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METHODOLOGY AND CRITERIA IN DUE PROCESS ADJUDICATION—A SURVEY AND CRITICISM

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THE apparently chaotic array of Supreme Court decisions on the due process requirements of the Fifth and Fourteenth Amendments presents an imposing challenge to anyone who would formulate a unifying rationale. It is difficult, for example, to imagine what general, systematic principle of law could be deduced from the following conclusions: a criminal conviction based on a confession obtained by physical and mental coercion violates due process regardless of its testimonial reliability,[1] but a conviction based on incriminating evidence obtained by acts concededly violative of the due process clause is not itself violative of due process;[2] the privilege against self-incrimination [3] and the right to be free of convictions based upon unconstitutional searches and seizures [4] are not protected by due process of law, but a conviction for illegally possessing narcotics based on the evidential use of narcotics unwillingly pumped out of the accused's stomach does violate due process;[5] the use of illegally obtained evidence to procure a conviction is not violative of due process when the illegality consists of breaking into the accused's office and rifling through his papers,[6] but does violate due process (at least in the eyes of two members of the Court) when the illegality consists of repeated and unauthorized entries for the purpose of installing a microphone and stringing wires to a neighboring garage;[7] due process is violated by the denial of an opportunity for the accused to retain counsel,[8] but not (necessarily) by the denial of an opportunity to have counsel appointed where a private retainer is financially impossible.[9]

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1. See, *e.g.*, Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945).
2. Wolf v. Colorado, 338 U.S. 25 (1948).
3. Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908).
4. Wolf v. Colorado, 338 U.S. 25 (1948).
5. Rochin v. California, 342 U.S. 165 (1952).
6. Wolf v. Colorado, 338 U.S. 25 (1948).
7. Irvine v. California, 347 U.S. 128, 142 (1954) (Frankfurter and Burton dissenting opinion).
8. Powell v. Alabama, 287 U.S. 45 (1932).
9. Bute v. Illinois, 333 U.S. 640 (1948); Betts v. Brady, 316 U.S. 455 (1942).

It may well be wisdom to recognize that the definition of procedural due process is not susceptible of confinement within a formula. And the keynote struck by the Supreme Court in 1877 that the meaning of due process must be determined only by a "gradual process of inclusion or exclusion"[10] surely is in the best pragmatic tradition. Yet, in the interest of assaying the possibilities of rational and deliberative constitutional adjudication, the diverse array of Supreme Court holdings fairly prompts the questions: By what principle is it determined or determinable what procedures are or are not consistent with due process? Is there a "rationalizing principle" that serves to give "proper order and coherence" to these adjudications?[11]

Conceding that it is in the nature of this constitutional provision that all-embracing definitions are impossible, it is nonetheless germane in a rational inquiry to ask through what intellectual process determinations have been or should be made. It may be that those critics are correct who deny the existence of any "right" decision and who view the basis of constitutional adjudication as no more than the personal predeliction, the subjective preference of the justices who make the decisions; but the possibilities of human intelligence should not be too quickly dismissed. Likewise in a tradition of arationality are the critics of reason of another school who insist that "right" decisions are reachable and often reached but only through the ineffable grouping of the minds of good men directed by an extra-rational magnetism inherent in the order of things. For to assert that right conclusions are capable of being reached in concrete cases by subjective evaluation, but that objective analytical generalizations of the specifications for determining right decisions are impossible, is tantamount to denying the basic postulate of reason and scientific method. In any event, whether doomed to failure at the outset or not, the purpose of what follows is to undertake some preliminary explorations into the possibilities of rational decision-making in the area of procedural due process.

The first two sections of this Article are devoted to an examination of the means that have been employed by the Supreme Court to give meaning to procedural due process. The objective in these pages is to describe rather than to evaluate. The first section purports to identify two basic themes that have historically characterized attempts to give meaning to due process—fixity and flexibility. The second section is concerned with further inquiry into what has become the prevailing view—the concept of a flexible due process. Here the objective is to classify and describe the means employed by the Court in

10. Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

11. *Cf.* Cardozo, J., in Palko v. Connecticut, 302 U.S. 319, 325 (1937):

> "The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. . . . [The inclusion and exclusion] has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself."

shaping an evolving and expanding due process. The premise is that by and large the Court has not been content to rest upon a frankly avowed subjective choice, but rather has attempted to rest choice upon criteria outside its personal idiosyncratic judgment.

The remaining pages of the Article are directed to a critical appraisal of the problems described in the first two sections. The third section picks up the controversy between a fixed versus a flexible due process described in the first section. In the first part the thesis is presented that a fixed due process is fundamentally unattainable. Attempts to achieve it have at best only disguised the fact that the problem inherently entails a choice of values. In actuality, they have only divorced the process of choice from the discipline of intellectual candor and rational analysis. The second part of this section elaborates the thesis that, apart from attainability, a fixed due process is undesirable —only a flexible due process responsive to the demands of new contexts examined in light of reason and experience is compatible with the proper role of the due process clause in the written constitution of a nation committed to judicial review. The fourth section picks up the problem raised in the second section—the development of standards to direct the process of signifying meanings of a flexible due process. The first part of this section is devoted to an analysis of the nature of the inquiry posited by the demands of a flexible due process, apart from the limitations imposed by the character of institutions responsible for making the final determinations. It is the premise of this section that the predicament imposed by a flexible due process is not entirely hopeless; the condition can be improved through the use of the methods of rational inquiry, since the impasse created is usually the product of an inadequate formulation of the relevant questions rather than the nature of the problem. The second part of the fourth section concerns itself with the institutionalized techniques of decision-making in this area (specifically, judicial review) that impose limits upon the extent to which full rational inquiry can be undertaken practically.

Fixity Versus Flexibility in Due Process Signification—A Description

The quest for fixity and the quest for flexibility have been the two dominant motifs in the Supreme Court's search to give meaning to procedural due process. So long as the ever-present danger of oversimplification in such categorizations is not forgotten it will be useful to examine the Court's thinking in terms of these polar attributes.

Fixed Due Process

Of the relatively few cases prior to the Fourteenth Amendment that examined the problem [12]—in terms of the due process clause of the Fifth Amendment directed against Congress—*Den ex dem. Murray v. Hoboken Land & Im-*

12. See Davidson v. New Orleans, 96 U.S. 97, 103-04 (1877).

provement Co.[13] is one of the earliest to have developed a due process of fixed meaning. The issue involved the validity of treasury distress warrants pursuant to which property of a defaulting taxpayer was seized and sold by the United States marshall without judicial proceedings. Finding in the Constitution "no description of those processes which it was intended or allowed or forbid" or even "what principles are to be applied to ascertain whether it be due process," the Court formulated two principles for determining due process: first, examine whether the process is in conflict with any of the provisions of the Constitution itself; second,

> "If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."[14]

The methods of legal historical research thus became the key tool in constitutional interpretation; if the search in the facts of the particular case yielded the conclusion that the processes in issue did "not differ in principle from those employed in England from remote antiquity—and in many of the States, so far as we know, without objection—for this purpose, at the time the Constitution was formed,"[15] it followed that the procedure was consistent with due process.

In 1884 the Supreme Court in *Hurtado v. California*[16] limited *Murray's* absolute commitment to the uses of history. In sustaining under Fourteenth Amendment due process California's innovation of the criminal information, the Court stated that *Murray* must mean only that a process sanctioned by immemorial usage necessarily is due process; and not that a process not so sanctioned necessarily is inconsistent with due process.[17]

"Immemorial usage" as a single determinative test[18] for defining due process has over the years on various occasions commended itself to a majority of the Court or to individual justices. Justice Harlan, dissenting in *Hurtado*,[19] inquired into the settled usages and modes of procedure prior to the adoption of the Constitution—making the point that "no other inquiry is at all pertinent"[20]—and found the absence of the historical use of the information in capital offenses conclusive of its inconsistency with due process. In 1896 the standard of "substantial accord with the law and usage in England before the

13. 59 U.S. (18 How.) 272 (1855).

14. *Id.* at 277. The precursors of this doctrine are discussed in MOTT, DUE PROCESS OF LAW 241-42 (1926).

15. 59 U.S. (18 How.) at 277.

16. 110 U.S. 516 (1884).

17. *Id.* at 528-29.

18. For other uses of history see discussion in text at pp. 353-57 *infra*.

19. 110 U.S. at 538.

20. *Id.* at 543. See his dissenting opinion in Maxwell v. Dow, 176 U.S. 581, 605, 613-14 (1900), embodying the same reasoning as to a criminal jury of less than twelve.

Declaration of Independence, and in this country since it became a nation" was made to determine the validity of a procedure requiring a prosecutor to furnish costs if the jury trying the case found that the prosecution was instituted without probable cause and with malicious motives.[21] In *Ownbey v. Morgan*[22] the Court, on the authority of the *Murray* principle, found historical English practice conclusive of the validity of a procedure that required a nonresident defendant whose property was attached to give security for the discharge of the property seized as a condition of appearing and defending.[23] A procedure whereby the accused was tried before a mayor whose compensation derived from the fine imposed was held inconsistent with due process in *Tumey v. Ohio*,[24] largely in view of its inconsistency with historical English practice.

A second exemplification of the fixity motif is found in those cases that identified the requirements of due process with a fair trial, defined to mean jurisdiction, notice and opportunity to be heard, in accordance with generally established procedure for the trial of cases.[25] One of the earlier statements of this position is the classic phrasing of Mr. Webster in *Dartmouth College v. Woodward*:[26] "By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."[27] The Court in *Davidson v. New Orleans*[28] in sustaining a real estate development assessment without judicial proceedings stated a typical formulation of this view:

> "[I]t is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."[29]

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21. Lowe v. Kansas, 163 U.S. 81, 85 (1896).

22. 256 U.S. 94 (1921).

23. "A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law. . . ." *Id.* at 111.

24. 273 U.S. 510 (1927).

25. "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction . . . and that there shall be notice and opportunity for hearing given the parties . . . . Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial and held them to be consistent with due process of law. . . ."

Twining v. New Jersey, 211 U.S. 78, 110-11 (1908).

26. 17 U.S. (4 Wheat.) *518 (1819).

27. *Id.* at *581.

28. 96 U.S. 97 (1877).

29. *Id.* at 105. See also Frank v. Mangum, 237 U.S. 309, 340 (1915); Kennard v. Louisiana *ex rel.* Morgan, 92 U.S. 480 (1876). This development is traced in MOTT, DUE PROCESS OF LAW § 88 (1926). See also Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440 (1926).

Another mode of deriving fixed meanings for due process has proceeded through the structure of the Constitution itself. An early manifestation of this approach involved the application of the principles of statutory construction. Since the due process clause was a part of the Fifth Amendment which was one part of the Bill of Rights, due process could not properly be construed to include, *ex vi termini*, any of the specific guarantees contained in the other parts of the Bill of Rights.[30] And since Fourteenth Amendment due process cannot reasonably be interpreted differently from Fifth Amendment due process, the same conclusion follows for the processes imposed upon the states.[31] Never more than a makeweight, the argument was politely put to rest in *Powell v. Alabama*, where the Court characterized it as an "aid to construction" which "must yield to more compelling considerations whenever such considerations exist."[32] Its contemporary interest resides largely in the contradictory conclusion of a later approach that likewise purports to find fixed meanings in the terms of the constitutional document—the conclusion that due process is exactly coextensive with the explicit guarantees of the entire Bill of Rights.

The terminal point of this latter analysis is the history of the adoption of the Fourteenth Amendment. Again suggesting the methods of statutory construction, the argument proceeds by way of an historical demonstration that it was the intent of the framers or the ratifiers of the Fourteenth Amendment (or of the public when it was being discussed) that the due process clause should fasten upon the states all of the specific provisions of the Bill of Rights.[33] While this thesis has repeatedly been rejected by majorities on the Court,[34] it caught the imaginations of the legal commentators[35] and has had vigorous exponents on the Court—chiefly Justice Harlan of the post-Civil War Court

30. "According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous."

Hurtado v. California, 110 U.S. 516, 534 (1884).

31. *Id.* at 535-36.

32. 287 U.S. 45, 66-67 (1932). The Court noted its earlier implicit rejection in Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897) (eminent domain—Fifth Amendment) and Gitlow v. New York, 268 U.S. 652 (1925) (free speech—First Amendment). It may be observed, however, that the argument has survived with a different orientation: *i.e.*, as indicating that it was not the intent of the drafters of the Fourteenth Amendment in enacting the due process clause to make it embody each and every provision of the Bill of Rights. See Malinski v. New York, 324 U.S. 401, 412, 415 (1945) (concurring opinion of Frankfurter, J.).

33. Adamson v. California, 332 U.S. 46, 71-72 (1947) (dissenting opinion).

34. *E.g.*, Brock v. North Carolina, 344 U.S. 424 (1953); Palko v. Connecticut, 302 U.S. 319 (1937); O'Neil v. Vermont, 144 U.S. 323 (1892).

