

BOOK REVIEWS

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

*Reviewed by Floyd Feeney**

Hans Zeisel has long been one of America's most perceptive and exacting writers about courts and justice. *The American Jury*, which he wrote with his University of Chicago colleague Harry Kalven, is easily the best American empirical work available on that subject.¹ *Delay in Court*, written with Kalven and Bernard Buchholz, closely examines the problem of delay, and even after twenty-five years is required reading for those interested in the problem.² A more general work, *Say It With Figures*, is widely known for its prescriptions on how to use statistics clearly and precisely.³

The Limits of Law Enforcement is in a sense a companion volume to *The American Jury*. It seeks to describe what happens to the vast majority of criminal cases that never reach the jury. Drawing on a statistical analysis of case records and interviews with key actors, Zeisel shows that for most felony crimes reported to the police no arrest was ever made, that for most arrests no conviction was secured, and for most convictions no prison sentence was imposed. In effect, this work is a continuation of the great crime surveys of the 1920's and 1930's. These projects, begun by Felix Frankfurter and Roscoe Pound in Cleveland in 1921, were the first to describe the practical workings of the whole criminal justice system.⁴ By far their most dramatic finding was the

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¹ H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966). A more recent English work with somewhat different conclusions is J. BALDWIN & M. McCONVILLE, *JURY TRIALS* (1982).

² H. KALVEN, H. ZEISEL & B. BUCHHOLZ, *DELAY IN THE COURT* (2d ed. 1978).

³ H. ZEISEL, *SAY IT WITH FIGURES* (1957).

⁴ CLEVELAND FOUNDATION, *CRIMINAL JUSTICE IN CLEVELAND* (F. Frankfurter & R. Pound eds. 1922).

“fall off” or “case mortality” as cases progressed from one stage to another. The significance of *The Limits of Law Enforcement* thus lies not in the discovery of this phenomenon, but rather in the demonstration that the phenomenon continues and in the analysis provided.

Zeisel wastes no time in indicating his views as to what conclusions should be drawn about case attrition. Finding that attrition rates in New York in the 1970's are essentially the same as those in the 1920's — and not all that different from those in Germany and Austria in the 1970's — he concludes that attrition is a normal fact of life and that there is relatively little that law enforcement can do to affect it or the crime rate in general. “The loss between arrest and conviction,” he says, “appears to be the unavoidable result of the judicial safeguards built into all Western law enforcement systems, requiring probable cause for arrest and proof beyond reasonable doubt for conviction.” (P. 25).

Zeisel considers three possible ways law enforcement might be able to reduce crime: (1) increasing arrests; (2) raising convictions; or (3) lengthening sentences.

Noting that prior efforts to increase arrests at the scene by decreasing response time have not proved successful and that detectives are able to solve relatively few crimes, Zeisel concludes that the possibilities of increasing arrests for serious crimes are slight, and speaks caustically about “armchair efforts” to prove otherwise (p. 3). Zeisel is only slightly more optimistic about whether dismissal of cases in which a suspect has been arrested might be reduced. Viewing most dismissals as being due to a “reluctant or hostile victim” (p. 26), he believes some improvement could be obtained “by more circumspect collection of evidence by the police, by lightening the burden on the complaining witness, and by diminishing his dominant position in the prosecution process” (p. 51).

Zeisel is also skeptical of efforts to reduce crime by increasing the length of sentences. He agrees that imprisonment prevents some crime by incapacitating offenders and isolating them from potential victims. He shows, however, that doubling the length of all sentences would at best increase the incapacitation effect on crime by only a quarter, and rightly points out the enormous difficulties of using a more selective incapacitation strategy because of the problem of identifying the right offenders to incarcerate (p. 54).⁵ Furthermore, Zeisel's skepticism extends to the claim that increased or mandatory sentences would reduce

⁵ Zeisel mentions some of the recent work of the Rand Corporation on this issue but does not discuss it in detail. See P. GREENWOOD, *SELECTIVE INCAPACITATION* (1982).

crime by deterrence. "The question," he argues, "is not whether the general threat of arrest, conviction and sentence deters crime, which it surely does, but whether a substantial increase in the now prevailing sentences for serious crimes will significantly increase their deterrent power." (P. 58). Agreeing that increased sentences have proven useful in reducing parking violations and crimes such as drunken driving, Zeisel nonetheless finds many reasons to doubt their efficacy as to more serious crimes. Among other things he cites the failure of such draconian measures as the death penalty and the Rockefeller drug laws to reduce crime (pp. 60-64). Because he concludes from the attrition statistics that "the overall likelihood [of an offender] being sent to jail or prison is so small," Zeisel asks rhetorically why one should expect an increase in the severity of sentences to "significantly affect their deterrent threat" (p. 67).

