Enduring Principles and Current Crises in Constitutional Criminal Procedure

AKHIL REED AMAR. *The Constitution and Criminal Procedure: First Principles*. New Haven, Conn.: Yale University Press, 1997. Pp. 272. $35.00.

Susan R. Klein

In this book, a collection of five previously published law review articles, Akhil Amar informs his readers that he will attempt to analyze the Fourth, Fifth, and Sixth Amendments from the perspectives of text, history, and structure, in order to "lay bare their first principles" (p. x). The first principle is summed up concisely: "the Constitution seeks to protect the innocent. The guilty, in general, receive procedural protection only as an incidental and unavoidable by-product of protecting the innocent *because* of their innocence" (p. 154). How can we best utilize the Fourth Amendment to protect the innocent? In Amar's view the text tells us to eliminate the warrant requirement, history tells us to eliminate the probable cause requirement, and plain old common sense dictates we eliminate the exclusionary rule. The self-incrimination clause of the Fifth Amendment can best protect the innocent by admitting all reliable fruits of compelled confessions and mandating pretrial governmental interrogation of suspects. The Sixth Amendment's guarantees can best protect the innocent by eliminating some testimonial privileges, limiting "extremely vigorous cross examination of *truthful* witnesses," and interpreting the right to counsel to protect only against erroneous conviction of the innocent (p. 142).

Susan R. Klein is the Baker and Botts Professor of Law, University of Texas at Austin. She thanks Douglas Laycock, Katherine Chiarello, Thomas Y. Davies, George Dix, Jordan Steiker, and Scott E. Sundby for their assistance with this project.

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My editor, in his initial bid to persuade me to write this essay, asked whether I though Amar's book was a "good" one.[1] It seems to me that anything which forces one to reexamine conventional wisdom, and to articulate and justify one's own historical, political, and worldviews is useful. Amar's knowledge of history is impressive, and the analytic path traveled to his conclusions is interesting, insightful, and provocative, if not always terribly original.[2] However, on balance I must conclude that Amar's vision of the animating principle behind the Bill of Rights is myopic and his analysis fails to mesh with the empirical world of criminal law practice.

I believe that both history and wisdom indicate that Amar's animating principle—the pursuit of truth—is not the only, or even, perhaps, the most important, principle at work in the Bill of Rights. However, Amar, along with a distressingly large proportion of the rest of our country's inhabitants, is unable to recall other, less tangible principles when confronted with the misleading but oft-used illustration of a bloody knife being suppressed and a leering murderer set free on a "technicality" (pp. 26, 30). To right this perceived wrong, Amar's self-proclaimed radical reinterpretation of constitutional criminal procedure does not simply eliminate the reforms of the Warren Court, it takes law and order ideology to new heights. This scholarship provides heavy artillery to the public's, the judiciary's, and virtually every politician's clamor to "do something" about the crime problem, regardless of the effectiveness or costs of such measures.[3] Unfortunately, soci-

1. I am not the first to answer this question. For other reviews of this book, see, for example, Bandes 1998 (arguing that Amar's analysis of constitutional criminal procedure denigrates the Framers' concern for the abuse of governmental power, and reflects the erroneous belief in the possibility of sorting the innocent from the guilty before determining what process is due); Paulsen 1997 (supporting Amar's view of the Fourth Amendment but arguing that Amar's interpretation of the self-incrimination clause is insufficiently radical).

2. Although Professor Amar is their most eloquent champion at present, the essence of most of his ideas did not originate with him. For example, Telford Taylor (1969) forwarded a similar reading of the warrant clause, Richard A. Posner (1981) argued for the elimination of the exclusionary rule, and Judge Henry J. Friendly (1968) similarly railed against the self-incrimination privilege.

3. One need only open a newspaper to gather examples of politicians' race to outdo each other in supporting new and more intrusive criminal schemes, even where reason demands another course. In a recent debate between Dan Lungren and Gray Davis, candidates for governor of California, Lungren attacked Davis for failing to support the death penalty. Davis, the Democratic lieutenant governor, replied, "I think Singapore is a good starting point as far as law and order, . . . You can't punish people enough as far as I'm concerned" Braun 1998. Another example is the New York State Assembly's recent adoption of Jenna's law, which expanded the length of sentences for violent offenders. Assemblyman Sam Hoyt, a Democrat from Buffalo, criticized the bill, saying "I think it's bad politics. I think it's bad policy," but he acknowledged that he voted for the bill nonetheless. He explained: In "the end it's one of these political issues that is going to pass overwhelmingly and it will be a noose around my neck politically for the rest of my career if I don't vote for it" (Precious 1998). Even appointed federal judges are not immune from such pressure, as demonstrated by the congressional move to impeach U.S. District Judge Harold Baer Jr. for a Fourth Amendment suppression ruling in a defendant's favor, and his subsequent reversal of his unpopular suppression order (Van Natta 1996).

ety will in fact pay an enormous cost for what may turn out to be a marginal benefit in terms of improved law enforcement.

My critique of Amar's work can be broken down into two general categories. The first category concerns his legal and constitutional analysis. In part 1 of my essay, I will review the first two essays in Amar's book with a view toward revealing and highlighting this first set of problems.[4] His allegiance to "plain-meaning textual arguments" (p. 153) and ancient historical practice frequently causes him to lose sight of those values the Framers actually enshrined in the constitutional clauses he would modify. For example, he may be historically accurate in his argument that warrantless searches were simply not a concern of the Framers when the Fourth Amendment was adopted. However, to conclude from this that the Court's current warrant preference is "backwards" ignores the fact that only a warrant or well-delineated exception can effectuate the values underlying the Amendment under current social conditions. This is because the Fourth Amendment was not, in fact, designed primarily to protect the innocent, but was instead a profoundly antigovernment amendment designed to control governmental power. The reality of modern police forces conducting broad warrantless searches that closely resemble the writs of assistance and general warrants condemned by the Framers is such that control of governmental power cannot be accomplished under Amar's proposed regime.

Similar problems emerge in Amar's Fifth and Sixth Amendment analyses, where he emphasizes particular words and phrases to reconceptualize the privilege against self-incrimination and, to a lesser extent, many other trial rights. Again his proposals are not grounded in present-day reality. Many of the Warren Court decisions that Amar criticizes were reactions to serious attacks on constitutional protections recently come to light. For example, just as *Mapp v. Ohio* (1961) came in response to law enforcement's intentional ignorance regarding the dictates of the Fourth Amendment, *Miranda v. Arizona* (1966) was a reaction to police coercion of incriminating statements during interrogations, and *Gideon v. Wainwright* (1963) was a response to the plight of the impoverished defendant's inability to obtain counsel. Amar's interpretations in the Fifth and Sixth Amendment contexts are plausible only if one ignores both current practice and many of the values underlying these same clauses. Thus, while it is true that, in the words of Amar, "Supreme Court case law in this field is remarkably complex, sometimes perverse, and often contradictory" (p. x), it cannot be clarified by a return to any single "first principle." Rather, the primary problem is not the doctrine surrounding the constitutional clauses but the clauses themselves. They seek to accomplish conflicting goals, and thus require the

4. Professor Amar's third and most recent article, "Sixth Amendment First Principles," offers fewer concrete suggestions and the least rigorous analysis, and time constraints prevent me from criticizing it here.

weighing and balancing of competing values. Doctrine is destined to stay messy and sometimes illogical, exactly as are the values it is designed to protect and we inconsistent humans who embrace those values.

The second category of criticisms I will level against Amar's book concerns whether Amar's suggested reforms will actually take us any closer to his first principle, protecting the innocent, or to others primary principles in the Bill of Rights, such as fairness and equality. I must conclude that most of his suggestions, if implemented, would do little to further the goal of protecting the innocent, and even less to address what many scholars and well-informed players in the system believe to be the most pressing criminal justice problems of the day, the erosion of principles of fairness and equality. Thus, in his first three essays, as well as his fourth essay, entitled "The Future of Constitutional Criminal Procedure," Amar often ignores critical issues in constitutional criminal procedure in favor of "rearranging the deck chairs" on a "sinking ocean liner."[5] He may do so in part because he lacks real-world experience in the criminal justice system, and in part because the issues with which he chooses to grapple are better suited for academic discourse: they do not involve factual questions requiring empirically based answers, they are relatively self-contained, and they are more amenable to a unified theory.

Such academic nearsightedness explains, for example, Amar's preoccupation with the exclusionary rule, despite the fact that only a small fraction of guilty defendants are released on this basis, and those who do escape through the exclusionary rule are not robbers and murderers but those caught in vice and narcotic stings (Davies 1983).[6] While it is axiomatic that the Fourth Amendment impedes law enforcement, the vast majority of guilty perpetrators are free not because of the suppression of evidence, but simply because law enforcement personnel are never able to solve the crimes and apprehend the culprits.[7]

Thus, in part two of my essay, I will outline what I believe to be the current significant issues and enduring principles in the world of constitutional criminal procedure. I will divide these problems into two types, though this division is not as neat as I make it seem. The first set of issues is

5. Professor Amar uses these phrases to describe current Supreme Court doctrine in the Fourth Amendment area (p. 2).

6. Davies found that search-related exclusion resulted in the loss of between 0.6 and 2.35% of felony arrests. The vast majority of evidence suppressed is contraband (weapons or controlled substances) (Davies 1983). See also Nardulli 1983 (effect of exclusionary rule is small: none of the motions to suppress in a study of 7,500 cases in Illinois, Michigan, and Pennsylvania involved serious cases such as murder, rape, or robbery). In cases involving violent crime, the prosecution can generally progress even after a successful suppression motion because victims and witnesses are available to testify, unlike "victimless" possession and vice crimes (Davies 1974, 774).

7. In the most recent statistics available, law enforcement agencies nationwide recorded a 21% overall crime index clearance rate, reflecting the percentage of crimes solved per crimes committed (Federal Bureau of Investigations 1996).

comprised of the myriad failures of criminal procedure to ensure the acquittal of the innocent. Though Amar's book resonates with this theme (pp. 3, 31, 47, 49, 65, 84, 90–93), he fails to discuss or even recognize the most common ways in which constitutional criminal procedure contributes to erroneous convictions. Although we cannot know how many people are wrongly imprisoned and never exonerated, the risk of convicting the innocent is unacceptably high. For example, advances in DNA testing have led to the recent discovery by the Department of Justice of 28 innocent but convicted men presently behind bars, some on death row (Connors 1996).[8] Moreover, where state officials requested DNA testing by the FBI of suspects already positively identified by eyewitnesses, over 25% of those suspects were conclusively excluded as the perpetrator.[9] Current statistics show 74 innocent inmates spent time on death row before being cleared.[10] As I will develop later in this essay,[11] the bulk of miscarriages of justice are produced through inaccurate eyewitness testimony, high-pressure plea bargaining, defendants' inability to obtain exculpatory evidence from the government, lack of funding for criminal defense attorneys, defendants' inability to adequately investigate the facts, and vague and malleable criminal laws. Yet both Amar and the Court have failed to suggest any clause of our Constitution as a remedy for these serious failings.

