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The Craft of Due Process

Kevin C. McMunigal
Case Western Reserve University Law School

THE CRAFT OF DUE PROCESS

KEVIN C. MCMUNIGAL*

Professor Israel's aim in telling the story of the Supreme Court's development of interpretative guidelines for due process "is to provide a springboard for further exploration of the appropriate role of free-standing due process . . . ."[1] He has certainly achieved his goal, offering as he does in this year's Childress Lecture an array of due process issues for lawyers, judges and academics to examine.

One such question that recurred to me as I read Professor Israel's article is how receptive the Supreme Court's conception of due process is to reform of our criminal justice system by means other than constitutional amendment. In determining whether a particular procedural right is so fundamental as to be protected by due process, for example, the Court has offered alternative reference points. As Professor Israel notes, the Court at times has suggested that the proper frame of reference for determining the fundamental nature of a procedural right is a broad one, the universality of the right to all civilized systems.[2] At other times the Court has suggested a narrower frame of reference for determining this issue, whether the right has been recognized within the Anglo-American common law tradition.[3] In 1968, the Court in *Duncan v. Louisiana*[4] appeared to have resolved this ambiguity by adopting the narrower of these standards—"whether . . . a procedure is necessary to an Anglo-American regime of ordered liberty"[5]—as the appropriate touchstone for due process analysis. To what degree does this choice ossify American criminal procedure? Does the choice of an Anglo-American standard for due process analysis effectively insulate a troubled American criminal justice

* Professor of Law, Case Western Reserve University School of Law. The author thanks Melvin Durchslag, Lewis Katz, and Robert Lawry for providing helpful comments on a draft of this article.

1. Jerold H. Israel, *Free-Standing Due Process in Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 305-06 (2001).

2. *Id*. at 352-55.

3. *Id*.

4. 391 U.S. 145 (1968).

5. *Duncan*, 391 U.S. at 149 n.14.

system from reforms inspired by continental systems outside the Anglo-American tradition?[6]

Another important question Professor Israel's article suggests is whether the Supreme Court's conception of due process and other constitutional criminal procedure rights as developed during the past century is compatible with the volume of offenses and offenders currently processed by the American criminal justice system. That conception adopts the view that each criminal defendant is entitled to an elaborate constellation of rights such as trial by jury, confrontation of witnesses and protection against self-incrimination. The elaborate nature of this conception, though, seems out of touch with the mass production quality of our criminal justice system, which recently reached a new record of incarcerating more than two million people.[7] As this figure suggests, providing an elaborate set of rights to each defendant would be extremely costly. Instead of fulfilling the promise of the Supreme Court's conception of criminal procedure rights, our criminal justice system threatens and entices ninety-four percent of defendants[8] into accepting a much cruder, simpler and less costly procedure: the negotiated guilty plea, which has been aptly described as "a capitulation to the conditions of mass society." [9] In

6. Professor William Pizzi has recently argued in favor of continentally inspired reform of the American criminal justice system. *See* WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH (1999). Professor Pizzi argues that the Supreme Court's current constitutional doctrines do not necessarily bar such reforms. *Id.* at 230-31. He notes that:

> [S]ome of the Supreme Court's decisions are not quite the barriers to reform they might initially appear to be. The Court has indicated in some of its opinions that it would reach a different decision if a legislature were to put forward an alternative scheme. To give an important example, in *Duncan v. Louisiana*, which imposed the requirement of jury trial on the states, the Court conceded in a footnote that "[a] criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the same purposes that the jury serves in the English and American systems." The Court had no option but to take this position because to insist that the lack of a jury made a system fundamentally unfair would condemn almost every western trial system in whole or part as well as international courts of justice which have never used juries. But the Court went on to note that "no American System has undertaken to construct such a system." Here is an opening for a major reform in the states that might permit us to move away from juries in their present form. We could compensate for the move by adding other guarantees of fairness, such as mixed panels, reasoned decisions, broad appellate review, and so on.

Id. at 231 (citations omitted).

7. ALLEN J. BECK, U.S. DEPARTMENT OF JUSTICE, PRISONERS IN 1999, BUREAU OF JUSTICE STATISTICS BULLETIN 1 (2000). The total number of Americans in jails and prisons in the United States reached 2,026,596 for the first time at the end of 1999. *Id*.

8. U.S. DEPARTMENT OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 1998, at 2 (2000).

9. S*ee* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) ("[P]lea bargaining . . . is a capitulation to the conditions of mass society and should be neither encouraged nor praised.").

stark contrast to the Supreme Court's elaborate conception, when this ninety-four percent of defendants are convicted, no trial takes place, no jury is empanelled, no witnesses are called much less confronted, and the judgment of conviction is based almost entirely on self-incrimination by the defendant.

