confined with a burglar who had just come to the end of his prison term. I asked him what he planned to do after his release, and he said: "Are you kidding? I am a burglar, and I have a kid at home who takes piano lessons." Ever since then, I have not believed that many criminals make cost-benefit analyses. We may weigh our alternatives when we consider whether to pay parking tickets, but robbers and burglars do not do so in their professions.

In the last few years a test was conducted that produced some most disconcerting results. Researchers designed the test to determine whether giving ex-convicts more than twenty dollars and an old suit when they left prison would delay their return to crime. A randomly selected group of ex-convicts received six months of unemployment payments, while another group received only a small amount of money when they were released. During the next year, the rearrest rate for *both* groups was forty-nine percent. This study directly tested the deterrent value of cost-benefit based programs. Thus, although I agree that Mr. Carrington's suggestion might work in some cases, I doubt that it would affect serious crime.

MR. HISHTA: Professor Reiss, crime statistics increasingly suggest that crime is primarily a young man's game. My first question, therefore, is whether a decrease in the number of youths after the

baby boom generation will lead to a decrease in juvenile crime? Second, you pointed out that juvenile crime often occurs in groups, and many people believe that juvenile crime statistics often are overstated because of this group factor. For example, if a single adult commits one burglary, and four teenagers commit another, crime statistics may suggest inaccurately suggest that youths commit eighty percent of all burglaries. Is this the case or does the underreporting of juvenile crime balance out this aberration?

PROFESSOR REISS: Both your questions lead to all sorts of interesting observations about the relationship between the prevalence of offenders in a population and the individual rates of offending. The two Wolfgang cohorts studies would argue that the proportion of young people who commit at least one offense did not change in the fifteen years between the two studies. If these studies are accurate, the prevalence rate of offenders in this society has not changed. Thus, if the crime rate is to rise, it can do so only because of an increase in the rate of individual offending. Now, when we study the current crime rate, we do not know how much of that rate results from one individual committing several crimes. Furthermore, our chances of arresting that individual may be only one in ten, and if he commits twenty crimes a year, the odds are that he will be arrested only twice. Thus, how one defines the crime rate is extremely important.

A related question is: What do we do with the accused once we have him? We know that a comparatively small number of people commit a substantial amount of all criminal acts, and we also know that youths commit a high percentage of those acts. I do not know whether we should lock juveniles up or not, but clearly we have a problem if we are talking about youth sanctions for basically "adult" criminals. Moreover, society should not treat vandalism, which is a crime that frequently is committed by youthful offenders, as a nonserious crime. We also are mistaken if we think that we can make police officers behave differently by punishing them or denying them a conviction. I will never forget the first *Miranda* case I heard on tape in New York City. A police officer was interrogating a suspect who demanded to speak to his lawyer. The policeman responded, "Shut up, I've got to give you the *Miranda* warning." After the police officer delivered the warning, the suspect again asked to talk to his lawyer and refused to answer any questions. The officer finally shouted, "Shut up, you are not going to see your lawyer!" The policeman clearly did not *want* to send the suspect to court. He knew the accused was a hood, and he wanted

to squeeze out of him all the information he could. The point is that if the police want to try a particular suspect, then the *Miranda* rule serves a deterrent purpose; if they do not want to try him, however, the rule is irrelevant. The same principle applies to the exclusionary rule and all the others: they do not deter the police from doing what they have no intention of doing in the first place.

MR. WASHINGTON: Mr. Carrington, Judge Bazelon and Professor Zeisel suggest that increasing the civil morality of America's inner city youth would be the most sensible way to attempt to prevent crime. Do you believe that more arrests and harsher sentences—including capital punishment—would serve as more effective deterrents to crime than would their proposal?

MR. CARRINGTON: I do not think that the two approaches are mutually exclusive. Obviously, improving the living conditions of the crime-prone age group of ghetto youth would significantly reduce crime. Just because a measured deterrent—whether it be a harsher sentence or the death penalty—does not deter *all* criminals, however, does not mean that it will not deter *any* criminals. We are in the unfortunate position of having to prove a negative, since we cannot determine how many criminals' acts were deterred by those sanctions. I think that we should work at the problem from both ends. Improve the living conditions—I agree with that approach 100 percent. But let's also try to determine whether the Wilson and Van den Haag cost-gain ratios are effective deterrents. No ready answer exists, and I do not think anybody here can give you one. Thus, we ought to try every possible alternative to improve the situation.

