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RANDOM THOUGHTS BY A DISTANT COLLABORATOR†

Wayne R. LaFave*

If Jerry Israel was born in the year 1934, then how is it that the *state* of Israel was not born until several years later? If you find that mind-boggling, then consider this: If, as is the case, I have known Jerry Israel since 1966, then how could it be possible that he did not get to know me until several years later? Although I am totally baffled as to the first conundrum, I can supply the *mot de l'énigme* — actually, a bunch of mots — for the second.

Back in 1965, the soon to be erstwhile¹ Dean of the University of Michigan Law School, Allan F. Smith, invited me to spend the Winter 1966 Term teaching there. This, he explained, was a part of that game of academic musical chairs which occurs when a series of law schools find it necessary to hire a visitor because one of their faculty is in turn filling such a need at another school. I would be replacing Jerry Israel, who had accepted an offer to visit at Stanford.² Not fully appreciating what the word “winter” means in Ann Arbor (and not forewarned that if I accepted I would be placed under the close scrutiny of the Michigan

† As titles for law review pieces go these days, this will be found wanting by many academic sophisticates. For them, I offer the following substitute: *Paradigms of Sociopolitical Postmodernist Psychoanalytic Storytelling in a Multicultural Jurisprudential Deconstruction of Jerry Israel: A Legal Positivist's Cost-Benefit Analysis and Empirical Exploration of the Interstices of Zen Buddhism, Cybernetic Futurism, Common Law and the Novels of Proust in Search of the Emerging Hermeneutical Synthesis of the Critical Legal Studies, Critical Race Theory and Radical Feminist Perspectives: Some Tentative Thoughts on the Implications of Reconceptualizing an Equalitarian Metatheory for Defining First Principles by Applying Game Theory to the Original Understanding of John Rawls Revisited (Part I).*

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1. Smith made no mention of any lame duck status at the time, so I can only surmise that once the faculty got wind of what he had done, he found it necessary to resign the deanship and make a hasty retreat to a campus administrative post.

2. Once one law school hires a visitor from another institution, it is necessary for the latter school to hire a visitor from yet another college of law, and so on. Thus, I replaced Israel, who doubtless replaced a Stanford professor going to Columbia to replace a faculty member going to Harvard. The “chains” produced by this phenomenon vary in length, depending upon how many visitors are hired before one is found that won't be missed at his home institution. In this specific instance, I was that person.

Law School's resident alienist during my time there³), I unhesitantly accepted the invitation. In short order Jerry telephoned to offer me his home at a rental I would have deemed exorbitant but for his explanation that his architect had also done the Taj Mahal, so I took the tenancy. I arrived in Ann Arbor on January 2, 1966, immediately moved into Jerry's digs and then was assigned his office, beginning a process by which over the next four months I came to know Jerry quite well. I can assure you, if you *really* want to get to know someone, sleep in his bed, sit in his easy chair, read from his library, listen to his loquacious cleaning lady, work in his office, and read his files.⁴ (By contrast, I did not get to know much about Jerry from his colleagues, who seemed largely oblivious of his existence, but I won't go into that here.⁵)

Not only did I spend an entire semester at Michigan without actually meeting Jerry, but I only infrequently have had the privilege of a face-to-face encounter with him since. One reason for this is that I have rarely returned to Ann Arbor, perhaps because of a fear that if I ever crossed that city's borders I would be placed again under close psychiatric surveillance. But I did return once, many years ago when I still was foolish enough to think that it would be enjoyable to watch the Fighting Illini football team play at Michigan. The game itself ranks as one of the all-time worst experiences of my entire life! An icy rain fell the entire day. Our seats were located in the first row and in the corner of the end zone, which because of the exaggerated crown of the playing field meant we had to look *up* to observe the action. I had not been forewarned of the advisability of wearing a "motorman's friend" to the

3. Although Israel apparently was allowed to teach the Criminal Law course without such scrutiny, I was later advised that the inestimable Dr. Andrew Watson, a psychiatrist from the University of Michigan Medical School and a frequent participant in law school courses, would regularly appear with me as I taught Criminal Law. That turned out to be the case. Watson helped out with the material from time to time, especially when we got to the insanity defense. But whenever I tried for a witticism in class and got even a titter, Watson would leap from his front row seat, point an accusing finger at a student so reacting, and ask, "Why did you laugh at that?" Needless to say, that put a damper on my efforts to inject a bit of humor into the course. At the end of each class, however, Andy and I would retire to the little restaurant across the street for coffee and rolls, where he bestowed appropriate therapy until each session ended by Watson exclaiming "to horse" and then bolting for the door.