35. See, *e.g.*, Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949).

and Justice Black of the contemporary Court. It has been invoked as the basis for precluding the states from imposing cruel or unusual punishment,[36] from employing a jury of less than twelve in criminal cases,[37] from permitting comment on the refusal of the defendant to testify,[38] and from failing to appoint counsel for indigent criminal defendants.[39]

Flexible Due Process

The principle of a flexible due process whose meaning is not wholly defined by any fixed standard has had the most success with the Supreme Court. While earlier statements of this principle are commonly cited,[40] it had its significant rise in the growth of the Supreme Court's appeal to a "higher law," to a set of overarching principles of rightness neither articulated in any document nor capable of being confined in words, but which the Court has a duty nonetheless to discover.[41] The constitutional requirement of "due process of law" became the vessel for containing this philosophy as regards both the power of the state to regulate and its power to experiment with procedural innovations. The uses and history of this variety of natural law in these two areas of substantive and procedural due process ran rather different courses. In the area of substantive economic regulation it was invoked chiefly to invalidate legislation; in the area of procedure it more often served to sustain the legislative or judicial judgment.[42] Again, in economic substantive matters it has atrophied since the New Deal into an historical relic; in procedural matters it has achieved in the same period its most forceful articulation and application. But it is nevertheless fairly clear that the theory, as a principle of constitutional adjudication, is at the core the same in both areas.

Articulation of the moral principles that determine whether a given process constitutes due process, has been inevitably general and subjective. Setting the pattern, early post-Fourteenth Amendment decisions called approving attention to an 1819 case interpreting Fifth Amendment due process as having been "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."[43] The classic and much quoted extract from Justice Matthews' opinion in *Hurtado v. California* identified due process with "those

36. O'Neil v. Vermont, 144 U.S. 323, 370 (1892) (dissenting opinion).

37. Maxwell v. Dow, 176 U.S. 581, 606-17 (1900) (dissenting opinion).

38. Adamson v. California, 332 U.S. 46, 68 (1947) (dissenting opinion); Twining v. New Jersey, 211 U.S. 78, 114 (1908) (dissenting opinion).

39. Betts v. Brady, 316 U.S. 455, 474 (1942) (dissenting opinion).

40. Most notably Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) *235, *244 (1819).

41. See HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS cc. VI & VII (1930); Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928).

42. See MOTT, DUE PROCESS OF LAW 254-55 (1926).

43. The quotation is from Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) *235, *244 (1819). It is adopted in Hurtado v. California, 110 U.S. 516, 527 (1884) as "the principal

fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ."[44] Subsequently, in the famous opinion of Justice Moody in *Twining v. New Jersey*, the crucial question was formulated as whether or not a given procedure is "a fundamental principle of liberty and justice which inheres in the very idea of free government, and is the inalienable right of a citizen of such a government."[45]

In recent times the most influential exponents of flexible-natural law due process have been Justices Cardozo and Frankfurter. The former phrased the determinative question in a variety of ways: whether the procedure in issue was "of the very essence of a scheme of ordered liberty"; whether to employ it violated a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"; whether a "fair and enlightened system of justice would be impossible without it"; whether "liberty and justice" would exist if it were sacrificed; whether its use subjects a person to "a hardship so acute and shocking that our polity would not endure it"; whether it is among those "immutable principles of justice, acknowledged *semper ubique et ab omnibus* . . . wherever the good life is a subject of concern."[46] Justice Frankfurter carries this tradition forward in the contemporary Court. For him, due process includes those procedures required for the "protection of ultimate decency in a civilized society."[47] Where the validity of given procedures is in issue, what is dispositive is "whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses,"[48] for due process "embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history."[49]

Justice Black, vanquished repeatedly in his heroic attempt to tie Fourteenth Amendment due process to the explicit procedural guarantees of the Bill of Rights, has articulated perhaps the most relevant question that can be asked concerning the flexible-natural law due process: "what avenues of investigation are open to discover 'canons' of conduct so universally favored that this Court should write them into the Constitution?"[50] Over seventy-five years of adjudi-

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and true meaning of the phrase . . . [never] more tersely or accurately stated. . . ." See also Twining v. New Jersey, 211 U.S. 78, 101 (1908).

44. 110 U.S. 516, 535 (1884).

45. 211 U.S. 78, 106 (1908).

46. See Palko v. Connecticut, 302 U.S. 319 (1937), and Snyder v. Massachusetts, 291 U.S. 97 (1934).

47. Adamson v. California, 332 U.S. 46, 61 (1947) (concurring opinion).

48. Malinski v. New York, 324 U.S. 401, 417 (1945).

49. Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (concurring opinion). See also, *e.g.*, Irvine v. California, 347 U.S. 128, 142 (1953) (dissenting opinion); Rochin v. California, 342 U.S. 165 (1952); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466 (1947) (concurring opinion).

50. Rochin v. California, 342 U.S. 165, 176 (1952) (concurring opinion).

cation makes it possible to identify at least the most traveled boulevards. It is to this purely descriptive task that the following section is devoted.

Criteria for Interpreting a Flexible Due Process—A Description

Few due process decisions are content to rest upon a naked, subjective choice; by and large the opinions seek justification in stuff sturdier than the personal feelings of the adjudicator. The authors of the great decisions in the tradition of a flexible due process unfailingly exhibit a concern to insulate personal predilections from the ultimate decision. Thus Justice Moody cautioned that, "under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations."[51] Justice Cardozo expressed a similar concern in *Snyder v. Massachusetts*.[52] And on the contemporary Court Justice Frankfurter, the storm center of the natural law-due process controversy, has repeated the admonition: "The . . . judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment."[53]

The effort to eliminate the purely personal preference from flexible due process decision making has taken two main forms. One has been a respectful deference to the judgment of the state court or the act of the legislature under review.[54] The other has been an attempt to rest conclusions upon external and objective evidence in such fashion that as far as possible it can be said that the Court is not so much itself creating its own policy determinations as it is interpreting and reading determinations that have already been made, albeit inchoate and requiring articulation and reconstruction.

The Search for Established Moral Judgments

The most significant kind of such objective data has consisted of the moral judgments already made on the point at issue, sought for in the express or implicit views of important segments of our society, past or present. So, for

51. Twining v. New Jersey, 211 U.S. 78, 106-07 (1908). *Cf.* Hurtado v. California, 110 U.S. 516, 527 (1884).

52. 291 U.S. 97, 122 (1934).

53. Malinski v. New York, 324 U.S. 401, 417 (1945) (concurring opinion). See also Rochin v. California, 342 U.S. 165, 170 (1952); Haley v. Ohio, 332 U.S. 596, 602-03 (1948) (concurring opinion).

54. See, *e.g.*, Frankfurter, J., concurring in Malinski v. New York, 324 U.S. 401, 417 (1945):

> "The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review."

example, it has been asserted by Justice Roberts, speaking for a majority of the Court, that the answer to whether furnishing counsel in all cases is required by fundamental principles of fairness "may be found in the common understanding of those who have lived under the Anglo-American system of law."[55] Even Justice Black, the arch enemy of natural law, when obliged to make battle on the enemies' grounds finds similar considerations determinative. Thus dissenting in the same case he stated: "Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the 'universal sense of justice' throughout this country."[56]

Justice Frankfurter again has most explicitly stated this consideration which recurs in most opinions in the natural law tradition. In his view, a determination of standards of fairness and justice does not involve "the application of merely personal standards but the impersonal standards of society which alone judges, as the organs of Law, are empowered to enforce."[57] On some occasions he finds that the standard dictated by the Constitution is the "consensus of society's opinion."[58] On other occasions he makes determinative the pervasive *feelings* of our society however inarticulately expressed.[59] He best expressed this view when he rebelled against an *ex parte* determination by the state chief executive of the sanity of a convicted murderer awaiting execution:

> "Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."[60]

To escape from the "idiosyncrasy of a personal judgment," the Court has regarded its function as one of discovering and applying pre-formed moral judgments, rather than of making new moral choices. But *whose* moral judgments? And *where* and *how* are these judgments discoverable? The Court's answers to these questions may be seen in four kinds of cases distinguished by whether reliance was placed upon: (1) the opinions of the progenitors and architects of American institutions; (2) the implicit opinions of the policy-making organs of state governments; (3) the explicit opinions of other American courts that have evaluated the fundamentality of a given mode of procedure; or, (4) the opinions of other countries in the Anglo-Saxon tradition "not less civilized than our own" as reflected in their statutes, decisions and practices.

55. Betts v. Brady, 316 U.S. 455, 464 (1942).
56. *Id.* at 476.
57. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 470 (1947) (concurring opinion).
58. *Id.* at 471.
59. *E.g.*, Haley v. Ohio, 332 U.S. 596, 603 (1948).
60. Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (dissenting opinion).

The Opinions of the Progenitors of American Institutions

One of the earliest and most cited of the natural law-due process decisions, *Twining v. New Jersey*,[61] attempted to find whether the privilege against self-incrimination was among those "immutable principles of justice which inhere in the very idea of free government,"[62] in an historical study of "how the right was rated during the time when the meaning of due process was in a formative state, and before it was incorporated in American constitutional law."[63] The Court found several indicia that in "the opinion of our constitution makers" the privilege was not fundamental. First, "none of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it."[64] Second, the privilege is omitted from all the important documents of early colonial history. Third, of the thirteen states that ratified the Constitution, nine ratified either without proposing any amendments or by proposing amendments that did not include the privilege against self-incrimination; only four proposed amendments that included the privilege, and of these, two did not adopt the privilege in their own constitutions until considerably later.[65]

In *Powell v. Alabama*[66] the Court, considering whether due process encompassed the right to representation by counsel, was likewise concerned with the understanding of the framers of the Constitution, this time with regard to the restrictive English practice of denying the privilege of representation by counsel in the more important criminal cases. The Court found of significance that in at least twelve of the original thirteen colonies the restrictive rule of the English common law was rejected and the right to counsel fully recognized in all criminal prosecutions except in one or two instances where the right was limited to capital offenses or the more serious crimes. In *Betts v. Brady*[67] the Court ten years later faced the related question of whether due process required the state to furnish counsel to the accused in all criminal cases. Constitutional and statutory provisions in the colonies prior to the adoption of the Bill of Rights evidenced to the Court that such a requirement was not in the "common

61. 211 U.S. 78 (1908).
62. *Id.* at 102, quoting Holden v. Hardy, 169 U.S. 366, 389 (1898).
63. 211 U.S. at 107.
64. *Ibid.*
65. "This survey does not tend to show that it was then in this country the universal or even general belief that the privilege ranked among the fundamental and inalienable rights of mankind; and what is more important here, it affirmatively shows that the privilege was not conceived to be inherent in due process of law, but on the other hand a right separate, independent and outside of due process. . . . The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried."
Id. at 110.
66. 287 U.S. 45 (1932).
67. 316 U.S. 455 (1942).

understanding of those who have lived under the Anglo-American system of law."[68] The Court found a great diversity in the constitutions of the thirteen original states in respect to the right of counsel. Such provisions as there were the Court attributed to an intent to reject the severe common law rule rather than one to guarantee the presence of counsel in all cases. As for the institution of appointing counsel for indigents, the Court found that this subject was treated, if at all, by statutory regulations that varied greatly among the colonies.[69]

The Implicit Opinions of the Policy Making Organs of State Governments

The implicit judgments of the organs of the state governments on the acceptability of a procedural mechanism as reflected in their constitutions, statutes, judicial decisions and practices have been used primarily in two ways: (1) to demonstrate the consistency of a given procedure with the requirements of due process, and (2) as evidence of the fundamental character of a right that may not be constitutionally violated.

Consistency with Due Process. In *Betts v. Brady* the Court sought the "common understanding of those who have lived under the Anglo-American system of law"[70] not only in the opinions of the framers of the Federal Constitution but also "in the constitutional, legislative, and judicial history of the states to the present date."[71] From a study of the statutes and decisions of the various states the Court found that appointment of counsel is predominantly viewed as a matter of legislative policy rather than as a fundamental right essential to a fair trial; it therefore concluded that due process does not obligate the states to furnish counsel in every case. It is of some interest that a like survey led Justice Black to a contrary conclusion.[72]

In *Bute v. Illinois* [73] a like issue was similarly disposed of; the Court rested upon the practice of the state courts and of the federal courts before 1938 in

68. *Id.* at 464.

69. In Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (dissenting opinion), Justice Frankfurter referred to the attitudes of such famous English law-men as Coke, Hawkins, Hale and Blackstone, in maintaining that the execution of insane persons was inconsistent with due process.

70. 316 U.S. 455, 464 (1942).

71. *Id.* at 465.

72. "In thirty-five states, there is some clear legal requirement or an established practice that indigent defendants in serious non-capital as well as capital criminal cases . . . be provided with counsel on request. In nine states, there are no clearly controlling statutory or constitutional provisions and no decisive reported cases on the subject. In two states, there are dicta in judicial decisions indicating a probability that the holding of the court below in this case would be followed under similar circumstances. In only two states (including the one in which this case arose) has the practice here upheld by this Court been affirmatively sustained. Appended to this opinion is a list of the several states divided into these four categories."
316 U.S. at 477 n.2 (dissenting opinion).