MS. COLLINS: Professor Tonry, since in a determinant system—one with the complex sentencing guidelines to which you alluded earlier—questions of culpability and greater responsibility are considered almost solely at the sentencing stage, do you think that criminal defendants should enjoy some or all of the constitutional safeguards usually afforded only at trial at the sentencing stage? If so, what impact would such a process have on our already overburdened judicial system?

PROFESSOR TONRY: At present, our system of criminal law administration has a considerable Rube Goldberg quality to it. Once the system decides to imprison a particular defendant—if we except from the generalization the couple of states that recently changed their laws in fundamental respects—the judge naturally asks himself what will happen when this man goes to prison. The

answer is that the convicted offender will sit in prison for as long as the parole board wants him to. The judge must next consider whether any constraints exist on the parole board's decisions on when to release people from prison. In a third of the statutory sentences the judge can specify that the defendant *must* remain imprisoned for up to one third or one half of the time to which he is sentenced. The question then becomes how long the judge wants a particular defendant to stay in prison. He knows that a nine-year sentence will mean minimum parole eligibility after three years, and that the parole board releases prisoners on their first eligibility date in eighty-five percent of the cases. Therefore, judges purposefully inflate sentences to discount for their knowledge that the parole board decreases the sentences which a judge imposes.

This Rube Goldberg structure renders relatively unimportant the considerations, evidentiary rules, and procedural requirements affecting judicial sentencing. If we abolish the system of parole release, if we paid more attention to the substantive criminal law—in other words, the questions of grading and responsibility—and if we changed criminal codes in accordance with suggestions made by national commissions in both Canada and England, then we would not need at the sentencing stage all those prophylactic and evidentiary rules that presently apply at the criminal court stage. Instead, judges would decide only whether a crime had been committed, and they they would look to the applicable statute to determine the maximum sentence. If the judge believed the case involved unusual circumstances, he could—subject to appeal—depart from the statutory term and state his reasons for imposing a higher or lower sentence. The sentencing structure presently is changing in this direction. If these sorts of developments continue to appear and eventually appear more or less in whole, we would not need to build into the sentencing system completely parallel sets of trial and sentencing rights.

I also would like to comment on the exclusionary rule. Many legislative actions are purely symbolic. For example, a legislature may pass a mandatory minimum sentence of three years for offense *X*, when many of the legislators know full well that such a mandatory minimum sentencing law often is not applied. Of course, this statutory minimum sentence may affect some marginal offenders who otherwise would not have gone to prison, but the people who would have gone to prison anyway still will. Perhaps even more significantly, the people who clearly would not have gone to prison still will not because one way or the other judges

and lawyers will see to it that they do not. Nevertheless, proponents of the mandatory minimum sentencing bill believe the rhetoric that because crime is so immensely important, the legislature ought to do *something* about it.

Proponents of the exclusionary rule offer the same sort of rhetorical justification, since the interests implicated in the intrusion of the private space of citizens are also immensely important. And yet the exclusionary rule does not serve the deterrent purpose for which it was designed. My question then becomes whether it matters if the mandatory minimum sentence laws are strictly applied. It is important as a matter of rhetoric, of course, that they exist. Similarly, as a matter of declaring our attachment to the kind of interests that animate and motivate the exclusionary rule, it is important to have it.

PROFESSOR UVILLER: It seems that Ms. Collins' question can be restated as follows: "Since the important decisions about what happens to a criminal offender are generally made at the sentencing or parole stages, should the constitutional protections usually lavished upon defendant at trial be accorded to them at that important stage as well?" In many ways our criminal justice system is a system of controlled paradoxes. We frequently find ourselves doing precisely opposite things at two different stages, thinking that in the mix of contrary principles justice somehow will prevail. For example, one of the great and fundamental rights at trial is the defendant's sixth amendment right to a public forum. The accusatory process plays a very important role in the criminal process, particularly in those states that still have the old grand jury system in which the grand jury proceedings are secret. We like to think that our system of criminal justice works because it is an adversary system, and that the truth will emerge in the clash of two opposing parties. The adversarial approach often is contrasted with the inquisitorial continental system of criminal justice, and in the United States we adhere to the fundamental principle that justice can be achieved best through the adversarial system. Yet we tolerate *Miranda* warnings, which are essentially an inquisitorial procedure, at the time of arrest before any accusatory instrument takes effect. Thus, our system is really both inquisitorial at a very important stage and accusatory or adversarial in other stages. We are both secret and public, and we are also "rule-laden" in our trial process and discretionary in the sentencing and release process. I believe that discretion is as important a part of our notion of justice as is due process. I am thus very sensitive about sentencing

guidelines, mandatory minimums, and controls on guilty plea bargaining. I am weary of efforts to reduce the discretion of people whom I believe to be, for the most part, well-meaning people concerned with a just outcome—people like sentencing judges and plea bargaining prosecutors. Such an approach would turn our criminal justice system from what is now a nice, paradoxical mix of contrary principles into a monolithic system.

