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A TRIBUTE TO JERRY ISRAEL: A FRIEND WITH A MESSY OFFICE

*Debra Ann Livingston**

When the Board of Editors asked me whether I would be willing to write a few words for an issue of the *Michigan Law Review* that would honor Jerry Israel, I was certain of two things. First, I was delighted to be offered the opportunity to heap praise upon a friend who has had an extraordinary influence upon the law: as a careful and meticulous scholar; a sympathetic, but rigorous teacher; and as a generous colleague who has helped and inspired many younger academics, among whom I am happy to be counted. Second, I knew that I would be at a serious disadvantage in chronicling and celebrating aspects of Jerry's long and successful career. Jerry and I met only in 1992, when I arrived at Michigan to begin my teaching career. I was confident that colleagues like Yale Kamisar and Wayne LaFave — who after all, began their immensely productive collaboration with Jerry sometime around 1969¹ — would have countless stories to tell (of deadlines, Supreme Court citations, and perhaps even one or two sporting events) that reached back into decades about which I could claim no expertise.

So I accepted the invitation, determining that I would write about that aspect of Jerry and Jerry's contribution to Michigan that I personally know best: the friendship and generosity that he has extended to younger colleagues in the field of criminal law and procedure, and the ways in which his thoughtful, pragmatic analysis of legal problems, illuminated by the considerable erudition that he brings to bear on criminal justice issues, has helped those of us just starting out in our aca-

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1. See LIVINGSTON HALL, YALE KAMISAR, WAYNE R. LAFAVE & JEROLD H. ISRAEL, *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS & QUESTIONS* (3d ed. 1969); see also JEROLD H. ISRAEL, YALE KAMISAR & WAYNE R. LAFAVE, *CRIMINAL PROCEDURE AND THE CONSTITUTION* (1988) (revised annually); JEROLD H. ISRAEL & WAYNE R. LAFAVE, *CRIMINAL PROCEDURE IN A NUTSHELL: CONSTITUTIONAL LIMITATIONS* (5th ed. 1993); YALE KAMISAR, WAYNE R. LAFAVE & JEROLD H. ISRAEL, *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS & QUESTIONS* (8th ed. 1994); WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* (2d ed. 1992) (text); WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* (1984) (three-volume treatise).

demic careers. Jerry has packed up his Ann Arbor office for relocation to a sunnier place that he has taken to frequenting in recent years — though, happily, with the promise to return, I'm told, several months a year. Anyway, I thought I'd begin with that office — to which many at Michigan rather constantly repaired, seeking illumination in matters of criminal law and procedure.

Jerry's office at Michigan could only be described as comfortably cluttered. Books were stacked upon books; papers were strewn over an antique desk — the outline of which was sometimes barely discernible amidst the piles of criminal justice reporters, law reviews, and bulging manila folders that surrounded it. The bookshelves were not neatly organized. Annual copies of the *Sourcebook of Criminal Justice Statistics*, well-thumbed, battled for space next to obscure reports on the administration of juvenile justice in Arkansas. There were boxes upon boxes — on the floor, and sometimes on the surprisingly comfortable chair in which visitors were invited to sit down. Titles — *The Perjury Routine*,³ *Lawyers at Lineups*,⁴ *Federal Habeas Corpus: A Study in Massachusetts*⁵ — peeked out from under copies of that somewhat obscure twice monthly, *Law Enforcement News*. The color scheme, built around a worn green carpet and not-so-recently painted green walls, was eerily reminiscent of Hollywood's depiction of police interrogation rooms. But the view — looking through the leaden glass of Michigan's stone casement windows, out over the Law School quadrangle — was phenomenal.

There were no porcelains in this office. No elegant Art Nouveau lamps to grace the space where Jerry sat, crammed in amongst back copies of *Crime and Delinquency*. There was a photograph of Potter Stewart, autographed to Jerry, hanging on one back wall. Sentimentally, there were two photos of the Michigan faculty (not often examined by said faculty, thankfully, since close scrutiny usually provoked embarrassed chuckles — for hair lost, sideburns worn, and leisure suits that did not survive the test of time). There was a photo, I think, of Jerry holding a grandson.

