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AKHIL AMAR ON CRIMINAL PROCEDURE AND CONSTITUTIONAL LAW: "HERE I GO DOWN THAT WRONG ROAD AGAIN"

DONALD DRIPPS*

Constitutional criminal procedure is in need of an overhaul. It is replete with tenuous distinctions and seemingly arbitrary line-drawing. Professor Akhil Amar would remedy that uncertainty with a unitary set of national rights fashioned through total incorporation, but would limit the overall protections currently afforded the criminally accused. Professor Donald Dripps agrees that constitutional criminal procedure needs change, but disagrees with Amar's proposed means to that end. In this Article, Professor Dripps critiques Amar's approach to constitutional criminal procedure, and finds it historically and theoretically barren. Professor Dripps concludes by offering a different remedy for the same ailment: due process of law.

In any given Term, criminal cases comprise about a fourth of the Supreme Court's docket.¹ They account for a proportionate share of the cases presenting constitutional questions.² Typically, these constitutional issues concern procedure rather than substance.

These facts might lead one to suppose that American constitutional law is centrally preoccupied with criminal procedure. Nothing could be further from the truth. In the criminal procedure context, the Court rather openly decides cases with minimal respect for doctrinal constraints. Even after vast expansions of federal responsibility for criminal law enforcement, the great bulk of criminal

* Professor of Law, University of Illinois. Thanks to Richard Aynes, Morgan Cloud, Yale Kamisar, Wayne LaFave, Andy Leipold, and Bill Stuntz for their helpful comments on a prior draft. Special thanks to Akhil Amar, who gave graciously and generously of his time in commenting on an earlier draft. In a piece such as this one, the usual caveat deserves unusual emphasis: Responsibility for the views expressed in this Article is solely the author's.

1. See, e.g., *The Supreme Court, 1991 Term, Leading Cases*, 106 HARV. L. REV. 163, 382-85, tbls. 2 & 3 (federal criminal cases, state criminal cases, and federal habeas corpus cases accounted for 30 out of 134 cases disposed of by written opinion during 1991 term).

2. See *id.* (criminal cases accounted for 15 out of 44 cases presenting constitutional questions that were resolved by written opinion).

cases are prosecuted by state authorities.³ In this context, the central constitutional principle is "fundamental fairness."⁴ While fundamental fairness nominally incorporates most of the procedures set out in the Bill of Rights, the Court has qualified those procedures according to *ad hoc* balances of competing interests.⁵

As one might expect, "fundamental fairness," qualified by interest-balancing, has generated an unprincipled and inconsistent body of law.⁶ The criminal procedure cases rarely acknowledge the

3. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1994, at 432 tbl. 5.5 & 485 tbl. 5.46 (1995) (U.S. Attorneys' offices obtained 42,459 convictions in 1994, compared to 893,630 state court convictions in 1992).

4. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968).

5. Compare, e.g., *Duncan*, 391 U.S. 145 (holding that Fourteenth Amendment incorporates Sixth Amendment right to jury trial in serious criminal cases) with *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989) (rejecting right to jury trial in DUI prosecution when maximum authorized sentence does not exceed six months incarceration); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that Fourteenth Amendment incorporates Sixth Amendment right to counsel and mandates appointed counsel for indigent felony defendants in state courts) with *United States v. Cronin*, 466 U.S. 648 (1984) (drawing no inference of ineffective assistance of counsel from fact that defendant in complex mail fraud case was represented by young lawyer who had never been involved in a jury trial and who was given only 25 days to prepare); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that Fourteenth Amendment incorporates both Fourth Amendment rights and exclusionary remedy) with *United States v. Leon*, 468 U.S. 897 (1984) (admitting evidence seized under authority of warrant issued without probable cause); *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding confession obtained by custodial interrogation absent warning and waiver inadmissible) with *New York v. Quarles*, 467 U.S. 649 (1984) (holding no warning or waiver required where questioning may further public safety).

For a recent example, see *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995) (upholding random urinalysis of public school athletes as not "unreasonable" under Fourth Amendment).

6. Compare, e.g., *Michigan v. Mosley*, 423 U.S. 96 (1975) (approving resumption of interrogation about another crime after suspect who had previously invoked *Miranda* right to silence was given renewed warnings and validly waived the right) with *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding resumption of interrogation after suspect invokes *Miranda* right to counsel impermissible despite renewed warnings and purported waiver); *United States v. Wade*, 388 U.S. 218 (1967) (holding post-arrest lineup to be a critical stage of prosecution at which suspect has Sixth Amendment right to counsel) with *Kirby v. Illinois*, 406 U.S. 682 (1972) (holding post-arrest but preindictment lineup not to be a critical stage at which Sixth Amendment right to counsel applies); *Ohio v. Roberts*, 448 U.S. 56 (1980) (holding that Sixth Amendment Confrontation Clause requires government to show unavailability of out-of-court declarant plus reliability of declarant's statements) with *United States v. Inadi*, 475 U.S. 387 (1986) (limiting *Roberts* by holding that Sixth Amendment Confrontation Clause does not require unavailability analysis and that reliability can be inferred from satisfaction of the traditional furtherance-of-conspiracy hearsay exception); *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (holding that due process requires government to disprove provocation defense beyond reasonable doubt) with *Patterson v. New York*, 432 U.S. 197 (1977) (holding that due process does not require

authority of anything but prior criminal procedure cases. Even this currency is somewhat debased, for while overt overrulings are infrequent, arbitrary distinctions abound.⁷ With isolated exceptions,⁸ the criminal procedure cases are a world unto themselves.

The academy has followed the Court and ratified this dissociation of legal sensibility. Laurence Tribe's *American Constitutional Law* makes three passing references to *Miranda v. Arizona*,⁹ and none to *Terry v. Ohio*,¹⁰ in the course of more than seventeen hundred pages.¹¹ The leading criminal procedure casebook cites hundreds of items from the academic literature, but neither *Democracy and Distrust*¹² nor *Toward Neutral Principles of Constitutional Law*¹³ makes the list.¹⁴

A great deal more is at stake than academic territoriality. Constitutional criminal procedure cases are, after all, constitutional cases. Their proper resolution demands consultation of those considerations that inform constitutional law more generally—legitimacy, prudence, representation-reinforcement, and neutral principles. In short, the Constitution needs to be put back into criminal procedure.

Given this state of affairs, the recent entry into the criminal procedure field of Akhil Amar, the brilliant, quirky Yale constitutionalist, is a signal development. In a series of recent articles, Professor Amar has called for fundamental reconsideration of well-established constitutional doctrine regulating criminal procedure. In his view, the central elements of Fourth Amendment doctrine—the warrant requirement, the probable cause standard, and the exclusionary remedy—should be abandoned.¹⁵ Joined by coauthor Renee Lettow, he argues that the Fifth Amendment's privilege against

government to disprove extreme emotional disturbance defense beyond reasonable doubt).

7. See *supra* notes 5 & 6.

8. In *Batson v. Kentucky*, 476 U.S. 79 (1986), for example, the Court relied heavily on general equal protection precedents.

9. 384 U.S. 436 (1966).

10. 392 U.S. 1 (1968).

11. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* lxxx, xcvi (2d ed. 1988).

12. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

13. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

14. See YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* lxvii, lxxviii (8th ed. 1994).

15. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter Amar, *Fourth Amendment*].

self-incrimination forbids no more than introduction of compelled testimony at the declarant's criminal trial.¹⁶ The privilege, on their account, imposes no limits on derivative use of compelled testimony.¹⁷ The supporting arguments, with respect to both the Fourth and the Fifth Amendments, invoke "text, history, and plain old common sense."¹⁸

Professor Amar earlier published his conclusion that the Fourteenth Amendment's Privileges-or-Immunities Clause applies the Fourth and Fifth Amendments against the states.¹⁹ The supporting argument places primary reliance on text and history. Although Amar, together with coauthor Jonathan Marcus, has discussed due process as an adjunct to the Double Jeopardy Clause, he has not developed an account of due process in search-and-seizure or interrogation cases.²⁰

No restatement can do justice to a complex argument. No one should read this essay who has not first carefully considered the elegant and provocative papers by Amar and by Amar and Lettow. Such readers will agree, I believe, that Amar's overall approach might

16. See Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995) [hereinafter Amar & Lettow, *Fifth Amendment*].

17. *Id.* at 900-01.

18. Amar, *Fourth Amendment*, *supra* note 15, at 757. In other articles, Professor Amar has addressed the Fifth Amendment Double Jeopardy Clause and the various clauses of the Sixth Amendment. See Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995); Akhil Amar, *Sixth Amendment First Principles*, GEO. L.J. (forthcoming 1996). This article does not specifically address double jeopardy, a subject of great difficulty but only modest practical urgency. Nor does this article address the Sixth Amendment's trial provisions, as it was completed before I was aware of Professor Amar's Sixth Amendment paper. It suffices here to note that his views of the Sixth Amendment depend on the interpretive methods, the incorporation thesis, and the disinterest in due process that underlie his Fourth and Fifth Amendment views. See Amar, *Fourth Amendment*, *supra* note 15; Amar & Lettow, *Fifth Amendment*, *supra* note 16. The arguments developed here against that overall approach apply as well against his Sixth Amendment claims.

19. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) [hereinafter Amar, *Fourteenth Amendment*]. Although Amar qualifies his incorporation thesis by distinguishing individual versus state collective rights, see *id.* at 1262-64, the criminal procedure guarantees appear to be individual in nature, even though the Fourth Amendment refers to the "right of the people." Amar's "refined incorporation" is not invoked in the Fourth and Fifth Amendment articles. See Amar, *Fourth Amendment*, *supra* note 15; Amar & Lettow, *Fifth Amendment*, *supra* note 16.

For a general rebuttal of Amar's Fourteenth Amendment views, see Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. CIN. L. REV. 1 (1993).

20. See Amar & Marcus, *supra* note 18, at 29, 31.

be well-described as Fourteenth Amendment maximalism and Bill of Rights minimalism. That is to say, he believes in a single, national set of individual rights against criminal investigation and prosecution, but he also believes that these rights permit the introduction of a great deal more evidence against the criminal defendant than present law permits.²¹ He believes, in short, that prevailing criminal procedure doctrine is constitutionally upside-down.²²

Given my belief that constitutional law and criminal procedure stand to benefit from closer connections, I am naturally excited by Professor Amar's recent work on criminal procedure. I am also disappointed by it. At the level of theory, his vision depends on a singularly unconvincing political account of the authoritative force of text and history; it lacks a coherent account of the authoritative force of precedent, and it lacks any account of the relation between majoritarian politics and minority rights of the sort that might inform the exercise of judicial review.

These issues may be so profoundly problematic that even the best minds at work in the field of constitutional law cannot resolve them. My disappointment may then more properly be directed at the human condition than at Professor Amar. But then it becomes fully competent to observe that if Professor Amar's approach is problematic as a matter of constitutional law, it would be unequivocally pernicious as criminal procedure.

As a positive or descriptive matter, the Amar approach is fundamentally (and most ironically) ahistorical. For those seeking to understand how criminal procedure came to its present state, the decisive turning points are not, as he would have it, *Slaughter-House*²³ and *Boyd*,²⁴ but rather *Hurtado*²⁵ and *Mapp*.²⁶ Amar virtually disregards the eighty years of due process adjudication separating these latter landmarks. As a result, he underestimates the changes in circumstances that led a pragmatic judiciary to the results he condemns. The practical consequence is that Professor Amar's approach would permit the recurrence of the central evils the Fourth and Fifth Amendments were designed to prevent.

21. See Amar, *Fourth Amendment*, *supra* note 15, at 794-95.

22. *Id.* at 757-61.

23. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

24. *Boyd v. United States*, 116 U.S. 616 (1886).

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

26. *Mapp v. Ohio*, 367 U.S. 643 (1961).

In the second place, Professor Amar, like the Warren Court before him, is preoccupied with the Bill of Rights to the exclusion, or at least to the neglect, of due process. Yet it is due process that most appropriately expresses the values a free society should honor in its criminal process. Limits on searches and interrogation, like juries and the right to confront adverse witnesses, are only means to the larger end of preventing punishment not authorized by judgment rendered after a fair trial. The Bill of Rights procedures are collectively inadequate to ensure a fair trial, and at least one of them, the Fifth Amendment privilege against self-incrimination, impedes rather than advances the pursuit of a fair inquiry into guilt or innocence.

Thus Professor Amar's approach to criminal procedure can only end in one of two scenarios. On a robust reading of due process, his narrow construction of the Fourth and Fifth Amendments is trivial, because the Fourth and Fifth Amendment doctrines he decries would be replaced with similar rules founded on due process. On a crabbed reading of due process, his narrow construction of the Bill of Rights would betray both the historical purposes of those provisions and expose contemporary citizens to police abuse and unfair trials.

The proliferation of tenuous distinctions in the case law proves that constitutional criminal procedure desperately needs more of what constitutional law ought to offer—general theory, neutral principles, and a reasoned explanation of the priority of judicially-recognized individual rights over legislatively-recognized collective goals. In my view, Professor Amar is offering something very different.

Part I of this essay explains the importance of Amar's incorporation thesis and then suggests that his account of the Fourteenth Amendment reveals the theoretical poverty of his program. His interpretation of the Privileges-or-Immunities Clause is problematic on textual and intentional grounds. Neither abolitionist constitutional doctrine nor a fundamental rights approach to the clause justifies total incorporation. On the politically far more plausible ground of conventional or positivist legal theory, the long-standing judicial refusal to invoke the boundless language of the Clause makes his account unreasonable.

Part II turns to the Fourth and Fifth Amendments. I suggest that it was not the admitted defects of *Boyd*²⁷ and *Counselman*²⁸ that led to their demise during the days of the Warren Court. Rather, it was

27. 116 U.S. 616 (1886).

28. *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

the advent of an effective remedy for violations of the Fourth Amendment by state and local police that forced the destruction of a federal model of search and seizure law, a model that had functioned reasonably well for fifty years. The Warren Court abandoned the assumptions supporting *Boyd*.²⁹ In *Terry v. Ohio*, Earl Warren himself did pretty much what Professor Amar demands—reduce the Fourth Amendment to an inquiry into reasonableness.³⁰ The Court, however, insisted on determining reasonableness on the basis of discrete, recurring categories of police conduct, and on excluding the fruits of violations.³¹

On this score, the Court has the better of Professor Amar. The practical weakness of damage actions as remedies for police excess cannot be cured by any foreseeable change in the technical details of the rules governing suits against police. Administering the last rites to the exclusionary rule therefore would invite a return to the good old days of midcentury. In any event, effective damage remedies, absent the establishment of clear standards for definable categories of police operations, might well deter legitimate police work and encourage abuses at the same time.

As for the Fifth Amendment, Professor Amar and Ms. Lettow deeply mistake its purpose. The privilege, unlike the common-law rule forbidding reception of involuntary confessions, was never understood as promoting the reliability of the trial. Reliability simply will not justify the privilege today, and probably never could have justified it. If we conceive of the privilege as opposing two famous abuses—the oath *ex officio* and the practice of torture—we come closer to its purpose than by looking to reliability. Professor Amar's approach, however, concludes that neither the oath *ex officio* nor even physical torture violates the Fifth Amendment privilege, so long as the verbal admissions so extracted are not themselves admitted at the declarant's trial.³²

Would not such practices violate due process? Well, they might, under current law—but we don't know Professor Amar's reading of

29. See *Warden v. Hayden*, 387 U.S. 294, 300-10 (1967) (holding that the Fourth Amendment does not bar seizure of "mere evidence," i.e., evidence other than contraband, fruits, and instrumentalities of crime); *Schmerber v. California*, 384 U.S. 757, 760-65 (1966) (holding that the Fifth Amendment privilege does not protect physical evidence, including involuntary blood sample).

30. See *Terry v. Ohio*, 392 U.S. 1, 27 (1968); Amar, *Fourth Amendment*, *supra* note 15, at 801.

31. *Terry*, 392 U.S. at 13, 30-31.

32. Amar & Lettow, *Fifth Amendment*, *supra* note 16, at 896-97, 926-27.

due process. Part III concludes this essay by arguing that his preoccupation with the Bill of Rights suggests what the experience of the Warren and Burger Courts confirms—that in the field of criminal procedure, we should begin our thinking with due process, rather than with the Bill of Rights. Given a constitutional prohibition of punishment without trial, and a constitutional requirement that trials be fair, criminal procedure can never go too far wrong, whatever its relation to the Bill of Rights.

I. THE INCORPORATION THESIS AND CONSTITUTIONAL THEORY

A. *Constitutional Criminal Procedure: A Thumbnail History*

From the 1884 decision in *Hurtado v. California*³³ until the last days of the Warren Court, the central issue in constitutional criminal procedure was the extent to which the Fourteenth Amendment's Due Process Clause limited the practices of state police and state courts. In *Hurtado*, the defendant sought the reversal of his murder conviction because California had instituted the prosecution by information rather than by indictment returned by a grand jury. He claimed that the information procedure violated the Fourteenth Amendment's Due Process Clause.³⁴

This claim had strong historical support. The words "due process of law" were first used by Coke in his commentary on Magna Charta Chapter 39, which had guaranteed that no free man would be punished except after a judgment of peers and according to the law of the land.³⁵ In the leading antebellum due process case, *Murray's Lessee v. Hoboken Land & Improvement Co.*,³⁶ the Supreme Court had upheld the use of a distress warrant to seize a vessel for payment of tax liabilities because this procedure was recognized at common-law. Due process, the *Murray's Lessee* Court reasoned, meant process accepted by the common-law.³⁷ The common-law, of course, required grand jury presentment in felony cases.³⁸ Joseph Story thought that due process required grand jury presentment.³⁹ Lemuel

33. 110 U.S. 516 (1884).

34. *Id.* at 520.

35. *See id.* at 528-32.

36. 59 U.S. (18 How.) 272 (1855).

37. *Id.* at 277.

38. 4 WILLIAM BLACKSTONE, COMMENTARIES *310.

39. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 663 (1883) (John E. Nowak & Ronald D. Rotunda eds., Carolina Academic Press 1987).

Shaw thought the same of the law-of-the-land provision in the Massachusetts Bill of Rights.⁴⁰

Nonetheless, eight of nine Justices rejected Hurtado's claim. To hold that common-law procedure acquired constitutional status by force of the Due Process Clause would "be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."⁴¹ Neither was due process defined by whatever procedure the legislature provided. Due process, tracking the Magna Charta, meant the law of the land, but it "is not every act, legislative in form, that is law."⁴²

Rather, the law of the land "refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."⁴³ Thus was born the doctrine of fundamental fairness, although the Court did not yet use those very words. State legislation that conflicted with "fundamental principles of liberty and justice" violated the law of the land and therefore due process. But due process did not forbid procedures that were "sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice."⁴⁴

Tested against these "fundamental principles," the information procedure accorded with due process.⁴⁵ Not until *Moore v. Dempsey*⁴⁶ would the Court set aside a state conviction on due process grounds.⁴⁷ Not until *Brown v. Mississippi*⁴⁸ would the Court

40. *Jones v. Robbins*, 74 Mass. (8 Gray) 329 (1857).

41. *Hurtado v. California*, 110 U.S. 516, 529 (1884).

42. *Id.* at 535.

43. *Id.*

44. *Id.* at 537.

45. *Id.* at 538.

46. 261 U.S. 86 (1923).

47. The Court did vacate a death sentence in *In re Medley*, 134 U.S. 160 (1890), but not because of due process. The state had convicted Medley under a statute adopted after the crime, one that provided for solitary confinement before execution. *Id.* at 164. The Court held that punishment under the new statute violated the *Ex Post Facto* Laws Clause of Article I, Section 10. *Id.* at 173.

48. 297 U.S. 278 (1936).

reverse a state conviction because of police methods. *Moore* involved a mob-dominated trial; *Brown* involved physical torture to extract a confession. Fundamental pretty much meant *fundamental*.

The Bill of Rights wasn't in the picture.⁴⁹ The *Hurtado* Court even reasoned that because the Fifth Amendment includes both the Due Process Clause and the grand jury requirement, the former could not encompass the latter.⁵⁰ Time passed, however, and the Court held that the Fourteenth Amendment's Due Process Clause incorporates both the Fifth Amendment's prohibition on takings of private property⁵¹ and the First Amendment's guarantee of freedom of speech.⁵²

When Justice Black, first in *Betts v. Brady*⁵³ and then in *Adamson v. California*,⁵⁴ opined that the Fourteenth Amendment incorporated all of the provisions of the Bill of Rights against the states, he began the process that led to the present state of constitutional procedure. His total incorporation thesis was repeatedly rejected; but gradually the provisions of the Bill of Rights applicable in criminal cases became "selectively incorporated" by the Fourteenth Amendment. That story has been told often;⁵⁵ what is not well-recognized are the consequences of incorporation.

The application of the exclusionary rule to the states in 1961,⁵⁶ of a right to appointed counsel in 1963,⁵⁷ and of the privilege against self-incrimination in 1964,⁵⁸ brought federal standards of criminal procedure into contact with the realities of prosecutions for garden-variety state felonies. The shock was profound. While the states struggled to accommodate the new rules, the Court—even with Earl Warren still serving as Chief Justice—began to qualify the Bill of Rights guarantees that had been forced on the states.

49. See *Twining v. New Jersey*, 211 U.S. 78 (1908) (holding that due process does not incorporate privilege against self-incrimination); *Maxwell v. Dow*, 176 U.S. 581 (1900) (holding that Privileges-or-Immunities Clause does not include Fifth Amendment right to grand jury presentment); *Hodgson v. Vermont*, 168 U.S. 262 (1897) (holding that information in instant case provided adequate notice of charge).

50. See *Hurtado v. California*, 110 U.S. 516, 534-35 (1884).

51. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

52. *Gitlow v. New York*, 268 U.S. 652 (1925).

53. 316 U.S. 455, 472 n.1 (1942) (Black, J., dissenting).

54. 332 U.S. 46, 71-72 (1947) (Black, J., dissenting).

55. See, e.g., Jerold Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253 (1982).

56. *Mapp v. Ohio*, 367 U.S. 643 (1961).

57. *Gideon v. Wainwright*, 316 U.S. 455 (1942).

58. *Malloy v. Hogan*, 378 U.S. 1 (1964).

Insinuating a spy into the intimate circle of the suspect was not a search,⁵⁹ while warrants to search any home in a whole neighborhood for building code violations, without any cause, let alone the probable kind, were upheld.⁶⁰ Temporary detention on suspicion and without a warrant was upheld.⁶¹ The Fifth Amendment privilege was limited to testimonial evidence.⁶² The exclusionary rule was not applied retroactively,⁶³ nor at the behest of anyone but the search victim.⁶⁴ Justice Black himself would have exempted electronic surveillance from the Fourth Amendment,⁶⁵ he also foreshadowed the Burger Court's line of attack on the exclusionary rule.⁶⁶

The Burger and Rehnquist Courts accelerated the process of retrenchment, but they did not originate it. Following the Warren Court's decision in *Hoffa*, the Burger Court held that any information voluntarily disclosed to another for any purpose can be seized by the government without implicating the Fourth Amendment.⁶⁷ Following the Warren Court's decision in *Linkletter v. Walker* and Justice Black's dissent in *Kaufman v. United States*, the Court reduced the exclusionary rule to a shadow of its federal form.⁶⁸ Following *Terry* and *Camara*, the Court seemed to invoke Fourth Amendment reasonableness to uphold any search the justices approved of—and they approved of a great many.⁶⁹

59. *Hoffa v. United States*, 385 U.S. 293 (1966).

