Saint Louis University Law Journal

Volume 45
Number 2 *(Spring 2001)*

Article 6

3-19-2001

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SOLVING SOME DUE PROCESS PUZZLES: A RESPONSE TO JEROLD ISRAEL

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It is a pleasure to be taken on Professor Jerold Israel's thorough and comprehensive tour of the Supreme Court's due process cases relating to criminal procedure. His careful doctrinal history maps out an entire city that most of us—even we professors of criminal procedure—know only neighborhood by neighborhood, and in which we tend to recognize only the more recent signposts and landmarks. Professor Israel offers a map, an annotated guidebook and an era-by-era history that resembles one of those layered archeology exhibits found at natural history museums. It is a tremendously helpful compendium that will be required reading for all serious students of constitutional criminal procedure.

On the other hand, it is not an easy piece for which to formulate a response. Professor Israel explicitly invites contributions of two kinds. First, he acknowledges that his is a doctrinal history that necessarily ignores "the personalities and the political and societal developments"[1] that contributed to shaping the Supreme Court's due process jurisprudence. "Hopefully," says Professor Israel, "others will fill in the rest of the picture."[2] Second, Professor Israel maps out a variety of possible positions on the relationship of due process to criminal procedure to which the Supreme Court might yet commit, but he leaves "evaluating the wisdom of these different positions"[3] to his commentators, of whom I am one. I hate to disappoint, but I am afraid that neither task is one that I undertake in this response, at least not wholly or directly. I decline the invitation to provide biographical, political or social history primarily because of limited expertise and time (the same excuse pleaded by Professor Israel himself), but I decline the invitation to defend a coherent normative vision of the intersection of due process and criminal procedure primarily because of a certain skepticism I feel toward that project. The enormously wide-ranging influence of the due process clause over the entire area of constitutional criminal procedure demonstrated by Professor

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1. Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 306 (2001).

2. *Id.*

3. *Id.* at 426.

Israel's work resists any simple, over-arching normative framework. Although I do not share the radical rejection of "top-down" theory propounded by some of my colleagues,[4] I do partake of a more limited reluctance to search for a single paradigm or even a single set of guidelines that must cover so much diverse territory.

However, I will try to offer in this brief response some comments that might be deemed at least slightly (albeit quite imperfectly) responsive to Professor Israel's call for historical context and normative constitutionalism. I will describe some due process puzzles I have encountered in my teaching of various aspects of constitutional criminal procedure and explain how Professor Israel's work has helped me to make sense of them. By using Professor Israel's work to help explain these puzzling cases, I hope to further enrich the context he has already provided. In addition, while I do not offer the normative guidelines that Professor Israel invites, his piece and my puzzles do lead me to some normative reflections—about what Professor Israel politely calls "craft,"[5] but which I might call candor or transparency.

Of course, both of my puzzles make brief appearances—how could they not?—in Professor Israel's encyclopedic work. However, I will play them out in a bit more detail and then explain how Professor Israel's work has given me some new insight into them.

The first puzzle is one I encounter every time I teach what those in the criminal procedure "biz" know as the "bail to jail" course—the chronological overview of issues, primarily constitutional, relating to criminal adjudication. Very early in this course, I teach the famous case of *Gerstein v. Pugh*,[6] in which the Supreme Court held that arresting and holding an unindicted person for trial was unconstitutional without a judicial determination of probable cause for detention. While this is a landmark case in that it delineated a new right for criminal defendants, the Supreme Court actually cut back on the holding below of the Fifth Circuit, which had not only invalidated Florida's practice of detaining people for trial on nothing but a prosecutor's information, but also required that the judicial hearing on probable cause be an adversary one.[7] The Supreme Court decided that what are now known as "*Gerstein* hearings" need not be adversarial; rather, they can be *ex parte* and based on sworn rather than live testimony.[8] The Court reached this conclusion by asserting that the Fourth Amendment warrant process specifies the "process that is due" in criminal cases involving seizures and detentions of persons.

4. *See* Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149 (1998).

5. Israel, *supra* note 1, at 426.

6. 420 U.S. 103 (1975).

7. *Gerstein*, 420 U.S. at 119.

