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BOUQUETS FOR JERRY ISRAEL

*Yale Kamisar**

As it turned out, of those asked to write a few words for an issue of the *Michigan Law Review* honoring Jerry Israel, I was the last to do so. And when I submitted my brief contribution to the *Law Review* I took the liberty of reading what the four others who paid tribute to Jerry had written. As a result, I feel like the fifth and last speaker at a banquet who listens to others say much of what he had planned to say.

As Wayne LaFave has pointed out, he, Jerry and I have collaborated on “a comprehensive, hernia-popping criminal procedure casebook” from its 1969 third edition to its 1994 eighth edition.¹ Moreover, in the course of a wonderful long-running collaboration,² we have co-authored more than twenty-five annual supplements to this casebook. I heartily agree with Wayne that the “unflappable Israel” has been “largely responsible for keeping this project afloat all these years.”³

As Wayne has noted too, in the 1970s the three of us also served as Co-Reporters for the Uniform Rules of Criminal Procedure Project of the National Conference of Commissioners on Uniform State Laws. Again, I agree with Wayne that Jerry made unique contributions to this project and that the final product “reflected more than anything the depth and breadth of Jerry’s understanding of the totality of the criminal justice system.”⁴

* Clarence Darrow Distinguished University Professor of Law, University of Michigan. A.B. 1950, New York University; LL.B. 1954, Columbia; LL.D. 1978, John Jay College of Criminal Justice, CUNY; LL.D. 1979, University of Puget Sound. — Ed.

1. Wayne R. LaFave, *Random Thoughts by a Distant Collaborator*, 94 MICH. L. REV. 2431, 2431 (1996).

2. See generally Jerold H. Israel & Yale Kamisar, *Wayne R. LaFave: Search & Seizure Commentator at Work and Play*, 1993 U. ILL. L. REV. 187 (tribute to Wayne LaFave).

3. LaFave, *supra* note 1, at 2434.

4. *Id.* at 2433. I believe, or at least I would like to believe, that the *Uniform Rules of Criminal Procedure* have significantly affected the thinking of judges and law professors, but as LaFave notes, it appears that no state has adopted any of the Uniform Rules’ provisions. *Id.* at 2434 n.7. Perhaps Jerry had this in mind when he recently observed:

Criminal procedure is hardly touched by those interests that typically have led states to adopt uniform laws. Unlike fields such as commercial law, a lack of uniformity in the criminal procedures of the different states is not likely to be a de-

Our former colleague, Debra Livingston, writes of “the friendship and generosity” that Jerry extended to younger colleagues in his field and how often “his thoughtful, pragmatic analysis of legal problems” illuminated various aspects of criminal procedure.⁵ She also points out that among those professors who had not taught criminal law or criminal procedure for very long, Jerry was the one you went to for an answer.⁶ I wonder whether Debra realizes how many times I went to Jerry for help and, although I have taught both criminal law and criminal procedure a lot longer than he has, how often Jerry clarified matters for me.

As Debra recalls, not infrequently Jerry and I would debate, sometimes loudly and fiercely, the merits or demerits of a newly decided case.⁷ But she may not have noticed that I did so only in selected areas, such as confessions or search and seizure. I was not about to debate Jerry on such topics as double jeopardy, habeas corpus, sentencing guidelines, grand jury procedures, or white collar crime generally because he knew so much more about those subjects than I did.

What happened when a reporter phoned me about a criminal procedure problem Jerry knew much more about? Typically, I would reply: “Let me consult with my lawyer and get back to you.”

Why didn't I tell reporters to call Jerry directly or ask Jerry to call back the reporter? When Wayne observes that he has never known Jerry to “leap in front of a TV camera, buttonhole a journalist, [or] send out a press release,”⁸ he understates Jerry's coolness toward the press quite a bit. It took me a long time to accept this (because we are so different in this regard), but Jerry believes reporters should do their own homework, feels that too often they ask silly questions, dislikes talking to

terrent to the free flow of goods, services, or persons between the states. Having criminal procedures that are different from those in other states is not likely to impede the full economic or social development of the individuals within a particular state. . . .

Not only is criminal procedure an unlikely candidate for state law uniformity; it is also a prime candidate for considerable individuality in the laws of each state. Criminal procedure is subject to many of the influences that push lawmakers in the direction of shaping the law to fit the special qualities of their local jurisdiction. Perhaps the most significant of those influences is the need to adjust procedures to fit the administrative environment in which the procedures will be applied.