60. *Camara v. Municipal Court of S.F.*, 387 U.S. 523, 534-39 (1967).

61. *Terry v. Ohio*, 392 U.S. 1, 20-28 (1968).

62. *Schmerber v. California*, 384 U.S. 757, 760-65 (1966); see *supra* note 29.

63. *Linkletter v. Walker*, 381 U.S. 618, 636-39 (1965).

64. *Alderman v. United States*, 394 U.S. 165, 171-76 (1969).

65. See *Berger v. New York*, 388 U.S. 41, 78-81 (1967) (Black, J., dissenting).

66. *Kaufman v. United States*, 394 U.S. 217, 237-242 (1969) (Black, J., dissenting).

67. See *United States v. Miller*, 425 U.S. 35 (1976) (bank records); *Smith v. Maryland*, 442 U.S. 735 (1979) (numbers called by telephone).

68. See *United States v. Leon*, 468 U.S. 897 (1984) (good-faith exception in warrant cases); *Nix v. Williams*, 467 U.S. 431 (1984) (inevitable discovery exception); *United States v. Havens*, 446 U.S. 620 (1980) (tainted evidence admissible to impeach testimony elicited by government on cross-examination of accused); *Stone v. Powell*, 428 U.S. 465 (1976) (state prisoners' exclusionary rule claims not cognizable on federal habeas); *United States v. Janis*, 428 U.S. 433 (1976) (tainted evidence admissible in civil proceedings); *United States v. Calandra*, 414 U.S. 338 (1974) (tainted evidence admissible before grand jury).

69. See *Burger v. New York*, 482 U.S. 691 (1987) (warrantless searches of junk yards for stolen cars reasonable); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (warrantless search of probationer's home based on less than probable cause reasonable); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (warrantless search by school officials based on "reasonable grounds for suspecting that the search will turn up evidence" reasonable (emphasis added)).

The Sixth Amendment right to counsel was satisfied by any performance that did not amount to a "breakdown in the adversary process."⁷⁰ Juries of fewer than twelve⁷¹ and nonunanimous convictions⁷² were accepted. *Miranda's* predicates of custody⁷³ and interrogation⁷⁴ were narrowly interpreted, while violations often led to admissible evidence.⁷⁵

Some of these developments, however disingenuous, reflect sensible orderings of the competing values. Incorporation, however, drove the Court to a method of "balancing" policy considerations unprivileged by constitutional authority against the provisions in the Bill of Rights. Either the Court would subvert the Bill, or the Bill would subvert important values in the criminal process. Meanwhile, the broader notion of due process—as forbidding punishment without trial, and requiring that trials be fair—fell into desuetude.

Due process does not prevent police practices save those that are "shocking to the universal sense of justice"⁷⁶—a tough test to meet in an era of genocidal wars and senseless criminality.⁷⁷ Due process does not require that the government disprove provocation⁷⁸ or even self-defense⁷⁹ beyond a reasonable doubt. Due process does not require the government to preserve potentially conclusive exculpatory

70. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

71. *Williams v. Florida*, 399 U.S. 78, 86-103 (1970).

72. *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion).

73. See *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam); *California v. Beheler*, 463 U.S. 1121 (1983) (per curiam).

74. See *Illinois v. Perkins*, 496 U.S. 292 (1990) (holding no *Miranda* warnings required when suspect is asked questions by cellmate informant); *Arizona v. Mauro*, 481 U.S. 520 (1987) (holding that confronting suspect in custody with suspect's wife and openly recording the husband/wife conversation was not interrogation); *Rhode Island v. Innis*, 446 U.S. 291 (1980) (holding that conversation purportedly between officers, but conducted in police vehicle with arrested suspect, about risk that murder weapon would be found by mentally-retarded youngsters attending school in neighborhood of the crime does not constitute interrogation).

75. See, e.g., *Oregon v. Elstad*, 470 U.S. 298 (1985) (admission obtained by *Miranda* violation does not taint admissions made after new warnings given); *Michigan v. Tucker*, 417 U.S. 433 (1974) (approving admission of testimony by witness disclosed to police by statement outlined in violation of *Miranda*); *Harris v. New York*, 401 U.S. 222 (1971) (impeachment exception).

76. See *United States v. Russell*, 411 U.S. 423, 432 (1973) (citing *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)).

77. See Donald Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261.

78. *Patterson v. New York*, 432 U.S. 197 (1977).

79. *Martin v. Ohio*, 480 U.S. 228 (1987).

evidence,⁸⁰ nor, in most cases, to bear the expense of expert witnesses for the indigent.⁸¹ In short, incorporation stunted the development of due process, while interest-balancing undermined incorporation.

B. Amar's Version of Originalism and the Incorporation Thesis

1. Constitutional Theory: Extra-Textual Amendments and Implied Consent

For Professor Amar, all this history holds little interest, because in his view the Supreme Court took a fatal misstep even before *Hurtado*. On his view, the Fourteenth Amendment's Privileges-or-Immunities Clause applies the Bill of Rights to the states; the *Slaughter-House Cases* were wrongly decided. On my view, this history shows that incorporation is an idea that badly serves criminal procedure, so that revisiting *Slaughter-House* would be a most unfortunate development. At least on the present selective-incorporation theory, states are spared the grand jury; and a strong argument can be made to free them, at some future point, from the privilege against self-incrimination. The prevailing selective-incorporation regime at least nominally depends on due process, and so long as the spotlight is on due process, the relevant values in criminal procedure have at least some hope of finally asserting themselves.

I doubt that Professor Amar would agree with this assessment of incorporation's consequences, but at least in theory it need not trouble him, for his argument for incorporation is based on text and history. Incorporation is compelled by authority even if it is unwise as policy. To skeptics who challenge the originalist premise according text and history conclusive authority, Professor Amar, unlike most originalists, has a coherent theoretical answer: The text and its original purposes can be set aside at will by a majority of the nation's voters, who are not constrained, as is the government itself, by the obstacle course process set out in the amending clause.⁸² The failure of the people to avail themselves of the direct-popular-amendment

80. *Arizona v. Youngblood*, 488 U.S. 51 (1988).

81. See David A. Harris, *The Constitution and Truth-Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 486-87 (1992).

82. See Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) [hereinafter Amar, *Philadelphia Revisited*]; Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) [hereinafter Amar, *Consent of the Governed*].

alternative signifies a majority's implied consent to the present Constitution, as conceived by those who made it.⁸³

Whether extra-textual amendments be valid or not, as a theoretical justification for originalism the Amar account is patently unreasonable. In the first place, it mistakes the nature of political justification; the consent of the majority is not unanimity. Even when a majority consents to a government, that government will coerce many who do not consent; and even among those who consent to the government many may object to some of its policies. Think about Germany in 1938 and again in 1946. Or think about minors and aliens, who are bound by laws over which they exert no electoral influence.⁸⁴ Majority consent is thus not a sufficient condition for political justification; and some other account of political authority might well dispense with majority consent as even a necessary condition of justification.⁸⁵

83. See Amar, *Philadelphia Revisited*, *supra* note 82, at 1073-74:

Admittedly, not even popular sovereignty can avoid all forms of entrenchment. First, the substantive constitutional rules adopted by one generation remain the status quo default rules governing subsequent generations unless and until amended. However, if a subsequent, deliberate majority can in fact amend these default rules, then their failure to do so can plausibly be seen as reflecting their implied consent. Since by definition, some status quo default rule must always exist, resort to some form of implied consent argument is inescapable. In contrast, if more than a deliberate majority were required to amend the Constitution, then the status quo would have to be justified on additional grounds besides just the majority's implied consent. The distinctive feature of my reading of the constitution is that it is the only reading that can rely solely on the concept of implied consent since it ensures that a deliberate majority of the People (if they choose to) can withhold their consent to the status quo by amendment.

(footnotes omitted).

84. Cf. DAVID HUME, A TREATISE OF HUMAN NATURE (L.A. Shelby-Bigge ed., Oxford Press 1965):

It never was pleaded as an excuse for a rebel, that the first act he perform'd, after he came to years of discretion, was to levy war against the sovereign of the state; and that while he was a child he cou'd not bind himself by his own consent, and having become a man, show'd plainly, by the first act he perform'd, that he had no design to impose on himself any obligation To obedience.

Id. at 548.

85. Amar, in *Philadelphia Revisited*, *supra* note 82, at 1074 n.112, cites Rousseau for the connection between political authority and tacit consent. But he does not mention Hume's classic and devastating critique of social contract theories. See HUME, *supra* note 84, at 539-49.

It may well be that "[w]hen the Framers embraced the social contract, however, they necessarily rejected Hume's critical views." Sheldon Gelman, "Life" and "Liberty": *Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights*, 78 MINN. L. REV. 585, 590 (1994). As Amar quite rightly notes, "We cannot say . . . that the Framers' intent should govern our interpretation solely because they intended that. We need an additional, external, argument from political philosophy

Second, even on its own terms, the Amar account assumes that a majority of the people *know* that they have the right to some extra-textual amendment process. The Fourteenth Amendment may have been an extra-textual amendment, but it is not popularly regarded as such. In any event, the process of approving the Fourteenth Amendment was not simultaneous nationwide popular voting. Indeed, Professor Amar concedes that the prevailing legal view rejects the possibility of extra-textual amendment.⁸⁶ His account thus treats as "consent" the failure of the people to exercise an option that has never been successfully exercised and that most experts believe cannot be successfully exercised.⁸⁷

Finally, Amar's leap from the right to extra-textual amendment to originalism is altogether conclusory. Supposing that consent legitimates, and that silence gives consent, to what are the people consenting when they stand silent? To the original meaning, after that has been rejected by the Court? Hardly. I doubt that any citizen of the republic, excepting Amar himself, ever has thought that the failure to initiate a direct referendum to reaffirm original intentions betrayed by the courts signalled rejection of the prevailing judicial interpretation over the now-academic original understanding. The "default rule" Amar's consent analysis really suggests is that when

to ground our circle." Amar, *Philadelphia Revisited*, *supra* note 82, at 1072.

86. See Amar, *Consent of the Governed*, *supra* note 82, at 460-61 ("The conventional reading" holds that Article V "enumerates the only mode(s) by which the Constitution may be amended."); Amar, *Philadelphia Revisited*, *supra* note 82, at 1102 ("Indeed, my unavoidably sweeping argument here has been that legal scholars have fundamentally misunderstood the most important features of our Constitution."). Professor Monaghan has published a thorough critique of the extra-textual amendment thesis. See Henry P. Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

87. Cf. HUME, *supra* note 84:

We find, that magistrates are so far from deriving their authority, and the obligation to obedience in their subjects, from the foundation of a promise or original contract, that they conceal, as far as possible, from their people, especially from the vulgar, that they have their origin from thence. Were this the sanction of government, our rulers wou'd never receive it tacitly, which is the utmost that can be pretended; since what is given tacitly and insensibly can never have such influence on mankind, as what is perform'd expressly and openly. A tacit promise is, where the will is signified by other more diffuse signs than those of speech; but a will there must certainly be in the case, and that can never escape the person's notice, who exerted it, however silent or tacit. But were you to ask the far greatest part of the nation, whether they had ever consented to the authority of their rulers, or promis'd to obey them, they wou'd be inclin'd to think very strangely of you; and wou'd certainly reply, that the affair depended not on their consent, but that they were born to such an obedience.

Id. at 547-48.

judicial decision betrays text and history, popular acquiescence ratifies the amendment proposed by the Court.

Now, I don't necessarily subscribe to that at all—but then I'm not arguing to throw out 120 years of precedent. Maybe, prescription notwithstanding, a clear showing that text and history compel incorporation might justify overruling *Slaughter-House* and *Dow*. To make that case, however, Amar would need a theoretical account of precedent in constitutional cases, a theoretical account he has never provided.⁸⁸

2. The Fourteenth Amendment and the Bill of Rights

The incorporation debate has evoked an enormous literature.⁸⁹ The recent defenders of incorporation⁹⁰ have linked the Privileges-or-Immunities Clause to antebellum abolitionist thought, and to revisionist historiography that deplores reconstruction as insufficiently radical to achieve real freedom for the former slaves.⁹¹

Professor Amar concludes that “all of the privileges and immunities of citizens recognized in the Bill of Rights became

88. See Akhil Amar, *On Lawson on Precedent*, 17 HARV. J.L. & PUB. POL'Y 39 (1994) (accepting constitutional precedent as authoritative but not as absolute).

89. Prior to Amar's *Fourteenth Amendment* article, the most prominent contributions, in chronological order, were Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limits on State Authority*, 22 U. CHI. L. REV. 1 (1954); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 134-56 (1977); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* (1986). Dean Aynes has recently published a fascinating history of the dispute between Fairman and Felix Frankfurter on the one hand, and Black and Crosskey on the other. See Richard Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995).

For histories of the Fourteenth Amendment, as distinct from studies devoted to the incorporation question, see CHARLES FAIRMAN, *HISTORY OF THE SUPREME COURT—RECONSTRUCTION AND REUNION, PART ONE 1207-1300* (1971); JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1965); WILLIAM NELSON, *THE FOURTEENTH AMENDMENT* (1988); Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

90. See CURTIS, *supra* note 89; Amar, *Fourteenth Amendment*, *supra* note 19; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993).

91. On the connection between the amendment and the political theory of the Republican party, see Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENTARY 235 (1984). For an overview on the historiography, see the “Note on Sources” in *id.* at 278-79. For examples of revisionist reconstruction histories, see, e.g., MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869* (1974); ERIC FONER, *RECONSTRUCTION* (1988).

applicable against states by dint of the Fourteenth Amendment."⁹² Some elements in the Bill of Rights are collective or states' rights, and some of the individual guarantees may change their meaning as a result of incorporation. For criminal procedure purposes, however, Amar's thesis is apparently total and imperative. Whether or not the Fifth Amendment's right to grand jury presentment or against self-incrimination, or the Sixth Amendment's vicinage requirement, or the Seventh Amendment's civil jury requirement is a fundamental right, each applies to the states so long as "the provision really guarantees a privilege or immunity of individual citizens rather than a right of states or the public at large."⁹³ Grand jury review would be required in the information states; unanimous juries of twelve would be required to convict, even in juvenile cases; and experiments with compelled testimony would be banned.

I have argued elsewhere that the Court in criminal procedure cases should concentrate on procedural due process, disincorporating particular Bill of Rights provisions that do not contribute to security from punishment without fair trial,⁹⁴ and recognizing some procedural safeguards not enumerated in the Bill of Rights when those safeguards are essential to the fairness of the trial or the prevention of extra-legal punishment.⁹⁵ Professor Amar diagnoses criminal procedure's condition much as I do; but his remedy is a prescription for perpetuating the cause of the disease.

Thus, the Fourteenth Amendment issue that divides us is narrow but critical. That issue is not whether the radicals were more enlightened than their foes. Nor is it whether the Privileges-or-Immunities Clause might provide a legitimate predicate for the incorporation of some of the Bill of Rights guarantees, or for recognizing unenumerated rights. Nor is the issue between us whether all of the criminal-procedure incorporation decisions should be overruled, because security from arbitrary search and seizure, the assistance of counsel, confrontation, and compulsory process are all essential to procedural due process. The proposition Amar asserts, and that I deny, is that the Privileges-or-Immunities Clause obligates the federal courts to require the states to observe criminal procedure

92. Amar, *Fourteenth Amendment*, *supra* note 19, at 1197.

93. *Id.*

94. See Donald Dripps, *Foreword: Against Police Interrogation—and the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699 (1988).

95. See Donald Dripps, *Beyond the Warren Court and its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REF. 591, 638-39 (1990); Dripps, *supra* note 77.

provisions of the Bill of Rights that do not contribute to, and may in fact impair, the decency of police methods or the fairness of trials.

On behalf of his thesis, Professor Amar argues that some Republicans had argued, during the struggle against slavery, that *Barron v. Baltimore*⁹⁶ was wrongly decided.⁹⁷ On this theory, the "privileges or immunities of citizens of the United States" include those in the Bill of Rights, and the Fourteenth Amendment made these rights enforceable against the states. His positive argument rests on the text of the clause⁹⁸ and the debates on the amendment in Congress.⁹⁹ In his negative case, he argues that the focus of the ratification debates on other issues,¹⁰⁰ and the early judicial rulings on the incorporation issue,¹⁰¹ do not fatally weaken the case for incorporation.

What can be said against Amar's incorporation thesis? To begin with, it suffers some serious weaknesses even internal to Amar's consent-based constitutional theory. Regarding the text, Amar asserts that the words of the clause are "*exactly* what one would expect if incorporation were a goal of the Fourteenth Amendment."¹⁰² It would be equally fair to say that the text is exactly what one would expect if protecting sexual privacy, or freedom of contract, or the right to grow marijuana were a goal of the Fourteenth Amendment. To say that the text is consistent with incorporation is uninteresting, because the text is consistent with almost anything.

This poses a serious challenge to Amar's consent-based interpretive theory, for (even assuming that a majority of the population ratified the Fourteenth Amendment)¹⁰³ the ratifiers did not approve the debates in Congress. It is common knowledge that the ratification process did not focus on incorporation.¹⁰⁴ It seems

96. 32 U.S. (7 Pet.) 243 (1833). Barron, whose wharf lost its value when city construction projects deposited sediment in the harbor near the wharf, sued the city for taking his property in violation of the Fifth Amendment. The unanimous Court, per Chief Justice Marshall, held that the Bill of Rights limited only the exercise of the powers delegated to the United States, and not the exercise of powers reserved by the states.

97. Amar, *Fourteenth Amendment*, *supra* note 19, at 1198-1218.

98. *Id.* at 1218-33.

99. *Id.* at 1233-46.

100. *Id.* at 1246-54.

101. *Id.* at 1254-60.

102. *Id.* at 1220 (emphasis added).

103. On the irregularity of the Fourteenth Amendment's ratification process, see Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 500-03 (1989).

104. Amar does not suggest that incorporation was affirmatively endorsed by anyone during the ratification process; rather he draws an inference of consent from silence. See Amar, *Fourteenth Amendment*, *supra* note 19, at 1249-51. On the absence of discussion

dubious to suppose that the ratifying polity understood the clause at a level of particularity that specified the criminal procedure guarantees. As Amar concedes, "many informed men simply were not thinking carefully about the words of Section One at all."¹⁰⁵ Those who did think carefully about the words of Section One must have realized that reasonable people could read its language in very different ways.

The second internal problem with Amar's incorporation theory concerns his reliance on the abolitionist opposition to *Barron v. Baltimore*. Amar argues that Representative Bingham, the progenitor of the privileges-or-immunities language, believed that prior to the Fourteenth Amendment, the Bill of Rights bound the states in theory but not in fact.¹⁰⁶ The Amendment supplied the remedy, not the rights; indeed Section One created no new rights at all.¹⁰⁷

The text of the Amendment, however, does not define privileges or immunities. The Privileges-or-Immunities Clause may be based on the assumption that *Barron* was wrong, but the clause does not declare that assumption. On Bingham's theory, the content of the clause depends on the antebellum constitution, which the Amendment by definition could not change. The argument for incorporation

of incorporation during the ratification process, see Fairman, *supra* note 89, at 81-132.

105. Amar, *Fourteenth Amendment*, *supra* note 19, at 1250 (footnote omitted). I think Amar is quite right in his response to Fairman's emphasis on ratification by states abandoning grand jury review. Under prevailing legal opinion, the Due Process Clause required grand jury review. What this implies is indeed that voters were thinking about Section One at a higher level of generality than specific aspects of criminal procedure.

106. Amar, *Fourteenth Amendment*, *supra* note 19, at 1233-36.

107. See Aynes, *supra* note 90, at 71-74. For example, in the debates on the first version of the amendment reported out of the Joint Committee in February, 1866, Bingham discussed *Barron*, but (erroneously) characterized *Barron* as holding that although the Fifth Amendment applies to the states, there was no power to enforce it in the federal government. Thus the amendment would "take from the States no rights that belong to the States." CONG. GLOBE, 39th Cong., 1st Sess. 1090 (Feb. 28, 1866) (statement of Rep. Bingham). The Bill of Rights had been "in the past five years in eleven states, a mere dead letter." *Id.* It was "absolutely essential to the safety of the people that it should be enforced." *Id.*

Bingham reiterated these views in defending the amendment that ultimately would become law:

Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy.

CONG. GLOBE, 39th Cong., 1st Sess. 2542 (May 10, 1866) (statement of Rep. Bingham).

based on abolitionist arguments about the meaning of the antebellum Constitution therefore contains the seeds of its own destruction.

What did (and does) the Privileges-or-Immunities Clause mean for someone who believed (or believes) that *Barron* was *rightly* decided? It would mean that the clause creates no new rights and imposes no new limits on the states; it would only empower Congress to enforce such things as the antebellum Constitution's ban on state *ex post facto* laws. In other words, Bingham supposed that the Bill applied to the states, not that the amendment changed the law to make the Bill apply to the states. A good lawyer who rejected Bingham's view of *Barron* could have read Bingham's speech and voted for the amendment in confidence that the Privileges-or-Immunities Clause could incorporate the Bill of Rights only if the courts, for reasons independent of the Amendment, overruled *Barron*.¹⁰⁸ The focus on congressional enforcement in the debates suggests the absence of any expectation that such a change would come over the courts.

On Bingham's theory, the Due Process and Equal Protection Clauses would not be redundant with the Privileges-or-Immunities Clause.¹⁰⁹ If the courts overruled *Barron* then indeed the Due Process Clause would be redundant, but that event was contingent in 1866 and in fact never occurred. The Equal Protection and Due Process Clauses conferred new powers on both courts and Congress. Even if *Barron* remained the law, these clauses, coupled with Section Five, gave Congress power to adopt the Civil Rights Act. Due process was too important to trust to luck; but the rest of the Bill could be applied by the courts to the states only if the courts decided that *Barron* had been wrongly decided in 1833.

Thus the incorporation theory predicated on the abolitionist argument that slavery violated the antebellum Constitution falls short of its goal because the abolitionist argument was erroneous and could

108. This point was noted by incorporation proponent Alfred Avins. See Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1, 14-15 (1968).

109. Professor Amar, *Fourteenth Amendment*, *supra* note 19, at 1224-25, suggests that the Due Process Clause was not redundant with the Privileges-or-Immunities Clause because the former protects "persons," including aliens, rather than "citizens." This argument, however, creates a textual embarrassment for his incorporation theory, because the Bill of Rights provisions refer to persons, rather than to citizens. Why would the framers of the Fourteenth Amendment, supposedly venerated of the Bill, not apply to aliens what the Bill applied to "persons"—namely, the Double Jeopardy Clause and the self-incrimination privilege?

not be made retroactively accurate. The amendment might have adopted abolitionist theory for the future; it could have done with the other clauses in the Bill what it did with the Due Process Clause. But it did not, leaving the courts free to adhere to *Barron* and thus to deny that the privileges or immunities of United States citizens include freedom from state interference with rights protected by the Bill against the federal government.