73. 333 U.S. 640 (1948).

reaching its conclusion that a proffer of counsel to an indigent accused was not required by due process of law. The Court found that prior to its 1938 decision in *Johnson v. Zerbst*,[74] which interpreted the Sixth Amendment to require appointment of counsel, federal practice did not show a consistent pattern of appointment of counsel in noncapital cases.[75] The Supreme Court discerned no uniform practice of appointing counsel in state courts, although it did mark a growing tendency in recent legislation to authorize the appointment of counsel to defend the more serious charges. Even this tendency, however, had taken place only since 1868 and was neither universal nor uniform. The Court observed that in 1931, twenty states had no statute authorizing the appointment of counsel in misdemeanor cases and fourteen had none even in felony cases (excluding capital cases).[76]

Evidence of Fundamental Rights. Using a commonly followed practice among the states as evidence that a contrary practice violates due process has found favor primarily in dissenting opinions.[77] Justice Roberts, dissenting from Justice Cardozo's opinion in *Synder v. Massachusetts*,[78] concluded that due process precluded a defendant in a criminal case from being denied the right to be present at the jury's view of the scene of the crime. He supported this conclusion by demonstrating the universality of the privilege of the accused to be present throughout the trial:

> "In the light of the universal acceptance of this fundamental rule of fairness that the prisoner may be present throughout his trial, it is not a matter of assumption but a certainty that the Fourteenth Amendment guarantees the observance of the rule."[79]

Justice Frankfurter, dissenting in *Solesbee v. Balkcom*,[80] conducted an extensive examination of state legislation and judicial decisions. He found that no state in the union would execute an insane man under sentence of death, and that the states predominantly employ procedures affording a reasonable opportunity to the defendant to substantiate his claim of insanity before it is rejected. He concluded that any procedure which deviated from this practice could not meet due process safeguards.

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74. 304 U.S. 458 (1938).

75. 333 U.S. at 659-60.

76. *Id.* at 664.

77. However, in *In re* Oliver, 333 U.S. 257, 266 (1948), holding a one-man grand jury summary contempt conviction in camera a violation of due process, Justice Black, for the majority, stated: "Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." And at 267-68: "Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public."

78. 291 U.S. 97, 123 (1934).

79. *Id.* at 131. *But see* Cardozo, J., for the majority: "It is one thing to say that the prevailing practice is to permit the accused to accompany the jury, if he expresses such a wish. It is another thing to say that the practice may not be changed without a denial of his privileges under the Constitution of the United States." *Id.* at 117.

80. 339 U.S. 9, 14 (1950).

Dissenting in *Brock v. North Carolina*,[81] Chief Justice Vinson argued that a second trial, after the prosecution's request for a mistrial was granted to allow it to obtain admissible evidence, was inconsistent with due process. He rested upon the finding that no state except North Carolina permitted this practice, that even North Carolina in its earlier cases had held to the contrary, and that six states had taken strong positions against this practice.

The Explicit Opinions of Other American Courts

The express opinions of other courts, predominantly state courts, of the fundamentality of given procedural rights has likewise been used to give content to flexible due process determinations. In *Powell v. Alabama* the Court examined the state decisions on the right to counsel and found that they "invariably recognize the right to the aid of counsel as fundamental in character."[82] In *Snyder v. Massachusetts*[83] both the majority and dissenting opinions made a similar "search of the books" for state courts opinions on the presence of a defendant at a jury view. The majority concluded that state courts differed as to whether a defendant must be present at a view and that no court had ever held the privilege "an essential condition of due process under the Federal Constitution."[84] The dissent reached a contrary conclusion, at least on the right of the accused to be present throughout the trial—a conclusion which for the dissent was dispositive of the case.[85]

In *Wolf v. Colorado*[86] the Court considered whether due process required the exclusion of evidence obtained in an illegal search and seizure which itself concededly violated the due process clause. Justice Frankfurter, for the majority, found the position taken by state courts on the admissibility of such evidence "particularly impressive."[87] The Court examined the state decisions before and after the assertion of the federal exclusionary rule in *Weeks v. United States*.[88] It found that of the 27 state courts that had passed on the issue before *Weeks*, 26 were contrary to and one was in accord with the *Weeks* doctrine; since *Weeks*, 47 state courts had passed on the issue, 30 holding contrary to *Weeks* and 17 in accord. The Court concluded that the pervasive feeling of society, at least as reflected in these opinions, was that the exclusion of this evidence was not compelled and that its admission in a criminal trial was not violative of due process.[89] Justice Murphy in dissenting apparently

81. 344 U.S. 424, 429 (1953).
82. 287 U.S. 45, 70 (1932).
83. 291 U.S. 97 (1934).
84. *Id.* at 118-19.
85. *Id.* at 131-32. See also *In re* Oliver, 333 U.S. 257 (1948).
86. 338 U.S. 25 (1949).
87. *Id.* at 29.
88. 232 U.S. 383 (1914).
89. The methodology of this decision could equally well be considered a resort to the implicit opinion suggested by general state judicial practice. The boundaries between implicit opinion reflected in practice and explicit opinion of courts will necessarily overlap

rejected the relevance of such an inquiry, stating that, "I cannot believe that we should decide due process questions by simply taking a poll of the rules in various jurisdictions. . . ."[90]

The Opinion's of Other Countries in the Anglo-Saxon Tradition

Justice Frankfurter has been the foremost exponent of reviewing the opinions of other countries to determine the fundamentality of a procedural right, confining his inquiry largely to the English speaking countries.[91] *Wolf v. Colorado* [92] was the first case in which Commonwealth practice was investigated exhaustively in a due process inquiry. The Court found that of ten jurisdictions within the United Kingdom and the British Commonwealth that had passed on the question none excluded evidence obtained by illegal search and seizure. "When we find that in fact most of the English speaking world does not regard as vital to such protection [of the right of privacy] the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right."[93] On the other hand, Justice Frankfurter in his dissenting opinion in *Stein v. New York* [94] employed Commonwealth opinion to conclude that due process was violated by the use in a trial of a confession elicited by police pressure.[95]

Additional Methods of Giving Objective Content to a Flexible Due Process

In addition to those inquires that turn on previously made moral judgments, two other kinds of inquires may be briefly noted. One is exemplified in such cases as *Powell v. Alabama* and *Snyder v. Massachusetts*, where a moral postulate of unquestioned acceptance is readily identifiable and the resolution of the due process issue is made by a kind of logical deduction from the accepted principle. Thus, in *Powell v. Alabama* the right to be represented by counsel was deduced from the right to a hearing. The Court, finding that notice and

whenever there is a course of adjudication on the validity of a particular practice. See also Brock v. North Carolina, 344 U.S. 424, 432 (1953) (dissenting opinion): "Thus, the considered views of many other jurisdictions may be utilized in determining the basic requirements of orderly justice and hence due process."

90. 338 U.S. at 46.

91. *But cf.* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 29-32 (1955) (dissenting opinion), where Justice Frankfurter acquiesced in a majority holding that Congress lacked power to subject civilian ex-servicemen to military jurisdiction for crimes committed during military service, in face of evidence that other nations with legal backgrounds similar to ours permit the exercise of such jurisdiction; *e.g.*, England, Australia, Canada, New Zealand. Brief for the Respondent, pp. 29-31, United States *ex rel.* Toth v. Quarles, *supra.*

92. 338 U.S. 25 (1949).

93. *Id.* at 29.

94. 346 U.S. 156, 199 (1953).

95. *Id.* at 200. See also Justice Frankfurter's concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170 n.17 (1951).

hearing together with proper jurisdiction are "basic elements of requirements of due process," concluded that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[96] And in *Snyder v. Massachusetts*, while both majority and dissent agreed on the major premise—that due process included the right to be present throughout the trial—they disagreed on whether the right to be present at the jury view was a logical corollary of that basic right.

A second approach finds evidence of the inconsistency of a given procedure with due process in the historical association of similar procedures with tyrannical governments. So, for example, Justice Black, dissenting from a holding that an excluded alien held on Ellis Island is not entitled to a hearing, stated:

> "No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now. Russian laws of 1934 authorized the People's Commissariat to imprision, banish and exile Russian citizens as well as 'foreign subjects who are socially dangerous.' Hitler's secret police were given like powers. German courts were forbidden to make any inquiry whatever as to the information on which the police acted. Our Bill of Rights was written to prevent such oppressive practices."[97]

Fixity Versus Flexibility in Due Process Signification—An Evaluation

With the purely descriptive passages of the first two sections as a background, it is now possible to examine critically the possibilities of reason and pragmatic inquiry in due process signification. At the outset of such a venture some kind of resolution of the controversy between a fixed and flexible due process is required. The motifs of fixity and flexibility in the search to give meaning to procedural due process reflect another and overriding controversy concerning the nature and proper function of judicial review. Given, for better or for worse, the institution of judicial review, is it essential to the democratic functioning of our institutions that Supreme Court policy-making be restrained by objective standards of adjudication?[98] Is it at all possible to erect such objective standards which can fairly be expected to direct the course of adjudication reliably?[99] Or must the Court, to interpret those general constitutional provisions that identify policies rather than precise rules, be allowed the broadest range of policy determinations, albeit with deference to the legislative judg-

96. 287 U.S. at 68-69.

97. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 217-18 (1953). See also *In re* Oliver, 333 U.S. 257, 268-70 (1948); Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).

98. *Compare* Richardson, *Freedom of Expression and the Function of Courts*, 65 Harv. L. Rev. 1 (1951), *with* Rostow, *The Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193 (1952).

99. See Hamilton & Braden, *The Special Competence of the Supreme Court*, 50 Yale L.J. 1319 (1941).

ment?[100] If such judgments must be made, can they be made on any basis more rational and demonstrable than the personal predilection of the majority of the Justices sitting at a particular time? Fundamentally no attempt to evaluate the merits of fixity versus flexibility in the interpretation of due process can fail to take a position on this larger controversy. Yet it may prove more fruitful to examine these issues in the narrower and more specific context of their relevance in giving meaning to procedural due process, and even more specifically in the context of that continuing debate between the two most extreme and most articulate contenders for the fixed and the flexible on the present Court (and perhaps on any Court), Justices Black and Frankfurter respectively. These issues will be examined in this narrow context in terms of two criteria: (1) the attainability and (2) the desirability of a fixed due process.

Attainability of a Fixed Due Process

It is possible, of course, to come to grips with Justice Black's thesis on the level on which it is stated, through an examination of the evidence bearing on the intended meaning of the Fourteenth Amendment. This raises questions of historical fact more or less amenable to the methods of historical research.[101] More pertinent for present purposes, however, is the philosophy of constitutional adjudication that motivated his resort to historical intent to define the meaning of procedural due process. Whatever the final judgment on the validity of his historical argument, it is at least clear that the evidence is neither so compelling nor unambiguous to have impelled him to this approach. Especially in the case of Justice Black, whose heart is not often absent from the significant elements impelling his conclusions, can one justly defend a modest skepticism that he is being carried willy nilly by an irresistible tide of historical argument. Nor has he attempted to conceal the main-springs of his position in this area. His reasons are plainly revealed on the pages of his opinions. He has observed the development of what he derisively terms the "natural law" theory of judicial review as a means whereby nine life-tenured judges have arbitrarily superimposed their social and economic philosophy upon that of responsible organs of government. And the technique of natural law in the area of procedural due process is the blood brother of natural law in the area of substantive due process.

While the abuse of that uncontrolled power which the natural law doctrine gives to the Supreme Court has been corrected in matters of laws regulating the social and economic working of our society, the danger of untimely resurrection exists as long as the doctrine receives judicial acceptance. The natural law formula "has been used in the past and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legis-

100. See HAND, SPIRIT OF LIBERTY 155-63 (1952); Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121, 123-25 (1927).

101. See the studies cited note 35 *supra*.

lative domain of the States as well as the Federal Government."[102] But another and more pressing fear "of even graver concern . . . is the use of the philosophy to nullify the Bill of Rights."[103] In past adjudications of the Court he has seen compelling evidence that "the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights."[104] He has seen it invoked to uphold state convictions that would have been reversible had the express provisions of the Bill of Rights been found applicable—convictions in which defendant was not provided with counsel,[105] the privilege against self-incrimination was abandoned,[106] the accused was put in double jeopardy,[107] and unconstitutional searches and seizures were condoned.[108] And his distrust of the Court in matters of individual liberty is further strengthened by recent decisions "sanctioning abridgment of the freedom of speech and press."[109]

Finally, and by way of generalization from these experiences, the untrammeled and inscrutable power that the natural law theory of judicial review delegates to a majority of the Justices of the Court is inconsistent with "the great design of a written Constitution,"[110] which authorizes no judicial restraint on the legislative power beyond the written words of its specific provisions. Hence the " 'natural law' formula . . . should be abandoned as an incongruous excrescence on our Constitution."[111] Justice Black, therefore, is led by his reasoning to the cause of a fixed due process whose meaning is unfailingly indicated by objectively verifiable data and whose contours are permanently fixed—in this case by the intent of the framers of the Fourteenth Amendment to embody the provisions of the Bill of Rights—beyond the power of the Supreme Court to alter.