The second significant issue in constitutional criminal procedure concerns crises in constitutional criminal procedural guarantees that are not primarily or directly concerned with separating the guilty from the innocent. While Amar may well be concerned with the various important constitutional issues that threaten to change the worlds of criminal and civil procedure and perhaps even the social fabric of our country, he does not mention them in his book. These problems, in what I consider to be descending order of importance, concern race relations in law enforcement and criminal justice administration and the Court's unwillingness to extend either equal protection or Fourth Amendment protection to minorities in any useful manner; the ongoing collapse of the criminal/civil divide, rendering the application of the Fourth, Fifth, and Sixth Amendments to any particular proceeding uncertain; and the excessive and multiple punishments inflicted on defendants from the combination of the federal and state criminal statutory explosions and the lack of any viable constitutional protection under present Fifth Amendment double jeopardy and Eighth Amendment excessive punishment jurisprudence.

8. The Innocence Project, an advocacy group at Yeshiva University in New York City, puts the figure at 56 (Higgins 1999).

9. See note 77 infra.

10. This is according to the count done by the organizers of a national conference on the death penalty held in November 1998 at Northwestern University Law School (Higgins 1999, 46–52).

11. See notes 74–104 and accompanying text, infra.

I. AMAR'S VISION OF CONSTITUTIONAL CRIMINAL PROCEDURE

A. The Fourth Amendment

In Amar's first essay, entitled "Fourth Amendment First Principles," he attacks what he calls the "three pillars of modern Fourth Amendment case law" (p. 1): the warrant requirement, the probable cause requirement, and the exclusionary rule; and he would replace them with doctrines that are "less destructive of the basic trial value of truth seeking—sorting the innocent from the guilty" (p. 3). According to Amar, the per se warrant requirement articulated by the Court in *Johnson v. United States* (1948), is contrary to both the amendment's specific words and available historical evidence.[12] One clause of the Fourth Amendment prohibits unreasonable searches and seizures, while the next allows warrants only upon probable cause,[13] and there is no reason to suppose that the two are logically related (p. 4). Moreover, Amar's reading of history does not support an implicit warrant requirement. Quite to the contrary, the Founders were quite fearful of warrants, as judges, dependent on the Crown, frequently issued broad and unreasonable ones. Once issued, warrants were the "friend of the searcher" (p. 13) because they constituted an absolute defense to a subsequent common law trespass suit.

Finally, Amar attacks the Court's adoption of the exclusionary rule as a remedy for Fourth Amendment violations, as an aggrieved party was limited at common law to a civil tort action (p. 20). The exclusionary remedy is found nowhere in the text of the Fourth Amendment, and it is nonsensical for the remedy for an amendment applicable to both civil and criminal searches to be available only in the criminal arena. Amar believes that the modern rationales for the rule—judicial integrity, fairness, and deterrence—do not explain or justify a rule that makes "we the people" contemptuous of the Fourth Amendment. Judges in nonexclusionary countries, such as England, cannot be accused of lacking integrity. It is unfair to the general public to exclude probative evidence of guilt, as such does not simply restore the status quo ante, but instead suppresses evidence that may well have come to light eventually even without the illegality (p. 26). Moreover, allowing a "self-selected and . . . despised" (p. 28) criminal defendant to act as a private attorney general is the worst way to achieve deterrence. This is because a

12. Likewise, Amar argues that the Court's current application of "probable cause" to all searches and seizures, rather than limiting this standard to searches conducted pursuant to warrants, is contrary to historical practice (p. 18).

13. The text of the U.S. Constitution, Amendment IV provides that the "right of the people to be secure in their persons, houses, papers, and effect, 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."

guilty defendant is overcompensated with this remedy, it has diminished the role of the civil jury, and it leads to an unjustified contraction of Fourth Amendment rights elsewhere.

Amar would replace the warrant and probable cause requirements with "common sense" reasonableness—that is, the legality and type of search and seizure would depend on the circumstances. How would Amar define reasonableness? He would replace the probable cause requirement, which he interprets as something more than 50%, with a sliding scale depending on the importance of finding the item and the intrusiveness of the search (pp. 19–20). Amar expects that each civil petit jury will share his or at least a "common sense" notion regarding what is and is not reasonable. Amar would also measure searches and seizures against what he calls "constitutional reasonableness" (p. 35). Thus, each petit jury is further expected to compare what is allowed under the Fourth Amendment to what is considered reasonable under the First Amendment's free speech clause and the Fifth and Fourteenth Amendments' equal protection and due process clauses. The traditional civil enforcement model would replace the exclusionary rule as the remedy for searches and seizures found by a jury to be unreasonable (p. 40). In addition to damages, Amar would amend 42 U.S. Code §1983 to recognize direct liability of government entities, abolish official immunity, award punitive damages, permit class actions, and provide for injunctive and administrative relief (pp. 40–43).

I will limit myself in this essay to two primary counterarguments to Amar's Fourth Amendment proposals. The first and most fundamental criticism is that the core of this amendment does not concern truth seeking, and history does not suggest otherwise. The question of what "core value" the Fourth Amendment seeks to preserve must be resolved before we can evaluate whether a jury determination of "reasonableness" ought to be the touchstone or "first principle" of Fourth Amendment jurisprudence, or even what factors ought to define "reasonableness." My second criticism centers upon the impracticality of Amar's proposed legal test and remedy. This second criticism depends in part on our resolution of the core-value question. A Fourth Amendment designed solely to assist law enforcement in convicting the guilty while protecting the privacy interests of the innocent will yield different doctrines and remedies than a fourth amendment designed to protect every person's privacy, dignity, or other interest.

Why was the Fourth Amendment enacted? Part of the answer is not controversial; it was enacted to ban general warrants, including general writs of assistance that had been authorized by Parliament for customs searches. The controversy regarding the historical meaning is over the framers' attitude toward *warrantless* searches and arrests. As noted previously, Amar asserted that the framers were hostile toward warrant searches because these "warrants" permitted extremely broad searches and immu-

nized the officers from trespass liability. Thus, the framers sought to limit the use of too-loose warrants in the second clause of the Fourth Amendment. However, they preferred that searches be warrantless altogether so that, pursuant to the first clause of the Fourth Amendment, the "reasonableness" of the search could be assessed by a jury after the fact. Tracy Maclin has countered Amar's assertion by noting that colonial opposition to general writs and warrants was not linked to the lack of postintrusion civil remedy. (Maclin 1994, 15-16; 1997). Moreover, Maclin has also noted that rather than relying on jurors, the framers regarded colonial judges as pre-Fourth Amendment heroes for their refusal to issue the legislatively authorized general writs. (Maclin 1994, 21-23). More importantly, Maclin noted that the reason that general warrants were condemned by English and colonial judges was that such warrants would have conferred discretionary search authorities on officers—and such discretion was anathema at common law. (Maclin 1994, 24).[14] It makes no sense that the framers would be so hostile to a general warrant, because it conferred discretionary authority upon an officer, but would have been willing to allow the same officer to exercise broad, warrantless discretion under a flexible "reasonableness" standard in the way Amar claims.

In addition, Thomas Y. Davies presents a different view of the historical Fourth Amendment. Unlike prior commentaries, Davies documents that the first clause was not meant to set a standard for warrantless intrusions. Instead, "unreasonable" actually carried a Cokean connotation of inherent illegality, not the relativistic and flexible meaning associated with the term today.[15] Thus, the framers meant for both clauses of the Fourth Amendment to ban general warrants and to incorporate the strict and inflexible common law rules of criminal procedure (Davies 1999). Davies argues that Amar's claims that the framers feared the immunizing effect of

14. For example, Maclin noted that Otis condemned the discretionary character of the writ of assistance in 1761 because, if allowed, it would be "a power that places the liberty of every man in the hands of every petty officer." He also noted that Chief Justice Pratt (later Lord Camden) condemned the discretionary authority of a general warrant in 1763 in *Wilkes v. Woods* by noting that such a warrant created "a discretionary power." Likewise, he also noted that Lord Mansfield condemned the general warrant in *Lease v. Money* because "[i]t is not fit" for an officer to decide who should be arrested (Maclin 1994, 24).

15. Davies argues that the intended meaning of "unreasonable" is revealed by the fact that John Adams personally introduced that term in the 1780 Massachusetts declaration of rights. Adams had taken notes of James Otis's 1761 argument in which Otis declared that the statute that provided for general writs was "void" because it was "against common right and reason." Otis, in turn, had borrowed "against reason" from Sir Edward Coke's opinion in Dr. Bonham's Case, 8 Coke Rep. 113, 118a (1610). Coke had used "against reason" as a label for a violation of a basic common law principle. Later writers, including John Locke and Blackstone, converted Coke's "against reason" to "unreasonable." Thus, Davies argues that Adams used "unreasonable searches and seizures" as a pejorative label for searches or arrests made under inherently illegal general warrants. Davies argues that the modern, relativistic meaning associated with "unreasonable" was first applied to the Fourth Amendment in the 1925 decision in *Carroll v. United States*.

"warrants" was overgeneralized. In fact, only a specific warrant protected an officer from trespass liability; both the magistrate who issued and the officer who executed a general warrant were liable for damages.[16] Thus, the Fourth Amendment ban on searches pursuant to general warrants, despite the existence of the postintrusion remedy, highlights the framers' desire to prevent discretionary intrusion on personal and domestic security and privacy, particularly in the home. Davies posits that the Fourth Amendment does not speak to warrantless arrests and searches because the framers did not perceive that these were capable of posing a serious threat. This is because at common law, a valid warrant was the only way a house search could be justified, and a valid warrant was the only potent form of arrest authority.[17]

On balance, it does not appear that there is any reason to accept Amar's historical treatment as a valid one.[18] However, even if Amar had made a persuasive historical case, I do not find the answer to any of these historical questions dispositive on the issue of whether we ought to jettison the three pillars of Fourth Amendment jurisprudence. Amar simply never tells us why ancient historical practice is important in this context,[19] and I am particularly unmoved by historical arguments when the present legal and social landscape is as completely foreign to that of the Framers' time as is the case with criminal law and procedure. The creation of our present large professional police force (with its concomitant problems of corruption and brutality) and our transformation from slavery to a multiracial society (with its concomitant problems of extreme racial tensions) were both entirely unanticipated (Steiker 1994). Moreover, the proliferation of the crim-

16. Davies argues that it was well established, as reaffirmed in the Wilkes case, that both a magistrate and an officer were liable for damages in trespass when the warrant was a general one. See also *Grumon v. Raymond*, 1 Conn. 39, 47 (1814) (both issuing magistrate and executing officer would be liable for trespass for an unparticularized general warrant). Thus, Davies argues that the framers were not opposed to a valid specific warrant, which was associated with significant protections against abuse; rather, they simply meant to prevent future legislation from making a general warrant legal (Davies 1999).