No one in Congress expected the courts to play the primary role in enforcing the Fourteenth Amendment. It is true that the House rejected a prior version framed as a pure grant of legislative power,¹¹⁰ and that the version finally adopted is facially self-executing. But unlike due process and equal protection, on Bingham's declaratory theory, the Privileges-or-Immunities Clause derives its meaning from the antebellum Constitution. Should the courts change their position and agree with Bingham that *Barron* had been wrongly decided, the courts could indeed act on the Privileges-or-Immunities Clause. But if they made that change, they could act directly against the states on the basis of the first eight amendments.¹¹¹

In fact, a unanimous Supreme Court in *Twitchell v. Commonwealth*¹¹² reaffirmed *Barron* as soon as the ink was dry on the Fourteenth Amendment. Twitchell was tried for murder after the Amendment came into effect.¹¹³ After his conviction, he sought a writ of error from the Supreme Court on the ground that his indictment, by not specifying the method of causing the victim's death, violated his Sixth Amendment right to be informed of the charge against him. The Supreme Court, after oral argument but apparently without briefing, dismissed the petition for the writ of error. In a terse opinion, the Court quoted extensively from *Barron v. Baltimore* to support the proposition that the Sixth Amendment did not apply to the states.¹¹⁴

110. See, e.g., NELSON, *supra* note 89, at 50-57.

111. In debates on the Thirteenth Amendment, Charles Sumner defended the theory that the antebellum Constitution applied the Bill of Rights to the states. His speech sheds some light on a question that Bingham did not address—the role of the courts. Sumner, consistent with the theory that the Bill of Rights always had applied to the states but that Congress had been delegated no enforcement power, asserted that the courts could abandon *Barron* and enforce the Fifth Amendment Due Process Clause against the states. See CONG. GLOBE, 38th Cong., 1st Sess. 1479-83 (1864) (statement of Sen. Sumner).

112. 74 U.S. 321 (1869).

113. The indictment was filed in December, 1868. See *id.* at 322. The amendment was declared effective by Congress and by the Secretary of State in the previous July. See 3 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW 679 (1986).

114. See *Twitchell*, 74 U.S. at 325-26.

Now maybe all that was going on in *Twitchell* was gross negligence by defense counsel, who failed to rely specifically on the Fourteenth Amendment. Still, *Twitchell* was a capital case, heard but six days prior to the day fixed for execution. Suppose, as the modern incorporationists hold, that among Republicans generally the antebellum Constitution was thought to extend the Bill of Rights to the states and that the Fourteenth Amendment was only declaratory of *Barron's* error. Would a unanimous Court then rely on *Barron* at all, let alone to execute a man whose lawyer failed to plead the right amendment? Would the Court do that without at least bringing the case up for full briefing and argument? This seems most unlikely, especially given that the *Twitchell* Court included Justice Swayne and Justice Field, both of whom would later dissent in *Slaughter-House*.

Amar explains *Twitchell* as judicial incompetence, pure and simple. Because *Twitchell* did invoke the Fifth Amendment Due Process Clause, and the Fourteenth Amendment on its face applies due process to the states, he concludes that the Court's resolution of the case shows only that the justices didn't know what they were doing.¹¹⁵

On its face that is not a very convincing account. We should not presume incompetence from all nine justices, plus defense counsel, without exhausting other possible explanations. In fact, there is another explanation, not just plausible but quite convincing.

Twitchell's due process argument was derivative of his Sixth Amendment notice and Fifth Amendment presentment arguments. There are no briefs for the case in the Supreme Court archives, probably because the issue was whether to stay the imminent execution by bringing the case to the Court for full review on a writ of error. There was no time for preparing papers. We have only the oral argument as represented in the official report. According to that report, *Twitchell's* lawyer invoked due process only by claiming that the failure of Sixth Amendment notice made the conviction unconstitutional.¹¹⁶ The Sixth Amendment made the conviction a

115. Amar, *Fourteenth Amendment*, *supra* note 19, at 1255.

116. See *Twitchell*, 74 U.S. at 323-24:

Mr. Hubbell, in support of the motion, contended, that the act of the Pennsylvania Assembly was repugnant to the 5th and 6th Amendments of the Constitution—to the last especially—that under these the prisoner had a right to be informed, before the trial, by the indictment, and so of record, that the murder was alleged to have been brought about by some particular instrument . . . to be informed, in other words, of the specific nature of the accusation, so as that he might be enabled to prepare for a defence; whereas, here the indictment

nullity, so the death warrant was not authorized by a valid judgment and violated due process. If, however, the Sixth Amendment claim failed, the due process claim would also fail.

The Court, then, did not need to discuss *Twitchell's* due process claim. This was not, as Amar would have it, because the Justices didn't know that the Fourteenth Amendment contained a Due Process Clause, but because disposition of the Sixth Amendment claim defeated the due process theory. *Twitchell* was in fact indicted by grand jury and tried by a petit jury, so that a free-standing due process claim would have been weak under the law as it stood before *Hurtado*.¹¹⁷ According to the report of the argument and to the Court's opinion, *Twitchell's* counsel clearly emphasized the Sixth Amendment.¹¹⁸ The Justices actually heard the argument, an argument unavailable to us. We should assume that they decided the question they thought had been presented.

In short, *Twitchell* proves that, at least with respect to the Sixth Amendment criminal procedure guarantees, a unanimous Supreme Court thought *Barron* was good law immediately after the adoption of the Fourteenth Amendment. *Contra* Amar, the Court cannot be written off as ignorant of the Amendment's text, because Amar is wrong when he asserts that *Twitchell* raised a due process claim that

stated but the general nature of the accusation, namely, that the prisoner had murdered Mrs. Hill; that the provisions of the Pennsylvania statute had been copied from a late British statute, and had departed from the principles of the common law-principles not more considerate and humane than just;—which, nevertheless, under the Constitution of the United States, remained, and remaining, were secured to all men; that the court below erred in not deciding in accordance with the view here presented, and that the warrant of the Governor for the execution was, therefore, not a “due process” of law.

When *Twitchell's* lawyer invoked “the 5th and 6th Amendments” he claimed that the Pennsylvania practice violated the Fifth Amendment grand jury presentment requirement because the Commonwealth's practice departed from the common-law practice. He also claimed that, independent of the Fifth Amendment right to grand jury presentment, the failure to allege the manner of causing death failed to give notice of the charge as required by the Sixth Amendment. The only invocation of due process comes against the death warrant, not against the pleadings or the trial.

117. *Twitchell's* lawyer did indeed raise the argument that the failure to allege the manner of the killing departed from common-law practice in a way inconsistent with the grand jury presentment requirement of the Fifth Amendment. But unless there was a substantial failure to supply notice of the charge, such as would make out a Sixth Amendment violation, the presentment argument is simply an effort to slip through a legal loophole. That is probably why *Twitchell's* lawyer raised the presentment claim, but relied primarily on the Sixth Amendment notice claim.

118. See *Twitchell*, 74 U.S. at 323, 325.

was independent of his Sixth Amendment notice claim or his Fifth Amendment presentment claim.

Even if Twitchell had relied exclusively on the Fifth Amendment, the case would still furnish weighty evidence against Amar's declaratory theory. Twitchell's lawyer, whether by negligence or design, made precisely the argument that Bingham would have made—that the Fifth and Sixth Amendments apply directly to Pennsylvania, just as they always had, *Barron* notwithstanding. On Bingham's view, Twitchell's lawyer could pick and choose among the Fifth Amendment or the Fourteenth Amendment Due Process Clauses, for the Fifth Amendment clause applied to the states. A unanimous Court declined to depart from *Barron*, meaning that after the Fourteenth Amendment, just as before, the Bill of Rights didn't apply to the states. Given *Twitchell*, *Slaughter-House* is consistent with the declaratory theory; all the Privileges-or-Immunities Clause did was grant congressional enforcement power for preexisting federal rights against state governments.

Amar also relies on Senator Howard's sponsoring speech as evidence for the incorporation thesis.¹¹⁹ Howard did not expressly rely on Bingham's erroneous assumption about prior law. Rather, he treated the Privileges-or-Immunities Clause as a new grant of federal power, to both courts and legislators, to enforce fundamental rights against the states. These, he asserted, included, but were not limited to, "the personal rights guarantied and secured by the first eight amendments."¹²⁰ Unquestionably, Howard's speech endorses the modern incorporation theory.

Howard's speech, however, is not necessarily inconsistent with my claim that the courts need not enforce the grand jury requirement and the self-incrimination privilege against the states. Howard, citing *Corfield v. Coryell*,¹²¹ described the Privileges-or-Immunities Clause as protecting fundamental rights. These fundamental rights "are not and cannot be fully defined in their entire extent and precise nature."¹²² When Howard illustrated the Bill of Rights, he ticked off the First Amendment's speech, press, and petition clauses, the Second Amendment right to keep and bear arms, the Third Amendment's ban on quartering soldiers, the Fourth Amendment

119. See Amar, *Fourteenth Amendment*, *supra* note 19, at 1236-38. For the speech, see CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (statement of Sen. Howard).

120. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

121. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230).

122. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

(including a warrant requirement!), and the Sixth Amendment's vicinage requirement. Howard, however, left out the religion clauses, grand jury presentment, the privilege against self-incrimination, confrontation, compulsory process, counsel, and civil jury trial.

Admittedly, Howard's list purports to illustrate, not exhaust, the "personal rights" in the Bill. He did not, however, advert specifically to self-incrimination or to grand juries; and he thought of privileges-or-immunities generally as fundamental rights which could not be precisely defined. A ratifier could not have consented to the grand jury and self-incrimination provisions simply by reading the text of the amendment, nor even by reading a copy of Howard's speech, but only by cross-referencing Howard's speech with the Fifth Amendment.

If Amar insists that Howard's speech was consented to by the ratifiers, he himself has a serious problem with the particularity with which Howard expressed himself. Howard described the Fourth Amendment rights incorporated by the Fourteenth Amendment as "the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit[.]"¹²³ If Amar accepts Howard's representations at the level of particularity required by total incorporation, he is stuck with the Fourth Amendment warrant requirement he so vigorously criticizes.

I don't believe that Amar has that problem, because on his consent theory it seems highly probable that the ratifiers understood the Privileges-or-Immunities Clause at a much higher level of generality than Howard described. Any ratifier who did parse the congressional debates would have realized that Congress paid more attention to Section Three's disqualification provisions than to Section One, and that such attention as was given left serious doubts about the meaning of Section One. Bingham described it as a delegation of legislative power to enforce the antebellum Constitution. Howard described it as protecting fundamental rights and those in the Bill; and as both a delegation of enforcement power and as self-executing. Stevens apparently agreed with Bingham's declaratory view, and saw the amendment as a grant of power to Congress to force racial equality upon the states.¹²⁴ Other speakers characterized Section

123. *Id.*

124. The provisions in Section One

are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. The amendment supplied that defect, and allows Congress to correct

One as both securing the constitutionality of the civil rights and of insulating the protections of the act against repeal except by constitutional amendment.¹²⁵

Amar does not deal with an item in the debates that, given the spaciousness of the privileges-or-immunities language, supports an agnostic view of the clause's meaning as strongly as Howard's supports incorporation. At the close of debate in the Senate, Reverdy Johnson, a Democrat but an able lawyer,¹²⁶ expressed approval of the Due Process and Equal Protection Clauses, but thought it "quite objectionable to provide that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' simply because I do not understand what will be the effect of that."¹²⁷ Johnson had served on the Joint Committee on Reconstruction; Bingham, Stevens and Howard had all expressed themselves; and Johnson still didn't know what he was voting on. The rest of the country could hardly have been better informed.

The substitution of the information procedure for indictment by grand jury in the immediate aftermath of the amendment's adoption suggests that contemporary legislators and judges did not understand Section One as requiring total incorporation. A good lawyer in 1866 would have read the Due Process Clause as requiring grand jury presentment.¹²⁸ Several states, however, ratified the Amendment near the time they abandoned grand jury review.¹²⁹ In the one pre-*Slaughter-House* decision on this question, the Supreme Court of

the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.

CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens).

125. See *id.* at 2462 (statement of Rep. Garfield); *id.* at 2498 (May 9, 1866) (statement of Rep. Broomall); *id.* at 2511 (statement of Rep. Eliot); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* 347 (1985) ("Speaker after speaker proclaimed that it was this statute for which the fourteenth amendment would provide an unassailable constitutional base."); NELSON, *supra* note 89, at 115 ("At the very least, section one was understood to remove all doubts about the constitutionality of the 1866 Civil Rights Act and thus to give Congress legislative power in reference to basic rights of contract, property, and personal security.").

126. See, e.g., JAMES, *supra* note 89, at 45.

127. CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866) (statement of Sen. Johnson).

128. See *supra* notes 35-40 and accompanying text.

129. See Fairman, *supra* note 89, at 81-135; *id.* at 101 (Kansas abandoned grand jury presentment in 1868); *id.* at 110 (Wisconsin abandoned grand jury presentment in 1870); *id.* at 115-16 (Michigan abandoned grand jury presentment in 1859).

Wisconsin unanimously rejected the claim that the Fourteenth Amendment requires states to proceed by indictment.¹³⁰

When the issue reached the Supreme Court in the *Hurtado* case, eight Justices rejected the claim despite its historical support. Nor was the result in *Hurtado* foreclosed by the *Slaughter-House* decision, for *Hurtado* invoked the Due Process Clause rather than the Privileges-or-Immunities Clause.

The grand jury decisions reflect the conclusion that Section One of the Fourteenth Amendment speaks at a higher level of generality than particular modes of criminal procedure.¹³¹ Even if a good lawyer in 1866 could not have voted to ratify the Amendment without understanding that due process requires grand juries, the courts did not insist that the precise procedures required by due process in 1866 would be the precise procedures due process required forever. To argue that the ratifiers unwittingly imposed the grand jury on themselves because they adopted a constitutional amendment containing a code word for grand juries is to say that the people consented to a pig in a poke.

In criminal prosecutions under the Civil Rights Act, the lower federal courts divided over the incorporation question.¹³² These prosecutions were pursuant to congressional enactment, in the formerly rebellious states. That incorporation should be debatable

130. *Rowans v. State*, 30 Wis. 129, 148-50 (1872). The conviction was reversed, however, because the jurors were allowed to go home for the nights during the trial.

131. See Patricia Allen Lucie, *White Rights as a Model for Black: Or—Who's Afraid of the Privileges or Immunities Clause?*, 38 SYRACUSE L. REV. 859, 869 (1987) (congressional debates on Thirteenth and Fourteenth Amendments endorse the Bill of Rights "as a corollary of freedom" but do not suggest "concern with the details of the Bill of Rights"); *id.* at 871 ("I am content to let Charles Fairman's argument stand—that the debates both in Congress and in the ratifying conventions disclose no intention or awareness that the privileges or immunities clause would revolutionize state practices to harmonize them with specific provisions of the Bill of Rights.").

132. Compare *United States v. Hall*, 26 Fed. Cas. 79 (C.C.S.C. Ala. 1871) (No. 15,282) with *United States v. Crosby*, 25 Fed. Cas. 701 (C.C.D.S.C. 1871) (No. 14,893). In *Hall*, the court not only held that the Fourteenth Amendment incorporated the Bill of Rights, but that the Equal Protection Clause required the states to restrain private individuals from interfering with the exercise of privileges or immunities. "And as it would be unseemly for congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures." *Hall*, 26 F. Cas. at 81.

In *Crosby*, the court dismissed a count of an indictment under the Civil Rights Act for violating the victim's Fourth Amendment rights. See 25 F. Cas. at 704 ("The article in the Constitution of the United States, to enforce which this count is supposed to be drawn, has long been decided to be a mere restriction upon the United States itself.").

even in this context suggests that incorporation is not mandated by the original understanding.

Internally, then, Amar's argument depends on the ratifiers sharing the understanding of Bingham or Howard. If they accepted Bingham's views, they assumed the risk that the judges would not overrule *Barron*. If they relied on Howard, they consented to grand juries and the self-incrimination privilege only if they extended his understanding to the detailed level of the criminal procedure guarantees in the Bill, most of which were never mentioned even by Howard. Given the vagueness of the clause's language, the focus of the ratification process on other matters, and the Supreme Court's unanimous rejection of the contrarian argument for overruling *Barron*, this is pulling a large rabbit out of a small hat.

From a theoretical premise external to Amar's, one consonant with actual political practice, his thesis becomes indefensible. From a positivist or conventionalist standpoint, legal validity depends on consistency with conventionally recognized exclusionary reasons or authoritative considerations.¹³³ The justification for constraints of

133. The classic conventionalist account is H.L.A. Hart's version of legal positivism. According to Hart, a legal system is a union of primary rules directed at individuals generally, and secondary rules addressed to officials to take appropriate action in response to failures to observe the primary rules. H.L.A. HART, *THE CONCEPT OF LAW* 77-96 (1961). A legal system must include a master rule, however complex, that determines the validity of other legal rules; this rule of recognition itself rests only on sustained, politically effective acceptance. See *id.* at 113 ("[R]ules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.").

Hart's model has been attacked on many fronts, some important but none fatal. For some of the more important objections, see DAVID LYONS, *ETHICS AND THE RULE OF LAW* 54-60 (1984) (arguing that many nonlegal institutions combine primary and secondary rules; law must be distinguished from them either by social function or by moral value); NEIL MACCORMICK, H.L.A. HART 108-11 (1981) (stating that Hart's theory of secondary rules presupposes rule of recognition, while rule of recognition presupposes secondary rules); PHILIP SOPER, *A THEORY OF LAW* 30-31 (1984) (finding that Hart's model is inconsistent because its "descriptions of a society's rules of obligation on the one hand and of the official acceptance of legal rules on the other differ markedly").

The most prominent objection to Hart's model comes from Ronald Dworkin, who argues that judges neither should nor do analyze legal problems in two stages, the first totally controlled by authority and the second, when authority leaves discretion, wholly uncontrolled by authority. See RONALD DWORKIN, *LAW'S EMPIRE* 114-50 (1986) (Ch. Four). Whatever the merits of Dworkin's objection as a theoretical matter, I think that in American practice, especially constitutional practice, the rule of recognition incorporates the moral elements of legal reasoning that Dworkin emphasizes. As Hart puts it, in his posthumous reply to Dworkin, "[d]escription may still be description, even when what is described is an evaluation." H.L.A. HART, *THE CONCEPT OF LAW* 244 (2d ed. 1994); cf. David Lyons, *Principles, Positivism, and Legal Theory*, 87 *YALE L.J.* 415, 424 (1977) (reviewing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977)); Philip Soper, *Legal*

any sort is simple: Constraints on decision promote justice indirectly.¹³⁴ The case for conventionally recognized constraints over unconventional constraints is equally easy: constraints that can be reinvented at will fail to constrain, and so the object of justice will less likely be achieved.

Even in an odious regime with many unjust laws, we would still object to judges disregarding conventional constraints on their authority absent very strong countervailing obligations. We would, for instance, properly criticize a Nazi judge who applied the wrong statute of limitations to a tort claim by one "Aryan" against another, even though Jews could not sue "Aryans" at all.

But of course the case for conventionalism is stronger, when, as in the United States, the contribution of conventional authorities is not exhausted by their formal character. If you agree that the conventional practice of American constitutionalism promotes justice either (or more likely both) because of the need for formal constraints on official power or because the specific conventions that have taken root in America promote the sort of liberal democracy that seems to be the best form of government yet devised, then you have reason enough to say that conventional validity deserves normative respect. The Justices themselves are in no position to question this account, for their practical power depends upon its acceptance by the country.¹³⁵

Theory and the Obligation of the Judge: The Hart/Dworkin Dispute, 75 MICH. L. REV. 473 (1977): -

134. As Larry Alexander puts it:

For example, no one may believe that the Constitution is an ideal set of authoritative rules in terms of his or her own political/moral principles. But everyone may believe that the Constitution is, in terms of those same principles, the best set of authoritative rules that it is possible to get everyone, or enough others, to accept as authoritative. Thus, in the real, imperfect world, the Constitution may be ideal.

Larry Alexander, *The Constitution as Law*, in 6 CONSTIT. COMMENTARY 103, 109 (1989).

135. This is why, for instance, Gary Lawson's argument against constitutional precedent is unpersuasive. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994). If the Justices themselves owe no fidelity to decisions of the Supreme Court, why should anyone accept a Supreme Court decision with which he or she disagrees as a matter of unconstrained moral reasoning? Judge Bork had it exactly right in 1971: The idea of constitutional adjudication cut loose from text and history, predicated on unconstrained moral arguments, invites the losing party to appeal to the Joint Chiefs of Staff—"a body with rather better means for implementing its decisions." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971). Bork, of course, has the same problem: why, on his rigid interpretivist account, shouldn't those who disagree with the framers direct their appeals to the Joint Chiefs?

But on a conventional account the connection between obligation and adjudication is secured. All recognize that the existing rule of recognition varies from each individual's

Convention clearly privileges text and history as considerations in constitutional decisionmaking, but it is equally clear that text and history are not the *only* permissible considerations. Precedent, prudence, representation reinforcement, and unconstrained ideas of good policy all have played their role in American constitutional practice. From a conventional point of view, the case against total incorporation under the Privileges-or-Immunities Clause emphasizes the scope of judicial power privileges-or-immunities litigation would confer; the unbroken line of precedent nullifying the clause on precisely this ground; and the apprehension that at least some of the Bill of Rights criminal procedure provisions are perverse anachronisms.

The language of the Privileges-or-Immunities Clause is so vague that it confers enormous discretion on the courts. Justice Miller wrote *Slaughter-House* with this concern in mind. Miller feared a "perpetual censorship"¹³⁶ of state legislation if the Court embraced a broad interpretation of the clause. *Lochner* was the logical legacy of Field's dissent, and the realization of Miller's fear. John Hart Ely,¹³⁷ Philip Kurland,¹³⁸ Herbert Wechsler,¹³⁹ Robert Bork,¹⁴⁰ David

vision of ideal justice. All recognize that the existing rule of recognition is better than what would likely replace it. All who invoke its protection are bound by logical consistency to support it. And, while some private citizens might conceivably maintain a consistently agnostic attitude toward political authority, or distinguish a commitment to some of the system's rules but not to others, officials generally and justices in particular stand in neither posture. The justices claim obedience to the law *qua* law. See *Cooper v. Aaron*, 358 U.S. 1 (1957).

136. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1873).

137. See ELY, *supra* note 12, at 30 (stating that the clause is "a delegation to future constitutional decision-makers to protect rights that are not listed either in the Fourteenth Amendment or elsewhere in the document").

138. Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, in *ONE HUNDRED YEARS OF THE FOURTEENTH AMENDMENT: IMPLICATIONS FOR THE FUTURE* 26, 27 (Jules B. Gerard ed., 1973) ("With legislative history as a guide, the privileges or immunities clause took the form of a blank check.").