4. Just kidding about this last point. His filing cabinet was locked, and the lock defied my best efforts.

5. Except for one example. After I had been on the scene over three months, I was greeted by another faculty member as I was stumbling through the dimly lit library stacks. He asked what I was teaching, and I answered I was subbing in Criminal Law for Israel, who was away at Stanford. There was an embarrassingly long pause, and then the faculty member said, "Oh, yes, Israel. I guess I do know him. But I didn't know he was gone."

game, and thus I spent the entire halftime and then some queued up with thousands of other hapless males in a serpentine lockstep shuffle toward Michigan Stadium's lone operational urinal. But the crowning blow was that Illinois's halftime lead lasted but minutes into the second half, a nonstop "Hail to the Victors" until the scoreboard reflected what I am sure was the most lopsided victory in the history of the Big Ten.

If you're wondering what all this has to do with Jerry, I'm coming to that now. After the game, Jerry and his wife Tanya received me and my family — at this point a chilled, soaked, and dispirited band — into their home for dinner. It was a wonderful event, full of laughter and good conversation, which I still fondly recall. The fact that our visit that evening made everything that had gone before seem insignificant certainly attests to the extreme warmth and friendliness of Jerry Israel. (There was one minor but somewhat ominous occurrence that evening, but I won't go into that here.⁶)

Most of my face-to-face meetings with Jerry Israel came about because he and I, and also Yale Kamisar, served as Reporters on the Project of the National Conference of Commissioners on Uniform State Laws to draft Uniform Rules of Criminal Procedure. The three of us, by then coauthors of a comprehensive, hernia-popping criminal procedure casebook, were apparently viewed by the Commissioners as inseparable, sort of like the Three Musketeers, as they asked the three of us collectively to participate in the Project. The Project Director, Ken Kirwin, did all the heavy lifting; the three of us were expected merely to have great thoughts. Over a span of 1971-1974, we all met every three or four months with the Special Committee named for this Project, and it was in that setting that I gained a real appreciation for Jerry's abilities as a lawyer and a scholar in the criminal justice field. Time and again, it was Jerry who would come up with the unique and imaginative provision needed to solve the seemingly insoluble problem before the group. This happened so often that it is no overstatement to say that the final version of these Uniform Rules reflected more than anything the depth and breadth of Jerry's understanding of the totality of the criminal justice system. Indeed, I would go so far as to say (as I am sure Yale also

6. Other than to say that when we were called to dinner, Jerry motioned me toward a particular chair, but I crossed up the seating plan somewhat when I instead helped the Israels' houseguest (as I recall, either Jerry's mother or mother-in-law) into that chair. Just moments later the chair collapsed and she was unceremoniously pitched to the floor. Had we not revised recently, at Jerry's suggestion, all our joint contracts with West Publishing to provide that in the event of the death of one of the authors, the survivor then should be entitled to all royalties, I would not have given this "accident" another thought.

would) that it is Jerry who deserves the credit for the impact which the Uniform Rules have had over the years. (But I won't go into that here.⁷)

Although Jerry and I were collaborators on the Uniform Rules Project, most of the time I have been the "distant collaborator" referred to in the title of this fulsome fascicle of flummery.⁸ For nearly thirty years we have worked together on a variety of books, and with rare exception we have carried out the planning and implementation of these joint undertakings merely by letter, telephone, or osmosis. Our longest collaboration together has been with Yale Kamisar on the *Modern Criminal Procedure* casebook,⁹ from the 1969 Third Edition to the 1994 Eighth Edition. Jerry's role in this endeavor has far exceeded that of the preparer of one-third of the casebook's material; he is largely responsible for keeping this project afloat all these years. The point is simply this: with an unremitting Kamisar and an unpredictable LaFave, it is absolutely necessary that there also be an unflappable Israel. It might well be said, then, as to this book and also the others mentioned below, that Jerry is primarily responsible for the high volume of sales we have enjoyed over the years. (Or, it might be said that there is another reason, but I won't go into that here.¹⁰)

