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BACK TO THE FUTURE DUE PROCESS ANALYSIS

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I will cite very few sources in this commentary, which accompanies Professor Jerold Israel's Childress Lecture and his article, which anchors this issue of the *Saint Louis University Law Journal*. The Professor's article is as thoroughly researched, and meticulously documented, as one would expect from one of America's foremost legal scholars. If you have not read Professor Israel's article, you will not find any research shortcuts here. In any event, I am sure that other commentators will supply you with lots of footnote references, and I really hate footnotes.[1]

I chose my title for two reasons in addition to the typical professorial love of a "cute" title. First, the title fits Professor Israel's article, in which he renews a plea for openness and honesty in Supreme Court opinions that he made in his first law review article as a professor. Almost forty years ago, in his classic article on the overruling of Supreme Court opinions, he called on the Court for an honest, open explanation of why an opinion would be overruled.[2] Second, I believe that the approach to incorporation and application of the Bill of Rights adopted by the Warren Court, and ratified by the Burger and Rehnquist Courts, froze due process analysis in the criminal law setting (as opposed to due process analysis in administrative law or civil trial settings) in the 1960s. Professor Israel picks up where scholars of the 1950s and 1960s, such as Justice Walter V. Schaefer,[3] Judge Henry Friendly[4] and Professor Sanford Kadish,[5] left off.

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1. How silly: a footnote about hating footnotes! I once talked about this subject in John E. Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317 (1985). I swiped the title for that talk and essay from the late Professor Fred Rodell. In other essays, I have attempted to resurrect Professor Rodell's brand of legal realism in analyzing constitutional issues. *See* John E. Nowak, *Professor Rodell, The Burger Court, and Public Opinion*, 1 CONST. COMMENT. 107 (1984); John E. Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 HASTINGS CONST. L.Q. 263 (1980).

2. *See* Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1372-73 (1977); Jerold H. Israel, Gideon v. Wainwright*: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 242-61.

3. *See* Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 2-4 (1956) [hereinafter Schaefer, *Federalism*]; W. SCHAEFER, THE SUSPECT AND SOCIETY (1966).

HONEST OPINIONS & OPEN BALANCING: AN ALTERNATIVE TO PRE-1930 & POST-1970 FORMALISM

Professor Israel has called on the Supreme Court for open, honest explanations of how the justices used the concept of due process when deciding criminal law and criminal procedure cases. Professor Israel is not asking for a rigid form of due process analysis that would allow us to predict the outcome of every future Supreme Court case so long as the justices on the Court remained the same. Rather, he is asking only for a clear explanation of the precise ruling in the case, and an honest statement as to how the majority of the justices viewed the values inherent in the due process clause when they made their decision. He offers the Court a variety of possible approaches to due process analysis, but he only makes a demand for openness and honesty in opinions. On the way to his conclusion, he shows us how the Court, during an era of formalism in legal theory, had no coherent theory of due process prior to the 1930s and how the Court gave up on what the Professor calls "free-standing due process" after it used the incorporation theory to make almost all of the clauses of the Fourth, Fifth, Sixth and Eighth Amendments applicable to state and local criminal prosecutions.

One of the reasons I believe that a court could achieve the goals set out by Professor Israel is that I saw a judge who could write such opinions. Thirty years ago I clerked for Illinois Supreme Court Justice Walter V. Schaefer. Even if I were someone who used footnotes in the normal law review manner, I would have nothing to cite for the next statements concerning Justice Schaefer's views of how to write judicial opinions in criminal justice cases. The following statements are based only on my memory and the memory of my co-clerk and friend, David M. Spector (who was a student of Professor Israel's, back when dinosaurs ruled the earth).