139. Herbert Wechsler, *Equal Protection Is a Double-Edged Sword*, in *ONE HUNDRED YEARS OF THE FOURTEENTH AMENDMENT: IMPLICATIONS FOR THE FUTURE* 39, 40 (Jules B. Gerard ed., 1973).

140. ROBERT BORK, *THE TEMPTING OF AMERICA* 37 (1990) ("Though some have complained bitterly about this, Miller was following a sound judicial instinct: to reject a construction of the new amendment that would leave the Court at large in the field of public policy without any guidelines other than the views of its members.").

Currie,¹⁴¹ and Richard Posner¹⁴² have all concluded that the clause is practically boundless.

Amar admits this is a concern. He suggests that the clause might function as an equality provision with respect to statutory and common-law rights,¹⁴³ and that the breadth of the textual language gives judges special reasons for caution. Yet he elsewhere admits that privileges or immunities include the private-law rights protected by the 1866 Civil Rights Act,¹⁴⁴ and the habeas corpus clause,¹⁴⁵ as well as the Bill of Rights. Any provision broad enough to include the right to transfer real estate, the right to own a firearm, and the right to have a contract action heard by a jury is as suspiciously broad as *Slaughter-House* is suspiciously narrow. If Justice Miller struggled mightily to find some right that the clause includes, Amar would have to struggle mightily to find some right that the clause excludes.

The search for a limiting interpretation drove the *Slaughter-House* majority to nullify the clause. This might be justifiable; given a boundless grant of federal power to supervise state legislation, it might be best to leave the exercise of that power to an accountable Congress. The assumption by those involved in adopting the amendment that Congress would have primary enforcement responsibility for the clause supports this result, even on purely intentionalist grounds.

If, however, the judicial nullification of the Privileges-or-Immunities Clause is rejected, incorporation does not necessarily follow. Privileges-or-immunities might refer to those rights that citizens of one state might claim in another under Article IV's Privileges-and-Immunities Clause. In the antebellum case of *Corfield v. Coryell*,¹⁴⁶ Justice Washington declared that the Article IV clause permitted some discrimination in favor of local citizens, but not with respect to "fundamental" rights. Thus the Fourteenth Amendment's Privileges-or-Immunities Clause might mean either that states must respect fundamental rights, or that states could not discriminate invidiously in the availability of those privileges or immunities state law extended

141. CURRIE, *supra* note 125, at 347. As Professor Currie puts it, the clause offers "the judicial holy grail . . . that lets us strike down any law we do not like." *Id.* (footnote omitted).

142. RICHARD A. POSNER, *OVERCOMING LAW* 246 (1995) (citing CURRIE, *supra* note 125, at 344-51).

143. Amar, *Fourteenth Amendment*, *supra* note 19, at 1231.

144. *Id.* at 1230.

145. *Id.* at 1228.

146. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230).

to white males. The convergence of these interpretations with the provisions of the 1866 Civil Rights Act reinforces their plausibility.

Amar's thesis differs slightly but significantly from these alternatives. In the 1860s and even today, either the fundamental rights approach or the equality approach would require most states to respect most of the personal liberties mentioned in the Bill of Rights. Under a fundamental rights approach, such items as freedom of speech and conscience, and security from arbitrary search and detention, qualify as privileges or immunities. Under an equality approach, state constitutions typically contain bills of rights highly similar to the Federal Constitution's.¹⁴⁷

At first blush the difference in theories may be slight, but it can have a great deal of significance. Under either the fundamental rights or the equality approach, states might depart from the federal Bill of Rights so long as they denied rights that were not fundamental on a nondiscriminatory basis. If a state abolished grand jury presentment in criminal cases for both white and black defendants, the state's practice offends Amar's interpretation, but not the fundamental rights or the equality interpretation.

Thus it is certainly possible, even if it is not desirable, to recognize a wider role for the clause than the *Slaughter-House* case recognized. In conventional terms, however, there is the further problem of *Slaughter-House* itself, and all the precedents reinforcing it. The Privileges-or-Immunities Clause, says that rigid interpretivist Robert Bork, is a "cadaver."¹⁴⁸ Even if *Slaughter-House* was wrong, prescription can convert an erroneous decision into a precedent worthy of content-independent respect.

Now Amar might reply that substantive due process is just privileges-or-immunities litigation in drag. Under the rubric of substantive due process, incorporation has become the conventionally recognized norm. Civil jury trial and grand juries are, arguably, the outlying cases that demand special justification. This is a plausible argument, but ultimately not persuasive.

First, the argument overstates the scope of incorporation actually recognized in the cases. In state cases criminal juries need not be composed of twelve persons nor be unanimous, and they are not required at all in the substantial percentage of criminal cases heard in the juvenile courts. The Fourth Amendment, Confrontation Clause,

147. See NELSON, *supra* note 89, at 116-19; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1465 (1992).

148. BORK, *supra* note 140, at 180.

and Compulsory Process Clause cases all reach results that could just as easily be reached purely on due process grounds—searches must be “reasonable” and the rules of evidence must not undermine the reliability of the trial. The grand jury and civil jury requirements are affirmatively not incorporated. So it would not be fair to characterize the current corpus of precedent as implicitly requiring incorporation.

Second, if substantive due process is legitimate because the *Slaughter-House* case erroneously rejected the fundamental-rights interpretation of the Privileges-or-Immunities Clause, total incorporation doesn’t follow because the fundamental-rights approach doesn’t require total incorporation. Special justification for refusing to incorporate the grand jury requirement or the self-incrimination clause is easy enough to establish.¹⁴⁹ In the grand jury context, in fact, that justification is so easy to establish that the Court has refused to incorporate the grand jury requirement despite clear evidence that “due process”—let alone privileges-or-immunities—was understood to require grand juries in 1866.

From a conventional point of view, Justice Reed’s reply to Justice Black in *Adamson v. California* is as cogent today as it was in 1947:

After declaring that state and national citizenship coexist in the same person, the Fourteenth Amendment forbids a state from abridging the privileges and immunities of citizens of the United States. As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading of the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship. It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as

149. See, e.g., David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 U.C.L.A. L. REV. 1063 (1986); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).

a functioning element in preserving the balance between national and state power.¹⁵⁰

Even considering text and history in isolation, the Privileges-or-Immunities Clause cannot justify incorporating the Bill's criminal procedure provisions. On the theoretically far more plausible premise of legal conventionalism, the incorporation thesis is simply unreasonable. In predicating constitutional criminal procedure on Fourteenth Amendment incorporation, Amar crafts a constitutional design that is at once illegitimate, and, as the experience of the Warren Court suggests, unwise.

II. THE FOURTH AND FIFTH AMENDMENTS

Amar's commitment to incorporation plays itself out in his treatments of the Fourth and Fifth Amendments. That commitment leads him to characterize the Supreme Court's search-and-seizure jurisprudence as ahistorical and incoherent, when in fact the cases can only be understood by recognizing the difference incorporation made. Amar characterizes the federal model of search-and-seizure law, based on the exclusionary rule, the warrant requirement, and probable cause, as "*Lochner's* legacy."¹⁵¹ But the Justices crafted the federal

150. *Adamson v. California*, 332 U.S. 46, 52-53 (1947) (citations omitted).

151. See Amar, *Fourth Amendment*, *supra* note 15, at 785-91. Amar then drops a footnote to Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987), but all that Amar borrows from Sunstein is alliteration. On Sunstein's view, the decline of *Lochner* expresses skepticism about the inevitability and/or the desirability of defining the constitutional *status quo ante* according to common law rules. On Amar's view, the appropriate baseline for Fourth Amendment analysis is the common law of torts. See Amar, *Fourth Amendment*, *supra* note 15, at 801-04 (discussing "*Common-Sense (Tort) Reasonableness*" as test of Fourth Amendment rights); *id.* at 813 ("Strict entity liability in the twentieth century makes perfect sense as the substitute for—indeed, the exact equivalent of—strict officer liability in the eighteenth century."). Professor Sunstein is quite careful to say that aspects of *Lochner's* concern for common law baselines are possibly wise and certainly too deeply embedded in our legal system to extirpate. See Sunstein, *supra*, at 915-17. But it is odd of Amar, who places such a premium on founding-era common law practice, to invoke the Sunstein lecture.

Amar continues:

Boyd and its immediate progeny involved corporate and regulatory offenses, rather than violent crime. These cases took root in a judicial era that we now know by the name *Lochner*, and the spirit inspiring *Boyd* and its progeny was indeed akin to *Lochner's* spirit: a person has a right to his property, and it is unreasonable to use his property against him in a criminal proceeding.

Amar, *Fourth Amendment*, *supra* note 15, at 788 (citation omitted). Arguably Amar means that only the early exclusionary rule cases dovetail with *Lochner*, but in fact the early exclusionary rule cases—*Weeks*, *Silverthorne*, and *Agnello*—all recognized a warrant requirement. See *Agnello v. United States*, 269 U.S. 20, 32 (1925) ("While the question has never been directly decided by this court, it has always been assumed that one's house

model on the explicit assumption that it would not apply to the states (as substantive due process clearly did, e.g., *Lochner*). And the federal model collapsed not because the Justices at last realized its inherent defects, but because *Mapp v. Ohio*¹⁵² brought the model into contact with the wide variety of searches and seizures practiced by state government.

This failure to place adequate emphasis on federalism in Amar's historical account in turn infects his positive Fourth Amendment program. *Mapp* was a shock because, absent the exclusionary rule, constitutional limits on search and seizure had become impotent. If legislatures faced incentives to provide meaningful tort remedies, *Mapp* would have been neither necessary nor revolutionary. Professor Amar admits that his whole program stands or falls together,¹⁵³ so that absent the effective tort remedies he envisions, his approach should be rejected.

As for the Fifth Amendment, the incorporation assumption implies that there must be *some* rationale for the privilege against self-incrimination. Amar and Lettow rightly reject most of the pious apologies that are typically offered on behalf of the privilege,¹⁵⁴ but then propose that the privilege is justified because it prevents the introduction of unreliable evidence against the accused.¹⁵⁵ This proposition is dubious standing alone, but the authors gloss it with the yet more doubtful corollary that physical fruits of compelled

cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein.") (citing *Boyd, Weeks, Silverthorne*, and *Gouled v. United States*, 255 U.S. 298 (1921)); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 390 (1920) (holding search illegal because made "without a shadow of authority"); *Weeks v. United States*, 232 U.S. 383, 390-91 (1914) (rejecting the use of evidence seized from defendant's house with no arrest or search warrant). As Amar recognizes, the probable cause standard is the "yoked mate" of the warrant requirement. Amar, *Fourth Amendment*, *supra* note 15, at 782.

Thus, the cases establishing the federal model all recognize the warrant and probable cause requirements. They cannot fairly be equated with *Lochner*, for they did not apply to the states. In any event, the federal model was not exclusively concerned with business crimes. In *Weeks* the seized papers related to illegal gambling; in *Agnello* the suppressed evidence was cocaine.

152. 367 U.S. 643 (1961).

153. Amar, *Fourth Amendment*, *supra* note 15, at 759 (defending "package . . . taken as a whole"); *id.* at 761 n.5 ("I emphasize that my package of criticisms and alternatives is offered as a whole.").

154. Amar & Lettow, *Fifth Amendment*, *supra* note 16, at 889-95. I quite agree with Amar's objections to the usual justifications for the privilege. See Dripps, *supra* note 94, at 711-18.

155. Amar & Lettow, *Fifth Amendment*, *supra* note 16, at 900-01.

testimony should be admissible because they are more reliable than testimony.¹⁵⁶

Reason leads Amar and Lettow to the brink of a heresy against constitutional faith—that the Constitution might include a thoroughgoing mistake that cannot be saved even by the cleverest interpretation. But they will not take the final plunge, and offer instead an interpretation of the privilege so narrow that it would undo most of the good the privilege does, without much mitigating its ill effects on the search for truth.

Those not committed to the incorporation theory can bring themselves to a more sensible conclusion. The privilege is a mistake and should be repealed. Until repeal, the privilege plainly limits the federal government, and as against that sovereign should be read at least broadly enough to prevent the historic abuses that inspired it. But the privilege is not binding on the states by anything more substantial than the *ipse dixit* of *Malloy v. Hogan*.¹⁵⁷ One important advantage of *Slaughter-House* and *Hurtado* lies in their ability to permit the states to compel self-incrimination through lawful process.

Amar's thought thus tracks the experience of the Warren Court in an interesting way. Insisting on incorporation, he underestimates how eighty years of nonincorporation influenced criminal procedure doctrine. He then concludes that the Bill of Rights imposes only modest restraints on government, whether state or federal. Attention is deflected from due process, at the very time that narrow interpretations of the Bill of Rights leave the Due Process Clause with much important work to do. In taking the incorporation approach to constitutional criminal procedure, Professor Amar travels down an old road, in the wrong direction.

A. *The Fourth Amendment*

1. The Rise and Fall of the Federal Model of the Fourth Amendment

One consequence of Amar's devotion to incorporation is that he gives too little weight to the relation between the state and federal cases that came to the Supreme Court during the period separating *Boyd* and *Mapp*. As a result, his understanding of what the Court has done in the Fourth Amendment cases is ironically ahistorical.

156. *Id.* at 911-19.

157. 378 U.S. 1 (1964).

Whether or not the incorporation thesis is correct on the merits, Amar's commitment to incorporation leads to misunderstanding the case law.

To read Amar, you would think that in the late 1960s and early 1970s the gross error of *Boyd v. United States* finally collapsed of its own weight. Then, at last, the exclusionary rule and the warrant and probable cause requirements began to be seen for what they are—pure inventions by thoughtless, *Lochner*-era Justices.¹⁵⁸ Stripped of its Fifth Amendment pretensions, the exclusionary rule was exposed as an irrational and illegitimate remedy; the “warrant requirement” sank into a quicksand of exceptions; and probable cause gave way to a balancing test that looked to reasonableness.

All these things happened, but they did not happen because the old model of the Fourth Amendment was finally recognized as a fraud. Rather, the warrant/probable cause/exclusionary rule model was born because the birth of modern police forces coincided with the decline of tort remedies for trespass and false arrest. That model fell apart because the Supreme Court extended the exclusionary rule to the states in 1961. Begin, then, with the advent of the distinctively federal law of search and seizure as it arose in the years that span the gap between *Boyd* and *Mapp*.

Initially, the Supreme Court did not interpret *Boyd* to require suppression of illegally-seized evidence. In *Adams v. New York*, police searched the defendant's office pursuant to a warrant and seized illegal “policy slips,” or lottery tickets.¹⁵⁹ They also seized letters, which were used at the trial both as handwriting exemplars and as admissions of ownership of the policy slips.¹⁶⁰ The Court without dissent held that *Boyd* did not require exclusion of illegally seized evidence,¹⁶¹ and so it was not necessary to determine whether the Fourteenth Amendment incorporated the Fourth.¹⁶²

158. See Amar, *Fourth Amendment*, *supra* note 15, at 787 (“The confusion began with the Supreme Court's landmark 1886 case, *Boyd v. United States*.”) (footnote omitted); *id.* at 791 (*Boyd* theory of Fourth/Fifth amendment fusion is “*Lochner*-era property-fetishism, dressed up as a textual argument”); Amar & Lettow, *Fifth Amendment*, *supra* note 16, at 916 (*Boyd* was “the godfather of *Counselman*”); *id.* at 927-928 (indicating that *Schmerber*, *Kastigar*, and inevitable discovery doctrine presage use-only immunity defended by Amar & Lettow).

159. 192 U.S. 585, 586-88 (1904).

160. *Id.* at 594.

161. *Id.* at 598. Note that in admitting this evidence, the Court seemed to think it significant that the original “invasion of the sanctity of the home” was *not* unlawful. *Id.*

162. *Id.* at 594.

In the ground-breaking *Weeks* decision, the defendant's home was searched twice following his arrest, once by local police and once by local police accompanied by the U.S. Marshal.¹⁶³ Justice Day once again wrote for a unanimous Court, but this time held that the defendant's pretrial motion for the return of his property—the papers showing his guilt of the crime charged—should have been granted, with the practical effect (given the *Boyd* limit on the subpoena power) of suppression.¹⁶⁴ *Adams* was distinguished, unconvincingly, on procedural grounds; an objection at trial was unseasonable, while a pretrial motion for return of property was timely.¹⁶⁵ The *Weeks* Court also noted that in *Adams* the police had a warrant;¹⁶⁶ but if the evidence in *Adams* were untainted the Court could have avoided both the exclusionary rule issue and the incorporation issue.¹⁶⁷

There is another, better explanation for the flip-flop than those given by the *Weeks* Court. *Adams* was a state case, in which the defendant claimed that the Fourteenth Amendment applied the Fourth to the states. Reversing the conviction would have imposed the exclusionary rule on the states, a step that the Court would not take for another fifty-seven years. In *Weeks*, the Court carefully distinguished the evidence seized by the local police in the initial search from the evidence seized later by the U.S. Marshal. Only the latter had to be returned, "as the Fourth Amendment is not directed to individual misconduct of [state] officials. Its limitations reach the Federal Government and its agencies."¹⁶⁸

Thus the *Weeks* Court answered the incorporation issue reserved in *Adams* in the negative; the Fourth Amendment holding of *Adams* was effectively overruled. That result should not occasion much surprise. As *Wolf v. Colorado*¹⁶⁹ suggests, reasonable Justices might well "stoutly adhere" to the exclusion of tainted evidence in federal cases without imposing the exclusionary rule on the states. The dual holding in *Weeks*—that suppression was required but that the Fourth Amendment did not bind the states—laid the foundation for the federal model.

163. *Weeks v. United States*, 232 U.S. 383, 386 (1914).

164. *Id.* at 398.

165. *Id.* at 396.

166. *Id.*

167. On the basic incompatibility of *Adams* and *Weeks*, see *Flagg v. United States*, 233 F. 481, 486-87 (2d Cir. 1916) (Veeder, J., concurring).

168. *Weeks*, 232 U.S. at 398 (citing *Boyd* and *Twining v. New Jersey*, 211 U.S. 78 (1908)).

169. 338 U.S. 25, 28 (1949).

After *Weeks*, the Court could consider federal law enforcement apart from its vastly larger and more unruly state counterpart. In the next major case, *Silverthorne Lumber Co. v. United States*,¹⁷⁰ the Court, per Justice Holmes, rejected a self-incrimination or property theory of the exclusionary rule in favor of denunciation and deterrence.

After an illegal search of the company's premises, federal agents seized its books and papers. The company's timely motion for return was granted. But the government then issued a subpoena for the books and records previously seized illegally—a subpoena which could not be resisted under *Boyd* because corporate bodies did not enjoy the privilege against self-incrimination.¹⁷¹

The government pressed the claim that the *Weeks* remedy was just another facet of *Boyd*'s interpretation of the Fifth Amendment, but Holmes wrote that this approach "reduces the *Fourth Amendment* to a form of words."¹⁷² The Fourth-Fifth fusion theory of the exclusionary rule was not dead; it would soon reappear with baleful consequences. *Silverthorne* makes quite clear, however, that the federal model did not depend solely on self-incrimination. At the very least, *Silverthorne* committed the authority of Holmes to the proposition that deterring and/or denouncing Fourth Amendment violations justifies the exclusionary rule, independently of rights to property or against self-incrimination.¹⁷³

Adams, *Weeks*, and *Silverthorne* involved the seizure of private papers of the sort that *Boyd* had declared immune from compelled production via subpoena. The return of property theory worked well enough for papers; it was not at all clear how the theory would work with physical evidence. Physical evidence lacks any of the communicative features of private papers, and is frequently illegal to possess, so that no court could grant a motion for a return of the property. In the cases following *Silverthorne*, the Court closed the gap between papers and physical evidence, and in so doing revived the property and self-incrimination theories. In *Gouled v. United States*,¹⁷⁴ the Court held that entry obtained by the pretense of an undercover agent works an unreasonable search and that the fruits of that search

170. 251 U.S. 385 (1920).

171. *See Hale v. Henkel*, 201 U.S. 43 (1906).

172. *Silverthorne Lumber*, 251 U.S. at 392 (emphasis added) (citing *Weeks*).

173. "[T]he rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way." *Id.*

174. 255 U.S. 298, 305-06 (1921).

must be suppressed on self-incrimination grounds under *Boyd*, at least so long as private papers constituted the evidence seized. *Gouled* also revived the property theory, holding that "mere evidence," as distinct from contraband, could not be seized even under the authority of a warrant based on probable cause.¹⁷⁵

In *Agnello v. United States*,¹⁷⁶ the Court relied on the Fifth Amendment to suppress cocaine seized during a warrantless home search. Agnello maintained that the government had fabricated the story of finding the cocaine in his house; thus, he could not move for the return of property he claimed he did not own, and which under the law, he could not own. The return-of-property theory, and with it the purported distinction between the objection to trial evidence and a pretrial motion for return of property, therefore had to go. But it was unfortunate that the Court relied on the Fifth Amendment rather than a Fourth Amendment deterrence theory. The Fifth Amendment angle led the Court to the difficult conclusion that the *Boyd* rule extends to cocaine as well as to private papers,¹⁷⁷ and to the adoption of the standing doctrine that would come to do so much damage to the deterrent function of the exclusionary rule.¹⁷⁸

So the Court during the first third of this century adopted various accounts of the exclusionary rule. But there can be little doubt that deterrence on the one hand, and federalism on the other, explains the holdings in the cases.¹⁷⁹ Federalism explains why *Adams* is not *Weeks* and why *Weeks* reached and rejected the incorporation claim. Deterrence explains why the lumber company and the cocaine possessor can invoke the exclusionary rule. And the warrant requirement, which no justice questioned before *Mapp*, was simply assumed.

Why did the Supreme Court reject the settled common-law rule that tainted evidence is admissible? In the *Weeks* case, Justice Day casually noted that the common-law rule "has the sanction of so many

175. *Id.* at 309.

176. 269 U.S. 20 (1925).

177. *Id.* at 33-35.

178. *See id.* at 35 ("But the judgment against the other defendants may stand. The introduction of the evidence of the search and seizure did not transgress their constitutional rights.").

179. For alternative interpretations of the early cases, see Gerard V. Bradley, *Present at the Creation? A Critical Guide to Weeks v. United States and Its Progeny*, 30 ST. LOUIS U. L.J. 1031 (1986); Yale Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 590-97 (1983).

state cases that it would be impracticable to cite or refer to them in detail."¹⁸⁰ That could only be so if the tort suits assumed by the Fourth Amendment's framers were, for one reason or another, failing to deter violations. What was needed was a new remedy for an old wrong, and in *Weeks*, *Silverthorne*, and *Agnello* the Court fashioned that remedy.