One can not fail to detect the apparent irony in Justice Black's final position. A vigorous opponent of the doctrine of substantive due process as a vehicle for uncontrolled judicial policy-making in the area of economic regulatory

102. Adamson v. California, 332 U.S. 46, 68, 90 (1947) (dissenting opinion). See Comment, *The Adamson Case*, 58 YALE L.J. 268, 275 (1949):

> "Pervading the pages of his dissent is Justice Black's distrust of the vagueness and uncertainty of the due process formula. He is haunted by the specter of due process as a clog on state economic legislation. His concern is to prevent a return to that charismatic jurisprudence which enabled the Court to substitute its views on economic policy for those of the legislature."

103. Rochin v. California, 342 U.S. 165, 177 (1952) (concurring opinion).

104. *Ibid.*

105. Bute v. Illinois, 333 U.S. 640 (1948); Betts v. Brady, 316 U.S. 455 (1942).

106. Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908).

107. Palko v. Connecticut, 302 U.S. 319 (1937).

108. Irvine v. California, 347 U.S. 128 (1954); Wolf v. Colorado, 338 U.S. 25 (1949).

109. Rochin v. California, 342 U.S. 165, 174, 177 (1952) (concurring opinion). The reference is to Dennis v. United States, 341 U.S. 494 (1951); Feiner v. New York, 340 U.S. 315 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

110. Adamson v. California, 332 U.S. 46, 68, 89 (1947) (dissenting opinion).

111. *Id.* at 75.

legislation,[112] he has been among those on the Court who have sought to reserve a plenary power of judicial review in the area of civil rights. In this area he has attempted to justify a judicial activism unrestrained by the doctrines of deference to the legislative judgment and the presumption of constitutionality.[113] In his view the judicial veto over the legislature, while grossly undesirable in matters of economic regulatory legislation, is required in the area of individual liberties. Yet in applying Fourteenth Amendment procedural due process to issues of individual freedom, Justice Black manifests a grave concern over a doctrine of judicial review that endorses judicial policy reevaluations.[114]

On reflection, however, the inconsistency is less real than apparent. In seeking to tie due process interpretation to the specific written provisions of the Bill of Rights, Justice Black's theory of judicial review is an appealing one: it precludes unfettered judicial subjectivity by pinning down constitutional adjudication to the interpretation of specific written language, and at the same time appears to give greater assurance that procedural guarantees will be applied with the vigor he thinks appropriate.[115] But the notion that this latter consequence follows from express directions in the written language of the Bill of Rights is hardly supported by the nature of those provisions or by the

112. See, *e.g.*, Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 533-37 (1949).

113. See, *e.g.*, Black, J., for the majority in Marsh v. Alabama, 326 U.S. 501, 509 (1946): "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."

114. An obverse irony is no less apparent in Justice Frankfurter's position. In matters of civil liberty, no less than in matters of economic regulation, he has been adamant in defense of a consistent deference and passivism in exercising the function of judicial review. See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (dissenting opinion); McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making*, 39 MINN. L. REV. 837, 843-51 (1955). In the area of procedural due process, however, he seems to be asserting a doctrine that increases, rather than decreases, the latitude of discretion open to the Court in adjudicating constitutional issues.

115. Justice Black's position in determining the negative implications of the commerce clause upon the power of the states to regulate economic affairs bears a resemblance to his technique of due process adjudication. He has opposed the Stone view of a balanced accommodation of state and national interests on the ground that the Court had no business acting the role of "super-legislature" mediating between federal and state interests on an *ad hoc* basis. Southern Pac. Co. v. Arizona, 325 U.S. 761, 784, 788 (1945) (dissenting opinion). He would sustain all state regulations affecting interstate commerce "except for state acts designed to impose discriminatory burdens on interstate commerce because it *is* interstate," leaving the ultimate determination to Congress. Gwin, White & Price v. Henneford, 305 U.S. 434, 442, 455 (1939) (dissenting opinion). The reason for the resort to an absolute test is again the feared use of the commerce clause as a substitute for due process in compelling a laissez-faire business system. "The judicially directed march of the due process philosophy as an emancipator of business from regulation appeared arrested a few years ago. That appearance was illusory. That philosophy continues its march." Hood v. Du Mond, 336 U.S. 525, 545, 562 (1949) (dissenting opinion). See Mendelson, *Mr. Justice Frankfurter and the Process of Judicial Review*, 103 U. PA. L. REV. 295, 298-300 (1954).

history of their interpretation by the Supreme Court. It may be conceded that some of the first eight amendments are of the specific statutory character which admit of little play for judicial value judgment—for example, the guarantee of a jury trial in all criminal cases and in all civil cases in which the amount in controversy exceeds twenty dollars,[116] and the guarantee of the initiation of criminal proceedings by indictment.[117] But these are not the provisions with which Justice Black is particularly concerned. The changing contours of and the vigorous divisions of the Court concerning the meaning of freedom of and from religion, [118] double jeopardy,[119] cruel and unusual punishments,[120] the privilege against self-incrimination [121] and unreasonable searches and seizures,[122] belie the notion that the literal language of these provisions directs and confines judicial inquiry along specific lines.[123]

The consequence of requiring due process to be measured precisely by the provisions of the Bill of Rights is not to eliminate broad judicial inquiry, but rather to change its focus from due process to freedom of speech or freedom from double jeopardy, and the rest, and to disguise its essential character. The notion that the problems of freedom and authority can be resolved by logically subsuming concrete cases beneath general principles (here the Bill of Rights) which secure their authority independently of the social contexts in which they are applied is a surprising reversion to a "postulate" theory of legal principles —surprising in view of its rejection in most other phases of the law. General

116. U.S. CONST. amends. VI & VII.

117. U.S. CONST. amend. V.

118. *Compare* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), *with* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); and McCollum v. Board of Educ., 333 U.S. 203 (1948), *with* Zorach v. Clauson, 343 U.S. 306 (1952).

119. See Wade v. Hunter, 336 U.S. 684 (1949); Kepner v. United States, 195 U.S. 100 (1904); see *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1847).

120. Compare majority and dissenting opinions in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 472 (1947).

121. Ullman v. United States, 350 U.S. 422 (1956); Rochin v. California, 342 U.S. 165, 174, 177 (1952) (majority and concurring opinions); Rogers v. United States, 340 U.S. 367 (1951); Upshaw v. United States, 335 U.S. 410 (1948).

122. See, *e.g.*, On Lee v. United States, 343 U.S. 747 (1952); Harris v. United States, 331 U.S. 145 (1947); Goldman v. United States, 316 U.S. 129 (1942).

123. "Could limitation to the specific guarantees of the Bill of Rights pin the Amendment down to a precise and certain meaning? Unfortunately, the judicial history of the first eight amendments does not indicate that its guarantees are particularly specific. Nuances of interpretation have emerged which do not derive from a literal reading. The words of the First Amendment do not lead inevitably to the conclusion that freedom of speech means freedom to carry on peaceful picketing, or that the free exercise of religion means license to distribute leaflets and ring doorbells. Nor, to cite a most recent example, does it necessarily follow that 'public rides to private schools' are permissible while the use of released time for religious education in public schools is interdicted by the separation of church and state. The greater the sweep of the Court's protection of personal liberties, the greater has been the departure from literal adherence to verbal formulae."

Comment, 58 YALE L.J. 268, 276 (1949).

principles do not decide concrete cases in the area of constitutional due process any more than in matters of property, tort or contract. To put the problem in terms of an absolute principle is to invite the assertion of a conflicting principle and to preclude the possibilities of rational inquiry into the empiric grounds for decision. The upshot is that empirical considerations must enter by the back door, and issues of due process become a congeries of irreconcilable moot points. In the end not only does personal predilection remain, but it exists in a less manageable posture than before the search for certainty began.

The shift from a due process broadly conceived to one tied to the Bill of Rights may, in view of the present status of the Supreme Court's definition of these provisions, constitute a net tactical gain for the rights of the individual.[124] But it is hardly a triumph of fixed meanings over flexible ones. Ultimately it amounts to an attempt to fortify certain favored doctrines of the Court by less pregnable barriers than those raised by any fluid concept of due process; for if the Court's interpretations of the Bill of Rights have been properly criticized, it is likely that the Court in the future will do worse rather than better —judged by the value choices of Justice Black. In the end, then, while the irony may linger, the apparently underlying inconsistency disappears—Justice Black's heart is still visible scarcely below the surface of his opinions.

Other historical attempts to derive fixed meanings —as by ascertaining the particular abuses that the framers of the Constitution had in mind to correct, or by discovering those immemorial usages in England that were not rejected by the Colonies—would appear to promise no greater assurance of success. In view of the inherent ambiguity in the phrasing of such questions, especially the former,[125] and the proven inadequacy of such quests to yield conclusive answers,[126] the purely historical search can be expected to do little more than

124. *But see id.* at 285:

> "Today a person who has been railroaded to prison has a good chance of obtaining federal relief. Fifteen years ago he had virtually none. That is the great achievement of procedural due process in the Fourteenth Amendment. Starting almost from scratch in 1932, the Court has built up an impressive corpus of protection for individuals accused of crime. That degree of protection is largely attributable to the flexibility of the due process technique."

125. For example: Whose intent is the intent of the document? Those opposed or those in favor? Those engaged in the debate actively, or those who passively cast their vote? As between Congress and the ratifying states, whose intent is determinative? As among the ratifying states, whose intent is determinative? How significant is the public understanding?

126. The most dramatic demonstration in recent time of the futility of a search for historical intent of the Fourteenth Amendment occurred in connection with the School Segregation Cases, 347 U.S. 483 (1954). The Court set the parties and the United States Attorney General to work to ascertain the intent of the framers with regard to school segregation. After prodigious labors of historical research the results were presented to the Court on reargument. The Court's final response, *id.* at 489:

> "This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amend-

further obscure the judicial value-choosing inherent in due process adjudication, which can proceed with greater expectation of success if pursued openly and deliberatively rather than under disguise.

Desirability of a Fixed Due Process

The need for a flexible due process, whose contours are not permanently shaped by any fixed mold, but which can adapt to drastically changed and changing social contexts, is suggested by a proper regard for the function of such a clause in the written constitution of a democratic community committed to the doctrine of judicial review. Underlying constitutional restraints is the premise that the power of government is potentially destructive of the conditions of freedom, however indispensable government may be for the first conditions of freedom.[127] The substantive and procedural limitations of the Constitution, therefore, are directed toward imposing those limitations upon governmental power that are required in the interests of preserving a free society. The substantive limitations insulate certain activities from the power of government on the premise that governmental regulation thereof must be destructive of human freedom. Thus the injunction of the First Amendment against laws "abridging the freedom of speech; or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The procedural limitations proceed from historical insights, that the manner in which governmental power is exercised upon the individual, even in an area of legitimate governmental concern, requires limitations.[128] Thus the prohibitions against bills of attainder, ex post facto laws, the more or

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> ments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty."

Research into the intent of the due process clause has yielded answers of no greater conclusiveness. *Compare* the conclusions reached by Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949), *with* Crosskey, *Charles Fairman, "Legislative History" and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

127. "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." THE FEDERALIST No. 51, at 337 (Modern Lib. ed.) (Hamilton or Madison).

128. *Cf.* Jackson, J., dissenting in Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 218, 224 (1953):

> "Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices."

less explicit procedural commands of the Bill of Rights with regard to the right to counsel, the right of confrontation, the privilege against self-incrimination, the right to be free of unreasonable searches and seizures and, most generally, the proscription that no person shall be deprived of life, liberty or property without due process of law. Thus conceived, in the light of its ultimate relation to the preservation of the conditions of a free society, the residuary procedural guarantee of due process is readily seen to be incompatible with changeless meanings. Freezing the meaning of due process, which in the final analysis is more a moral command than a strictly jural precept, destroys the chief virtue of its generality: its elasticity. Future generations would become bound to the perceptions of an earlier one; the experience that develops with changing modes of governmental power, unpredicted and unpredictable at an earlier time, as well as the deeper insights into the nature of man in organized society that are gained in continually changing social contexts, would become irrelevant.[129]

Accentuated in the period between the drafting of the Constitution and contemporary times, the flux of science, technology, communication, and social and economic organization has created new problems of government and obsolesced others. Thus it has long ceased to be a matter of major concern whether, as the Fifth Amendment requires, a man accused of a capital offense be held on a presentment or indictment of a grand jury. The device of the information is found to accomodate the administration of justice more efficiently without imperiling procedural freedom. The same is true for the requirement that the defendant have the right to a jury of twelve in all criminal cases, as well as in civil cases when the value in controversy exceeds twenty dollars. In the words of Justice Frankfurter: "Some of these [provisions] are enduring reflections of experience with human nature, while some express the restricted views of Eighteenth Century England regarding the best methods for the ascertainment of facts."[130]

On the other hand, the changing character of American society has created different kinds of impasses between governmental authority and procedural freedom.[131] These contemporary impasses may be divided into two categories. The first concerns problems of *extension*: whether there is warrant for extending those procedural requirements denoted by the notion of due process into certain areas other than the formal adjudicatory processes in which they have traditionally been considered applicable. The second concerns problems of *intension*: whether within the areas in which due process has traditionally

129. *Cf.* Holmes, J., in Missouri v. Holland, 252 U.S. 416, 433 (1920): "The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

130. Adamson v. California, 332 U.S. 46, 63 (1947) (concurring opinion).

131. Due process "expresses a demand for civilized standards of law. It is thus not a stagnant formulation of what has been achieved in the past but a standard for judgment in the progressive evolution of the institutions of free society." Frankfurter, J., in Malinski v. New York, 324 U.S. 401, 414 (1945).

been applicable, the concept ought properly to be defined to embrace procedural requirements other than those traditionally embraced by the term.