Jerold Israel, *Federal Criminal Procedure as a Model for the States*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1996, at 130, 133-34.

5. Debra Ann Livingston, *A Tribute to Jerry Israel: A Friend with a Messy Office*, 94 MICH. L. REV. 2443, 2443 (1996).

6. *See id.* at 2444.

7. *See id.* at 2449.

8. LaFave, *supra* note 1, at 2436.

them, and usually flatly refuses to do so. However — and I must say I find this astonishing — even when I told him that I was trying to help out a reporter who had phoned me about a topic on which I felt shaky, Jerry, as Judge Borman described his dealings with him, was “always available, patient, and right on target with his answer.”⁹

At times, I would feel so awkward serving as the intermediary between Jerry and a reporter that I literally would beg him to make himself available to the reporter as a personal favor to me. (Needless to say, nobody ever had to persuade me to make myself available to the press.)

Jerry has many outstanding qualities. He has great powers of analysis,¹⁰ a tremendous capacity for hard work, a fabulous memory,¹¹ remarkable staying power (having produced more scholarship in the 1990s than he did in the 1960s, when he first began writing about crim-

9. Paul D. Borman, *A Tribute to Professor Jerold Israel — My Teacher, My Co-Author, My Good Friend*, 94 MICH. L. REV. 2450, 2451 (1996).

10. Perhaps the best example is Jerry's thoughtful and definitive discussion of the “selective incorporation” doctrine, under which, once the Court determines that a provision of the Bill of Rights protects a fundamental right, that provision is enforced against the states via the Fourteenth Amendment to the same extent it applies to the federal government. See Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982), well summarized in Livingston, *supra* note 5, at 2446 n.6.

11. One incident comes readily to mind. When Claus von Bülow was convicted of attempting to kill his wife Martha (“Sunny”) von Bülow (a conviction subsequently overturned on appeal), various reporters received conflicting advice as to whether, in addition to his conviction, Mr. von Bülow could also be prosecuted and convicted of murder in the event of the death of his wife (who remained in a permanently vegetative state). A television newscaster called me for an authoritative answer. I replied that I couldn't tell him off the top of my head, but I knew someone who could. I then rushed down the hall to ask Jerry whether he knew of any case on point. After looking out the window for about three seconds, Jerry said approximately the following:

There's a 1912 case called *Diaz v. United States* [223 U.S. 442 (1912)], a case where the defendant was convicted of assault in the Philippine Islands when his victim was still alive and then prosecuted for, and convicted of, homicide when the injured person died as a result of the blows inflicted during the assault. The U.S. Supreme Court upheld the conviction, but you have to keep in mind that in that case the Court was construing a provision of a Philippine statute against double jeopardy. The case does indicate that where, despite the best efforts of law enforcement officials, a crime is not completed or discovered until some time after the defendant has been prosecuted for another crime growing out of the same transaction, the Double Jeopardy Clause does not bar a prosecution for the second crime.

I asked Jerry how he happened to know about the *Diaz* case. He told me that Justice Brennan had mentioned the case in a footnote to a concurring opinion in *Ashe v. Swenson* [397 U.S. 436, 448 (1970)], and that, after coming across *Diaz* in Brennan's footnote, he had decided to read the case. As I turned to leave, I couldn't resist asking Jerry whether he remembered the number of the footnote in Brennan's opinion that contained the reference to *Diaz*. Jerry looked at the ceiling for a couple of seconds and replied: “I think it was footnote six.” It turned out to be footnote seven. Nobody's perfect.

inal law and procedure),¹² extraordinary insights about the legislative process (largely as a result of twenty years service on the Michigan Law Revision Commission), and a vast knowledge of criminal law and criminal procedure. He is, as Dean Jeffrey Lehman called him, “a role model of dedication to the scholarly craft”¹³ or, as Professor Livingston described him, “simply put, a learned man — in the best and most wonderful sense of that word.”¹⁴

However, if I had to single out one quality of Jerry’s, it would be his detachment, his openmindedness — his integrity, if you want to call it that. More than any other person I know, Jerry is, to use Learned Hand’s phrase, “a runner stripped for the race”:

One ingredient [of wisdom] I think I do know: the wise man is the detached man. . . . Our convictions, our outlook, the whole make-up of our thinking, which we cannot help bringing to the decision of every question, is the creature of our past; and into our past have been woven all sorts of frustrated ambitions with their envies, and of hopes of preferment with their corruptions, which, long since forgotten, still determine our conclusions. A wise man is one exempt from the handicap of such a past; he is a runner stripped for the race; he can weigh the conflicting factors of his problem without always finding himself in one scale or the other.¹⁵

