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# Professor Israel, The Due Process Clause, and the Lessons of History

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# PROFESSOR ISRAEL, THE DUE PROCESS CLAUSE, AND THE LESSONS OF HISTORY

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I am both honored and pleased to be asked to comment on Professor Jerold Israel's Childress Lecture. Professor Israel's contributions to the field of criminal procedure are both legion and legendary, and they all possess the same attributes. His work is remarkably erudite. As demonstrated by his lecture on the Supreme Court's treatment of the due process clause in criminal cases, he always knows his subject matter intimately and is a model for the rest of us—as difficult for the rest of us as that may be. Indeed, I very much doubt that we will see his command of this subject matter ever duplicated in an American law school; it will be approached only by later historians interested in the Supreme Court's criminal due process jurisprudence who will use Professor Israel's article as the foundation for their work. He is careful, a complement surely of his erudition. He knows of what he speaks, and thus does not misspeak. He is clear, logical and orderly. He undertakes important tasks with real world consequences. While his peers engaged in highly publicized but largely rhetorical, and even more largely inconsequential, debates over the Warren Court legacy, Professor Israel was authoring important and useful treatises, rewriting substantive criminal codes, and making major contributions to the Uniform Code of Criminal Procedure.

In my judgment, Professor Israel is criminal law and procedure's answer to the great systematizers of the generations preceding him, people like Wigmore in Evidence, Corbin in Contracts, Prosser in Torts. He has worked tirelessly to organize, rationalize and improve the fields of law within his interests. Thus, another consistent trait of his work, when he writes, he writes to make a point, whether to demonstrate a matter of institutional competence, such as the ways in which the Supreme Court handles overruling in the remarkably creative article published early in his career,[1] or to lay the ground work for the rationalization of a criminal code.[2]

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1. *See generally* Jerold H. Israel, Gideon v. Wainwright*: The "Art" of Overruling*, 1963 SUP. CT. REV. 211 (1963).

2. *See generally* Jerold H. Israel, *The Process of Penal Law Reform—A Look at the Proposed Michigan Revised Criminal Code*, 14 WAYNE L. REV. 772 (1968).

Except this time. In a striking departure from his entire previous corpus, Professor Israel's objective in this article is not to make a point; rather, it is simply to catalogue the Court's criminal due process cases, as he states explicitly: "I hope to . . . provid[e] a fairly complete history of the Court's development and application of interpretive guidelines for determining the content of free-standing due process," in order to provide "a springboard for further exploration of the appropriate role of free-standing due process in the constitutional regulation of due process."[3] Obviously, I suspect that Professor Israel has with great precision identified precisely one of the contributions he has made, and it is an estimable one, although I am not entirely convinced that Professor Israel agrees. I wonder because the last section of his paper is entitled, "The Lessons of History." History and the Lessons of History are two quite different things as Professor Israel conceives them, and he explicitly pursues the former at the expense of the latter when he apologizes for presenting "such a narrow history, ignoring the personalities and the political and societal developments that contributed to shaping these [due process] guidelines." Professor Israel at first tells us that he is going to lay out the facts, pure and simple, and leave their interpretation and normative implications to others. But then, why close with the Lessons of History, precisely what the introductory remarks appear to disclaim as the objective of the inquiry?

The Lessons of History would be the point of a History, of course, and as I said previously, Professor Israel always writes with a point in mind. So perhaps the disclaimer is not to be taken seriously. No one would amass and present the fruits of such astonishing learning and forego the opportunity to tease out its lessons, and especially not a mature scholar looking back on a lifetime of productive engagement with his or her chosen area.

But now another puzzle arises. While the history is robust, the Lessons of History are quite thin. They are comprised of (1) a reiteration that opinions of the Court contain unexplained departures from positions stated by the justices in previous opinions; (2) the observation that opinions deploy ambiguous "guidelines" for interpretive use, such as "history," which could refer to any time from the Magna Carta to yesterday; and (3) an assertion that the justices must have known full well what they were doing, as the same ones often were involved in both the previous and the present decision.[4]

Professor Israel is aware of this puzzle:

> The failure to answer such questions may be the product of an inability to muster a majority for a single position. More likely, however, that failure reflects the view that the guidelines better serve the institutional needs of the Court by not answering such questions . . . . The task of formulating guidelines

3. 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 (2001).