The complexity and costliness inherent in the Supreme Court's conception of procedural rights, then, have largely been accommodated within the volume of our criminal justice system by creating a two-tiered system of criminal justice: an elaborate level of protection for those few who stand trial but minimal protection for the overwhelming majority who plead guilty. One criticism which can be advanced regarding the Supreme Court's treatment of due process and criminal procedure generally, is that it has paid too little attention to cost and complexity and the volume of offenses and offenders processed by our criminal justice system. Another is that the Court has focused its attention too narrowly on the few who go to trial and showed too little concern for the overwhelming majority who plead guilty.

Such questions—whether our criminal justice system has been rendered too difficult to reform or too complex to deal effectively with the volume of offenses and offenders brought before American courts—though important, ultimately go to the wisdom of the Supreme Court's approach to due process. I leave detailed examination of these issues for another day and following Professor Israel's lead, I focus in the following pages on the craft rather than the ultimate wisdom of the Supreme Court's due process methodology.

I have three reactions to offer in response to Professor Israel's lecture. The first is an observation contrasting the expansive exercise of judicial power under the due process clause with the restriction of judicial power in other areas of law which converge with the Supreme Court's criminal procedure jurisprudence to control the criminal justice system. This comparison helps in understanding why the Supreme Court's due process methodology suffers from the two problems Professor Israel describes at the end of his lecture: (1) unacknowledged departures from prior case law and (2) ambiguities and inconsistencies among cases regarding the standards the Supreme Court has offered in support of its interpretations of due process in criminal cases.[10] The second point deals with the Supreme Court's failure to distinguish clearly between rule and remedy leading to confusion about the scope of certain rules. My third point is a theoretical one suggesting that the confusion and complexity found in the Supreme Court's due process methodology may partly be explained by both a general failure to articulate clearly the purposes that methodology seeks to serve and a particular failure to come to terms with a non-instrumental approach to criminal procedure.

10. Israel, *supra* note 1, at 427-32.

I. JUDICIAL LAWMAKING IN AN AGE OF LEGISLATION

As I followed Professor Israel's story of the development of due process, I was struck by the contrast between the Supreme Court's jurisprudence in the area of criminal procedure and roughly contemporaneous developments in other areas of law critical to the resolution of criminal cases: substantive criminal law, the law of sentencing and the law of evidence. In developing its due process jurisprudence, the Supreme Court speaks as if it is applying rather than making law. But the body of law falling under the rubric of due process is so expansive and its textual grounding so minimal, the Court appears in Professor Israel's story to be making rather than applying law. The justices appear to have treated the due process clause as a mandate to create a broad constitutional common law of criminal procedure. This expansive use of judicial power under due process, as well as other constitutional provisions, is in marked contrast to the contraction of judicial power in substantive criminal law, sentencing and evidence.

At the time the constitution was drafted, the job of defining criminal offenses was firmly in the hands of the judiciary.[11] A movement toward codification started with the American Revolution and by the late 1800s was well under way. Today, legislators have primary and virtually exclusive authority regarding the creation of new offenses. Indeed, it is difficult in recent decades to find an example of the prosecution of a common law crime in either federal or state jurisdictions.[12]

The judiciary undoubtedly still plays a significant though often controversial role in shaping the contours of the substantive criminal law through interpreting statutes. Additionally, legislatures sometimes write criminal statutes so vaguely that the task of defining one or more elements of an offense shifts to the judiciary.[13]

Despite these qualifications, two things are clear. There has developed in this country a broad consensus that the work of defining criminal offenses should be done by legislators rather than judges. And though judges nonetheless play a role in defining offenses, there has been a fundamental shift in power from judges to legislators in defining crimes compared with the days of common law crimes.

In recent years, one finds a similar though less dramatic restriction of judicial power in the area of sentencing. As late as 1985, a federal judge sentencing a criminal defendant exercised almost exclusive authority in

11. *See* Note, *Common Law Crimes in the United States*, 47 COLUM. L. REV. 1332 (1947).

12. For one recent example of court approval of prosecution of a common law offense, see *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994).