Jerry and I are also collaborators on a variety of criminal procedure texts. He and I had independently engaged in discussions with West Publishing about doing something in that field, so the gray eminence and great compromiser at West, Roger Noreen, suggested we pool our talents. Viewed from that particular perspective, it cannot be

7. Except to say that after approval of the Uniform Rules by the Commissioners in August of 1974, they (the Rules, not the Commissioners) dropped out of sight like a lead balloon. To the best of my knowledge, not a single state has ever adopted a single provision from the Uniform Rules!

8. For all allocations allotting alluring alliterative allusions, my sincere thanks for the generous and enthusiastic assistance of William Safire, the unquestioned champion at this sort of thing.

9. Which from the beginning had one paperback offspring called *Basic Criminal Procedure*, and which now has a second offspring called *Advanced Criminal Procedure*. It also has a first cousin, similarly authored, called *Criminal Procedure and the Constitution*.

10. Except to note that a recent news account says that West Publishing Company, publisher of all our books, "has a client list that includes almost every large and middle-sized law firm in the country.

" 'Owning the customers is the most critical factor,' says Gary Arlen, president of Arlen Communications Inc., a Bethesda, Md., research company specializing in interactive media. 'If they trust you, they'll buy almost anything you have to sell them.' " Edward Felsenthal, *West's Bid to Find a Buyer Comes Amid Pressure on Legal Publishers*, WALL ST. J., Oct. 23, 1995, at B7.

questioned that I got the better end of the deal. The two of us¹¹ have worked together on five editions of the *Criminal Procedure — Constitutional Limitations* nutshell, two editions of the *Criminal Procedure* hornbook, and a multi-volume *Criminal Procedure* treatise. To those projects Jerry has brought the order,¹² precision, and attention to detail that mark all his scholarship. Over the years I have heard all sorts of stories about collaborations gone sour as the coauthors have disputed about whose name should be first,¹³ who should be allocated what subjects, and so forth. Our collaboration is in marked contrast, for our relationship always has been most cordial,¹⁴ and Jerry has seen to it that we bring our projects to fruition without a hitch. (Well, almost without a hitch, but I won't go into that here.¹⁵)

As the "distant collaborator" who has never been on the scene in Ann Arbor when Jerry was holding forth in class, I am perhaps not the best person to comment upon his teaching style or success. But I have managed to intrude a "mole" into the Ann Arbor academic scene, and that highly reliable source has supplied me with all the information I need to address this point as well. For what seems like an eternity, my son Jim has been pursuing a Ph.D. in engineering at the Ann Arbor campus. Notwithstanding my advice to the contrary, for almost that entire time Jim has lodged in a cramped maisonette in the bowels of a seedy messuage within crawling distance of the Michigan Law School. This is precisely the type of place where law students could be expected to billet, and thus it has been Jim's fortune (mis- or good, I'm not sure which) that most of his housemates have in fact been law students. Some were enrolled in Jerry's classes; they have from time to time passed on to Jim various comments about those classes; and Jim then dutifully has passed that information on to me. Via that pipeline I learned what I would have suspected from my familiarity with Jerry's

11. We invited Yale Kamisar to join us in these endeavors as well, but he was too busy with his other commitments, especially the demanding position as CEO of Clarence Darrow Printing, Inc., which supplies *Miranda* cards for 87% of the nation's law enforcement agencies.

12. I wisely always left to Jerry the responsibility for "building the structure" of our texts, as it were, by developing a detailed outline showing all of the part, chapter, and section breakdowns for the entire enterprise. He always performed that important task with great skill, so that it can be said emphatically (but pseudocontradictorily) that whatever Jerry built was not Jerry-built.

13. That never has been of concern to Jerry, probably because he thought it really did not make any difference. He may feel otherwise now. *See infra* text at note 27.

14. *But see supra* note 6.

