Book Review

Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism

The Constitution and Criminal Procedure: First Principles. By Akhil Reed Amar.* New Haven: Yale University Press, 1997. Pp. xi, 272. \$35.00 (hbk.), \$16.00 (pbk.).

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Akhil Amar's new book on criminal procedure¹ is as important for the broad trend it reflects as for the many interesting ideas it contains.² Amar is a progressive who, in other works, has argued powerfully for more democratic and humane constitutional principles.³ Yet in this book, he sharply attacks the

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1. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997).

2. The book consists of a compendium of pieces previously published in slightly different form in various law reviews. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123 (1996); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169 (1995); Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995).

3. See, e.g., Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994) [hereinafter Amar, *Central Meaning*] (arguing that the central pillar of republican government is popular sovereignty); Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against the States?*, 19 HARV. J.L. & PUB. POL'Y 443 (1996) (arguing that the Fourteenth Amendment bars states from abridging the right to bear arms, freedom of speech, and other constitutional rights); Akhil Reed Amar, *The Fifteenth Amendment and "Political Rights"*, 17 CARDOZO L. REV. 2225 (1996) (arguing that the Fifteenth Amendment should be read to protect the right to hold office, be voted for, serve in the military, and serve on a jury); Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENTARY 403 (1993) [hereinafter Amar, *The*

progressive orthodoxy of criminal procedure. Amar allies himself with the opponents of the Fourth Amendment exclusionary rule and the warrant requirement. He argues against suppression of the "fruits" of incriminating, coerced statements and for a general reorientation of criminal procedure toward factual guilt and innocence. In short, although many of his ideas are idiosyncratic and resist ideological pigeonholing, one cannot miss the fact that he ends up enthusiastically embracing main elements of the conservative critique of criminal procedure liberalism.

Because Amar is among our most energetic and erudite constitutional scholars, his ideas are certain to receive wide attention. Because the ideas are interesting and powerfully presented, they deserve examination on their own terms. For reasons set out in Part II of this Review, it turns out that at least some of the ideas are at least somewhat oversold. I argue that there may be more to Warren Court reforms than is commonly acknowledged these days. Apart from the ideas themselves, however, the very fact that someone like Amar has written this book is also a fact of considerable significance. The book simultaneously symbolizes and helps propel the flood tide away from criminal procedure liberalism.

Even in its heyday, political support for the Warren Court revolution was fragile.⁴ Today, it has more or less collapsed. Amar is hardly the only liberal academic who has gotten off the criminal procedure bandwagon,⁵ and outside the academy, the trend is still more striking.⁶ The recent "liberal" Clinton appointees to the Supreme Court seem as unfriendly to criminal procedure liberalism as their conservative colleagues,⁷ and much of President Clinton's own success reflects his identification of the Democratic Party with the forces of "law and order."⁸

In short, this book is part of a significant movement that has produced a secular change in the politics of criminal procedure. Accordingly, its

Thirteenth] (arguing that the Thirteenth Amendment may prohibit child abuse).

4. See FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 8-25 (1970) (recounting contemporary political opposition to Warren Court decisions).

5. It is noteworthy, for example, that Cass Sunstein, Jeffrey Rosen, and Richard Parker, each of whom is associated with progressive causes in one way or another, are quoted as effusively praising the book on the dust jacket.

6. The trend is epitomized by the transformation of Harold Rothwax, who began a lengthy and distinguished career as a civil liberties lawyer and ended it as one of the harshest critics of Warren Court criminal procedure decisions. See HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* (1996).

7. For example, Justices Ginsburg and Breyer have frequently joined their conservative colleagues in narrow readings of the Fourth Amendment. See, e.g., *Maryland v. Wilson*, 117 S. Ct. 882 (1997) (holding that an officer making a traffic stop may order a passenger to get out of the car); *Ohio v. Robinette*, 117 S. Ct. 417 (1996) (holding that the defendant's consent to search was voluntary even though he had not been told that he was free to go); *Whren v. United States*, 116 S. Ct. 1769 (1996) (holding that the reasonableness of a traffic stop does not depend upon the motivation of the officer).

8. See David Johnston & Tim Weiner, *Seizing the Crime Issue, Clinton Blurs Party Lines*, N.Y. TIMES, Aug. 1, 1996, at A1; Adam Nagourney, *The Candidates: Dole Attacks on Crime but Clinton Is Ready*, N.Y. TIMES, Sept. 17, 1996, at A1.

publication provides an occasion for reflection on why so many progressives of an earlier era embraced the Warren Court reforms in the first place, on why their vision has collapsed, and on what, if anything, deserves to be salvaged from the wreckage. These broader issues are addressed in Part III of this Review. Before turning to them, however, Professor Amar's specific proposals require analysis.

I. AMAR'S PROGRAM

With characteristic energy and ebullience, Amar argues for wide-ranging reform. Although his proposals cover many different areas of criminal procedure, and although he advances a mix of arguments supporting them, they are united by two broader themes: a desire to reorient criminal procedure toward questions of factual guilt and innocence and a deep commitment, manifested in Amar's other work as well,⁹ to notions of popular sovereignty.

With respect to the Fourth Amendment, these themes are reflected in Amar's opposition to a per se warrant requirement and an exclusionary rule. Amar claims that the modern Court has turned the Warrant Clause on its head.¹⁰ Whereas the Framers were fearful of warrants and wanted to restrict their use,¹¹ the Court has read the Fourth Amendment as if it required warrants in many cases.¹² Doubtless, this reading is motivated by the fact that the Warrant Clause seems to restrict searches in ways that would be rendered meaningless if police were not required to secure warrants in the first place. The Fourth Amendment's text provides that warrants can be issued only upon probable cause and only on the basis of an affidavit specifically describing the place to be searched and the persons or things to be seized.¹³ These requirements would be nullities if the police could always avoid them by the simple expedient of searching and seizing without warrants. Why would the Framers impose requirements *for* warrants if they did not mean to *require* warrants?¹⁴ The modern Court has solved the puzzle by reading the

9. See, e.g., Amar, *Central Meaning*, *supra* note 3; Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657 (1997).

10. See AMAR, *supra* note 1, at 3-17.

11. See *id.* at 15-16.

12. See, e.g., *Johnson v. United States*, 333 U.S. 10, 14-15 (1948).

13. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

14. See AMAR, *supra* note 1, at 18; see also *Whiteley v. Warden*, 401 U.S. 560, 566 (1971) (arguing that "less stringent standards for reviewing the officer's discretion in effecting a warrantless arrest and search would discourage resort to the procedures for obtaining a warrant"); Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 263 (1984) (arguing that it would be "incongruous" for police officers to have "greater power to make seizures than magistrates have to

reasonableness standard, applicable to all searches, as if it required warrants for at least some of them.¹⁵

Amar offers a different solution. He points out that at common law, warrants immunized government officials from damage suits. The Framers worried about this immunizing effect. They wanted to restrict, rather than encourage, the *ex parte* warrant procedure because they believed that, in general, the legality of searches should be determined by juries applying the Fourth Amendment's reasonableness standard. On this view, then, the problem addressed by the Fourth Amendment is not the police circumvention of warrants, but the police immunity from civil judgments that warrants afford.¹⁶

Accordingly, Amar favors a return to the Fourth Amendment's text and to the original understanding. Police officers should not be required to get warrants and should not be required to demonstrate probable cause before they search and seize. Instead, searches and seizures should be judged according to the Fourth Amendment's "reasonableness" standard, with reasonableness determined primarily by juries adjudicating tort actions brought for damages.

Amar's commitment to traditional tort remedies is also reflected in his opposition to the exclusionary rule. Amar argues that in many situations, the exclusionary rule requires the suppression of evidence, the discovery of which was not caused by the illegal activity. The exclusion of otherwise reliable evidence therefore gives guilty defendants a windfall, while doing nothing to compensate innocent victims of lawless police activity.¹⁷ In contrast, a beefed-up system of civil remedies would compensate innocent victims who deserve compensation while also providing an optimal level of deterrence.¹⁸

Amar's proposals for Fifth Amendment reform reflect a similar concern about guilt and innocence. On his view, the Self-Incrimination Clause¹⁹ makes sense only as an effort to prevent wrongful conviction of the innocent.²⁰ Coerced self-incrimination is a problem because innocent people can be made to appear guilty if they are forced to testify in their own defense. Modern Fifth Amendment doctrine once again turns this concern on its head. On the one hand, the privilege sometimes leads to the conviction of the innocent when potential defense witnesses rely on their Fifth Amendment

authorize them").

15. See, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967) (noting that "[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment").

16. As Amar puts it, "Warrants . . . were friends of the searcher, not the searched. They had to be limited; otherwise, central officers on the government payroll in *ex parte* proceedings would usurp the role of the good old jury in striking the proper balance between government and citizen after hearing lawyers on both sides." AMAR, *supra* note 1, at 13.

17. See *id.* at 25-29.

18. See *id.* at 40-43.

19. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .").

20. See AMAR, *supra* note 1, at 71.

privilege to refuse to testify, thereby preventing defendants from presenting exculpatory evidence to the jury.²¹ On the other hand, modern Fifth Amendment doctrine protects the guilty by excluding perfectly reliable evidence gained as the "fruit" of compelled statements.²²

In one of the most insightful moves in the book, Amar ties these Fifth Amendment difficulties to the scope of immunity currently accorded defendants whose statements are compelled. Under modern doctrine, a defendant is entitled to "use" and "derivative use" immunity.²³ The prosecution is not only precluded from using the compelled statements themselves; it is also prohibited from using evidentiary fruits of those statements, including physical evidence that is secured as the result of information conveyed by the defendant. Often, the derivative use restriction puts the prosecution in a difficult position: Once the defendant has made compelled statements, the prosecution may be unable to prove that its evidence derives from an independent source.²⁴

Amar's insight is that most of these problems in Fifth Amendment law can be resolved by abolishing derivative use immunity. Under his proposal, defendants would remain free to decline to testify at their own trials, and compelled pretrial statements would continue to be inadmissible. A defendant could be compelled to speak prior to trial, however, and the prosecution could use his statements to develop new leads, including physical evidence and additional witnesses, that could be presented at trial.²⁵ Therefore, abolition of derivative use immunity would continue to shield the innocent from being made to appear guilty when they take the stand. Moreover, it would eliminate the problem that sometimes prevents innocent defendants from calling witnesses who might vindicate them. Under current law, prosecutors have a legitimate reason for refusing to immunize these witnesses, because the immunization imposes on the prosecution the burden of proving that evidence they later develop against the witnesses was independent of their testimony at trial.²⁶ If derivative use immunity were abolished, prosecutors could no longer

21. See *id.* at 49-51; see also Peter W. Tague, *The Fifth Amendment: If an Aid to the Guilty Defendant, an Impediment to the Innocent One*, 78 GEO. L.J. 1, 1 (1989) (noting that the Fifth Amendment privilege against self-incrimination "can shackle the innocent defendant from attempting to prove that another person committed the crime").

22. See AMAR, *supra* note 1, at 49.

23. See *Kastigar v. United States*, 406 U.S. 441, 459 (1972).

24. For a dramatic—and, in my view, strained—application of this principle, see *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam), in which the court reversed the conviction of Iran-Contra defendant Oliver North. Although the prosecution took elaborate precautions to demonstrate that its evidence was gathered prior to North's compelled testimony before a congressional committee, it was unable to demonstrate to the court's satisfaction that prosecution witnesses had not been influenced by the testimony. See *id.* at 943. Other courts have been more restrained in applying the principle. See, e.g., *United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991).

25. See AMAR, *supra* note 1, at 70-88.

26. Many lower courts have been sympathetic to this argument and have held that a judge should not force an immunity grant. See, e.g., *United States v. Heldt*, 668 F.2d 1238, 1282-83 (D.C. Cir. 1981); *United States v. Turkish*, 623 F.2d 769, 771-79 (2d Cir. 1980). But see *Virgin Islands v. Smith*, 615 F.2d 964, 969

object to the immunization of defense witnesses because they would not lose any evidence that they would have had otherwise.

Amar's proposal not only provides additional protection for the innocent, it also reduces the amount of undeserved protection for the guilty. There is no reason to doubt the reliability of physical or testimonial evidence gained as a result of a defendant's compelled statements.²⁷ The abolition of derivative use immunity would allow the prosecution to examine the defendant under oath in a controlled and civilized environment, with failure to cooperate subjecting the defendant to contempt sanctions. Although the defendant's statements themselves would remain inadmissible at trial, wholly reliable evidence developed through the defendant's testimony would be admissible.²⁸

In his penultimate chapter and appendix to the book, Amar presents a grab bag of proposals for reform of Sixth Amendment law,²⁹ including reforms designed to make the criminal jury a more viable institution. Once again, these disparate proposals are united by his concern for popular sovereignty and his emphasis on reliable guilt determinations. Thus, he would reverse Supreme Court decisions holding that dismissal with prejudice is the only remedy for speedy trial violations,³⁰ thereby eliminating an undeserved windfall for guilty defendants.³¹ When trial delay causes unreliable outcomes that endanger the innocent, dismissal may be an appropriate remedy. In contrast, when the problem is damage to reputation or lengthy pretrial incarceration, the appropriate remedy is compensatory or punitive damages or release from prison.³² Similarly, Amar reconceives the public trial requirement as a measure designed to protect the innocent and to guarantee public input into the criminal justice system.³³ The right to a jury trial, in some ways central to

(3d Cir. 1980) (noting that a court can grant use immunity if the defendant is otherwise prevented "from presenting exculpatory evidence . . . crucial to his case"); *United States v. Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978) (recognizing the court's "inherent remedial power" to grant immunity where the prosecution withheld it for purposes of distorting the factfinding process); Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 73, 168 (1974) (arguing that the court can force granting of immunity). Perhaps the dilemma could be at least partially resolved by forcing the witness to claim her Fifth Amendment privilege before the jury or by allowing the defense to argue to the jury that it should draw an adverse inference from the witness's failure to testify. For a discussion, see STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 481 (5th ed. 1996).

27. See AMAR, *supra* note 1, at 84.

28. See *id.* at 87.

29. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

30. See, e.g., *Strunk v. United States*, 412 U.S. 434 (1973).

31. See AMAR, *supra* note 1, at 92.

32. See *id.* at 105-14.

33. See *id.* at 116-24.

Amar's vision, is not (or not just) a protection for the defendant, but a guarantee of democratic, public participation in the criminal justice process.³⁴ Accordingly, neither the defense nor the prosecution should be permitted to waive the right.³⁵ The right to counsel is also a protection for the innocent and a guarantee of factually reliable outcomes. It follows that lawyers should be sharply restricted in their ability to present testimony that they know to be perjured or to mislead jurors through aggressive cross-examination of witnesses they know to be truthful.³⁶

In a brief concluding chapter, Amar ties together his interpretations of the Fourth, Fifth, and Sixth Amendments and explains how these interpretations relate to his broader constitutional methodology. Amar believes that we should pay much more attention to the Constitution's text. In his view, "the Constitution is not some ventriloquist's dummy that can be made to say anything the puppeteer likes."³⁷ Therefore, he criticizes "leading scholars and distinguished judges" who "have paid [little attention] to the text of the Constitution while busily making criminal procedure pronouncements in its name."³⁸

Yet Amar himself is not a simple textualist. "Textual argument," in his view, is "a proper starting point for proper constitutional analysis."³⁹ Nonetheless, "sometimes, plain-meaning textual arguments in the end must yield to the weight of other proper constitutional arguments—from history, structure, precedent, practicality, and so on."⁴⁰ According to Amar, each of these strands of constitutional argument can be united under a single broad theme: "the simple idea that constitutional criminal procedure should protect the innocent, and not needlessly advantage the guilty."⁴¹

II. AN EVALUATION

A. *Amar's Methodology*

One cannot help but admire the erudition and intelligence Amar brings to the task of reforming criminal procedure. Many of his proposals are sensible and overdue; all of them are interesting and worthy of serious consideration. Beyond the specifics, perhaps the greatest strength of the book is the infectious

34. *See id.* at 120-23.