PROFESSOR REISS: To argue about sentencing guidelines in the context of the exclusionary rule is like chasing your tail. Discretion is lodged earlier in the system—that is, if we completely eliminate jury trials—then a system emerges in which discretion will just get out of control. The trouble with the American system is that we allow pleas of guilt. If I really were interested in protecting defendants, I would forbid guilty pleas and place upon the state the entire burden of proving all its cases. Instead, we have an archaic doctrine permitting defendants to plead guilty and throw themselves upon the mercy of the sovereign.

I should also point out that comparing the question of arrest on probable cause and the requirement of proof beyond a reasonable doubt would get rid of a lot of cases. There is nothing wrong with a policeman making an arrest on probable cause; he does not have to justify the grounds for the arrest beyond a reasonable doubt, and he is not expected to. Thus, if we have a lot of falloff between arrest and conviction, the system is not working properly. The problem is that the states do not always prove their cases beyond a reasonable doubt. Prosecutors often force defendants to plead guilty in what amounts to a conspiracy between the defense and the state. In that kind of situation we get what we make.

PROFESSOR ZEISEL: Although the guilty plea does not exist, as such, in Europe, defendants are invited to say whether or not they are guilty. I can hear my friend Al Reiss when someone says they are guilty: "Don't tell me!"

MR. WISEMAN: Professor Uviller, I would like to pin you down on your response to Professor Tonry's comment on the exclusionary rule. If one respects the purpose and legitimacy of the fourth amendment and considers both the small number of cases in which the exclusionary rule actually serves to suppress evidence and the even smaller number of cases in which it generates an acquittal or dismissal of charges, is not the continued vitality of the rule a small price to pay for the protection of the public's fourth amendment guarantees?

PROFESSOR UVILLER: I do not know whether we can quantify

accurately the effects of the exclusionary rule on criminal prosecutions—that is, the extent to which the exclusionary rule deters police misconduct and affects the behavior of police officers and the conduct of an investigation. About the only thing I know is that the garbage that is handed out as fact in the field of economics is only slightly better than the garbage we lawyers band out with the help of econometrics. I do not think we know how to interpret these statistics you posit in any meaningful way and I really do not know what their effect might be.

Now, the lawyer's part of your question, Mr. Wiseman, is: "If we exclude evidence only in those cases in which abuses are flagrant and willful, then how are we ever going to teach law enforcement officers to respect the law?" First of all, I do not think that you can deter a law enforcement officer from engaging in violative conduct that is not flagrant and willful. I do not think we can possibly affect his behavior when he believes that his actions are proper. Furthermore, I agree with Anthony Amsterdam and those who suggest that police investigative conduct is probably not affected by the limitations consequently placed on evidence that they discover. For one thing, the case probably will not reach trial. Even if it does, the police officer simply is not thinking that far ahead when he is searching a paper bag found in a suspect's trunk. The way to affect the conduct of police officers is to punish them civilly—dock them pay, cut down their vacation, demote them, or inflict other such penalties. But we do not want to do that. We do not really want to deter police illegality to that extent because we fear that the imposition of an effective deterrent on police lawlessness would result in a totally inert police force. We fear an overly deterred police force even more than we do a lawless police force. Thus, we do not really want to exercise *full* deterrence. We simply want to counsel our police officers on proper investigative behavior.

We must keep in mind that police officers, first and foremost, are civil servants. Basically, they concern themselves with regulations—they want to know what conduct the department requires of them. Thus, because we have ingrained the requirements of the *Miranda* rule into police training manuals, into regulations, into police academies' curricula, and into the patrol cars, police behavior probably would not change a bit if we merely eliminated the exclusionary rule. Police officers, for the most part, will do what their chiefs tell them to do as long as the required conduct seems feasible, reasonable, involves no more than a reasonable effort, and does not threaten them in terms of their civil service mentality.