13. *See, e.g.*, Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 6-11 (1997); Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?* 110 HARV. L. REV. 469, 471-79 (1996).

choosing a sentence from an often wide range established by the statute under which the defendant had been convicted.[14] In an armed bank robbery, for example, the judge could choose any sentence from straight probation to twenty-five years imprisonment.[15] Driven largely by concern about disparities among sentences under a system giving judges so much discretionary power, a movement in favor of determinate sentencing sought to restrict that power. In the federal system, that movement culminated in adoption of the Federal Sentencing Guidelines, which greatly restrict the power of judges in sentencing, limiting them to choosing sentences within ranges typically marked by months rather than years. Sentencing guidelines have been adopted in a number of states, though many are not as restrictive of judicial power as the federal guidelines.[16]

The restriction of judicial power that has occurred in the area of sentencing is not as dramatic or universal as the restriction one finds in the creation and definition of offenses. Some states have refused to adopt a guidelines approach,[17] and the guidelines many states have adopted give greater power to judges than the federal guidelines.[18] Even under the federal guidelines, judges have limited power to depart from the guidelines to impose either a more or less severe sentence.[19] Nonetheless, the past several decades have witnessed an unmistakable movement toward confining the exercise of judicial power in the area of sentencing.

The law of evidence provides another example of restriction of judicial power. Like the common law of crimes, the law of evidence was created largely by judges. Common law evidence rules were supplemented by occasional statutes on topics such as business records until a trend toward codification took hold in the twentieth century, culminating in the 1965 California Evidence Code and the 1975 Federal Rules of Evidence. Today evidence law primarily takes the form of codes.[20]

Judges still control some areas of evidence law. Under the Federal Rules of Evidence, for example, privilege rules[21] and some areas of impeachment[22] have been left to common law development. Judges also still play an

14. For a description of federal sentencing practice before and after adoption of the Federal Sentencing Guidelines, see NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW 684-708 (3d. ed. 2000).

15. *See* 18 U.S.C. § 2113 (1994 & Supp. III 1997).

16. Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 426 (2000).

17. *Id*. at 427.

18. *Id.* at 427-30.

19. ABRAMS & BEALE, *supra* note 14, 726-47.

20. Some states, such as Missouri, still utilize common law evidence rules.

21. FED. R. EVID. 501; *see* ROGER C. PARK ET AL., EVIDENCE LAW 383-84 (1998).

22. There are, for example, no federal rules controlling impeachment for bias or capacity. *See* PARK ET AL., *supra* note 21, at 459-67.

important role interpreting evidence rules, and trial judges in particular clearly exercise power in applying rules such as Federal Rule of Evidence 403, which grants the trial judge considerable discretion in controlling the admission of evidence through weighing probative value and need against dangers of prejudice, confusion, and waste of time. Nonetheless, as in criminal law, there has been a sea change in attitude in the law of evidence over the past century about giving judges the power to create evidence rules.

The contrast between restriction of judicial power in the areas of substantive criminal law, sentencing and evidence, and the expansion of judicial power described in Professor Israel's article is marked. As Professor Israel has noted, constitutional standards created by the justices of the Supreme Court have come to "constitute what is surely the most important single body of law governing the [criminal justice] process."[23] It stands in marked contrast not only to U.S. law on substantive crimes, sentencing, and evidence, but also in contrast to European systems which are code based.[24] Ironically, the period typically viewed as the apogee of judicial lawmaking in the area of criminal procedure, the 1960s and 1970s, coincided with the culmination of the movement to remove evidentiary lawmaking from the judiciary—the enactment of the Federal Rules of Evidence. The Federal Rules not only codified the vast majority of federal evidence law, but also provided a catalyst and model for restricting the power of judges over evidence law in many states.

The movement toward legislation and away from common law was not restricted to the areas of criminal law and evidence. Rather, the shift in law-making power from judges to legislators one finds in criminal law and evidence are typical of a larger phenomenon, which has led to our current legal culture being called "the age of statutes" [25] by Judge Guido Calabresi and "an age of legislation" [26] by Justice Antonin Scalia.

Why this difference? Why do we deny judges power over defining criminal offenses and evidence rules but grant them such power in the area of criminal procedure? One response is that criminal procedure is an area with a

23. 1 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE, 469 (2d ed. 1999) [hereinafter TREATISE].

24. PIZZI, *supra* note 6, at 158.

25. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); *see also* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS xv (1997) ("We live in an age of statutes in which the nation's legislatures serve actively as the dominant institutions for determining public policy and translating it into law."); WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 17 (2000) ("[W]e live in a democracy, where today most of our law is made not by judges in common law cases but by popularly elected legislators adopting statutes and by administrative agencies promulgating rules and regulations.").

26. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13 (1997).

much more substantial constitutional dimension than substantive criminal law or evidence. Criminal procedure receives more attention in the constitution than any subject other than the basic organization of the federal government.

But the importance of judge-made constitutional rules in the field of criminal procedure is not simply a product of the number of constitutional provisions devoted to criminal procedure. It is also a result of the Supreme Court's expansive interpretation of those provisions, particularly in the past forty years. Why has our legal culture favored restriction of judicial power in some areas relating to criminal justice but tolerated expansion in another?