35. *See id.* at 120.

36. *See id.* at 141-44. Amar's apparent willingness to allow defense attorneys to make what will amount to conclusive judgments as to whether their clients are lying is in some tension with the populist and pro-jury views that animate the rest of the book.

37. *Id.* at 152.

38. *Id.*

39. *Id.* at 153.

40. *Id.*

41. *Id.* at 154.

sense of enthusiasm and discovery that someone outside the discipline can generate.⁴² Amar is not steeped in ancient criminal justice lore, and he is not nursing old wounds suffered in long-forgotten battles. Accordingly, he can give the field an authentically fresh look.

But if this fresh look is the book's greatest strength, it also leads to serious problems. For all the originality of some of his proposals, it must be said that Amar sometimes trumpets ideas as new when they are in fact merely newly discovered by him. Amar is more than generous in his citation of the scholarship of others,⁴³ and he successfully unifies many strands of prior arguments in ways that are truly original. Nonetheless, as Amar appropriately acknowledges, much of his work builds on the work of others: His reading of the Warrant Clause owes much to Telford Taylor;⁴⁴ Richard Posner had previously developed many of his arguments concerning the exclusionary rule and its relationship to the Warrant Clause;⁴⁵ his Fifth Amendment argument is in some respects similar to Henry Friendly's;⁴⁶ and, despite some differences, his theory of the Speedy Trial Clause parallels that developed by Anthony Amsterdam.⁴⁷

Amar is dismissive of many others working in the field,⁴⁸ yet he ignores problems that many of those he dismisses would surely have noticed. For example, one passage in the book seems to suggest that under current doctrine, the right to counsel attaches at the point of arrest, rather than after formal charge.⁴⁹ His book treats most of formal doctrine at face value, although

42. Amar has been writing about and teaching criminal procedure for a number of years, but he nonetheless often presents himself as an outsider. See, e.g., *id.* at ix-x (discussing Amar's desire to bring a constitutional scholar's perspective to bear on criminal procedure).

43. See, e.g., *id.* at 179 n.4 (crediting many others for originating ideas that Amar defends in the book).

44. See TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969).

45. See Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49.

46. See Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

47. See Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525 (1975).

48. For example, he writes: "[T]he kind of constitutional law discourse and scholarship that now dominates criminal procedure is generally, in a word, *bad* constitutional law—constitutional law insouciant about constitutional text, ignorant of constitutional history and inattentive to constitutional structure." AMAR, *supra* note 1, at ix-x.

49. See *id.* at 138-39. This passage is more than a little puzzling. The Supreme Court has held that the right to counsel attaches only after formal charge, see *Moran v. Burbine*, 475 U.S. 412 (1986); *United States v. Gouveia*, 467 U.S. 180 (1984); *Kirby v. Illinois*, 406 U.S. 682 (1972), and it is hard to believe that Amar is not aware of this fact. Indeed, at one point, Amar correctly cites *Moran* and *Gouveia* for the proposition that "the Sixth Amendment right to counsel does not attach until the initiation of formal adversary criminal proceedings." AMAR, *supra* note 1, at 221 n.201. Yet in the passage cited above, Amar clearly implies that the right attaches at the point of arrest. Amar writes:

Given the explicit words of the counsel clause, and the overall architecture of the Sixth Amendment, the "right . . . to have the Assistance of Counsel for [one's] defence" is triggered when and because a person is "accused" of "criminal" wrongdoing. As we saw in our discussion of the speedy trial clause, the Sixth Amendment is *accusation-based*, because accusation itself subjects a person to distinct risks. One risk is the threat of prolonged pretrial detention—a threat triggered by arrest or indictment. . . .

anyone with real world experience knows that an evaluation of it must take into account widespread police perjury,⁵⁰ judicial nullification,⁵¹ the pervasive impact of the plea-bargaining system,⁵² and the severe underfunding of defense counsel.⁵³ In a book that has factual guilt as a central theme, it is disappointing to find virtually nothing about the problem of eyewitness identification and the Burger Court's evisceration of Warren Court protections against factually erroneous identification testimony.⁵⁴ Perhaps most

Even for an "accused" not subject to arrest or pretrial detention, the formal accusation itself of course triggers another threat to liberty. . . .

Of course, there may well be occasions prior to criminal accusation when general, innocence-protecting principles will trigger an analogous right to counsel, but there is no blanket rule requiring counsel before accusation. Consider, for example, the immemorial practice of excluding defense lawyers from the grand jury inquest. An arrest may trigger the risk of extended pretrial detention, but a grand jury summons does not.

Id. at 138-39 (footnotes omitted).

It is possible that the quoted passage is meant to criticize, rather than describe, *Kirby*, *Gouveia*, and *Moran*. There are two reasons that this explanation seems unlikely, however. First, at other points in the book, when Amar means to criticize existing doctrine, he leaves no ambiguity as to his intent. *See, e.g., id.* at 1 ("The Fourth Amendment today is an embarrassment. Much of what the Supreme Court has said in the last half-century . . . is initially plausible but ultimately misguided."). Second, the passage in question itself cites to *Kirby*, *Gouveia*, and *Moran*, among other decisions. *See id.* at 139 & 247-48 nn.220-22. These citations strongly suggest that Amar is describing the holding of cases rather than criticizing them. His parenthetical after the citation to *Kirby* describes the case as "suggesting that all Sixth Amendment guarantees are accusation-based," *id.* at 247 n.220, and the text to which this footnote is appended makes clear that he links accusation to arrest, *see id.* at 138-39. In fact, however, *Kirby* emphatically rejects the proposition that counsel attaches after arrest: "[A] person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby*, 406 U.S. at 688. Amar's citation to *Moran* includes a parenthetical describing the case as "finding no Sixth Amendment right to counsel during interrogation in police station prior to accusation and rejecting contrary language of *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Escobedo v. Illinois*, 378 U.S. 478 (1964)." AMAR, *supra* note 1, at 248 n.222. This is an accurate summary of the holding. What the summary neglects to say, however, is that the Court's holding turns on the broader proposition that Sixth Amendment rights are not triggered by arrest in the absence of formal charge.

50. *See* Morgan Cloud, *Judges, 'Testifying,' and the Constitution*, 69 S. CAL. L. REV. 1341, 1350-55 (1996); Christopher Slobogin, *Testifying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1041-48 (1996). *But cf.* AMAR, *supra* note 1, at 56-57 & 206 nn.49-52 (criticizing police deception in securing statements from suspects).

51. *But see* AMAR, *supra* note 1, at 56-57 (noting that "judicial decisions have created a divergence between theory and practice" and raising the possibility that "the police are tempted to subvert formal rules because the rules make no sense").

52. *See* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979 (1992). *See generally* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983) (discussing the costs of abolishing plea bargaining and possible alternatives).

53. *See* Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 656-63 (1986); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 377-97 (1995).

54. *See, e.g.,* *Manson v. Brathwaite*, 432 U.S. 98 (1977) (holding that the product of unnecessarily suggestive identification procedures should be admitted when the identification is "reliable"); *United States v. Ash*, 413 U.S. 300 (1973) (holding that there is no right to counsel for photographic identification procedures); *Kirby v. Illinois*, 406 U.S. 682 (1972) (holding that there is no right to counsel for identification procedures conducted before formal charge).

egregiously, the book devotes only scant attention to the problem of race and the ways in which it intersects with criminal procedure protections.⁵⁵

Perhaps some of these flaws should be forgiven on the ground that Amar's book is ultimately about constitutional methodology—history, text, and structure—rather than about the practicalities of the criminal justice system. The problem, though, is that Amar himself believes that history, text, and structure cannot be separated from real world outcomes. He is surely right to insist that “proper methodology of constitutional criminal procedure does not blind itself to practical effects.”⁵⁶ It seems a shame, then, that the book does not pay more attention to these effects.

Moreover, Amar's methodological arguments have problems of their own. Although he decries the fact that so few criminal procedure scholars are familiar with constitutional law,⁵⁷ he himself suggests a view of modern constitutional practice with which many constitutional scholars would disagree. For example, his book begins with a lengthy lament about the untidy state of Fourth Amendment law. On his view, Fourth Amendment doctrine consists of a hodgepodge of rules, exceptions to rules, ad hoc adjustments, and outright anomalies that can be justified by neither text nor history and that, taken as a whole, fail to reflect any sensible or unified theory or policy.⁵⁸ Some of these criticisms are surely on target, but Amar fails to acknowledge that similar complaints could be advanced against virtually any area of constitutional doctrine. For better or worse, what American constitutional law amounts to is a confusing mixture of textual and doctrinal exegesis, tradition, policy analysis, political accommodation, reasoning from historical experience, and randomly preserved detritus from past generations, all of which stubbornly resist generalization or rationalizing theory.⁵⁹

55. At a few points in the book, Amar makes passing reference to the intersection between problems of race and criminal justice, although he nowhere engages in sustained analysis. See, e.g., AMAR, *supra* note 1, at 37 (“Even if racially disparate impact alone does not violate the Constitution, surely equal protection principles call for concern when blacks bear the brunt of a government search or seizure policy. Thus, in a variety of search and seizure contexts, we must honestly address racially imbalanced effects and ask ourselves whether they are truly reasonable.”); *id.* at 160 (“[I]n asking the ‘race question’ we must also remember that racial minorities are often the victims of crime, too.”). For sophisticated and detailed discussions of the issue, see RANDALL KENNEDY, *RACE, CRIME AND THE LAW* (1997); David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy’s “Politics of Distinction,”* 83 GEO. L.J. 2547 (1995); and Tracey Maclin, “Black and Blue Encounters”—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 203 (1991).

56. AMAR, *supra* note 1, at 154.

57. He writes:

Scholars should know better, but too few of those who write in criminal procedure do serious, sustained scholarship in constitutional law generally, or in fields like federal jurisdiction and remedies. As a result, discourse in constitutional criminal procedure has evolved separately, cutting itself off from larger themes of constitutional, remedial, and jurisdictional theory.

Id. at 115. I have noted a similar problem, although I hope in less dismissive tones. See Louis Michael Seidman, *ABSCAM and the Constitution*, 83 MICH. L. REV. 1199, 1203-04 (1985) (book review).

58. See AMAR, *supra* note 1, at 1-31.

59. For a sustained argument that this eclecticism is a virtue, see PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991).

To take an example almost at random, consider the First Amendment public forum doctrine. The Court has fashioned out of whole cloth elaborate, but nonetheless inconsistently applied, distinctions between traditional and nontraditional⁶⁰ and open and limited⁶¹ public fora. The cases are full of confused discussion of content neutrality, viewpoint neutrality, and subject matter neutrality.⁶² None of this doctrine has any clear grounding in the text of the First Amendment or in practices at the time of the Framing. The cases are not only internally inconsistent, but also fail to reflect a coherent theory about the obligation of the government to subsidize speech,⁶³ much less a coherent view about subsidization of the exercise of constitutional rights more generally.⁶⁴ In short, public forum law is—and for that matter, many other areas of constitutional law are—every bit as confused as criminal procedure. Given the fact that the Court is applying two hundred years of precedent, developed through compromise by a multi-member body operating under important political constraints and without agreement as to appropriate methodologies, it could hardly be otherwise.⁶⁵

Amar's criticisms are especially ironic in light of his own methodological eclecticism. Pragmatic and eclectic approaches have the great virtue of allowing considerable flexibility. Of course, the downside of this virtue is that they are also open to the very sort of "ventriloquist's dummy" manipulation

60. Compare *United States v. Grace*, 461 U.S. 171, 180 (1983) (holding that the sidewalk near a court is a traditional public forum), with *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (holding that the sidewalk near a post office is not a public forum).

61. Cf. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (distinguishing between "quintessential" public fora, "voluntary" public fora, and public property that is "not by tradition or designation a forum for public communication"). Compare *Hague v. CIO*, 307 U.S. 496, 515 (1939) (holding that streets and parks are open public fora), with *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 655 (1981) (holding that a state fair is a limited public forum).

62. Compare *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981) (holding that even when property is not a public forum, government regulation must be content neutral), with *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (upholding a content-based restriction because it was viewpoint neutral), and *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (invalidating a viewpoint-neutral restriction because it limited subject matter).

63. Compare *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984) (holding that the accumulation of signs posted on public property was a sufficient substantive evil to justify a limitation on speech), with *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (holding that the accumulation of litter on public property was an insufficient substantive evil to justify a limitation on speech).

64. Compare, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that the government may condition access to family planning funds on a recipient's not giving advice concerning abortion), with *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987) (holding that the government may not condition a permit to rebuild a beachfront home on a grant of an easement to allow public access to the beach). See generally LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES* 74-77 (1996) (discussing the incoherence of the conditional offer doctrine).

65. See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (discussing various approaches to constitutional interpretation and justification of judicial review); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (arguing that there is some coherence in the various kinds of constitutional interpretive arguments that have been developed over time). For one explanation of this state of affairs emphasizing the contradictions generated by multi-member decisionmaking bodies, see Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

that Amar decries.⁶⁶ Consider, for example, Amar's textualism. He vigorously criticizes the willingness of other constitutional scholars to ignore text⁶⁷ and fills many pages with detailed textual analysis. It is not always clear, however, that this analysis imposes any meaningful restraints on his ability to vindicate his own policy preferences. For example, Amar seems to suggest that the exclusionary rule violates the Sixth Amendment's "public trial" requirement.⁶⁸ This reading of the Sixth Amendment text, which, of course, speaks only of public access *to* the trial, and not of rules of evidence *for* the trial, is at best expansive and perhaps altogether fanciful.⁶⁹ It is not coincidental that Amar's willingness to indulge this broad reading leads to a result that he also favors on policy grounds.

In contrast, when Amar turns to the putative warrant requirement in the Fourth Amendment, he suddenly becomes a strict constructionist. If the public trial requirement can be read as prohibiting the exclusionary rule, then certainly the text of the Fourth Amendment is expansive enough to encompass a modified warrant requirement. Perhaps warrants are necessary to make the "people . . . secure" from unreasonable searches. Perhaps some, but not all, searches without warrants are "unreasonable." Of course, this reading would run counter to Amar's policy proposals. Accordingly, in this context, strict construction is required: "To read in a warrant requirement that is not in the text—and then to read in various nontextual exceptions to that so-called requirement—is not to read the Fourth Amendment at all. It is to rewrite it."⁷⁰

Similar difficulties infect Amar's discussion of constitutional history. Amar's knowledge of this field is encyclopedic, and he brilliantly succeeds in fleshing out his arguments with historical support that others have ignored. Much of this material is fascinating. Unfortunately, however, Amar never

66. AMAR, *supra* note 1, at 152.

67. *See id.*; *supra* text accompanying note 38.