15. Except to repeat once again, for the record, this plaintive petition: "Jerry, for the last time, just where in hell is your manuscript for the second edition of the *Criminal Procedure* treatise?"

other endeavors: in the classroom, as elsewhere, he is known for his careful preparation, orderly presentation, and insightful comments. (I also learned that his students' affection is manifested uniquely in Jerry's courses, but I won't go into that here.¹⁶)

What I like most about Jerry (apart from the fact that he is an easy mark¹⁷) is that he is a quiet, unassuming, and self-effacing person. Never, ever have I known him to leap in front of a TV camera, button-hole a journalist, send out a press release, or in any other way toot his own horn. Indeed, it would not surprise me in the least if he were to sabotage the offices of the *Michigan Law Review* in order to prevent the issue dedicated to him from ever seeing the light of day. Yes, he possesses humility, that "foundation of all virtues"¹⁸ which (with the exception of a few of us¹⁹) is an unknown quality amongst law teachers. Of course, to be a virtue, the humility must not be excessive,²⁰ selective,²¹ or necessary.²² Certainly it can be said that in Jerry's case there is genuine humility of a special and enduring kind, as is indicated clearly by the following chart:

16. Except to say that the information Jim received from a variety of sources and then passed on to me is that at the conclusion of the final day of each course, the members of the class collectively respond with an enthusiastic crouching ovation.

17. I don't mean to suggest by this that I have managed, over the years, to shake him down for large amounts of money because of the outcome of Illinois-Michigan football games. Even Israel won't give that many points! But he can be had without much effort. For example, not so long ago he was bragging to me about the *Michigan Law Review* and asserted, with his customary understatement, that the *Review* without exception publishes well-written, well-edited articles. I responded that as a not infrequent contributor to the *Review* I would agree that he was not wrong entirely, but that he was not right entirely either. This got his dander up (uncharacteristically, I might note, for Jerry is not known for elevated dander), and he asserted again and even more emphatically the unmitigated excellence of the *Review's* articles and editorial standards. He thus had no hesitation in putting a ten-spot on the line regarding my prediction that within the next six months the *Review* even would publish an article with a totally nonsensical opening sentence. Jerry has lost the bet. See Wayne R. LaFave, *Computers, Urinals and the Fourth Amendment: Confessions of a Patron Saint*, 94 MICH. L. REV. 2553 (1996). However, I came close to losing, as I considered sensible exordia which might have been even more attention-grabbing. *Id.* at 2553 n.5.

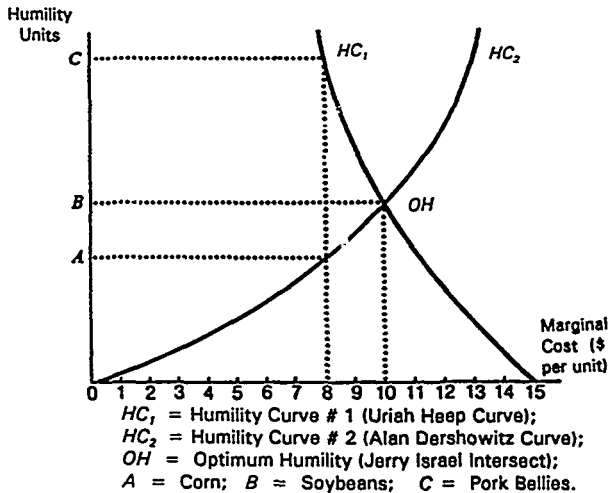
18. A DICTIONARY OF AMERICAN PROVERBS 317 (Wolfgang Mieder ed., 1992).

19. Lest this inclusion of myself in the exception category be viewed as suspect, I should explain that my humility does not really stand out, for it is only one of my many admirable qualities.

20. "Too much humility is pride." A DICTIONARY OF AMERICAN PROVERBS, *supra* note 18, at 317.

21. "To be humble to superiors is duty, to equals courtesy, to inferiors nobleness." Benjamin Franklin, *quoted in* A NEW DICTIONARY OF QUOTATIONS 557 (H.L. Mencken ed., 1960).

22. As Winston Churchill obviously felt about Clement Attlee when he said of him, "He is a modest man with much to be modest about." JAMES C. HUMES, *THE WIT AND WISDOM OF WINSTON CHURCHILL* 148 (1994).