When I arrived at Michigan in the summer of 1992 to teach criminal procedure, I visited that office almost immediately. Jerry, after all, was now my senior colleague. I was going to be teaching a course that he had taught for many years: the Criminal Procedure Survey, that pur-

3. Irving Younger, *The Perjury Routine*, 204 NATION 596 (1967).

4. Frank T. Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?*, 17 UCLA L. REV. 339 (1969).

5. David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973).

ported, in one semester, to work through the Fourth, Fifth, and Sixth Amendments, while also introducing the student to the entire criminal adjudicative process — from bail to jail, as the Michigan criminal procedure crowd liked to refer to it. I was new to academic life, new to the Midwest, and new to teaching, but working under the influence of that vaunted self-assurance that former prosecutors (and their criminal defense counterparts) can sometimes summon up, I didn't think that I was new to criminal procedure.

Of course, I hadn't yet encountered Jerry.

I remember that first meeting pretty clearly. The door to Jerry's office was open. Jerry was sitting behind his desk, holding a *Tab*. He was wearing shorts and a baseball cap. (I won't mention what I was wearing but, in fairness, it was my first day on the job, and so I can scarcely be faulted for failing to predict Michigan's somewhat relaxed summer dress code.) Jerry welcomed me to the faculty, and I sat down in that surprisingly comfortable chair. We talked about many things: from prosecutorial discretion to sentencing guidelines, from wiretapping to interrogation. During the course of the conversation, Jerry would periodically start rummaging around in boxes, or among the books and pamphlets on various shelves, each time emerging triumphantly with relevant material: statistics on how promptly defendants are brought to trial in the federal system and in cities across the United States; a study on the rates at which prosecutors in six or seven major urban offices decline to proceed with cases after arrest; a chart depicting the circumstances in which bail is usually afforded or denied. At the end of an hour, I had accumulated a pile of materials several inches high — much of which I still use in teaching, and all of which added to my understanding of the ways in which the criminal justice system operates. I had also discovered, in a mere hour, just how little I really knew.

That conversation was the first of a series of memorable talks over the two years that I was at Michigan. You could say that my criminal procedure education really began in that office. Jerry's door was always open. Jerry was also around — a regular among the weekend crowd, and often in the office into the evening, when he was working to finish a manuscript. In my first year of teaching, my course drew its shape from Jerry's syllabus. I avoided error by dropping in to see Jerry on the way to class. Despite his many accomplishments — the prodigious and influential scholarly work, the many accolades that he has received — Jerry was accessible, and wholly without pretension in our many conversations. He listened — not pointing out, even once, that some of my questions might be answered more efficiently merely by perusing his treatise. He was also himself inquisitive, and open to new arguments

and new approaches to teaching subjects that he knew better than anyone. Perhaps Sam Gross, another of Jerry's colleagues who recently started teaching criminal procedure again, after spending several years teaching evidence, put it best: "There are two ways to learn to teach criminal procedure. One way is if your office is right across the hall from Jerry. The second, dramatically inferior way, is any other set of circumstances."

Jerry is known, among the criminal law and procedure crowd at Michigan, as the one with the encyclopedic knowledge of the field. You go to him for an answer. The question can be legal, or not so strictly legal; narrowly doctrinal or touching upon broad concerns with the institutional realities of disparate American criminal procedural systems, as they exist today. He is, simply put, a learned man — in the best and most wonderful sense of that word. Are you wondering how important the grand jury is in states across the country? Ask Jerry. Perplexed about double jeopardy? Give Jerry a call. One Ann Arbor evidence scholar, namely Richard Friedman, who is known to turn his attention, at times, to matters concerning the criminal justice system, recently described himself as wholly panic-stricken at the idea that Jerry will now be spending much of his time in Gainesville. I can only hope that with Jerry in Florida, the foot traffic to his office is replaced, rather rapidly, with a stream of letters, phone calls, and drafts. Otherwise, there will be many confused souls in Ann Arbor — students, colleagues, judges, and lawyers — who will be forced to suffer their confusion, having come to rely upon him over the years for the clarity and illumination that are his trademark.