68. Amar states:

[T]he public trial was designed to infuse public knowledge into the trial itself, and, in turn, to satisfy the public that truth had prevailed at trial. . . . All these values have been turned upside down by modern doctrines that—in the name of the Constitution, no less—exclude evidence the public knows to be true. . . .

. . . .
 . . . [V]arious modern exclusionary rules are not merely indefensible as a matter of text, history, and structure, and remedially inapt to boot. These modern upside-down rules also do violence to the elaborate adjudicatory architecture of the truth-seeking, confidence-enhancing, innocence-protecting, public trial envisioned by the Sixth Amendment.

AMAR, *supra* note 1, at 119.

69. Others have noted a tendency toward such readings in Amar's earlier work. *See, e.g.,* Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639 (1993) (criticizing Amar's suggestion in Amar, *The Thirteenth*, *supra* note 3, that the Thirteenth Amendment prohibits child abuse).

70. AMAR, *supra* note 1, at 10. Oddly, Amar himself would "rewrite" the Fourth Amendment to create a warrant regime that bears considerable resemblance to the one he attacks. *See id.* at 38-39 & 197 n.190 (pointing out that, under his proposal, "the results of many 'warrant requirement' cases need not necessarily be jettisoned, although their logic would need to be reconceptualized"); *see also infra* note 85.

explains exactly why we should treat historical practice as important.⁷¹ The Framers' world notoriously was not our own, and the differences are nowhere more apparent than when talking about issues of criminal procedure. The late eighteenth century was a world not only without organized crime, but also without an organized police force.⁷² Bill of Rights protections applied only to the federal government,⁷³ which had exceedingly limited law enforcement responsibilities. Criminal trials were typically conducted without counsel,⁷⁴ and the defendant had no right to testify in his own defense.⁷⁵ There were no telephones, no automobiles, no drugs, no gangs, no drive-by shootings, and, indeed, few people. Why should anyone suppose that the Framers' notions about criminal procedure would have much relevance for us?⁷⁶

In light of these difficulties, Amar concedes that some "translation" of historical practice is necessary to make it comport with modern reality.⁷⁷ But how much translation? Perhaps if the Framers were faced with modern conditions, they would favor warrants and an exclusionary rule to make the people "secure." Or, for that matter, perhaps in the face of current threats to public order, they would abandon Fourth and Fifth Amendment protections altogether.⁷⁸

71. I do not mean to say that Amar always treats history as dispositive. See, e.g., AMAR, *supra* note 1, at 8 ("The problem with the so-called warrant requirement is not simply that it is not in the text and that it is contradicted by history. The problem is also that, if taken seriously, a warrant requirement makes no sense."). Indeed, part of the difficulty is that Amar's unwillingness to commit to a constitutional methodology sometimes makes his choice between methodologies seem tendentious.

72. See David A. Sklanski, *Criminal Procedure and the Private Police* 40-43 (1998) (unpublished manuscript, on file with the *Yale Law Journal*).

73. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

74. An Act for the Punishment of Certain Crimes Against the United States (The Federal Crimes Act of 1790), ch. 9, § 29, 1 Stat. 112, 118, required appointment of counsel in capital cases, but not otherwise. Most trials were conducted without counsel. See WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 27-43 (1955); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1089 (1994).

75. See AMAR, *supra* note 1, at 214 n.133 (citing Joel N. Brodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91 (1982)).

76. Carol Steiker has criticized Amar's argument on similar grounds. See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 823-25 (1994).

77. See AMAR, *supra* note 1, at 29-30 (noting that "the traditional eighteenth-century civil model must be brought into the twenty-first century"); cf. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1173 (1993) (proposing a "sketch of a practice of fidelity in law, modeled on a practice of translation in language").

78. Of course, this is a problem that all constitutional "translators" face. For an especially powerful description of the difficulty, see Michael Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 395, 402-03 (1997). As Klarman writes:

Translators have selected an arbitrarily low level of generality at which to translate. They adjust the Framers' constitutional commitments to reflect changed circumstances, but fail to ask whether the Framers would have remained committed to the same concepts had they been aware of future circumstances. . . .

. . . .
 . . . If we treat *all* changed circumstances as relevant variables, then we simply will have converted the Framers into us, and asking how they would resolve a problem is no different from asking how we ourselves would resolve it. Yet a decision to treat some changed circumstances as variables and others as constants seems entirely arbitrary.

Id. at 395, 402.

At times, then, Amar's pragmatism seems too undisciplined. The more serious problem, however, is that on other occasions, his approach is much too rigid. As already noted, Amar's preoccupation with text and history sometimes causes him to pay insufficient attention to how his proposals might work in practice. These problems are especially acute in the Fourth and Fifth Amendment contexts, to which I now turn.⁷⁹

B. *Amar's Fourth Amendment Proposals*

Amar is entirely convincing when he argues that the Court's emphasis on a warrant requirement fits uneasily with the intent of the Framers, at least as narrowly conceived. Still, the overriding command of the Fourth Amendment is to make "the people . . . secure in their persons, houses, papers, and effects."⁸⁰ For a pragmatic translator, the question is not how the Framers meant to achieve this goal in their time, but how we can best achieve it in ours.⁸¹

From this pragmatic point of view, there is more to be said for a warrant requirement than Amar imagines. This is true whether one focuses on the individual victim of the search or on the problem of systemic deterrence. Focusing first on the individual, once an invasion of privacy has occurred, legal remedies are unlikely to be effective. To be sure, if property is seized or destroyed, perhaps the property can be returned or the individual compensated for his loss.⁸² But most of modern Fourth Amendment law deals, not with property, but with privacy and autonomy. Imagine, for example, a person awakened in the dead of night and then made to stand naked while the police rummage through his house. Perhaps damage remedies would provide systemic deterrence of future invasions of this sort (although, for reasons addressed below,⁸³ this claim, too, is doubtful). It should be clear, however, that money damages cannot make the individual "whole" after the event. The goods in question are simply not commensurate. Once an individual has been humiliated, embarrassed, or terrified, the injury is in a real sense irreparable. Trying to guess at the amount of money that a person would "trade" for this

79. Although approximately one-third of Amar's book discusses Sixth Amendment issues, see AMAR, *supra* note 1, at 89-144, I have limited my critical analysis to his Fourth and Fifth Amendment proposals. I have done so because these proposals raise the most troubling questions about Amar's approach, as well as the most serious challenge to criminal procedure liberals.

80. U.S. CONST. amend. IV.

81. Cf. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974) (suggesting that the Fourth Amendment is "a regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure").

82. Indeed, for just this reason, the "plain view" doctrine, which permits warrantless seizures of property when the seizures can be accomplished without invasions of privacy, makes sense. See, e.g., *Horton v. California*, 496 U.S. 128 (1990) (explaining and defending the plain view doctrine).

83. See *infra* notes 109-112 and accompanying text.

experience profoundly misunderstands what the experience is all about.⁸⁴ It follows that a system of *ex ante* licensing may be more effective in dealing with the problem of unlawful searches than a system of *ex post* compensation. Our aim should be prevention before the fact, rather than cure when it is too late. Therefore, the warrant requirement might be defended as a means of making the people “secure” by providing a system of judicial review for searches and seizures before they occur.⁸⁵

Of course, at least in principle, the threat of damages might also provide *ex ante* protection by deterring wrongful searches. It turns out, though, that warrants have considerable advantages from the systemic deterrence perspective as well. At first blush, it might seem that the warrant requirement is perverse: The requirement does work only in cases where an officer has not engaged in the evil that the requirement is meant to prevent. If the officer conducts an unreasonable search, his conduct can be condemned because of its unreasonableness, and there is no need for a warrant requirement to hold him responsible. It is only when an officer’s conduct is otherwise constitutionally permissible that the Warrant Clause has bite. Since the purpose of the warrant requirement is to prevent conduct that is otherwise unconstitutional, it might seem that it is in just these cases that the requirement is also unnecessary.

84. Amar himself seems to understand and agree with this point. See AMAR, *supra* note 1, at 43 (“Early prevention is often better than after-the-fact remedy. The Fourth Amendment says its right ‘shall not be violated.’ When judges can prevent violations before they occur, they should do so—especially if after-the-fact damages could never truly make amends.”); see also *id.* at 115 (“The first line of defense must always be prevention.”).

85. Again, Amar seems to understand and, to some extent, agree with this argument. He writes:

Due process values may even call for judicial preclearance of certain types of government searches and seizures, if there are good reasons for suspecting strong and systematic overzealousness on the part of certain segments of executive officialdom. In some situations, a search or seizure could be deemed constitutionally unreasonable because no prior approval was sought from a more neutral and detached decision maker. Preclearance might also help firm up the record of what facts the government had before the intrusion, thereby preventing officials from dreaming up post hoc rationalizations.

Id. at 38-39.

Of course, to the extent that Amar concedes the value of warrants, he gives up on what is distinctive about his approach. He therefore hastens to add that the “selective judicial preclearance” he favors is “a far cry from the warrant requirement I have been attacking so insistently.” *Id.* at 39. He claims that his proposal differs from current law in two important respects. First, “[j]udicial preclearance would not be a *per se* requirement of all searches and seizures, nor even a presumptive mandate, subject to well-defined categorical exceptions.” *Id.* Instead, reasonableness judgments would be “pragmatic, contingent, and subject to easy revision.” *Id.* Second, “judicial preclearance would be in addition to, rather than instead of, after-the-fact review in civil actions brought by the citizen target.” *Id.*

With regard to the first point, Amar perhaps overestimates the “rule-like” quality of current doctrine. See *infra* notes 89-90 and accompanying text. He may also underestimate the need police officers have for clear rules. As I argue below, the best justification for the warrant requirement is that even police officers acting in good faith will find it difficult to make accurate judgments about the vague and fact-specific standards for when searches are permissible. See *infra* notes 86-88 and accompanying text. It defeats the purpose of the requirement if its scope is every bit as vague and fact-specific as the standards for the searches and seizures themselves. With regard to the second point, I think that Amar is right to worry about the shielding effect of warrants. For reasons explained below, however, there is an argument that this shielding effect would be more significant under the damages regime that he favors than under the exclusionary rule regime that he rejects. See *infra* notes 107-112 and accompanying text.

On closer analysis, however, the warrant requirement makes a good deal of sense.⁸⁶ The difficulty is that even officers acting in good faith may overestimate their own ability to determine whether their conduct is within constitutional limits. Imagine, for example, parents who prohibit children from crossing a busy street when not in the presence of an adult. The purpose of the rule is to prevent children from taking unnecessary risks when crossing, yet the rule has independent force only in cases where the children are disciplined despite the fact that they have not taken such risks (since otherwise they could be disciplined for taking the risks). A bright-line rule prohibiting crossings under all circumstances might nonetheless be sensible. True, the child has not taken an unnecessary risk in *this* case, but we cannot be confident of her judgments in *future* cases. Better, then, to require parental supervision in all cases instead of encouraging the child to make her own judgments.

Similarly, it may make sense to require judicial supervision of searches and seizures in all cases and to enforce this bright-line requirement even in cases where the police make the "right" decision on the particular facts before them. This prophylactic approach is especially sensible because of the complex and fact-specific nature of the inquiry.

As Amar points out, probable cause has never been a fixed standard with a clear and precise meaning.⁸⁷ As vague as it is, however, a "reasonableness" standard, which Amar would substitute for probable cause, is more amorphous still. Instead of focusing on only one factor (the strength of the government's case), a reasonableness standard asks the police to evaluate the interaction of numerous factors, including the degree of the invasion, the seriousness of the crime, and the need for the evidence. The result is that every case will necessarily be unique, and resolution of any given case will provide little guidance for how the next case should be resolved. Officers themselves may therefore be better off with a rule that requires prior approval of individual cases and discourages them from trying to generalize from past cases.⁸⁸

All this is not to claim that the Warrant Clause, as presently administered, is without problems. The requirement has become so riddled with complex exceptions⁸⁹ that an officer is at least as likely to err in determining whether

86. The argument in the next few paragraphs is a special application of the general argument for legal formalism that Frederick Schauer develops with great sophistication. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

87. See AMAR, *supra* note 1, at 19-20; cf. *Illinois v. Gates*, 462 U.S. 213, 232 (1983) ("[P]robable cause is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules.").

88. Of course, if officers *realized* that they would be better off with prescreening, there would be no need for a warrant *requirement*. An optional prescreening mechanism, which officers could utilize when they believed it necessary, would be sufficient. The argument for a requirement therefore rests on the empirical judgment that the police are likely to overestimate their own ability to make accurate probable cause determinations, much as children overestimate their own ability to cross streets safely.

89. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (delineating the "special needs" exception); *California v. Acevedo*, 500 U.S. 565, 573 (1991) (car search exception); *New York v. Burger*, 482 U.S. 691, 712 (1987) (administrative search exception); *Warden v. Hayden*, 387 U.S. 294, 299 (1967) ("hot pursuit" exception).

she must get a warrant as she is to err in determining whether she has probable cause.⁹⁰ Moreover, the Court's willingness to accord very substantial discretion to magistrates' decisions whether to issue warrants,⁹¹ and its insistence that the exclusionary rule should be inapplicable when police rely on warrants in good faith,⁹² mean that the Framers' original concern about the shielding effect of warrants has some modern salience. This problem is aggravated by the practice, permitted in some jurisdictions,⁹³ of "magistrate shopping" to find a judge willing to issue a warrant and by the absence of an adversary process to guide judges in deciding whether the prerequisites for a warrant have been met.

These defects in the warrant process are real, but they argue for reform of the process rather than for its abandonment. The Court might address them by abolishing some of the exceptions to the warrant requirement, by abolishing or sharply constricting the good faith exception, by providing more rigorous review of magistrate probable cause determinations, and by prohibiting magistrate shopping.⁹⁴

In short, Amar is—and the Framers were—right to worry about the potentially shielding effect of *ex parte* warrants, and Amar is right that the present system has defects not imagined by the Framers. It does not follow, however, that warrants cannot be made to work. The sensible solution to these problems is to make the warrant procedure more reliable and to constrain its shielding effect, not to abandon it entirely.

The argument for warrants substantially overlaps with the argument for the exclusionary rule. Amar is transfixed by the idea that the exclusionary rule is "upside down."⁹⁵ It takes effect only in cases where the police find what they are looking for—cases where the defendant is almost certainly guilty. In these cases, the defendant receives a windfall—the suppression of the evidence and, often, dismissal of the underlying charge—that has no logical connection to the constitutional violation. In contrast, the exclusionary rule provides no direct

90. Amar's reforms would make this problem worse rather than better. *See supra* note 85.

91. *See Gates*, 462 U.S. at 236-37.

92. *See Massachusetts v. Sheppard*, 468 U.S. 981, 988 (1984); *United States v. Leon*, 468 U.S. 897, 906 (1984).

93. *See, e.g., United States v. Pace*, 898 F.2d 1218, 1231 (7th Cir. 1990) (rejecting a blanket rule prohibiting the government from submitting a warrant application to a second magistrate); *cf. Leon*, 468 U.S. at 918 (acknowledging the possibility of magistrate shopping).