CHART 1: HUMILITY INDEX²³

(But I won't go into that any further here.²⁴)

It is customary in a paean such as this to include a biographical sketch of the appropatee, hitting all the high points of his life. Unfortunately, I am in no position to carry out such an undertaking. As I realized only after I reflected on this particular task, I actually know precious little about the trials, tribulations, honors, and rewards which made up Jerry Israel's life prior to his entry into academe. In a way, perhaps this is not surprising; precisely because he is humble and self-effacing, Jerry has not made it a point to press upon others accounts of his earlier accomplishments. But I can and should mention a few things. Certainly I should report here that as a young lad growing up in the midst of the depression, Jerry sold newspapers and lumps of coal from his wagon on street corners.²⁵ I likewise should report that he is an outstanding graduate of an outstanding institution, Yale Law School. And finally, I should acknowledge that in the brief interval between his days

23. I wish to express my sincere thanks to the most Honorable Richard A. Posner, longtime law and economics guru and now Chief Judge of the United States Court of Appeals for the Seventh Circuit, for his generous assistance in the development of this chart.

24. Except to say that it is much more difficult to try to describe in words (rather than through a chart) precisely the kind of humility I see in Jerry Israel. What I want to express is the thought that he is not excessively and ingratiatingly humble, but at the same time is not without humility. Perhaps the best I can do is to say that he is on the one hand not Uriah Heepian, but on the other hand is distinctly nonDershowitzian!

25. Not because I know this to be true, for I do not, but rather because this gives a nice Horatio Alger flavor to my account.

as a law student and later as a law professor, Jerry served a Term as Potter's porter (but I won't go into that here²⁶).

These, then, are my random comments about Jerry Israel. I hope the reader has profited from this brief account. I know I have benefited from doing it, as in the process of setting out these comments I have gained an even greater appreciation for my distant collaborator. Indeed, I regret not having done something along these lines sooner, for certainly someone should have come to the defense of Jerry in response to the incessant scurrilous attacks upon his very personhood which have emanated from state and federal courts, the media, and even from the groves of academe. Most pronounced has been the logomachical assault upon his good name, which in our joint publishing ventures always has been clearly and consistently stated on the cover and title page as "Jer-old H. Israel." But as a consequence of this anti-Israel jihad, he often is known instead as "Isreal"²⁷ (but, apparently, never by the more complimentary "Is real"). But this *lapsus calami* is not the worst of the moniker-mashing and handle-mangling, for it is Jerry's first name which has borne the brunt of the attack. My coauthor has been referred to

26. Except to say that after Israel finagled a clerkship interview with Mr. Justice Stewart, he found himself extremely nervous during the interview itself. Doubtless that is why, when the Justice asked Jerry why he wanted to serve as a clerk to a Supreme Court Justice, Jerry with uncharacteristic flippancy immediately shot back, "Because there is no heavy lifting." Stewart took umbrage at this response, yet felt he could not offend Jerry's patrons back at Yale by rejecting him, so he did the next best thing by signing Jerry up and then "adjusting" his assignment. Israel spent the entire Term on the Supreme Court's loading dock unpacking boxes of briefs, records, and cert. petitions, an experience which served him well when later, in academe, he had occasion to refer to "the weight of authority." (Stewart was suspected of having taken umbrage on other occasions as well, which is why the Chief Justice had him kept under close surveillance whenever he was in the Supreme Court building.)

27. See, e.g., *Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48, 56 (2d Cir. 1992); *Murphy v. Puckett*, 893 F.2d 94, 96 (5th Cir. 1990); *Grimsley v. State*, 632 So. 2d 547, 551 (Ala. Crim. App. 1993); *People v. Blommaert*, 604 N.E.2d 1054, 1057 (Ill. Ct. App. 1992); *State v. Porter*, 639 So. 2d 1137, 1140 (La. 1994); *State v. Copley*, 594 N.E.2d 648, 651 (Ohio Ct. App. 1991); *Clark v. State*, 800 S.W.2d 500, 505 (Tenn. Crim. App. 1990); Ronald J. Bacigal, *The Right of the People to Be Secure*, 82 KY. L.J. 145, 196 n.316 (1993); W. James Ellison, *Legal Ethics Condones AIDS Transfer: A Disclosure Dilemma*, 12 WHITTIER L. REV. 327, 342 n.87 (1991); Mary A. Lynch, *The Application of Equal Protection to Prospective Jurors with Disabilities: Will Batson Cover Disability-Based Strikes?*, 57 ALB. L. REV. 289, 290 n.1 (1993); Pamela R. Garfield, Comment, *J.E.B. v. Alabama ex rel. T.B.: Discrimination By Any Other Name ...*, 72 DENV. U. L. REV. 169, 171 n.16 (1994).