Perhaps one finds in operation here a sort of law of dynamic homeostasis maintaining a general balance of power between the branches of government. As judicial power is curbed in one area, such as the creation of criminal offenses, there is a compensating expansion of power in the creation of criminal procedure rules. Another possible explanation is that we find expansive judicial power more acceptable in creating new rules of criminal procedure than in creating new crimes since the expansion of procedural protections typically serves to protect the citizenry by restricting the imposition of liability, while the creation of new crimes expands liability.

But what insight does this contrast offer to the craft problems highlighted by Professor Israel at the end of his lecture? He points to two: (1) unacknowledged departures from prior case law and (2) ambiguities and inconsistencies among cases regarding the standards the Supreme Court has offered in support of its interpretations of due process in criminal cases.[27]

These weaknesses are hardly unique to the Supreme Court's treatment of due process in criminal cases. One finds the same sort of problems, for example, in the Supreme Court's minimum contacts cases applying due process to state exertion of extraterritorial jurisdiction over defendants in civil cases.[28] The Supreme Court's minimum contacts jurisprudence reflects a gradual accumulation of a motley assortment of factors ranging from the defendant's conduct and mental state to the federal government's foreign policy interests. Typically, new factors have been added without acknowledgment or justification of departure from past practice and with little if any attempt to integrate innovations with prior cases.

Nor are such weaknesses restricted to the work of the Supreme Court. Rather, they are typical of judge-made common law. Professor Israel's complaints resonate with general criticism of judge made law made by champions of codification in many areas of law. The common law of

27. Israel, *supra* note 1, at 427-32.

28. *See* Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 195-99 (1998).

evidence, for example, has been characterized as "a growing, changing, fractious and often contradictory body of precedents."[29]

The unacknowledged departures from prior case law might be the result of several different factors. One possibility is that the justices are simply unaware of the existence of the prior cases they fail to acknowledge. The fact that the corpus of Supreme Court case law devoted to due process has grown increasingly voluminous and complex would be consistent with such an explanation. Accessibility problems are typical of common law. Those who favored abandoning the common law approach in favor of codification of federal evidence law, for example, advanced the pragmatic argument that the common law of evidence was too voluminous and complex to be accurately found and understood by judges and lawyers in the midst of trials.[30]

But other factors make it implausible that the justices would be unaware of relevant prior case law. The justices have more time and support for research than a trial judge and in recent years have gained access to computerized databases to aid in locating relevant prior cases. The justices also have the luxury of being able to devote their time and energy primarily to legal issues, as opposed to trial judges who must concern themselves with the resolution of both legal and factual issues. Parties appearing before the Supreme Court have typically had the opportunity to research the applicable precedents at both the trial and appellate levels before briefing the Supreme Court. So one would think the parties would do a good job pointing out relevant prior cases even if the justices and their clerks had not found them on their own. The Supreme Court also often has the advantage of opinions from lower courts, which have researched the applicable case law.

A more plausible explanation for the problem of unacknowledged departures from prior cases is that the justices are aware of the prior cases from which they are departing but unwilling to openly acknowledge when they abandon an established approach and create something new. Why might the justices hesitate to be candid about this? First, the notion of fidelity to precedent may prove a hindrance to candor about the justices creating new legal rules. Second, the conceit that the justices are simply applying constitutional text rather than creating new law may also be a barrier to candor. Finally, the fact that the justices are operating in an age of legislation, a legal

29. PARK ET AL., *supra* note 21, at 425-29.

30. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE: DOCTRINE AND PRACTICE 4 ("Making evidence law accessible is the main reason for the code that has become the most influential body of American evidence law—the Federal Rules of Evidence."); *Proposed Rules of Evidence: Hearings Before the House Spec. Subcomm. on Reform of Federal Criminal Laws of the Comm. on the Judiciary*, H.R., 93d Cong. 90 (1973) (testimony of Albert Jenner) ("[T]he administration of justice in the federal courts is suffering seriously. A major factor in this regard is the maelstrom of rules of evidence which must be presently ferreted out and applied by federal judges.").

culture increasingly opposed to judges creating law, may help explain their reluctance to openly acknowledge active law making.

The problem of ambiguities and inconsistencies between cases might also be explained in several ways. Professor Israel's ambition in seeking to tell the story of due process over a period of almost 120 years brings to mind a methodological divide I read of recently among geologists.[31] There now exist two quite different approaches to understanding the earth's history and structure. Traditional geologists examine the earth's surface at close range. They look at particular sections of the earth's surface, scrutinizing the details of particular formations through field-work and by putting hammer to rock. A new breed of geologist trained in physics, though, has recently brought to the field a set of techniques radically different from those of the traditional geologist. Using satellite maps to examine huge sections of the globe at long range, these new geologists develop complicated mathematical models and universal laws on a much grander scale than traditional geologists.