Federalism, meanwhile, enabled the Court to insist on rigorous interpretations of the Fourth Amendment. The warrant requirement was taken with utmost seriousness, but the Supreme Court developed the requirement in the context of home or workplace invasions, and took it no further than that. Undercover agents could not obtain valid consent to search by deception; and mere evidence could not be seized at all. The federal model was so generous to the suspect that in the years following *Mapp* even the liberal Warren Court felt compelled to undo most of it.¹⁸¹

The unfortunate feedback from this rigorous model was that the Court in the *Olmstead* case adopted a narrow definition of "searches and seizures."¹⁸² Given *Gouled's* prohibition of exploiting the suspect's ignorance and of seizing mere evidence, equating eavesdropping with Fourth Amendment "searches" might have amounted to forbidding electronic surveillance altogether.¹⁸³ So the property-based conception of the amendment prevailed—but the self-incrimination approach distinctly did not. So long as private papers, correspondence included, were shielded from discovery under *Boyd*, private conversations would seem equally entitled to protection.¹⁸⁴

180. *Weeks v. United States*, 232 U.S. 383, 396 (1914).

181. See *Linkletter v. Walker*, 381 U.S. 618 (1965) (refusing to give *Mapp* retroactive effect; implicitly but conclusively rejecting Fifth Amendment rationale for exclusionary rule); *Hoffa v. United States*, 385 U.S. 293 (1966) (holding that conversations with spy after entry consented to without knowledge of informant's arrangement with authorities admissible); *Schmerber v. California*, 384 U.S. 757 (1966) (holding that Fifth Amendment privilege does not protect physical evidence); *Warden v. Hayden*, 387 U.S. 294 (1967) (holding that Fourth Amendment does not forbid searches for mere evidence).

182. 277 U.S. 438 (1928).

183. Statements made in furtherance of a conspiracy would not be mere evidence, but any retrospective reference to completed offenses would be mere evidence. And if one who admits a caller can suppress papers seized during a brief absence from the room, telephone users with no reason at all to suspect eavesdroppers could suppress recordings of their conversations. Thus the *Olmstead* majority wrote that "*Gouled v. United States* carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication and must be confined to the precise state of facts disclosed by the record." *Id.* at 463.

184. *Olmstead* is famous now chiefly for the eloquent dissenting opinions of Holmes and Brandeis—opinions that illustrate how justices with powerful intellects and consistent principles can indeed overcome the emotional reluctance to affirm civil liberty by releasing

Thus there was nothing terribly ahistorical about either the warrant requirement or the exclusionary rule. Just as Professor Amar believes that changes in technological circumstances inform constitutional interpretation, as with electronic surveillance,¹⁸⁵ so changes in the legal environment need to be taken into account. If the state tort actions that provided the traditional remedy for false arrest and trespass had become ineffective against modern police departments, the federal courts were duty-bound to find some effective substitute for the remedy the framers had presupposed.

To make this point concrete, suppose that in the late nineteenth century a state had passed a statute simply abolishing the common-law torts of trespass and false imprisonment. The statute would have priority over state common-law, so in this state federal officers simply could not be sued for violations of the Fourth Amendment. The only way for a federal court to prevent wholesale Fourth Amendment violations would be to: (1) create a constitutional tort remedy; or (2) declare the state statute unconstitutional; or (3) recognize the exclusionary rule. All of these responses would be innovative, but the exclusionary rule would really be no more so than the other two.

The warrant requirement, as such, first appears as dicta in an 1876 opinion by Justice Field.¹⁸⁶ But the warrant requirement for residential searches was not simply invented. The common-law trespass action was a strict liability affair.¹⁸⁷ A warrant was a

an acknowledged criminal. See *id.* at 470 ("We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.") (Holmes, J., dissenting); *id.* at 479 ("And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.") (Brandeis, J., dissenting).

185. See Amar, *Fourth Amendment*, *supra* note 15, at 798 ("Time-honored rules of trespass need to be supplemented to deal with new technology like wiretapping, as the Court held in *Katz*.") (footnote omitted). Professor Amar then goes on in the same passage to suggest corresponding modernization of legal remedies—confined to damage actions.

186. *Ex parte Jackson*, 96 U.S. 727, 733 (1876).

187. See 3 WILLIAM BLACKSTONE, COMMENTARIES *208-15.

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.

Entick v. Carrington, 19 Howell's St. Trials 1029, 1066 (C.P. 1765).

defense, but reasonableness was not.¹⁸⁸ Judge Cooley made the trespass-based warrant requirement explicit: "The *only* lawful mode of making search upon one's premises is under the command of search warrants"¹⁸⁹ Evidence of reasonableness was received in mitigation of damages only.¹⁹⁰ Amar is quite right that the function of search warrants was to cut off liability for trespass. He is wrong, however, when he asserts that "if the jury deemed the search or seizure unreasonable—and reasonableness was a classic jury question—the citizen plaintiff would win and the official would be obliged to pay (often heavy) damages."¹⁹¹ Amar is confusing trespass with negligence in a way that his sources do not.¹⁹²

188. Reasonableness might mitigate damages, but it would not negate liability. See 3 BLACKSTONE, *supra* note 187:

But the law of England . . . has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases) as an injury or wrong, for satisfaction of which an action of trespass will lie; but determines the *quantum* of that satisfaction, by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage sustained.

Id. at *209. As Judge Cooley put it, "Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it. Every one must be sure of his legal right when he invades the possession of another." *Cubit v. O'Dett*, 16 N.W. 679, 683 (Mich. 1883). Thus in *Wilkes v. Wood*, 19 Howell's St. Trials 1154 (C.P. 1763), the defense sought to prove that Wilkes was in fact guilty of criminal libel, but this was admissible on the question of damages, not on the question of liability. The Solicitor General argued to the jury that if Wilkes

should be proved to be the author of that paper, which he was confident he should be able to prove, to the full satisfaction of the court and jury; in that case, so far from thinking him worthy of exemplary damages, he was certain they would view him in his true and native colours, as a most vile and wicked incendiary, and a sower if dissention amongst his majesty's subjects.

Id. at 1159.

189. THOMAS COOLEY, *COOLEY ON TORTS* 295 (1880) (emphasis added).

190. See *Simpson v. McCaffrey*, 13 Ohio 509 (1844); *Sandford v. Nichols*, 13 Mass. 285 (1816).

191. Amar, *Fourth Amendment*, *supra* note 15, at 774 (footnote omitted).

192. Amar asserts that "[t]here is considerable evidence verifying the reasonableness role of the civil jury in search and seizure cases throughout the nineteenth century. Here I shall present only a smattering." *Id.* at 818 n.228. He then cites:

(a) Counsel's argument in *Simpson v. McCaffrey*, 13 Ohio 509, 517 (1844), for the proposition that "it is further a rule that the circumstances which would render a search reasonable are for the jury to judge." The court, however, did not adopt counsel's submission. The *Simpson* court reversed, but only because evidence showing reasonable suspicion was admissible in mitigation of damages only. *Id.* at 520-24;

(b) The dissenting opinion of Justice Woodbury in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). In *Luther*, the Supreme Court threw out a trespass action on political question grounds, because the justification claimed by the defendants was that they were acting under martial law, declared at a popular convention because of an attempt to replace the old state government. The dissenting opinion states only that a jury should award damages for home invasion "unless a justification is made out fully on correct

Now maybe Amar is saying that because reasonableness might reduce the jury's damage award to less than the cost of suit, the trespass action recognized a *de facto* reasonableness defense. But he himself heavily emphasizes the generosity of the jury awards in the *North Briton* affair and argues that the framers would have assumed that such damages would be available.¹⁹³ If the framers of the

principles," *id.* at 87 (Woodbury, J., dissenting), which in trespass would have required consent or a valid warrant. Woodbury continues to say that if the defendants committed trespass "from patriotism, and with proper decorum and humanity, the legislature will, on application, usually indemnify them by discharging from the public treasury the amount recovered for any injury to individual rights." *Id.* (Woodbury, J., dissenting). This is a dissenting opinion, in a case that arose from a virtual civil war, in which martial law had been declared; and yet all the opinion asserts is that reasonableness might be grounds for indemnification from the legislature. The plaintiff would still collect damages, but maybe the state, rather than the defendants, would pay them. *Id.* at 88 (Woodbury, J., dissenting);

(c) *Allen v. Colby*, 47 N.H. 544 (1867). The plaintiff sued the defendants for trespass to chattels, not for trespass to real property. *Id.* at 544-46. In *Allen*, the plaintiff, Allen, in 1862, was bent on evading the Civil War draft, and had packed his clothes for the purpose of fleeing to Canada. *Id.* The defendants, the sheriff and a deputy, went to the house of one Hawley to arrest Allen. But Allen had fled, leaving behind his clothes in a valise. *Id.* The sheriff seized the valise. After the war, Allen returned from Canada and demanded the return of his clothes, which Colby refused. Allen then sued. *Id.*

The court held that the "provision of the constitution against unreasonable searches and seizures cannot be understood to prohibit a search or seizure, made in attempting to execute a military order authorized by the constitution and a law of Congress, when the jury under correct instructions from the court, have found that the seizure was proper and reasonable, as they have in this case." *Id.* at 549. Amar omits the court's reference to the authorization of Congress and the military order. The court can be read as saying that these supply, at least in wartime, the positive legal justification that a search warrant would ordinarily provide. Alternatively, the court can be read as saying that the seizure of the valise was an appropriate step to effect Allen's *arrest*, for which of course no warrant would be required. Finally, it is worth noting that there was no home invasion. The court took pains to note:

The case does not find, and there is no evidence reported, from which it can be inferred, that the defendants broke into Hawley's house, or committed any other wrong in order to obtain possession of the plaintiff's valise and clothing. The authorities have, therefore, no application in which it has been held that property cannot be taken on a legal warrant, if possession of the property was first obtained by a wrongful act.

Id. There is thus no suggestion in *Allen* that even in wartime a jury would have discretion to award no damages for a warrantless home invasion;

(d) A 1908 jury instruction manual directing courts that officers do not need a warrant to *arrest*. 2 FREDERICK SACKETT, BRICKWOOD'S SACKETT ON INSTRUCTIONS TO JURIES § 2449(a) (3d ed. 1908). I fail to see how this is germane; the common-law authorized warrantless arrests of felons; the civil action for trespass was distinct from the action for false imprisonment.

193. Amar, *Fourth Amendment*, *supra* note 15, at 815 ("Presumed damages are especially appropriate in Fourth Amendment cases, given Lord Camden's explicit embrace of an award of 300 pounds to a journeyman printer.").

Fourth Amendment assumed that trespass actions would provide the remedy and that juries would award generous damages, then they intended a *de facto* warrant requirement for home searches as well. With the decline of the tort remedy, excluding the fruits of warrantless home searches became necessary to enforce that requirement.

The Court constructed this federal model of the Fourth Amendment in the fourteen years between *Weeks* and *Olmstead*. The model functioned without fundamental disagreement among the Justices for another thirty years, in marked contrast to the sharp divisions in the confessions cases. Because the substantive criminal vagrancy laws allowed the police to arrest for mere suspicion,¹⁹⁴ the search-incident-to-arrest exception exempted street encounters from the warrant requirement. Whatever regulatory inspections the federal government conducted did not provoke litigation. Thus the recurring government activities that would ultimately force the demise of the federal model after *Mapp* put no pressure on the prevailing Fourth Amendment paradigm.

Mapp suddenly made the federal model *practically*, as well as nominally, binding on state law enforcement, which is to say the real, day-to-day world of cops and robbers. Then and only then did constitutional standards matter to state and local police, thus making the demise of the federal model only a matter of time.

Given the fact that local police routinely engage in coercive street encounters, the federal model was living on borrowed time. The invalidation of the vagrancy ordinances made some accommodation between street encounters and the Fourth Amendment more urgent,¹⁹⁵ but even if the vagrancy laws remained valid the warrant requirement could not survive the application of the exclusionary rule to the states. For one thing, in many cases, even when the substantive criminal law conferred authority to arrest on suspicion, the arrest was often incident to a search of the person rather than the other way around. Even if a creative legal theory could have harmonized street encounters with the federal model, no theory however creative could harmonize that model with state and local building inspections.

194. See Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 614 (1956).

195. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), did not come until four years after *Terry*. But well before *Terry*, litigants had successfully challenged vagrancy ordinances on constitutional grounds. See *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 93-95 (1965); Annotation, 25 A.L.R.3d 792, 792-826 (1969) (collecting cases from lower courts).

In 1967, the Court dealt with the building inspection problem,¹⁹⁶ and in 1968 turned to street encounters.¹⁹⁷ In both contexts, the Court did what Professor Amar urges—reduce the Fourth Amendment analysis into an inquiry into reasonableness.¹⁹⁸ The *Terry* Court, however, recognized that the stop-and-frisk is a distinctive, recurring *category* of police behavior.¹⁹⁹ The Court gradually crafted a general standard of justification—what became known as the reasonable suspicion standard—for this category of police operations.²⁰⁰

In applying the *Camara/Terry* balancing test, the Court has consistently expressed hostility to official discretion.²⁰¹ Restraint and inquiry based on particularized suspicion, or pursuant to a mandatory general policy, are favored over random or discretionary intrusions. In a real sense the Court has come full circle from *Wolf*, for incorporation of the Fourth Amendment has meant no more than that government agents act reasonably, and the determinants of reasonableness resonate with due process rather than with any values peculiar to the restriction of searches and seizures.²⁰²

196. *Camara v. Municipal Court of S.F.*, 387 U.S. 523 (1967).

197. *Terry v. Ohio*, 392 U.S. 1 (1968).

198. In *Camara*, the Court reasoned that what must be probable is cause, not the actual presence of evidence; the rest was easy:

Having concluded that the area inspection is a 'reasonable' search of private property within the meaning of the Fourth Amendment, it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.

387 U.S. at 538. Similar reasoning prevailed in *Terry*:

But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

Terry, 392 U.S. at 20 (footnote omitted).

199. See *Terry*, 392 U.S. at 26-27.

200. See 3 WAYNE LAFAYE, *SEARCH AND SEIZURE* § 9.3 (2d ed. 1987). On the desirability of discrete categories of Fourth Amendment scrutiny, as distinct from case-by-case reasonableness analysis, see two Fourth Amendment classics—Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 387-91 (1974); Wayne LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters* and *Beyond*, 67 MICH. L. REV. 40, 56-59 (1968).

201. See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 454 (1990); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323-24 (1978).

202. Compare *Berger v. New York*, 388 U.S. 41 (1967) with *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995). In *Berger*, the Court, operating without the option of the *Terry* balancing test, struck down a New York statute authorizing court-ordered electronic

The treatment of the Fourth Amendment in the Supreme Court shows how fundamentally ahistorical Amar's Fourth Amendment analysis is. On his account, the exclusionary rule became an anachronism after *Schmerber* because the rule was rooted in the fusion of the Fourth and Fifth Amendments which was embraced by *Boyd* and by the Brandeis dissent in *Olmstead*.²⁰³ But *Mapp v. Ohio*,²⁰⁴ decided three years before *Malloy v. Hogan*,²⁰⁵ applied the Fifth Amendment privilege against self-incrimination to the states. Justice Black provided the fifth vote in *Mapp*, and relied on the self-incrimination theory.²⁰⁶ Potter Stewart, however, withheld his opinion on the exclusionary rule question because the issue was not properly before the Court, and supported the *Mapp* result on deterrence grounds.²⁰⁷ Moreover, the Court applied the exclusionary rule to the states in cases following *Mapp* but predating *Malloy*, which incorporated the privilege against self-incrimination. For example, an all-but-unanimous Supreme Court (per Justice Stewart) excluded tainted evidence in *Stoner v. California*.²⁰⁸

The Court did extend the Fifth Amendment privilege to the states in *Malloy*, decided in 1964. But it promptly held that *Mapp* would not be given retroactive effect—a result explicitly justified on deterrence grounds and inconsistent with the self-incrimination

surveillance because the statute did not require that an eavesdrop order "particularly describe" the conversations to be seized. *Berger*, 388 U.S. at 58-59. In *Acton*, the Court upheld mandatory drug testing, without particularized suspicion and without warrants, under the *Terry* balancing test. *Acton*, 115 S. Ct. at 2390-97. In *Berger* the focus on the warrant clause gave the Fourth Amendment distinctive content, *Berger*, 388 U.S. at 49-60; in *Acton* the result, and the reasoning, would have been the same under the Due Process Clause as under the reasonableness clause of the Fourth Amendment, see *Acton*, 115 S. Ct. at 2390-97.

203. See Amar, *Fourth Amendment*, *supra* note 15, at 787-91. Amar writes:

Property worship was of course once in vogue, but this aspect of the *Lochner* era was supposedly laid to rest in the 1930s. If a person's very blood can be forcibly taken and used against him because it is not "testimonial"—as Justice Brennan held for the modern Court in *Schmerber*—it is hard to understand why his bloody shirt is entitled to greater protection.

Id. at 788 (footnote omitted).

204. 367 U.S. 643, *reh'g denied*, 368 U.S. 871 (1961).

205. 378 U.S. 1 (1964).

206. *Id.* at 661-66 (Black, J., concurring).

207. *Id.* at 672 (Black, J., concurring).

208. 376 U.S. 483, 486-90 (1964). For a restatement of Justice Stewart's views, see Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1380-1404 (1983).

theory.²⁰⁹ So it seems quite clear that the exclusionary rule did not rest on the self-incrimination theory prior to *Schmerber*.

The central fact in the history of the Fourth Amendment in this century is that *Mapp* worked a revolution in local police operations,²¹⁰ just as the central fact of Fourth Amendment history in the nineteenth century is the rise of modern police forces and the corresponding atrophication of the tort remedy.²¹¹ If effective civil remedies carried the political appeal that would commend them to legislators, those remedies would have forced the police to comply with the Amendment in the days between *Wolf* and *Mapp*; *Mapp* would have discomfited the police but little. Without *Mapp*, *Boyd* might even now be the law, while *Hoffa*, *Robinson*, *Ross*, and *Belton* might not be. Without *Mapp*, there would have been no disingenuous judicial reaction against the exclusionary rule of the sort initiated by the Burger Court's decision in *Calandra*.

Those who recognize the pivotal significance of *Mapp* will understand how Fourth Amendment law has grown so complex. Rather than scrap the federal model, the Justices have sought to accommodate the old model to the imperatives of state law enforcement. To do this, they recognized discrete categories of police tactics that are wholly unregulated by the Fourth Amendment because they are not searches or seizures, discrete categories of police searches and seizures that require neither warrants nor probable cause and categories of acceptable uses for tainted evidence. All three of these

209. See *Linkletter v. Walker*, 381 U.S. 618, 637 (1965) ("The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved.").

210. See, e.g., Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 708-11 (1974) (illustrating impact of *Mapp* on police behavior with data on increase in search warrants obtained by police after the decision); Sam J. Ervin, Jr., *The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment*, 1983 SUP. CT. REV. 283, 293 (noting that "[b]efore the *Mapp* decision, search warrants were virtually unknown and unused writs in many states having no exclusionary rules of their own"); Yale Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L. REV. 436, 440-46 (1964) (describing police reactions to tighter enforcement of restrictions on their power); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 71-72 (1994) (describing changes in police procedures after *Mapp*).

New York City Police Commissioner Michael Murphy described the effect of *Mapp* as "dramatic and traumatic," and compared the Warren Court's criminal cases to "tidal waves and earthquakes." Michael J. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966).

211. See Carol Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830-38 (1994).

processes began with the Warren Court, but the Burger and Rehnquist Courts have carried them much further.

It is this proliferation of categories that gives Fourth Amendment law its chaotic appearance, while all that remains of the old model is that if police search a home or office without a warrant, any evidence they discover will be excluded from the government's case-in-chief at the trial of the search victim. Professor Amar is willing to bury this last remnant of the old model, but it is hard to see why. However confusing the Fourth Amendment is to lawyers, it is not terribly confusing to police officers.²¹²

The applicable law can be restated clearly enough:

- (1) Police need a warrant founded on probable cause, or probable cause and exigent circumstances that justify proceeding without a warrant, or consent, to search a home or office for evidence or for a nonresident they desire to arrest.²¹³
- (2) Police need an arrest warrant founded on probable cause to arrest a suspect at his home; they need probable cause, but no warrant, to arrest in public.²¹⁴
- (3) Police need probable cause, but no warrant, to search an automobile and any container within an automobile; the search, however, may not extend to areas where the suspected evidence could not be concealed.²¹⁵ Pursuant to an established policy, any impounded vehicle may be searched to inventory the contents, and containers in the car may be searched as well.²¹⁶
- (4) Incident to a lawful arrest, the police may, without probable cause or a warrant, search:

212. Police manuals manage to capture the essentials in remarkably few pages. See, e.g., RONALD CARLSON, *CRIMINAL JUSTICE PROCEDURE* 13-52 (3d ed. 1985) (covering arrest and search). The law has since then been made even simpler for police. For example, the *Acevedo* decision means that, outside a building, the only time the police need a warrant to search a container, such as a suitcase or a backpack, is when the container is in the possession of a pedestrian whom the police do not yet have probable cause to arrest. See *California v. Acevedo*, 500 U.S. 565, 569-81 (1991).

213. See *Arizona v. Hicks*, 480 U.S. 321, 323-29 (1987); *Steagald v. United States*, 451 U.S. 204, 208-23 (1981).

214. See *Payton v. New York*, 445 U.S. 573, 583-603 (1980); *United States v. Watson*, 423 U.S. 411, 414-25 (1976); 2 LAFAYE § 5.1(b), at 397-405, *supra* note 200.

215. *Acevedo*, 500 U.S. at 570-72; *United States v. Ross*, 456 U.S. 798, 809-17 (1982).

216. *Colorado v. Bertine*, 479 U.S. 367, 371-77 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 367-76 (1976).

- (a) the person of the suspect, including any clothing or containers in the suspect's possession;²¹⁷
 - (b) the passenger compartment of the car the suspect was in, if the arrest took place on the road;²¹⁸
 - (c) the immediate area, if the suspect was arrested indoors.²¹⁹
- (5) Without a warrant or probable cause, but with reasonable suspicion, the police may detain a pedestrian or a motorist for investigation,²²⁰ and, if specific facts suggest the suspect may be armed, the police may frisk the suspect to enable the investigation to proceed in safety.²²¹

So the warrant requirement is now pretty clearly confined to private premises.²²² While probable cause is not reducible to rules, "in the ordinary case the probable cause standard is likely to be fairly predictable to those who must apply it."²²³

The distinctions in the exclusionary rule cases *are* arbitrary,²²⁴ but that hardly calls for abandoning the exclusionary rule. The Court should modify the exclusionary rule cases by (a) eliminating or liberalizing the Fourth Amendment standing doctrine²²⁵ and by (b) replacing the current set of exceptions (good faith, impeachment,

217. *Gustafson v. Florida*, 414 U.S. 260, 263-66 (1973); *United States v. Robinson*, 414 U.S. 218, 224-35 (1973).

218. *New York v. Belton*, 453 U.S. 454, 457-62, *reh'g denied*, 453 U.S. 950 (1981).

219. *Chimel v. California*, 395 U.S. 752, 755-68, *reh'g denied*, 396 U.S. 869 (1969).

220. *Alabama v. White*, 496 U.S. 325, 328-32 (1990); *Terry v. Ohio*, 392 U.S. 1, 16-27 (1968).

221. *Adams v. Williams*, 407 U.S. 143, 145-49 (1972); *Sibron v. New York*, 392 U.S. 40, 59-68 (1968).