94. The absence of defense counsel poses a more difficult problem. Obviously, the surprise necessary to make searches successful might be jeopardized if the defendant's lawyer were informed of the pendency of a warrant application. Even here, though, the problem might be at least partially remedied if we put our minds to it. Perhaps jurisdictions could appoint a "devil's advocate," whose permanent function would be to argue against warrant applications in much the way that some jurisdictions employ lawyers whose permanent job is to speak on behalf of consumers against utility rate increases. Even if this solution is deemed impractical, defendants are surely better off with imperfect *ex ante* review than with no such review at all, at least so long as the shielding effect of warrants is constrained.

95. *E.g., AMAR, supra* note 1, at 156.

protection for innocent victims of unreasonable police searches where the police fail to find incriminating evidence.⁹⁶

There is surely something to this criticism. From the perspective of individual remediation, the exclusionary rule is difficult to defend. This argument has limited force, however. As argued above,⁹⁷ individual remediation is difficult or impossible in any event. Once a violation occurs, money damages (the main alternative to exclusion) are also ineffective in returning a victim to the status quo ante. It follows that the defense of any remedy must be largely prospective. Indeed, in some ways the very term "remedy" is misleading. Our aim should be systemic deterrence, rather than individual remediation.⁹⁸

Moreover, while it is true that exclusion sometimes provides an undeserved windfall, the same can be said of some damage awards. Amar favors punitive damages,⁹⁹ which also give parties money they do not deserve in the name of deterrence.¹⁰⁰ It might be said that at least these parties have suffered some unjustifiable loss, but even this will not be true if damages are used to enforce the warrant requirement.¹⁰¹ Imagine a case where the police have

96. Of course, to the extent that the exclusionary rule deters future searches without probable cause, it provides indirect protection for the innocent. The probable cause requirement measures the ex ante likelihood that a search will reveal evidence. It seems sensible to suppose that, holding other things equal, the police are more likely to have probable cause to search guilty defendants than innocent defendants. Enforcement of the requirement through the exclusionary rule therefore primarily benefits the innocent.

97. See *supra* notes 83-85 and accompanying text.

98. Amar sometimes seems to understand this point. He argues that "[e]arly prevention is often better than after-the-fact remedy. . . . When judges can prevent violations before they occur, they should do so—especially if after-the-fact damages could never truly make amends." AMAR, *supra* note 1, at 43. Yet he unaccountably loses track of this understanding when discussing the preventive function of the exclusionary rule. He argues that exclusion cannot be justified "merely [as] a judicially fashioned, empirical, pragmatic and deterrence-based remedy for an antecedent Fourth Amendment violation." *Id.* at 151. This is so because [j]udicial remedies must fit the scope of the right. For example, a court is not free, as a matter of constitutional law, to play the "Leavenworth lottery": Because the government violated the constitutional rights of A, judges spin the wheel and spring some lucky (but unrelated) convict B from Leavenworth. This scheme might indeed deter—and the legislature might have the power to enact this into law—but courts have no such power as a matter of traditional remedial theory.

Id. at 151-52. Amar's hypothetical appeals to a powerful intuition, but if the aim is indeed prevention, rather than cure, he needs to provide some argument to support the intuition. He never tells us what, precisely, is wrong with a "Leavenworth lottery" or why the creation of such a lottery is an appropriate exercise of the legislative, but not the judicial, function. In fact, his own proposals for punitive damages function much like such a lottery. See *infra* notes 99-100 and accompanying text; *infra* text accompanying notes 109-110.

99. See AMAR, *supra* note 1, at 41-42 & 199 n.215. Strikingly, he argues for such damages, not on the ground that they provide individual remediation, but to avoid "systematic underdeterrence." *Id.* at 41-42.

100. Amar does suggest that not all the extra money need go to the plaintiff: Some "could flow to a 'Fourth Amendment Fund' to educate Americans about the amendment and comfort victims of crime and police brutality." *Id.* at 42. Nonetheless, Amar implies that plaintiffs would receive some windfall, presumably to give them adequate incentive to bring suit. See *id.*

101. Amar would abolish the warrant requirement. See *id.* at 4-5, 44. He emphasizes that his reforms should be treated as a package, see *id.* at 180-81 n.5, so it may seem unfair to criticize him for anomalies produced by adoption of one component of the package without the rest. Still, Amar acknowledges that even in the absence of a per se requirement, some prescreening would be appropriate. See *id.* at 44; see also *supra* note 85. Moreover, his claim that the exclusionary rule imposes unacceptable costs is based in

probable cause and would have obtained a warrant had they asked for one. If the police instead conduct a warrantless search, the defendant can hardly claim that his privacy was unjustifiably invaded. Precisely the same privacy loss would have occurred had the police bothered to obtain a piece of paper from a judge before conducting the search. A defendant who receives damages in this situation is awarded them, not in the name of corrective justice, but because damages are necessary to create the right ex ante incentives. Although a warrant would have done nothing to change the result in his case, we want to encourage the police to get warrants in future cases for the benefit of future search targets. Of course, this is precisely the same reason that evidence is excluded at trial, and it results in a similar windfall for the search target who benefits from the remedy.

It follows that the argument about the relative merits of the exclusionary rule and civil damages, like the argument about the warrant requirement, must rest on judgments about systemic deterrence. What method of enforcement is most likely to make the "people . . . secure" from the threat of unreasonable searches and seizures at the least cost? Viewed in this way, the exclusionary rule doubtless has problems, but there is once again more to say in its favor than Amar supposes.

First, the costs of the rule are greatly overstated. Often, the appearance of costs amounts to an optical illusion. When the police actually possess the evidence and cannot use it, this appears to be a cost of the exclusionary rule. It must be remembered, however, that the police obtained the evidence in the first place only because they violated the Fourth Amendment. In recent years, the Supreme Court has fashioned an exception to the exclusionary rule for cases where, on a preponderance of the evidence, the police can show that they would have discovered the evidence in any event had they not violated the Amendment.¹⁰² The exception means that, in many cases, evidence that is suppressed would not have been found in the first place if an alternative, effective deterrent had been in place to prevent the illegal search. Hence, loss of evidence is often a cost of the Fourth Amendment itself rather than of the means of enforcement.¹⁰³

large part on cases where the police fail to get a warrant. See AMAR, *supra* note 1, at 26. It seems appropriate, therefore, also to note the costs imposed by a damage remedy in this context.

102. See *Nix v. Williams*, 467 U.S. 431, 448 (1984); cf. *Murray v. United States*, 487 U.S. 533, 537-39 (1988) (holding that evidence should not be suppressed when there is a lawful independent source for it).

103. See Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 36 n.151, 47-48 (1987) (arguing that "costs" of the exclusionary rule are really costs of the Fourth Amendment itself); cf. William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 406-11 (1981) (arguing that a tort remedy would result in the loss of more evidence than the exclusionary rule).

Of course, as Amar emphasizes, there remain other cases where the exclusionary rule does impose a loss.¹⁰⁴ One must ask, though, whether the loss is greater than the losses produced by likely alternatives. Amar, along with many others,¹⁰⁵ advocates an invigorated damage remedy directed against the jurisdiction rather than against the individual officer.¹⁰⁶ Perhaps paradoxically, such a remedy might lead to the loss of more evidence than losses suffered under the exclusionary rule.¹⁰⁷ To understand why, we need to emphasize again the amorphous, fact-specific nature of Fourth Amendment judgments. Amar treats the flexibility of the substantive standard he would utilize as a virtue, and there is certainly something to be said for a "general reasonableness" test that measures not only the strength of police evidence, but also the extent of the invasion and the seriousness of the crime. Still, such an approach is unlikely to produce many bright-line rules that the police can count on. The result in each case will rest on its own individual mix of facts. This problem is greatly aggravated by reliance on jury verdicts, which carry no stare decisis effect.¹⁰⁸

104. Amar offers two examples. First:

Suppose the police could easily get a warrant, but fail to do so because they think the case at hand falls into a judicially recognized exception to the so-called warrant requirement. A court later disagrees—and so, under current doctrine, the search was unconstitutional. But if the court goes on to exclude the bloody knife, it does indeed confer a huge benefit on the murderer. The police could easily have obtained a warrant before the search, so the illegality is not a but-for cause of the introduction of the knife into evidence.

AMAR, *supra* note 1, at 26. Of course, this loss would also occur if there were a damage remedy in place sufficient to deter the unlawful search in the first place. When deterrence succeeds, the costs of lost evidence are attributable to substantive Fourth Amendment law, rather than to the exclusionary rule. Amar's point is that the exclusionary rule imposes costs that a damage remedy avoids when deterrence fails. As Amar himself acknowledges, however, the severity of this problem would be much reduced if his proposal to abolish the warrant requirement were adopted. *See id.* at 44-45. It would also be much reduced if my proposal to simplify the requirement by eliminating the confusing web of exceptions were put into effect. *See supra* text accompanying notes 89-94.

Amar's second example involves a case where the police search without enough justification to be "reasonable," and five minutes later, independent information comes to the police station that would have nudged the probability needle enough to make the search reasonable. Here, too, the illegality of the search when conducted is not a but-for cause of the later introduction of the bloody knife, and exclusion makes the murderer better off than he would have been had no Fourth Amendment violation ever occurred.

AMAR, *supra* note 1, at 26. It is likely, however, that the inevitable discovery doctrine would preclude suppression of this evidence under current law. *Cf. United States v. Andrade*, 784 F.2d 1431 (9th Cir. 1986) (holding that the inevitable discovery doctrine bars suppression of evidence because of an unlawful search incident to arrest where it would have been discovered later in any event through an inventory search). Indeed, Amar himself characterizes his proposal as a vast widening of that doctrine. *See AMAR, supra* note 1, at 193 n.137.

105. *See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411, 422 (1971) (Burger, C.J., dissenting); Posner, *supra* note 45, at 53-58.

106. *See AMAR, supra* note 1, at 41.

107. *See Mertens & Wasserstrom, supra* note 103, at 406-11.

108. Empirical data show that there is far more variation in decisions by individual jurors than in decisions by individual legal professionals. *See NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* 225-26 (1995). This result is hardly surprising: "[W]hile jurors typically have no experience in awarding damages the professionals do have both training bearing on the calculation of

On top of the vagaries of the substantive standard, the amount of damages is also likely to be quite unpredictable. There is no real market in humiliation and privacy invasion that can serve as a yardstick for juries. A given jury's judgment as to what a particular case is "worth" will inevitably be intuitive and ad hoc,¹⁰⁹ and jury judgments regarding punitive damages are likely to be more unpredictable still. In short, police departments attempting to calculate the risk and seriousness of liability before the fact are confronted with what amounts to a lottery with potentially very large stakes—a lottery made far riskier by elimination of the *ex ante* warrant procedure, which Amar also advocates.¹¹⁰ When confronted with uncertainties of this magnitude, a natural reaction is to be risk averse. Police departments are likely to steer clear of the constitutional line because they are so uncertain as to where the line is and because crossing it might unpredictably lead to very large losses. The result might well be under-policing, which would uncover much less evidence and solve many fewer crimes than the Fourth Amendment, on its own terms, would permit.

Thus, a damage remedy, like the exclusionary rule, ends up "excluding" some evidence as a cost exchanged for the benefit of deterring some Fourth Amendment violations. It does not follow, however, that the costs of the two approaches are identical. A virtue of the exclusionary rule is that it usually¹¹¹ does no more than take away the benefit of wrongful searches. The rule eliminates the incentive to conduct an illegal search by depriving the police of its benefit, but it usually does not impose additional costs on the police. It would be as if the only penalty for robbing a bank were a requirement that the robber return the stolen money. Because the rule usually does no more than take away benefits, the risk of overdeterrence is much reduced.

Indeed, if there is a problem with the exclusionary rule, it is more likely to be *underdeterrence*.¹¹² Because the rule eliminates only the evidentiary benefits of illegal searches, it imposes no deterrence when the police do not seek to achieve those benefits. Thus, when officers uninterested in uncovering evidence engage in gratuitous violence or harassment, or when they conduct searches solely to confiscate contraband or weapons, the rule has little or no

damages and, equally important, a perspective on what appropriate awards are, based on their knowledge of other cases." *Id.* at 226. Focusing on the reaction of individual jurors is misleading, however, since jury verdicts are the product of group decisionmaking. It turns out that the group decisions made by jurors actually exhibit *less* variation than decisions made by a single judge—a result probably explained by the pooling effect of group decisionmaking. *See id.* at 226-32. Still, a jury decision in one case has no impact on jury decisions in future cases. As Vidmar argues, legal professionals with knowledge of prior cases tend to bring their decisions into line with those cases. *See id.* at 226. It therefore seems likely that the precedential force of judicial decisionmaking will reduce variation over time. In contrast, the level of variance for jurors will remain constant, since they have no knowledge of the outcomes of prior cases.

109. *See id.* at 226 (reporting that empirical data show "that the awarding of noneconomic damages is a . . . subjective process even for trained, experienced legal professionals").

110. *See* AMAR, *supra* note 1, at 39.

111. But, admittedly, not always. *See supra* note 104 and accompanying text.

112. *See* AMAR, *supra* note 1, at 28-29, 41-42, 156-58.

deterrent effect. This is a serious problem, but it is, once again, a mistake to look at the exclusionary rule in isolation. Damage remedies also pose an underdeterrence problem. Many victims of police searches will appear unattractive to juries, and few will have the knowledge or ability to initiate civil litigation. In any event, the solution to the underdeterrence problem is not the wholesale abandonment of the exclusionary rule. Instead, the problem suggests that the rule needs to be supplemented. One characteristic of cases where the rule does not deter is that they often (although concededly not always) involve officers acting in bad faith. By definition, these are searches and seizures in which the officers are not motivated by the desire to prosecute the target, since if they were so motivated, the exclusionary rule would deter them. Because these searches include a conscious mental element, they can be deterred by a more carefully cabined damage remedy that poses less risk of overdeterrence. In particular, most bad faith searches can be deterred by holding officers liable only if they unreasonably ignore legal limits about which they should have known.¹¹³ Tort actions subject to this qualified immunity at once deter bad faith searches and avoid the perverse incentive to steer far clear of the line for fear of going over it.

The upshot, then, is that the optimal regime may be closer to the status quo than many people imagine. As things stand, we have an exclusionary rule, limited by the inevitable discovery doctrine,¹¹⁴ to deter searches motivated by the desire to obtain evidence, and a damage remedy, limited by a qualified official immunity defense,¹¹⁵ to deter searches conducted in bad faith. I do not mean to claim that the present regime is perfect. Perhaps I have miscalculated the risk of overdeterrence produced by the tort regime or the costs produced by exclusion. Even if I have not done so, perhaps we could imagine a hypothetical regime that would do a better job at less cost. In principle, a carefully constructed system that imposed just the right level of compensatory and punitive damages in just the right cases might strike a better balance.

At this point, though, the real world again rears its ugly head. Whatever else one wants to say about the exclusionary rule, one of its virtues is that it is currently in place. To his great credit, Amar goes out of his way to emphasize that his reform proposals must be considered as a package.¹¹⁶ In his view, abolition of the exclusionary rule without the strengthening of damage remedies and injunctive relief that he also favors is unacceptable. It is wrong to criticize Amar for advancing proposals that are not currently

113. See *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (holding that a police officer is shielded from liability if a reasonable officer could have believed that the search comported with the Fourth Amendment).