In the domain of extension, one significant group of problems is created by those attenuated procedures that have been developed pursuant to the demands of a security program for insulating disloyal or subversive persons from certain areas of American life. The federal loyalty program is an obvious example. Can it be said that due process is violated by procedures—used to deprive a person of a right to work for the government—that fall far short of the requirements of due process in judicial proceedings? The question arises whether due process is properly extendible to those disloyalty proceedings that result in an "adverse finding against the employee on the issue of his loyalty arrived at by a proceeding which has the appearance of a trial on the merits,"[132] but in which the finding is made "as a result of secret information given by informants who were not under oath, who were not presented at the hearing and whose identities were not disclosed to the employee."[133] A like problem of extension is raised by the activities of some congressional investigative committees in so far as they have been employed as a legislative means of imposing genuine sanctions on individuals through procedures wholly unacceptable in any judicial proceedings directed to that objective.[134] Another is raised by the administrative action of the Attorney General of the United States in excluding aliens without a hearing and declining to disclose the evidence on which he bases his finding that their entry would be prejudicial to the interests of the United States.[135] And it is raised again by the administrative action of the State Department in denying passports to citizens either without any hearing, or after a hearing marked by the use of confidential information whose nature and source is kept from the applicant.[136]

Other contemporary problems of the extension of due process arise from the attenuated procedures developed to fulfill more effectively the humanitarian aims of certain social legislation. One such problem concerns the trial and treatment of juveniles who have allegedly engaged in criminal conduct. Can the traditional rights of a youthful accused be modified on the ground that they interfere with the attainment of the rehabilitative objectives of the juvenile

132. Brief for Petitioner, p. 15, Peters v. Hobby, 349 U.S. 331 (1955).

133. Petition for Writ of Certiorari, p. 2, Peters v. Hobby, 349 U.S. 331 (1955). See Bailey v. Richardson, 341 U.S. 918 (1951), *affirming per curiam, by an equally divided court*, 182 F.2d 46 (D.C. Cir. 1950). Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 149, 174, 183 (1951) (concurring opinions). Concerning state employees, see Slochower v. Board of Educ., 350 U.S. 551 (1956).

134. See CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 452-63 (1953); Comment, 65 YALE L.J. 1159 (1956).

135. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); *The Supreme Court, 1952 Term*, 67 HARV. L. REV. 91, 99-102 (1953); *cf.* Cole v. Young, 351 U.S. 536 (1956).

136. See Shactman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955); Nathan v. Dulles, 129 F. Supp. 951 (D.D.C.), *dismissed as moot*, 225 F.2d 29 (D.C. Cir. 1955); Boudin v. Dulles, 136 F. Supp. 218 (D.D.C. 1955).

delinquency laws?[137] A similar issue is posed by certain proposed and enacted legislation for the commitment and care of the mentally ill. In so far as these laws deprive the patient of notice and an opportunity to be heard in non-emergency situations prior to his commitment to a mental institution, has he been deprived of due process of law?[138]

As for the domain of intension of due process, the major current controversy turns upon the extent to which police activities employed to obtain testimonially trustworthy evidence should be held to invalidate a trial and conviction in which the evidence has been used. Such activities include the obtaining of verifiable confessions [139] or real evidence [140] through the use of physical or psychological coercion, or the obtaining of evidence through unreasonable searches and seizures [141] or through the surreptitious use of modern electronic devices, such as the wire-tap, the detectograph or the concealed microphone.[142]

The resolution of these contemporary impasses is hardly suggested by any previously derived signification of the meaning of due process. Solutions of the problems of another day are useful but certainly not determinative of today's problems. The ultimate nature of the impasse of all procedural due process issues may be the same: preserving the integrity of a democratic community without imperiling other legitimate values. But acceptable resolutions of due process predicaments are not likely to be forthcoming from the application of pre-formed molds, which by definition ignore the unique character in which each generation's problems are presented. The dynamic quality of government permits no such ready answer. Contemporary technological advancements in the means of "invisible intrusion" pose the problem of privacy and human dignity in a new guise. New insights and discoveries in psychology and sociology suggest new dimensions to the problems of social rehabilitative programs for deviant individuals. In a period of acute international tension and widespread suspicion, what otherwise might constitute an innocuous dis-

137. *Cf.* Shioutakon v. District of Columbia, 114 A.2d 896 (D.C. Munic. Ct. App. 1955); People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932); *In re* Holmes, 379 Pa. 599, 100 A.2d 523 (1954); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944). See also Rubin, *Protecting the Child in the Juvenile Court*, 43 J. CRIM. L., C. & P.S. 425 (1952).

138. See A Draft Act Governing Hospitalization of the Mentally Ill, Federal Security Agency, Pub. Health Serv. Pub. No. 51 (rev. 1952); State *ex rel.* Fuller v. Mullinax, 364 Mo. 858, 269 S.W.2d 72 (1954); Comment, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L.J. 1178 (1947); ABA Special Committee on the Rights of the Mentally Ill, 72 REP. OF THE ABA 289 (1947). The determination and treatment of alcoholics raises related problems. See Note, *Legislation for the Treatment of Alcoholics*, 2 STAN. L. REV. 515, 529-30 (1950).

139. Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Paulsen, *The Fourth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954).

140. Rochin v. California, 342 U.S. 165 (1952).

141. Irvine v. California, 347 U.S. 128 (1954); Wolf v. Colorado, 338 U.S. 25 (1949).

142. Irvine v. California, 347 U.S. 128 (1954); On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928).

charge from employment or a mere denial of a privilege may become transmuted into a penalty of the highest order. Fixed resolutions of another day may provide easy answers; but it is not likely that they will result in answers that afford continued meaning and vitality to the ultimate function of procedural limitations upon governmental power in a democratic community.

Criteria for Interpreting a Flexible Due Process—An Evaluation

Having concluded that quests for fixed meanings of procedural due process have failed to accomplish more than to mask and drive from conscious recognition the subtle problems of value choosing inherent in due process adjudication, and that, in any event, no fixed meaning is adequate to the purposes of the due process clause in a written constitution, one moves to the most perplexing aspect of due process adjudication: how are flexible meanings to be derived in particular situations? One possible approach has been from the start rejected by the Court: that which would find answers in the unexamined hunches and predilections of a majority of the Justices. Whether or not in point of fact this has been the determinative criterion in due process cases, as may be argued, it is clear that typically the Court has attempted manfully to avoid it. Recognizing, however, that moral choice is the irreducible ingredient of due process adjudication, the Court has attempted to break the impasse by regarding its function as one of passively applying moral judgments already made, rather than as one of actively making new moral decisions.[143]

It is, of course, possible to raise questions concerning the reliability of the techniques used by the Court to ascertain the prevalent moral judgments of the community and to decide which segments of society are important to consult. Is it contemporary or historical moral judgments that are ultimately dispositive? If contemporary moral judgments are important, is it proper to discount those produced by passing crises on the grounds that they are likely to change? If so, on what basis does the Court decide which judgments are stable and which are transitory? Is it fair to assume that the statutes and court decisions typically used as evidence of moral decisions are fairly representative of the conscience of the community? Surely, the decisions of a group of legislators and judges are not an accurate measure of the judgment of society; first, they are a selected group, and second, there may well be a time lag between the decision of the people and its implementation in law. Or does the "conscience of the community" really mean the conscience of a select group of the community, its lawgivers—judges and legislators? If so, what theoretical justification exists for giving such significance to this one segment of society? Would a Gallup poll of the moral judgment of the relevant community be regarded as an absurdity by the Court or as a useful aid to constitutional adjudication?[144]

143. See text at pp. 327-28 *supra*.

144. A model for a scientific investigation into the actual moral feelings of the community on given issues through the use of refined personal interview techniques has re-

These and other questions that readily come to mind suggest that the Court has yet to analyze the full implications of its most conspicuous technique in due process adjudication.[145] However, since the central objective of this Article is to examine the possibilities of reason and pragmatic inquiry in due process decision making, it is necessary to posit the more fundamental question: can a technique of constitutional due process adjudication that resorts to the preformed moral judgments of others be defended?

The crucial difficulty with this approach is that it escapes rather than meets the problem. Due process of law in its procedural signification is drained of any independent integrity as a governing normative principle. It becomes merely a vehicle for delaying the implementation of a change in procedural law until it is accepted by the conscience of a sufficient number of the relevant segments of the community. Theoretically anything is potentially due process. Its character is irrelevant; all that counts in the end is whether it is accepted. If and when, therefore, lynching of child sex murderers ceases to offend the conscience of enough of the community, the state's sponsoring of such activity would presumably be consistent with due process of law. In a way this consignment of the venerable conception of due process to the limbo of complete moral relativity is an extraordinary development, for it comes down to little more than this: that due process has no independent meaning. Not only does due process lose its character as a legal principle; it no longer is even a moral principle. Or, if it is a moral principle, it is the principle that morality is coextensive with the temper of the feelings of any given community at any given time.

The premise underlying this view of due process adjudication is the complete subjectivity of all moral judgments. If it is true that a flexible due process requires the exercise of moral choice, and if it is also true that moral choosing entails exclusively an appeal to matters of taste and preference into which reason and objective verification can gain no foothold, how could the Court justify using due process to foist its own preferences upon the rest of the country? Since decisions must be made and since decision requires implementing someone's rationally unsupported preference, in a democratic society there would appear to be one answer—apply the moral choices of the consensus of the community. In the following pages, however, I propose to make some preliminary inquiries into whether this basic premise, without qualification, is inescapable; whether, to some degree there may be a standard of correctness in the moral choosing inherent in due process adjudication; whether the undisciplined factors of taste and undemonstrable preference necessarily exclude any resort to reason and scientific method.

Before proceeding to this task, however, it is of crucial importance to recognize that in a venture of this kind there are really two analytically separate

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cently appeared. See Cohen, Robson & Bates, *Ascertaining the Moral Sense of the Community*, 8 J. LEGAL ED. 137 (1955).

145. *Id.* at 138-39.

problems. One has to do with the ultimate utility of rationality in moral choices of the kind under discussion. The second has to do with the extent to which the theoretically desirable rational inquiry can be an effective element with regard to the nature and limitations of the judicial process.

Possibilities of the Method of Rationality

The Values Involved in Procedural Due Process

The general function of the procedural restraints upon governmental power as reflected in due process of law has already been suggested.[146] Before inquiring into the uses of reason and knowledge in due process decisions it is desirable to probe somewhat more deeply toward the end of ascertaining in what particular respects procedural due process relates to the ultimate goals of a free society. In a sense this is an attempt to specify the values identifiable in the concept of procedural due process.

Insuring the Reliability of the Guilt-Determining Process. The various procedural safeguards traditionally demanded in the name of due process appear to be directed to two objectives. One is the goal of insuring the reliability of the guilt-determining process—reducing to a minimum the possibility that any innocent individual will be punished. It is not of crucial importance whether the individual tried is in fact guilty or innocent, but it is of crucial concern that the integrity of the process of ascertaining guilt or innocence never be impaired. If in this effort to insure that none but those guilty be convicted, many guilty go free, the price is not too great in the long view of democratic government. If there is any consideration basic to all civilized procedures it is this, no matter how disparate the means chosen to give it effect.

This consideration, often expressed in terms of "fairness," gives meaning to the great bulk of procedures that have become part of the due process of law: that the accused be put on fair notice of the nature of the prohibited acts; that he be given an adequate opportunity to present his side through counsel before a fair and impartial tribunal free from prejudicial influences; that he be entitled to be continuously present at the trial, and to confront and cross-examine his accusers; that he have the right to be free of the damaging and untrustworthy influence of coerced confessions and testimony knowingly perjured.

The relation between restrictions on process directed to this objective and the ultimate values of human freedom is not obscure. With such guarantees, the area of forbidden conduct is confined within a fixed orbit. A man may govern his conduct with some reasonable assurance of its legal consequences. In the area of permitted conduct he may respond to his own judgment free at least from the fear of society's official sanctions. Due process thus serves the same end as a positive law, as contrasted with a law residing in the will of a ruling power—the attainment of legal security and certainty.[147]

146. See text at pp. 340-41 *supra*.

147. See DICEY, LAW OF THE CONSTITUTION c. III (9th ed. 1939).

Insuring Respect for the Dignity of the Individual. The second objective identifiable in other procedural safeguards traditionally deemed a part of the due process of law is more elusive and subtle. But its vitality is manifest in a number of requirements not fully explicable in terms of the first objective. An involuntary confession elicited by brutal physical or psychological pressure upon the defendant is inadmissible under the due process clause regardless of the degree to which other evidence corroborates its trustworthiness;[148] relevant and damaging physical evidence has been held inadmissible on the same ground when it has been obtained by forcibly seizing the defendant and pumping it out of his stomach.[149] Likewise in this category are the specific injunctions of the Bill of Rights—the right to be secure against unreasonable searches and seizures; the prohibition against cruel and unusual punishment,[150] excessive bail and double jeopardy. While the Supreme Court has so far held only some of these procedural provisions embraced within due process, they all suggest the presence of a value other than the reliability of the guilt affixing process. Central to these requirements is the notion of man's dignity, which is denigrated equally by procedures that fail to respect his intrinsic privacy or that entail the imposition of shocking brutality upon him. The ideal of man's individuality, which, after all, is what infuses meaning into the concept of freedom, is an emotional and personal as well as an intellectual affair. The temper of society is the soil in which it must find nourishment. Where society's sanctioned procedures exhibit a disdain for the value of the human personality, that ideal is not likely to flourish.