222. One can still construct a hypothetical case in which the warrant requirement applies outside private premises. Suppose the police have probable cause to believe that an innocent pedestrian messenger is carrying a parcel of cocaine. They have no probable cause to arrest, and, while *Acevedo* would permit a search of the parcel if the messenger boards a vehicle, so long as he does not the police might still need a warrant to search the parcel. But the scenario, while it will no doubt someday be litigated, is quite uncommon.

223. William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 897 (1991).

224. See, e.g., *United States v. Payner*, 447 U.S. 727, 731-37, *reh'g denied* 448 U.S. 911 (1980) (papers stolen by federal agents during burglary of accountant's hotel room admissible against taxpayer, who had no standing to invoke exclusionary rule); *United States v. Havens*, 446 U.S. 620, 624-29, *reh'g denied*, 448 U.S. 911 (1980) (tainted evidence admissible to impeach statements made by defendant but elicited by the government on cross-examination).

225. See *People v. Martin*, 290 P.2d 855, 858-59 (Cal. 1955); 5 WAYNE LAFAVE, SEARCH & SEIZURE § 11.3(h), at 212-19 (2d ed. 1987).

preliminary proceeding, etc.) with a single "probable lawful discovery" exception. Such an exception would admit illegally-obtained evidence, in any procedural context, if and only if the government proved by a preponderance of the evidence that the police would have obtained the evidence in compliance with Fourth Amendment standards, but for the violation.

Such an approach would rationalize the exclusionary rule cases. The rule would then do no more than restore the constitutional *status quo ante*, which would help to reduce the rhetorical disadvantage of relying on criminals as private attorneys general. It would come closer to a rational evaluation of the appropriate sanction than any plausible alternative.

Amar's alternative is a strong presumption of inevitable discovery, counting on legislatures and juries to set damages high enough to deter illegality. He asserts:

Given the almost metaphysical difficulties in knowing whether the bloody knife or some evidentiary substitute would have come to light anyway, should not the law strongly presume that somehow, some way, sometime, the truth would come out? Criminals get careless or cocky; conspirators rat; neighbors come forward; cops get lucky; the truth outs; and justice reigns—or so our courts should presume, and any party seeking to suppress truth and thwart justice should bear a heavy burden of proof.²²⁶

The supporting footnote is doctrinal, not empirical. It had to be.

The Department of Justice reports that only 20% of crimes known to police are cleared by arrest; for violent crimes the figure is 12.8%.²²⁷ Only about half of these arrests end in conviction.²²⁸ These numbers, of course, leave out drug sales which are *not* reported to the police, and in which the drugs, had they not been seized illegally, typically would have been sold or destroyed. There is nothing metaphysical about the causation issue; in most instances the police can't make a case.²²⁹ Exclusion may not restore the constitu-

226. Amar, *Fourth Amendment*, *supra* note 15, at 794 (footnote omitted).

227. U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 453 tbl. 4.26 (1994).

228. See, e.g., Brian Forst, *Criminal Justice System: Measurement of Performance*, in 2 ENCY. CRIME & JUSTICE 479, 481 (Sanford H. Kadish ed., 1983).

229. This is not to say that crime pays. In one sense, Amar is right when he says that justice prevails most of the time; repeat criminals will eventually get caught. But that is a far cry from asserting that most crimes get punished. We tolerate low clearance rates because success in a single crime does not materially reduce the long-run likelihood that repeat offenders will be convicted of another offense. Given its benefits, we should

tional *status quo ante* in every case, but in the vast majority of cases it does just that.

Amar suggests that *ex post* compensation could make a search reasonable.²³⁰ This suggestion neglects the important principle that substantive Fourth Amendment rights are themselves prophylactic. Some percentage of searches that are unreasonable *ex ante* will turn out, *ex post*, to discover evidence, just as some percentage of searches that are reasonable *ex ante* will turn out, *ex post*, to discover no evidence. The Amendment, however, condemns every example of unreasonable searches, even those that turn out to discover evidence.²³¹

Professor Amar seems to accept this account of Fourth Amendment rights when he calls for punitive damages for Fourth Amendment violations. He would, I suppose, object to allowing the prosecution to use peremptory strikes to purge the jury of blacks and Hispanics because the government stood willing to pay the excused jurors their damages.²³² The exclusionary rule is as natural a constitutional remedy as reversing the conviction of a white defendant because the prosecution discriminated against blacks during jury selection.²³³ The Fifth Amendment Takings Clause, after all, is unique in providing a textual escape hatch contingent on compensation.

tolerate the exclusionary rule in the same spirit.

230. Amar, *Fourth Amendment*, *supra* note 15, at 807.

231. See Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 920 (1986):

The purpose of the Fourth Amendment is not the defeat of certain criminal laws, but the protection of the lawful enjoyment of privacy. . . . With respect to a particular case, the actual existence of the evidence satisfies the value judgment struck by the Amendment. . . .

This does not mean that any successful search is legal, because there is no way to protect lawful privacy without also protecting criminal privacy. The search without probable cause, however, is objectionable not because it discovered evidence, but because it represents an official practice likely to intrude upon the lawful enjoyment of privacy. A due regard for the deterrent function of a Fourth Amendment remedy adequately responds to the illegality of such an official practice.

(footnotes omitted).

232. Actual damages would probably be negative, heightening the absurdity.

233. *Powers v. Ohio*, 499 U.S. 400, 404-16 (1991). For the comparison with the exclusionary rule, see Daniel Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 260-62 (1988) (discussing deterrence rationale underlying Supreme Court cases permitting defendants to challenge convictions on ground that indicting grand jury was selected in violation of Equal Protection Clause).

Compared to Amar's alternative—damages set by legislatures and juries plus a strong presumption of inevitable discovery—the exclusionary rule is a model of reason. Given the politics of law-and-order, Amar's approach would likely result in legislatures and juries inviting the police, in certain neighborhoods, to engage in precisely what the founders so abhorred—general, house-to-house searches. For example, when the ACLU sued the Chicago public housing authority to enjoin warrantless, unit-to-unit searches at the Robert Taylor Homes, the tenant's council approved of the searches, and many of the residents intervened in the litigation on behalf of the government.²³⁴

Under Amar's regime, broader police searches would invade the privacy of many innocent people, and discover much evidence of crime. The evidence would almost always be admitted, for who can prove that the police wouldn't have gotten "lucky"? The search victims—or at least the bolder and angrier victims—would then sue. If their damages were of the "ruinous," "heavy"²³⁵ sort Amar advocates some of the time, then the damage action would have prospective effect at least as adverse to law enforcement as exclusion. If their damages were only the "compensation" he advocates at other times,²³⁶ or if juries really disregarded the privacy of the poor,²³⁷ then we would be back to the 1940's.

In short, the exclusionary rule cases are in disarray not because of the rule's admitted limitations, but because the Justices since *Calandra* have lacked the clear understanding and unflinching determination of Holmes and Brandeis. Amar argues that this proves that the exclusionary rule is unsustainable,²³⁸ but even the Rehnquist Court has found it politically acceptable to preserve the exclusionary rule in its central application.²³⁹ It is also worth noting that the Court has not been dramatically more receptive to tort suits brought by innocent parties than it has been to the exclusionary rule. In the

234. See Erika George, *Recent Development—The Fourth Amendment's Forcing of Flawed Choices: Giving Content to Freedom for Residents of Public Housing—Pratt v. Chicago Housing Authority*, 848 F. Supp. 792 (N.D. Ill. 1994), 30 HARV. C.R.-C.L. L. REV. 577, 581-82 (1995).

235. Amar, *Fourth Amendment*, *supra* note 15, at 812.

236. *E.g.*, *id.* at 807-08.

237. On this possibility, see Maclin, *supra* note 210, at 29-31.

238. Amar, *Fourth Amendment*, *supra* note 15, at 800 ("In the long run, popular sentiment will (quite literally) have its day in court, for the people elect Presidents, who in turn appoint federal judges.").

239. *E.g.*, *Arizona v. Hicks*, 480 U.S. 321, 329 (1987).

tort cases that Amar postulates as more attractive than suppression motions, the Court has turned aside the pleas of innocent citizens²⁴⁰ and even newspapers.²⁴¹

It may be that *any* effective remedy for Fourth Amendment violations is politically unsustainable, and here criminal procedure scholars might well benefit from an analysis of the role of prudence in constitutional adjudication. Such analyses have issued from Yale,²⁴² and I for one would be greatly interested in Amar's views on prudence in adjudication. Thus far, however, he offers only the vague idea that the Court should stand aside because the people ultimately get what they really want.

That notion is not self-evident. It suggests, for instance, that *Plessy v. Ferguson*²⁴³ and *Korematsu v. United States*²⁴⁴ were rightly decided. The Court is indeed politically accountable through the appointment process, but is nonetheless vastly less accountable than legislatures. Its purpose in a democratic system is to stand up for just but unpopular causes.²⁴⁵ There are political limits on how many such causes any Court can take on, so prudence counsels choosing them with care. If the Burger Court had backed away from the exclusionary rule and *Miranda* because it had taken a new and unpopular stand for other liberties—for the rights of gay people,²⁴⁶ say, or imposing either privacy-based or Eighth Amendment limits on our crazy drug laws²⁴⁷—then the unpopularity of the exclusionary rule might factor into the constitutional analysis. Given, however, that the Burger Court undertook abortion-on-demand as its principal

240. See *Anderson v. Creighton*, 483 U.S. 635, 646 (1987); *Pierson v. Ray*, 386 U.S. 547, 557-58 (1967).

241. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 567-68 (1978).

242. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (2d ed. 1986) [hereinafter BICKEL, *LEAST DANGEROUS BRANCH*]; ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 *YALE L.J.* 1567, 1573-90 (1985).

243. 163 U.S. 537 (1896).

244. 323 U.S. 214 (1944). It is of course possible to develop an account of prudence that avoids the enthusiastic embrace of malicious but widespread popular feelings. Bickel, for instance, took the view that the Court should not have decided *Korematsu* at all. See BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 242, at 139.

245. The *locus classicus* of this view is, of course, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

246. Cf. *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901, 901 (1976) (no substantial federal question presented by declaratory judgment suit challenging constitutionality of criminal sodomy statute).

247. Cf. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 690 (1974) (upholding forfeiture of pleasure yacht on account of discovery of as little as one joint of marijuana aboard yacht, after yacht was leased by third parties).

libertarian initiative,²⁴⁸ prudence is a poor apology indeed for *Calandra* and its ilk.

Amar's point really suggests the critical question about representation-reinforcement that he never addresses. Which scenario is more probable—that the Supreme Court can deter Fourth Amendment violations through the exclusionary rule, or that legislatures can deter Fourth Amendment violations through meaningful tort remedies? We know the answer to that question based on the years between *Wolf* and *Mapp*—a point that can be illustrated with a vignette entitled “The Education of Roger Traynor.”

Traynor began his judicial career as hostile to the exclusionary rule as Amar. In *People v. Gonzales*, decided in 1942, he wrote an opinion reaffirming the admissibility of tainted evidence.²⁴⁹ But experience changed his mind. The tort remedy had become ineffectual, and not solely because of official immunity. The police consistently disregarded the Fourth Amendment. In one California case, the police forcibly pumped the stomach of a man who had swallowed morphine pills when the police entered his bedroom, at night, without a warrant.²⁵⁰ In another case, the police, without a warrant, repeatedly broke into the suspect's house to plant a microphone, moving it at one point into the marital bedroom.²⁵¹

Traynor came to view the exclusionary rule as the only practical alternative to official lawlessness:

My misgivings about its admissibility grew as I observed that time after time it was being offered and admitted as a routine procedure. It became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure subject to no effective deterrent; else how could illegally obtained evidence come into court with such regularity? It was one thing to condone an occasional

248. See *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

249. See *People v. Gonzales*, 124 P.2d 44, 46-49 (Cal. 1942) (Traynor, J.), *cert. denied*, 317 U.S. 657, *reh'g denied*, 317 U.S. 708 (1942). Traynor's rhetoric was strikingly similar to Amar's. See *id.* at 46 (“The defendant may have civil and criminal remedies against the officers for their illegal acts, but the state is not precluded from using the evidence obtained thereby.”) (citations omitted); *id.* at 47 (“The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment.”).

250. *Rochin v. California*, 342 U.S. 165, 166 (1952). In the Supreme Court of California, Traynor voted to deny a hearing on the conviction in *Rochin*. See *People v. Rochin*, 225 P.2d 913, 913 (Cal. 1951), *rev'd*, 342 U.S. 165 (1952).

251. *Irvine v. California*, 347 U.S. 128, 130-31 (1954) (plurality opinion).

constable's blunder, to accept his illegally obtained evidence so that the guilty would not go free. It was quite another to condone a steady course of illegal police procedures that deliberately and flagrantly violated the Constitution of the United States as well as the state constitution.²⁵²

In *People v. Cahan*,²⁵³ he reversed his former view and wrote the opinion of the California Supreme Court adopting the exclusionary rule.

We have been compelled . . . to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant results that the courts under the old rule have been *constantly* required to participate in, and in effect condone, the lawless activities of law enforcement officers. . . . Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures.²⁵⁴

The defects of the tort remedy did not attend expansive rules of immunity.²⁵⁵ In *Gonzales*, Traynor cited with approval a prior decision recognizing *no* immunity for police sued in conversion for seizing chattels.²⁵⁶ The California Supreme Court would later recognize immunity for police sued for malicious prosecution, but this ruling did not apply to suits for false arrest.²⁵⁷ Thus, for conversion, false arrest, and, we may suppose, in keeping with the general rule,

252. Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 321-22.

253. 282 P.2d 905 (Cal. 1955).

254. *Id.* at 911-13 (emphasis added).

255. For the contrary view that immunity played a major role in explaining the ineffectiveness of tort remedies, see Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 502-03 (1955). Foote wrote in the immediate aftermath of *White v. Towers* but before *Dragna v. White* (discussed *infra* note 257), which helps to explain his characterization of California immunity law as "extreme." *Id.* at 503. But immunity was not, even on Foote's account, an independent reason for the failure of damage remedies. "Even without such an extreme result as California's, the development of the tort actions has served the same policy end. The measure of damages, defenses and evidentiary rules which have grown up with them have had the practical effect of importing a clean hands doctrine into the remedies." *Id.* at 503-04.

256. *Silva v. MacAuley*, 26 P.2d 887, 891 (Cal. Dist. Ct. App. 1933), *cited in* *People v. Gonzales*, 124 P.2d 44, 46 (Cal. 1942).

257. *White v. Towers*, 235 P.2d 209, 211-14 (Cal. 1951) (police immunity for malicious prosecution); *Dragna v. White*, 289 P.2d 428, 429-30 (Cal. 1955) (no police immunity for false arrest).

for trespass,²⁵⁸ California police enjoyed no *de jure* immunity from tort suits. And Traynor, who owes much of his considerable reputation to his innovative decisions extending tort liability in other contexts, would not have despaired of the tort remedy if some quick-fix of the immunity rules showed hope of improving the situation.

Traynor had plenty of company on his Fourth Amendment odyssey. Earl Warren represented the state in the 1942 *Gonzales* case. Tom Clark was Harry Truman's Attorney General. They did not impose the exclusionary rule on the states out of ignorance or ideology. They decided *Mapp* the way that they did because, like Traynor, experience had convinced them that there was no other way to enforce the Constitution.

So there is nothing inherently arbitrary about the exclusionary rule. Consistently applied, as most academics and a minority of justices have long maintained, the rule can be applied without arbitrary exceptions. For example, Justice Traynor, whose Fourth Amendment views as a whole are remarkably coherent and sensible,²⁵⁹ wrote a clear-headed opinion recognizing third-party standing to invoke the exclusionary rule.²⁶⁰ And simply admitting openly what is now implicit—that there is a home-and-office exception to the general proposition that neither warrant, consent, nor emergency is indispensable to Fourth Amendment reasonableness—would go a long way toward rationalizing the substantive Fourth Amendment law.

Amar may be right to say that the federal model itself was unwise and unsupported by constitutional authority. But even if *Boyd*, *Weeks*, and *Agnello* are all in the spirit of *Lochner*, the model those cases established was always contingent on *Hurtado*. If *Slaughter-House*, *Hurtado*, and *Maxwell* had gone as Amar wishes, the federal model would never have been born. The exigencies of state law enforcement would have precluded it. Those exigencies explain why *Mapp* meant the end of the old model, and why the best way to

258. See RESTATEMENT (FIRST) OF TORTS § 210 & cmt. h (1934) (actor has privilege to enter pursuant to a search warrant if "the order is valid or fair on its face"); WILLIAM L. PROSSER, PROSSER ON TORTS 89 (1st ed. 1941) ("The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.") (footnote omitted); *id.* at 154-57 (officer has privilege to rely on warrant to arrest that is fair on its face).

259. See Gordon Van Kessel, *Chief Justice Roger Traynor and The United States Supreme Court: Contrasting Approaches to Search and Seizure*, 25 PAC. L.J. 1235 (1994).

260. *People v. Martin*, 290 P.2d 855, 857-58 (Cal. 1955).

understand modern Fourth Amendment law is to characterize it as one long and awkward reaction against *Mapp v. Ohio*.

2. Amar's Positive Fourth Amendment Program

We come now to Amar's specific prescriptive claims about the Fourth Amendment. On his view, the touchstone of the Amendment is reasonableness, and in the main juries rather than judges ought to determine reasonableness in the context of lawsuits against the police.²⁶¹ In these lawsuits, the police should enjoy no special immunities. On the other hand, the absence of a warrant would be irrelevant to the reasonableness determination. The support for these proposals is partly historical and partly practical; Amar cautions that all his proposals cannot be justified independently but must instead be considered as a package.²⁶²

To this there is a short and decisive reply: Since *effective* damage remedies for Fourth Amendment violations will not be adopted by legislatures, and are beyond the institutional capacity of the judiciary, Amar's program is a dead letter. It all depends on effective civil remedies; but no legislature has ever adopted one, and no court has ever created one.²⁶³

Consider the following proposal for reform:

Whether the tort remedies could develop into such a measure of control will depend upon the extent to which they are overhauled in the light of the deterrent objective. The essential steps in such a process are (1) governmental liability, (2) provision for minimum liquidated damages, and

261. Amar, *Fourth Amendment*, *supra* note 15, at 818 (" 'Reasonableness' is largely a matter of common sense, and the jury represents the common sense of common people.") (footnote omitted).

262. See *supra* note 153.

263. See Yale Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than "An Empty Blessing,"* 62 JUDICATURE 337, 350 (1979). Professor Kamisar stated:

Wolf established the "underlying constitutional doctrine" that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers" (though it did not require exclusion of the resulting evidence); *Irvine* warned that if the states "defaulted and there were no demonstrably effective deterrents to unreasonable searches and seizures in lieu of the exclusionary rule, the Supreme Court might yet decide that they had not complied with 'minimal standards' of due process." But neither *Wolf* nor *Irvine* stimulated a single state legislature or a single law enforcement agency to demonstrate the problem could be handled in other ways.

Id. (footnotes omitted).

(3) restriction of the "clean hands" defenses which today keep most potential plaintiffs from going to court.²⁶⁴

That was written a few years before Akhil Amar was born, in an article widely-regarded as a classic treatment. Caleb Foote's recommendations, however, have never been adopted.

A quarter century ago, the Chief Justice of the United States sounded another call for reform: "Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated."²⁶⁵ Warren Burger passed away last summer, and Congress has done nothing to create a damage remedy assessed by an administrative agency.

More than a decade ago, Judge Posner wrote:

If . . . punitive damages are awarded in proper cases, if judges deal firmly with jury prejudice, if imagination is used in valuing intangible items of damage such as loss of mental repose, and if class-action treatment and injunctive relief are granted in appropriate cases, then, I believe, the tort remedy will bring us closer to optimum deterrence of Fourth Amendment violations than the exclusionary rule.²⁶⁶

Now Amar is calling for much the same as Foote, Burger, and Posner. What makes him think it will ever happen?

The problem is not simply that civil remedies give police disincentives to abusing the respectable and the prosperous but not to abusing the poor and unpopular.²⁶⁷ The problem is not simply that it is very difficult to evaluate appropriate damages for Fourth Amendment violations.²⁶⁸ Personal injury suits present some similar

264. Foote, *supra* note 255, at 514.

265. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting).

266. Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 68.

267. See Foote, *supra* note 255, at 504-07 (noting that plaintiff's criminal record can be admitted to impeach credibility and to mitigate damages).

268. See Stuntz, *supra* note 223:

The harms that flow from illegal searches and seizures are mostly intangible and diffuse and therefore hard for the legal system to price accurately. This valuation difficulty, together with some other problems common to damages actions against government officials, makes it very hard for the system to avoid seriously over- or underdetering police misconduct.

Id. at 882-83. Compare Posner, *supra* note 266, at 50-53 (tort damages should not include search victim's prosecution and conviction with evidence discovered) and John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1474-75 (1989) (same) with Arval A. Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 WASH. L. REV. 647, 662

problems. Such problems are real, but I have little doubt that it is *technically* feasible to create effective civil remedies for Fourth Amendment violations. It is not, however, *politically* feasible.

When Professor Amar persuades Senator Hatch to sponsor legislation that would (a) eliminate good-faith immunity for the police, (b) establish nontrivial minimum liquidated damages for Fourth Amendment violations (say \$10,000 for an illegal stop, \$25,000 for an illegal arrest, and \$50,000 for an illegal home invasion), and (c)

(1982) ("Clearly, Posner's suggestion of the cost of an illegal search—the victim's lost time in cleaning up—doesn't even begin to cope with the actual social costs created by illegal searches and seizures.") and Jeffries, *supra*:

If, however, compensation were limited to constitutionally relevant injury (i.e., the invasion of privacy), recoveries might be so modest that law enforcement authorities would tend to regard them merely as a cost of doing business. . . .

Ultimately, the question is empirical, but risk seems great that a strictly compensatory remedy would be instrumentally inadequate.

Id. at 1476.

Posner, Jeffries, and Morris all accept the idea that, because the substantive criminal law forbade the search victim's crime, his losses due to prosecution are not cognizable. Posner and Jeffries further maintain, and Morris does not deny, that society's *gains* from prosecution ought to be counted. These two positions contradict one another. When police seize and destroy a hundred thousand dollars worth of cocaine, we do not describe that as a welfare loss because the law forbids deriving utility from cocaine. But doesn't the law also forbid deriving utility from unreasonable searches? See Dripps, *supra* note 231, at 920; Meltzer, *supra* note 233, at 260, 267-69 (characterizing Fourth Amendment rights as prophylactic in nature). To say that the search target has no right to the contraband is not to say that the government has a right to search his house. One might as well say that the presence of the contraband gives the police a justification for lying under oath that the suspect consented to the search. Posner's argument thus condenses to the proposition that society's interest in enforcing the criminal code has priority over the Fourth Amendment to the Constitution, a proposition I had thought rejected by *Marbury v. Madison*. See 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.2(a), at 24-29 (3d ed. 1996) ("[T]he cost argument was rejected when the Fourth Amendment was adopted." (footnote omitted)).