17. Davies argues that officers had little incentive to initiate warrantless searches or arrests, as they were subject to lawful forcible resistance, and were strictly and personally liable in trespass even for good faith and reasonable mistakes as to whether a felony was committed and as to the identification of the felon (Davies 1999).

18. I am not qualified to judge which of the experts is correct. Moreover, I am skeptical that any lawyer-historian is fully able to separate her political and policy preferences from her historical interpretation (see, e.g., Cloud 1996, 1708, suggesting that lawyers' histories of the Fourth Amendment have been particularly partisan).

19. The cynical among us might conclude that when, as is so often the case, a scholar or justice insists on absolute fidelity to history and consistency when constitutional criminal procedure is at stake, but allows wide deviation from history and glaring inconsistencies when other constitutional clauses are considered, it is because the former amendments are disfavored stepchildren. For example, few would argue that we cannot have different First Amendment tests in different contexts, despite that fact that the language of the clause and history of the First Amendment tell us only that Congress shall "pass no law," not that the law may or may not be passed depending on whether it is viewpoint-neutral, whether it regulates print media versus broadcasting, whether it regulates commercial versus political speech, and whether it is conducted in a public forum.

inal law into almost every area of modern life, and the utilization of civil and administrative sanctions, were equally unimaginable to our forebearers (Klein 1996).

Instead of the simple historical fact query, I would ask what I consider to be two higher-level questions: (1) *why* were the Framers fearful of general warrants, writs of assistance, and other "unreasonable" searches and seizures; and (2) should we be bound by the animating principles of politicians long dead? Amar fails to confront either question, never entering the debate in the academy as to the core value underlying the amendment. Whether the value can be traced back to the Framers or is of more recent vintage, we cannot sensibly discuss how best to interpret the amendment under current social conditions until that value is selected.[20] For example, is the Fourth Amendment, as conventional wisdom and the Court presently dictate, designed to protect an individual's privacy interests against government intrusion?[21] If so, one can make a fairly compelling case for utilizing the same Fourth Amendment doctrines developed for criminal investigations in administrative and other civil investigations,[22] and applying the exclusionary remedy in those proceedings,[23] as they are frequently as detrimental to our privacy as criminal investigations and trials (Seidman 1995). Or is the amendment to preserve a sense of reciprocal government-citizen trust? (Sundby 1994). If so, the Court may wish to revisit established doctrines on the use of government informants, "consensual" searches, and the definitions of what constitutes a search and seizure. One might sensibly suggest that a government that assumes that every individual exercises her freedoms responsibly would not utilize technology or friendships to spy on its citi-

20. I am not prepared, at this point in my career, to either select from among those presented by other scholars or to propose my own. I merely note that one cannot coherently criticize Fourth Amendment jurisprudence without doing so.

21. The Court tied the Fourth Amendment to an individual's "reasonable expectation of privacy" in *Katz v. United States* (1967, 351). Most current scholarship embraces this view. See, for example, Bradley 1993 (arguing that more restrictive house searches ought to be the model for all Fourth Amendment law); Slobogin and Schumacher 1993 (criticizing the Court's overly narrow definition of privacy by utilizing empirical research into people's actual privacy preferences).

22. Presently, the Court does not do so. See, for example, *Michigan Dep't of State Police v. Sitz* (1990) (need to ensure highway safety makes sobriety checkpoints reasonable absent warrant or individualized suspicion); *Vernonia School Dist. v. Acton* (1995) (need for safe athletic program permits urine drug testing of students absent warrant or individualized suspicion); *National Treasury Employees Union v. Van Raab* (1989) (special need of drug interdiction permits drug testing of customs employees absent warrant or individualized suspicion); *New York v. Burger* (1987) (administrative needs justify statutorily authorized warrantless searches of closely regulated industry absent individualized suspicion).

23. The Court imposes the exclusionary sanction only in criminal cases. See, for example, *United States v. Janis* (1976) (exclusionary remedy inapplicable in civil action by IRS to collect taxes); *INS v. Lopez-Mendoza* (1984) (exclusionary rule inapplicable in administrative deportation hearing).

zens,[24] instruct its armed officers to "ask" citizens to submit to questioning and searches,[25] rifle through peoples' garbage or trespass on their private property,[26] or chase its citizens through the streets[27] without some level of required justification for believing that the citizen is involved in criminal activity.

Do changes in our social structure mandate that the Fourth Amendment now act to free individuals from the fear of legalized violence and public humiliation at the hands of police, rather than to prevent information disclosure? (Stuntz 1995). If this is the goal, the Court ought to shift its focus from obtaining warrants to more stringent regulation of the execution of search and arrest warrants, and limit coercion occurring during those street encounters and automobile stops that do meet the required level of justification. Should the amendment instead attempt to protect minorities and those holding unpopular views from harassment? (Johnson 1983). If so, we may need to further limit police discretion in all citizen encounters, more closely scrutinize penal statutes with a disparate impact on minorities, and grant such oversight authority to the courts rather than to legislatures or juries. Or is the Fourth Amendment simply a manifestation of our culture's distrust of unrestrained governmental authority, particularly executive and legislative discretion? (Maclin 1994).[28] If so, any interpretation should include judicial regulation of the police.

Though Amar never identifies the value he wishes to promote, he does suggest that the amendment's protection should be available most readily to the innocent (pp. 3, 31).[29] There are a number of problems with this. First, it is inconsistent with his remedy, as he rejects the colonial understanding

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24. The Court allows the government to utilize relatively sophisticated equipment to conduct nonsearches of things in plain view, *Dow Chem. Co. v. United States* (1986, 227) (aerial surveillance and mapping does not implicate Fourth Amendment), and allows government agents to surreptitiously record conversations so long as one party willingly participates in the conversation. *United States v. Miller* (1967) (no reasonable privacy interests exist in conversations that are electronically recorded by undercover police).

25. Such searches are generally considered by the Court to be consensual. See, for example, *Florida v. Bostick* (1991) (case remanded for determination as to whether consent was voluntary where armed guard boarded bus at station and asked passenger for permission to search baggage); *INS v. Delgado* (1984) (Fourth Amendment not implicated by factory "survey" of employees by 25 law-enforcement agents blocking the exits).

26. The Court permits both through its doctrines of abandonment and open fields. See *California v. Greenwood* (1988) (no reasonable expectation in privacy in curbside trash; therefore, police dissection of garbage for evidence of wrongdoing was not a search); *Oliver v. United States* (1984) (no expectation of privacy in open fields).

27. The Court does not consider a police chase of a suspect to be a seizure of that individual unless and until he is apprehended. *California v. Hodari D.* (1991) (young black pedestrian chased down the street by police cruiser was not "seized" until physically captured); *County of Sacramento v. Estate of Lewis* (1998) (civil rights plaintiff accidentally run over and killed by officer during high-speed vehicle chase never "seized" within the meaning of the Fourth Amendment).

28. This same theme can be found in Amsterdam 1974.

29. Amar appears to favor the privacy rationale when he refers to the Fourth Amendment in his Fifth and Sixth Amendment essays (p. 63, "the Fifth Amendment is *not* about

that *ex post* success of a search rendered it reasonable despite the lack of *ex ante* justification.[30] Second, it is historically inaccurate. Available evidence suggests that, though the guilty may have been denied a civil trespass remedy, the Framers intended that the Fourth Amendment deter unreasonable searches against the guilty as well as the innocent. Most of the American victims of the maligned searches were factually guilty of violating England's smuggling and seditious libel laws. Yet the colonists were outraged by what they considered governmental abuse and overreaching (Bandes 1998). Third, in our increasingly regulated and criminalized world,[31] few would benefit from a regime that protected only the factually innocent. Nearly one of thirty-five Americans was in prison, jail, or on probation or parole in 1997 (Austin American Statesman 1998), and these are only the ones who were prosecuted! Excluding myself, of course, I doubt many of us could escape a Kenneth Starr-type investigation unscathed.

However, putting these problems aside, we can ask whether any of Amar's suggestions for the reform of Fourth Amendment jurisprudence foster *any* of the above-referenced core values, for the factually innocent or for the factually guilty? I believe that his suggestions would ultimately be unsuccessful, even by his own measure. Let us start with eliminating the warrant and probable cause preferences in favor of a "reasonableness" standard. I first note that despite the Court's stated preferences and Amar's handwringing over the way these preferences hamper law-enforcement efforts, a flexible "reasonableness" or balancing test has, in fact, been adopted by the Court over the last few decades for the majority of searches. Searches conducted pursuant to a warrant are far outnumbered by searches conducted pursuant to the numerous well-established exceptions to the warrant preference (the automobile exception,[32] searches incident to an arrest,[33] immigration roadblocks,[34] closely regulated business inspections,[35] sobriety checkpoints,[36] the emergency exception,[37] special-needs searches,[38] plain

bodily privacy, as is the Fourth"; and p. 91, "nothing in the text, history, or structure of the Fourth Amendment supports such an upside down approach to privacy rights").

30. He does not go this far, though he never explains why.

31. For example, at Professor Beale's last count, the federal criminal code contained more than 3,000 proscriptions (Beale 1995, 980 n.10). By my count, Texas has over 400 penal proscriptions (Klein and Chiarello 1998).

32. *United States v. Ross* (1982) (police can search entire automobile without warrant if they have probable cause to believe that there is contraband therein); *California v. Acevedo* (1991) (searches under this exception include containers once placed within vehicle).

33. *United States v. Robinson* (1973) (police can search areas reachable by arrestee, including containers, without a warrant or probable cause).

34. *United States v. Martinez-Fuerte* (1976) (border patrol may combat transportation of illegal aliens by stopping vehicles at fixed checkpoints near international borders and briefly questioning occupants).

35. *New York v. Burger* (1987) (statutorily authorized warrantless searches acceptable).

36. *Michigan Dep't of State Police v. Sitz* (1990) (no warrant or individualized suspicion necessary for short detention of driver to verify sobriety).

view/plain feel searches and seizures,[39] and routine searches at the international border).[40] Moreover, much law enforcement activity has been immunized from scrutiny for reasonableness of any sort by the Court's restrictive definitions of what constitutes "searches" and "seizures" subject to the Fourth Amendment. Examples here include trespasses into open fields,[41] tracing items and persons by use of government-placed beepers,[42] spying via low-flying helicopters (*Florida v. Riley* [1989]), searching for contraband via narcotic-sniffing canines (*United States v. Place* [1983]), searching through garbage,[43] and searching conducted after consent.[44]

Likewise, probable cause is no longer the norm in most cases. Police can detain citizens if they can articulate a reasonable suspicion that criminal activity was or is afoot;[45] they can conduct a "pat-down" frisk based on reasonable suspicion that an individual is armed;[46] they can send travelers, visitors to public buildings, and schoolchildren through metal detectors with no suspicion at all;[47] they can search with reasonable suspicion or no suspicion at all pursuant to a special noncriminal need;[48] and they can do inventory searches[49] and health and safety inspections[50] absent any individualized suspicion.