Justice Schaefer believed in writing very precise rulings concerning the decisions in criminal cases, while leaving open the possibility for due process analysis that would change in the future. He thought that a court's opinion should state a ruling so precisely that lower courts and law enforcement officers would have no problems understanding the ruling and applying it in situations that were substantially similar to those in the case. Nevertheless, the Justice wrote his opinions (yes, as difficult as this may be to believe, the Professor turned Justice wrote the opinions himself) so that any reference to due process principles in the Illinois or U.S. Constitutions would be flexible. His reasoning in such opinions left open the possibility that the conception of

4. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

5. Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

due process he put forward might be used to come to different conclusions in the future, as society and the criminal procedure process evolved.[6]

Another bias may cause me to interpret Professor Israel's article as I have done above, and to agree with him. Since my earliest days as a professor, I have agreed with the position espoused by the late Professor Bickel that U.S. Supreme Court opinions should be understood as part of a dialogue with the citizenry rather than merely as technical rulings in specific cases. Bickel believed the Court, while it may speak to the public, should be aware that it is part of a dialogue.[7] The Supreme Court may not directly react to public opinion, but the values on which our society has a consensus, or lack thereof, must be part of every Supreme Court decision. Professor Francis Allen noted that the Court could only help to change society through opinions that appealed to shared national values. Without clear, honest opinions from the Court, the public cannot be expected to fairly evaluate the Court or to be significantly influenced by it. As Professor Allen noted:

> The Warren Court enjoyed its greatest successes when it advanced solutions that were supported by a broad ethical consensus, as in cases involving the right of impoverished defendants to counsel in the courtroom . . . . The central problem of the Warren Court's activism in the criminal area was not that it threatened serious abuses of power by politically irresponsible judges. Rather, it was simply that, despite the Court's ingenious, persistent, and some may feel, heroic efforts to overcome the inherent limitations of judicial power, the Court attempted more than it could possibly achieve.[8]

The Supreme Court did not care much about what we now call civil liberties until the 1920s; it only started to develop due process principles in the 1930s.[9] The Court's first significant action striking a state conviction that was

6. *See supra* note 3 and *infra* note 12.

7. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1975); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE MORALITY OF CONSENT (1978).

8. Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 540 (1975). Professor Allen's concern with the identification of fundamental values in the criminal process is reflected throughout his writings. *See, e.g.*, FRANCIS A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 135-39 (1964); Francis A. Allen, *The Supreme Court, Federalism and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213, 235 (1959) [hereinafter Allen, *Supreme Court*]; Francis A. Allen, *The Law as a Path to the World*, 77 MICH. L. REV. 157 (1978); Francis A. Allen, *Criminal Law and the Modern Consciousness: Some Observations on Blameworthiness*, 44 TENN. L. REV. 735 (1977); Francis A. Allen, *Rights in Conflict: A Balanced Approach*, 3 VAL. U. L. REV. 223 (1969); Allen, *Legal Values and Correctional Values*, 18 U. TORONTO L.J. 119 (1968); Francis A. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1; Francis A. Allen, *Foreword—Quiescence and Ferment: The 1974 Term in the Supreme Court*, 66 J. CRIM. L. & CRIMINOLOGY 391 (1975).

9. *See* Allen, *Supreme Court*, *supra* note 8, at 235; John E. Nowak, *The "Sixty Something" Anniversary of the Bill of Rights*, 1992 U. ILL. L. REV. 445.

obtained under the influence of a mob overruled *sub silentio* one of its earlier decisions.[10] Perhaps the Court (like Connecticut, Georgia and Massachusetts, which ratified the Bill of Rights in 1939) was embarrassed that it had a record of approving state disregard for individual rights as our nation was coming into conflict with fascist nations.

One of the major contributions of Professor Israel's article is the demonstration that the Supreme Court's due process decisions from *Hurtado* to the 1930s made little sense, in part because of the confusion concerning the role of history. After reading the Professor's article, no reasonable person (a term that may exclude ultra-pro-police department justices) should be able, to say (with a straight face) that the only processes guaranteed a person charged with a crime are the processes that were in common usage at the time of the ratification of the Fifth or Fourteenth Amendment due process clauses. It was not until after the adoption of the Fourteenth Amendment that states gave defendants a right to testify in their own defense.[11] Could, or should, prohibition of defendant testimony survive due process analysis in a society that has greater capability for discovering the truth or falsity of exculpatory evidence than existed in centuries past? If you think so, your last name must be Scalia or Thomas.