114. See *Nix v. Williams*, 467 U.S. 431, 440-41 (1984).

115. See *Anderson*, 483 U.S. at 639.

116. See AMAR, *supra* note 1, at 180-81 n.5.

politically feasible. Good legal scholarship can sometimes *change* what is politically feasible. Nonetheless, in the current political environment, the chance of replacing the exclusionary rule with a truly effective network of civil remedies is close to zero. If current protections are indeed dismantled, they are not likely to be replaced with the carefully calibrated, thoughtfully designed system that Amar favors.¹¹⁷ Instead, we are likely to see what Amar most fears—adoption of those parts of his proposal that weaken Fourth Amendment protection and rejection of the parts that strengthen it. A constitutional pragmatist must accept the world as she finds it. Given the political realities of our world, the warrant requirement and exclusionary rule, for all their faults, may be about the best that we can do.

C. Amar's Fifth Amendment Proposals

Similar difficulties plague Amar's efforts to reform self-incrimination law. Once again, Amar's recounting of the history of the Amendment and of the development of the derivative use restriction is fascinating. He convincingly demonstrates that the restriction is contrary to historical understandings and that its doctrinal underpinnings are weak. Amar again fails, however, to make a normative link between the past and present. Why should we be bound by historical understandings if they fail to achieve modern objectives? Indeed, apparently recognizing the normative emptiness of his historical and textual project, Amar expends much of his effort defending his proposals as sound policy.

Many readers are likely to be unsympathetic to this endeavor from the outset. Amar's entire policy argument is premised on the assumption that the privilege serves only instrumental goals—that it is designed to do no more than promote reliable determinations of guilt or innocence.¹¹⁸ Amar's position therefore rejects a long tradition that treats Fifth Amendment rights as significantly limiting the extent to which a liberal state can coerce even guilty defendants.¹¹⁹ This tradition emphasizes the distinctions between the

117. For arguments along similar lines, see Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 56 (1994); and Steiker, *supra* note 76, at 848-49.

118. For similar criticisms of Amar, see Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 938-41 (1995).

119. See *Rogers v. Richmond*, 365 U.S. 534, 541 (1961) (holding that a coerced confession should be suppressed even if trustworthy); LEONARD LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 332 (2d ed. 1986) (emphasizing the connection between the privilege against self-incrimination and freedom of expression as well as political and religious liberties). For contemporary work in this tradition, see, for example, DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 194 (1988); and Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87 (1970). I have discussed this tradition at greater length in Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 719-47 (1992) [hereinafter Seidman, *Brown and Miranda*]; Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 130-36 (1996) [hereinafter Seidman, *Points of Intersection*]; and Louis Michael Seidman, *Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 YALE J.L. & HUMAN. 149, 162-73 (1990).

collective and the individual and between body and mind. On this view, the collective has legitimate jurisdiction over an individual's body. It can appropriately force him, against his will, to submit to harsh punitive measures. What it cannot do is harness his will. A defendant can be punished, but she cannot be made to consent to her own punishment by willing acts of self-destruction.

Perhaps these ideas are hopelessly old-fashioned or simply incoherent,¹²⁰ but they are too important and firmly grounded to be altogether ignored. Nor is it sufficient to claim, as Amar does, that the noninstrumental view of the privilege is inconsistent with existing doctrine.¹²¹ Indeed, this claim is more than a little ironic, since Amar himself calls for a comprehensive overhaul of existing doctrine so as to bring it into line with his approach.

In any event, most existing doctrine fits quite nicely with the noninstrumental view. For example, advocates of this view need not be embarrassed by the fact that the privilege applies only to defendants in criminal cases. Amar is right to point out that the state regularly requires individuals to reveal embarrassing information about themselves in the civil context.¹²² Similarly, individuals can be made to testify in criminal cases against close friends and relatives.¹²³ Still, criminal punishment poses a special problem for a liberal state. The criminal sanction represents the most coercive measures such a state can bring to bear on an individual. The risk that individuals will be completely subsumed for collective purposes is at its height, and the condemnation that accompanies the criminal sanction amounts to something close to exile from the moral community. It is hardly surprising, then, that there should be special safeguards ensuring defendants the right to refuse to cooperate in this process—a right to hang on to some shred of their individuality by not consenting to their own punishment.

Nor are cases like *Schmerber v. California*¹²⁴ inconsistent with this approach, as Amar supposes.¹²⁵ True, the blood test that the court permitted in *Schmerber* entailed the use of the defendant's body for state purposes. But this use was permissible precisely because the state used *only* the defendant's body. Because blood tests can be performed *against* an individual's will, they do not require the *harnessing* of will that the Fifth Amendment condemns.¹²⁶

120. I have suggested some of the problems with them in Seidman, *Points of Intersection*, *supra* note 119, at 131-36.

121. See AMAR, *supra* note 1, at 66-67.

122. See *id.* at 66.

123. See, e.g., *People v. Delph*, 156 Cal. Rptr. 422 (Ct. App. 1979) (denying the testimonial privilege to an unmarried couple who lived together); *Young v. Knight*, 329 S.W.2d 195 (Ky. 1959) (holding that a juvenile can be forced to testify against her father).

124. 384 U.S. 757 (1966) (holding that requiring a defendant to submit to blood testing does not violate the Self-Incrimination Clause).

125. See AMAR, *supra* note 1, at 66-67.

126. See *United States v. Wade*, 388 U.S. 218, 261 (1967) (Fortas, J., concurring) ("*Schmerber* . . . did not compel the person actively to cooperate—to accuse himself by a volitional act . . .").

Other identification techniques, like voice and handwriting exemplars,¹²⁷ do require exercise of will. These tests pose harder Fifth Amendment problems, but there is a case to be made for their permissibility as well because the techniques arguably do not intrude upon a defendant's inner thought processes—his knowledge, hopes, beliefs, and desires—that are the subject of Fifth Amendment protection.¹²⁸ In contrast, using the defendant to locate incriminating real or testimonial evidence cuts strongly against the Fifth Amendment's noninstrumental policy goals. The state can learn of the defendant's belief about the location of evidence only by harnessing his will and then using it to achieve the defendant's own destruction.¹²⁹

The power that these ideas have over us is no better illustrated than by Amar's own inability to escape them. If factual reliability were the sole touchstone of Fifth Amendment law, one should favor use of a defendant's coerced testimony when extrinsic evidence can corroborate the testimony. The compelled statement of a murder defendant revealing the location of the hidden weapon is highly reliable, and if reliability were the only concern, we should favor admission not only of the weapon, but also of the statement itself.¹³⁰

127. See *United States v. Dionisio*, 410 U.S. 1 (1973) (voice); *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting).

128. See *Doe v. United States*, 487 U.S. 201, 216-17 (1988) (holding that a written statement was not "testimonial" for Fifth Amendment purposes because it "shed[] no light on [the defendant's] actual intent or state of mind").

129. Amar asks rhetorically:

Doesn't the government use a suspect as the testimonial instrument of his own destruction when it secretly invades his house (with a warrant), wiretaps his conversations without his consent, and then uses his own words against him in a criminal trial? Or when it subpoenas the defendant to furnish extant documents written in his own hand and then uses those documents at trial? Or when it compels a defendant to authorize (with words) the release of his own bank statements and then uses the authorization and bank statements to convict him?

AMAR, *supra* note 1, at 215 n.141 (citing *Doe*, 487 U.S. 201 (1988); *Andresen v. Maryland*, 427 U.S. 463, 470-77 (1976); *Fisher v. United States*, 425 U.S. 391 (1976); *Olmstead v. United States*, 277 U.S. 438, 462 (1928)).

Apparently, Amar believes that the answer to each question is "yes." Each of these cases, however, is consistent with the noninstrumental view because in each of them, the incriminating material was voluntarily created. For example, no one compelled *Olmstead* to have the conversations that were wiretapped or *Doe* to create the incriminating bank records. Indeed, in *Olmstead* and *Andresen* the defendant was not compelled to do anything at all. Even the most extravagant reading of the Fifth Amendment privilege does not bar government gathering of evidence without defense cooperation. *Fisher* and *Doe* are harder cases because some defense cooperation was required. Perhaps for this reason they are wrongly decided under a noninstrumentalist view. At a minimum, though, the Court's reasoning attempts to accommodate that view. The decisions rest on the judgment that the compelled cooperation did nothing to reveal the defendant's inner mental state in an incriminating fashion. Thus, while the material produced was incriminating, its creation was not compelled; while *production* of the material was compelled, the *production* was not incriminating testimony.

130. Cf. *Rogers v. Richmond*, 365 U.S. 534, 541 (1961). The Court wrote:

To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed.

Id.

Yet apparently, Amar opposes the admission of corroborated statements.¹³¹

Similarly, someone concerned solely with reliability should have no objection to a system under which the government could call random individuals before a tribunal where they would be asked, on pain of contempt if they were to refuse and perjury if they were to lie, to admit to any crimes they had committed within, say, the last five years. Amar claims to have Fourth Amendment objections to such a scheme,¹³² but this explanation will not do. The "seizure" that occurs when an individual is forced to appear in court hardly rises to a level that merits constitutional protection. The Court has never held that an ordinary witness, subjected to a subpoena to testify in an ordinary case, can assert a Fourth Amendment right not to appear.¹³³ Nor has it suggested that jurors, subjected to much lengthier "detention" in the courthouse, have valid Fourth Amendment claims. Concern about the "search" of the witness's mind is closer to the mark. The Court has, however, frequently held that invasions that do no more than reveal incriminating evidence are not "searches" for Fourth Amendment purposes.¹³⁴ Questions directed solely at prior criminal conduct would seem to elicit no more than this. Moreover, as Amar himself acknowledges,¹³⁵ ordinary witnesses, who are frequently called upon to reveal embarrassing facts about themselves, enjoy no Fourth Amendment right not to testify.

Thus, if there is something wrong with dragnet procedures forcing ordinary citizens to confess criminality, it lies neither in Fourth Amendment restrictions

131. See AMAR, *supra* note 1, at 228 n.265. He exhibits some ambivalence on this score:

Nor are reliability concerns always cured by a physical corroboration test, because many confessions may concern internal mental states, where misunderstandings are quite likely. In short, physical evidence can at best partially rather than fully corroborate a statement. To the extent the physical evidence partially corroborates, it can be introduced itself. To introduce the confession in addition risks introduction of unreliable and uncorroborated aspects of the confession—say about the defendant's *mens rea*. Perhaps, however, the trier of fact could be told merely that "something defendant said" led the police to the victim's body, the stolen goods, or what have you. On the other hand, this paraphrase looks rather like defendant witnessing—it is an account of defendant's own words—and, as with all paraphrases, introduces reliability concerns of its own.

Id. To the extent Amar opposes admission of corroborated statements on reliability grounds, his argument is unconvincing. It is hard to see why *all* corroborated statements need to be suppressed because *some* of them are unreliable. Moreover, introduction of the physical evidence is often not an adequate substitute for introduction of the statements leading to that evidence. Consider, for example, the hypothetical discussed in the text. Simply allowing introduction of the weapon may do little to advance the prosecution's case. The important fact is not that the weapon was found, but that the defendant knew where it was. There is a sense in which this fact concerns an "internal mental state[]," but it is hard to see how the evidence relating to that state is unreliable, or why a misunderstanding is "quite likely." If there are indeed other cases where there is a problem with reliability or misunderstanding, these statements could be suppressed on this ground.

132. See *id.* at 87.

133. See *United States v. Dionisio*, 410 U.S. 1, 9 (1973) ("It is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome.").

134. See *United States v. Jacobsen*, 466 U.S. 109, 118-22 (1984); *United States v. Place*, 462 U.S. 696, 707 (1983).

135. See AMAR, *supra* note 1, at 65.

on searches and seizures nor in a Fifth Amendment built on the foundations of reliability. Our strong intuition that procedures of this sort exceed constitutional bounds is rooted instead in concepts about appropriate limits on government coercion and appropriate boundaries of individual freedom—in short, on the very values that Amar wants to reject.

Suppose, though, that despite all this, one were fully convinced that assuring factual reliability was the only legitimate function for the privilege. Does it follow that one would then favor Amar's approach? I think not.

First, it is important to understand that far less is at stake here than one might think. At first blush, it seems that the abolition of derivative use immunity would give the government extensive new powers that it now lacks. In every case, the government could call the defendant to the stand prior to his trial and use his testimony to gather additional evidence against him. It turns out, however, that the government already enjoys something not far removed from this authority.¹³⁶ The Supreme Court has already all but abolished derivative use immunity in the *Miranda* context.¹³⁷ Police, therefore, currently are free to question defendants without *Miranda* protection and to use the answers they provide to develop additional evidence. Similarly, there is little if any protection remaining for incriminating documents. If the government has not compelled the creation of the document, then it is usually permitted to compel its production on the ground that the creation of the content of the document is not compelled and the production is not incriminating.¹³⁸ If the government *does* compel the document's creation, then forced production is often permissible under the "required records" exception to the privilege.¹³⁹

When we strip away all of this, what Amar's proposal amounts to is the grant of additional power to secure the defendant's oral testimony prior to trial through subpoena and the contempt power, rather than through the implicit coercion inherent in police interrogation. And even with respect to this change, there is less than meets the eye. To see why, we need to compare more

136. I do not mean to endorse the holdings of all the cases I discuss in the paragraphs that follow. Some of these cases may read the privilege too narrowly, especially if one takes a noninstrumental approach. My only claim is that, as a positive matter, much of what Amar wants to achieve can be accomplished under existing law.

137. See *Oregon v. Elstad*, 470 U.S. 298, 304-09 (1985) (refusing to suppress a confession as fruit of a statement secured in violation of the *Miranda* rule); *Michigan v. Tucker*, 417 U.S. 433, 438-46 (1974) (refusing to suppress testimonial evidence as fruit of a statement secured in violation of *Miranda*); cf. *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1048 (9th Cir. 1990) (holding that *Tucker* and *Elstad* apply to physical evidence).

138. See *Fisher v. United States*, 425 U.S. 391, 409-14 (1976). *Fisher* does not apply to cases where the very act of production is incriminating. See *United States v. Doe*, 465 U.S. 605, 612-14 (1984). The logic of *Fisher* suggests that the government could surmount this difficulty by granting the defendant use and derivative use immunity for the act of production.

139. See *Shapiro v. United States*, 335 U.S. 1, 7-16 (1948); cf. *Baltimore City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 554-62 (1990) (rejecting a Fifth Amendment privilege not to produce a child under court supervision).

carefully Amar's proposal with current doctrine. Two points are worthy of note. First, as mentioned above,¹⁴⁰ Amar would not permit the government to use its new power against just anyone. Before an individual could be hauled before a court, the government would have to lay an appropriate foundation for his testimony.¹⁴¹ Amar is vague as to what this foundation would consist of, but it seems to amount to some sort of preliminary showing that the witness is likely to possess incriminating information.¹⁴² Second, the Supreme Court has been very clear that the Fifth Amendment privilege functions as a shield, but not as a sword.¹⁴³ This means that while the government cannot use compelled testimony to meet its own burden of proof, neither can the defendant use invocation of the privilege to meet his burden.