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37. *Minnesota v. Olsen* (1991) (no warrant necessary when there is an emergency such as imminent destruction of evidence, escape of suspect, or danger to police or others).

38. See note 22, supra.

39. *Horton v. California* (1990) (Fourth Amendment permits seizure of item in plain view without warrant if probable cause to believe it is contraband is immediately apparent, and officers can legally view and reach the item to be seized); *Minnesota v. Dickerson* (1993) (plain feel exception).

40. *United States v. Ramsey* (1978, 616) (routine border searches require neither a warrant nor probable cause).

41. *Oliver v. United States* (1984, 179) (no warrant nor probable cause necessary for government to trespass onto open fields looking for criminal activity).

42. *United States v. Karo* (1984) (neither installation of beeper on can sold to defendant nor transmission allowing government to follow can from store to curtilage of house implicated a Fourth Amendment interest; however, monitoring of beeper after entry into home constituted a search).

43. See *California v. Greenwood* 1988, supra note 22.

44. *Ohio v. Robinette* (1996) (detainee need not be told he is free to go before consenting to vehicle search).

45. *United States v. Hensley* (1985) (detention based upon reasonable suspicion that person committed felony in past).

46. *Terry v. Ohio* (1968) (violent nature of robbery offense suffices).

47. These kinds of searches would surely be approved on either a special needs or consent rationale. See *National Treasury Employees Union v. Van Raab* (1989, 675–76 no. 3).

48. Special needs cases in which no individualized suspicion is required are cited supra in note 22. Special needs cases requiring individualized suspicion, but not probable cause nor a warrant, include *O'Connor v. Ortega* (1987) (offices of governmental employees can be searched if reasonable suspicion); *Griffin v. Wisconsin* (1987) (homes of probationers can be searched if reasonable suspicion and authorizing regulation); *New Jersey v. TLO* (1985) (public school student's pocketbook may be searched if reasonable suspicion).

49. *South Dakota v. Opperman* (1976) (automobiles can be inventoried pursuant to standardized police procedures); *Colorado v. Bertine* (1987) (including containers).

50. *Camera v. Municipal Ct. of City and County of San Francisco* (1967) (government can obtain area warrant based upon reasonable administrative standards).

Does this trend suggest that we ought, as Amar contends, to abandon the stated preferences for a warrant and probable cause entirely? Shorter-term history, ignored by Amar, teaches that despite the many inroads, there was excellent reason to institute the warrant preference, and it remains advantageous to require a warrant where feasible. Justice Robert Jackson's 1948 admonition that "the protections [of the Fourth Amendment] consist in requiring that those inferences [which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime" (*Johnson v. United States* [1948, 13]) was partially in response to Nazi Germany's use of the police power to exterminate the Jews, and partially in response to the whippings, beatings, and other inhumane uses of police authority against African Americans in the American South (Steiker 1994, 820). Similarly, the Warren Court's strengthening of the warrant requirement in the 1950s and 1960s was in response to police harassment and other abuse inflicted upon protestors during the civil rights movement.

It seems to me that, for a variety of reasons, it remains as true today that a warrant is the best way to prevent unwarranted intrusions into privacy, depredations of dignity, violations of government-citizen trust, harassment of minorities, or whatever other value one believes needs protecting. A police officer will, of course, always believe or at least say she believes that every search or seizure she wishes to conduct is justified. Thus, without a warrant and probable cause requirement, police would conduct many more searches than at present, and some percentage of these would be unjustified. Human nature is such that we assign a Herculean task when asking a judge or jury to find after the fact that an officer had no basis for a search or seizure, particularly when that search turns up incriminating evidence against a criminal. This difficulty is compounded by the pervasiveness of police perjury in general, and the ease of constructing a story establishing an exception to the warrant requirement after a search is completed.[51] For those searches that do not turn up evidence of a crime, postsearch review and remedy, whether by a judge or jury, obviously come too late to prevent the intrusion and restore lost privacy and dignity. We need, instead, a penalty harsh enough to provoke systemic deterrence.

Of equal importance, I believe it crucial to have the Court clearly delineate generally applicable rules both as to precisely when it is acceptable to search/seize without a warrant and what standard of justification (probable cause or something less) is required. The alternative is to allow either judges or juries to determine reasonableness on a case-by-case basis. Both of

51. See note 56, infra.

these alternatives are bad ones, though Amar's proposed jury regime[52] is particularly disastrous.

Let us first consider a world where judges determine the reasonableness of warrantless searches on the facts before them in particular civil tort cases. The insurmountable drawback of this method is that police will receive inadequate guidance for their future conduct. Even an officer who wishes to obey the dictates of the Fourth Amendment cannot study and conform to doctrines when confronted with thousands of cases in which each judicial decision was based on one of an almost infinite number of factual permutations. What this officer needs, particularly when forced to make quick decisions in dangerous settings, are bright-line rules that she can easily comprehend, remember, and apply.[53] It is for this reason that the Warren Court was forced to create *Miranda*'s prophylactic rule. Though maligned by conservative jurists and scholars, this infamous decision actually assists law enforcement: if an officer reads the warnings and obtains a waiver, she can continue to question the suspect without an attorney present, and she benefits from a strong presumption that any resulting statement is voluntary and therefore admissible. (Klein 1994). Conservative courts since Justice Warren's day have continued to laud and employ bright-line rules for law enforcement officers in the Fourth and Fifth Amendment areas.[54]

If we allow juries rather than judges to determine Fourth Amendment contours through damages awarded to plaintiffs via civil verdicts, one of two things will occur. Either the juries will not punish misbehavior at all and

52. Although Amar proposes four enforcement regimes (the legislature may describe rules for search and seizures, the executive may implement guidelines for recurring fact patterns, the judiciary may create case law, and juries will determine civil tort verdicts), the jury regime would seemingly trump whatever the other branches do. The executive and legislative branches would likely continue to do nothing at all, and the judiciary will not render advisory Fourth Amendment opinions in the absence of motions for exclusion of evidence.

53. A number of scholars have noted this phenomenon. Professor Alschuler wrote that rules "tend to limit the importance of subjective judgment, to promote equality, to control corruption, to simplify administration, and to provide a basis for planning before and after controversies arise" (1984, 227). Likewise, Professor LaFave warned that "it may well be that the rules governing search and seizure are more in need of greater clarity than greater sophistication" (1982, 321). Professor Ogletree (1987) argued against the case-by-case approach in the confession context because of its inability to direct the behavior of police.

54. Some examples of these include the rule allowing an officer to order passengers out of a vehicle during a stop regardless of whether she can articulate reasonable suspicion of criminal activity or danger, *Maryland v. Wilson* (1997); the rule permitting officers to search the entire passenger compartment of an automobile, incident to a driver's arrest, even if that driver has no immediate access to the vehicle, *New York v. Belton* (1981, 458) ("a single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront"); the rule permitting search of containers upon custodial arrest regardless of whether they might contain evidence or weapons, *United States v. Robinson* (1973, 235) (a "police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search"); and the rule allowing custodial interrogation after warnings and waiver, *Miranda v. Arizona* (1966) (rule provides better guidance to police than former multifactored voluntariness test).

police officers will do whatever they please, or juries will faithfully award damages but police officers will again have no guidance on how to lawfully conduct searches and seizures. I believe that the former outcome is the more likely one. The vast majority of Americans correctly perceive that they are highly unlikely to be the target of a police search or seizure, but are much more likely to be the victim of a crime. Of course, the majority of Americans available for jury duty, in addition to being law-abiding and much more fearful of the robbers than the cops, are also not members of the racial minorities disproportionately and unfairly harassed by police officers.[55] Thus, most jurors will view a defendant-officer as a decent individual doing a tough job, a "guilty" plaintiff as a criminal deserving of punishment rather than damages, and an innocent plaintiff as simply paying a minimal price for social order. This perception will be assisted by the nasty but pervasive problem of police perjury, coupled with officers' high credibility with judges and jurors.[56] For these reasons, defendants win nearly every case currently brought pursuant to *Bivens* (1971) or 42 U.S.C. § 1983 for violations of a constitutional right, particularly where the defendant is a peace officer.[57]

Not only are "guilty" plaintiffs unlikely to succeed because of lack of jury sympathy, and "innocent" plaintiffs unlikely to succeed because of jury-perceived good faith on the part of officers, but relatively few "innocent" plaintiffs will be willing or able to bring suit. Many of the most common potential Fourth Amendment violations, such as those involving automobile stops, brief detentions, and checkpoints, do not rise to the point where the average citizen would feel it worthwhile going to court. Thus, an entire sphere of Fourth Amendment issues would essentially be left unreviewed and without redress. Moreover, even violations egregious enough to motivate a plaintiff to sue would probably not get before a jury. Few plaintiffs would be sophisticated enough to hire lawyers and sue police departments. Even fewer would have damages sufficiently large to persuade an attorney to risk her relationship with the local prosecutor's office to take the case (see, e.g., Schuck 1983).

Even if juries do award damages to plaintiffs for what they consider to be officer misbehavior, a jury-reasonableness regime will provide even less

55. See notes 108–110 and accompanying text, infra.

56. A number of studies confirm this: Skolnick 1982, 42–43 (studying several police departments and concluding that for police, lying is a "routine way of managing legal impediments—whether to protect fellow officers or to compensate for what [the policeman] views as limitations the courts have placed on his capacity to deal with criminals"); Westley, 151 (reporting that 77% of police officers questioned would perjure themselves rather than testify against another officer).

57. These studies include Office of Legal Policy 1989 (finding that plaintiffs filed 12,000 *Bivens* action since 1971, but defendants paid damages in only 5 cases, and finding fewer than 3 dozen reported 42 U.S.C. § 1983 cases based on violations of the Fourth Amendment over the past 20 years); Smith 1979 (defendants win nearly every section 1983 case brought to judgment); Meltzer 1988 (finding that the likelihood of significant damage awards against police misconduct is extremely small).

guidance to officers than a system in which a judge determines whether the behavior was reasonable, because jury verdicts can have no precedential value. Judges will at least be forced to distinguish every case before them from higher court cases with similar facts. In addition to being unable to instruct their officers on what Fourth Amendment law is, police departments will be unable to plan resource allocation, as the amounts of compensatory and/or punitive damages awarded will be wholly unpredictable. While the "cost" of the exclusion of evidence is to put the police department in the position they would occupy absent a constitutional violation, the monetary value of a plaintiff's lost Fourth Amendment interest will vary widely depending on the life experiences of each petit juror and the attractiveness of the plaintiff.