Like the earth's surface, the Supreme Court's due process jurisprudence is the product of a gradual, case-by-case process of accretion.[32] Lawyers, judges and most academics, as Professor Israel points out in his article,[33] consume the Supreme Court's due process jurisprudence the same way it is produced. Like traditional geologists, they work with it in discrete chunks, examining at close range individual cases, such as *Chambers v. Mississippi*[34] on the constitutional dimension of excluding hearsay offered by a criminal defendant, or clusters of cases dealing with particular issues, such as the line of cases from *Brady v. Maryland*[35] through *Strickler v. Greene*[36] on prosecutorial disclosure of exculpatory evidence.

By contrast, Professor Israel adopts in his article a perspective on the Supreme Court's due process jurisprudence that is the scholarly equivalent of the physicist-geologist's view of the earth's surface. He makes us look at the big picture, giving us a panoramic view across a wide range of criminal procedure issues from investigation to sentencing and covering more than a century of the Supreme Court's work.

Narrow framing, focusing one's attention on a particular case or cluster of cases, reveals certain types of flaws in the Supreme Court's work, such as lack of logical force or clarity in a particular opinion or inconsistencies within

31. *See* James Glanz, *Physicists Invading Geologists' Turf*, N.Y. TIMES, Nov. 23, 1999, at F1.

32. CASS R. SUNSTEIN, ONE CASE AT A TIME ix (1999) ("[T]he [Supreme] Court is part of a long historical tradition. Anglo-American courts often take small rather than large steps, bracketing the hardest and most divisive issues.").

33. Israel, *supra* note 1, at 305.

34. 410 U.S. 284 (1973).

35. 373 U.S. 83 (1963).

36. 527 U.S. 263 (1999).

particular lines of cases relating to a particular subject. But narrow framing insulates us from both the insights and challenges found in the larger story of due process.

Inconsistencies and ambiguities of the sort Professor Israel points out emerge more clearly when one adopts the sort of broad framing found in Professor Israel's article. Though the work of the Supreme Court is often made up of issues of national importance, its method of making law, like the common law method generally, naturally inclines the justices toward narrow framing. Developing legal principles in the context of resolving particular cases, as judges do, naturally runs the risk of over-attention to doing justice in the particular case and inattention to whether the resolution of that case is consistent with prior case law. As Professor Israel points out, most academics criticizing the Court's work also adopt this sort of narrow framing, so the academic literature has not exerted much corrective leverage on the Court.

Since the weaknesses Professor Israel points out are typical of judge-made law, it is probably unrealistic to think that those weaknesses will change as long as the Court's due process jurisprudence continues to be made by judges through a common law process. Perhaps, though, Professor Israel's article and others prompted by it adopting a similar broad viewpoint will increase the Court's awareness of these problems and prompt improvement.

II. DISTINGUISHING RULE FROM REMEDY

A recurring craft problem which causes confusion in the Supreme Court's due process and other criminal procedure cases is failure clearly to distinguish rule from remedy. Appellate courts often need to treat the question of whether a rule was violated separately from what steps, if any, the court should take under the circumstances of a particular case to remedy a violation. In assessing whether reversal of a trial court judgment and the granting of a new trial are appropriate remedies, appellate courts often look to the impact of a rule violation on the outcome of the case.[37]

Assume, for example, an appellate court is confronted with a claim that a trial court's admission of a criminal defendant's prior criminal record violated the ban on character evidence.[38] If the appellate court decides the character rule was in fact violated, it would not automatically reverse the trial court's judgment and grant a new trial. But if the erroneously admitted evidence

37. For examples of rules codifying such outcome oriented appellate review standards, see FED. R. EVID. 103(a); FED. R. CIV. PRO. 61; FED. R. CRIM. PRO. 52(a). For an account of the rationale and development of such rules, see CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, 441-43 (2d. ed. 1995).

38. *See* FED. R. EVID. 404(a).

affected the outcome of the trial, the appellate court typically would reverse and grant a new trial.[39]

In the law of evidence, the Supreme Court and other appellate courts routinely partition their analysis of rule violation from their analysis of an appropriate remedy without great difficulty. But the Supreme Court often fails to maintain that distinction in constitutional criminal procedure. At one time it was thought that any constitutional error required reversal.[40] But in *Chapman v. California*,[41] the Supreme Court held that the harmless error doctrine may apply even to constitutional errors. Since *Chapman*, the Supreme Court has at times collapsed the questions of rule violation and appropriate remedy into a single analysis and in doing so created confusion.