Ultimately, Zeisel concludes that society's best hope lies neither with law enforcement nor the criminal justice system, but with greater efforts to prevent crime. "There is as little justification for crediting law enforcement systems abroad with keeping their crime rates low as there is justification for blaming ours for allowing such a high level of crime." (P. 84). Highway safety, he says, has come about through better highways, improved ambulance service, and reduced speed limits. Crime control can only occur through similar changes in the environment. The place to start is with ghetto youths, and the avenue to reach them must be the school (pp. 85-88).

From his analysis of school statistics, Zeisel concludes that in the 1970's seventy-five percent of all Harlem high-school-age boys were out of school for two of every three days, and argues that this must have had an enormous effect on the crime rate. He does not spell out what he thinks should be done, but does indicate that only radical change is likely to succeed. If there is a weak link in Zeisel's analysis, it is probably here — as there is no indication that educational reform directed at ghetto youth is any more likely to be successful than the law enforcement approach that the book critiques. This is not to say that Zeisel is wrong; merely that he has not demonstrated that his strategy is likely to succeed. A full discussion of his proposed new strategy might well require another book, however, and it seems too much to expect this to be spelled out in detail in this work.

Zeisel's conclusions are obviously far different from those that have dominated the political debate about crime in the United States for the past decade, and sharply different from those of some recent administrations. Although even Zeisel would undoubtedly admit that his data and analysis are not always sufficient to prove the many propositions

that he advances, his work is important because it is a serious attempt to deal with the hard issues in a way in which neither the literature nor the political process has done very well.

Although some of the points he makes are not particularly new, Zeisel provides valuable insights into such key processes as plea bargaining, sentencing and pretrial release, often adding much-needed precision and clarity. His method of describing how charges are downgraded through prosecutorial review and plea bargaining, for example, shows that the concessions offered in plea bargaining in New York at the time of the study may amount to half or more of the potential sentences and that prosecutors routinely process some felonies, such as auto theft, as misdemeanors (pp. 127-34).

The Limits of Law Enforcement also provides some important insights into the often complex and highly individualized reasons that defendants have for going to trial. Not surprisingly, some defendants go to trial because they believe there is a strong likelihood of acquittal. Others go to trial despite poor chances for acquittal because their sentence will probably be no worse if they are convicted by a jury than if they plead guilty. Still others go to trial for no discernible reason, despite poor chances for acquittal and a high likelihood of a more severe sentence if convicted by a jury (pp. 141-58).

Zeisel's comments on pretrial detention suggest that the relationship between pretrial detention and likelihood of conviction is more complicated than much of the literature indicates. Some of this literature suggests that persons detained while awaiting trial are convicted more often than those who are released on bail or on their own recognizance. Zeisel agrees that there is such a difference but indicates that one reason for it is that defendants who are detained in minor cases often plead guilty with the understanding that their "sentence" will be the time already served in detention. Defendants who are free on bail or their own recognizance obviously have no such incentive to plead guilty, and the incentive is much reduced in more serious cases, as the period of pretrial detention is much less likely to be equal to the sentence (pp. 46-49, 217-27). Zeisel also points out that more suspects abscond than are sentenced to prison, but suggests solving this problem by prosecuting absconders rather than by detaining more defendants (pp. 213-17).

A significant point mentioned only briefly is that this is the second book written from the study of New York case dispositions. The first was a monograph entitled *Felony Arrests*, issued by the Vera Institute of Justice in 1977 and published commercially in a revised version in

1981.⁶ The empirical study on which both works are based was conducted during 1974-76 when Professor Zeisel was associated with the Vera Institute. At some point disagreements apparently arose about the analysis and were resolved by a decision to have separate works. It is hard at this point to tell what the argument was about but fortunately we now have two works instead of one. The Vera study provides a far richer description of what happens to cases in the New York City courts and perhaps the best explanations yet as to why cases fall apart. As Malcolm Feeley says in the foreword to the revised version, the study is "one of the truly outstanding books on the criminal courts that have been published in the past decade."⁷ Although it contains less detail about the specifics of case attrition in New York, Zeisel's book is wider ranging, including his thoughts about many different aspects of crime and crime control. Ultimately there is relatively little overlap in the two works, and both can be read with profit.