This limitation on the privilege has some important consequences. One consequence is that the government can often avoid the privilege by the simple expedient of shifting the burden of proof. Amar's concern about invocation of the privilege in contexts like government employment¹⁴⁴ is therefore overblown. Often, the government can make an employee testify about suspected wrongdoing by shifting the baseline such that the employee must prove his suitability for the job, rather than the government proving unsuitability.¹⁴⁵

The government has some ability to shift the baseline even in the criminal context by turning elements of the offense into affirmative defenses.¹⁴⁶ When it does so, the defendant cannot meet his burden by invoking the privilege and is pressured by the threat of conviction into testifying to prove the defense.

140. See *supra* text accompanying note 132.

141. See AMAR, *supra* note 1, at 87.

142. Amar writes:

Fourth Amendment standards would constrain both the government's right to demand answers in general—the government must justify its decision to single a person out for detention (seizure) and interrogation (search)—and the government's right to ask any particular question. Irrelevant questions, questions for which no foundation had been laid, intrusive or embarrassing questions, repetitive questions—all these should be subject to a general Fourth Amendment test of reasonableness.

Id.

143. See *United States v. Rylander*, 460 U.S. 752, 758 (1983). As the Court declared: We think the view of the Court of Appeals would convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his. None of our cases support[s] this view.

Id.

144. See AMAR, *supra* note 1, at 53.

145. Compare, e.g., *Lefkowitz v. Turley*, 414 U.S. 70, 79-84 (1973) (holding that the state cannot use invocation of the privilege to refuse to contract with a contractor), with *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 856-58 (1984) (holding that an applicant for a student loan cannot use invocation of the privilege to prove that he has registered for the draft). For a more detailed discussion, see Seidman, *Points of Intersection*, *supra* note 119, at 152-53.

146. See *Martin v. Ohio*, 480 U.S. 228, 233-36 (1987) (upholding a scheme placing the burden of proof on the defendant to demonstrate self-defense); *Patterson v. New York*, 432 U.S. 197, 201-05 (1977) (upholding a scheme placing the burden of proof on the defendant to demonstrate extreme emotional disturbance).

Although the Court has been unclear about the point, there is presumably some limit on the government's ability to utilize this device. Whereas the government may force an employee to prove every element of continued suitability for a job, it may not force on a defendant the full burden of demonstrating innocence.¹⁴⁷

Still, the government can shift the baseline through the force of its evidence. So long as the government's case will not withstand a motion for a judgment of acquittal, the defendant is free to assert the privilege and not cooperate in any way in the prosecution. Once the judge holds that the case is strong enough to go to the jury, however, there is nothing unconstitutional about the compulsion the defendant then feels to testify—compulsion that derives from the threat of conviction if the defendant remains silent.¹⁴⁸ Moreover, if the defendant succumbs to this pressure, he is not permitted merely to tell his side of the story. Instead, he must also respond to appropriate cross-examination.¹⁴⁹ Of course, the prosecution is permitted to use both statements made on cross-examination, and fruits derived from the statements, to convict the defendant.

What, then, is the precise difference between the Amar proposal, on the one hand, and the status quo, on the other? The difference seems to come down to three factors. First, neither the Amar proposal nor the current doctrine permits pressuring of defendants without some preliminary showing of guilt. Under current doctrine, the preliminary showing must be strong enough to convince the judge that a reasonable jury would be justified in returning a conviction. Because Amar is so imprecise, it is hard to know how strong a case he would require before a defendant could be questioned. Perhaps the standard is less stringent than this, but we simply cannot be certain until Amar spells out his scheme in more detail.

Second, under the current regime, the pressure exerted on the defendant is in the form of the threat of conviction for the underlying offense. Under Amar's proposal, the pressure comes from the threat of conviction for contempt. Depending on the circumstances, the pressure may be less intense in the latter situation than the former. Under the current regime, the defendant may believe that the jury will return an acquittal even if he remains silent; under Amar's proposal, the defendant is unlikely to believe that he will escape

147. See *In re Winship*, 397 U.S. 358, 362-65 (1970) (holding that the prosecution must prove all elements of an offense beyond a reasonable doubt).

148. See, e.g., *Williams v. Florida*, 399 U.S. 78, 83-84 (1970). As the Court in *Williams* wrote: The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. . . . That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

Id.

149. See *id.* at 80-86. For a famous application of this principle, see *United States v. Hearst*, 563 F.2d 1331, 1339 (9th Cir. 1977), in which the court held that Patricia Hearst could not testify in her own defense unless she was willing to undergo reasonable cross-examination.

a contempt citation if he refuses to cooperate. This difference is real, but it amounts to a matter of degree, and its extent will depend upon the circumstances. One can imagine circumstances where the threat of contempt is less coercive than the threat of conviction. An individual faced with very serious charges might be more willing to be held in contempt so as to avoid alerting the prosecution to relevant evidence prior to trial than to forgo the chances of acquittal by remaining silent at trial. Moreover, in many other cases, the government's case is so strong that the defendant has no realistic option but to take the stand if he is to have any hope of avoiding conviction.

Finally, there is the matter of timing. Amar would permit a defendant to be pressured prior to trial; current doctrine permits pressure only after the government has put on its case. But this difference, too, is easy to overstate. First, when a defendant reveals important new information during cross-examination, a trial judge currently has discretion to recess the trial so that the prosecution can use this testimony to develop more evidence for use in rebuttal.¹⁵⁰ Second, it is unclear that the current regime prevents the government from securing the defendant's testimony prior to trial. The key here is that if the defendant elects to take the stand, the Constitution permits the government to compel him to submit to cross-examination. If compulsion is permissible at the moment of cross-examination, why should previously compelled statements not be admissible as well?¹⁵¹

150. Cf. *Williams*, 399 U.S. at 85-86 (holding that a court can grant the government a continuance on the ground of surprise when alibi evidence is introduced).

151. The Court's willingness to allow the prosecution to impeach defendants who take the stand with statements secured in violation of *Miranda* is consistent with this principle. See *Harris v. New York*, 401 U.S. 222 (1971). The *Harris* Court expressly relied upon the argument that a defendant who chooses to take the stand thereby gives up his right not to undergo reasonable cross-examination based on testimony that would be treated as unconstitutionally compelled if used in the government's case in chief. See *id.* at 225 ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process." (citations omitted)); see also *Oregon v. Hass*, 420 U.S. 714 (1975) (holding that prosecutors could use a defendant's inculpatory statements to impeach his testimony even though he had asked for a lawyer and had not yet received one).

In *New Jersey v. Portash*, 440 U.S. 450 (1979), however, the Court distinguished *Harris* and *Hass* and held that immunized testimony could not be introduced to impeach a defendant. See *id.* at 459 ("[A] defendant's compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him in a criminal trial."); cf. *Brooks v. Tennessee*, 406 U.S. 605, 607-12 (1972) (holding that a statutory requirement that the defendant be his own first witness if he took the stand at all unconstitutionally penalized his right to remain silent). If the *Portash* opinion is taken literally, compelled pretrial testimony cannot be utilized against a defendant who chooses to testify. There are nonetheless good reasons that *Portash* should not be so read. First, the opinion nowhere explains why so much should turn on the timing of the compulsion. If it is constitutional to compel statements at the moment of cross-examination, what is wrong with the admission of previously compelled statements? Second, *Portash* creates a serious conflict between *Harris* and *Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* held that custodial statements given in the absence of the warning and waiver procedure were unconstitutional because they were "compelled" within the meaning of the Fifth Amendment. See *id.* at 467. If "compelled" speech cannot be admitted to impeach a defendant who takes the stand, as *Portash* holds, then what is the justification for *Harris*?

In subsequent cases, the Court has suggested that statements secured in violation of *Miranda* may not actually be compelled in the constitutional sense. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 306 (1985)

Perhaps, then, under current law, the prosecution could accomplish something quite close to what Amar proposes: It could haul the defendant before a judge, question him about the crime, and use the resulting testimony in the event that the defendant elected to take the stand. Put differently, instead of affording the defendant full-scale use and derivative use immunity, the government need only inform the defendant that it would not use the testimony if the defendant elected to remain silent at his trial. Of course, whether the defendant elects to remain silent is a function of the strength of the government's case. But Amar's proposal also conditions the prosecutor's ability to question the defendant on the strength of its case.

The upshot, then, is that Amar's proposal is somewhat oversold. Its adoption would make some difference, but it is unlikely to accomplish the

("The *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."). Still, a third reason for a limited reading of *Portash* is that it creates tension with other Fifth Amendment doctrine unrelated to the *Miranda* rule. For example, in *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980), the Court held that the Fifth Amendment had not been violated when the defendant was impeached by his failure to turn himself in prior to arrest. In general, however, the government may not make evidentiary use of silence because such use tends to compel speech. See *Griffin v. California*, 380 U.S. 609, 614-15 (1965). The *Jenkins* Court distinguished *Griffin* on the ground that a person who elects to testify thereby waives his right to resist the introduction of compelled speech against him:

It can be argued that a person facing arrest will not remain silent if his failure to speak later can be used to impeach him. But the Constitution does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." . . . [In *Raffel v. United States*, 271 U.S. 494 (1926), we] explicitly rejected the contention that the possibility of impeachment by prior silence is an impermissible burden upon the exercise of Fifth Amendment rights. "We are unable to see that the rule that [an accused who] testifies . . . must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not."

Jenkins, 447 U.S. at 236-37 (citations omitted).

Similarly, in *Williams v. Florida*, 399 U.S. 78 (1970), the Court upheld against Fifth Amendment attack a requirement that criminal defendants provide notice of an alibi prior to trial. Although the defendant might feel pressured to reveal his alibi testimony, this pressure did not violate the Self-Incrimination Clause because it was "of the same nature as [that which] would induce him to call alibi witnesses at trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts." *Id.* at 85. Because this pressure was not unconstitutional during trial, it followed that it was not unconstitutional prior to trial:

Petitioner concedes that absent the notice-of-alibi rule the Constitution would raise no bar to the court's granting the State a continuance at trial on the ground of surprise as soon as the alibi witness is called. Nor would there be self-incrimination problems if, during that continuance, the State was permitted to do precisely what it did here prior to trial: take the deposition of the witness and find rebuttal evidence. But if so utilizing a continuance is permissible under the Fifth and Fourteenth Amendments, then surely the same result may be accomplished through pretrial discovery, as it was here, avoiding the necessity of a disrupted trial.

Id. at 85-86. *Williams* precisely parallels the situation posed by a defendant required to testify about a crime prior to trial with the understanding that the evidence will not be admitted unless he testifies at trial. If the notice-of-alibi rule is consistent with the Fifth Amendment because it concerns only the timing of disclosure, it would seem that a pretrial deposition would be consistent with the Fifth Amendment as well. Concededly, it is difficult to reconcile the *Portash* opinion with this outcome. The *holding*, however, might be reconciled on the ground that *Portash* was afforded comprehensive use and derivative use immunity prior to his testimony. Perhaps it violates the Fifth Amendment to *tell* the defendant that he has immunity, but then to utilize the immunized testimony against him. Cf. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (finding that due process is violated when a defendant is told that he has the right to remain silent, and then his silence is used against him).

sweeping change that he imagines. Put differently, even if the Fifth Amendment is viewed solely from an instrumental perspective, the current regime does less to protect the guilty, and Amar's reforms do less to punish them, than he claims.

There is also a deeper reason that instrumentalists should be skeptical of Amar's reforms. Suppose Amar is right to claim that his reforms would do more to punish the guilty. Is he also right to claim that the prosecutor's new powers would not harm the innocent?¹⁵² There is a sense in which he is correct. A defendant's compelled oral testimony may make her appear guilty when she is in fact innocent. In contrast, when a defendant's testimony leads to physical evidence or other witnesses, the way in which the evidence is located provides no reason to doubt its reliability.¹⁵³

The problem becomes more complex, however, if one thinks more carefully about what "guilt" and "innocence" mean in this context. Although these terms are central to Amar's argument, he nowhere defines them, and it turns out that the effort to do so significantly undermines his project.

Superficially, it might appear that Amar has implicitly adopted a positivist definition: "Guilt" is determined by the positive law that defines the offense in question. On reflection, however, it becomes clear that this definition is inconsistent with Amar's normative project. The law defines guilt and innocence through procedural, as well as substantive, provisions. If the guilty are simply those the law defines as guilty, then defendants who are not convicted because of current Fifth Amendment protections are not "guilty." Thus, a positivist "guilt-or-innocence" approach fails to provide critical leverage with which to attack the current system.

It follows that Amar must have implicitly adopted a normative standard for guilt and innocence. The question is not whom the law actually punishes, but whom the law *ought* to punish. But once the definition is opened up in this way, it is no longer so clear that current Fifth Amendment doctrine fails to protect the innocent. Amar's assertion that it does simply restates his rejection of the noninstrumental interpretation of the Fifth Amendment privilege. In contrast, a person who embraces a noninstrumental approach will believe that the Fifth Amendment protects the "innocent" when it prevents the state from convicting people through use of procedures that are normatively objectionable.

152. Amar makes a valid point when he asserts that current Fifth Amendment doctrine sometimes harms the innocent by preventing defendants from presenting exculpatory evidence, *see* AMAR, *supra* note 1, at 49-51; *see also supra* text accompanying note 21, but this problem could be addressed without a wholesale rethinking of Fifth Amendment doctrine. First, it is not obvious that Fifth Amendment rights should prevail when they come in conflict with the Sixth Amendment right to compulsory process. Even if they do, the problem might be substantially mitigated by forcing the prosecution to grant immunity when necessary to prevent a miscarriage of justice or by forcing the witness to claim the Fifth Amendment privilege before the jury. *See supra* note 26.

153. Even this point requires qualification. Alerting the prosecution to evidence prior to trial might give an unscrupulous prosecutor the opportunity to mold her case around the evidence. To this extent, abolition of derivative use immunity might harm the innocent.

Moreover, even if we put this argument to one side, there is still another sense in which current Fifth Amendment law protects the innocent. A recent, brilliant article by William Stuntz¹⁵⁴ provides a useful entry into the difficulty. Stuntz argues that an equilibrium develops between substantive criminal law and constitutional procedural protections. On his view, legislatures may respond to expanded procedural protection by criminalizing more conduct, thereby granting the police more discretion.¹⁵⁵ Stuntz advances this argument as a critique of procedural protections. He maintains that they are counterproductive because they lead legislatures to criminalize more conduct and to punish that conduct more severely. But the significant point for our purposes is that Stuntz's argument can also be made to run in the other direction. If one believes that legislatures start with a tendency to overcriminalize and overpunish conduct, but that there is some limit on the extent to which they can respond to procedural changes, such changes might protect the innocent by making the prosecution and detection of crime more costly, thus mitigating the overpunishment that legislatures would otherwise mandate.