A prime example of this confusion can be found in the line of Supreme Court due process cases dealing with prosecutorial disclosure of exculpatory evidence. The first of these cases was *Brady v. Maryland*,[42] a 1963 case in which the Court held that the prosecutor has a due process obligation to disclose material exculpatory evidence to the defense. In *Brady*, the Court did not define the term *material*. One plausible reading of *Brady* is that the Court used the term material in a broad sense, as a synonym for relevance, a common meaning in the law of evidence. Under this broad interpretation, the prosecutor would need to disclose all relevant exculpatory evidence. But it is also possible to interpret *Brady* as suggesting a narrow interpretation of the term material as including only items of exculpatory evidence which have particularly high probative value.

Thirteen years later, the Supreme Court dealt with this ambiguity about the scope of the *Brady* disclosure rule by adopting a two-tiered approach in *United States v. Agurs*.[43] If the defense specifically requested an item, the materiality standard was broad. The prosecutor was required to turn over anything that might have affected the outcome. Without a specific request, a narrower standard applied. The prosecutor was required to turn such items over only if they would have created reasonable doubt. Nine years later, in *United States v. Bagley*, the Supreme Court abandoned the two-tiered *Agurs* approach to materiality in favor of exclusive use of a narrow test.[44] Under *Bagley*, prosecutors must disclose exculpatory evidence only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[45]

39. *See* PARK ET AL., *supra* note 21, at 542-47.

40. *Id*. at 551 ("Prior to the Supreme Court's decision in *Chapman v. California*, it was thought that constitutional errors were always grounds for reversal.").

41. 386 U.S. 18 (1967).

42. 373 U.S. 83 (1963).

43. 427 U.S. 97 (1976).

44. 473 U.S. 667, 681-84 (1985).

45. *Bagley*, 473 U.S. at 682.

In the course of roughly twenty years, then, the Supreme Court went from failing to define materiality, to simultaneously embracing both broad and narrow definitions of materiality in a bifurcated analysis, to what appears in *Bagley* to be a single, narrow definition. In the course of these various twists and turns, it collapsed two different inquiries, the scope of a defendant's right to receive exculpatory information and whether a violation of that right mandates reversal and a new trial. These developments have had a number of unhappy consequences.

One is the awkwardness of the phrasing of the *Brady* rule found in *Bagley*. It is phrased as an *ex post* rule which looks back at a finished trial, asking what "would have been different" at the trial if the exculpatory evidence had been disclosed. This makes sense for a remedy rule, which is typically applied retrospectively by an appellate court *after* the trial has been concluded. But this phrasing makes no sense as a rule of disclosure, which is typically applied prospectively by a prosecutor *before* trial. A prosecutor deciding whether or not to disclose exculpatory evidence before trial obviously cannot look back at a trial that has yet to take place.

Even if one recasts the *Bagley* materiality standard as an *ex ante* rule requiring prediction of whether the *Brady* information would affect the outcome of an upcoming trial, practical application problems remain. Imagine a pre-trial defense motion seeking certain information under the *Brady* rule, to which the prosecution responds by asserting that the requested information does not meet the *Bagley* materiality test. Assume the judge agrees to review the disputed information *in camera* to determine whether it is material. How can the judge apply the *Bagley* materiality test and predict how the requested information will affect the outcome of the trial without detailed knowledge of the evidence which will be introduced at trial by both the prosecution and defense? The judge is unlikely to have such detailed knowledge of the evidence prior to trial. By contrast, a judge without detailed knowledge of the other evidence could apply prior to trial a test that casts materiality simply in terms of probative value relative to an important issue in the case.

A third problem is lingering ambiguity about the scope of the disclosure rule, ample evidence of which is found in *Strickler v. Greene*,[46] the Court's most recent encounter with the *Brady* disclosure rule. Consider the following passage from Justice Stevens' opinion in *Strickler*:

> [The prosecutor's] special status explains both the basis for the prosecution's broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called "*Brady* material"—although, strictly speaking, there is never a real

46. 527 U.S. 263 (1999).

> "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.[47]

The Supreme Court in *Strickler* reaffirmed *Bagley's* narrow materiality standard. Nonetheless, Justice Stevens refers twice here to the prosecutor's "broad" disclosure duty and obligation as if the broad interpretation of materiality were still viable. He attempts to clarify the ambiguity between the broad and narrow views of materiality by resorting to the adjectives "so called" and "real." A "so called" *Brady* violation is failure to disclose evidence that satisfies the broad materiality standard. A "real" *Brady* violation is failure to disclose evidence that would probably have changed the outcome. Distinguishing more effectively and consistently between rule and remedy would help ameliorate such confusion in the *Brady* area and in other areas of due process as well.

