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Book Review: Tempered Zeal: A Columbia Law Professor's Year on the Streets with the New York City Police. by H. Richard Uviller.

David Dolinko

expression, control that would not be permitted if the expression were that of a private citizen. Such control is a condition of service.[13]

Again, this is not to suggest that the government can control military speech completely. At some point the connection between the military endeavor on the one hand and a soldier's expression on the other becomes too attenuated. Where that point lies seems a question best answered initially by the military, subject ultimately to court review. Military leaders like to get the job done, and the value of communication is forced upon those who don't already appreciate it. Military leaders also know a lot about the nature of discipline; martinets shouting orders went out of style long ago. Doubtless the interest in free expression by soldiers is not weighed as accurately by the military as it is by the courts, but it is just as likely that a court will not weigh the military's interest in discipline as accurately as the military will. It therefore makes sense for the courts generally to defer to the military in evaluating that interest. Certainly an across-the-board increase in the amount of court intrusion into the military communication structure requires far more justification than Packer has presented.

TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE. By H. Richard Uviller.[1] Chicago: Contemporary Books. 1988. Pp. xix, 234. Cloth, $19.95.

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Appellate judges and legal academics too often lack firsthand acquaintance with the front-line realities of the criminal justice system. Fearing that his own exposure to those realities as a young prosecutor had grown stale during fourteen years teaching law, Professor H. Richard Uviller spent eight months of a recent sabbatical "hanging out with" and observing police in the crime-ridden Ninth Precinct of New York City. The book that resulted should interest

13. While service is not always voluntary, everyone recognizes that military service involves at least the kinds of loss of freedom that are incident to voluntary employment. If a drafted soldier has the freedom to flout orders, then it doesn't make much sense to have a draft at all. Maybe the draft is unwise or unconstitutional, but surely such a conclusion is not required simply by the freedom of expression principles of the first amendment.

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anyone concerned with the mind-set and working environment of the police and their responses to the constitutional criminal procedure jurisprudence of the past few decades.

This is not to deny the book's failings. It is not even remotely a sound piece of social scientific research—unsurprisingly, given Uviller's naively Baconian decision to "resis[t] all temptations to formulate a theory to guide my investigation." No reason is given to suppose that New York's police department is fairly representative of big-city American departments generally.[3] Even within the New York department, the particular unit Uviller observed—a special robbery investigation team called "9 RIP"—is highly unusual, mixing patrolmen and detectives in an uncommonly egalitarian fashion that made it an informal, unstructured "pocket of anarchy in the midst of a vast, paramilitary, bureaucratic structure."

Nonetheless, the dearth of empirical information on the real-world context and consequences of the Supreme Court's criminal procedure decisions should make us grateful for Uviller's anecdotes and observations. These come interspersed with mini-lectures on a variety of topics including the *Miranda* doctrine, the conduct of lineups, and how to get a search warrant, which will be of interest primarily to readers generally unfamiliar with the criminal law and its enforcement mechanisms. The anecdotes and observations offer a compelling though necessarily partial picture of the atmosphere and setting of police life and the ways in which police respond to the constraints of the Constitution as judicially interpreted.

Physically, the officers Uviller studied moved through a cramped, no-frills, timeworn stationhouse in a generally down-at-the-heels neighborhood with more than its share of homeless persons, prostitutes, abandoned buildings and thriving drug traffickers. Emotionally, they inhabited a world of frustration arising from "the inescapable sense of helplessness at the heart of power, the maddening inability to make the process work despite all the authority implicit in the badge." Mistrust of outsiders is pervasive—as Sergeant Browne, 9 RIP's commander, laments, "no one ever gives us the whole truth. I usually end up not knowing what the hell really happened." Citizen complaints of brutality arouse resentment, and citi-

3. Previous observers have found wide disparities in the behavior of different departments. Charles Silberman, for example, spoke of "a world of difference between the cold, aloof, impersonal 'professional' style cultivated by Los Angeles police, . . . and the warmer, more personal and civil . . . orientation of police in cities such as Oakland and New York." Charles E. Silberman, *Criminal Violence, Criminal Justice* 289 (Vintage Books, 1978). James Q. Wilson's study of eight American police departments distinguished three styles of policing: "watchman," "legalistic," and "service." James Q. Wilson, *Varieties of Police Behavior* (Harvard U. Press, 1970).

zens seeking police assistance are themselves often less than upstanding. The non-police components of the criminal justice system are not much better. Judges, especially appellate judges, seem aloof, unsympathetic, even dense, and assistant DA's are often hectoring, dismissive, and—to the cops—cowardly. Even the police force itself can exasperate, with its stifling bureaucracy "that always seems more concerned with rules, statistics, and risk aversion than with good ideas and initiative"—prompting in one officer a "feeling that this department is run by morons."