Last, let us turn to Amar's proposed elimination of the exclusionary rule. Though to his credit Amar advocates (at least on paper) his reforms only in toto rather than in any piecemeal fashion (p. 3 n. 5), only the naive would believe that his total package would ever be enacted. In fact, federal legislation that eliminated the exclusionary rule and replaced it with a tort suit was proposed in 1995, and Amar testified in favor of it.[58] He praised this bill despite the fact that, far from tracking his comprehensive remedial scheme,[59] the bill limited recovery to actual damages plus $10,000 punitive damages (with a $30,000 cap), eliminated the jury, and limited damage awards to those convicted of a crime to "actual physical personal injury and actual property damages" (rather than any damages that flow from being convicted based on unconstitutionally obtained evidence). This is an even smaller price to pay than is currently permitted under our failing present civil rights statutes.

Amar again ignores shorter-term history in focusing on eighteenth-century practice in determining remedies. Is the exclusionary sanction a perfect remedy? Clearly not. Amar correctly notes that it is frustrating, to say the least, to allow a guilty person to escape punishment. Moreover, it does nothing to compensate the innocent. On the other hand, the rule does little more than restore the status quo ante, despite Amar's criticism to the contrary, as evidence that would have come to light absent the violation is generally admitted under the "ultimate or inevitable discovery" exception to the exclusionary sanction (*Nix v. Williams* [1984]).

For lack of a feasible alternative, the Supreme Court was forced to extend the exclusionary rule to the states in the 1961 case *Mapp v. Ohio* (1961) because of the rampant lawlessness the country experienced during the preceding 12 years, after it had held in the 1949 case *Wolf v. Colorado*

58. H. 666 and S. 3, 104 Cong., 1 Sess. (1995). Amar testified on 7 March 1995 before the Senate Judiciary Committee.

59. In his Fourth Amendment essay, Amar included enterprise liability, the abolition of official immunities, and a sentencing discount for convicted defendants. Neither the Senate nor House bill included these reforms.

that the federal exclusionary rule did not so apply. One might have thought that, prior to 1961, the Fourth Amendment did not exist, as most state legislatures provided absolutely no remedy for its violations, state judges and police departments implemented no procedures to deter violations, and state law enforcement officials in most jurisdictions never bothered to learn much less obey the search and seizure rules imposed by the federal Constitution (Klein 1994, 459–61; Dripps 1996).

The available empirical evidence, although inconclusive, suggests unquestionably that an exclusionary rule holds the most realistic promise of effectively preventing law enforcement illegality. Further, the evidence demonstrates that this rule has, in fact, fostered systemic institutional compliance with the mandates of the Fourth Amendment, as police supervisors and prosecutors, worried about losing cases due to suppressed evidence, educate street officers and federal law enforcement agents on Fourth Amendment doctrine.[60] While police officers and prosecutors may disagree with suppression rulings in particular cases, both groups agree that neither the exclusionary rule nor constitutional limits on police interrogation impose significant costs upon them (American Bar Association 1988).

Is Fourth Amendment doctrine perfect? Far from it. Is Amar correct in his criticisms that concerns about potential suppression down the road cause distortion in the judicial definitions of "search" and "seizure," and create exceptions to the warrant preference and probable cause standard? Yes. Has police perjury, committed to avoid possibly successful suppression motions, run rampant (a problem unmentioned by Amar)? Yes. The crux of our disagreement is not about the reasonableness clause versus the warrant clause, as the reasonableness clause appears to have prevailed. Our disagreement is over the wisdom of having court-imposed categorical rules that law enforcement personnel must to learn and follow coupled with the exclusionary sanction and existing civil rights remedies, versus ad hoc civil jury verdicts that would give police no guidance in conforming their behavior to the strictures of the Fourth Amendment, would shift the perjury problem from the suppression hearing (to avoid losing the case) to the tort trial (to avoid losing money), and that would generally do little to foster institutional compliance with the Fourth Amendment. It seems to me that the present system wins hands down.

B. The Fifth Amendment

In Amar's second essay, "Fifth Amendment First Principle: The Self Incrimination Clause," he again employs both textual and historical arguments to criticize Supreme Court jurisprudence in this area, and offers his

60. Many studies confirm this. See, for example, Orfield Jr. 1987.

own doctrines in their stead. Amar attempts to "solve the riddle and untie the Gordian knot" of a clause that "continues to confound and confuse" (p. 46). This Gordian knot in the clause is a lack of an easily identifiable rationale. Amar solves the riddle by offering us "the best reason underlying that rule—reliability" (p. 47).

What exactly does Amar find confusing about the doctrines surrounding the privilege? The first problem is the Court's current position on immunity. In *Kastigar v. United States* (1972), the Court held that use and derivative immunity, extending to all evidence obtained as a result of the testimony compelled by the immunity grant, is necessary to comply with the Fifth Amendment's self-incrimination clause. This position is nonsensical, according to Amar, for two reasons. First, physical fruits of a compelled statement are generally reliable, and thus exclusion is contrary to the criminal trial's truth-seeking function. Second, the words of the clause[61] prohibit compelling a person to be a *witness*, and witnessing can only be done by people, not things (p. 59). The second major problem, what Amar terms "the most striking flaw in current application of the privilege" (p. 49), is that an innocent defendant cannot call the actual culprit to the stand and compel her to be a witness and answer questions. Thus, courts "cripple the innocent defendants while the guilty wrap themselves in the self-incrimination clause and walk free" (p. 48). Third, the Court admits out-of-court confessions obtained through police interrogation after Miranda waivers, though this practice may lead to troubling forms of interrogation and unreliable confessions. At the same time, the Court refuses to allow more civilized and reliable methods of discovery such as depositions or questioning by magistrates (p. 56). This refusal is contrary to historical practice, for it was common from the time of ratification for magistrates to question the accused before trial (p. 69).

Amar's solution to all three problems is to allow the government to compel all persons to testify in a proceeding outside of a formal "criminal case" against that person (p. 70). The penalty for refusing to answer would be criminal contempt of court, and the penalty for lying would be criminal perjury.[62] He interprets the self-incrimination clause to prohibit only the admission of this compelled testimony in the person's criminal trial. This interpretation solves the first self-incrimination-clause problem, because an immunity agreement would only require the exclusion of testimony rather

61. The text of the U.S. Constitution, Amendment V provides that "No person . . . should be compelled in any criminal case to be a witness against himself."

62. Years before Amar's book was published, a number of eminent scholars have suggested interrogation before a magistrate (Alschuler 1996, 2669 n. 174). However, most of the proposals, bowing to the original understanding of the Fifth Amendment, would allow the suspect to remain unsworn, and would permit no penalties for a refusal to answer. Amar's proposal of sworn testimony under penalty of perjury and contempt sanction is exactly what the framers meant to forbid when they prohibited compelled self-incrimination (Alschuler 1996, 2657).

than fruits. The defendant could be questioned by a magistrate pretrial which, hopefully, would lead to physical evidence and third party testimony, all of which would be admissible. This approach also solves the second problem, because guilty witnesses could no longer invoke the privilege in another person's trial. They would have to testify, and suffer the admission in their own future criminal trial of any fruits obtained from their testimony. The third problem, of actual compulsion and unreliable confessions obtained during police-station interrogations, would be resolved by the shift to the magistrate hearing rooms (p. 76). These reforms are in keeping with Amar's theme of protecting "the *innocent* defendant from *erroneous* conviction—and . . . is wholly consistent with the deep structure of our bill of rights" (p. 87).

I will focus again on two criticisms; the first questions the core value Amar selects as underlying the Fifth Amendment, and the second questions whether any of Amar's suggestions will be effective in meeting his own goals. Unlike in his Fourth Amendment essay, here Amar clearly enunciates what he believes to be the animating value underlying the self-incrimination clause. However, Amar never tells us *why* he picks reliability as the first principal. It is certainly not grounded in history or in the text of the amendment. He simply asserts it, as if playing king for the day. Amar is quick to criticize the other rationales typically given for the self-incrimination clause: that the defendant is otherwise presented with a cruel trilemma;[63] that the clause protects a special zone of mental privacy;[64] that it assures noninstrumentalization of defendants;[65] and that it helps maintain parity between an individual and the state;[66] as inadequately explaining the current scope of the privilege as defined by Supreme Court doctrine. This description is accurate. But Amar's rationale of reliability does no better a job at explaining current Supreme Court doctrine, or his numerous reforms would be unnecessary.

While I am far from an apologist for all self-incrimination doctrine, a closer examination reveals that a *combination* of the above values does, in fact, account for all modern self-incrimination jurisprudence. Amar would change doctrine so as to abandon every other value and protect solely reliability, without providing any persuasive justification for selecting this value,

63. *Murphy v. Waterfront Comm.* (1965, 55) (in the absence of the privilege, a defendant would be forced to choose between self-accusation, perjury, or contempt).

64. This position is outlined in *Couch v. United States* (1973, 328); and by Gerstein 1970, 90. But see *United States v. Balsys* (1998, 2232) (the self-incrimination clause offers "conditional protection of testimonial privacy subject to basic limits" rather than the right to a "private enclave").

65. This argument is advanced by Luban 1988 (the government impermissibly subordinates a person to the state when it uses her private thoughts as the active means of her own destruction).

66. *Murphy v. Waterfront Comm.* (1964, 55) (clause achieves a "fair balance" between individuals and the state).

much less its exclusivity. He simply ignores a strong tradition that there are limits to what the state can do, even to a guilty person. While the state may be able to coerce physical evidence from a suspect's body, we generally enshrine the view that it cannot harness an individual's will against herself (Levy 1968). Protecting such a value will, of course, hinder the truth-seeking function of a trial. This is acceptable only because reliability is simply not the first principle of the self-incrimination clause.

Amar's historical argument for making reliability the touchstone of the self-incrimination clause is as flawed as his Fourth Amendment history lesson. Even in those jurisdictions that allowed a magistrate to question an accused pretrial, the accused could refuse to answer. The worst possible repercussions from a refusal to answer was that the prosecutor might later ask the petit jury to draw whatever inferences they might from the silence. Eighteenth- and nineteenth-century jurists and legislatures understood they could not compel the defendant to speak consistent with the self-incrimination clause, even in a pretrial proceeding, and courts uniformly excluded compelled pretrial testimony. It was, in fact, in response to this privilege that immunity statutes sprang up in the early nineteenth century. Had answering questions been mandatory, immunity statutes would have been unnecessary. Had reliability been the touchstone of the amendment, these immunity statutes would have offered only testimonial immunity, as Amar suggests. Instead, many of the early-nineteenth-century statutes and judicial opinions mandated full transactional immunity, which not only excluded compelled testimony and its fruits but prevented the prosecution from going forward altogether.[67]

Amar's second attempt to elevate reliability as the touchstone of the self-incrimination clause is his claim that the Supreme Court has recently accepted reliability as the animating principle. In fact, the Court has downplayed the unreliability of a compelled confession as the reason for excluding it, and highlighted instead its disapproval of police interrogation tactics considered offensive (Kamisar 1995). In a long series of cases involving everything from physically beating a confession out of a defendant to more subtle psychological pressure, the Court has consistently excluded confessions in which the interrogation method was such as to overcome the defendant's will, in total disregard of whether or not the defendant spoke the truth.[68] As recently as 1993, in *Winthrow v. Williams*, the Court permitted a collateral attack on a conviction based on *Miranda* grounds because this was

67. *Counselman v. Hitchcock* (1892) (detailing state cases that required full transactional immunity in order to compel testimony).