Professors Israel's calls for open balancing of values in terms of today's society picks up where Justice Schaefer left off in his Holmes Lecture.

> Due process cannot be confined to a particular set of existing procedures because due process speaks for the future as well as the present, and at any given time includes those procedures that are fair and feasible in the light of then existing values and capabilities. Some features of present procedures are now accepted by force of custom, or because no practical way has been found to improve them. Technological change or a refinement in our sense of justice may make their retention intolerable.[12]

I must admit that I've given very little thought to complex problems of criminal procedure since I wrote my one and only article in the area more than twenty years ago.[13] I was more than pleased to be part of the panel sessions in St. Louis and to contribute an essay commenting on Professor Israel's article, for two reasons. First, I have the greatest respect for Jerry Israel. Second, to those who doubted me decades ago I wanted to say, "I told you so." I see

10. Moore v. Dempsey, 261 U.S. 86 (1923) (overruling *sub silentio* Frank v. Mangum, 237 U.S. 309 (1915)). This point was made by Judge Friendly. *See* Friendly, *supra* note 4, at 937. The *Frank* case involved a situation in which anti-Semitism, as well as mob influence, played a part in the trial. At least one made for television movie—"The Murder of Mary Phegan"—was made about the facts of the *Frank* case.

11. *See* Schaefer, *Federalism*, *supra* note 3, at 2.

12. *See id.* at 6.

13. John E. Nowak, *Foreword—Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397 (1979).

Professor Israel's article as a great scholar opening the door to reconsideration of using a due process methodology in the interpretation of Bill of Rights provisions. After all, no state appears before the Supreme Court asking: "Can we please have unreasonable, warrantless searches and seizures?"; or "Will you please let us compel a person's testimony through torture and other coercive practices?" No, the Fourth and Fifth Amendment cases involve difficult fact situations that require balancing our societal interest in efficient law enforcement and our society's desires for a process that is fundamentally fair and that respects human dignity.

In that long ago article, I used the works of Francis Allen, Walter Schaefer, and, primarily, Sanford Kadish [whose due process methodology is explained in Professor Israel's article] to take the position that incorporation of specific provisions of the Bill of Rights into the due process clause and application of those provisions in an identical manner to federal and local law enforcement systems would be of value only to nine persons, the Justices of the United States Supreme Court. At first, incorporation allowed a Warren Court Justice to say "I wasn't expanding these rights based on my personal choice, the [Fourth, Fifth, Sixth or whatever] Amendment made me do it." Incorporation turned out to be a two-edged sword. A Justice of the Burger and Rehnquist Court could say: "It's not my fault that I'm approving what seems to be an unfair process, it's just that the issue involves only the meaning of the [Fourth, Fifth, or Sixth or whatever] Amendment and that Amendment doesn't help the defendant in this case."

Judge Henry Friendly predicted that post-incorporation decisions might be a disaster for the Court. He warned: "There is grave risk of self-delusion in the reiterated references to the declaration of fundamental principles in the Bill of Rights as 'specifics'; . . . So let us hope, as true friends of the Court, that in the fullness of time, it will escape from the 'verbal prison' it has been building for itself by selective incorporation doctrine and will regain the 'sovereign prerogative of choice.'"[14]

How could the Court incorporate the due process analysis of Professor Israel, Francis Allen, Sanford Kadish and Walter Schaefer, into opinions on specific provisions of the Bill of Rights, as well as opinions focusing solely on one of the due process clauses? Here's one possibility.

> First, the Court should face the question of judicial interpretation openly and identify the values that are involved in the case. The opinion should note the precise Bill of Rights or due process clause issues and the problem of defining and protecting values when no historical means exist for arriving at a fixed meaning for the constitutional provision in question.