4. *Id.* at 427-32 (discussing "The Lessons of History").

> for applying due process to the criminal justice process appears to be viewed as directed more at setting a tone than giving detailed direction. Scholars may desire to draw significant meaning from every different shading of language, but that has not been the history of the Court's own reading of its language. It has utilized standards stated with sufficient breadth and with sufficient shading of outlook as to accommodate major shifts in approach as changes in the Court's composition produces major shifts in the majority's viewpoints. This has allowed the Court to adhere, for example, to *Hurtado's* initial definition of fundamental rights for almost 120 years while modifying from one generation to the next the role of the independent content of due process.[5]

Yet another puzzle—Professor Israel, while seeing the potential benefits of the Court's failure to articulate or be bound by detailed expressions of the meaning of due process, thinks it would be "refreshing" and "perhaps even helpful" were the Court to bite the bullet, as it were, and tell us what the then existing majority viewed as "the guidelines we will utilize in determining what constitutes a denial of fundamental fairness."[6] On second thought, perhaps this is really not a puzzle at all; perhaps it is precisely what it purports to be: Professor Israel has accurately described his observations of the Court's work product, and is expressing both his discontent with it and suggesting the outlines of a better approach.

But, there remains a puzzle even on this interpretation of Professor Israel's position. The opinion that Professor Israel outlines, which he hopes the Court will someday surprise us with, is completely devoid of substance. It is simply a prelude to the Court's majority announcing its then current view of the proper scope of the due process clause, although without any promise of longevity. Moreover, Professor Israel's article contains not a hint at what he thinks the proper scope is. Are we then to infer that it just does not matter what the content is, and that any substantive account will do? Is the point simply to provide some temporary clarity rather than to get the matter right? Indeed, are we to think that there is not a "right" and "wrong" approach to due process, and that the only hope is for some short-lived clarification? Or is the point that, even if there is a right and wrong to due process, whatever the value of getting the matter right is outweighed by settling the matter for the moment?

But now, the final puzzle. Hasn't the Court done many times over precisely what Professor Israel proposes? Isn't one of the important messages of this distinguished scholar as he reflects on a lifetime of engagement with the Court's criminal jurisprudence that there is virtually no evidence that one majority's articulation of the general contours of due process has any substantial effect on the Court's deliberations in the next case that comes along? Doesn't his own work demonstrate that his proposal is essentially an

5. *Id.* at 431-32.

6. *Id.* at 432.

improbable wish for the world to be quite different from what it really is, quite different from what his own work demonstrates it to be?

Regardless whether Professor Israel's concluding thought is meant to be taken seriously or is instead merely an engaging way to end an article effectively demonstrating that the aspiration of the thought is not likely ever to be accomplished, there lurk interesting questions here concerning the analytical tools that Professor Israel is employing and whether they are appropriate to the task he has set himself.

Whether intended or not, Professor Israel is reflecting the widely and strongly felt desire for certainty and predictability in the law, and his article, viewed at least from the lens of his concluding section, is a disappointed search for those variables in the Court's treatment of the due process clause, taking the cases as a whole. The ideal culmination of his search would be the articulation of an algorithm that permits results under the due process clause to be deduced from a defined set of premises, thus imparting certainty and predictability to the process. Interestingly, Professor Israel comments from time to time on the role of deduction in the Court's opinions, although he does not develop the point or place it in context with other tools of reasoning.[7] In any event, Professor Israel's approach is an example of the standard idealization of law, at least by those in the profession in touch with the operation of the legal system and the practice of law for whom certainty and predictability are critical. Add in legitimate sources of the premises, and one has the essence of the standard version of the rule of law: Authoritative statements of clear rules by legitimate lawgivers that can be applied in a straightforward, predictable fashion.

By referring to these matters as idealizations, I mean them no disrespect. Certainty and predictability are important variables in life. Any legal system constructed in the afterglow of the Enlightenment and dedicated to the liberal conception of government as serving the private interests of the citizenship will have at its core the aspiration for clear and definite articulation of rights and obligations by duly constituted authorities. Certainty and predictability allow individuals to protect their interests and plan their lives, to flourish. My guess is that the desire for certainty and predictability goes even deeper and is hard-wired into the brain, for it has real survival value. If the village's children wander down to the riverbank and get eaten by alligators, the villagers' genes will soon die out unless a quite certain rule is quickly put into place: "Stay away from the riverbank."