Both the Zeisel work and the Vera study are part of a series of recent studies on both sides of the Atlantic, addressing the issues of attrition and convictions. Although major differences in the legal systems and in the amount and character of crime in the two societies make exact comparisons difficult, many of the problems faced are similar and much can be learned from contrasting how these problems are addressed. In the United States, the terms of the debate were framed in 1972 by Patrick Murphy, then the New York City Police Commissioner, in a highly publicized speech to the New York City Bar Association in which he charged the courts with responsibility for the low level of convictions.⁸ In the same year, in an even more highly publicized speech, Sir Robert Mark, then Commissioner of the London Metropolitan Police, charged that the English scales of justice were tipped too far toward the defendant and that this was responsible for the decreasing rate of convictions at trial.⁹

The Vera study was the first United States work to specifically address the Murphy charges. It confirmed Murphy's thesis that there was an enormous drop-off between arrest and conviction. Its rich, graphic descriptions, however, made it clear that the statistics looked worse than

⁶ VERA INSTITUTE OF JUSTICE, *FELONY ARRESTS* 5 (rev. ed. 1981) [hereafter *FELONY ARRESTS*].

⁷ M. Feeley, *Foreword*, *FELONY ARRESTS*, *supra* note 6, at xviii.

⁸ Murphy, *The Police, the Lawyers and the Courts*, 27 *REC. A.B. CITY N.Y.* 23 (1972).

⁹ R. MARK & P. SCOTT, *THE DISEASE OF CRIME — PUNISHMENT OR TREATMENT?* (1972). Sir Robert Mark later elaborated on this theme in the 1973 Dimbleby Lecture, R. MARK, *MINORITY VERDICT* (1973).

the cases, and that in robbery and burglary, as well as assaultive and sexual crimes, much of the drop-off came in situations in which the offender was a spouse, lover, friend, or associate of the victim. The conclusion, like that in the Zeisel study, was that attrition and charge deterioration even at a high level was essentially a normal process attributable more to the character of the crime and the evidence than to failure of the criminal justice system.¹⁰

At about the same time, Forst and his associates at Inslaw published the first of a series of studies based on data from PROMIS, a computerized prosecutorial information system developed originally in Washington, D.C.¹¹ This study classified the reasons for attrition, and like the Vera study, showed witness problems to be a major cause. It also suggested that evidence problems caused a great deal of attrition, and argued that gathering more evidence might lead to more convictions.

The next generation of American studies elaborated on these themes. Additional Inslaw studies showed that the Washington, D.C. results applied to numerous other locales as well.¹² Feeney, Dill and Weir catalogued the evidence in robbery and burglary cases in San Diego and Jacksonville and demonstrated that its strength was highly predictive as to which arrests would end in conviction.¹³ This study showed that in most attrition cases both the police and the prosecutor believed the suspect to be guilty and argued that the failure to prosecute further was often due to the fact that the police tended to collect only enough evidence to arrest and that no one felt responsible for collecting the additional evidence needed to convict. A study of police-prosecution relationships by McDonald identified a similar gap and likewise concluded that this inhibited the proper prosecution of cases.¹⁴ Some confirmation of the possibilities for greater evidence gathering came at about the same time from an experiment undertaken by the New York City Police and the Vera Institute.¹⁵ In that experiment, police detectives undertook greater follow-up of robbery cases in one precinct. When compared with a control precinct, the result was a substantially higher conviction rate.

¹⁰ FELONY ARRESTS, *supra* note 6, at 134.

¹¹ B. FORST, J. LUCIANOVIC & S. COX, WHAT HAPPENS AFTER ARREST? (1977).

¹² K. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING (1979).

¹³ F. FEENEY, F. DILL & A. WEIR, ARRESTS WITHOUT CONVICTION: HOW MANY AND WHY (1983).

¹⁴ W. McDONALD, POLICE PROSECUTOR RELATIONS IN THE UNITED STATES: EXECUTIVE SUMMARY (July 1982).

¹⁵ J. McELROY, C. COSGROVE & M. FARRELL, FELONY CASE PREPARATION: QUALITY COUNTS (1981).