68. See, for example, *Rogers v. Richmond* (1961) (confession involuntary where police threatened to bring defendant's ailing wife to the stationhouse); *Colorado v. Connelly* (1986) ("involuntary" statement admissible because it was the product of defendant's mental illness, and not police overreaching).

necessary to deter police officers from violating *Miranda* and coercing statements.

My second criticism of Amar's essay is more practical. Even if one accepts reliability as the touchstone of the clause, Amar's proposals will not effectuate the raison d'être behind his selection of this value—that "more guilty persons will be brought to book, while the plight of the truly innocent defendant will be improved" (p. 47). In fact, his proposals may result in precisely the opposite effect. Let us first consider a pretrial interrogation conducted by a magistrate. Amar tells us that he hopes these more civilized interrogations will replace those presently occurring at the stationhouse. [69] If this were truly to occur, I would bet the farm that many *fewer* guilty persons would be "brought to book" because of the huge number of criminal suspects who make statements to police, despite receiving their Miranda warnings. Many guilty suspects erroneously think they can outwit the police and make statements they believe to be exculpatory, but that are actually inculpatory. Many more make truthful statements they know to be inculpatory as a result of what Amar terms "offensive" police practices that do not rise to the level of Fifth Amendment or due process violations. Without these statements, many crimes might go unprosecuted.

Would magistrates be able to obtain these same statements? It seems to me that nobody who has set foot in a courtroom could think so. The woman in the black robe will not pretend to be the defendant's friend to reduce the emotional barriers to admission of guilt, intimidate the defendant, play "good cop/bad cop," fabricate evidence, or employ any of the other tricks that peace officers use to encourage speech. If they are willing to take the time to do these things, judges become in effect investigating officers, and the potential value of the procedure is lost. Moreover, the magistry of the courtroom, the formality of the situation, and the use of legal jargon will impress upon the defendant the severity of the situation, leading to general reticence to speak and receptivity to assistance of counsel. If such a magistrate-conducted interrogation after an arrest is considered to be the initiation of formal proceedings against the defendant, as it is certain to be, the defendant will have a Sixth Amendment right to consult with counsel before enduring the proceeding.[70] This will give guilty suspects more time to

69. Amar recognizes that, at the time of the framing, any questioning of suspects was done by justices of the peace. The framers never anticipated postarrest interrogations by police officers. Thus, a full-blown originalist treatment would require that all interrogations be performed by judicial officers. Amar asserts that the Constitution no longer requires this, though he never explains why. Perhaps it is because, as I note earlier, it would make *Miranda* sound rather tame by comparison. I believe it unlikely that legislatures or courts would ban stationhouse interrogations in favor of magistrate-conducted ones, and Amar admits the Constitution does not require this path. If I am correct in my prediction, than the addition of another layer of interrogation will do nothing to solve the admittedly serious problem of unreliable police-coerced confessions.

70. *Michigan v. Jackson* (1986) (holding that the Sixth Amendment is triggered by a formal judicial proceeding).

concoct stories than if they had to answer questions from officers immediately following the event.

Defense attorneys will likely counsel clients not to answer a question if they cannot clearly remember the event. This epidemic of amnesia is unlikely to be cured by Amar's proposed contempt sanction. How is the judge to know if the defendant honestly cannot remember, never knew the answer to a question, or is merely attempting to stop the prosecutor from obtaining derivative evidence? Any attempt to use the contempt sanction will turn the interrogation into a mini-trial in which the prosecutor attempts to prove that the defendant actually did commit the crime and that he is therefore lying regarding his memory, and the defendant attempts to prove that he did not commit the crime and is being honest. Finally, in addition to the time and resource strain of conducting a trial before the trial in cases where the suspect is recalcitrant, there is also the practical problem of having enough magistrates, courtrooms, court reporters, defense attorneys, and prosecutors to interrogate every suspect in such an official manner.

Amar's second reform, allowing defendants to call the "real" perpetrator to the stand, is equally impracticable.[71] I would first note that Amar has not shown this to be a real world problem. Though it may happen on Perry Mason episodes, Amar has provided no documented cases in which the wrong man was prosecuted, the defendant knew who the perpetrator was, the prosecutor refused to investigate this person or grant testimonial immunity, and the defendant's only way to clear his name was to convince the perpetrator to take the stand and confess guilt. My guess is this inability is due to a number of factors. First, prosecutors generally desire a prosecution against the individual who actually committed the offense, and are willing to dismiss cases or add codefendants when necessary. Second, if it is true that a different individual perpetrated the crime, there generally is other evidence of that individual's guilt besides his own confession. Any such evidence would, of course, be fair game for the defendant to offer. Third, there will often be other physical or testimonial evidence of doubt as to the defendant's guilt, such as DNA evidence, fingerprint analysis, and alibi witnesses. Such evidence would also, of course, be admissible. Finally, if we put the "real culprit" on the stand and compelled him to testify, he would certainly lie rather than admit guilt (unless he was colluding with the defendant).

71. I would also note that his "textural" claim that the Fifth Amendment allows this hinges on his extremely artificial reading of "in any criminal case" as though it means "only in the defendant's own trial." He offers no explanation or justification for this reading. In fact, Chief Justice Pratt permitted a witness to invoke the privilege during *Wilkes v. Woods*, the case Amar claimed was the model for the Fourth Amendment (Dripps 1996). This clearly demonstrates that the common-law right was understood to be broader than Amar's treatment.

In the real world, the problem is not that a named defendant is entirely innocent while a potential witness protected by the self-incrimination clause is the actual culprit. Rather, the defendant is unable to produce evidence that the third party committed the crime because in fact the defendant committed the crime, either by himself or perhaps with the third person upon whom he now wishes to lay the blame. If we accept Amar's reform and force a witness to testify against himself with the grant of testimonial immunity, this will encourage collusion between guilty defendants and guilty witnesses or guilty defendants and innocent witnesses. Each can testify at the other's trial that they in fact are the actual culprit, and their inculpatory statement would be excluded at their own trial. So long as they refrain from taking the stand in their own trial and telling a contradictory story, perjury would be impossible to prove.

I conclude that Amar is chagrined not so much by self-incrimination clause doctrine as by the clause itself. It is a small step to go from admitting fruits and third-party witness testimony derived from compelled statement on the grounds of reliability, to admitting a (true, fully corroborated) coerced confession itself on the grounds of reliability. For Amar, the only worthy recipient of self-incrimination protection appears to be that defendant who is actually innocent but whose exculpatory evidence would be disbelieved because he performs poorly as a witness (p. 68). This seems to me an inadequate reason to create and maintain a constitutional amendment. Surely we could now employ the due process clause to protect such a person, or utilize an expert to explain the problem to the jury. Amar's essay and its focus on reliability either supports outright repeal of the self-incrimination clause, or fails to account for other values underlying the clause.

II. THE PRESSING PROBLEMS OF CONSTITUTIONAL CRIMINAL PROCEDURE

A. Protecting the Innocent

Amar claims that the first principle of our Constitution is to protect the innocent, yet his entire project, with all its attendant criticisms of Supreme Court jurisprudence surrounding the Bill of Rights, fails to grapple with or even include any mention of how innocence is most frequently sacrificed under present doctrine. This failure may reflect his preference for discourse at a high level of abstraction: it causes him to miss most of the practical problems in criminal justice administration. Or he may simply be under the mistaken impression that our system of justice erroneously acquits the guilty but does not falsely convict the innocent.

Though the vast majority of those convicted of crimes in this country are factually guilty, a fair enough minority of those behind bars or already

executed may be factually innocent (of any crime at all or, more likely, of the more serious crime charged rather than some lesser offense) to say that our substantive criminal law and criminal procedural systems are failing (Givelber 1997).[72] The conviction of an innocent person is a failing in any sense of the word, but it seems to me a more serious moral failing when the false positives are not an inevitable byproduct of our criminal justice system but are instead mistakes that we choose, from sloth, apathy, or thrift, not to prevent or discover. The political expediency of being perceived as "tough on crime" is such that the legislature is unlikely to address much less resolve these problems (Estrich 1998). It seems to me that we have no choice but to turn to judicial interpretation of the federal Constitution.

While Amar mentions the innocent defendant unable, because of the self-incrimination clause, to force the true perpetrator to admit guilt, this is a solution looking for a problem. In fact, the problems of erroneous convictions are far more pressing in numerous other areas, yet no remedial action is suggested by Amar or forthcoming from the Court. For example, the Court has done little to prevent erroneous convictions due to eyewitness misidentifications. Although eyewitness testimony is one of the most compelling types of evidence to a jury,[73] it is quite frequently inaccurate (Loftus 1988).[74] Many of the factors we take as indicators of reliability, such as a witness being particularly certain regarding the identification, a witness undergoing a particularly stressful and/or violent encounter, and a witness having the opportunity to view the defendant on numerous occasions, in fact may well make her testimony less accurate.[75] It is well documented that

72. Givelber's insightful article provides a lengthy and shocking review of studies documenting erroneous convictions and executions of prisoners, as well as instances in which the courts have admitted the mistakes and released prisoners falsely convicted. See also Bedau and Radelet 1987 (documenting 17 cases in the 1970s and 1980s in which convicted capital murder defendants were subsequently shown to be probably innocent).

73. Research has shown that juries accord disproportionate weight to eyewitness identification. Because they substantially overestimate the ability of a witness to accurately identify a culprit from a lineup or show up, cross-examination of these witnesses offers marginal safeguards to the defendant (Cutler, Penrod, and Dexter 1990). Subjects of a study presented with a staged theft estimated that 70.6% of witnesses would be able to make accurate identification, while just 12.5% actually made a correct identification (Brigham and Brothwell 1983).

74. Legal scholars and social scientists have recognized this for some time. See, for example, Handberg 1995 (discussing scientific evidence about eyewitness identification and explaining that it is often inaccurate); Hoffheimer 1989 (listing many sociological and psychological studies documenting the problem of eyewitness misidentification); and Kubie 1959 (recognizing that human memory is "one of [our] most fallible instruments").

75. For example, identifications made by a witness to a violent event are less reliable than those made by a witness to a nonviolent event because the violence generates stress in the witness and inhibits her ability to focus her attention. See Clifford and Hollin 1981. Postcrime activities, such as viewing mug shots or answering leading questions by law enforcement, can dramatically affect a witness's memory. See Loftus 1979 ("Postevent information can not only enhance existing memories but also change a witness's memory and even cause nonexistent details to become incorporated into a previously acquired memory"). One study shows that a confident eyewitness is not necessarily an accurate one. See Wells, Ferguson, and Lindsay 1981, (noting that inaccurate eyewitnesses gain more confidence than accurate eye-

misidentification has resulted in many erroneous convictions.[76] For example, a study commissioned by the Department of Justice recently reported the plight of 28 defendants who were improperly convicted on the basis of inaccurate eyewitness testimony and later exonerated by DNA testing (Connors et al. 1996). Many of the individuals in that particular study were on death row when released. While many "lucky" suspects are positively excluded by DNA testing before trial but after indictment and positive eyewitness identifications,[77] we can only guess at the number of erroneously convicted individuals currently serving sentences because no DNA evidence is available.