The Clash of Opposing Values. If these values were the only operative ones in formulating the limits of governmental procedures the problem would be of small compass. The grounds of decision would embrace a straightforward scientific examination of the causal antecedents of such values. But, in fact, the pressure of other values competing for recognition poses the crucial problem. Action consistent with one group of values may prove to be inconsistent with others. Thus, making a full judicial hearing a condition of severing governmental employment on grounds of disloyalty tends to maximize the reliability of the sanctions imposed. But what of protecting the government against those willing to do it damage if given the opportunity government employment may offer? And what of the asserted need to those entrusted with security regulation to preserve the identity and hence the future usefulness of their informers? Similar conflicts are evident in legislation that aims to rehabilitate members of society, such as juvenile offenders or the mentally ill. In

148. See note 1 *supra*; Rochin v. California, 342 U.S. 165, 172-73 (1952).

149. *Ibid.*

150. See Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (dictum):

> "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner."

so far as the process of treatment entails restriction upon liberty of action and the imposition of undesired consequences, the full judicial hearing tends to maximize the assurance that only those eligible for such consequences will be subjected to them. But what of the rehabilitative ends of such laws, which may be undermined in various ways by the requirement of such procedures?

This clash of values has led some to abandon the hope that reason and knowledge can find any leverage in matters of value choosing typified by due process adjudications. Judge Learned Hand, for example, suggests that "the answers to the questions which they [constitutional restraints] raise demand the appraisal and balancing of human values which there are no scales to weigh." Sometimes we can tell the factual effects of a proposal, just as one can tell how much money a tax will raise and who will pay it. But the kernel of this matter "is the choice between what will be gained and what will be lost. The difficulty here does not come from ignorance, but from the absence of any standard, for values are incommensurable."[151] This is not a new insight. Cardozo earlier had observed that "thinkers have complained with justice of the lack of any formula whereby preference can be determined when values are conflicting. There is no common denominator to which it is possible to reduce them."[152] In a sense, what follows is an attempt to explore the limitations and qualifications of this insight in the context of due process decision-making.

The Accommodation of Alternative Values. The impasse is at least partly a product of the way of stating the question. When the issue is put in terms of the collision of absolutely stated values, perhaps there is little room for other than a personally anchored like or dislike. It may be doubted, however, that this is the best or most accurate way of putting such questions. The insight of the pragmatic philosophers is a useful one; that is, that values are not once-and-forever-stated absolutes, but are, after the fashion of scientific laws or principles, tentatively formulated generalizations which explain the resolution of past moral impasses and which serve to give direction to the solution of new ones. Stated values, therefore, are distilled formulations of wants discovered by examining past solutions to problems of choice. It follows that any new problem where past formulations of wants appear to suggest contrary lines of action requires an examination of alternative modes of action in the context of the problem presented to ascertain the wanted or valued solution. So viewed, what is demanded is not so much the resolution of conflicting values as the accommodation of values—rendering our ultimate wants consistent with our action by ascertaining the common denominator of those tentative want formulations that have arisen from past solutions to other problems.

The development of Anglo-American procedures associated with due process in the traditional criminal law area exemplifies this kind of value accommodation. The important values of maximizing the reliability of the guilt determination

151. HAND, SPIRIT OF LIBERTY 161 (1952).

152. CARDOZO, PARADOXES OF LEGAL SCIENCE 56-57 (1928).

process and preserving respect for the individual would appear on the surface to conflict with the value of enforcing the criminal law by punishing as many guilty persons as possible. In actuality, however, the procedures evolved to define criminal law due process can be more usefully and accurately viewed, not so much as a compromise of the conflicting values, as their accommodation in the context of enforcing the criminal law. Thus, the accommodation arrived at suggests that the essence of the apparently conflicting values is neither that the innocent should never be punished or that no man should suffer his privacy and dignity to be impaired at the hands of the state, nor that the sanctions of the criminal law should unfailingly be applied to those who have violated the law. The essential values as they finally appear are that the guilty be punished with sufficient consistency to serve the social functions of the criminal law; that the freedom of the individual responsibly to govern his social behavior and the respect for individual decency be preserved; and that the opening for the subversion of the democratic social order through corruption of the criminal processes be prevented.

Value accommodation so viewed, reason and knowledge gain greater leverage. While absolutely viewed ethical principles in diametric collision leave room perhaps only for personal choice, accommodation of wants to new social contexts is more readily seen to be more an affair of reason and knowledge—reason, by way of reflection upon the ultimate distillate of the multiplicity of wants when their prior formulation appears to offer no handles for decision; knowledge, by way of an estimate of the alternative lines of conduct available and of their consequences.[153]

Two important, but not ultimately damaging, qualifications must be made. First, it may well be that in a given choice situation reason will have run itself out without reliably having indicated the grounds for choice—that is, where the situation is ultimately ambiguous, prior conduct no guide, and the bedrock of personal choice solidly and unavoidably faced. But to suggest that this radical impasse characterizes all attempts to give meaning to the broad standards of the Constitution abandons reason too quickly. Secondly, available knowledge may also prove inadequate. Only haphazard and desultory excursions have as yet been made into the vast problems of the human and social sciences. To this, two observations may be made. One, even absent the knowledge to deal adequately with such problems, the possibility of their ultimate resolution will be substantially enhanced if the failure is recognized as one of an absence of knowledge rather than of the futility of knowledge. Two, the use of available knowledge can be expected to achieve more reliable solutions, even though less than certain ones, than are offered by the despair of arationality or the false promise of the literal word.

153. *Cf.* HUGHES, THE SUPREME COURT OF THE UNITED STATES 165-66 (1928): "[T]he protection both of rights of the individual and of those of society rests not so often on formulas, as to which there may be agreement, but on a correct appreciation of social conditions and a true appraisal of the actual effect of conduct."

Rational Inquiry and the Significant Questions to be Asked

As suggested above, the various traditional procedural requirements of due process indicate the influence of two significant values: (1) maximization of the reliability of the guilt determination process, and (2) preservation of the intrinsic dignity of the individual. Some specific procedural requirements are motivated by both considerations; others, perhaps most, appear to reflect predominantly one or the other. The pertinent lines of pragmatic inquiry, therefore, are not necessarily the same for all kinds of procedures identified with due process. The immediately following analysis will consider only those avenues of inquiry relevant in discovering the permissibility of attenuating in new contexts those traditional procedures that serve to insure the reliability of the determination process.

The Impact of the Decision in Question. One obvious area of knowledge that requires investigation has to do with the impact of the decision which has at least two relevant dimensions: the impact upon the personal life of the individual as to whom it is made, and the impact upon society of permitting a possibly greater margin for misdeterminations. For example, the quantum of proof necessary in most civil matters, usually involving the creation of only a monetary liability, is less than that required for the imposition of the sanctions of the criminal law. The difference is perhaps most readily explicable in terms of the impact of the respective findings. The personal impact upon the life of the individual from the imposition of criminal sanctions is of far more serious proportions than from the imposition of a civil liability The impact upon society is likewise of a different order. The greater consequences for the security of society portended by the administration of the criminal law permit a lesser margin for error. The breakdown of a free society is more likely to arise out of the unpredictable enforcement of criminal penalties than out of a like unpredictability in determining the incidence of civil liability.

The reaction of the courts to the juvenile delinquency laws dispensing with many traditional safeguards of the criminal law affords another example. In making determinations of whether young persons have committed acts that subject them to the consequences of these laws (acts which, apart from such laws, would be crimes), such safeguards as the right of public trial, the right to confrontation and examination of witnesses and the right to representation by counsel have been eliminated. The predominant reaction of the courts, however, has been to sustain the constitutionality of these laws against due process challenges. The typical rationale of these cases is that no finding of criminality attends individual determinations of juvenile delinquency; the significance of a finding is that the youth needs care, not that he deserves punishment for an anti-social act. Further, the objective of these findings is not to impose punishment but purely to rehabilitate youthful citizens into acceptable social individuals. The fact that the individual himself may object to the determination and its consequences is not made dispositive.[154] The personal and social impacts

154. See note 137 *supra.*

of misdeterminations are more readily tolerated when the personal consequences for the life of the individual and the social consequences for the security of the general population are significantly less portentous.

A reference to two current and unresolved impasses in the use of governmental procedures short of those traditionally required by due process of law suggests the import of knowledge of the kind described. In the history of federal civil service the Supreme Court had virtually no occasion to consider the applicability of constitutional due process to procedures for terminating employment until the creation of the federal employee loyalty program. Since then the Court has had two opportunities; the first was lost through failure to obtain a majority for a decisive position;[155] the second, because of the availability of nonconstitutional grounds.[156] The circumstance responsible for the creation of this new issue is the enhanced personal and social impact of a finding of ineligibility. What is at stake is a finding that an individual is of sufficiently doubtful loyalty that he cannot be trusted to work in the employ of his country. Especially "in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy,' "[157] the impact of such a finding begins to approximate "the stigma and hardships of a criminal conviction,"[158] and the issue of the applicability of the due process procedures of the criminal law is immediately raised.

With this development in federal security may be compared the impact of a finding of need for institutionalized mental treatment under procedures that have dispensed with the requirements of advance notice and hearing. Quite plainly the personal and social consequences of this type determination is of a different order from determinations of criminality or disloyalty; the consequences are not deliberately imposed hardships, but scientific medical treatment; the objective is not to penalize or ostracize, but to rehabilitate sick persons into healthy ones. While social stigma may result, it may be significantly less severe than that which follows a conviction of a crime or a finding of disloyalty. At the threshold of inquiry into the issue of extending traditional criminal due process procedures into these new kinds of determinations, a pragmatic examination of the personal and social consquences of findings in these two respective areas is of immediate relevance.

155. Bailey v. Richardson, 341 U.S. 918 (1951).

156. Peters v. Hobby, 349 U.S. 331 (1955).

157. Wieman v. Updegraff, 344 U.S. 183, 191 (1952). "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy." *Id.* at 190-91. *Cf.* Douglas, J., concurring in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 180 (1951): "A disloyalty trial is the most crucial event in the life of a public servant. If condemned, he is branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice."

158. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (concurring opinion).

Justification of the Attenuated Procedure. But while an estimation of the personal and social impact of a finding is a necessary consideration in the decision of due process extension to areas beyond the criminal law, it is obviously not sufficient. Whether it be determined that the impact is equivalent to or less than the consequences of a criminal conviction, a rational decision of whether the demands of due process allow any attenuation of traditional procedures must depend upon the case made in justification for the attenuation. The relation between the two factors would appear to be direct; the greater the severity of the impact of the determinations, the greater the degree of urgency and persuasiveness that must be shown. In the area of the federal employee loyalty program, for example, the Court has indicated its conviction that the impact of findings of disloyalty *is* similar to criminal sanctions.[159] One might expect, therefore, the requirement of a relatively strong justification for increasing the hazard of misdeterminations. Where, on the other hand, the order of the impact is significantly less, as perhaps in the area of mental commitment or in administering the juvenile delinquency laws, a greater play for legislative experimentation with procedures is tolerable.

There appear to be chiefly two constituents that determine the strength or weakness of the justification: the nature of the values it purports to further; and the indispensability of the attenuated procedures in attaining those objectives. The first evaluates the substantiality of the objectives in terms of the needs of a functioning democracy. Are they, on the one hand, of the order of furthering the national security, or restoring the mentally ill, or rehabilitating youthful delinquents? Or are they, on the other hand, to speak of extremes, of the order of reducing the cost of administering the law, avoiding delays, or the like. The second element examines the degree to which the attainment of those objectives necessitates the attenuation of the procedures designed to insure reliable determinations.

The two facets of the case for justification are obviously not equally amenable to assessment in terms of knowledge. The substantiality of the objective is not susceptible of fine measurement—here indeed there are no scales to make the balance. However, while precise order in the hierarchy of values is unattainable, the extremes at either end are more easily recognized. In addition, where the competing values are too close on the scale to trust to ready differentiation, the inquiry may be turned to the other measure—the necessity for the attenuated procedures. Here empiric inquiry is on surer ground. While there may be formidable obstacles to reliable measurement, the fault is the absence of knowledge, not its irrelevance.