The exclusionary rule is such an elegant remedy because, when the government's activity is motivated by the desire for evidence, the rule comes very close to setting the sanction equal to the government's anticipated gain. The rule will, on this account, still *underdeter* for two reasons. First, much illegal police activity does not trigger the rule, either because the police don't find evidence or they find it but get away with it due to police perjury, ineffective defense representation, a quick guilty plea, or whatever. Second, illegally-obtained evidence that is inadmissible is still valuable to the police—strategic intelligence is thereby acquired about criminal operations, and contraband is taken off the street. But to say that the rule underdeters is not to say that it should be regarded as a failure. For a contrasting view of the underdeterrence argument, see Stuntz, *supra* note 223, at 911 n.66.

The difficulty of the valuation problem, however, interacts with the dynamics of public choice. Legislatures, lobbied by prosecutors and police, would be extremely unlikely to adopt the kind of liquidated and punitive damages that alone could make for effective civil remedies. Far more likely would be a reform bill tailored along Posner's line—one that paid damages for new hinges and so on.

provide that either party may introduce polygraph evidence and the failure of the opposing party to introduce such evidence,²⁶⁹ then it will be time to talk about building a Fourth Amendment model on civil remedies. One can only imagine the reaction of the Drug Enforcement Agency and the Bureau of Alcohol, Tobacco and Firearms, let alone the Los Angeles or the Philadelphia or the Chicago police.²⁷⁰ Certainly Senator Hatch can imagine it.

Who would be in favor of such legislation? Law professors and civil libertarians. Who would oppose it? Any politician who wants to be seen as a friend of the police. Who would benefit from such legislation? Young men, typically black, who are the chief targets of police excess. Who would lose? Anyone who is either sufficiently old or sufficiently well-off to be secure from the police but vulnerable to predatory crime.²⁷¹ The fortunes of such legislation are easy enough to predict.²⁷²

Amar posits the Privacy Protection Act adopted by Congress in response to the *Zurcher* case as an example of the kind of remedy he has in mind. What he does not say is that the Act's protections are expressly limited to the institutional media—about the strongest interest group in the political universe.²⁷³ Efforts to include other

269. On the desirability of admitting polygraph evidence in suppression hearings, see *United States v. Posado*, 57 F.3d 428, 430-36 (5th Cir. 1995) (holding that *per se* rule of inadmissibility of polygraph evidence does not apply to suppression hearings); Donald Dripps, *Police, Plus Perjury, Equals Polygraphy*, J. CRIM. L. & CRIMINOLOGY (forthcoming) (urging admissibility of polygraph examinations whenever outcome of suppression motion turns on credibility).

270. See Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1051-54 (1987) (police surveyed favored exclusionary rule over effective tort suits against individual officers).

271. Thus any effective Fourth Amendment remedy will cause some people to be victims of crime. The criminal law must make tragic choices. " 'But there is nothing new in the realization' that Fourth Amendment protections come with a price." *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2404 (1995) (O'Connor, J., dissenting) (citation omitted).

272. For a fuller and more general treatment, see Donald Dripps, *Criminal Procedure, Footnote 4, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993).

273. See *id.* at 1083-84, stating:

The history and the limited scope of the Privacy Protection Act are instructive. Third-party searches threaten the privacy of many people, including accountants, lawyers, social workers, educators, and doctors. Well before *Zurcher*, the Court had made clear that the standing requirement would invite unlawful searches of third-parties who happened to possess evidence of crime by others. But not until an extremely powerful interest group—the media—became aroused, was the legislature moved to act. And when it did act, it adopted

innocent custodians of criminal evidence—lawyers, doctors, and accountants—were defeated by law enforcement interests. Amar takes for his norm an exotic exception to the usual practice of law-and-order politics.

If effective tort remedies were adopted, the police would be unable to obtain much evidence of crime. True, in a few cases undeterred police would discover evidence that would be admissible absent the exclusionary rule. The number of these cases, however, would vary inversely with the effectiveness of the new civil remedies. And in many cases, the government would deal away valid criminal charges to escape the bite of the new tort remedies²⁷⁴—“rubbing our noses”²⁷⁵ in the price we pay for the Fourth Amendment, just as does the exclusionary rule.

Indeed, it might well be the case that truly effective civil remedies would cause the loss of more evidence than the elimination of the exclusionary rule would secure. Deterred police might well refrain from constitutionally permissible searches that would yield evidence of serious crimes.²⁷⁶ This might be particularly true given the radical uncertainty Amar’s reliance on jury determinations of reasonableness would create in the minds of the police.

Again, Amar might say that judges could direct verdicts and so create categories of police conduct that are reasonable or unreasonable *per se*. Judges might even direct verdicts based on whether or not the police had gone through warrant-like screening procedures. But these *per se* rules would replicate the complex categories of current Fourth Amendment law. The law might be different, but it would be no less complicated.

Thus Amar’s whole approach is politically counterfactual. He ignores what is probably the most prominent thread in contemporary constitutional law scholarship—the representation-reinforcement theory of judicial review, reflected in the famous fourth footnote of

protections only for the institutional press, and not for third-parties generally, in spite of an effort in Congress to provide such broader protection.

Two years after *Zurcher*, the Supreme Court upheld the admission of evidence seized by agents who burglarized the hotel room of the target’s accountant. But the Act was never broadened to confer protection on accountants.

Id. (footnotes omitted).

274. See *Town of Newton v. Rumery*, 480 U.S. 386, 389-91 (1987); *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 310, 311 n.7 (1987).

275. John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1037 (1974).

276. See Orfield, *supra* note 270, at 1053-54.

*Carolene Products*²⁷⁷ and expounded by John Hart Ely²⁷⁸ and Jesse Choper.²⁷⁹ The reason why effective civil remedies have never been adopted is less that they cannot be devised than that they would protect a small group of citizens from the agents of a large group. And that is why courts, not legislatures, have to take the lead in protecting constitutional rights against the police.

The exclusionary rule has great limitations; Earl Warren noted most of them in *Terry v. Ohio*.²⁸⁰ In particular, the absence of an effective civil remedy leaves citizens at the mercy of illegal arrest. So my skepticism about the political prospects for an effective civil remedy should not be interpreted as hostility to the enterprise. But if Amar insists on presenting *as a package* a policy program with an inherently improbable central component, we have ample reason for rejecting the package. At least we have good reason to defer fundamental changes, predicated on an effective tort remedy, until an effective tort remedy materializes.²⁸¹

But let us suppose, for the sake of argument, that a truly effective tort remedy were brought into existence. Under such a regime, the case for a warrant requirement is stronger, rather than weaker.²⁸² The case for manageable standards for recognizable categories of cases, as opposed to an opaque standard of reasonableness, would be stronger too. And even in a regime of meaningful civil sanctions, the exclusionary rule should be retained for bad-faith searches.

Warrants protect privacy in two ways. First, by imposing a nontrivial cost *ex ante* on proposed searches, a warrant requirement operates to discourage purely speculative intrusions.²⁸³ Second, by forcing the police to record their justification in advance, warrants limit the ability of police and judges to devise *post hoc* rationalizations for the discovery of evidence.²⁸⁴ These protections do not seem extravagant when the government proposes to invade an especially sensitive privacy interest—quintessentially, the home.

277. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

278. See ELY, *supra* note 12, at 73-104.

279. JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 73-79 (1980).

280. See 392 U.S. 1, 13-15 (1968).

281. Even exclusionary-rule critics Warren Burger and Dallin Oaks agree. See *Bivens v. Six Unknown Named Agents of the Fed. Narcotics Bureau*, 403 U.S. 388, 411-12 (1971) (Burger, C.J., dissenting); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 756 (1970).

282. See Stuntz, *supra* note 223, at 906.

283. See Dripps, *supra* note 231, at 923-33.

284. See Stuntz, *supra* note 223, at 915-18.

Government entity liability would lead departments to put pressure on the police to avoid liability—that is the whole point to entity liability. But the more acute the pressure, the more the temptation on the part of individual officers to avoid liability either by perjury or by preliminary authorization.²⁸⁵ If preliminary authorization cuts off subsequent liability, as warrants traditionally did and still do, there is good reason for making it a rigorous and costly process. On the other hand, if preliminary authorization does not confer a degree of immunity, then the police would have no incentive to undertake the process.

Amar recognizes this when he talks about the possibility of making "preclearance" a condition for reasonableness.²⁸⁶ Given an effective tort remedy, this would amount to a mere alteration of the warrant requirement. The tortured history of the warrant requirement, however, would have to be relitigated, this time asking whether "preclearance" (by a prosecutor? a police supervisor? a judge?) is essential to the reasonableness of searches of footlockers, automobile trunks, glove compartments, backpacks and so on.²⁸⁷

So too, the case for "bright lines" is stronger in a tort regime than in an exclusionary regime. All the police lose from exclusion is a conviction they might possibly have obtained with more investigation. They stand to lose more from an effective tort remedy. At the moment, Fourth Amendment law is, from the police standpoint, reasonably clear. It may be that the cases do not hold water as a matter of legal reasoning, but their results are readily translatable into police procedure.²⁸⁸

Professor Amar would undo that considerable achievement. "Reasonableness" would have to be reworked from the ground up.

285. On the risk that tort remedies would foster more police perjury than the exclusionary rule, see Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 126 (1992).

286. Amar, *Fourth Amendment*, *supra* note 15, at 810, 817.

287. For the flavor of the problem, see *United States v. Ross*, 655 F.2d 1159, 1174-76 (D.C. Cir. 1981) (en banc) (Tamm, J., dissenting), *rev'd*, 456 U.S. 798 (1982).

288. Arbitrary rules can be perfectly clear. There may be no reason for the distinction between a warrantless automobile search based on probable cause (which may extend to the trunk under *United States v. Ross*, 456 U.S. 798 (1981)) and a warrantless automobile search based on the arrest of the driver (which may not extend to the trunk under *New York v. Belton*, 493 U.S. 454 (1981)), but the police can understand the distinction. And the exclusionary rule cases do not obscure the rules that determine the primary legality of police conduct. Alternative, more restrictive and coherent rules could be equally easy to understand and apply. See Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 320-33 (1982).

Maybe the probable cause and reasonable suspicion standards would survive, maybe not. Maybe the residential warrant requirement would remain, in the form of a "preclearance" requirement, maybe not. Obliterating prevailing premises would not establish new ones; the injunction to be reasonable is no more than a command to do good and avoid evil.

Finally, a regime of civil damages would not justify abolishing the exclusionary rule.²⁸⁹ Absent the suppression remedy as a shotgun in the closet, civil remedies effectively put Fourth Amendment rights up for sale. Knowing or reckless violations of Fourth Amendment standards call for exclusion of the fruits, even if damages are also assessed.

Amar's arguments *against* the exclusionary rule, as distinct from those *in favor* of civil damages, are unpersuasive. The argument that exclusion is disproportionate is inconsistent with Amar's plea for punitive damages. The argument that criminal defendants are unattractive plaintiffs neglects the fact that innocent civil plaintiffs will come from the same social milieu. No matter what the legal remedy for illegal searches, the police are not about to toss the house of the PTA president. Thus, even granting Amar's politically unrealistic assumption of effective civil remedies, most, if not all, of current Fourth Amendment law ought to remain in place.

B. The Fifth Amendment Privilege Against Self-Incrimination

Professor Amar and Ms. Lettow argue that the Fifth Amendment privilege against self-incrimination should be interpreted to prohibit only the use at trial of the defendant's compelled statements.²⁹⁰ On their account, witnesses may be compelled to answer questions in any proceeding so long as their words are not later received against them at a criminal trial.²⁹¹ Even at trial, physical evidence derived from compelled pretrial testimony should be admitted.²⁹² Thus, to Amar and Lettow, the underlying purpose of the privilege is to promote the reliability of the criminal trial process.²⁹³

289. See Jeffries, *supra* note 268, at 1476-77; Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1266 & n.168 (1983); see also George C. Thomas III & Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad-Faith "Exception" to Exclusionary Rule Limitations*, 45 HASTINGS L.J. 21, 24-34 (1993) (arguing that bad-faith violations require a broader exclusionary rule).

290. See Amar & Lettow, *Fifth Amendment*, *supra* note 16, at 858-59.

291. *Id.* at 898-901.

292. *Id.* at 909-19.

293. *Id.* at 922-24.

The argument is ingenious but utterly unconvincing. At the time the amendment was adopted, the accused was disqualified, due to interest, from giving sworn testimony at his own trial.²⁹⁴ Nonetheless, common-law procedure of this era involved questioning the accused before trial, and the answers so obtained were admitted in evidence.²⁹⁵ At the trial itself, the accused was obliged to conduct the defense, and so spoke constantly, giving unsworn but nonetheless relevant information to the jurors on a regular basis.²⁹⁶

Thus the privilege, as distinct from the common-law confessions rule, was not inspired by doubts about the reliability of information given by a witness in jeopardy.²⁹⁷ The criminal justice system of the framers relied heavily on just such information. The recent historical scholarship by John Langbein and Eban Moglen, while subject of course to revision in light of new historical evidence, seems convincing on this count.

But their work claims only that the privilege played no meaningful role in common-law criminal trials.²⁹⁸ There can be no denying that the privilege was highly regarded by the colonists who broke from England and by those who drafted the Fifth Amendment. The Virginia Declaration of Rights of 1776 includes the privilege,²⁹⁹ as do many state constitutions adopted prior to the federal Constitution of 1789.³⁰⁰ How could the privilege have been at once revered and neglected?

The answer seems straightforward enough—the privilege was a “fighting right” that had to be claimed.³⁰¹ Few if any criminal

294. John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1055 (1994).

295. See *id.* at 1059-62 (English practice); Eban Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1094-99 (1994) (American practice).

296. See Langbein, *supra* note 294, at 1048-62.

297. Thus Amar and Lettow err by invoking Blackstone's distrust of confessions as proof of the unreliability of in-court utterances by the accused. Compare Amar & Lettow, *Fifth Amendment*, *supra* note 16, at 922-23 with 3 JOHN WIGMORE, EVIDENCE § 823, at 248-49 (3d ed. 1940) (confessions rule distinct from privilege against self-incrimination: “The sum and substance of the difference is that the confession-rule aims to exclude self-incriminating statements which are *false*, while the privilege-rule gives the option of excluding those which are *true*.”).

298. See Langbein, *supra* note 294, at 1084; Moglen, *supra* note 295, at 1089.

299. See Virginia Bill of Rights of 1776, § 8, reprinted in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 3813 (Francis Newton Thorpe ed., 1909).

300. See LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT 409 (1968).

301. See *id.* at 375.

defendants, absent counsel, knew of the privilege or were bold enough to assert it during examination. The privilege's primary practical role was to protect political and religious dissent, *outside* the context of criminal justice. Amar and Lettow have it exactly backwards. From the founding to *Miranda*, the privilege has had to fight its way into the criminal justice system. To suggest that the privilege cannot be claimed except by one on trial is to confine the privilege to the only context in which it was unavailable at the founding.

Eighteenth-century immunity statutes, called "amnesty statutes," conferred only transactional immunity, not use immunity.³⁰² The privilege itself was thought of in terms of whether or not the answer would incriminate the witness, taking into account immunity statutes, pardons, statutes of limitations, and so on, all as of the time that the question was asked. Courts did not compel testimony first, and ask what use if any could be made of it later. Rather, they insisted that the privilege holder use it or lose it. The practical effect was that, in the relatively rare instances in which the privilege was invoked, it conferred practical immunity not only for the testimony which was not given, but also for the physical fruits which were not disclosed.

Three prominent examples from legal history illustrate the point. The first is *Wilkes v. Wood*,³⁰³ a case Amar makes much of for Fourth Amendment purposes. The defendants at the trial of this civil trespass action sought to prove Wilkes, the plaintiff, guilty of criminal libel, for the purpose of reducing damages. The defendants called as a witness the printer of the libelous matter. He was in jeopardy of prosecution for criminal libel, and invoked his privilege. The defendants vigorously objected, but the court ruled that he was not bound to answer any question that might incriminate him.³⁰⁴

302. See 4 JOHN WIGMORE, EVIDENCE § 2281, at 3165-84 (1st ed. 1904).

303. 19 Howell's St. Trials 1154 (C.P. 1763).

304. See *id.* at 1162:

Walter Balff says, in the first place, that he is under a recognizance, and therefore pray he may be excused from answering any question which may tend to affect or injure himself.

A debate ensued for near an hour, whether he may or may be allowed the privilege.

The Solicitor-General very strenuously asserts, that in the present case he may not be allowed it.

Serjeant Glynn, and the Recorder, reply to him.

The Lord Chief Justice gives it as his opinion, that the man is not bound to answer to any matter which may tend to accuse himself.

The report then drops a footnote to the *nemo tenetur seipsum accusare* maxim.

The second example comes from Blackstone, a primary source of legal knowledge for the framers. According to Blackstone, a prospective juror in a civil case "may be examined on oath . . . with regard to such causes or challenges as are not to his dishonour or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage."³⁰⁵

The third example is *Marbury v. Madison*.³⁰⁶ The Supreme Court itself inquired into what had become of Marbury's commission. Levi Lincoln, Attorney General of the United States, who may have destroyed the commission himself,³⁰⁷ objected to being sworn as a witness, both on grounds of executive privilege and on grounds of self-incrimination. The Court agreed that he "was not obliged to state anything which would criminate himself."³⁰⁸

Prospective jurors and witnesses in civil cases, then, could avail themselves of the privilege. Courts did not compel them to answer on condition that their testimony not later be used against them, still less with the proviso that fruits could be used. Indeed, it seems that the primary role for the privilege was to protect individuals from being questioned upon oath in proceedings other than criminal trials. Again, in criminal trials, the accused could not be sworn at all, but was constantly giving information, if not evidence, in the course of conducting the defense.

Why then does the amendment's text confine the privilege to "any criminal case"? Madison's draft provided only that no person shall be compelled to be a witness against himself; the "criminal case" language was added with little explanation.³⁰⁹ One possible rationale was to avoid creating a right against compelled discovery of books and papers in civil cases, but there is no clear proof of the motive behind the change.³¹⁰ There is certainly no suggestion that the text was designed to constitutionalize a narrower privilege against self-incrimination than the one recognized under prevailing law.³¹¹

305. 3 WILLIAM BLACKSTONE, COMMENTARIES *364.

306. 5 U.S. (1 Cranch) 140 (1803).

307. See LEONARD W. LEVY, JUDGMENTS 275 (1972).

308. *Marbury*, 5 U.S. at 144.

309. See Levy, *supra* note 300, at 251; Moglen, *supra* note 295, at 1122-23.

310. See Levy, *supra* note 300, at 424-27.

311. See STORY, *supra* note 39, § 931, at 662-63 (Fifth Amendment "is but an affirmance of a common-law privilege"); 3 JOHN WIGMORE, EVIDENCE § 2252, at 3102-03 (1st ed. 1904) ("But this constitutional sanction, being merely a recognition and not a new creation, has not altered the tenor and scope of the privilege; it has merely given greater permanence to the traditional rule handed down to us." (footnote omitted)); Levy, *supra* note 300, at 427-32. Judge Friendly believed that restricting the privilege to criminal trials

A "case" in any event is not necessarily identical to a "prosecution."³¹² The Sixth Amendment uses the latter term, in dealing specifically with the criminal trial. The Fifth Amendment, by contrast, contains a miscellany of rights, some against criminal and some against civil liabilities.³¹³ We speak routinely of police investigators working *on a case* before they have a suspect. If we think of a "case" as a *potential* "prosecution" we can square the text of the Fifth Amendment with its history.³¹⁴

was inconsistent with both history and policy:

For one thing, it would omit the witness before a legislative investigation, although John Lilburne's encounter in 1645 with the House of Commons' Committee on Investigation, which has been wittily called "a sort of House Committee for the Investigation of Un-English Activities," was one of the most famous chapters in the history of the privilege. Colonial assemblies also had recognized the privilege in their own investigations. Furthermore, once the amendment was read to cover the mere witness in a criminal case, it seemed irrational not to apply it to the witness in a civil trial. Madison's original version had read simply "nor shall be compelled to be a witness against himself"; the limiting phrase "in any criminal case" was proposed by John Laurence, a Federalist Representative from New York, and was adopted without comment even from Madison. Whatever Laurence's purposes may have been, the courts have long read the clause to mean what it said before his qualifying amendment.

Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 676-77 (1968) (footnotes omitted).

312. See *Counselman v. Hitchcock*, 142 U.S. 547 (1892):

It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

Id. at 562.

313. See *id.* at 563 ("A criminal prosecution under article 6 of the amendments is much narrower than a 'criminal case,' under article 5 of the amendments.").

314. Amar & Lettow, *Fifth Amendment*, *supra* note 16, at 910 n.229, invoke Article III to argue that a "'case' begins when a prosecutor or plaintiff files an indictment or complaint." I think the equation of the Fifth Amendment and Article III extremely unlikely; the provisions were adopted at different times for different purposes. Whatever the meaning of "cases" in Article III, limiting the Fifth Amendment to post-indictment questioning would mean that both oaths or torture could be used *before* indictment. The only founding-era limit on using such statements at trial would have been the confessions rule, not the privilege. Moreover, cases like *Marbury* recognizing the privilege for third-party witnesses clearly disregarded the limited reading of "case" that Amar and Lettow propose.

In any event, Amar and Lettow contradict their definition of "case" when they say earlier that "[p]retrial, a suspect under our scheme must comply with all judicially authorized depositions, inquests, and subpoenas." *Id.* Logically, their definition of "case" calls for cutting off compelled questioning at the time of indictment—the same arbitrary line drawn for Sixth Amendment purposes in *Kirby v. Illinois*, 406 U.S. 682 (1972).

This reading meshes perfectly with the known history; a witness, whether a prosecution witness at a criminal trial, or before a legislative tribunal, or in a civil proceeding, could claim a privilege not to make a criminal case against himself under oath. Given the ubiquity of pretrial examination of the accused, the ban on sworn testimony by the defendant at trial, and the textual reference to "any" criminal case, reading "case" as "prosecution" leads to the odd conclusion that the *only* people the framers meant to protect with the privilege were third-party witnesses at criminal trials. That seems like an enormously unlikely scenario.

As a conventionalist rather than an originalist, I admit that an unintended interpretation might be valid if some other species of constitutional authority, or some really overwhelming policy consideration, supported that interpretation. But the text is ambiguous, and history and precedent are quite clear that the privilege can be claimed in any proceeding.³¹⁵ The practical effect of the privilege, when claimed, was use-plus-fruits immunity.

Amar and Lettow embrace the pre-*Counselman* nineteenth century cases, exemplified by *People v. Kelly*,³¹⁶ that accepted testimonial-immunity statutes as constitutional. By that period, defense lawyers had entered the criminal process in force and the privilege had become a serious impediment to law enforcement. The testimonial-immunity approach thus sheds no light on the Fifth Amendment, although it might regarding the Fourteenth. This approach was unanimously rejected in *Counselman*,³¹⁷ and again repudiated in *Kastigar*,³¹⁸ so that from a conventional viewpoint reviving testimonial immunity faces an uphill fight, and depends on accommodating immunity so limited with the underlying purposes of the privilege.