As someone who practiced criminal law for several years before becoming an academic (and so experienced criminal law in its messy operational sense, so to speak), I think that what I appreciate most about Jerry, as an intellectual, is his terrific capacity to deal with complexity. This capacity manifests itself, I think, in two major ways.

First, Jerry doesn't treat legal abstractions as things that float freely. He tends to situate them in historical circumstances and existing forms of practice, and to take responsibility, as a scholar, for understanding the empirical world — past or present — in which power is invoked, legal decisions are made, and people's lives are affected.⁶ I learned a tremendous amount from him about the ways in which federal

6. Consult, for example, Jerry's lucid history of selective incorporation, in which he carefully analyzes how the doctrine has been shaped by various concerns that have been afforded different weight in different periods of constitutional history, for reasons that he skillfully illuminates. See Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 249 (1982).

prosecutions, with which I was professionally familiar, differ from typical state prosecutions; we talked, at length, about how these differences might be salient in thinking about procedural rules. The piles of material in Jerry's Michigan office — studies, compilations, statistical abstracts — were, to my mind, a testament to his desire to understand criminal procedural rules in light of the complex world in which rules exist: a world in which rules are faithfully (or not so faithfully) applied, artfully (or not so artfully) evaded, and always, in the process of application, partially (or wholly) changed from the ideal form in which their drafters contemplated them.

Second, more theoretically, Jerry doesn't reduce the criminal justice system to binary description — where results are civil libertarian or oriented to crime control, where every decision can be understood, supposedly, in simple and politically conventional terms. In a thoughtful essay, Jerry has explicated fully nine, different, often conflicting, values that are extant in the criminal procedural materials and that can explain and illuminate portions.⁷ I still begin my criminal procedure course by invoking those nine values, and by suggesting that at the theoretical level, as well as the concrete, complexity is the name of the game.

Jerry, who clerked for Justice Stewart from 1959 to 1961, wrote some eloquent words in describing Justice Stewart's judicial philosophy. I invoke them here because I believe that they are helpful in understanding how Jerry himself approaches the task of evaluating and explaining criminal law and procedure. The judge, Jerry said, confronts issues that arise in specific factual settings. These issues, he continued, commenting upon Justice Stewart's conception of the judicial role:

are far too complex to be resolved by the simple application of one or two absolute values. The judge views an issue in the context of a specific factual situation, and his resolution of the issue must take into account a multitude of considerations presented by that context — considerations too diverse and complicated to be categorized or analyzed readily in terms of any set of doctrinaire labels. His decisions cannot be based upon abstract generalities, but must be the product of a careful evaluation of all relevant factors that will produce an answer that is pragmatically and theoretically sound.⁸

As Jerry described Justice Stewart's judicial philosophy, the Justice's recognition of complexity and avoidance of quick and easy answers did

7. See Jerold H. Israel, *Cornerstones of the Judicial Process*, KAN. J.L. & PUB. POLY., Spring 1993, at 5.

8. Jerold H. Israel, *Potter Stewart*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2921, 2921 (Leon Friedman & Fred L. Israel eds., 1969).

not signal, in him, a lack of appreciation for guiding principles. Nor do similar habits of mind — the embrace of complexity and the aversion to oversimplification — signal in Jerry, the scholar, a distaste for overarching explanatory frameworks. Such frameworks are useful, when they are useful, and in these circumstances, they are freely employed. But in Jerry's work, theoretical frameworks are adopted only provisionally, where useful, and only after due consideration for the matters that they omit or discount. An abiding understanding of complexity, and a meticulous avoidance of over easy characterization — these qualities are ever present in Jerry's painstaking and careful scholarship and account, in large measure, for the acclaim that it has won.