Unfortunately, the Court's present test for excluding unreliable eyewitness identification does little to correct the problem. Though a defendant has a right to an attorney's presence at a post-indictment lineup, this attorney apparently has no right to object to a suggestive procedure or suggest improvements (*United States v. Wade* 1967, 228). Moreover, the defendant has no right to the assistance of counsel before formal proceedings begin (*Kirby v. Illinois 1971*), and no right to counsel during nonpersonal viewings such as photo arrays, regardless of the timing (*United States v. Ash 1973*). Many of the present identification procedures used by officers are highly unreliable. For example, when police offer only a single, handcuffed individual as the culprit at a "show up," the pressure to positively identify her is enormous.[78] Out-of-court identifications obtained through "suggestive and unnecessary" procedures are nonetheless admitted if they possess certain indicia of reliability,[79] despite the fact that these indicia have since been shown to be unreliable indicators of accuracy. Moreover, in-court identifications made on the heels of an out-of-court identification that not only may have been suggestive but actually violated either the Sixth Amendment right to counsel or the due process clause are regularly admitted under

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witnesses as a result of briefing by the prosecutor). A substantially higher percentage of cross-racial identifications are inaccurate. See Johnson 1984 (discussing the data on cross-racial identification and proposing new legal protections).

76. See, e.g., Huff, Rattner, and Sagarin 1996 (giving examples); Loftus 1986, 243 (estimating that half of all wrongful convictions result from misidentifications); and Bochard 1932 (a collection of 29 stories in which inaccurate eyewitness testimony led to wrongful convictions).

77. DNA testing done by the FBI for state and local labs from 1989 to 1996 positively exclude 25–27% of the defendants tested (*Criminal Practice Manual* [BNA], 7 May 1997, 11(10):184.

78. The Court allowed this practice in *Stovell v. Denno* (1972, 302). The same danger of unreliability inheres in in-court identifications, where the defendant can easily be identified through her placement in the courtroom (she is usually the one seated at defense counsel's table), or the fact that she is the only African American or tall blonde woman in the courtroom.

79. *Manson v. Braithwaite* (1977) (a court should consider [1] the opportunity of the witness to view the criminal during the crime; [2] the witness's degree of attention; [3] the accuracy of the witnesses prior description of the criminal; [4] the level of certainty demonstrated by the witness at the confrontation; and [5] the length of time between the crime and the confrontation).

an "independent source" exception.[80] This despite the fact that research has demonstrated that human memory is unable to compartmentalize in this fashion and recall solely the original incident while blocking out the subsequent viewings of the suspect (Brigham and Brothwell 1983).

The Court has chosen to ignore the recent advances in social science and psychological research: there have been no significant developments in constitutional law in this area since 1977. Calls for reform, including the introduction of eyewitness testimony experts, more stringent court supervision of lineups, show ups, and in-court testimony, and more elaborate and cautious jury instructions,[81] have gone unheeded.

Judges and legislators alike have ignored a second "innocence" problem—the well-documented phenomenon of innocent people pleading guilty to criminal offenses. Social scientists explain that this occurs for a number of reasons. Suspects who are especially vulnerable to pressure, such as mentally retarded individuals, can give "coerced-compliant" or "coerced-internalized" false confessions (Gudjonsson 1992).[82] Even a suspect without psychological abnormalities may falsely plead guilty due to improper pressure from a court-appointed defense attorney;[83] because she will be released (either on bail, probation, or sentenced to time served) in exchange for the plea;[84] because she fears that a previous criminal record will ensure a con-

80. *Coleman v. Alabama* (1970) (trial court would be justified in finding that in-court identification of defendant was based entirely on observation of assailant during crime rather than on unconstitutional lineup, despite evidence that witness had only a fleeting glimpse of assailant as he ran across highway, and that witness's description of assailant did not match defendant's description). Commentators have long noted that courtroom identifications based on the independent source exception are so frequently admitted that police have little incentive to grant a defendant's Sixth Amendment request (Levine and Tapp 1973).

81. A number of solutions have been proposed. See, for example, Rosenberg 1990–91 (suggesting heightened due process for pretrial identifications); Westling 1992 (advocating the use of expert witnesses); Hoffheimer 1989 (suggesting special jury instructions). England's response to the numerous miscarriages of justice resulting from erroneous eyewitness identification, as noted in the Devlin Report, was to mandate a detailed pretrial identification procedure to be followed by police (§ 66 Police and Criminal Evidence Act 1984).

82. Gudjonsson analyzes several cases in which defendants were convicted on the basis of confessions that were later proven to be false. Some confess to please the authority figure, and some suspects come to believe that they are guilty. See also White 1997 (discussing three examples of suspects who confessed after being subjected to standard interrogation techniques and whose confessions were later determined to be false); Cohen 1996 (discussing Johnny Lee Wilson, a retarded man, who was convicted of murder after falsely confessing to a crime that subsequent evidence proved he could not have committed).

83. Because of their high load of cases and the relatively poor compensation scheme, these lawyers have strong financial disincentive to take a case to trial. See, for example, *Miller v. Angliker* (1988) (defense attorney's failure to investigate obvious leads resulted in defendant's plea of not guilty by reason of insanity to three murders later determined to be committed by another man).

84. See, for example, *United Sates v. Berkholtz* (1994, 34) (defendants claimed they pled guilty to mail fraud because their attorney told them they would only be sentenced to probation and would receive back some valuable property seized by the government).

viction in her current case;[85] in order to protect members of her family;[86] to preserve her finances;[87] or simply because she is risk averse (McMunigal 1989).[88]

Calls for reforms, such as mandating that exculpatory evidence be revealed to defendants before acceptance of a plea, requiring independent verification of guilt beyond the defendant's colloquy, or abolishing plea-bargaining altogether, have been rebuffed by the Court (Schulhofer 1984). Instead, the Court treats all recitals of guilt in open court as "voluntary and intelligent" confessions, ignoring the reality of overwhelming pressure on defendants to plead guilty regardless of the truth.[89] This treatment probably stems from the hard cold fact that 90% of criminal convictions are by plea, and the system would grind to a halt if all these cases had to be tried.[90] The Court all but admitted that it has chosen efficiency over accuracy in *North Carolina v. Alford* (1970),[91] when it allowed a defendant to plead guilty despite his protestations of innocence.

Innocent people who do insist on trials may still be convicted if they lack information necessary to their defense. Unfortunately, Supreme Court doctrine does not encourage the government to disseminate exculpatory evidence to the defense camp. Though the Court has held that the due process clause of the Fourteenth Amendment mandates that material exculpatory evidence in a prosecutor's possession as to defendant's guilt or punishment be disclosed,[92] this rule has not done nearly as much to ensure accuracy as one might hope. As a practical matter, given the resource and information differential between the parties, a defendant will almost never know when exculpatory evidence is either purposefully or in good faith but

85. See, for example, *United States v. Flores* (1996, 965) (defendant pled guilty to a drug offense because she believed she would be convicted despite her claim of innocence).

86. See, for example, *United States v. Hess* (1994, 1213) (defendant claimed that he only pled guilty to obtain favorable treatment for his wife).

87. See, for example, *United States v. Roberts* (1991, 1536) (court allowed defendant to withdraw his guilty plea where he pled only because waiting for trial had ruined his marriage and was destroying his business).

88. For example, suspect Melissa Funte stated that she "came really close to accepting" a guilty plea of probation for shaking her three-month-old son to death, though the case was later dismissed because she was able to afford six defense experts to testify that there was no evidence of trauma (Hansen 1998, 74).

89. See, for example, *Brady v. United States* (1970, 747) (defendant's plea was "voluntary and intelligent" despite inducement of avoiding a death penalty scheme, which was later declared unconstitutional); *McMann v. Richardson* (1970) (guilty plea derived from physically coerced involuntary confession measured up to "voluntary and intelligent" standard).

90. The Court cited this statistic in *Brady v. United States* (1970, 752 n. 10). Most sources place the figure between 80 and 95%, on both the federal and state and local levels.

91. The Court in *North Carolina v. Alford* (1970) allowed the defendant to plead to the crime because the evidence supported guilt, despite defendant's testimony that "he had not committed the murder but was pleading guilty because he faced the threat of the death penalty if he did not do so" (1970, 28).

92. The Supreme Court first created this duty in *Brady v. Maryland* (1963).

erroneously withheld by a prosecutor.[93] This lack of information occurs in part because many police officers, whether from lack of knowledge or disagreement with the rule, fail to report exculpatory evidence to the prosecutor.[94] Further, current doctrine requires that the prosecutors determine what, if any, evidence is sufficiently material to trigger the rule.[95] Thus, even if a prosecutor learns of exculpatory evidence from her agent and intends in good faith to comply with the rule, she is not a sufficiently impartial party to make an unbiased materiality determination.[96]

In those few instances when defendants discover a violation by some fluke,[97] prosecutors are not disciplined for their actions and can retry that defendant, and thus they have no incentive to comply with the rule (Rosen 1987).[98] Constitutionally based reforms, such as requiring a prosecutorial open-file policy, allowing a neutral third party to review the files for exculpatory evidence, or strengthening the legal standard to include any evidence that tends to negate guilt,[99] have been rejected by federal courts (Capra 1984).

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93. Sheppard 1981 (arguing that unless the defendant learns by some stroke of luck that the prosecution had exculpatory evidence, a violation of the Brady rule will never come to light).

94. See, for example, Fisher 1993 (providing several graphic examples and concluding that "most police probably do not generally report exculpatory evidence").

95. Evidence is material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (*United States v. Bagley* [1985, 682]).

96. Many have noted this rather obvious point. See, for example, *United States v. Oxman* (1984, 1310) ("[W]e are left with the nagging concern that [because of the prosecutorial bias in determining favorability of evidence] material beneficial to the defense may never emerge from secret government files."); Beatty 1981 (suggesting that prosecutors are incapable of making objective determinations of favorability).

97. See, for example, Gershman 1992; *United States v. Oxman* (1984) (defense attorney found out after the trial from another attorney that a government witness had an undisclosed immunity agreement); *Chavis v. North Carolina* (1980, 221) (defense counsel discovered favorable treatment of star prosecution witness, supposedly imprisoned, when witness waved to defense counsel from the balcony of a beach motel); *United States v. Starusko* (1984, 265) ("Only if the defendant is the beneficiary of fortuitous happenstance by discovering the material through extrajudicial means . . . are his rights vindicated. The 'game' will go on, but justice will suffer"); *Jones v. City of Chicago* (1988) (trial court dismissed capital murder charges against defendant when an investigator told the defense team that he had prepared two reports that suggested another man committed the murder).