14. Friendly, *supra* note 4, at 937-38.

> Second, the Court should determine the importance of the values endangered by the state's practice. The opinion should inquire into either the nature of the values reflected in the Bill of Rights provision at issue in the case or the general principles of due process, i.e., protection of individual dignity, equality of treatment, and traditional conceptions of fairness.
>
> Third, the Court should examine the impact of a ruling (for or against the defendant) on the reliability of the guilt-determination process, and it should evaluate the cost of administering a system with the procedural safeguard, if any, sought by the defendant. This portion of the analysis involves questions of economic and social costs, including the difficulty of administering a system of justice with limited resources and expanded procedures.
>
> Fourth, the Court should determine whether the due process or Bill of Rights values outweigh the social costs of a ruling adverse to the state. This entails more than a mere utilitarian balancing test; it involves explicit reasoning in the opinion that confronts the question of the extent to which the state practice endangers fundamental constitutional values. Further, the court openly should examine whether this society's historic and philosophic commitment to those values requires it to bear the costs.[15]

THE COST OF INCORPORATION: *MIRANDA* VS. THE DUE PROCESS SCHOLARS

We can see the cost of the Court's failure to use a due process methodology in cases concerning whether a defendant's confession was "voluntary." The voluntariness issue presents us with a clear example of how incorporation stifled due process analysis, and prevented open consideration of clashes between individual and societal interests. Every day trial courts must determine whether or not a confession was made voluntarily so as to comply with both due process and Fifth Amendment principles. Unfortunately, the Supreme Court of the post-incorporation era has been of no help to these courts.

The *Harvard Law Review*, in a Development Note in 1966, said of the due process voluntary confession cases to that time: "The Court's cases suggest that the due process voluntariness standard has three possible goals: (1) ensuring that convictions are based on reliable evidence; (2) deterring improper police conduct; or (3) assuring that a defendant's confession is the product of his free and rational choice."[16] The Development Note then went on to show how the Court's opinions were capable of being read as favoring one or another of the goals as the primary consideration in voluntariness cases. One thing that can be said for all those cases from the1930s to the 1960s, as

15. Nowak, *Foreword*, *supra* note 13, at 401-02.

16. *Developments in the Law—Confessions*, 79 HARV. L. REV 935, 963-64 (1966).

difficult as they were for students to summarize, is that the cases involved open balancing of the needs of society for efficient police investigation against values of individual dignity that were part of our history and traditions.

The problem defendants face today in proving the confession was involuntary is the same problem that they faced more than thirty years ago. Unfortunately, state courts and lower federal courts are no better equipped to make voluntariness determinations, in terms of guiding principles from the Supreme Court, than they were thirty years ago.

The Supreme Court decided *Miranda v. Arizona*[17] in 1966, after decades of cases struggling to define whether a confession was voluntary. The *Miranda* Court focused so intently on the Fifth and Sixth Amendment that it forgot to use the due process methodology developed in cases from the 1930s and 1960s. The cases following *Miranda* ended the Supreme Court inquiry into the principles of fairness, respect for individual dignity, and the needs of society for efficient law enforcement that would have followed from a due process methodology.

Although there were still some voluntariness cases to decide in the 1960s, it took only a few years for the focus on *Miranda* technicalities to replace any open consideration of the intersection of due process and the Fifth Amendment in Supreme Court opinions. Professor Israel's and his Florida faculty colleague's student treatises on criminal procedure cite only a few post-1971 Supreme Court decisions concerning the voluntariness of confessions, and most of those cases focus on the voluntariness of a *Miranda* waiver, not on the voluntariness of the confession itself.[18] It almost seems like, if you get a *Miranda* waiver, it is okay for police to coerce a defendant!