This cannot be done. Imagine a drug dealer sworn as a witness and asked: "Where is your stash?" If the privilege is based on the

Evidently, Amar and Lettow equate "case" with *trial*—but that can't be right, because in 1789 the accused could not be sworn as a witness at trial.

315. By way of precedent, see *Arndstein v. McCarthy*, 254 U.S. 71 (1920) (civil proceedings); *Bram v. United States*, 168 U.S. 532 (1897) (police interrogation); *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447 (1894) (administrative proceedings); *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (grand jury proceedings); *Marbury v. Madison*, 5 U.S. (1 Cranch) 140, 144 (1803) (appellate proceedings).

316. 24 N.Y. 74 (1861). *Kelly* is a companion case to *People v. Hackley*, which is the title case in the New York reports. The case has always been cited as *Kelly*.

317. *Counselman*, 142 U.S. at 562.

318. *Kastigar v. United States*, 406 U.S. 441, 449-59 (1972).

temptation of oath-breaking and the consequence of damnation, there is no difference in such a case between testimonial immunity and compelled testimony at the trial itself. An honest answer leads straight to jail; a dishonest one straight to hell.

On the other hand, if the privilege is based on the temptation of the questioner to resort to brutality, the case is again the same. If the police can get an honest answer about the location of the stash, they will have their case if they can prove independently that the suspect had access to the drugs. In any case involving physical evidence, drug cases especially, they will be as tempted to coerce a pretrial confession as they were in the days of the third degree.³¹⁹

Even on the reliability theory, which I reject, the cases are indistinguishable. A suspect might very well be the innocent custodian of physical evidence. Thus the practical jeopardy of the witness remains, and whatever unreliability stems from jeopardy would also remain. It is no answer to say that the physical evidence is reliable; sure, the white powder tests positive for cocaine, but who had possession? Sure, the ballistics test shows the pistol registered to the witness is the murder weapon—but did he pull the trigger? An innocent person with a genuine but improbable defense would know that honest answers might lead to his conviction.

Thus both innocent and guilty have motive to lie when compelled to testify about physical evidence. Amar and Lettow would exclude the testimony but admit the fruits, but on their theory fruits will rarely be discovered because the testimony is unreliable. The one

319. Wigmore, in defending use-only immunity, seemed to assume that the discovery of derivative evidence would be a coincidence:

By this interpretation the relation between the main crime and the fact "tending to criminate" is not a logical and inherent one, i.e., that of a legal whole to its parts, but a casual and external one, i.e., a relation consisting in the probability that the one fact will so stimulate the ingenuity and fit the resources of certain prosecuting officials that they will be enabled thereby to discover the other fact, which otherwise, with the same ingenuity and resources, would have remained undiscovered by them. The thought of making an important rule of law turn upon so casual, ephemeral, and unmeasurable a test as this was never entertained, and could not have, by so wholesome a thinker as Chief Justice Marshall. It was reserved for latter-day Courts, who treated the privilege with morbid delicacy, and were disposed to expand it into misty attenuation, to resort to this meaning. . . . *Counselman v. Hitchcock* . . . is heterodox and unsound.

4 JOHN WIGMORE, *EVIDENCE* § 2261, at 3121 (1st ed. 1904). Given Wigmore's view of the privilege's purpose—to prevent the system from resorting to extorted confessions—this is the only way to defend use-only immunity, for if the questioner and the suspect both know that the answer to the question will have the effect of proving guilt, the temptation to brutality is as strong as ever.

substantial gain that could come from pretrial depositions is eliciting *false* testimony that *can* be used at the trial, but this they are unwilling to do.

We might measure the consistency of the Amar/Lettow approach with the Fifth Amendment by asking how John Lilburne's cases would have come out under their theory.³²⁰ Lilburne, it will be recalled, was twice tried for criminal libel based on authorship of political tracts. Amar and Lettow would have permitted him to be questioned in full before trial. They would not permit use of the answer to the question, "Are you the author of *An Impeachment of High Treason against Oliver Cromwell?*" But other questions would be asked: "With whom did you contract to print *An Impeachment?* Where can we find the printer? How many copies of that contract are there? Where are they?" And so Lilburne would have faced the dilemma of swearing falsely or convicting himself. Any interpretation of the Fifth Amendment that permits this result is suspect.

As for precedent, I think Professor Kamisar has shown that the Court's receptivity toward the fruits of *Miranda* violations should not be understood as receptivity to the fruits of compulsion by formal process.³²¹ Indeed, I think Professor Kamisar understates his case, for the Court has strongly suggested that evidence derived from compelled statements is inadmissible. In *New Jersey v. Portash*, the Court held that immunized pretrial testimony could not be used to impeach the defendant's trial testimony.³²² New Jersey's position was not that the compelled pretrial statements could be used for the truth of the matter asserted. The state accepted the privilege's bar on any

320. On Lilburne's trials, see Levy, *supra* note 300, at 266-300; Harold W. Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213 (1952).

321. See Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 968-75, 1008-09 (1995). In their reply, Amar and Lettow fall back from precedent to text and history. See Akhil Reed Amar & Renee B. Lettow, *Self-Incrimination and the Constitution: A Brief Rejoinder to Professor Kamisar*, 93 MICH. L. REV. 1011 (1995).

322. 440 U.S. 450 (1979). Professor Kamisar quite rightly notes that *Portash* expressly recognized a distinction between statements obtained in violation of *Miranda* and statements obtained by compulsion through formal process. See Kamisar, *supra* note 321, at 975. My point, however, is that in *Portash* the Court rejected the use of compelled testimony for a nontestimonial purpose, just as if the government had offered a compelled hand-written statement incriminating the suspect in robbery as a handwriting exemplar to prove that the suspect had written the ransom note in an unrelated kidnapping case. Although verbal in form, the evidence excluded in *Portash* was not—at least not technically—testimonial.

such use.³²³ What the government sought to do with the statements was only to prove that the defendant/witness told different stories at different times and was therefore unworthy of belief.

Given the purpose for which they were offered, the statements in *Portash* could not have been unreliable; theoretically, they were no more testimonial than the blood sample in *Schmerber*. The tag line for impeachment with such statements is: "Were you lying then, or are you lying now?" The impeaching party doesn't care which answer the jury favors. The statements are relevant so long as they were made, whether or not they were true.

There, is of course, the risk that the jury would disregard the limiting instruction. But there is nothing in *Portash* to suggest that this was any concern for the Court. Indeed, the Court explicitly disdained any concern for reliability: "The Fifth and Fourteenth Amendments provide a privilege against *compelled* self-incrimination, not merely against unreliable self-incrimination."³²⁴

The Court's refusal is no more than fidelity to the privilege. There is nothing inherently suspect about compelled self-destructive testimony. Civil defendants facing massive damage awards, or losing custody of their children, must answer adverse questions under oath. No one distrusts the jury's ability to evaluate such testimony.

Professor Schulhofer has attempted to rehabilitate the reliability account of the privilege.³²⁵ He claims that "the privilege helps many innocent defendants and that acquitting these innocents is more important than convicting an equal or somewhat larger number of guilty defendants."³²⁶ One could say the same thing for a rule that bars the testimony of prosecution witnesses whose last names begin with the letter R. This rule would help innocent and guilty alike. If the defendant is *really* guilty, surely the prosecutor can find some witnesses with other names. Since preventing unjust conviction is more important than enabling just conviction, the R-witness rule is justifiable.

323. Brief for Petitioner at 30, *Portash*, 440 U.S. 450 (No. 77-1489) ("While not admissible to prove the accused's guilt, petitioner submits that prior immunized testimony should be admissible to impeach the accused's materially inconsistent trial testimony.").

324. *Portash*, 440 U.S. at 459.

325. Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 319, 325-33 (1991). Professor Schulhofer also relies on the tendency of the privilege to prevent inhumane police interrogation, an important point against Amar and Lettow's account, which would permit police questioning aiming for physical fruits. *Id.*

326. *Id.* at 329.

That is not, of course, what it means to say that compelled self-incriminating testimony is *unreliable*. That claim means something more than the claim that "the privilege, as a revolution or an earthquake, might protect the innocent."³²⁷ It doesn't mean that compelling the defendant to testify would cause erroneous verdicts (permitting witnesses to testify whose last names start with R will cause *some* erroneous verdicts). It means that in the cases in which compelled testimony would determine the outcome, compulsion would cause an unacceptable proportion of erroneous verdicts. That might be so in one of two ways. Testifying might permit the introduction of impeachment material that has a tendency to cause a decision on an irrational basis, such as prior convictions or past acts of dishonesty. Alternatively, the accused might be an ineffective witness.

To justify the privilege on the ground that the impeachment rules are irrational is to let the tail wag the dog. The principal reason why defendants refuse to take the stand is that they fear impeachment with prior convictions—a fear with strong support from the empirical evidence.³²⁸ If the impeachment rule were abolished, either by excluding the convictions for impeachment purposes or by admitting them in the government's case in chief, the most plausible reason for the innocent defendant to stand silent would disappear.

More generally, impeaching evidence—prior inconsistent statements, past acts of dishonesty, and so on—ought to be admitted to impeach only when their probative value outweighs their potential for prejudice. So long as the rules governing impeachment make sense, compelling the defendant to testify does not run a risk of irrational verdicts.

That leaves the ineffective witness scenario. The defendant might truthfully testify to innocence in an incredible manner, or foolishly choose to tell a false exculpatory story instead of a true one. The framers didn't seem to think much of this risk, for they relied on the "accused speaks" model for their own criminal procedure. The risk is surely less today given the ubiquity of defense counsel. But the fundamental point is that the "truth is consistent with itself, and every

327. Dripps, *supra* note 94, at 715.

328. See HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 161 (Phoenix ed. 1971) (in cases in which the jury learned that the defendant has no prior record, the conviction rate fell from 42% to 25%).

one who is speaking the truth can tell in the main a straight story.³²⁹

Even if the privilege does protect some innocent, ineffective witnesses from unjust conviction, its price is still high. Not only, as Amar and Lettow rightly stress, does the privilege pose a bar to the innocent defendant seeking third-party testimony,³³⁰ but the availability of the privilege in court has driven the interrogation of the suspect to the police station.³³¹ All of the claimed defects of testimony in court while represented by counsel pale into insignificance with the defects of secret questioning by the police.

The suspect may be drunk, high, injured, or exhausted; he will certainly be frightened. When a court decides what the suspect said, and under what pressures, it will decide on the basis of the testimony given by the police. Even if a system of in-court questioning caused the convictions of innocent people, which I doubt, it would cause far fewer such convictions than the police interrogation which the privilege perpetuates.³³² And, while the present system subjects the poor and ignorant to unregulated questioning by the police, it permits professional spokesmen, such as Oliver North and O.J. Simpson, to give no evidence at all—even though neither could be impeached with prior convictions.

If the risk of false convictions stemming from in-court testimony were thought to be greater than I believe it to be, measures far short of the privilege could protect the truth-finding function. For example, the accused might be compelled to answer written interrogatories, through counsel, before trial. Or the court, as opposed to the prosecutor, could conduct the examination of the defendant. Or a privilege conditioned on a showing of testimonial deficiencies might be developed. Many measures are possible, but the absence of any such measures on the civil side suggests that testimony compelled against interest is generally reliable.

Amar and Lettow seem to believe this, for they suppose that compelled pretrial examination would commonly lead to the discovery of admissible, reliable fruits. If compelled testimony were unreliable, it shouldn't be counted on to turn up much fruit. If compelled

329. Henry T. Terry, *Constitutional Provisions Against Forcing Self-Incrimination*, 15 YALE L.J. 127, 127 (1906).

330. Amar & Lettow, *Fifth Amendment*, *supra* note 16, at 861.

331. On the role of the privilege in fostering police interrogation, see sources cited in Dripps, *supra* note 94, at 714 n.62.

332. For cases of false conviction due to confessions extracted during police interrogation, see MARTIN YANT, *PRESUMED GUILTY* 75-95 (1991).

testimony does turn up reliable fruit, the testimony that led to the fruits is no less reliable than the fruits themselves.³³³

That is why, as Amar and Lettow rightly acknowledge,³³⁴ formal questioning in court should replace informal questioning at the police station.³³⁵ Under their system, however, the typical defendant would simply lie at the pretrial examination rather than take a contempt sanction. The typical defendant certainly would not disclose the location of physical evidence that might hang him at trial. Subsequently, even if the prosecution can disprove the pretrial testimony, it would be barred by Amar's and Lettow's account of the privilege from using it at trial.

Just as now, the window between arrest and the arrival of defense counsel would continue to supply the only practical opportunity to get evidence from the suspect. But under the Amar/Lettow model, physical evidence derived from the police interrogation would be admissible, no matter how coercive the questioning. And they are strangely agnostic about when even verbal admissions extracted by the police would, or would not, be admissible at trial.³³⁶ Amar and Lettow characterize police abuse as a Fourth Amendment violation,³³⁷ but that takes us back to Amar's hostility to the exclusionary rule and his enthusiasm for damage actions.

Given the proportion of cases that involve physical evidence—murder weapons, robbery booty, and above all, drugs—their proposal would vastly increase the incentive to coerce confessions. The admissibility of fruits would nullify the privilege's practical value as an antidote to the traditional abuses of police

333. Corroboration with independent evidence may not be thought to establish the reliability of a statement. See *Idaho v. Wright*, 497 U.S. 805, 822 (1990). But when a statement causes the discovery of the physical evidence, the case is better described as a case of guilty knowledge than a case of a corroborated admission.

334. Amar & Lettow, *Fifth Amendment*, *supra* note 16, at 904.

335. For various proposals for in-court interrogation, see WALTER V. SCHAEFER, *THE SUSPECT AND SOCIETY* 31-56 (1967); Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932); Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. & CRIMINOLOGY & POLICE SCI. 1014 (1934).

336. Amar & Lettow, *Fifth Amendment*, *supra* note 16, at 908-09.

337. *Id.* at 927 ("[T]he root antitorture idea is largely a Fourth Amendment idea and not a Fifth Amendment idea"); cf. STORY, *supra* note 39, § 931, at 662-63 (stating that the Fifth Amendment privilege "is but an affirmation of a common-law privilege. But it is of inestimable value. It is well known, that in some countries, not only are criminals compelled to give evidence against themselves, but are subjected to the rack or torture in order to procure a confession of guilt.").

interrogation, while enough of the privilege would survive to prevent replacing police interrogation with in-court questioning.

The privilege is at best an anachronism and at worst a constitutional blunder. But it's in the Constitution, and the courts are bound to apply it. Amar and Lettow stand in the Wigmore tradition of strangling the privilege through restrictive interpretation. A more honest and more successful attack on the privilege would be to return to *Twining* and *Adamson*, thereby freeing the states to experiment with meaningful forms of in-court pretrial questioning. Another alternative, less honest and less effective, would be to overrule *Griffin v. California*, so that the suspect could be given a strong reason to tell his story at a pretrial hearing. But even that approach would be more faithful to the privilege than the Amar/Lettow account.

III. UP FROM INCORPORATION

So: I think Amar is wrong about constitutional theory, wrong about incorporation, wrong about the Fourth Amendment, and that Amar and Lettow are wrong about the Fifth Amendment. Yet in another and more general way, I think Amar is right about criminal procedure. Professors Maclin,³³⁸ Steiker,³³⁹ and Kamisar³⁴⁰ all make cogent points against one or another of Amar's claims, and I agree with most of what those critics have to say, so far as it goes.

But what Amar's critics have said doesn't go very far. They each object to some aspects of prevailing doctrine, but they do not acknowledge the arbitrary quality of the *entire regime* of constitutional criminal procedure. The Court decides criminal procedure cases as though it had some common-law supervisory power over criminal justice. Neither the text nor history nor precedent seems to count for much. Not surprisingly, cases decided without consulting any general principle abound with inconsistencies and uncertainties.

The principle reason for this state of affairs is the incorporation doctrine. Harlan was right and Black was wrong; the "specific guarantees" of the Bill have not survived the countervailing pressure of policy. Nor is the Bill, standing alone, enough to secure decent police methods and fair trials.

Oddly, the proof of this thesis comes from Amar's own work. What makes Amar's work interesting is his rhetorical cunning, the

338. See Maclin, *supra* note 210.

339. See Steiker, *supra* note 211.

340. See Kamisar, *supra* note 321.

ability to rehabilitate lost causes, such as the incorporation doctrine, tort alternatives to the exclusionary rule, and the reliability theory of the privilege. Not surprisingly, his most brilliant arguments turn out to be wrong.³⁴¹ But their failure is highly instructive.

Amar acutely realizes that originalism is politically bankrupt, absent some contemporary source of obligation to the framers' intentions. He responds not by abandoning originalism (which would not be brilliant but merely reasonable) and concocts a political theory founded on popular knowledge of the possibility of extra-textual amendment. Subtract the unconvincing but brilliant argument, and originalism becomes by Amar's admission only "the dead hand of the past."³⁴²

Amar acutely realizes that the case for incorporation is badly damaged by the *Twitchell* case. He responds not by abandoning incorporation (which would not be brilliant, but merely reasonable), but instead by arguing that *Twitchell*'s due process claim proves that all nine justices were in a complete funk that day. Subtract the daring but incredible argument, and, by Amar's own admission, Fairman, Frankfurter, and Berger have a "trump card" to play with a "flourish."³⁴³

Amar acutely realizes that most criticism of the exclusionary rule is really criticism of the Fourth Amendment. He responds not by defending the exclusionary rule (which would not be brilliant, but merely reasonable), but by creating a gap between the Fourth Amendment right and the exclusionary remedy in his rousing "cops get lucky, conspirators rat" passage.³⁴⁴ Subtract the passionate but demonstrably false argument, and, by Amar's own admission, "setting criminals free is a cost of the Fourth Amendment itself, and not of the much-maligned exclusionary rule."³⁴⁵

Amar and Lettow acutely realize that the traditional justifications for the Fifth Amendment privilege are pious nonsequiturs. They respond not by opposing the privilege (which would . . . well, by now you get the point), but rather by attempting to rehabilitate the reliability theory of the privilege. Subtract this counterfactual and incomplete response, and by their own admission the justifications for

341. Cf. Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 917 (1986) (arguing that "brilliance" should count heavily against an economic or legal theory).

342. Amar, *Philadelphia Revisited*, *supra* note 82, at 1072.

343. Amar, *Fourteenth Amendment*, *supra* note 19, at 1255.

344. Amar, *Fourth Amendment*, *supra* note 15, at 794.

345. *Id.* at 793-94 (footnote omitted).

the privilege either "prove[] too much or too little (or both)" or are "simply wrongheaded."³⁴⁶

Amar's critics have focused on one or another of his clever innovations, not on the underlying motivation for those intellectual maneuvers. I agree that his innovations are failures; but their motivation is fundamentally sound. Constitutional criminal procedure is a mass of contradictions; the founders can give us neither obligatory nor even plausible guidance on most of our problems; and the contradictions in the cases make reliance on precedent problematic. This would be a poor prognosis even for state commercial law, which frees no murderers and imprisons no innocents, and which can be reformed by statute. For a body of law theoretically founded on the written Constitution of a republic, meant to govern the moral dilemmas of crime and punishment, the situation borders on disgrace.

The way out of the predicament will not be easy. But if the Court would readopt due process as the dominant idea in criminal procedure, and recharacterize due process in procedural rather than substantive terms,³⁴⁷ things would begin to improve. "Fundamental fairness" applied on a case-by-case basis is no doctrine at all, certainly not a doctrine with any roots in the Constitution. But preventing punishment outside the criminal process, and ensuring that the criminal process does all it can to prevent unjust convictions, are the core ideas of due process of law. If the Court would implement those ideas by promulgating general standards, it could avoid the vacuous generality of fundamental fairness and the arbitrary particularity of incorporation.

Much, probably most, current law should survive. Arbitrary searches and seizures deprive people of liberty without due process, for it is the prospect of a valid prosecution that justifies coercive methods of investigation. But due process could go further than the Fourth Amendment, regulating such practices as the planting of spies and the collection of information confided to third parties, because "liberty" is a more expansive concept than privacy. If the exclusionary rule is the only practical way to enforce the ban on unreasonable search and arrest, then the exclusionary rule is constitutionally justified as well. Police questioning, with its sinister secrecy and history of abuse, is likewise vulnerable to due process

346. Amar & Lettow, *Fifth Amendment*, *supra* note 16, at 889-90.

347. For the outlines of this approach, see Dripps, *supra* note 95, at 618-20.

challenge—a challenge that has a good chance of success, once nonviolent, public questioning in court gains constitutional sanction.

Due process, moreover, can do far more than the Bill of Rights to make trials fair. If police investigation focuses on a single suspect and fails to preserve potentially exculpatory evidence, then the trial becomes an appeal from the investigation and due process is violated. If the government is allowed to prove odious but irrelevant prior acts by the accused, so that the jury might convict against the evidence, due process again is violated. If the accused offers probative, exculpatory testimony, whether from experts or from persons with first-hand knowledge, the due process right to a fair trial requires admitting the evidence.

Professor Amar, by contrast, has little to say about due process. The double jeopardy article he wrote with Jonathan Marcus describes the underlying principles of due process as “protecting innocent persons and checking government overreaching,”³⁴⁸ and the text of the Due Process Clause as “more spacious—but also more flexible, less absolute”³⁴⁹ than that of the Double Jeopardy Clause. Yet the double jeopardy article also makes clear that, for Amar, due process functions as a gap-filler, something resorted to when the Bill of Rights permits a really troubling result.

Amar’s thought is drawn primarily to the Bill of Rights, with its legalistic text and its revered history. His commitment to incorporation is at the least not compelled by conventional sources of constitutional law, and it leads him to both misunderstand current law and to chart a deeply mistaken course for the future.

Even if his statist readings of the Fourth and Fifth Amendments were valid, due process makes those interpretations of questionable relevance. A robust concern for “protecting innocent persons and preventing government overreaching,” such as I endorse, would lead to a residential warrant requirement, an exclusionary rule, and a proscription on evidentiary use of statements obtained during police interrogation. Given Bill of Rights minimalism, defense lawyers would resort to the Due Process Clauses of the Fifth and Fourteenth amendments. Without an account of the role those clauses play in search-and-seizure and interrogation, Professor Amar’s entire program remains unclear.

348. Amar & Marcus, *supra* note 18, at 29 (footnote omitted).

349. *Id.* at 31.

As against the federal government the Bill of Rights of course applies, so the claims I developed about the Fourth and Fifth Amendments would remain relevant even in a regime that, in state cases, focused on due process. Due process, however, is itself part of the Bill of Rights, so that any due process rights that go beyond the Fourth, Fifth and Sixth Amendments' particular provisions would also run against the federal government.

The Court resorted to incorporation thirty years ago as a response to the manifest defects of criminal justice in the states and the manifest failure of the fundamental fairness regime to do much about the situation. But there was nothing magical about the incorporation doctrine, just as due process can mean something both more specific and more closely connected to constitutional text and history than fundamental fairness. Given a constitutional ban on punishment without trial, and a constitutional requirement that trials be fair, criminal procedure would at last be on the road to a principled and coherent body of doctrine. When it comes to constitutional criminal procedure, our first principle should be due process.