variously as "Jerald,"²⁸ "Jarold,"²⁹ "Jerrold,"³⁰ "Jerad,"³¹ "Jere,"³² "Gerald,"³³ "Gerold,"³⁴ "Harold,"³⁵ "Jerome,"³⁶ and (my personal favorite) "Joshua."³⁷ There is good reason to suspect that Jerry's name similarly has been transmogrified even inside Hutchins Hall, this time

28. See, e.g., *Woodward v. State*, 855 P.2d 423, 429 (Alaska Ct. App. 1993); *In re Albert*, 664 A.2d 476, 480 (Md. 1995); *State v. Hernandez*, 842 S.W.2d 306, 312 (Tex. Ct. App. 1992); Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 547 n.197 (1992); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 182 n.433 (1992); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 402 n.82 (1993); Michael J. Aiello, Note, *United States v. Barone: Evaluating Police Re-Interrogation After Moseley Courts must Consider the Suspect's State of Mind*, 2 WIDENER J. PUBL. L. 707, 708 n.2 (1993); James A. Francque, Note, *People v. Simac: How Much Is Too Much Advocacy?*, 26 LOY. U. CHI. L.J. 793, 802 n.97 (1995); Fred Schlosser, Casenote, *The Fifth Amendment Right Against Self-Incrimination: An Individual's Right Versus the Government's Need For Effective Law Enforcement*, 16 S. ILL. U. L.J. 197 n.2 (1991).

29. See, e.g., Christopher S. Thrutchley, Note, *Minnick v. Mississippi: Rationale of Right to Counsel Ruling Necessitates Reversal of Michigan v. Mosley's Reversal of Michigan v. Mosley's Right to Silence Ruling*, 27 TULSA L.J. 181, 183 n.15 (1991).

30. See, e.g., *State v. Thagard*, 527 N.W.2d 804, 810 (Minn. 1995); Richard J. Bonnie, *The Competence of Criminal Defendants Beyond Duskey and Drope*, 47 U. MIAMI L. REV. 539, 543 n.24 (1993); Patrick Ingram, Note, *Censorship by Multiple Prosecution: "annihilation, by attrition if not conviction,"* 77 IOWA L. REV. 269, 281 n.109 (1991).

31. See, e.g., *Hornaday v. State*, 639 N.E.2d 303, 306 (Ind. Ct. App. 1994).

32. Eve Silberman, *Yale Kamisar on Guard*, ANN ARBOR OBSERVER 31, 34 (Nov. 1992).

33. See, e.g., *McCone v. State*, 866 P.2d 740, 747 (Wyo. 1994).

34. See, e.g., David E. Marko, *The Case Against Gender-Based Peremptory Challenges*, 4 HASTINGS WOMEN'S L.J. 109, 111 n.12 (1993).

35. See, e.g., Sa'id Wekili & Hyacinth E. Leus, *Police Brutality: Problems of Excessive Force Litigation*, 25 PAC. L.J. 171, 188 n.125 (1993).

36. See, e.g., Rebecca F. Dallet, Comment, *Taking the Ammunition Away From the "War on Drugs": A Double Jeopardy Bar to U.S.C. § 881 After Austin v. United States*, 44 CASE W. RES. L. REV. 235, 241 n.37 (1994); Alfred Paul LeBlanc, Jr., Note, *United States v. Alvarez Machain and the Status of International Law in American Courts*, 53 LA. L. REV. 1411, 1433 n.82 (1993).