Professor Israel is, I think, lamenting the lack of certainty and predictability in the Supreme Court's due process cases. But certainty and predictability come at a price. If the only source of food or water for the villagers is the river and its fish, the rule that protects them from destruction by

7. *Id.* at 371-73.

alligators assures them of destruction by famine and thirst. To come at an acceptable cost, rules often have to be tailored to the occasion. And some occasions call for rules of a different sort than the deductive one implicitly at the heart of Professor Israel's critique of the Court. Suppose the villagers needed water or fish from the river to survive. They would do well to adopt a rule to the effect: "Approach the river with great care, preferably in an open area during daylight, and be sure to be on guard for anything suggesting danger, although we can't specify in advance exactly all the dangerous signs. In fact, as you learn what some of them are, please keep us informed." This rule has some certain and predictable elements, some of which require the exercise of judgment, and some that ask for corrective feedback.

Generalize this. There are always at least two questions that inform analysis, and thus legal regulation, of any kind. One, to focus just on regulation as a subset of analysis, is the nature of the thing being regulated; the other is how well the tools available for the regulation might work, given the nature of the thing to be regulated. An object or field to be regulated may be simple and straightforward, or it may be complex and unpredictable. Tools of regulation range from simple, straightforward, deductively applied commands or proscriptions, to unconstrained discretion or letting nature take its course, with many way stations in between, such as discretion within varying degrees of constraint, indirect versus direct influences (moral sanctions versus tax incentives versus criminal penalties, for example), rules versus standards versus principles and so on.

Another variable relevant to intelligent choice about regulation is the appropriate conception of the thing to be regulated. What is the appropriate level of abstraction? What are the salient parameters of the problem? What needs immediate attention, and why? And, what can be set aside for the moment? The conceptual point is sometimes largely independent of the two variables discussed in the previous paragraph, as in much of mathematics, for example, but sometimes largely a restatement of them, as is probably the case with the explanation of "due process" that is Professor Israel's task. These various points standardly get jumbled up in the law because there are no obvious "natural kinds" in quite the same way that lions, walruses and water molecules exist; the order to the law is conventional, not natural.[8] Choices of the proper conceptual level to enter into a problem thus have to be made; they are not given to us by nature.

Perhaps Professor Israel would not agree. He has chosen to analyze the due process clause as though it were a natural kind, rather than simply a convention marking a place and a set of practices in a set of conventions, that

8. Some would disagree. Natural rights lawyers would, for example, as probably would a believer in moral reality. The objects of law, people for example, may very well be natural kinds, of course.

can be examined in its own right in much the same way that a biologist interested in lions need not be concerned with the physical properties of water molecules. Perhaps Professor Israel does not think that the due process clause is a natural kind like lions, recognizes it as a conventional concept, but nonetheless thinks that his choice may be the most convenient and fruitful working hypothesis. In either case, another interesting question is exposed. To combine the questions of natural kinds and fruitful working hypotheses into one, that question is whether the due process clause can be studied not only independently of the historical and political variables that Professor Israel explicitly has put aside but also independently of the rest of the Constitution of which it is a part. Professor Israel spends some time on the relationships between the due process clause of the Fourteenth Amendment and the provisions of the Bill of Rights, both the particularized ones and the Fifth Amendment's own due process clause, but he spends no time at all on any other relationship outside of these parameters. For example, he does not address questions of federalism or separation powers, nor does he examine matters of institutional competence such as the limits of the adversarial process and the relative capacity of different institutions to engage in systematic studies of problem areas.

Bring all these points together with the following thought experiment. Suppose instead of analyzing due process in the search for its legal verities, Professor Israel had engaged in the quite different project of attempting to specify the nature of due process adjudication over time. He might plausibly have formulated his hypothesis thusly:

> If due process is a natural kind with defined parameters, is not just a convention, and is comprised of a defined set of problems whose solutions can be reduced to manageably sized sets of necessary and sufficient conditions, and if the Supreme Court is strongly dedicated to the rule of law conventionally conceived, then I predict that I will find a relatively clear articulation of the meaning of the due process clause that will persist reasonably well over time. If some or all of this is false, I predict I will find a set of explanations of the meaning of due process that are not orderly in any obvious way and that cannot plausibly be reduced to rule-like form.