12. In the 1990s Jerry published *Cornerstones of the Judicial Process*, KAN. J.L. & PUB. POLY., Spring 1993, at 5; *Federal Criminal Procedure as a Model for the States*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1996, at 130; a new 800-page casebook, WHITE COLLAR CRIME: LAW AND PRACTICE (1996) (with Ellen S. Podgor and Paul D. Borman); two new editions of the 1700-page casebook he co-authors with Wayne LaFave and me, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS (7th ed. 1990, 8th ed. 1994); and a new edition of the 1300-page handbook on criminal procedure he co-authors with Wayne, CRIMINAL PROCEDURE (2d ed. 1992). In addition, Jerry has written hundreds of pages of manuscript for portions of the forthcoming second edition of the multi-volume treatise, *Criminal Procedure*, that he co-authors with Wayne. The first edition of this treatise filled three volumes; the second is expected to fill five.

Although our 1994 casebook contains dozens of references to the inchoate second edition of the LaFave-Israel multi-volume treatise, and the 1992 LaFave-Israel hornbook purports to be an “abridgement” of the “forthcoming” second edition of the treatise, the treatise has yet to appear. See LaFave, *supra* note 1, at 2435 n.15. Jerry has not explained to me why there has been a delay in publication, and I have not asked him for an explanation (nor would I do so without giving him the *Miranda* warnings). But an anonymous informant from the state of Illinois who has proved reliable many times in the past has told me the delay is due to Jerry’s determination to treat every issue exhaustively.

13. Jeffrey S. Lehman, *Tribute to Jerry Israel*, 94 MICH. L. REV. 2429, 2430 (1996):

14. Livingston, *supra* note 5, at 2446.

15. Learned Hand, *Mr. Justice Cardozo*, in THE SPIRIT OF LIBERTY 98, 101 (Irving Dilliard ed., 1959).

I think Jerry's openmindedness and sense of fair play led him to conduct his monumental study of the work of the Burger Court in the field of criminal procedure.¹⁶ Jerry believed that just as some critics of the Court of the 1960s had "so overstated their case as to create a grossly inaccurate and unfair image of the Warren Court,"¹⁷ various "liberal" critics of the Court of the 1970s had demonstrated that "gross exaggeration is a quality that can be shared by criticisms coming from both sides of the political spectrum."¹⁸ After spelling out his thesis with painstaking care, Jerry concluded, a hundred pages later,¹⁹ that —

neither the record of the [Burger] Court nor the tenor of its majority opinions, taken as a whole, really supports a broad movement towards restricting the protections afforded the accused. Many civil libertarians might be well advised to examine the current Court's record carefully and to push aside the fact that Richard Nixon appointed four members of the current court. If they did so, they might find that their true interests lie in dropping their wholesale attacks on the Burger Court and in attempting instead to attract public attention to the various decisions of that Court that stress the continuing need to safeguard the basic rights of the accused.²⁰

As Professor Carol Steiker points out in this very issue of the *Law Review*, in the three decades since Richard Nixon ascended to the presidency "and then almost immediately had the opportunity to replace Chief Justice Earl Warren and three Associate Justices with appointees of his own," the Supreme Court's "pulse-takers" have offered "peri-

16. Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319 (1977).

17. *Id.* at 1321.

18. *Id.* at 1322.

19. Along the way, Jerry seriously doubted that the Court would overrule *Mapp* or *Miranda*, but anticipated the Court's adoption of a so-called "good faith" exception to the search and seizure exclusionary rule (actually, as Jerry makes clear, a "reasonable mistake" exception). Jerry discussed proposals to adopt a "good faith" exception to the exclusionary rule at some length, *see id.* at 1408-15, and concluded that such an exception would "not seriously undermine the [exclusionary] rule's basic functions." *Id.* at 1410. Although Jerry's discussion was fair and balanced — he was careful to present, and to respond to, various objections to a "good faith" modification of the exclusionary rule — he failed to convince either one of his frequent collaborators. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3, at 51-70 (3d ed. 1996); Yale Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court*, in THE BURGER YEARS 143, 164-65 (Herman Schwartz ed., 1987). I hasten to add, however, that Jerry did impress a majority of the Supreme Court. When, seven years after Jerry had published his *Legacy of the Warren Court* article, a 6-3 majority of the Court adopted a "good faith" exception to the exclusionary rule, it quoted from Jerry's article with approval. *See United States v. Leon*, 468 U.S. 897, 920 n.20 (1984).