The *Miranda* ruling, if not the Court's opinion, probably was a valuable one because, thanks to television and movies since 1966, every man, woman and child in the United States should now be aware of their Fifth and Sixth Amendment rights. There may well have been no attempt to stop the third degree practices of the "bad old days," if *Miranda* had not focused national attention (if only due to the controversy about the ruling) on coercive police practices. Nevertheless, I do not believe that the *Miranda* ruling has really helped individual defendants whose confessions were involuntary. Those persons who believe that *Miranda* was a great triumph for the rights of defendants must spend all of their time in classrooms. Years ago, when I taught criminal procedure courses, if one of my students said that the *Miranda* warnings would prevent coerced confessions, I would reply: "Either you just moved to Illinois, or you've already been in law school too long." Perhaps my

17. 384 U.S. 436 (1966).

18. WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY KING, CRIMINAL PROCEDURE, § 6.2 (3d ed. 2000); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS, ch. 16 (4th ed. 2000).

view of *Miranda* is tainted by the fact that I live in Illinois. The law enforcement abuses that cause confession and convictions in capital cases to be so untrustworthy that our governor declared a moratorium on capital punishment would not have been cured by *Miranda* or any of its progeny. It seems unlikely, at least to this old, jaded professor, that police officers who lie about torturing a defendant to get a confession will tell the truth when asked about whether they gave the *Miranda* warnings to a defendant and received permission to interrogate him.

In 1965, in *Griffin v. California*,[19] the Supreme Court ruled that the Fifth Amendment prohibited a prosecutor or judge from commenting in front of a jury, on the defendant's failure to testify. The *Griffin Miranda* combination effectively stopped any ability of state courts to develop interrogation systems that differed from the formal *Miranda* structure, even if the alternatives might have provided a better balance of individual and societal interests. Specifically, those decisions took away the ability of any court [including the Supreme Court, unless it was to overrule *Griffin* and *Miranda*] to examine the system Yale Kamisar termed the "Kauper-Schaefer-Friendly model" for suspect interrogation.[20] Those three scholars wished to use the Fourteenth Amendment due process clause, together with the Fifth and Sixth Amendments, to prohibit virtually all confessions that were not made before a defendant was presented to a magistrate. Professor Kamisar summarized their proposal as follows:

> If one were to revise it [Kauper's Proposal] in light of subsequent developments and the great dialogue they stimulated, the "modernized" version would present an attractive alternative to the Miranda model.
>
> Such revisitation and revision of the old Kauper plan has in fact occurred—most notably by two of the most eminent critics of *Escobedo* and *Miranda*, Justice Walter Schaefer and Judge Henry Friendly. A modernized version, based largely on their writings, might take approximately the form of the five provisions that follow:
>
> 1. A person taken into custody because of, or charged with, a crime to which an interrogation relates, may be questioned only in the presence of and under the supervision of a judicial officer.

19. 380 U.S. 609 (1965).

20. Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 32 (1973); Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1239 (1932), *reprinted in* 73 MICH. L. REV. 39, 54 (1974). *See supra* notes 3-4. *See also* Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. & CRIMINOLOGY 1014, 1017 (1934); W. SCHAEFER, THE SUSPECT AND SOCIETY, *supra* note 3, at 76-81.

> 2. The person shall immediately (that is, as soon as humanly possible) be brought before a judicial officer who shall, before questioning begins, determine the existence of the grounds for detention or arrest.
>
> 3. The judicial officer shall give the person the familiar Miranda warnings and, in addition, inform him that if he is subsequently prosecuted his refusal to answer any questions will be disclosed at the trial.
>
> 4. A complete written record shall be kept of the judicial examination; the information of rights, any waiver thereof, and any questioning shall be recorded upon a sound recording device; and the suspect shall be so informed.
>
> 5. The questions shall be asked by police officers or prosecuting attorneys rather than the judicial officer, but only in the presence of the judicial officer, who may intervene to prevent abuse.[21]

Under the Kauper-Schaefer-Friendly model, few defendants' statements would be admissible against the defendant unless those statements were made under the supervision of a judicial office. In exchange for having a strict rule on how police could get confessions that were truly voluntary, the suggested model would have allowed prosecutors to comment on a defendant's failure to make a statement in his defense. Adoption of their proposal would require a focus on due process values and open balancing of the needs of society against the threat to fundamental values presented by coercive police practices. It would also require rejection of the Court's decision regarding comments on a defendant's silence.