It must be said that this technique operates in a crude fashion. There is not a necessary nexus between the particular defendants protected by the Fifth Amendment privilege and the particular defendants who receive sentences that are too long or are punished for conduct that should not be made criminal in the first place. Still, Fifth Amendment doctrine may provide indirect protection for the innocent. The current legal regime forces the prosecution to use more resources to catch and convict defendants than it would have to use if it were unconstrained by the privilege. If we assume that there are limited resources available for these purposes, it follows that prosecutors and police must prioritize. There will be many factors that go into their decisions, but surely one of them will be the perceived seriousness of the offense. Hence, it seems sensible to suppose that Fifth Amendment protection indirectly leads to increased protection for people who are "innocent" in the sense that they do not deserve the kind of punishment they would otherwise receive.¹⁵⁶

154. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

155. See *id.* at 7.

156. In his celebrated dissent in *Morrison v. Olson*, 487 U.S. 654 (1988), Justice Scalia objects to the independent counsel statute on grounds that parallel this argument for the Fifth Amendment privilege. Scalia complains that the independent counsel is not required to prioritize and, therefore, is likely to bring cases that should not be prosecuted:

"One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain"

. . . .
 . . . The mini-Executive that is the independent counsel . . . is intentionally cut off from . . . the perspective that multiple responsibilities provide. What would normally be

Even if the reduction does not produce these distributive effects, it seems certain that, in the aggregate, an increase in the cost of prosecution and conviction will reduce the length of prison sentences. If one believed that sentences are currently much too long, an aggregate reduction is a step in the right direction.

Obviously, this is a second-best solution. It would be far more efficient if the courts directly constrained overcriminalization and overpunishment. As Stuntz points out, however, the courts have not been very successful in developing doctrine that accomplishes these ends.¹⁵⁷ In any event, we need to focus once again on the fact that Fifth Amendment doctrine is already in place. A conservative Supreme Court is quite unlikely to develop new protective doctrine under, say, the Cruel and Unusual Punishment Clause. It will be much harder for it to dismantle existing doctrine under the Fifth Amendment. In the real world, then, the privilege may play an important and unacknowledged role in protecting the innocent.

Of course, this argument rests on the assumption that the political branches in fact punish too much crime too harshly. There was a time when this assumption was an article of faith among criminal procedure liberals. Today, that faith is no longer widely shared. To see why the faith developed in the first place, and why it has declined, we need to look more closely at the short and troubled history of criminal procedure liberalism.

III. THE RISE AND FALL OF CRIMINAL PROCEDURE LIBERALISM

To some degree, of course, the decline of the liberal position on criminal justice is but one aspect of the decline of liberalism more broadly. We live in a conservative age, many former liberals have been swept away by the tide, and more than a few are even swimming with it. Still, criminal justice issues pose a special problem for liberals. To see why, we need to focus on the reasons that liberals supported the criminal procedure revolution in the first place. This support turns out to be more puzzling than it may at first seem: There is a sense in which the identification between liberalism and the aggressive support of Fourth and Fifth Amendment rights has always been anomalous. The fact that today it is the militias and the National Rifle Association that are supporting Fourth Amendment rights may therefore reflect no more than a return to a more natural state of affairs.¹⁵⁸

regarded as a technical violation . . . may in his or her small world assume the proportions of an indictable offense.

Id. at 727-28, 732 (Scalia, J., dissenting) (quoting Robert Jackson, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)).

157. See Stuntz, *supra* note 154, at 66-69.

158. I explore these arguments in more detail in Seidman, *Brown and Miranda*, *supra* note 119, at 721-27; and Seidman, *Points of Intersection*, *supra* note 119, at 125-40.

A century ago, it was often conservatives who argued for Fourth and Fifth Amendment protection.¹⁵⁹ As Amar points out, the great early criminal procedure cases—in particular *Boyd v. United States*¹⁶⁰—are full of the language of legal formalism, the protection of property rights, natural law, and defense of a private sphere.¹⁶¹ In the run-up to the New Deal revolution, liberals fought against all of these things. They were for freeing government from the shackles of natural law limitations, for government intervention, for redistribution, and against trying to erect legal principles on chimerical notions of private freedom of will.¹⁶² The fight against *Lochner*¹⁶³ was both a struggle for political—as opposed to judicial—supremacy and a struggle against the assumption that the distribution of power in the private sphere was natural, just, and inevitable.

It is worth remembering, in this context, that vigorous police enforcement of the criminal law is a form of government intervention designed to curb the exercise of private power. It is also a form of redistribution. Public money is used to provide protection for those who lack the private resources to protect themselves, in much the way that social security or welfare reallocates results reached in private markets.

There is a sense, then, in which Amar's rejection of Warren Court criminal procedure precedents keeps faith with the central commitments of New Deal liberals. If this is so, however, we need to ask why liberals were attracted to the Warren Court's views in the first place. Why did liberals seek to erect constitutional barriers to vigorous government action in this field even as they were tearing down barriers to other forms of redistribution and government activism?

There are two principal reasons that liberals of an earlier generation were attracted to criminal justice issues. The first relates to race.¹⁶⁴ Blacks and whites have had different historical experiences with the criminal justice system—experiences that affect their judgments about it to this day. For many whites, the police represent protection from private violence. When one views their function in this way, support for the police is consistent with the support liberals accord to government more generally when it protects against private coercion. For blacks, in contrast, the police were often allied with private perpetrators of violence and oppression. The criminal justice system—

159. See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 419-28 (1995).

160. 116 U.S. 616 (1886).

161. See AMAR, *supra* note 1, at 22.

162. See, e.g., Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 423 (1987).

163. *Lochner v. New York*, 198 U.S. 45 (1905).

164. See Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1305-06 (1982); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 62-64 (1996).

especially the third degree and the trumped-up charge—helped to enforce a regime of Jim Crow and racial oppression. The lynch mob, enforcing its own brand of racial justice with police acquiescence, is a central image in the historical memory of many African Americans,¹⁶⁵ powerfully and recently invoked in settings as divergent as the Clarence Thomas confirmation hearings and the O.J. Simpson murder trial.

For New Deal liberals interested in redistribution, this experience with Jim Crow meant that liberal arguments ran in the opposite direction when it came to the criminal law. Whereas freeing government from constitutional restraints was associated with social justice in other contexts, racial justice required the imposition of constitutional restraint. This restraint was especially important at the local level, where racist-dominated police forces were an important part of the Jim Crow system.¹⁶⁶ The constitutionalizing and nationalizing thrust of Warren Court reforms therefore made sense to many liberals.

Even when criminal justice reforms were not about race, liberals had a second, related reason for supporting them. One important branch of New Deal liberalism sought to replace old-fashioned conceptualist analytic techniques with rationalistic, scientific, policy management approaches.¹⁶⁷ Some liberals of this stripe saw the criminal justice system as shot through with irrationalities, of which racism was just a special case. On this view, judicial control was essential in order to bring sense to a system dominated by prejudice, corruption, and inefficiency. Criminal justice professionals, as opposed to the untutored cop on the beat, understood that policies of mass arrest and detention on less than probable cause, or of regularly coercing confessions, were simply not sensible ways of using scarce law enforcement resources.¹⁶⁸ The warrant and probable cause requirements were designed not so much to protect privacy per se as to provide prior judicial oversight ensuring that searches were cost-justified. Rules against involuntary confessions were designed not solely to protect an inviolate human will (an argument that *Lochner* supporters would have understood), but also to assure factual accuracy of jury verdicts.

165. For discussions of the ways in which lynching reinforced the Jim Crow regime, see NEIL R. McMILLEN, *DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW* 224-53 (1989); and JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 109-19 (1984).

166. See Cover, *supra* note 164, at 1303.

167. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 227 (1976) (discussing the New Deal commitment to flexibility and instrumentalism); PETER H. IRONS, *THE NEW DEAL LAWYERS* 9-10 (1982) (describing the apolitical professionalism of New Deal lawyers).

168. See Amsterdam, *supra* note 81, at 421 (arguing that a police rulemaking requirement would mean that "[m]any practices not tolerated in individual cases . . . would not be approved or authorized by the police command structure itself if it were required to assume responsibility for determining the propriety of those practices as a general mode of departmental operation").

A second technocratic argument, closely linked to the first, held that it was barbaric and ineffective to attempt to control crime through force. Crime was a "disease" rather than a manifestation of evil, and could most effectively be controlled by treating its "root causes."¹⁶⁹ In the long run, attacks on the conditions causing crime, and rehabilitation of those who committed crime, would do much more to solve the problem than incarceration.¹⁷⁰

Both the anti-racial-subordination and the technocratic arguments for judicial supervision of the criminal justice system retain some vestigial force today. But both have come under sharp attack in recent years. Thus, some liberals continue to defend criminal justice protections as part of the attack on racism, but the argument has become more difficult to make out as black neighborhoods have been decimated by crack and drive-by shootings. Scholars like Randall Kennedy have taught us that African Americans are disproportionately victimized by crime as well as by the criminal justice system and that racism can take the form of under-policing as well as overpolicing.¹⁷¹ Under the tutelage of Kennedy and others, white liberals have begun to relearn in this new setting the great lessons of American Legal Realism: Forceful government intervention may be necessary to make people free, and there is nothing necessarily natural, just, or inevitable about the distributions of power that result when the government remains passive. The point remains true whether the power is exercised by drug lords or by captains of industry.

Moreover, much of modern criminal procedure doctrine does not mesh well with the view that treats Warren Court reforms as part of the project of racial liberation. To the degree that police intervention remains a civil rights issue, it is because the police regularly hassle, harass, and humiliate young black men on account of their race. But the linchpin of much modern Fourth Amendment law is informational privacy, a concern that has little to do with the typical street encounter. As others have forcefully argued,¹⁷² the Fourth Amendment's preoccupation with informational privacy is anomalous in the post-New Deal period, in which the administrative state demands personal and embarrassing information from us on a regular basis. The civil rights concern is not about the revelation of information, but about the personal invasions,

169. See, e.g., BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST* 18 (1963) (suggesting medical parallels to the search for causes of crime); BARBARA WOOTTON ET AL., *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* 267 (1959) (arguing that "the primary purpose of classifying socially inadequate persons as defective should be to make available to them whatever help they need").

170. For a representative and influential example of arguments along these lines, see KARL A. MENNINGER, *THE CRIME OF PUNISHMENT* (1968).

171. See KENNEDY, *supra* note 55, at 29-75.

172. See, e.g., William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1029-34, 1052-54 (1995).

inconveniences, and humiliations that are the standard tools of aggressive patrolling.

This disconnect is made worse by reliance on the exclusionary rule as the main means of Fourth Amendment enforcement. I argued above that the problems with the exclusionary rule are overstated and that it may in fact be the most efficient means of deterring Fourth Amendment violations.¹⁷³ That said, it is undoubtedly true that the exclusion of reliable evidence in a criminal trial is too much for many Americans to swallow and that it has resulted in civil rights-criminal procedure liberals fighting on a political terrain that is uniquely unfavorable to their cause. It must also be conceded that to the extent that the Fourth Amendment is equated with the exclusionary rule in popular debate, the Fourth Amendment is made to seem irrelevant to what most concerns civil rights liberals. In some ways, a regime of "stop and frisk" is the modern analogue of Jim Crow rules in the old South—a system designed to keep "dangerous" young blacks under control by constantly reminding them of who is in charge and what their station in life is during every public moment. But, as Amar correctly suggests, to the extent that the police are interested in no more than harassment, the threatened suppression of evidence provides little incentive for them to change their behavior.¹⁷⁴

A parallel series of developments has weakened the technocratic argument for constitutional control over the police. Today, it is revisionists like Amar, rather than criminal procedure liberals, who make the most forceful cost-benefit arguments.¹⁷⁵ Thus, it is generally acknowledged today that the rehabilitative project that liberals once favored has, for whatever reason, failed, and there is little remaining public support for treating crime as a "public health" problem.¹⁷⁶ With regard to police misconduct, it has come to be seen

173. See *supra* notes 97-117 and accompanying text.

174. See AMAR, *supra* note 1, at 28 (contending that "[u]nder the exclusionary rule, the more guilty you are, the more you benefit"). Chief Justice Warren made this point when he inaugurated the stop-and-frisk doctrine. See *Terry v. Ohio*, 392 U.S. 1, 14-15 (1968) ("The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial." (citation omitted)). Warren's opinion, however, never explained why the "reasonable suspicion" standard the Court embraced was more amenable to exclusionary rule enforcement than the warrant and probable cause standard it rejected.

175. For other revisionist proponents of this view, see, for instance, Joseph D. Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, reprinted in A CRIMINAL PROCEDURE ANTHOLOGY 35, 39 (Silas J. Wasserstrom & Christie L. Snyder eds., 1996) (arguing that the exclusionary rule is an ill-conceived policy); and Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985) (arguing that *Miranda* strikes the wrong cost-benefit balance).

176. When Congress established the United States Sentencing Commission, it expressly provided that "[t]he Commission shall insure that the [federal sentencing] guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." Act of Oct. 12, 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2022 (codified as amended at 28 U.S.C. § 994(k) (1994)).

For examples of liberals who came to doubt the wisdom of "public health" approaches, see ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); and Alan M. Dershowitz, *Preventative*

that the judicial tools available to criminal procedure liberals were too blunt to control behavior effectively in the way such liberals desired.¹⁷⁷ For example, police may respond to a tightening of the probable cause requirement by the simple expedient of arresting more individuals for minor crimes or extracting more supposed "consents" for searches.

Judicial tools may be not only ineffective, but also unnecessary. Today, many believe that the project of "professionalizing" police forces has largely succeeded.¹⁷⁸ Internal constraints are far more effective than they once were. Moreover, some police practices that liberals once condescendingly treated as irrational and prejudiced may make some sense. In the Fifth Amendment context, for example, Amar is right to argue that compelled statements can be an efficient way to discover reliable evidence. In the Fourth Amendment context, the recent experiences of New York and other cities demonstrate that there is at least some reason to think that the kind of police hassling of "undesirables" to which liberals object may be a cost-effective method of controlling crime.¹⁷⁹

It is not even clear that racial discrimination in law enforcement is completely irrational. There is a persistent and disturbing correlation between race and crime: Young black men are disproportionately more likely to commit certain street crimes than members of some other ethnic groups.¹⁸⁰ There can be no doubt that racist stereotypes cause many to exaggerate this correlation. Nor can there be any doubt that some of the correlation is itself an artifact of discriminatory exercises of prosecutorial and police discretion. But if it is a mistake to overstate the correlation, it is also a mistake to pretend that it does not exist. Hence, if one examines the question solely from a technocratic point of view, it may be rational to target young black men for special police attention.

As this example illustrates, although criminal justice liberals were initially motivated by both justice and technocratic concerns, the two are in some

Confinement: A Suggested Framework for Constitutional Analysis, 51 TEX. L. REV. 1277, 1321-24 (1973).

177. For a detailed argument along these lines, see Stuntz, *supra* note 154.

178. See, e.g., ROBERT E. FOGELSON, *BIG CITY POLICE* 219 (1977); Richard A. Leo, *Criminal Law: The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 678 (1996).

179. See GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 106-56 (1996).

180. As Randall Kennedy has recently written:

It does no good to pretend that blacks and whites are similarly situated with respect to either rates of perpetration or rates of victimization. They are not. A dramatic crime gap separates them. In relation to their percentage of the population, blacks on average both commit more crimes and are more often victimized by criminality. The familiar dismal statistics and the countless tragedies behind them are not figments of some Negrophobe's imagination. The country would be better off if that were so. Instead, the statistics confirm what most careful criminologists (regardless of ideological perspective) conclude: In fact (and not only in media portrayal or as a function of police bias) blacks, particularly young black men, commit a percentage of the nation's street crime that is strikingly disproportionate to their percentage in the nation's population.