20. Israel, *supra* note 16, at 1425 (footnote omitted).

odic updates on the fate of the Warren Court's criminal procedure 'revolution' in the Burger and Rehnquist Courts."²¹ I confess to having written three "periodic updates" myself.²² And of the many "pulse-takers" who preceded me in the same enterprise, I found Jerry Israel's article the most comprehensive, the most measured, the most meticulous, and the most useful.²³

* * *

Although I never specifically asked him, I suspect Jerry is in basic agreement with another point Learned Hand made. If I may quote Hand a second time, he once observed:

[Y]ou may not carry a sword beneath a scholar's gown, or lead flaming causes from a cloister. . . . You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt.²⁴

21. Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2466 (1996). Many of these articles are listed *id.* at 2467 n.5.

22. See Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1 (1995); Kamisar, *supra* note 19; Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, the Burger Court (*Is It Really So Prosecution-Oriented?*), and Police Investigatory Practices, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62 (Vincent Blasi ed., 1983).

23. Of course, in the two decades since Jerry wrote his "Legacy of the Warren Court" article, many significant decisions have been handed down and many other "pulse-takers" have had their say. This has diminished the usefulness of Jerry's article (but not its high quality). I do not plan, in this lifetime, to deliver a fourth update on the state of health of the Warren Court's landmark criminal procedure decisions, but if I were to do so my starting point would be Professor Steiker's excellent article. See *supra* note 21.

24. Learned Hand, *On Receiving an Honorary Degree*, in *THE SPIRIT OF LIBERTY*, *supra* note 15, at 102, 105.

With all deference to one of the great figures in American legal history, I must register a dissent. Of course a scholar who tackles a problem or a cluster of problems should *start out* with an open mind or "an open ear to the cold voice of doubt." But after studying for hundreds of hours such issues as the search and seizure exclusionary rule; the admissibility of confessions; the nature and scope of the right to assigned counsel; the death penalty; and the relationship, if any, between the crime rate and rules of evidence and procedure, and after thinking, writing and speaking about these issues for many years, isn't the scholar, at some point, likely to arrive at some pretty firm conclusions? If so, why shouldn't scholars explain to noncriminal law specialists in the legal profession and to members of the public generally how and why they reached the conclusions they did and how and why arguments to the contrary by law enforcement officials and politicians are unsound or misleading? If this makes the scholar an "advocate" or "counteradvocate," so be it.

I know the generalization I am about to make is hard to prove to everybody's satisfaction and is the kind of generalization that makes my friend and colleague Jerry Israel wince, but I believe that so many law enforcement officials, politicians, and media peo-

Now Jerry is well aware that sometimes, at least, I do “carry a sword” beneath my gown, and every time he, Wayne, and I prepare a new edition of our casebook, Jerry — how shall I put this — looks into my gown or watches for that sword. The three of us always have operated on the premise that the one chiefly responsible for a particular chapter has the final say on what goes into the chapter and how the selected cases and extracts from the literature are edited. But that has not prevented Jerry from making his views known. Not infrequently the conversation would go something like this:

JHI: If this book gets much longer the seams will burst; we have to edit cases as tightly as possible.

YK: I realize that, Jerry.

JHI: Then why is Brennan’s dissent [or Marshall’s or Stevens’s] in so-and-so case about two and a half times as long as the opinion of the Court?

YK: Well, it’s a much better opinion than the one Burger [or Rehnquist] wrote for the Court.

JHI: What do you mean, much better?

YK: Well, it’s more sound, more closely reasoned, more persuasive —

JHI: More persuasive to whom? Certainly not to a majority of the Supreme Court!

YK: You can’t judge the quality of an opinion by how many votes it commands. After all, Justice Holmes’s dissenting opinion in *Abrams* was joined by only one other Justice.²⁵

JHI: Wait a minute! Are you claiming that this underedited dissent we’re talking about ranks with the Holmes dissent in *Abrams*?