37. See, e.g., *Dunlap v. State*, 894 P.2d 134, 140 (Idaho Ct. App. 1995).

to the feminine "Jeri," so that his gender³⁸ could be manipulated.³⁹ It is almost as if the name "Jerold" doesn't even exist.⁴⁰ As if that were not bad enough, he also has been referred to as someone else entirely,⁴¹ and also has been alluded to as if he were a group of persons unworthy of

38. I was going to use the word "sex" here, but then I began to worry about displaying such a term in a piece which might be seen by law students and other impressionable individuals. You see, I am from another era, for when I was a law review editor I would have blue-penciled that word—to say nothing of the F-word and the N-word—out of a manuscript without a second thought. Today, however, the F-word, e.g., Jennifer Lynn Orff, *Demanding Justice Without Truth: The Difficulty of Postmodern Feminist Legal Theory*, 28 LOY. L.A. L. REV. 1197, 1225 (1995), and N-word, e.g., Linz Audain, *Critical Cultural Law and Economics, The Culture of Deindividualization, the Paradox of Blackness*, 70 IND. L.J. 709, 749 (1995), are deemed *comme il faut*. See also Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1309 (1995) (managing to incorporate both the F-word and the N-word into the same sentence). Lest it be thought I have located a few deviants, I should point out that through the magic of Westlaw I have learned that there are 597 articles using the F-word and 643 using the N-word.

In any event, I have taken the safest course and used the word "gender" here. However, I checked in my dictionary to make sure of the meaning of that term and was told that it means "sex." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 944 (1981). I have my doubts about that. Compare the following two sentences: (A) He walked into the singles' bar, sat down next to a person of the opposite gender, and then inquired, "How about sex?" (B) He walked into the singles' bar, sat down next to a person of the opposite sex, and then inquired, "How about gender?"

39. Each academic unit in a public institution of higher education must file an annual report with the U.S. Department of Education and with the campus affirmative action office; the report is to be made on Form DE/895/sx, entitled "Faculty Broken Down by Sex." Rumor has it that the Michigan Law School Dean listed a "Jeri" Israel in an effort to make it appear that greater progress had been made in achieving a sexually diverse faculty.

I find that report believable, for I have engaged in such cozenage myself. Some years ago, when I was Associate Dean at Illinois, it was my responsibility to file Form DE/895/sx for our unit. When resubmission became necessary because my first report (a one-liner which simply said "None, but we have a few broken down by alcohol") was summarily rejected, I improved our status by listing my then colleague Marion Benfield as "Marian," thus earning us another tally on the distaff side. Imagine my horror when, just a few weeks later at a campus party, I observed our Dean, John Cribbet, introduce Marion to Joe Smith, our campus affirmative action officer. Minutes later, Smith sidled up to me and whispered, "She's not much of a looker, but she has a nice personality."

40. After considerable research I have reached the conclusion that the name does exist but is quite rare. Just how rare, you ask? Well, let me go out on a limb and assert that Jerold apparently does not fall within the 20,000 most common names, but is to be found within the 35,000 most common. Compare BRUCE LANSKY, 35,000 PLUS BABY NAMES 353 (1995) (listing Jerold) with CAROL MCD. WALLACE, 20,001 NAMES FOR BABY (1992) (not listing Jerold).

41. See, e.g., *State v. Steele*, 1994 WL 637185 (Wis. Ct. App. 1994) (claiming that Israel is actually Austin W. Scott, Jr., who met his untimely demise in the year 1966).

mention by name.⁴² But the unkindest cut of all, beyond question, is to go unmentioned entirely, and this fate has befallen Jerry in spades, for several courts and commentators have concluded that I should be treated as the sole author of the earlier-mentioned *Criminal Procedure* texts.⁴³ At present, Jerry does not even exist in at least two federal circuits⁴⁴ and eighteen states,⁴⁵ to say nothing of several law schools.⁴⁶ All

42. See, e.g., K. Lianne Wallace, Note, *Privileged Communications In Sexual Assault Cases: Rhode Island's Treatment of Clergyman-Parishioner and Psychotherapist-Patient Communications*, 28 SUFFOLK U. L. REV. 433, 440 n.40 (1994) (citing one of our coauthored works as being by LaFave et al.). My dictionary, at least, defines this term as meaning "and others," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 38, at 779, and that *must* be correct, for it is just as I remember it from my 1946 high school Latin class.