III. METHODOLOGY IN SEARCH OF A PURPOSE

Professor Israel focuses his lecture on the Supreme Court's interpretative guidelines and the use of those guidelines in resolving issues presented in particular due process cases. What policies, though, drive the selection of these guidelines? One source of confusion and incoherence in the Supreme Court's due process cases is the Court's failure to address and to articulate the purposes that methodology seeks to serve.

The purposes of substantive criminal law have been and continue to be the subject of extensive examination and vigorous debate. Justifications such as retribution, deterrence, and incapacitation, for example, provide the axes around which academic and public debate revolves on many criminal justice issues, such as imposition of the death penalty. But the purposes of criminal procedure, by contrast, have not received much attention. Rather, they have typically been treated as "obvious and noncontroversial."[48] Professor Peter Arenella has described "a glaring deficiency in criminal justice scholarship: the failure to identify the functions served by American criminal procedure."[49] In attempting to assess and compare the work of the Warren and Burger Courts in the area of criminal procedure, Professor Arenella concludes that "[w]ithout a clearer understanding of criminal procedure's functions, we cannot begin to

47. *Strickler*, 527 U.S. at 281 (citations omitted).

48. Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 185-86 (1983) ("What functions are served by criminal procedure? For the most part, American criminal justice scholarship has assumed that the answers to this question are obvious and noncontroversial.").

49. *Id.* at 247.

make any useful comparison of the two Courts' approaches to criminal procedure."[50]

This lack of close attention to the purposes of criminal procedure among legal academics is mirrored in the Supreme Court's criminal procedure opinions, including those on due process. Rarely does the Court address the ultimate purposes of due process in particular or criminal procedure in general. When the Court does mention a justification or purpose of a particular criminal procedure right, it does so in passing and with cursory treatment at best. Professor Arenella's point that it is difficult to make sense of the Warren and Burger Courts' criminal procedure legacies without first articulating the purposes criminal procedure seeks to serve is equally valid when it comes to making sense of the Supreme Court's due process jurisprudence.

Looking at the Supreme Court's due process jurisprudence from the broad perspective offered in Professor Israel's article, I felt a bit as I did when I once took a ride in a hot air balloon. The increasingly dramatic view of the surrounding landscape revealed as the balloon rose higher and higher gave me an uneasy combination of exhilaration and nausea. The broad expanse of the Supreme Court's due process methodology revealed in the course of reading Professor Israel's article produced a similar ambivalence. Many of the themes that emerge in the history of the Supreme Court's due process methodology are quite interesting. But the inconsistencies and confusion in methodology reminded me of Lawrence Friedman's description of the evolution of due process as being characterized by "zigs and zags and lurches, like a drunk trying to walk a straight line."[51] The Supreme Court's failure to focus on and articulate where it has been headed in its journey of developing the meaning of due process in modern American criminal procedure may help explain these "zigs and zags and lurches."

One question the Court has neglected in its general failure to examine and articulate the purposes of criminal procedure is whether criminal procedure rules such as the right to due process are supported by any non-instrumental justification. Instrumental and non-instrumental approaches to justifying legal rules are found in many areas of law. The instrumental view is prospective; it focuses on the interests of society rather than on the rights or responsibilities of individuals and relies on instrumental rather than moral criteria.[52] The non-instrumental view, in contrast, is retrospective; it focuses on the rights and responsibilities of individuals and relies on moral rather than instrumental criteria.[53]

50. *Id.* at 248.

51. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY, 56 (1993).

52. McMunigal, *supra* note 28, at 199.

53. *Id.* at 200.

These differences are readily apparent in criminal law and torts. An instrumental approach to criminal law might see criminal punishment as an instrument for advancing the socially-useful goal of reducing future crime through deterrence, rehabilitation or incapacitation.[54] A non-instrumental view of criminal law often labeled "just deserts" sees criminals as being properly punished because they deserve it based on past wrongdoing, not because it will provide any future benefit to society.[55] An instrumental approach might see tort law as a means for advancing the collective social goals of deterrence or cost-spreading.[56] A non-instrumental view often called "corrective justice," by contrast, looks to the respective moral rights and responsibilities of individual actors to determine the distribution of tort liability.[57]