8. *Id.* at 125.

Thus, those arrested on a judicial warrant are not entitled to *Gerstein* hearings, and those arrested without warrants are entitled only to the same sort of hearing that would generate such warrants. This particular determination of the Court was a close one, 5-to-4, with Justice Stewart penning a blistering attack on the majority's reasoning:

> I see no need in this case for the Court to say that the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, the custody of a refrigerator, the temporary suspension of a public school student, or the suspension of a driver's license. Although it may be true that the Fourth Amendment's "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases," this case does not involve an initial arrest, but rather the continuing incarceration of a presumptively innocent person. Accordingly, I cannot join the Court's effort to foreclose any claim that the traditional requirements of constitutional due process are applicable in the context of pretrial detention.[9]

Justice Powell, writing for the majority, responded to Stewart's call for "traditional" due process analysis not by denying that such analysis might lead to a different result, but rather by insisting that the due process clause was simply inapposite to the case because the Fourth Amendment was "tailored explicitly"[10] for the criminal justice system.[11] Powell thus suggested—but did not elaborate or defend—the proposition that if there is a specific constitutional provision on point (as there often will be in the post-incorporation world, given the relative specificity of the Bill of Rights regarding criminal procedure), there is no recourse to the due process clause, even if there is a strong argument that traditional due process balancing would lead to a different result.

Students in my class enjoy elaborating and taking sides in this debate between Stewart and Powell, but they really start scratching their heads when, much later in my chronological course (and twelve years later in Supreme Court time), we stumble upon *Pennsylvania v. Ritchie*,[12] in which a father accused of raping his daughter sought to subpoena confidential files containing prior statements made by the complainant to the state Children and Youth Services in the course of its investigation of the complaint of sexual abuse. Once again, the Supreme Court announced a new right for criminal defendants—the right to have access to any information deemed material to the defense by the court after *in camera* review of the relevant records.[13] But once again, the Court rejected the broader reasoning and result of the lower court, in

9. *Id.* at 127 (Stewart, J., concurring) (citations and internal references omitted).
10. *Id.* at 125 n.27.
11. *Gerstein*, 420 U.S. at 125.
12. 480 U.S. 39 (1987).
13. *Ritchie*, 480 U.S. at 43.

this case the Pennsylvania Supreme Court, which would have granted the defendant direct access to the subpoenaed material based on a reading of the compulsory process clause of the Sixth Amendment, which gives a defendant the right to use the "compulsory process" of the courts—the subpoena power—for "obtaining witnesses in his favor."[14] Instead, the U.S. Supreme Court reasoned that the defendant's claim should be considered not under the compulsory process clause but rather under the "broader protections of the due process clause of the Fourteenth Amendment,"[15] because that is what the Court "traditionally"[16] had done in prior cases involving the government's duty to disclose material exculpatory evidence.

Therein, of course, lies the source of the head scratching. Why was the Fourth Amendment deemed to be "tailored explicitly" for the criminal process, when it nowhere mentions criminal cases, while the Sixth Amendment was not so deemed, despite the fact that it begins with the words, "In all criminal cases . . ."? Why did Ritchie get the benefit of the "broader protections" of the due process clause, while Pugh and his co-respondents did not? Why did the *Ritchie* Court not mention *Gerstein*? What, if anything, changed in the twelve years between *Gerstein* and *Ritchie*? And which opinion is right, anyway?

The second puzzle is one that I encounter whenever I teach my course on capital punishment. In 1971, the Supreme Court considered the first global constitutional challenge to the practice of capital punishment. The capital defendants in *McGautha v. California* and *Crampton v. Ohio*[17] both argued that their death sentences were unconstitutionally imposed because their sentencing juries deliberated without any standards to guide the exercise of their discretion. As the Court described their argument: "[P]etitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law."[18] Despite the "undeniable surface appeal"[19] of this argument, the Court rejected it, explaining that providing appropriate guidance to capital sentencing juries is both impossible (because any list of determinative factors would be both over- and under-inclusive) and unnecessary (because capital sentencing jurors can be counted on to take their job very seriously and thus to consider all factors relevant to a given case).