To finish the thought experiment, and in the spirit of Professor Israel's hypothetical Supreme Court opinion, attach this experimental hypothesis to the beginning of Professor Israel's article, detach the last section, "The Lessons of History," and replace it with a newly entitled section, "Discussion." What would be the contents of the discussion section? It might go something like this:

> Having examined the entire range of the Supreme Court's pronouncements on due process in criminal cases, the strong hypothesis that "due process" constitutes a natural kind that can be characterized in terms of manageably sized sets of necessary and sufficient conditions and is so employed by a

> Supreme Court with a strong commitment to the conventional view of the rule of law has been disconfirmed. No positive thesis has been confirmed, however. The explanation for our findings may reside in any of the variables, or in some interaction of them. For example, "due process" may constitute a natural kind, but the Court may not be committed to the conventional idea of the rule of law. Alternatively, the Court may be committed to the conventional idea of the rule of law, but the subject matter encompassed by the phrase "due process" may extend over too vast a landscape to permit usable generalizations to emerge. Which of these possibilities, or many other similar ones that we have not specifically articulated, is the case will have to be determined by future work.

This indicates to me that in addition to providing a definitive cataloguing of the relevant cases, Professor Israel has made another contribution by outlining the direction future scholarship should go. He identifies one possible explanation for the unpredictability of interpretations of the due process clause—changing majorities on the Court—and that is certainly one variable that needs study.[9] He also mentions in passing "political and social developments" as one possible explanation of the data, and he is again surely right that this is in need of further study. The adoption of the Fourteenth Amendment was not just, and not even mainly, a juridical act akin to the passing of a statute; it recognized in part the changes that had been wrought by a civil war, a "non-constitutional" event that profoundly modified constitutional relationships. And of course interpretive theories are not themselves provided in the Constitution, and this is yet another matter that bears on the interpretation of the due process clause.

There are other issues that need attention as well. I very much doubt that interpretations of the due process clause could ever be captured by a general theory that would be politically acceptable. Due process claims can be raised about virtually any aspect of the criminal process. They are context dependent, and the contexts vary dramatically both case to case within a jurisdiction and over the various jurisdictions in which due process claims can be raised. Any general theory would thus have to encompass such a large number of variables as to be, literally, computationally intractable. Ross Rosenberg and I have given an extended discussion of this in an area that is structurally analogous—

9. Although the outcome of such studies are not preordained. Most observers predicted that the changes from the Warren Court to the Burger and then Rehnquist Courts would produce dramatic change in constitutional law, and in particular in those areas dealing with the criminal process. The consensus today is that the effects of changing membership are not nearly so strong as previously believed. *See generally* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vince Blasi ed., 1983).

the Fourth Amendment[10]—and if anything, what goes by the term "due process" is even more variegated. In large measure, in fact, Professor Israel has replicated our findings concerning the Fourth Amendment in the due process context (whether he subscribes to our analysis of what is found or not). In any event, the extension of the term "due process" is also unpredictable, which is another variable that makes algorithmic, rule-like approaches to problems generally unsatisfactory. The unpredictability comes from many sources, including the grand sociopolitical changes Professor Israel notices but puts aside, but also from the ever-changing milieu at the bottom of the process—the realities of crime, investigation and trial at the street level, as it were.

Although Professor Israel identified, but did not examine, one variable that increases the unpredictability of due process adjudication—changing membership on the Court—he fails to address the astonishing complexity involved. This can be considered on many levels. Take what some may think is the simplest task—ensuring doctrinal consistency. Professor Israel must cite more than 100 cases in his article. To ensure consistency in a set of cases requires, at a minimum, the comparison of each case to all the others. To check the consistency of cases on the assumption that each case could be right or wrong by comparison to every other case would require $2^{100}$ comparisons. And of course "right or wrong" does not capture our view of cases—sometimes they are partially right and partially wrong. Moreover, there is often disagreement about what a case stands for, how to read concurring opinions, the implications of dissents, and so forth, all of which complicate the matter further.

Consider just a few of the complicating variables. Opinions issue to hold together tenuous coalitions, but the opinions surely do not capture all the thinking of every person who signs on to the opinion. Thus, the next case may look a lot like the previous one, but critically different to one of the members of the first majority. If the first case was 5-to-4, perhaps the next will be 5-to-4 but apparently in the opposite direction, creating an appearance of inconsistency. The appearance, though, is false; the reality is that a new variable has been introduced in the decision-making process. Similarly, often the articulated ground of decision in cases is not a single variable, whether it is the "independent meaning of due process" or something else. As Professor Israel recognizes, *Griffin v. Illinois*[11] is as much about equal protection as it is due process, yet contains no algorithm to separate the two. Many of the cases

10. *See generally* 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).