Much of this grim picture duplicates previous observers' findings. Police skepticism and distrust of the public is frequently noted,[4] and Jerome Skolnick reported in the mid-sixties that police thought judges unreasonable, unintelligent meddlers abdicating their crime-fighting responsibilities.[5] Skolnick, however, painted a much more harmonious picture of police-prosecutor relations, finding low-level screening prosecutors deferential to police and high-ranking prosecutors able to criticize them without arousing resentment.[6] It would be interesting to know whether the bad blood Uviller discovered stems from specific features of the Manhattan DA's office, and how common or idiosyncratic those features are.

Uviller's view of the police officer's world is by no means wholly grim, however, and comes nowhere near Arthur Niederhoffer's bleak picture of rampant cynicism "at all levels, in every branch of law enforcement."[7] Uviller's officers find their work meaningful and strive to achieve justice. They approach even the most dangerous situations with "an air of casual confidence," taking charge with crisp authority and demanding respect and deference—successfully, in most instances. These officers value their hunches and pride themselves on their ability to "sense" criminal activity, to the point of occasional overconfidence. These attitudes (essentially those Skolnick described as the police "craftsman" approach) help explain the cops' resentment when second-guessed by distant judges and their dismay at the loss of control and challenges to their views which they experience in the judicial arena.

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4. William Westley's 1951 doctoral thesis, published in 1970, harps on this theme. William A. Westley, *Violence and the Police* 106-08, 110-11, 145 (MIT Press, 1970). See also Wilson, *Varieties of Police Behavior* at 27-29 (cited in role 3); Silberman, *Criminal Violence, Criminal Justice* at 325 (cited in note 3).

5. Jerome H. Skolnick, *Justice Without Trial* 225-29 (John Wiley & Sons, 2d ed., 1966). But one more recent study found police *less* cynical toward judges and courts than either firemen or college students. Phil J. Crawford and Thomas J. Crawford, *Police Attitudes Toward the Judicial System*, 11 J. Police Sci. & Admin. 290, 293 (1983).

6. Skolnick, *Justice Without Trial* at 199-202 (cited in note 5).

7. Arthur Niederhoffer, *Behind the Shield: The Police in Urban Society* 94 (Doubleday, 1967).

Yet that arena, and particularly its remote appellate judges, sets the ground rules that constrain police discretion in detecting and investigating crime. How do the police respond? Uviller reports that they generally follow the law, and fall back on a reliable intuitive sense of fairness in situations where the law gives them vast discretion. Thus the police "understand the basic principles of search and seizure law as expounded by the High Court" and "felt its constraint upon their actions." They have "internalized the basic ingredients of a fair lineup" and they "Mirandize" suspects before any formal interrogation—though not immediately upon arrest (which is not legally required). Though warrants give officers almost unlimited discretion to search disruptively and destructively, cops routinely obey self-imposed limits. Similar restraint controls their use of weapons and their interaction with citizens on the street—indeed, Uviller claims he "never saw an officer speak rudely to a civilian, much less push someone around."[8] And 9 RIP won't initiate robbery prosecutions without identification evidence supplying far more than the bare "probable cause" required by law.