Just one year later, however, the Supreme Court considered exactly the same challenge to prevailing capital sentencing practices—this time, however,

14. *See id.*; U.S. CONST. amend. VI.
15. *Ritchie*, 480 U.S. at 56.
16. *Id.*
17. 402 U.S. 183 (1971).
18. *McGautha*, 402 U.S. at 196.
19. *Id.*

under the Eighth Amendment's proscription of "cruel and unusual punishments" rather than under the due process clause. And this time, of course, the capital defendants prevailed. The famous case of *Furman v. Georgia*,[20] which had the effect of constitutionally invalidating death penalty statutes nationwide, generated no precise holding, because each of the five Justices in the majority issued his own opinion, with none of them joining the opinion of any of the others. However, one predominant theme in the majority opinions was the unacceptability of standardless discretion. In the evocative words of Justice Stewart, such standardless sentencing regimes generate death sentences that are "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[21]

What I and my students always find baffling here is the fact that the Court chose to invalidate standardless capital sentencing under the cruel and unusual punishments clause rather than the due process clause, when the argument sounds so—well, *procedural*. Indeed, the whole "death is different" theme that runs through *Furman* and much of the rest of the Court's capital jurisprudence seems like a natural argument for the sliding scale of due process—the more significant the individual interest, the greater the process that is due. The students always assume that there must have been a change in the Court's personnel between *McGautha* and *Furman*, and that the altered Court was simply looking for a way to abolish capital punishment without running afoul of the doctrine of *stare decisis*. It is true that two members of the Court changed between *McGautha* and *Furman*: Justices Black and Harlan left the Court and were replaced by Justices Powell and Rehnquist, respectively. But Powell and Rehnquist voted in *Furman* exactly as Black and Harlan had done in *McGautha*—to *uphold* capital punishment against constitutional challenge. It was Justices Stewart and White who changed their vote in the year between *McGautha* and *Furman*. The puzzle is why? Why was the cruel and unusual punishments clause a more attractive route to the (temporary) abolition of capital punishment, when doctrinally it seems like so much more of a stretch?

I must admit, our collective head scratching never yielded any very insightful conclusions. The cynics among the students tended to resolve the apparent conflict between *Gerstein* and *Ritchie* by positing that the Court's choice between the due process clause and a more specific provision of the Bill of Rights was governed simply by the Court's desire to limit the scope of criminal defendants' rights. And the change from *McGautha* to *Furman* can be accounted for by Justice White's theory that the infrequency with which capital punishment was imposed prevented it from furthering any plausible

20. 408 U.S. 238 (1972).

21. *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

penological purpose and thus rendered it "excessive"[22]—an argument that does sound more appropriate to the cruel and unusual punishments clause than the due process clause. Given that White (along with Stewart) was one of the two crucial changed votes, his theory might be enough to explain the apparently puzzling choice of constitutional rubrics.

Professor Israel's detailed work on the evolution of the relationship between due process and criminal procedure suggests some more plausible and richer solutions to my puzzles. First of all, Professor Israel convincingly demonstrates that the *Gerstein*/*Ritchie* conflict is only part of a larger ebb and flow on this very issue. He adds *Graham v. Connor*[23] on the *Gerstein* side and *Chambers v. Mississippi*[24] and *Ake v. Oklahoma*[25] on the *Ritchie* side, as well as *Albright v. Oliver*[26] and *County of Sacramento v. Lewis*[27] as limiting the *Graham*/*Gerstein* principle. This elaboration adds more than doctrinal thoroughness to the issue; it demonstrates that the relationship between the due process clause and the more specific provisions of the Bill of Rights was a frequently encountered issue with a long and conflicted history, stretching back, indeed, to the foundational case of *Hurtado v. California*.[28] While Professor Israel does not generally attempt himself to imagine or attribute reasons for this ebb and flow beyond the reasons given within the Court's cases, his careful elaboration and analysis of those reasons provide fodder for such speculation, and I will thus try to tease out some solutions to my puzzles from his work.