Use of an open due process type analysis, might have resulted in a very different opinion in *Dickerson v. United States*[22] and a renewal of interest in the development of procedures that might actually stop coercive police interrogation of suspects and unreliable confessions.

In *Dickerson*, the Justices [except for the you-could-have-guessed-which-two] rejected a congressional attempt to disregard the *Miranda* ruling. That case, as indicated by the vote of the Justices, was an easy one, because the congressional act did not provide any safeguards against police coercion. If the *Dickerson* opinion had been framed in due process terms, the Court could have revived interest in how a society with modern technology could limit coercive police practices without suppressing voluntary confessions. A due process-based opinion in *Dickerson* would have described *Miranda* as having been based on due process clause values. Our hypothetical *Dickers*on opinion would have explained that *Miranda* was simply the best way a court in the 1960s could have balanced a defendant's right not to be coerced and the interest of society in allowing police interrogation that respected principles of fairness and individual dignity. Finally, the opinion would have emphasized

21. Kamisar, *supra* note 20, at 23-32 (footnotes and emphasis omitted).

22. 120 S. Ct. 2326 (2000).

how, with modern technology, the state or federal governments could create a law enforcement system that could eliminate the need for *Miranda* warnings while protecting against coercive police practices.

Had *Dickerson* been a true due process opinion, it might have encouraged legislatures to take a new look at the types of processes suggested by Professor Kauper, Professor & Justice Schaefer, and Judge Friendly. Technology, as Justice Schaefer might have said, has made *Miranda* useless and his model possible. If parents at intermission at the theater can monitor how their baby is being treated by the babysitter, it should be possible to provide judicial screening of interrogation practices without unduly burdening law enforcement.

Even with better Supreme Court opinions, there might not be a revival of interest in the Kauper-Schaefer-Friendly model, because it would provide real protection against the type of police abuses that have made headlines in California and Illinois. Police may well prefer *Miranda* over a truly fair system for the interrogation of suspects.

"CAN'T ANYBODY HERE PLAY THIS GAME?"[23]

Professor Israel has noted (complete with lots of footnote references for you) the Court's failure to add any consideration of fundamental values to the utilitarian balancing test it has used in procedural due process cases apart from criminal cases.[24] Professor Israel's article also shows how badly the current justices perform when they use substantive due process analysis in cases involving the administration of our criminal justice system.

Most "criminal procedure" cases actually present substantive due process issues, rather than procedural issues.[25] In cases in which the Fourth Amendment is the primary issue, a defendant is asserting that his substantive right to privacy has been violated, rather than asking for some new procedures. In virtually all Fifth Amendment "voluntariness cases," the defendant is asserting that his substantive right to be free from being coerced into confessing to a crime has been violated.

23. This statement is a quote from the late, great Casey Stengel about the 1962 New York Mets. My less cleverly worded view of the current majority of Supreme Court Justices is set out in John E. Nowak, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091 (2000).

24. *See* 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). For an examination of these procedural due process cases, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, chs. 10 & 13 (6th ed. 2000); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, ch. 17 (3d ed. 1999).

25. On the distinction between procedural and substantive due process, see NOWAK & ROTUNDA, CONSTITUTIONAL LAW, *supra* note 24, at § 10.6.

After thirty years of talking about due process cases as if they were only technical Fourth, Fifth and Sixth Amendment decisions, the Supreme Court seems to have lost the ability to discuss substantive procedural issues in criminal justice administration situations. *County of Sacramento v. Lewis*,[26] discussed in Professor Israel's article, shows that, perhaps due to a lack of practice, the Court is really bad when it comes to dealing with such problems.[27]

In *Lewis*, the Justices unanimously ruled that the negligence of a police officer, which caused the death of an innocent motorcycle rider (on a motorcycle that the police had a right to chase), did not violate due process. The court was able to narrow the issues to the question of whether the police officer's actions violated substantive due process. The best test the majority could come up with for this case was the "shock-the-conscience test." But that test was developed in the 1930s-1960s era for the examination of intentional police actions designed to secure evidence or testimony from a defendant.