11. 351 U.S. 12 (1956).

he cites hold that there is no due process violation, such as in *Betts v. Brady*.[12] Is it obvious that such cases are informative on the positive meaning of "due process"? Professor Israel identifies many variables that have been taken into account by the cases, and he also provides syntheses of these variables by various commentators, yet nowhere is there any indication of how the variables interact, which adds yet another layer of complexity. Suppose historical practice implies one thing, yet institutional competence, separation of power, or federalism another. How is the interaction to be worked out?

Even such a "simple" thing as original intent, if that could somehow be demonstrated to be the polestar of constitutional decision, is deeply problematic in certain respects. I won't repeat here the numerous arguments over what original intent might mean and the equally numerous arguments about its justification as the centerpiece of constitutional decision. Assume you know what it means and that it is the centerpiece. Now answer the following question: Employing "original intent" as the proper authoritative principle, does the Fourth Amendment, or the due process clause, or both, or whatever, regulate wiretapping? No one at the time the Fourth Amendment was adopted was thinking about wiretapping for a rather obvious reason: Virtually no one was thinking about electricity. I know of no evidence suggesting that anyone was thinking of wiretapping as a constitutional issue when the Fourteenth Amendment was ratified either. And for that matter, how about thermal imaging, which is now before the Supreme Court?[13] Applying originalism to issues never conceived of by whomever the appropriate founding generation may be is no mean feat. Does the failure to think of wiretapping mean it is completely unregulated by the Fourth Amendment? Does it mean that the right to be free from wiretapping is a right "reserved to the people?"

None of these questions have algorithmic answers. Their answers emerge as a consequence of a process. In my view, Professor Israel's major contribution is that it is yet another demonstration of the grip that the adversarial, common law process has on American lawmaking. The Court does not appear to be searching for grand, top-down theories—at least so far as its actions as compared to its words are concerned—to superimpose over the enormously complicated messiness of the criminal justice process. It is instead attending to the arguments of the parties over time in widely disparate areas in which it has no particular expertise, and reaching its best judgment on the merits of each case it hears. There may be tension, real or imagined, between the Court's view of the merits in one case and its view of the merits in another, but that is only a problem if for some reason such tension is illegitimate. But, what is the basis of the illegitimacy? Where does it say that the Constitution is

12. 316 U.S. 455, 473 (1942).

13. Kyllo v. United States, No. 99-8508, 2000 U.S. LEXIS 4863 (granting writ of certiorari).

only to be interpreted through grand, top-down theories to be applied deductively? Indeed, isn't the existence of the adversarial/common law tradition, a tradition preceding the enactment of any part of the Constitution and continuing today, quite to the contrary? There is no incoherence in looking at problems locally rather than as points in a vast, all-inclusive theory. To be sure, there is a problem for those who claim that the only appropriate form of constitutional adjudication involves general theories, but again, on what is that based? And what is the basis for thinking that general theories would be pragmatically better in any event? General theories generally come out badly over time precisely because of their lack of responsiveness to the real world around them. Separate but equal comes to mind, as does the phrase "consistent with the letter but not the spirit of the law."

I suspect that the readers of this symposium will come across numerous general theories in the comments on Professor Israel's article of what due process adjudication "should entail," and what theory or theories the Court "should" embrace. The promotion of general theories will surely have many sources. Some of it will come from the deeply ingrained attraction for rules I discussed earlier. It also comes from academics who would have the Court impose their idiosyncratic political and social views on the rest of us without having to bother with the democratic process. In the end, this will reduce to commentators plugging for their pet theories, but without the responsibility for their actions that a real political actor possesses, and without the theory being tested through the adversarial process by the individuals directly affected by it. Needless to say, I would guess, I think most of those theories should remain as academic exercises. The picture that Professor Israel has painted is not one that causes me, or should cause anyone except disappointed academics, to despair. To the contrary, it is a picture of a vibrant, organic process that evolves in the face of new problems. In most walks of life, the choices are evolve or stagnate. I suspect this one is no different.