KENNEDY, *supra* note 55, at 145 (footnote omitted).

tension with each other. Efforts to control the police discretion that gives rise to discriminatory law enforcement may result in not only more crime, but also in less privacy. Consider, for example, the problem posed when the police suspect a motorist of having committed a crime, but have less than reasonable suspicion to stop him. The Court has held that it violates the Fourth Amendment to single out individual cars for reasons that fall below the reasonable suspicion threshold.¹⁸¹ On the other hand, the Fourth Amendment permits the police to establish a roadblock where all cars are stopped without suspicion of any kind.¹⁸²

From the perspective of racial justice, these decisions make some sense. By insisting that the privacy invasion be suffered by a broader and more randomly determined class of people (whoever passes through the roadblock rather than individuals the police choose to stop), the Court attempts to link minority rights to majority interests. By insisting that all people bear equal privacy losses, the Court forces the political process to take account of costs that might be ignored if they fell only on politically vulnerable groups. This is, of course, a venerable strategy for the protection of minorities, associated in an earlier era with Chief Justice Stone¹⁸³ and, in our own time, with the work of John Hart Ely.¹⁸⁴

We should not overstate the extent to which this strategy achieves its stated goals, however. As already noted, judicial tools tend to be too blunt an instrument for effective control of police discretion.¹⁸⁵ They do nothing to control pretextual stops.¹⁸⁶ Nor, for that matter, do they control the location of the roadblock, which may be determined without judicial supervision.¹⁸⁷ Moreover, from the perspective of efficiency, this regime produces quite perverse results. The Court's rule makes the constitutionality of police tactics turn on the willingness of police to invade more privacy. Instead of only stopping the cars whose drivers are suspected of illegal activity, now all cars passing through the roadblock must be stopped. Stranger still, the rule seems to permit stops precisely because there is no reason to suspect that the stop will be productive. Officers who have some basis for a stop, albeit falling below the reasonable suspicion threshold, are more constrained than officers

181. See *Delaware v. Prouse*, 440 U.S. 648 (1979) (disallowing random, discretionary spot checks of motor vehicles on Fourth Amendment grounds).

182. See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

183. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 783 (1945).

184. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). For a discussion of the intersection between Ely's theory and Fourth Amendment law, see Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19 (1988).

185. See *supra* notes 85-88 and accompanying text.

186. See *Whren v. United States*, 116 S. Ct. 1769, 1774 (1996) (holding that the Fourth Amendment does not prohibit pretextual stops).

187. See *Sitz*, 496 U.S. at 460 (Stevens, J., dissenting) (arguing that the police have too much discretion to choose the location of a roadblock); cf. *Merrett v. Moore*, 58 F.3d 1547, 1551 (11th Cir. 1995) (upholding a "mixed motive" roadblock).

who have no basis at all. It follows that a regime that allows police to target their efforts, even if they lack reasonable suspicion, may actually be more protective of privacy than a regime designed to constrain police discretion.

We are left, then, with the question why anyone would prefer more invasions of privacy to less, especially when the job can be done more effectively with less. Conceivably, we may be able to control police discretion by preventing officers from targeting individuals in ways that may be invidious. But this advance is achieved at the cost of not only less effective law enforcement (a cost that, we need to remember, is itself borne disproportionately by minority communities), but also of more privacy invasion.

In summary, then, there are good reasons that many liberals no longer support Warren Court criminal procedure reforms, although they are by and large not the reasons Amar offers. The reforms may indeed represent a large-scale historical mistake. They may be premised on assumptions about the naturalness and justice of the private sphere that liberals have elsewhere rightly rejected.¹⁸⁸ Moreover, they may not have advanced the cause of racial justice or concentrated law enforcement resources where they are most needed, as liberals once hoped. Does it follow that the project of imposing constitutional control on police behavior should be abandoned? Perhaps it should, but it seems a shame that the reasons that the project might still be of value are so rarely articulated.

The best argument for Warren Court reforms rests on some uncontroversial empirical facts and a very controversial normative conclusion. The facts are these: As of midyear 1997, there were 1,725,842 men, women, and, yes, children, in federal and state prisons and local jails, an increase of 4.7% over the previous year.¹⁸⁹ Even before this latest increase, 615 of every 100,000 United States residents were behind bars,¹⁹⁰ which is far more than in any other industrialized nation except for Russia, which has a rate of 690 per 100,000 residents.¹⁹¹ Our rate is more than five times that of Canada, more than six times that of Great Britain, and more than sixteen times that of Japan.¹⁹² Within the past decade, our prison population has doubled on a per

188. See, e.g., Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874-75 (1987) (attacking *Lochner* as resting on government inaction, a defense of the existing distribution of wealth and entitlements, and acceptance of a baseline established by the common law).

189. See DARRELL K. GILLIARD & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 1997, at 1 (1998), available at (visited Jan 19, 1998) <<http://www.ojp.usdoj.gov/bjs/pub/ascii/pjim97.txt>>.

190. See CHRISTOPHER J. MUMOLA & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 1996, at 2 tbl.1 (1997), available at (visited Jan. 19, 1998) <<http://www.ojp.usdoj.gov/bjs/>>.

191. See MARC MAUER, THE SENTENCING PROJECT, AMERICANS BEHIND BARS: U.S. AND INTERNATIONAL USE OF INCARCERATION 1995, at 3 (1997). Tables of relevant statistics are available on the Internet at (visited Jan 19, 1998) <<http://www.sproject.com/press-12.htm>>.

192. See MAUER, *supra* note 191, at 4 tbl.1.

capita basis.¹⁹³ To be sure, the most recent figures indicate a decline in the rate of increase—although only in the *rate* of increase and not in the numbers, which continue to go up.¹⁹⁴ It should be noted, as well, that the decline comes before the new spate of “three strikes, you’re out” laws takes full effect—laws that bid fair to rescue Medicare from collapse by turning our prisons into huge, publicly subsidized nursing homes for superannuated prisoners.

It is, of course, true that if we incarcerate a high enough percentage of our total population, at some point, sooner or later, we will reach an equilibrium where crime will begin to decline. Perhaps we have reached this point. It is here, though, that the controversial normative conclusion takes hold. The conclusion is that this situation is simply morally unacceptable. One could have a long discussion about what it means to have a free country, or about what the objectives of constitutional democracy should be, but it should at least be clear that a nation that incarcerates a huge percentage of its population is not free, and that a constitution that permits this outcome has not succeeded.

The question, then, is what, if any, relationship there is between our rules of criminal procedure and these outcomes. There are four possibilities. The first is that we have high incarceration rates because we have high crime rates, and that we have high crime rates at least in part because our criminal procedure rules “handcuff” the police. If this view is correct, then it is easy to see why liberals have abandoned Warren Court reforms. To be sure, there remains an argument grounded in individual rights for not taking effective actions to address serious social dislocations. But arguments of this sort are associated with *Lochner*-like, conservative ideologies. For liberals who are consistent, it seems hard to defend a system that protects the rights of a few criminals at the expense of the rights of their many victims.

A second possibility, perhaps more likely, is that we have high incarceration rates because we have high crime rates, but that crime rates are a product of broad social disintegration and simply have nothing to do with criminal procedure rules. If this view is correct, liberals are right to turn their attention elsewhere. It makes far more sense to use scarce political resources in an attempt to address the causes of social disintegration than to fight a losing and ineffectual battle over a set of irrelevant legal rules.

Although the final two possibilities will strike many readers as paradoxical, they need to be considered. Perhaps our high rates of incarceration are doing little or nothing to combat crime, and Fourth and Fifth Amendment law is actually helping prosecutors to produce these higher rates. In recent years, crime rates have remained static or declined, but incarceration rates have

193. See MUMOLA & BECK, *supra* note 190, at 3.

194. The average yearly increase for the years 1990 to 1996 was 7.3%, compared with 5% for 1996. See *id.* at 2 tbl.2.

continued to increase.¹⁹⁵ This increase may be caused by the public perception that crime is out of control and that draconian punishments are necessary to deal with it. Popular misconceptions about criminal procedure may feed this perception. Because people believe that legal technicalities set large numbers of guilty and dangerous criminals free, they may think that too many miscreants are escaping punishment. Because they believe that the problem could be brought under control if only the legal technicalities were changed, they fail to focus on the bankruptcy of mass incarceration as a crime-fighting strategy. In other words, on this view, the Fourth and Fifth Amendments serve to legitimate outcomes that would otherwise seem unacceptable. The public believes that the police face tremendous legal obstacles in controlling crime, and it follows from this belief that the few people they do manage to catch should be treated as harshly as possible.

Although he nowhere articulates it in quite this way, this hypothesis might provide support for Amar's program. Perhaps a new social contract could be formulated whereby the police are freed from procedural constraints that hamper prosecutions of the guilty in return for a substantial reduction in the use of incarceration as an all-purpose social remedy.

I, too, have some sympathy for a grand bargain of this sort.¹⁹⁶ The solution is especially attractive in light of the modern Court's evisceration of Fourth and Fifth Amendment protection. Given the ineffectiveness of those protections as currently interpreted and the public perception that they are nonetheless seriously hampering law enforcement, we might be better off if we stopped pretending that the police were seriously constrained and started facing up to our vast overdependence on incarceration.

There are nonetheless some difficulties with this approach, at least as compared with an effort to reinvigorate criminal procedure. First, it is not clear that the approach would reduce aggregate rates of incarceration. Instead, it might only broaden incarceration costs. True, sentences would be shorter, but the police, freed from procedural constraints, would catch more people who would be subject to incarceration. If one believes that there are already too many people under criminal jurisdiction, this may be a step in the wrong direction. Perhaps more seriously, this approach would increase, rather than reduce, police presence in the everyday lives of inner-city residents. It would mean more harassment, more humiliation, and more police violence as compared to an effort to take criminal procedure protections seriously.

These costs may ultimately be worth the benefit if they in fact produce a reduction in crime. There is a final possibility, however, that must also be

195. Compare MUMOLA & BECK, *supra* note 190, at 2 (noting a 5% increase in incarceration for the United States in 1996), with FBI, *UNIFORM CRIME REPORTS FOR THE UNITED STATES—1996*, at 6 (1996) (noting a 4% decrease in the crime rate index in 1996).

196. See Louis Michael Seidman, *Criminal Procedure as the Servant of Politics*, 12 CONST. COMMENTARY 207 (1995).

considered. I am reluctant to call it a hypothesis—it may be no more than a romantic hope. Still, it just might be that reinvigorating, rather than giving up on, Fourth and Fifth Amendment protections could produce a reduction in crime. Taking criminal procedure seriously might build a symbolic bridge between those with and without power. It might signal to society's losers that there are some limits on the extent to which a majority will use its coercive power to get its way. The hope is that in exchange for this forbearance, the people with the least reason to accept our social institutions might consent to them.¹⁹⁷

To be sure, with enough force and treasure, it is possible to enforce law and order without such consent. If enough violence is applied—if enough people are intimidated, incarcerated, and executed—sooner or later our criminal classes will be cowed into submission. But the costs of this strategy are very large, and as more and more people are subject to the jurisdiction of the criminal justice system, the marginal benefits decline rapidly. On any given day, nearly one in three African-American males in their twenties is under some type of court supervision.¹⁹⁸ With numbers like these, it is simply not possible to maintain the blaming function of the criminal law among the groups we are trying to control. What results, instead, are pathologies whereby a prison sentence becomes a rite of passage or, worse yet, a badge of honor, whereby juries regularly nullify charges, and whereby still more draconian penalties are necessary to coerce compliance, leading, in turn, to more nullification.¹⁹⁹

The evidence of such pathologies is all around us; the racial divide in the O.J. Simpson case is just the most dramatic example. Indeed, it is worth

197. For some empirical support for this view, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990). Tyler's empirical study found that "normative" methods of encouraging compliance—i.e., the inculcation of "values that lead people to comply voluntarily"—are more cost-effective than "mechanisms of deterrence that stem from instrumental control over reward and punishments." *Id.* at 161. According to Tyler, "legitimacy plays an important role in promoting compliance," *id.*, and "[p]rocedural justice is the key normative judgment influencing the impact of experience on legitimacy," *id.* at 162. Procedural justice, in turn,

is . . . related to interpersonal aspects of the decision-making procedure. People place great weight on being treated politely and having respect shown for their rights and for themselves as people. The way people are dealt with by legal and political authorities has implications for their connection with the social group and their position in the community. It therefore has important implications for self-esteem and group identification. People are unlikely to feel attached to groups led by authorities that treat them rudely or ignore their rights. . . . People will not feel identified with officials whom they regard as unresponsive to their problems and unwilling to help and protect them.

Id. at 164 (citations omitted).

198. See MARC MAUER & TRACY HULING, *THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER I* (1995). A summary of this report is available on the Internet at (visited Jan. 19, 1998) <<http://www.sproject.com/rep4.htm>>. In 1995, the average black male was seven times more likely than the average white male to be imprisoned for more than one year. See MUMOLA & BECK, *supra* note 190, at 9.

199. For a detailed discussion of racial disparities in punishment and some of their consequences, see MICHAEL H. TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 49-80 (1995).

remembering that the O.J. Simpson trial began with the trial judge's rejecting what was almost certainly a valid Fourth Amendment suppression motion.²⁰⁰

Concern about pathologies like these is nothing new. More than two hundred years ago, at the founding of the republic, James Madison wrote the following:

In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.²⁰¹

In our own time, Ronald Dworkin has made the same point differently:

If we want our laws and our legal institutions to provide the ground rules within which these issues will be contested then these ground rules must not be the conqueror's law that the dominant class imposes on the weaker The institution of rights is therefore crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected. When the divisions among the groups are most violent, then this gesture, if law is to work, must be most sincere.

. . . The Government will not re-establish respect for law without giving the law some claim to respect. It cannot do that if it neglects the one feature that distinguishes law from ordered brutality. If the Government does not take rights seriously, then it does not take law seriously either.²⁰²

Are Madison and Dworkin right? I have to say that I have my doubts. It seems clear, though, that the ultimate fate of criminal procedure liberalism will turn on this question, rather than on the nature of warrant practice in eighteenth-century England. The time may indeed have come for us to give up on the Fourth and Fifth Amendments. Still, the last, best hope for avoiding an endless escalation of the violence on both sides is to put in place some form of mutual disarmament. A reinvigorated law of criminal procedure just might be a starting point for this broader project. To give up on this hope and this project is, in an important sense, to give up on the promise of liberal

200. See Henry Weinstein, *Challenges to Evidence Ruling Likely To Fail, Experts Say*, L.A. TIMES, July 8, 1994, at A23 (discussing the suppression motion in Simpson's trial).

201. THE FEDERALIST NO. 51, at 324-25 (James Madison) (Clinton Rossiter ed., 1961).

202. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 204-05 (1978).

constitutionalism more generally and to opt instead for a regime supported only by force and the threat of force. If any reason at all remains to work for a reinvigoration of the law of criminal procedure, then that is it.