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A TRIBUTE TO PROFESSOR JEROLD ISRAEL — MY TEACHER, MY CO-AUTHOR, MY GOOD FRIEND

*Paul D. Borman**

He who learns from his Fellow a single chapter, a single verse, a single expression, or even a single letter must pay Him honor.

(Adapted from Pirke Avot, "Ethics of the Fathers")

Jerold Israel is my colleague, my good friend, and my teacher. He is also my role model for each of those categories. I appreciate the opportunity to honor him with this Tribute.

I have known Jerry since 1969 — twenty-seven years.¹ Jerry and I met when we were appointed by Michigan Governor William Milliken to a seven-person Committee to Study the Feasibility of the State Commission on Investigation. The Committee, chaired by Judge Philip Pratt, a wise and revered jurist,² gathered information by hearing testimony, by visiting states that had such commissions, and by debating the pros and cons of the commissions at length. It was an excellent vehicle to learn about the members of the Committee, and I learned to respect

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1. Although I never had him for a Professor when I went through the University of Michigan Law School (1959-1962), I have heard some good stories from students who were there in the 1960s:

- (1) how Jerry would take a football from under the lectern, toss it toward the students, and the one who caught it would then be on the firing line for Jerry's questions;
- (2) how Jerry told a student enrolled in his Saturday class — who had other ideas on how to spend Saturday morning — that if he missed one more class, he'd be dropped. That student, now a successful Washington lawyer, appreciates that Jerry cared enough about legal education to make that student stick around and learn the law.
- (3) how Jerry would zone in on a student who had clearly not prepared for class and ask enough questions to make that student realize that he did not want that uncomfortable experience to occur a second time.

My sources have requested anonymity. In the spirit of this literary season, the author has agreed to their requests. See ANONYMOUS, *PRIMARY COLORS* (1996).

2. In 1969, Judge Pratt served as an Oakland County Circuit Judge. In 1970, he was appointed to the United States District Court for the Eastern District of Michigan, where he served as Chief Judge from 1986 until his untimely passing in 1989.

Jerry for his intellect, his ability to sort the wheat from the chaff, his wry sense of humor, and his up-beat personality.

That same year — 1969 — when I began teaching criminal law and procedure at the Wayne State University Law School, I quickly came to recognize that Jerry Israel was the “maven,” or supreme expert, in the areas of criminal law and procedure. I also came to recognize that his casebook was the “bible” on criminal procedure.³ During my ten years of teaching and, subsequently, during my sixteen years of practice, I would make many a phone call or visit to Jerry to discuss issues of criminal law and procedure. He was never aloof or otherwise in an “ivory tower.” He was always available, patient, and right on target with his answer.

In 1979, when I left full-time law teaching to become the Chief Federal Defender in Detroit, I had just completed a set of materials for a seminar on white collar crime. I told Jerry about the materials and proposed co-teaching an evening seminar at the University of Michigan Law School. Jerry agreed, and he and I began sixteen years of co-teaching — my most intellectually stimulating and rewarding years.

When I came to Ann Arbor in September, 1979 for our first seminar, I was the Defender, and Jerry was the author of a recent, significant article challenging civil libertarian views that the Burger Court had destroyed the legacy of the Warren Court.⁴ The smart money in Las Vegas placed me on the left, and Jerry on the right. The reality was that neither of us could be slotted on one side or the other in 1979, nor even sixteen years later.

While the seminar was titled White Collar Crime, the materials covered more than just the substantive crimes — mail fraud and extortion — and included procedural issues (grand jury practice), evidentiary issues (privileges), civil matters involving parallel administrative investigations, and sentencing of individuals and organizations. The great reward to me — and to the students — was learning from Jerry about all of these matters.⁵

It was appropriate that the University of Michigan designated Jerry to the Alene and Allen F. Smith Chair at the law school. I was fortunate to have had Allen Smith as my real property professor in my first year

3. YALE KAMISAR, WAYNE R. LAFAYE, & JEROLD ISRAEL, *MODERN CRIMINAL PROCEDURE*, is now in its 8th Edition.

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

5. A second reward has been co-authoring a casebook with Jerry and Professor Ellen Podgor of Georgia State University: JEROLD ISRAEL, ELLEN PODGOR, & PAUL BORMAN, *WHITE COLLAR CRIME* (1996).

at law school. He was an outstanding professor and was beloved by his students. Jerry has followed in his tradition.

In all of the twenty-seven years that I have known Jerry, I have never heard him utter an angry word or even seen him turn his face into a mean scowl. Even when we would talk about sports, after the Michigan football team had been blown out the previous Saturday, Jerry would never utter a harsh word about any of the coaches or the players. And these days, that's being a real gentleman.