YK: No, Jerry, I was only making the point —

JHI: Look, if and when this dissenting opinion you’re so fond of becomes as famous as the Holmes dissent in *Abrams* — by the way, I wouldn’t hold my breath — I shall encourage you to leave out the majority opinion entirely and just publish the dissent. *In the meantime*, however, I think as a general rule a dissenting

ple have been proclaiming “crime crises” for so long and have expressed lack of confidence in the capacities of ordinary institutions and traditional procedures to deal with the current great emergency for so long, (see Yale Kamisar, *The Rights of the Accused in a “Crime Crisis,”* in *POSTMORTEM: THE O.J. SIMPSON CASE 211* (Jeffrey Abramson ed., 1996); Yale Kamisar, *When the Cops Were Not “Handcuffed,”* *N.Y. TIMES MAG.*, Nov. 7, 1965, at 34, reprinted in *CRIME AND CRIMINAL JUSTICE 46* (Donald R. Cressey ed., 1971)), that members of the academy who are knowledgeable about these matters almost have an obligation to enter the fray in order to respond to these charges.

25. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

opinion shouldn't be much longer, or any longer, than a majority opinion. Why don't you take another look at the dissent and see whether you can whittle it down some more? You can do it. I know how drastically you can edit an opinion — when it's one by Burger or Rehnquist.

My editing of opinions was not the only thing that concerned Jerry. On occasion, he would also have something to say about a portion of a law review article I had decided to reprint in one of the chapters of the casebook assigned to me. Once again, Jerry was watching for that sword under my gown. I remember one incident very well. When preparing the 1974 Fourth Edition, I decided to run a long extract from an article by Professor Anthony Amsterdam, which stated in part:

To a mind-staggering extent — to an extent that conservatives and liberals alike who are not criminal trial lawyers simply cannot conceive — the entire system of criminal justice below the level of the Supreme Court of the United States is solidly massed against the criminal suspect. Only a few appellate judges can throw off the fetters of their middle class backgrounds — the dimly remembered, friendly face of the school crossing guard, their fear of a crowd of “toughs,” their attitudes engendered as lawyers before their elevation to the bench, by years of service as prosecutors or as private lawyers for honest, respectable business clients — and identify with the criminal suspect instead of with the policeman or with the putative victim of the suspect's theft, mugging, rape or murder. Trial judges still more, and magistrates beyond belief, are functionally and psychologically allied with the police, their co-workers in the unending and scarifying work of bringing criminals to book.²⁶

Jerry was troubled by the passage. The conversation between us went something like this:

JHI: You know, I think Tony may have overstated the degree to which judges and magistrates are allied with the police.

YK: I thought he was right on the money.

JHI: Now why doesn't that surprise me? I didn't expect you to have any doubts, but I do. Serious ones. You know, it's hard to support the kind of generalizations Tony made with any hard data. But based on the courts and judges with which I'm familiar, I would have to disagree with him.

YK: I thought you had a high regard for Tony Amsterdam.

JHI: I do. I also have a high regard for Frank Allen, Joe Grano, Sandy Kadish, Frank Remington, and many others. But I wouldn't auto-

26. Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970).

matically accept, and don't accept without challenge, everything they say either.

YK: Look, *we* are not saying this; Tony Amsterdam is.

JHI: I don't think we can wash our hands of the matter that easily. *We* decided to reprint his article. If his views are questionable *we* ought to drop an editor's footnote saying so. Need I remind you that when you edited Chief Justice Burger's majority opinion in *Harris v. New York*,²⁷ you felt no compunction about dropping an editor's footnote questioning his reading of the record. Well, if we can challenge the Supreme Court's reading of the record in a given case, why can't we question the accuracy of a law review writer?

YK: Two law professors had written an article spelling out how the *Harris* Court had distorted the record in that case.²⁸ I simply dropped a footnote referring to that article. But I don't know of any article challenging Amsterdam's assertion that to a very large extent the criminal justice system is tilted against criminal suspects and criminal defendants.

JHI: If you came across such an article, would you use it?

YK: Yes, you convinced me of that.

JHI: Why don't you make another tour of the relevant literature. If you don't find anything on point now, I assure you that you will find something right on the nose before we do the next edition.

Three years later, Tony Amsterdam's views *were* challenged in print — by Jerry Israel. So, when I quoted Amsterdam's views again about how the system is “solidly massed against the criminal suspect” and how judges and magistrates are “functionally and psychologically allied with the police,”²⁹ in the 1980 Fifth Edition, I was able to add the following editor's footnote:

But see Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 Mich. L. Rev. 1319, 1422 fn. 433 (1977), “find[ing] Professor Amsterdam's characterization deficient at several points”:

First, a great many judges who can recall the friendly school guard can also recall the tales of their sons, daughters, nephews,

27. 401 U.S. 222 (1971). Often called the first blow the Burger Court struck *Miranda*, *Harris* held that statements preceded by defective warnings, and thus inadmissible to establish the prosecution's case-in-chief, could nevertheless be used to impeach the defendant's credibility if he chose to take the stand in his own defense.