Now, I know for a fact that the exclusionary rule has had a positive effect on police behavior up until this summer. I was there in New York in 1959 and 1960 when not one police officer in a thousand knew what a search warrant was or knew what to do with one. Today, *every* police officer knows what a search warrant is and most of them get one most of the time. This development has occurred because of the exclusionary rule, but not because individual police officers are afraid that their evidence will not be admitted if—God forbid—their cases should have to go to trial. It has happened because police trainers and manual writers read the advance sheets and put into the police procedures the conduct necessary to comply with the requirements of the fourth amendment.

PROFESSOR REISS: They also know that the judge does not pay any attention; he just signs the warrant.

PROFESSOR ZEISEL: In the 2,000 felony arrests I referred to in my presentation we had roughly 800 dismissals. In not a single case did the prosecutor dismiss because of the exclusionary rule. But in about half a dozen cases the court excused a guilty plea because some doubt existed about the propriety of the seizure of certain evidence.

MS. ROSEN: Professor Zeisel, I would like you to comment on the potential benefits of increasing the public investment in the law enforcement system, rather than diverting those funds to deal with educational and social problems. One of the reasons we invest in a law enforcement system is to combat the public's fear of crime. Chief Justice Burger claims that this fear is permeating the fabric of American life. First, how would a gradual and long-term socialization program address the issue of public fear? Second, if you accept Professor Reiss' idea that lesser crimes are really the serious crimes, and if you supplement the enforcement of these lesser crimes, would not the public be better off?

PROFESSOR ZEISEL: I do not want to pursue the question of where to invest greater resources because I am afraid I would then have to tell you that the investment would not bear fruit. But if you are concerned about the psychology, I would say let Mr. Reiss' thoughts, which are new to me, be more popularized. Then, if you are only concerned with the psychological effect, *tell* the public you invested the funds in law enforcement and instead actually give the money to more worthwhile social programs.

MS. ROSEN: What about the public fear?

PROFESSOR ZEISEL: The public fear is a special problem. The best answer I know is just to tell the kids not to be afraid. I have

lived in Chicago for thirty years, and many people have told me not to walk home alone. Somebody once told me I should not be afraid and I heeded his advice. Now, I always walk alone.

MR. HISHTA: Professor Reiss, you place a lot of emphasis on crimes against property. Do you favor a restitutionary form of sentencing in these cases? If so, how would you implement such a procedure?

PROFESSOR REISS: I do not think that you properly can consider any of the alternative sanctions by themselves. Briefly, restitution means penalizing a defendant in terms of either money or time. Once work becomes translatable into money, you then have the problems inherent in a system of fines, and it gets to be a very complicated issue. I certainly think that we ought to take much more seriously the question of alternative sanctions, but we must think of them as being related. We cannot simply create a single new sanction and call it "restitution." We must design a program that combines fines, service requirements, and so on into an integrated, packaged system.

MR. WASHINGTON: Mr. Carrington, you argue that the discontinuance of capital punishment between the years 1967 and 1976 and a corresponding doubling of the murder rate illustrates the deterrent effect of capital punishment. Most criminologists, however, agree that the vast majority of homicides are crimes of passion or impulse that involve no real degree of forethought. You favor a mandatory imposition of the death sentence for premeditated murder, yet you concede that no conclusive evidence supports the deterrent value of capital punishment. Moreover, a 1971 Los Angeles Police Department (L.A.P.D.) survey you rely upon to support your theory has been discredited in the courts because of its coercive nature. The remedy you support would apply to only a small percentage of people convicted of homicide, yet that remedy—capital punishment—is fraught with problems. For example, capital punishment is imposed disproportionately upon black convicts who have killed white victims, whereas whites who have killed blacks rarely are given the death sentence. Given this and other problems that are attached to capital punishment, why do you support such an onerous penalty of little proven worth?

MR. CARRINGTON: Let me take your question one point at a time. The L.A.P.D. conducted its study by questioning ninety-nine people who had committed rather serious felonies—principally robbery—with either an inoperative weapon, an unloaded weapon, a toy weapon, or no weapon. When asked why they carried inoper-

ative weapons, fifty percent of them cited their fear of the death penalty. Now, I think this study is very persuasive. Some might argue that the prisoners told the police what they thought the police wanted to hear. That the convicts carried inoperative weapons, however, was not a choice the police infiuenced. I think tlie study's weakness is the relatively small number of convicts questioned.