The first English work to address Sir Robert Mark's thesis was that of Michael Zander.¹⁶ Using officially published statistics, he contended that the overall English conviction rate was in fact not low but very high. It was true, as Sir Robert Mark asserted, that many defendants who went to trial in the Crown Court were acquitted, but the great majority of the defendants pleaded guilty rather than going to trial. Zander calculated that the conviction rate was closer to ninety than to fifty percent and argued that this certainly demonstrated no great tipping of the scales toward the defense. Baldwin and McConville, in a series of important studies of jury trials and other cases in the Crown Court, found that in cases that went to trial, juries often produced results at odds with the perceptions of judges, attorneys, and police involved in the case.¹⁷ Like Zander, however, they found that most cases ended in guilty pleas rather than trials and that the number of questionable outcomes was "no more than a tiny fraction of all cases that pass through the criminal courts."¹⁸ Vennard analyzed a group of cases contested in the magistrate's court, where decisions are made by lay magistrates rather than a jury.¹⁹ Because of concerns expressed about the fairness of magistrates, she sought to determine whether acquittals and convictions could be explained by the evidence presented or whether other factors were involved. Her principal finding was that magistrates' decisions "are strongly associated with a few quantifiable indices of the evidence adduced by the parties and the credibility of the witnesses."²⁰

A very different kind of study by McBarnet went further than the other English studies and argued that it was the high English conviction rate rather than the supposedly high acquittal rate that was the cause for alarm.²¹ She said that although English law claims to provide

¹⁶ Zander, *Are Too Many Professional Criminals Avoiding Conviction? — A Study in Britain's Two Busiest Courts*, 37 MOD. L. REV. 28 (1974); see also Baldwin & McConville, *The Acquittal Rate of Professional Criminals: A Critical Note*, 37 MOD. L. REV. 439 (1974); Zander, *Acquittal Rates and Not Guilty Pleas: What do the Statistics Mean?*, 1974 CRIM. L.R. 401; Zander, *The Acquittal Rate of Professional Criminals: A Reply*, 37 MOD. L. REV. 444 (1974).

¹⁷ J. BALDWIN & M. MCCONVILLE, *supra* note 1, at 130; see also J. BALDWIN & M. MCCONVILLE, *NEGOTIATED JUSTICE: PRESSURES TO PLEAD GUILTY* (1977); S. MCCABE & R. PURVES, *THE JURY AT WORK* (1972).

¹⁸ J. BALDWIN & M. MCCONVILLE, *supra* note 1, at 130.

¹⁹ J. VENNARD, *CONTESTED TRIALS IN MAGISTRATES' COURTS* 20 (1982); see also J. VENNARD, *CONTESTED TRIALS IN MAGISTRATES' COURTS: THE CASE FOR THE PROSECUTION* (1980).

²⁰ J. VENNARD, *CONTESTED TRIALS IN MAGISTRATES' COURTS* 20 (1982).

²¹ D. MCBARNET, *CONVICTION, LAW, THE STATE AND THE CONSTRUCTION OF*

a great deal of protection to the defendant, it is in fact heavily weighted toward the prosecution. Her principal evidence was various legal rulings and examples from individual cases.

Taken together, what do these studies indicate about case attrition? Most emphasize the crucial role of the available evidence and the willingness of the victim to proceed. Like Zeisel's work, most pay little attention to legal rules as a major present cause of attrition. Although the exclusionary rule (which prevents the use of illegally obtained evidence) is highly controversial and is often asserted to be a major factor in determining the outcome of criminal cases in the United States,²² virtually none of the studies find the rule to be a major factor in non-convictions, except in specialized areas such as drug enforcement.²³ The studies also suggest that much of the debate about legal rules in England has been similarly irrelevant to the everyday world of real courtrooms. In 1972, the Criminal Law Revision Committee proposed that the prosecution be allowed to comment to the jury on the defendant's silence when the defendant chose not to testify on her own behalf.²⁴ The purpose of this proposal was to counteract a supposed trend toward more acquittals brought about by manipulation of the jury. Subsequent empirical analysis showed that the conviction rate was in reality high, questioned whether there was a trend toward increased jury acquittals, and indicated that the defendant's silence had little to do with those jury acquittals which did occur.²⁵

The studies do not show that legal rules designed to produce fairness never reduce the number of convictions, but certainly they indicate that claims of effect have to be analyzed very carefully. No doubt this kind of skeptical view should also be applied to claims such as McBarnet's that the legal system itself is a major cause of convictions. Clearly there are situations in which McBarnet's thesis applies, as Solzenitzyn's bit-

JUSTICE (1981).