Jerry has opinions, principles and standards, and he doesn't compromise or hide them. But he has never taken the low road to make or score a point. That is why he is respected and admired by all who know him. My respect for Jerry also extends to his family. One of the benefits of working with Jerry has been spending time with him and his wife Tanya and attending the weddings of two of his children.

Jerry's move from Ann Arbor to Florida — to an endowed chair at the University of Florida Law School at Gainesville — hardly means he is ready for the rocker and the Centrum Silver. The best evidence that the mind does not atrophy after moving to Gainesville is Jerry's next-door neighbor at the Florida Law School, Professor Francis Allen. A retired Michigan Law Dean and Professor, Frank Allen, who is senior to Jerry by 15 years, has just authored an outstanding book: *The Habits of Legality: Criminal Justice and the Rule of Law*.

There remains much for Jerry to do in addition to teaching, updating his many casebooks and treatises, and cherishing his new role as a grandfather. My bold suggestion is that Jerry should consider authoring a law review article updating his earlier article which compared the impact of the Burger Court on the legacy of the Warren Court. I, for one, look forward to an article by Jerry defining the Rehnquist Court's treatment of the major themes presented in the Warren Court's decisions.

Would Jerry reach the same conclusion with regard to the Rehnquist Court that he did in his previous article regarding the Burger Court?

The record indicates that the Burger Court has not undermined most of the basic accomplishments of the Warren Court in protecting civil liberties; neither has the Burger Court consistently ignored the interests of the accused.⁶

Would Jerry favor all, several, or none of the Rehnquist Court's decisions dealing with Warren Court precedent in the area of criminal procedure? His earlier revelation regarding the Burger Court stated:

6. Israel, *supra* note 4, at 1324.

I must acknowledge that I was not a staunch supporter of the Warren Court's criminal procedure decisions, although I also was not a severe critic. I also acknowledge that I favor several (but not all) of the Burger Court decisions that may be viewed as narrowing the reach of the Warren Court precedent.⁷

Would Jerry reach the same conclusion regarding Chief Justice Rehnquist's stewardship as he did with regard to Chief Justice Burger?

Civil libertarian critics too often assume that the positions of Chief Justice Burger will eventually be reflected in the rulings of the Burger Court. The Chief Justice today no more reflects the view of a majority of the Justices than did Chief Justice Warren in the period from 1958-1962.⁸

Perhaps Jerry could begin by analyzing Chief Justice Rehnquist's recent Eleventh Amendment opinion in *Seminole Tribe of Florida v. Florida*,⁹ and then segue into an analysis of Chief Justice Rehnquist's Tenth Amendment criminal law opinion in *United States v. Lopez*.¹⁰

7. *Id.* at 1324 n.9 (citations omitted). It would also be of interest to readers to receive, at least in a footnote, Jerry's views on the two contrary opinions by the same New York Federal District Judge, first suppressing evidence and castigating the "N.Y.P.D. Blue," and then admitting the evidence and apologizing to "the dedicated men and women in blue who patrol the streets of our great city." Don Van Natta Jr., *Looking Inside a Judge's Mind*, N.Y. TIMES, Apr. 7, 1996, at E3. Compare *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y.) (holding that investigatory stop was invalid and suppressing evidence found during that stop), *vacated by* 921 F. Supp. 211 (S.D.N.Y. 1996) with *United States v. Bayless*, 926 F. Supp. 405 (S.D.N.Y. 1996) (Baer, J. recusing himself). Jerry would probably disagree with the language in the initial decision suppressing evidence, *inter alia*, on the ground that it was reasonable for residents of Washington Heights to run from police because police officers were "corrupt, abusive, and violent."

In his law review article on the Burger Court, Jerry disagreed with Professor Anthony Amsterdam's assertion that "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." Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970). Jerry noted that while

it is difficult to challenge such generalizations except with other generalizations that are equally lacking in hard data to support them. . . . The substantial rate of defense success on suppression motions in narcotics cases, as documented in cities like Chicago and Washington, certainly suggests that a fair portion of judges in many overburdened courts will quickly dispose of matters against, as well as for, the police.

Israel, *supra* note 4, at 1421-22 n.433.

Does that District Judge's second opinion in *Bayless*, vacating his initial decision to suppress the evidence, give credence to Professor Amsterdam's hypothesis, or would Jerry just call that case an anomaly?

8. Israel, *supra* note 4, at 1422 n.435 (citations omitted).

9. 116 S. Ct. 1114 (1996).

10. 115 S. Ct. 1624 (1995).

Whether or not Jerry accepts my invitation to author this article — as a Judge it's easy to give suggestions/orders — I know that he will continue to be the same fine, hard-working mensch in Florida. I will miss his company on Wednesday nights at Hutchins Hall. I hope to drop in on his Florida White Collar Crime Seminar at least once a semester to continue my learning process. I wish him well.