But let me return, at least briefly, to that cluttered office where Jerry did his work to mention one or two of the ways in which Jerry will be sorely missed, not only by those on the Michigan faculty who devote themselves to (or sometimes turn their interests in the direction of) criminal law and procedure, but also by those less lucky souls who have other scholarly concerns. To set the stage, it was sometimes, quite frankly, a noisy office. A Fourth Amendment decision would be announced. The *New York Times* would contain a provocative piece on the latest development in some grand jury investigation or in some celebrated criminal case. The noise would begin, almost invariably, with Yale, who would stride down the hall to Jerry's office — case, newspaper article, or other relevant material in hand — proclaiming loudly upon the merits or demerits of the matter. On the most memorable days, Jerry would disagree, in whole or in part, with Yale's evaluation of the state of the criminal justice universe, as revealed by the matter at hand. Debate would ensue.

These days were special because, in a moment, the calm of Michigan's Legal Research Building would be suddenly disturbed, and all would be drafted to explicate a matter of criminal law and procedure. Through Jerry's open door, the often animated discussion between Jerry and Yale would attract, first, other criminal law and procedure professors, and sometimes evidence scholars, who would slowly converge in Jerry's office, or outside it in the hall, to add their two cents to the controversy. Tort scholars, labor law specialists, and commercial law aficionados would eventually join the fray — lured from their offices either by the pure intellectual fascination of criminal law and procedure, or by the realization that no quiet work was going to get done, until this matter was thoroughly explored. These were occasions of camaraderie, of friendship and debate. And the lively conversations that began in Jerry's office, around some matter of doctrine, some assessment of the criminal defense lawyer's tactics, would often echo, for days, in satellite discus-

sions — in the faculty lounge, the hallways, or over lunch, and often among faculty members who toiled in areas seemingly far removed from criminal law and procedure. The openness of these debates, their excitement and conviviality, were a product, to my mind, of the intellectually provocative, and at the same time down-to-earth and unpretentious scholars who usually set them off in the first place — namely, Jerry and Yale.

Based on my conversations with several of Michigan's professors, in the course of preparing this tribute, Michigan and the scholars residing there will miss these lively debates. They will miss Jerry in many other ways as well. Certainly Jerry is well-known, among the Michigan faculty, not only as a resource to draw upon in learning about criminal law and procedure, but also as a repository of institutional memory — as the person to be counted upon, to remember and to recount the lore that is an essential part of the ongoing practice of places like Michigan. Jerry's Ann Arbor office, crammed with information that he made readily accessible, could serve as an easy metaphor for this aspect of Jerry's contribution to institutional life. But less metaphorically, the Michigan faculty, I am told, will miss another, special quality that Jerry was understood to bring to Michigan, and to its collegial decision making: namely, Jerry's widely recognized care and concern for Michigan itself. This care and concern was apparent, as lawyers might express it, in the integrity that Jerry brought to the assessment of institutional issues, in Jerry's habits of good faith and fair dealing, and in the trust that was universally afforded to Jerry in matters of importance. Jerry's care and concern for Michigan represents a pure intangible, unlike his concrete contributions to scholarship, to academic debate, and to institutional memory. It is less easily compensated for with the telephone, fax, FedEx, and e-mail that can keep us abreast, via communications to Florida, with developments in forfeiture law. But it is certainly to be acknowledged as one of Jerry's substantial contributions to Michigan, as an institution.

Jerry's departure, then, is Michigan's loss, the University of Florida's certain and substantial gain. I was just lucky — to begin my academic career at Michigan, when Jerry's office was open for business, and Jerry was available to help a new academic learn her trade. I predict that Jerry's office at Florida will soon be cluttered, if it isn't already. And I must confess, too, that I've already called down there once, in a panic, right before a double jeopardy class. To you, Jerry, all the best as you pack up that Ann Arbor office, and unpack in Florida. I know that you will be sorely missed. And thanks again for all your help and for those memorable conversations.