43. Only my acute verecundity prevents me from commenting on the extent to which that characterization is apt.

44. United States v. Ritchie, 35 F.3d 1477, 1485 (10th Cir. 1994); Austin v. Borel, 830 F.2d 1356, 1362 (5th Cir. 1987).

45. *Ex parte* Hergott, 588 So. 2d 911, 917 (Ala. 1991); Tagala v. State, 812 P.2d 604, 611 (Alaska Ct. App. 1991); Clay v. State, 883 S.W.2d 822, 827 (Ark. 1994); People v. Hill, 839 P.2d 984, 994 (Cal. 1992); People v. Castro, 835 P.2d 561, 562 (Colo. Ct. App. 1992); State v. Johnson, 701 P.2d 239, 242 (Idaho Ct. App. 1985); People v. Newberry, 652 N.E.2d 288, 299 (Ill. 1995); Medlock v. State, 547 N.E.2d 884, 886 (Ind. Ct. App. 1989); Commonwealth v. White, 565 N.E.2d 1185, 1191 (Mass. 1991); Lundin v. State, 430 N.W.2d 675, 679 (Minn. Ct. App. 1988); Scroggins v. State, 859 S.W.2d 704, 709 (Mo. Ct. App. 1993); People v. Velasquez, 503 N.E.2d 481, 482 (N.Y. 1986); State v. Isleib, 343 S.E.2d 234, 238 (N.C. Ct. App. 1986); Houle v. State, 482 N.W.2d 24, 30 (N.D. 1992); Commonwealth v. Cooper, 567 A.2d 656, 659 (Pa. Super. Ct. 1989); State v. Van Sickel, 411 N.W.2d 665, 667 (S.D. 1987); Forte v. State, 759 S.W.2d 128, 132 (Tex. Crim. App. 1988); State v. Hammond, 829 P.2d 212, 215 (Wash. Ct. App. 1992).

46. E.g., those who published the following: Edwin J. Butterfoss & Lisa J. Burkett, *Extending the Guiding Lefthand of Counsel*, 17 HAMLINE L. REV. 307, 309 n.11 (1993); Lisa K. Coleman, Comment, *Criminal Law — California v. Acevedo: The Erosion of the Fourth Amendment Right to be Free From Unreasonable Searches*, 22 MEMPHIS ST. U. L. REV. 831, 836 n.40 (1992); Peter A. Gaudio, Comment, *Batson's Incomplete Legacy: Gender Discrimination and the Peremptory Challenge*, 3 SETON HALL CONSTL. L.J. 475, 476 n.6 (1993); Teresa K. LaMaster, Note, *Prejudice and Retroactivity: Limits on Habeas Relief in Lockhart v. Fretwell*, 53 MD. L. REV. 244, 250 n.56 (1994); Stephen E. Hall, *A Balancing Approach to the Constitutionality of Drug Courier Profiles*, 1993 U. ILL. L. REV. 1007, 1012 n.55. Of these, perhaps the last (my own school) is most understandable!

of this has prompted me to offer this conclusion (which I *will* go into here):

Jerry, you're a genuine schlemiel!⁴⁷

47. On the Kamisar, LaFave & Israel *Modern Criminal Procedure* casebook, I am viewed by my colleagues as the token Gentile, who occasionally can make a unique contribution, as when I once pointed out to them a place in the galley proofs where they had mistakenly referred to the Chief Justice as "Berger" rather than "Burger." Yet I know what a schlemiel is (though I have never been able to figure out the other words which my two collaborators have directed toward me over the years, including but not limited to: chazzer, chutzpenik, ganek, k'vatsh, oysvurf, pustunpasnik, putz, schlepp, schmuck, schlump, shvister, szhlok, traifnyak, yatebedam, yold, and zhulik).

The reason I know the meaning of "schlemiel" is that I once heard a wonderful story involving such a person: Once upon a time there was this guy (let's call him Jerry) who was fixing himself some breakfast. He toasted a slice of bread, then put marmalade on the toast, and then raised the slice toward his mouth, only to have it slip from his hand and fall to the floor, marmalade side down. Jerry was perplexed because he could recall several similar previous instances and remembered that every time, without exception, the marmalade side hit the floor. Jerry then consulted a rabbi, who dismissed him with an admonition to be more careful. But the same thing happened several more times (again, always marmalade side down), so Jerry went to the rabbi once more and pleaded for help. The rabbi agreed to appear for breakfast the next morning to see if the same thing would happen, and, *mirabile dictu*, it did. "Ah, Jerry, now I get it," the rabbi wisely explained, "you're putting the marmalade on the wrong side."