Is there an analog in criminal procedure to the "just deserts" approach to criminal law and the "corrective justice" approach to torts? Professor George Fletcher has written "[t]he most common mode of moral reasoning in the Anglo-American tradition is cost/benefit analysis—the 'balancing' of competing advantages and disadvantages of adopting particular courses of action. As the argument goes, all legal decisions (by individuals as well as courts) should be judged according to their consequences."[58] The tendency toward instrumental thinking is particularly strong in the area of procedure, often viewed as simply a means for enforcing the rights and obligations found in substantive law.[59] Professor Israel's treatise, for example, begins by defining criminal procedure as " the law governing that series of procedures through which the substantive criminal law is enforced."[60]

In thinking about criminal procedure, then, we naturally tend to gravitate toward justifying and measuring procedural rights in instrumental terms, by assessing the consequences of applying or failing to apply those rights on objectives such as enforcing substantive criminal law, discovering historical truth, minimizing factual errors, cost, efficiency, deterring police misconduct or maintaining public respect for the criminal justice system. But is the justification for criminal procedure rights in general and due process in

54. *See, e.g.*, Johannes Andeneas, *Deterrence*, *in* ENCYCLOPEDIA OF CRIME AND JUSTICE 591, 592 (Sanford H. Kadish ed., 1983).

55. *See, e.g.*, Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND EMOTIONS 179 (Ferdinand Schoeman ed., 1987).

56. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

57. *See, e.g.*, Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part I*, 1 LAW & PHIL. 371 (1982).

58. GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 144 (1996).

59. *See, e.g.*, BLACK'S LAW DICTIONARY 1203-04 (6th ed. 1990) (defining procedure as "the mode of proceeding by which a legal right is enforced"); BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 697 (2d ed. 1995) (noting that "[*p*]*rocedural law* . . . consists of the rules by which one establishes one's rights, duties, liberties, and powers").

60. 1 TREATISE, *supra* note 23, at 5.

particular exclusively instrumental? Do we give defendants due process only because of the useful consequences it may produce, such as a more accurate determination of factual guilt? Or is due process in part accorded to individual defendants based on a moral intuition that defendants deserve certain procedural rights, that certain types of *process* are *due* to individuals threatened by the government with loss of liberty or life through imposition of a criminal sanction apart from whatever socially useful consequences such process produces? The Supreme Court's lack of attention to the underlying purposes of criminal procedure make it difficult to answer this question. The Court's frequent emphasis on results and, in particular, on the factual accuracy of the determination of guilt, suggest a negative answer to this question. But other aspects of the Court's work, such as its exemption of certain cases from harmless error analysis, may be read as consistent with non-instrumental reasoning.

The Supreme Court's failure to address the purposes of criminal procedure causes confusion because it masks the tensions which may arise among different and at times competing purposes. Even if one adopts a strictly utilitarian view of the purposes of criminal procedure, various utilitarian goals can conflict. Cost and accuracy, for example, are perennially at odds. Extensive appellate review, for example, may increase accuracy in terms of fact determination and application of the law, but it increases cost. Limitations on the amount and scope of appellate review represent a compromise between these competing goals. By failing to address and articulate the purposes of criminal procedure, the Court provides no means for recognizing and openly resolving such tensions on a consistent, principled basis.

If one recognizes a non-utilitarian aspect to the purposes of criminal procedure rules, the potential for conflict between utilitarian and non-utilitarian values adds another potential source of tension to those which may already arise among utilitarian goals. Again, an advantage of having the Supreme Court address and articulate the purposes of criminal procedure would be to force the Court to confront this tension and provide some means for resolving it. Professor Paul Robinson has written about the need for developing mixed theories in substantive criminal law to deal with such tensions. When such conflicts occur,

> ultimately a choice must be made to follow one purpose at the expense of another. Yet, when faced with conflicting purposes, judges, legislators, and sentencing-guideline drafters have no principle to guide that decision. In the absence of a guiding principle, the choices made are at best inconsistent . . . . At worst, the absence of a guiding principle fosters arbitrariness or prejudice.[61]

61. Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 20 (1987) (citations omitted).

Professor Robinson's point about substantive criminal law is equally valid when applied to the Supreme Court's criminal procedure cases in general and due process cases in particular. The Supreme Court's failure to acknowledge, much less provide guidance in resolving, such tensions in part explains the inconsistency and ambiguity found in the Supreme Court's due process jurisprudence.

IV. CONCLUSION

Professor Israel encourages us to use a wide lens in assessing the Supreme Court's due process jurisprudence. Doing so provides grounds for both pessimism and optimism about improving the craft of due process in the Court's work. The fact that some of the flaws he identifies are typical of common law process suggests there is little reason to be optimistic about remedying those flaws as long as the Supreme Court's jurisprudence continues to develop through what is essentially a common law process. But the wide lens Professor Israel's article prompts us to use may help in remedying these flaws by bringing them into clearer view for both the Court and its academic critics.