²² E.g., Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

²³ A recent study argues that the rule has somewhat wider effects than most other studies have shown, but shows the strong concentration on drug cases. U.S. NATIONAL INSTITUTE OF JUSTICE, *THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA* (1982).

²⁴ CRIMINAL LAW REVIEW COMMITTEE, ELEVENTH REPORT, CMD. 4991, ¶¶ 28-43 (1972) (Report on Evidence (General)).

²⁵ See, e.g., Zander, *Are Too Many Professional Criminals Avoiding Conviction? — A Study in Britain's Two Busiest Courts*, 37 MOD. L. REV. 28, 57-58 (1974).

ter comments on the fine words of the Soviet laws demonstrate.²⁶ The hard part is not determining what can happen, but what is happening, and for that purpose it certainly is helpful to have empirical evidence. What little evidence of this kind there is is not particularly favorable to McBarnet's thesis insofar as England and Scotland are concerned.²⁷

While the studies make similar findings about many issues, they differ considerably in their perceptions as to whether attrition is a problem and as to whether it can or should be reduced. Zeisel seems to see attrition as a problem but, as his *Limits of Law Enforcement* title suggests, doubts that much can be done about it.²⁸ Others are more optimistic about the possibilities for reducing attrition, although presumably all would agree that there are limits beyond which it is not possible or desirable to go, and McBarnet would no doubt argue that these limits have already been passed. Ultimately one's view as to whether something more can or should be done depends in large part on one's view as to whether the cases ending in nonconviction represent the innocent being separated from the guilty or simply guilty parties against whom there is insufficient evidence. Such views may differ from place to place and time to time.

It is unclear how the large differences shown between Britain and America should be interpreted. While attrition in America consistently amounts to forty to fifty percent of adults arrested for serious crimes, the British rate appears to be less than half and possibly only a quarter of this. There are many possible explanations for this difference, including McBarnet's thesis, but not enough information at this point to resolve the question.²⁹ Obviously more research is needed.

²⁶ See, e.g., A. SOLZENITZYN, *THE GULAG ARCHIPELAGO*, 122-23 (1973).

²⁷ While McBarnet discusses both English and Scottish rules, the most severe examples she gives of ways that broad fairness principles are undercut by the fine print of day-to-day decisions relate to Scotland. The empirical information available is not sufficient to fully assess her thesis, but there are indications that other factors may well be at work. Scottish statistics report convictions as a percentage of cases charged and a recent work on Scottish prosecutions shows that 8% of the cases are screened out by prosecutors ("the prosecutor fiscal") prior to charge and that no decision is involved in another 6%. See S. MOODY & J. TOOMBS, *PROSECUTION IN THE PUBLIC INTEREST* (1982). Moody and Toombs also report that some prosecutors believe more evidence is now being required for charges than was true in the past (p. 61). This may help to explain why the conviction rate has been increasing over the past 50 years, as shown by A. ARNOTT & J. DUNN, *THE SCOTTISH CRIMINAL* 11 (1970).

²⁸ Zeisel indicates a belief that it might be possible to reduce attrition in New York by 10% (p. 51).

²⁹ Sanders and Cole argue that because the prosecution in England is not independent of the police, many "weak" cases are prosecuted. The authors indicate that some

A few quibbles. Having watched plea bargaining in a number of places in Britain, I am not inclined to agree that it is a "uniquely American institution" (pp. 37 n.18, 44 n.46). Nor am I so sure as Professor Zeisel that the New York data is typical of the country as a whole, particularly as to the high proportion of robbery and burglary arrests that involve offenses between parties who know each other (pp. 163-76). These are matters of judgment and detail, however, and do not detract from the overall value of the book. It is, as former Attorney General Edward Levi indicates in his *Foreword*, "an important, significant, and welcome essay" (p. xvi).

of these end in acquittals, but that some also end in convictions. This analysis seems accurate but does not attempt to assess the number of cases affected. It seems doubtful, however, that the proportions are high enough to explain much of the difference in American and English conviction rates. See Cole & Sanders, *Criminal Prosecution in England: Evolution and Change*, 14 CONN. L. REV. 23 (1981); Sanders & Cole, *The Prosecution of "Weak" Cases in England and Wales*, CRIM. JUST. REV., Fall 1982, at 23.