28. Alan M. Dershowitz & John Hart Ely, Comment — *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

29. See text accompanying *supra* note 26.

and nieces about the unnecessary “hassle” they received from police in the course of a traffic stop, a police visit to a noisy party, or even a marijuana bust. The difficulties that police encountered in the 1960s frequently altered the attitudes not only of teenagers and college students, but of their parents as well. Skepticism as to police efficiency, motive, etc., spread beyond those immediately involved and obviously included a significant group of those “middle-class” lawyers who are now on the bench. Second, the bench itself, at least in the large cities, comes from a far more diversified background than Amsterdam acknowledges. On the benches of the two primary trial courts in the Detroit area — Wayne County Circuit Court and Detroit Recorder’s Court — we have not only former prosecutors and business lawyers of middle-class backgrounds, but also former public defenders, defense lawyers, and lawyers who grew up in the ghettos of the city. Perhaps Detroit may be somewhat atypical, but defense lawyers in other large cities have told me of similar diversity among the judges in their cities. Third, insofar as these judges are functionally allied with anyone on a day-to-day basis, it is not so much with the police as the prosecutor *and* the public defender or defense “regulars” who appear in their courtrooms. Obviously the pressure of high volume may lead some judges to want to “push past” preliminary motions and “get to the case.” Also, many may take the position, perhaps correctly, that as between a defendant and a police officer, the defendant is more likely to lie, having a greater interest in the outcome. This is not the equivalent, however, of the almost inevitable bias that Amsterdam suggests.³⁰

* * *

I have quoted two observations by Learned Hand that I think apply to Jerry Israel. But Holmes, too, said something that makes me think of Jerry:

I learned in the regiment and in the [Harvard Class of 1861] the conclusion, at least, of what I think the best service that we can do for our country and for ourselves: To see so far as one may, and to feel, the great forces that are behind every detail . . . to hammer out as compact and solid a piece of work as one can, to try to make it first rate, and to leave it unadvertised.³¹

Trying hard to make a piece of work first rate and then leaving it unadvertised — that’s Jerry. In writing of Jerry’s “unassuming and self-effacing” nature, Wayne noted that “it would not surprise [him] in the

30. YALE KAMISAR, WAYNE R. LAFAVE & JEROLD H. ISRAEL, *MODERN CRIMINAL PROCEDURE* 205 n.b (5th ed. 1980).

31. Oliver Wendell Holmes, *The Class of '61*, in 3 *THE COLLECTED WORKS OF JUSTICE HOLMES* 504, 504 (Sheldon M. Novick ed., 1995).

least if [Jerry] were to sabotage the office of the *Michigan Law Review* in order to prevent the issue dedicated to him from ever seeing the light of day.”³² I assume Wayne spoke in jest, but he came closer to the truth than I think he ever imagined. Dedicating this issue of the *Law Review* to Jerry Israel was done without his knowledge or cooperation and over his strong objection.

More than a year ago, after consulting with various faculty members and *Law Review* editors, I walked into Jerry’s office and started talking about the “networks” senior professors develop over the years. I named a number of people who were in my network and asked Jerry who were in his.

“What’s going on?” responded Jerry. “Are you trying to help put together a collection of law review tributes to mark my retirement from the U-M? No way. I don’t want to be a part of that. I don’t want to impose that burden on my friends. Besides, dedicating an issue to a retiring professor is something that’s gone out of style.”

Jerry’s attitude was so foreign to me that at first I simply did not believe him. I was about to say, “Surely, you are not serious, Mr. Israel” when — his eyes blazing — he looked right at me and repeated grimly that he did not want to put this kind of burden on his friends. I decided he *was* serious.

So I lied. I told him we would do it his way — forget about dedicating an issue of the *Law Review* to him and simply run a story about his retirement from the law school in *Law Quadrangle Notes* (the law school alumni publication). This, Jerry insisted, was the appropriate thing to do and the only thing he wanted done.

Jerry Israel’s views to the contrary notwithstanding, I hope and trust that dedicating an issue of the law review to professors like Jerry on occasions such as these is something that will never go out of style. And I hope even more that law professors like Jerry Israel will never go out of style.

32. LaFave, *supra* note 1, at 2436.