Yet while the officers may know and grudgingly follow constitutional rules, they seem largely oblivious to the *point* of those rules. Many seemed to think the Supreme Court's fourth amendment cases reflected only a desire to deter searches and seizures,[9] while *Miranda* was "just another way for the courts to throw out perfectly good evidence."[10] They resented being expected to observe

8. It's hard to take this assertion at face value. Perhaps what seemed polite and unthreatening to Professor Uviller might appear rude to a citizen overawed by a "sudden, aggressive move" from the police, with their "firm tone" and "hand . . . placed heavily and decisively." Perhaps the officers consciously or unconsciously modified their behavior in Uviller's presence—though Uviller believes otherwise. Certainly, well-publicized incidents such as the March 3, 1991 videotaped beating of an unarmed traffic arrestee by Los Angeles police make one wonder how representative Uviller's polite 9 RIP cops can be. It's worth noting that, as one review of *Tempered Zeal* pointed out, Uviller's Ninth Precinct itself is not immune to blatant brutality: Ninth Precinct cops responded to a riot in a neighborhood park in August 1988 by covering their badge numbers and beating civilians indiscriminately, and by subsequently refusing to testify before the department's internal review board. See Book Note, 103 Harv. L. Rev. 1390, 1393 n.13 (1990).

9. The police whom Uviller observed spoke bitterly of the frustration of seeing plainly guilty criminals turned loose "because the judge didn't like the way the cop took the knife off him." It is not clear whether they knew, or would be comforted by knowing, that most statistical studies find the exclusionary rule's impact negligible. See Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 Am. Bar Found. Res. J. 611.

10. Yet police generally may have grown to accept *Miranda*, as various observers report. See Tamar Jacoby, *Why Cops Like* Miranda, Newsweek 53 (July 18, 1988). After all, the consensus is that *Miranda* has had little appreciable effect on the rate of confessions. Nor has it curbed police use of lies, false sympathy, and similar tricky interrogation tactics—such as those Uviller himself suggests to a dubious 9 RIP officer. The evolution and effect of the *Miranda* doctrine are succinctly reviewed in Patrick A. Malone, *"You Have the Right to Remain Silent":* Miranda *After Twenty Years*, 55 Am. Scholar 367 (1986).

rules that judges themselves fought over—and had only questionable authority to impose, anyway—while law professors "pretend[ed] this stuff makes sense."[11] And their legal knowledge had glaring gaps, like their belief in a "crime scene" exception to the search warrant requirement despite its explicit rejection by the Supreme Court a decade earlier, and their distinction—wholly spurious under existing law—between a true arrest and merely "picking someone up" for a stationhouse lineup. The officers' attitudes make all too predictable their frequent resort to perjury to make their actions retroactively "fit" constitutional rules.

One of Uviller's most interesting claims is that the police suffer a malady law professors routinely observe in students—a tendency to seek and even invent hard-and-fast rules in place of the often amorphous standards pervading the law. This craving for certainty leads police to ascribe mistaken significance to rigid rules that they develop, such as precise verbal formulae for questioning lineup witnesses or giving *Miranda* warnings, or the "two-hour/two-mile" rule conjured up to govern the permissibility of show-ups. It could also account for another phenomenon Uviller observes (without drawing the connection): an occasional tendency for police to "overestimate restrictions on their authority." Uviller's example is the 9 RIP officers' refusal to arrest a robbery suspect without a confident lineup identification, which seems like another instance of police treating a policy of their own devising as if it were a rigid legal requirement.

Uviller actually claims that overestimating restrictions is the general police rule, not an occasional practice. His observations belie this, however—witness the cops' mistaken beliefs in a crime-scene exception to the warrant requirement, an ability to "pick someone up" for a lineup without probable cause, and the ease of establishing consent to an otherwise unauthorized search or seizure. Even these instances where police *under*estimate the restrictions on their authority bespeak a longing for "bright line" rules: crime scenes can always be searched; arrest always means full-scale custody, booking, and charging; consent needn't require detailed examination of all circumstances of the particular situation. It would be interesting to see how prevalent among police the quest for cer-

11. Other observers find police less hostile to Warren-era constitutional restraints. A 1986 survey of Chicago narcotics officers concluded that they almost always understood what they'd done wrong when evidence was suppressed, and favored retaining the exclusionary rule (though with a good faith exception) rather than abolishing it. Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. Chi. L. Rev. 1016 (1987).

tainty Uviller observes really is, and how much police behavior it might explain.