Lower courts needed guidance regarding how they should address the questions presented when the police unintentionally take a person's life, liberty or property. In part because of its use of a test that was never intended to deal with such situations, the *Lewis* court avoided questions concerning whether the family of the deceased was entitled to any compensation under the takings clause or whether there were any violations of procedural due process principles. The use of the shock-the-conscience test, and the narrowing of the issues, make the *Lewis* decision useless.

Here's a type of problem referred to in one of my favorite books called the "little Johnny hypothetical."

> In our hypothetical, little Johnny, an only child, is attending his first day of school. His mother and father are at home at their little house, which, unfortunately, happens to be quite close to a highway. A state police officer, in pursuit of the suspect, is driving his police car negligently, grossly negligently, or recklessly. Because of the negligent, grossly negligent, or reckless actions of the police officer, his squad car leaves the street and hits the house of little Johnny's parents. Both of Johnny's parents are killed; the house catches fire and burns to the ground. Little Johnny has lost his parents (his sole sources of support) and virtually all of the family economic resources (because his parents could not afford adequate insurance, and had very little equity in the property). Little Johnny finds a kindly attorney to bring suit against the state; the state admits negligent, grossly negligent, or reckless conduct on the part of the police officer. Nevertheless, the state refuses to pay any money to little Johnny on the basis of a state law that granted state and local governments sovereign immunity. On these facts would the state have taken little Johnny's property or liberty and trusts in violation of due process?

26. 523 U.S. 833 (1998).

27. *See* Israel, *supra* note 24, at 402-03. For more details regarding this case, see NOWAK & ROTUNDA, CONSTITUTIONAL LAW, *supra* note 24, at § 10.6 (f).

> Would the state have violated the taking of property clause, which applies to state and local governments through the due process clause of the Fourteenth Amendment? Is little Johnny under these facts, entitled to some type of compensation from the state? These are questions that were left unanswered in *Lewis*.[28]

Perhaps the Court in *Lewis* was unable to deal with the entire set of problems in the case because the Justices were unaccustomed to using due process analysis in cases involving police activity. However, I suspect that the reason the *Lewis* Court did not address all these issues is the same reason that Professor Israel's call for open, honest due process opinions will never be followed by the Justices. Writing the type of opinion called for by Professor Israel is very difficult. Justices who have time for moot courts, lectures and summer vacations, that even professors envy, don't have time to write such opinions. On the other hand, it should not be hard to instruct an army of law clerks on how to write opinions that mask due process issues in terms of technical interpretations of specific Bill of Rights provisions.

I guess my only conclusion should be that we should add being a Supreme Court Justice to a list [which would include golf and sex] of "The top ten things you can have fun doing, even if you're not very good at it." However, I can't resist tossing in another quote from my favorite author.

> At the end of each term it may appear that the results of the cases are the most important aspect of the Court's work. However, it is the decision-making process, as reflected in the opinions of the Court that is most important. While today's rulings may be limited or overturned tomorrow, if the Court indicates that it will form constitutional rules based on fiat rather than on reason, its authority inevitably will be called in question. Adoption of the due process methodology model for decisions in both due process and Bill of Rights cases would focus the court's attention, in all criminal procedure decisions, on its basic function of finding constitutional values.[29]

If courts adopted Professor Israel's suggestion for how to write opinions in due process cases, we might have open, honest opinions that would command public respect. Thanks for trying, Jerry!

28. NOWAK & ROTUNDA, CONSTITUTIONAL LAW, *supra* note 24, at 394-95.

29. Nowak, *supra* note 13, at 423. The omitted footnote referred to E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949), and Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946).