Regarding tlie question of tlie disproportionate number of blacks on death row, I admit that courts often impose tlie death penalty arbitrarily and discriminatorily. The answer, however, is not to do away with tlie deatli penalty; tlie answer is to do everything possible in an imperfect system to ensure that courts apply tlie death penalty in a nondiscriminatory fashion. I think tlie Supreme Court tried to say precisely tliat in the *Furman* decision. The states have tried to follow this case—stressing the imperfections of a liuman system—in tlie *Gregg* line of decisions, and these decisions have been upheld.

I tliink you have got to remember the victims, too, Mr. Washington. In the last study I read blacks constituted roughly twelve percent of the population but fifty-two percent of tlie homicide victims. When you include the victims factor in tlie disproportionate death row figure, tlie statistic becomes easier to understand. The principal crime victim is a young black male who lives in tlie ghetto. The principal potential criminal is the same type of person. A lot of people wlio oppose tlie dealtli penalty fail to take tliese facts into consideraton.

You have made a very eloquent argument against the death penalty. It is my simple belief, however, tliat—setting aside crimes of passion—if we could save even one life by executing an already convicted murderer, tlien we should do it. Conceding, as I must, that I cannot prove conclusively tliat tlie deatli penalty deters, let us consider tlie case of a liorrible murderer—for example, Cliarles Manson or Richard Speck. If you execute tliat person, and it does not deter anybody, tlien all you liave done is execute an obviously dangerous man. If it *does* deter, on the other hand, tlien you save some lives—lives we never can prove we saved. The bottom line, then, is whose interests do you favor: tlie lives of murderers, or the lives of potential victims?

PROFESSOR ZEISEL: I tliink I can appropriately refer you to the December, 1981, issue of the *Harvard Law Review*, in whicli the answers to Mr. Washington's questions can be found. Those answers are not the ones tliat Mr. Carrington suggests.

Ms. COLLINS: Professor Tonry, as you know, people often criti-

cize determinant sentencing systems because tbey remove discretion from botb tbe judiciary and the administrative bodies like parole boards and departments of correction. They argue tliat tlie prosecutor becomes the sole repository of discretion in sucli a system because he has tlie power to plea bargain. Has this been a problem in determinant sentencing states? If so, wliat remedy would you propose?

MR. TONRY: It has been widely hypothesized tliat many of tlie new sentencing schemes tliat establish relatively specific sentencing criteria are manipulable in exactly tlie way you describe. I certainly would agree witli tliat and believe that it is likely to liappen. Apparently, bowever, this development has yet to emerge. Tlie primary determinant of how the principal actors involved in a particular court—the judge, tlie lawyers, the probation officer—respond to a change in the law is best predicted by examining how those same people conducted trials before the law clianged. I know of an interesting evaluation of tbe impact of tbe California determinant sentencing law. Tlie study examined plea bargaining patterns in three California counties using participant observation methods, in which tlie researcher sits in court during tbe negotiating sessions. The researchers discovered tliat in tliose jurisdictions in which sentencing liad been a judge dominated process *before* tlie determinant sentencing took effect, tlie process *remained* judge dominated. The judges typically would bear the discussion by the two lawyers for six or seven minutes and would tlien say to tlie prosecutor: "Well, this offense is worth about five years; you will liave to dismiss tlie firearms aggravating factor," and the prosecutor would do just that.

In a different county prosecutors traditionally had dominated the sentence negotiation system. Judges served in almost an advisory role. Typically, the prosecutor would state wliat lie believed to be the appropriate sentence, and the defendant could explain either why this sentence was too long or wliat factors made liis case special. The judge's view would sometimes differ from the prosecutor's, but instead of telling the prosecutor to dismiss a certain count, he would merely suggest that he do so. Tlius, tlie prosecutor essentially had made the final decision prior to tlie determinant sentoncing law. In sum, there is an immense inertia in these things. I think, therefore, tliat my earlier fear of prosecutorial infiuence probably was exaggerated.

In closing, I would like to say that myths and realities is a nice theme for this Symposium. So many of the issues we liave dis-

cussed today require an answer to the threshold question of where you start from on, for example, the exclusionary rule, preventive detention, or the death penalty. On many of these questions, Frank Carrington's myth may be Hans Zeisel's reality, or Hans Zeisel's myth may be Frank Carrington's reality. All these things are primarily matters of symbolism. The issues, to the extent that they are debated empirically—as if the answer were out there to be found—are never going to be resolved definitively. The touchstone is policy orientation, not empiricism.