Reverting to an example chosen from current impasses in due process signification—commitment procedures—it is apparent that the body of knowledge available for judgment, while not complete, is significant. In the area of hospitalizing the mentally ill, observations of psychiatrists and administrators are available as to the effect of advance notification and contested hearings on

159. See note 157 *supra.*

the medical prognosis of the patient. The substantiality of the evidence that such procedures impair successful treatment by deterring early steps to hospitalization requires a judicial assessment on the level of pragmatic examination. Integrally related is an examination of the extent to which substitute procedures have been provided to palliate the increased peril of misdeterminations. The recent Draft Act Governing Hospitalization of the Mentally Ill,[160] for example, while dispensing with advance notice and hearing, assures a full judicial determination at any time after commitment upon demand of the patient or one acting on his behalf, guarantees habeas corpus, insures the right of the patient to communicate by sealed mail, and requires periodic inspections by hospital staff.[161]

The Relevance of and Evidence for a Prediction of Consequences

Ultimately the judgment, which will be phrased in terms of whether given procedures are consistent with due process, entails a prediction of consequences. What will be the effect upon the character of a free society where the procedures sanctioned may fall short of the level of reliability insured by traditional due process procedures? Is there a serious and imminent threat that the essential moral commitments of a society will be substantially impaired, or may a successful resolution of apparently competing considerations be reasonably predicted? The factors of individual and social impact of misdeterminations and the justification for the added risk of such misdeterminations are significant precisely because of their relevance in making such a prediction. In effect they point respectively to the questions, what will be the effect of an added risk of misdeterminations if certain procedures *are* sanctioned, and what will be the effect of *not* permitting an attenuation of those procedures. Perhaps in some cases the peril readily foreseeable from the use of such provisions in a given context is so obviously great as compared with the harm of not sanctioning those procedures, or vice versa, that the answer is immediately indicated. In other, perhaps most, cases the relevant consequences of action and inaction will not be so apparent. In any event, the crucial issue turns principally on prediction of consequences; and predicting consequences is the particular business of knowledge. I say principally because no matter how much knowledge is at hand, the question of what is a "substantial impairment" of the essential commitments of a free society may well entail a subjective judgment. But the effort to rationalize the process of adjudication of due process questions has not therefore led to a dead end. First, even if in the last analysis a nonscientific judgment must be made, the ambit of this judgment has been confined as narrowly as possible through the identification of the relevant factors of decision and a maximum exploitation of the uses of knowledge. Secondly, even in the final

160. See note 138 *supra*.

161. On this subject generally, see Kadish, *A Case Study in the Signification of Procedural Due Process—Institutionalizing the Mentally Ill*, 9 WESTERN POL. SCI. Q. 93 (1956).

matter of rendering a balance, some avenues of pragmatic inquiry may be available which, if not dispositive, may at least give significant direction.

At this point the experiences of other communities become relevant. While the Supreme Court has, as indicated, made use of this material, it has done so purely in the search for preformed judgments. What is being suggested here is that the chief relevance of this data is its use as a basis for predicting the factual consequences of the suggested attenuation of procedures and as evidence of whether those consequences are compatible with the commitments of a free society. Certainly there are formidable difficulties in this use of such material. Yet this method is no less than that used traditionally by the social scientist: lacking the possibilities of controlled experimentation in the laboratory, he resorts to the only empiric ground of study available—the actual conduct of men in society.

The fundamental problem in making use of the data of comparative legal systems is the identification and isolation of causal elements out of a complex pattern of continuously interacting and multifarious cause and effect relationships characteristic of social organizations. Examination of the uses and limitations of such material may best proceed by consideration of the four kinds of situations in which such experience may be used: (1) where radically dissimilar and unacceptable communities are examined, and (a) a similar procedural innovation has not been employed, or (b) a similar procedural innovation has been employed; and (2) where similarly structured and acceptable communities are examined, and (a) a similar procedural innovation has not been employed, or (b) a similar procedural innovation has been employed.

Although there are distinguishing considerations in these various situations, several are common to all. One common factor is the task of identifying what constitutes a "similar" practice. In *Snyder v. Massachusetts*,[162] for example, the dissent justified its position that the accused had a constitutional right to be present at the jury view in the well-established principle that the accused was entitled to be present throughout the trial. Justice Cardozo, on the other hand, did not consider that principle to cover the jury view, on the ground that the view did not constitute part of the trial. Interpreted within the meaning of this principle, "trial" was meant to include only those parts of the proceedings absence from which might be actually prejudicial to the ability of the accused to defend himself.

Another common problem arises out of the number of relevant comparisons that need to be made. It has been observed that a danger in the use of comparative law lies in the selective character of the systems chosen for comparison.[163] Although error resulting from selectivity may well prejudice the reliability of the inquiry, all possibly relevant experiences need not be studied in every case. If it can be satisfactorily determined, for example, that a given

162. 291 U.S. 97 (1934).

163. See McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making*, 39 MINN. L. REV. 837, 849 (1955).

procedural innovation was causally related to the unacceptable aspects of a system, or, in the case of an acceptable system which had adopted the innovation, that in all relevant respects the system was so like our own that the procedural innovation would not have different consequences in our system, a single experience would suffice. The need for comparison with more than one system grows out of the difficulty in each case of isolating causal elements.

Turning to the relevant considerations in the use of comparative data of this sort in the several separate situations indicated above, those entailing a negative use of this information, 1(a) and 2(a), can be taken together. Certainly the fact that wholly unacceptable communities have not made use of a given procedural mechanism offers little ground for a valid inference that they are therefore acceptable in our system. The fact that trial by ordeal is not used in Communist dictatorships or was not used in Nazi Germany scarcely suggests that trial by ordeal should be acceptable to us. On the other hand, evidence that acceptable and similarly oriented communities have not employed a particular procedural innovation may have value but only within a limited area. Since studies of other systems are useful in predicting the consequences in our own society and in deciding whether those consequences are compatible with the commitments of a free society, the absence of that procedure in the experience of an acceptable society impairs the usefulness of a comparison. Nonetheless, data of this sort is relevant in at least one respect: it bears upon the necessity of the procedural experiment to attain the objectives advanced in its justification. If similar communities have been able to attain similar objectives without the attenuation of procedures designed to maximize reliable determinations, it is at least some evidence that we can duplicate that experience. If it can be shown, for example, that other democratic communities similarly menaced by the threat of internal subversion from governmental employees have successfully met this threat without the attenuation of traditional procedural safeguards, some doubt is cast, although of course not conclusively, upon the necessity for the procedures of the federal employee loyalty program.[164]

A problem common to all situations in which the experience of similar and acceptable communities is used (2(a) and 2(b)) is the selection of societies sufficiently similar to make comparisons meaningful. The experiences of the states themselves would appear in this respect to afford the most reliable conclusions. Foreign experience presents greater difficulties. Whenever the Court has used foreign comparative law data in searching for moral judgments, it has predominately investigated the experience of the United Kingdom and Commonwealth countries.[165] Others have suggested, however, that the less homogeneous cultures of some European countries, with cultural diversities similar to our own, might prove more reliable.[166] Certainly the relevance of another

164. *Cf.* Bontecou, *The English Policy as to Communists and Fascists in the Civil Service*, 51 COLUM. L. REV. 564 (1951).

165. See text at notes 91-95 *supra*. *But cf.* Hurtado v. California, 110 U.S. 516, 530 (1884).

166. McWhinney, *supra* note 163, at 849-50.

nation's experiences cannot be determined apart from the particular question under examination. In general, however, since the issue turns upon acceptable procedural frameworks, nations inheriting the same fundamental concepts of procedural justice as we—generally the English speaking countries—suggest the most appropriate comparisons.

The positive use of comparative law data in drawing implications from the employment of a given procedural mechanism in an unacceptable legal system (1(b)) warrants consideration. Some due process opinions have attempted to employ data of this kind, as for example, by identifying secret trials with periods of oppression in English history;[167] or by identifying the use of extorted confessions obtained in camera with Soviet or Nazi practices.[168] But the use of a procedural innovation in an undemocratic community does not by itself condemn its use here. As a rhetorical device the comparison has obvious appeal. The actual evidential value of such identifications, however, would depend upon a successful demonstration that these procedures were causally related to the breakdown of freedom, and the sanction of similar procedures here would produce similar results in American society. The practical difficulties of such a demonstration would appear enormous.

Perhaps the most fertile area of inquiry is the experience of communities with value structures and institutions similar to our own that have experimented with a given procedural innovation (situation 2(b)). Certainly in such comparisons the problem of isolating causal elements, while still formidable, is less complex than in the other kinds of comparisons discussed. An appraisal in these terms, for example, of the procedural innovation of the Draft Act Governing Hospitalization of the Mentally Ill might prove of considerable value.[169] Confronted with very largely the same social problem, the United Kingdom and the Commonwealth countries have long employed procedures for determining eligibility for commitment which fall short of the rigid requirements of criminal procedures, but which are supplemented by provisions designed to insure that persons not eligible for hospitalization will not be held.[170] Assessment of these procedures is facilitated by several official inquiries that scrutinized the operation of mental commitment laws for evidence of willful or accidental misdeterminations.[171] If an examination of this kind indicated that in those countries the incidence of misdeterminations was not appreciably increased and that the objectives of the mental commitment program were furthered by such procedures,

167. See *In re* Oliver, 333 U.S. 257, 268-70 (1948).

168. See Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).

169. For a tentative attempt to do so, see Kadish, *supra* note 161.

170. See, *e.g.*, Lunacy Act, 1890, 53 & 54 VICT., c. 5, as amended, National Health Service Act, 1946, 9 & 10 GEO. 6, c. 81, sch. 9; Lunacy Act of 1898, § 9, 6 NEW SOUTH WALES STAT. 457 (1824-1937); Mental Defectives Act of 1911, §§ 4 & 5, 5 PUBLIC ACTS OF NEW ZEALAND 743 (reprint 1932); Lunacy Act of 1928, § 26, 4 VICTORIAN STAT. 1 (1929); Provincial Hospital Act § 21, 3 REV. STAT. OF NEW BRUNSWICK, c. 179 (1952).

171. REPORT OF THE SELECT COMMITTEE ON LUNACY LAW, 16 H. COMM. SESSIONAL PAPERS 43 (1878); REPORT OF THE ROYAL COMM'N INTO LUNACY AND MENTAL DISORDER (1926).

some useful knowledge would have been obtained tending to support the constitutionality of similar procedures here. If, on the other hand, the contrary is indicated, then it would be particularly relevant to know if other democratic communities have accomplished the objectives of such a program without attenuating traditional due process procedures. Similar evidence might be available as a result of the experimentation by the various states with different procedures for commitment of the mentally ill. In view of the relatively close similarity of social, political and economic conditions among the states, such evidence would be even more reliable.[172]

In the foregoing I have argued that the chief value of the study of the experience of other communities is that it provides some factual data upon the basis of which relevant predictions can be made of the effect of a mooted procedural innovation. But such data, of course, has another use, which the Supreme Court has recognized, of affording guidance on the ultimate issue of judging whether the consequences predicted are compatible with the commitments of a democratic community. To the extent that judges and legislators of similar communities have with some consistency sanctioned the use of a given procedure, something like a presumption, but certainly not a conclusive one, arises that the final consequences of the use of such procedures are not inconsistent with those commitments.

Rational Inquiry in Other Areas of Due Process

The preceding analysis has confined itself to an examination of the pragmatic lines of inquiry relevant to one kind of due process question. However, the function of insuring reliable determinations does not exhaust the significance of procedural due process. Due process has at least one other significant dimension, manifest most clearly in those restrictions upon the modes of bringing the law's command to bear upon individuals—double jeopardy, cruel and unusual punishment, unreasonable searches and seizures, etc.—which are not directed to insuring reliable determinations. These restrictions express a second value-goal implicit in the conception of due process—the preservation of the intrinsic dignity and worth of the individual. Furthermore, the live constitutional issues in this area have centered not upon the kinds of adjudications in which those restrictions should operate, but rather upon the essential meaning of these restrictions in adjudications concededly governed by due process limitations. As put above, the problems relate to the intension rather than the extension of procedural due process.

No attempt will be made here to elaborate upon the relevant avenues of in-

172. Absent sufficient evidence upon which a confident judgment of constitutionality can be made, much can be said for a provisional judgment upholding the use of the mooted procedure pending the development of a reliable body of experience in the state involved as well as elsewhere. *Cf.* People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955), overruling prior decisions upholding admissibility of evidence procured in violation of constitutional guarantees against unreasonable search and seizure "because other remedies have completely failed to secure compliance with the constitutional provisions. . . ."

quiry for this other area of due process. Ultimately, perhaps, the uses of reason will be directed similarly in all due process questions—assessment of the consequential impact of withdrawing or imposing certain procedural limitations in terms of the most successful adjustment of apparently conflicting value-goals. But the relevant considerations and available techniques for their determination may differ. For example, when the practice is directed to preserving the dignity of the individual, the factors necessary for a prediction may not be as readily measurable as when the value concerns the reliability of determinations. Further, while in the latter case the moral judgments of significant segments of the community is not, I have argued, dispositive, the problem is different when the human dignity function is preeminent. Then the value itself, human dignity, is a product of and has meaning in terms of societal attitudes.