First, the very organization of Professor Israel's account, which separates pre-incorporation and post-incorporation due process cases, recognizes that the Court had good reasons to view free-standing due process very differently in the post-incorporation context. Most significantly, as Professor Israel recognizes, while in the pre-incorporation era, free-standing due process could cut both ways (*i.e.*, it enabled the Court "not only to recognize rights that had not been recognized at common law, but also to conclude that certain rights recognized in the common law tradition were no longer deemed basic to fairness"[29]), in the post-incorporation era, free-standing due process became a one-way ratchet ("the flexible, open-ended due process could grow in only one direction—adding to the rights protected under the Bill of Rights"[30]). Moreover, as Professor Israel also recognizes, selective incorporation

22. *Id.* at 312 (White, J., concurring).
23. 490 U.S. 386 (1989).
24. 410 U.S. 284 (1973).
25. 470 U.S. 68 (1985).
26. 510 U.S. 266 (1994).
27. 523 U.S. 833 (1998).
28. 110 U.S. 516 (1884).
29. Israel, *supra* note 1, at 387.
30. *Id.*

happened tremendously quickly, with all but one of the criminal procedure guarantees of the Bill of Rights applied to the states "over a period of less than a decade."[31] The Court paid a large price in public legitimacy for its so-called "criminal procedure revolution." Indeed, a large part of President Nixon's platform in 1968 was based on "law and order" concerns and included explicit promises to appoint Justices to the Court who would share his views on this important issue. Very soon after the era of incorporation, the Court also made another withdrawal from its legitimacy bank,[32] when it decided *Roe v. Wade*,[33] a decision based in part on a broad reading of the due process clause. Thus, it is not at all surprising that the pressure to cabin the use of the due process clause would be exceedingly strong in 1975, the year in which *Gerstein* was decided.

Moreover, the Court's speedy incorporation of the criminal procedure protections of the Bill of Rights had already imposed huge costs in terms of reorganization and litigation in the state courts. The imposition of yet another expensive and time-consuming protection—the adversary hearing rejected in *Gerstein*—would have imposed a cost far beyond the civil due process hearings that the Court had approved for the repossession of refrigerators and the suspension of public school students to which Justice Stewart referred in his sharply worded concurrence. The criminal justice system was simply much bigger and more continuously in operation than any civil setting, and in addition, it required the free provision of lawyers to participate in any adversary hearing that might be required.[34] Thus, there were tremendously strong pressures to decide *Gerstein* the way it came out in 1975.

Twelve years later, however, when the Court was faced with the *Ritchie* case, the situation had in some ways shifted: despite the *Gerstein* Court's attempt to cabin the use of free-standing due process, that doctrine had already left its mark all over the trial process, and far beyond merely those rights aimed at providing a fair hearing, as Professor Israel amply documents. In contrast, it was the incorporated provisions of the Bill of Rights that in many instances had not yet been broadly construed beyond the narrow trial context. The compulsory process clause at issue in *Ritchie* was a case in point: as the majority opinion noted, "This Court has had little occasion to discuss the contours of the compulsory process clause."[35] *Ritchie* provided an opportunity to cabin the compulsory process clause in a way that the Court had earlier tried

31. *Id.* at 304.

32. *See* Stanley Ingber, *The Interference of Myth and Practice in Law*, 34 VAND. L. REV. 309, 339-40 (1981) (positing a "legitimacy account" from which the Supreme Court draws).

33. 410 U.S. 113 (1973).

34. Coleman v. Alabama, 399 U.S. 1 (1970).

35. *Ritchie*, 480 U.S. at 55.

and failed to cabin the idea of procedural due process—by limiting its operation to ensuring the basic fairness of the trial, or the "main event."

As for the *McGautha*/*Furman* puzzle, those two cases were decided in 1971 and 1972 respectively—immediately after the setting of the incorporation sun. As with *Gerstein*, the hydraulic pressure to attempt some cabining of expansive procedural due process must have been at its apogee in the years immediately after the heyday of the criminal procedure revolution and the retirement of Chief Justice Earl Warren. Moreover, the epic tone and length of the opinions in *Furman* (and to a lesser extent, *McGautha*) signaled that the Court understood just how highly scrutinized and hotly contested its decisions in those cases were likely to be. Only later, and in cases in which the stakes were much less high, did the Court employ the due process clause to regulate, in relatively minor ways,[36] capital punishment practices under the Constitution.[37]

Thus, Professor Israel's careful, chronological presentation of the twists and turns of the Supreme Court's due process jurisprudence in relation to criminal procedure has generated some less reductionist and more plausible solutions to the puzzles I have encountered over and over again in my courses. Instead of simply shrugging our shoulders and writing off the Court as hopelessly outcome oriented, Professor Israel's work lets us see how the due process clause might look different, and more or less attractive as the site of free-standing constitutional law-making, at different times and in different doctrinal contexts.