It would also be interesting to see more detailed empirical studies of the real-life constraints on the theoretical powers of the police. Uviller provides a striking example when he discusses how the statutory availability of telephone search warrants, which greatly speed up the warrant process and encourage officers to use it, has been nullified in New York County by the turf-protective hostility of the District Attorney's office. This is precisely the kind of information most helpful to someone without firsthand law enforcement experience who reads appellate opinions on warrantless searches and wonders why the cops didn't just get a warrant—how long could it take, anyway?

Although many of Uviller's observations, like those just discussed, are thought-provoking and suggestive, the book's episodic format and a desire to touch on a wide range of topics prevent Uviller from developing any of them too deeply. More disturbingly, the book is marred by a surprising number of legal errors and a pervasive reluctance to examine critically the perceptions and behavior of the police.

For example, Uviller is wrong in treating the rule against coerced confessions as an outgrowth of the fifth amendment, in asserting that states are free "to extend federal as well as state constitutional constructions," in declaring that "[a] request for counsel operates exactly like a refusal to be questioned at all" for *Miranda* purposes, and in defining "prejudice" as if it applied only to the erroneous admission of evidence. His penchant for a "cop's-eye" view of the law leads him to ridicule judicial aversion to hypnotically refreshed testimony as "one of those strange areas of conservative suspicion one encounters from time to time in law" in which judges "shy away" from an otherwise well-regarded tool "[w]ithout logic or reason" by relying on "bits of this and that picked up from here and there." In fact, the leading cases excluding such testimony—*People v. Shirley*[12] in California and *People v. Hughes*[13] in New York—rely heavily on the writings of scientific experts in detailing, carefully and at length, the unreliability of hypnosis. Elsewhere, too, Uviller seems too quick to accept the police at face value or to put the best possible gloss on their behavior—even suggesting that police perjury isn't really so bad if it merely circumvents an exclusionary rule. He never seems to wonder why the officers he portrays as unfailingly polite and professional arouse

12. 31 Cal. 3d 18, 723 P.2d 1354, 181 Ca. Rptr. 243 (1982).
13. 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983).

such disbelief in "big-city jurors" and such fear in even the victims of crime.

Despite its defects, *Tempered Zeal* is worth the attention of students of the criminal justice system. Its ultimate message, like Jerome Skolnick's a quarter-century ago, is that police are caught between conflicting demands, but Uviller and Skolnick disagree on what those demands are. For Uviller, the public demands both "effective anticrime activity and restraint," with cops "out in the streets as a visible deterrent force as well as a crime-solving and criminal-apprehension battalion, while at the same time . . . law bound [and] rule observant." Skolnick, by contrast, found little evidence that the citizenry wanted "restraint" at all, and instead depicted the police as caught in a "conflict between the democratic ideology of work and the legal philosophy of a democracy."[14] Both perspectives are illuminating, and still more light is needed. Perhaps the greatest service Professor Uviller's book can perform would be to stimulate others to follow in his footsteps.

COURTS, CORRECTIONS AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS.[1] Edited by John J. DiIulio, Jr.[2] New York, N.Y.: The Oxford University Press. 1990. pp. xii, 338. $32.50.

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I doubt that any lawyer can practice in the field of prison law, whether on behalf of prisoners or on behalf of correctional officials, and not be a legal realist. Whatever the situation in less polarized

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14. Skolnick, *Justice Without Trial* at 235 (cited in note 5).

1. This collection consists of the following essays: Malcolm M. Feeley and Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*; John J. DiIulio, Jr., *The Old Regime and the* Ruiz *Revolution*; Sheldon Ekland-Olson and Steve J. Martin, Ruiz: *A Struggle Over Legitimacy*; Ben M. Crouch and James W. Marquart, Ruiz: *Intervention and Emergent Order in Texas Prisons*; Bradley S. Chilton and Susette M. Talarico, *Politics and Constitutional Interpretation in Prison Reform Litigation: The Case of* Guthrie v. Evans; Ted S. Storey, *When Intervention Works*; Edward E. Rhine, *The Rule of Law, Disciplinary Practices, and Rahway State Prison*; Bert Unseem, Crain: *Nonreformist Prison Reform*; Robert C. Bradley, *Judicial Appointment and Judicial Intervention*; Clair A. Cripe, *Courts, Corrections, and the Constitution: A Practitioner's View*; and John J. DiIulio, Jr., *Conclusion: What Judges Can Do to Improve Prisons and Jails*.

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