Limitations on the Use of Rationality in the Process of Judicial Review

In the first part of this section the attempt was made to examine the extent to which the methods of rationality could be effectively utilized in the task of giving meaning to a flexible due process. In a sense, the issue there discussed was a false one,[173] since the analysis proceeded in disregard of the realities of judicial review in operation. The discussion was premised upon the existence of a decision-making institution unrestricted in its access to and use of relevant data. The central question was: how could an ideal decision-maker confronted with the problem of signifying meanings for a flexible due process maximize the uses of reason and intelligence? But the Supreme Court exercising the function of judicial review is plainly not that ideal decision-making institution. It remains for the final pages of this Article to explore the implications of this conclusion.

The extensive examinations of fact and policy crucial to rational inquiry might be said to convert the Court into an active participator in policy making, counter to the dominant tendency of confining the role of the Court in the exercise of judicial review within as narrow a compass as possible. Several of the common objections to an enlarged judicial review lose much of their persuasiveness, however, where the challenge is not to remake substantive policy, but to supervise the procedures through which laws are enforced upon individuals.[174] The objection that judges lack the expertise and background to make competent judgments of policy falls short of the mark when the policy concerns procedural matters. The main business of courts, after all, has historically been the process of adjudication—applying rules of law to the concrete setting of a case. It is unlikely that any other organ of government will have greater insight into procedural problems.

173. Though perhaps no more so than the speculations of the physicist on the movement of a free-falling object in a vacuum.

174. See Kauper, *The First Ten Amendments*, 37 A.B.A.J. 717, 783 (1951); Mendelson, *Mr. Justice Frankfurter and the Process of Judicial Review*, 103 U. PA. L. REV. 295, 308 (1954). *Cf.* Frankfurter, J., concurring in Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952).

As for the alleged nondemocratic character of judicial review, permitting as it does a handful of appointed judges to interfere with the policy determinations of representatively elected officials, again the objection is not so great in matters of procedure. While in some cases the veto of a chosen procedure may altogether scuttle a legislative scheme, in many instances there is still room left the legislature to effectuate its substantive objectives through alternate procedures. Furthermore, "insofar as it [procedural due process] is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law."[175]

Another objection to judicial review—that it imperils the prestige and independence of the judiciary by embroiling it in charged partisan political controversies—[176] likewise applies with less force. To some degree public opinion may fail to distinguish between substantive political determination and the procedures designed for its implementation. Yet, to the extent that the distinction can be maintained, the danger of political embroilment is lessened.

But the special competence of the Court in constitutional questions involving the adjudicatory process does not wholly bridge the gap between rational solution of due process questions and the Court's institutional limitations. The remaining practical problem is whether the Supreme Court is institutionally equipped to ascertain and evaluate the complex factual data necessary for rational decision-making. It is beyond the scope of this Article to undertake a full scale inquiry into the problem of the use of knowledge outside the record in constitutional adjudication. But because my purpose has been to suggest the theoretical possibilities of resolving procedural due process issues through the methods of reason and empiricism, some general observations on the practical or instrumental aspect of the subject are inescapable.

In the first place, the use of "legislative" facts, as distinguished from "adjudicative" facts peculiar to the litigants,[177] is not a new experience for the judicial system. The day is long past, if it ever truly existed, when the judicial function was regarded as narrowly confined to applying pure rules of law to judicially proven facts.[178] Certainly the Supreme Court has recognized the relevance of social and economic data in the process of adjudication and has been willing to make use of them; most notably in cases calling for determinations of constitional questions, in which "constitutional facts" have been of crucial importance.[179] In turning questions of constitutionality upon such matters as the

175. Jackson, J., dissenting in Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 218, 224 (1953).

176. See HAND, SPIRIT OF LIBERTY (1952).

177. See Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942).

178. See Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952-60 (1955); Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924); Note, *Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to Courts*, 61 HARV. L. REV. 692 (1948).

179. See Davis, *Judicial Notice*, 55 COLUM. L. REV. 945 (1955); Biklé, *supra* note

relation of hours of work to female health,[180] the nature of abuses in the employment agency business and the possible effects of maximum fee charges,[181] or the character and consequences of certain kinds of merchandising,[182] the Court has recognized the empirical breadth of constitutional adjudication. And in resolving such questions it has turned to the products of the research of the social scientist—treatises, technical articles, private research reports, congressional committee reports.[183] While resort has been made to data of this kind principally in economic due process questions, similar inquiries are manifest in other kinds of constitutional issues. In such cases as *Dennis v. United States* [184] and *American Communication Ass'n, CIO v. Douds* [185] the various opinions of the Justices range far and wide into questions of international relations, the historical development of Communist influences in foreign countries, the nature, aims and practices of Communism, and the contemporary state of the American mind. Most recently, in the *Segregation Cases,* the Court paid its respects to the research of the social psychologists in reaching its conclusion that public school segregation per se has deleterious consequences on the personality and learning potential of Negro children.[186] To some degree data of this kind has reached the Court through lower court direct testimony;[187] but the principal access to it has been through the device of judicial notice, combined with the Court's independent researches[188] or the presentation of factual data by counsel in the form of the Brandeis brief.[189] While the device of judicial notice as a means of access to constitutional facts has serious limitations, especially if it is restricted to facts "so universally known that they cannot be the subject of dispute,"[190] a good case can be made that the Supreme Court in constitutional cases has successfully molded it to the demands of its function.[191]

177; Note, *The Presentation of Facts Underlying the Constitutionality of Statutes*, 49 HARV. L. REV. 631 (1936).

180. Muller v. Oregon, 208 U.S. 412 (1908). *Compare* People v. Williams, 189 N.Y. 131, 81 N.E. 778 (1907), *with* People v. Charles Schweinler Press, 214 N.Y. 395, 108 N.E. 639 (1915).

181. Ribnik v. McBride, 277 U.S. 350 (1928), especially dissenting opinion at 359.

182. Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924), especially dissenting opinion at 517.

183. See notes 180-82 *supra.*

184. 341 U.S. 494 (1951).

185. 339 U.S. 382 (1950).

186. Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954).

187. *Id.* at 494. See discussion of expert testimony of social scientists in the *Segregation Cases* at the trial level in Note, 61 YALE L.J. 730, 735-38 nn.25-35 (1952).

188. See, *e.g.*, Justice Brandeis' dissenting opinions in Truax v. Corrigan, 257 U.S. 312, 354 (1921), and United Ry. and Elec. Co. v. West, 280 U.S. 234, 255 (1930).

189. See Muller v. Oregon, 208 U.S. 412 (1908).

190. UNIFORM RULES OF EVIDENCE rule 9 (1953). Rule 9 further requires that noticeable facts be "of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." See also MODEL CODE OF EVIDENCE rules 801-06 (1942).

191. See Davis, *Judicial Notice*, 55 COLUM. L. REV. 945 (1955).

In the light, therefore, of this long experience of the Court with pragmatic data, the practical implementation of rational inquiry in procedural due process cases calls for no significant new departure in the methodology of constitutional adjudication. In a sense it comes to this: that the world of fact and knowledge is relevant as well to issues involving the signification of a flexible due process as it is to substantive due process questions. Yet this may not be an altogether fair or complete answer to the problem raised at the beginning of the section. First, although the Court has proven itself willing and able to make use of some pragmatic data, there are serious limitations upon the efficient use of such data in the adjudicatory process; second, the character of the pragmatic inquiry suggested for resolving due process questions raises special problems of its own.

For the first, the adversary system is not well suited for complex scientific investigations of fact.[192] The collection, evaluation and presentation of social science data calls for subtle skill and training not part of the educational background of the lawyer. He has no special qualifications to deal with historical, economic, sociological or psychological fact and theory. Further, such projects are expensive; it is truer here than in a legal argument that the more persuasive, if not the more valid, case will be made by the side with the biggest research team of scholars. In addition, the atmosphere of a partisan clash of scientists is not suitable for gaining genuine insight into human societal problems.[193] If the Justices themselves were trained scholars in the social sciences, or if they had at their disposal research teams of men so qualified, these handicaps could conceivably be overcome. But neither is the case.

As for the special problems entailed by the kinds of inquiry suggested in the foregoing pages, two may be suggested. By and large the Court's use of pragmatic data has been confined to judging the reasonability of the legislature's judgment. This is a lesser task than using such data to make an independent judgment of the reasonability or unreasonability of the legislative or judicial judgment in terms of an empirically derived policy accommodation.[194] Secondly, in so far as the Court has made use of social science data it has confined itself to research studies already made. To some extent such existing data may be expected to prove useful as well for the kind of due process inquiries projected above. But in perhaps greater measure the kinds of questions upon which judgments would have to be made have not been answered. Greater scholarship of the highest order on the outer frontiers of human knowledge and dealing with the most intractable of subjects would ultimately be inescapable.

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192. *Cf.* FREUND, ON UNDERSTANDING THE SUPREME COURT 90-91 (1949).

193. Compare Professor Cahn's trenchant examination of the scientific evidence adduced through the adversary procedure in several of the *Segregation Cases* at the trial level. *1954 Annual Survey of American Law, Jurisprudence*, 30 N.Y.U.L. REV. 150, 161 (1955).

194. See remarks of Professor Freund quoted in CAHN, SUPREME COURT AND SUPREME LAW 49-50 (1954).

This impasse between what is theoretically desirable and practically possible makes the future progress of constitutional law in this area reasonably debatable. On the one hand it is possible to retreat from analysis and revert to the effort "to imprison due process within tidy categories."[195] If this is not the path of wisdom and reason, it is at least expedient. It is not likely, however, that this effort could ever succeed. If past efforts in this direction are any guide, it is more likely that the ultimately dispositive criteria will enter by the back door, unexamined and only intermittently recognized for what they are. And if the back door were successfully barred, the predicament would be no more auspicious; for due process adjudication would have become a purposeless ritual rather than a means of insuring the conditions of a free society.[196]

On the other hand, one may conclude that judicial review is ultimately impossible if rationally conceived; that it should be abandoned formally or *sub silentio* in favor of other means for insuring limitations upon the procedures available for imposing governmental power upon individuals. Other democratic societies have attained this objective without the formality of explicit constitutional restraints and without judicial review.[197] Yet whatever the inherent limitations of insuring procedural freedom through judicial interpretation of a written constitution, by now the commitment has been too long and too consistent to will it away. What may have been possible, or even preferable, in a nation's beginnings may cease to be even a conceivable alternative after a century and a half of institutionalization. Indeed, whatever may be said for legislative supremacy, there is little reason for optimism that the American legislature, whatever its institutional potential for dealing with reason and fact, will succeed more than the handicapped Court in harnessing the methods of rationality and disinterested intelligence to resolve the critical impasse between authority and freedom.

In the end, it may be ventured, there is reason for hope that the methods of reason and knowledge can gain greater leverage in resolving the predicament of due process adjudication, despite the unavoidable conclusion that the level of human knowledge and the institutional disabilities of the Court preclude full utilization of the methods suggested. There is always the prospect that these institutional limitations can, in part at least, be overcome; as, for example, through the development of mechanisms to assist the Court in the

195. Irvine v. California, 347 U.S. 128, 142, 147 (1954) (dissenting opinion).

196. *Cf.* Frankfurter, J., concurring in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 468 (1947).

197. "It is highly significant that not a single constitution framed for the English-speaking countries since the Fourteenth Amendment has embodied its provisions and one would indeed be lacking in a sense of humor to suggest that life, liberty or property is not amply protected in Canada, Australia, South Africa."

Frankfurter, J., quoted in McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making*, 39 MINN. L. REV. 837, 846-47 (1955). *Cf.* Radin, *The Judicial Review of Statutes in Continental Europe*, 41 W. VA. L.Q. 112 (1935); Deener, *Judicial Review in Modern Constitutional Systems*, 46 AM. POL. SCI. REV. 1079 (1952).

efficient use of reason and knowledge.[198] But beyond this long-run prospect, it may be suggested that progress toward finding the right answers or even the means of finding the right answers can come only after the right questions have been posed. Moreover, the Court has already hurdled the chief obstacle by recognizing the indispensability of broad pragmatic inquires in constitutional adjudication; and it has proven itself ingenious and successful in molding judicial techniques more effectively to fulfill its needs in this regard. The accomplishment of efficient exploitation of the methods of reason entails not so much a break with the past, as progress along paths already staked out.

Finally, it is unreal to measure the test of success of rational decision making in terms of whether decisions become completely rational and completely informed. A more reasonable standard is whether some progress along such lines is achievable. Certainly some knowledge of the kind pertinent for rational due process adjudications is already available in the studies of the social sciences; and the Court to some degree has access to and is capable of using it. Even conceding the substantial institutional limitations alluded to, the Court is in a position at least to expand its use of the methods of reason and scientific inquiry. No one who has seriously confronted the course of constitutional adjudication of due process questions can fail to rejoice at even a modest increment in that direction.

198. As early as 1924 recommendations were made for the creation of a research body which would make determination of constitutional facts. Corwin, *Reports of the Nat'l Conference on the Science of Politics*, 18 AM. POL. SCI. REV. 119, 153 (1924). See also POUND, THE SPIRIT OF THE COMMON LAW 214 (1921); Beutel, *Some Implications of Experimental Jurisprudence*, 48 HARV. L. REV. 169, 181 (1934).

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