But before we entirely reject a reductionist, cynical view of Supreme Court decision-making,[38] let us consider what, if anything, the long and complicated doctrinal story related by Professor Israel suggests as a normative manner. Once again, I will not take on the task of proposing a coherent set of considerations to guide the Court in future due process decisions, despite Professor Israel's invitation. Rather, I prefer to draw out and reinforce a different sort of normative conclusion from Professor Israel's work, a conclusion more about judicial attitude toward constitutional decision-making than about a particular doctrinal theory.

The complete about-face between *Gerstein* and *Ritchie* (or, to a lesser extent, between *McGautha* and *Furman*) is unsettling partly, at least, because it

36. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 401 (1995) (describing the contribution of the due process clause to the constitutional regulation of capital punishment as "nothing more than a modest, ad hoc series of limitations on particular state practices" resulting in "quite marginal" constraints).

37. *See* Israel, *supra* note 1 at 394 n.533 (citing due process cases regarding capital punishment).

38. Such a view is more attractive than ever before, after the Court's amazing and indefensible performance in *Bush v. Gore*, 121 S. Ct. 525 (2000).

is so unexplained. Professor Israel observes that such "unacknowledged departures"[39] are endemic in the Supreme Court's due process jurisprudence, and he gently chides the Court for its failings in the area of "judicial 'craft.'" Professor Israel, however, goes on to proffer a face-saving explanation for these failings:

> The implication of such silence is that the Court simply did not attach any precedential weight to its general descriptions of the character of due process. The rulings in the earlier cases, including what was said there about the particular procedural rights at issue, was not contrary to what the Court was now saying about different procedural rights.[40]

Professor Israel intimates that he does not completely buy this theory, describing its implicit underlying distinction between "reasons" for a given ruling and a complete "explanation" of the ruling as challengeable as "inconsistent . . . with the purposes underlying the basic requirement that an appellate court offer reasons for its ruling."[41] He thus goes on to suggest that it would be "refreshing" and "perhaps even helpful" if the Court would someday "surprise us" with an opinion generating guidelines that it will announce and follow, albeit without the weight of *stare decisis*, in the due process area.[42]

I would go a large step further than this, both in tone and in substance. Not only is the Court's unexplained ping-ponging between inconsistent theories of due process contrary to the "basic requirement" that appellate courts explain their decisions, but it also poses the danger that the Court will be tempted to use such tactics strategically to avoid losses of legitimacy, as I intimated it might have done above when I offered some solutions to my due process puzzles. Such uses, whether or not they are strategic (and indeed, whether or not they are conscious at all), may well have the effect of masking the important moral and political choices that cannot be avoided in any constitutional adjudication. This masking not only fails as explanation, it also has the unfortunate tendency to deflect scrutiny and criticism of constitutional choices because it makes those choices invisible.[43] Thus, I would call not so much for better "judicial craft," but rather for candor and transparency in constitutional interpretation. This is the primary normative lesson I want to draw from Professor Israel's work on due process. As he has so persuasively demonstrated, the due process clause is implicated far and wide in the criminal justice system, touching on all manner of important issues from pre-trial restraints on liberty to the practice of capital punishment. The Court will

39. Israel, *supra* note 1, at 427-30.

40. *Id.* at 429.

41. *Id.* at 430 n.719.

42. *Id.* at 432.

43. *See* Steiker & Steiker, *supra* note 36, at 429-38 (describing "legitimation theory" and explaining how it operates in the context of the constitutional regulation of capital punishment).

continue to have to make hard constitutional choices, and only if it honestly and openly assesses its past choices and its current options can it include "the People" as part of this important discourse.