98. Rosen, after reviewing files from the disciplinary bodies of all 50 states and the District of Columbia, noted that, since *Brady v. Maryland* was decided in 1963, "only nine cases were uncovered in which discipline was even considered" for the suppression of Brady material (1987, 720). One exception is the case of seven law enforcement officials currently on trial for putting Rolando Cruz, an innocent man, on death row for 11 years. However, these prosecutors not only withheld the exculpatory evidence of the actual killer's confession, they fabricated evidence against the defendant (Cohen 1999).

99. The ABA Model Rules of Professional Conduct, Rule 3.8(d) (1996) adopted a "tends to negate guilt" standard. Scholars and practitioners alike have suggested that the federal system adopt the open-file policy currently employed in a few states. See, for example, Middlekauff 1994.

Both erroneous convictions after trials and false pleas of guilty frequently result from defendants' inability to adequately investigate the facts. This, in turn, is due to appointed counsel's lack of funds.[100] Though the Court has interpreted the Sixth Amendment to require free counsel to all indigent defendants actually incarcerated (*Scott v. Illinois* [1979]) and a free psychiatric expert to an indigent defendant claiming insanity as a defense in a capital case (*Ake v. Oklahoma* [1985]), this does not begin to combat the enormous disparity in resources between the prosecutor and the defense camps, especially on the state and local levels. Woefully underpaid and overworked defense attorneys are unable to fully investigate factual claims and defenses,[101] defendants feel pressed to accept plea agreements,[102] judges regularly refuse to authorize defense spending on experts and investigators,[103] and the legal standard for finding defense counsel to be constitutionally ineffective is laughably high.[104] Despite pleas from practicing attorneys in courtrooms and from scholars in law reviews, the Court has shown no inclination to mandate adequate funding as a matter of constitutional law (Stuntz 1997).

B. Fostering Other Values

I believe it unlikely that any of Amar's proposed reforms in the Fourth, Fifth, and Sixth Amendment areas would protect innocent people from conviction, or even that they would offer as much protection as might other potential reforms. However, as I have mentioned throughout this review essay, an equally important and perhaps more comprehensive critique of Amar's project is his assertion that a single value underlies criminal proce-

100. For example, Virginia, like most states, has a statutory "cap" on court-appointed criminal defense attorneys' fees—$575 for felonies with sentences of 20 years or more, $132 for misdemeanors (Crim. Prac. Rep. [BNA] No. 12, at 25 [28 January 98]). These low caps provide a strong disincentive to invest any appreciable amount of time on such a case. In another example, Anthony Porter was freed from death row after 16 years when a Northwestern University journalism class investigated his case and obtained a confession from the actual killer. Mr. Porter had been unable to afford an investigator to work on his case (Cohen 1999).

101. There is general agreement on this point. For example, one recent study found that in one jurisdiction, some public defenders represented over 400 felony defendants in eight months, and the average was over half that number (Klein and Spangenberg 1993).

102. Scholars and players in the system both report that public defenders are forced to press clients to plead guilty as a response to resource constraints. See, for example, McIntyre 1987; Schulhofer 1992.

103. Though the Court requires state spending on a medical expert when this is necessary for a fair trial, that constitutional standard permits judges and legislators to regularly refuse to authorize funds on the grounds that they are unnecessary, and/or that *Ake* does not extend to nonmedical experts or investigators.

104. The Court developed this test in *Strickland v. Washington* (1984). Except for cases involving conflicts of interest, defendants must show not only that their counsel's performance was objectively unreasonable, but that this deficiency prejudiced the outcome of the trial. Judges regularly find that counsel were constitutionally effective, even in cases where counsel were inebriated or asleep during the proceeding.

dural guarantees. Because of his refusal to acknowledge other values, his project misses the bigger picture and the bigger problem—reconciling multiple values. Concerns such as dignity, fairness, and equality are also part of the fabric of criminal procedure, but these values frequently conflict with the goal of ferreting out the guilty. A few illustrations follow of the critical social problems looming on the horizon that require us to attempt a balance between competing values.

The most pressing of these problems is race relations. Any person not visiting Mars these past few years could deduce from the Rodney King and O. J. Simpson verdicts that blacks and whites in this country view our criminal justice system through different colored lenses. It is no wonder, when one considers the real-life differences in treatment between whites and minorities. We live in a society where one in three young black men nationwide is presently under the supervision of the criminal justice system.[105] Further, we operate a criminal justice system in which the death penalty is imposed disproportionately upon black defendants who murder nonblack victims (Baldus and Woodworth 1998).[106] We battle the drug war by intentionally punishing possession and distribution of the form of cocaine preferred by poor black Americans 100 times more severely than possession and distribution of the form enjoyed by middle-class whites (Sklansky 1995).[107] Understandably, minority Americans have difficulty believing we would complacently tolerate any of these statistics if the races were reversed.

Though Amar mentions that he hopes juries will take account of race relations in imposing civil damage awards against law enforcement for violations of the Fourth Amendment (pp. 37–38), the empirical literature suggests that juries will, in fact, almost always side with the police against suspects and minority groups. Reconstruction-era as well as recent history teaches that we simply cannot rely on juries or legislators to protect minorities. We must turn to the judiciary. However, while the Court happily used

105. A 20- to 29 year-old African American male had a 30.2% chance of being under criminal justice control on any given day of 1994 (Mauer and Huling 1995). In Baltimore in 1991, the figure was 56% for African-American males between 18 and 35 (National Center on Institutions and Alternatives 1992). In California in 1986, 60.5% of black males between 18 and 30 had been arrested (Tillman 1987).

106. Their study reveals that blacks in Philadelphia are four times more likely to receive a death sentence than whites, that prosecutors deciding whether to pursue the death penalty are 98% white, and that 100% of inmates on death row in Kentucky murdered white victims, despite the fact that over 1,000 blacks were murdered in Kentucky since the death penalty was reinstated.

107. Sklansky noted that Congress in 1986 was well aware that their decision to punish crack cocaine with 100 times more severe sentences than for the equivalent amounts of powder cocaine would have a disproportionate impact on African Americans. Presently, nine out of ten federal prisoners serving mandatory sentences for trafficking in crack cocaine are black (Sklansky 1995, 1283, 1289–97). When the sentencing commission proposed amending the guidelines and statutes to equalize the treatment of crack and powdered cocaine (57 Crim. L. Rep. [BNA] 2095 [1995]), Congress for the first time passed legislation disapproving these guidelines (Pub. L. No. 104-38, 109 Stat. 334 [1995]).

the Bill of Rights as part of its antidiscrimination crusade in the 1960s, it appears unwilling to do so in the 1990s. For example, the Court recently had the golden opportunity to extend both equal protection and Fourth Amendment protections to relatively clear instances of racial discrimination by law enforcement, but stayed its hand.

In *Whren v. United States* (1996), an unmarked police car containing two plainclothes vice-squad officers stopped two young black men in a new truck for the sin of stopping at an intersection "for what seemed an unusually long time—more than 20 seconds." Overwhelming evidence exists that such stops are frequently racially motivated[108] and impose disproportionate hardships upon minorities,[109] and much of it was presented to the Court.[110] However, the Court rejected the defense argument that the Fourth Amendment ought to limit police discretion by prohibiting any detention that a reasonable police officer would not have made. Instead, the Court agreed with the government's position that an officer can stop a motorist if she has probable cause to believe that a traffic regulation is being violated. The rather obvious problem here is that total compliance with traffic and equipment regulations is nearly impossible. Thus, this standard permits officers to make pretextual stops based on impermissible factors such as race.

While the Court assured us in *Whren* that any selective enforcement against minorities will be checked by analysis under the equal protection clause, which does allow inquiry into the subjective motivation of individual officers, in actuality they had made such protection largely unavailable that very term. In *United States v. Armstrong* (1996), an African American defendant in Los Angeles sought discovery to support his selective prosecu-

108. See Davis 1997, 428–32 (discussing the prevalence of race-based harassment by police officers); Sklansky 1997, 317 (lamenting the fact that concerns with racially motivated searches have largely disappeared from Fourth Amendment jurisprudence); Harris 1994b, 679–81 (criticizing the reasonable suspicion standard because *Terry* stops are disproportionately used to detain blacks and hispanics); Johnson 1983, 225–30 (discussing many case examples in which the police based their "reasonable suspicion" solely on the detainee's race); Bast 1997; Fletcher 1996 (noting that, in 1993, several police officers in Reynoldsburg, Ohio, admitted that an informal group in the department called themselves the "Special Nigger Arrest Team" and targeted blacks for traffic stops and arrests). Most recently, a 1999 government report prepared for Governor Christie Whitman revealed that New Jersey state police engage in "racial profiling" resulting in discrimination against minority drivers. 65 BNA CRIMINAL LAW REPORTER 98 (4/28/99).

109. Nationwide statistics are unavailable because local police departments are under no federal requirement to keep or release information about the race of motorists they detain. Congressman John Conyers recently introduced the Traffic Stops Statistics Study Act, which would make it mandatory for states to record the race and gender of every motorist pulled over. Although the bill was approved by the House in March, it is currently stalled in the Senate Judiciary Committee. However, anecdotal examples and local statistics abound. See, for example, Fletcher 1996 (study done in 1995 showed that 71% of motorists stopped along Interstate 95 in New Jersey and Maryland were black); Brazil and Berry 1992 (videotapes of stops in Florida showed that 70% of motorists stopped were black or Hispanic even though blacks and Hispanics are only 5% of the drivers along that stretch of highway); Brand-Williams 1998.

110. *Whren* 1996, Brief for Petitioners, 21–29 (No. 95-5841).

tion motion for dismissal of a crack-cocaine indictment. His supporting evidence included a report that all 24 defendants prosecuted for crack cocaine in that federal district in 1991 were black. The Court denied discovery because the defendant had failed to show that the government refused to prosecute similarly situated whites. After all, the sentencing commission report that 90% of those sentenced for crack offenses are black demonstrates that not all races smoke crack. Of course, as Justice Stevens astutely pointed out, this same statistic may instead prove that the government selectively arrests and prosecutes blacks for crack-cocaine offenses; thus, only blacks are eventually sentenced.

The Court has made it largely impossible for a defendant to obtain discovery to support (much less win) an equal protection claim or win a Fourth Amendment one.[111] A defendant like Armstrong can never prove that similarly situated white college kids are experimenting with crack but are not being investigated or prosecuted. Likewise, a defendant like Whren can never prove that they complied with every conceivable traffic regulation, or that similarly situated white traffic miscreants are ignored by vice cops. Either such data are not kept at all, or are in the government's hands. The Court is slowly allowing the plethora of new laws and regulations to allow a return to pre-1950s police discretion.

A second significant issue in constitutional criminal procedure concerns what I perceive to be the ongoing collapse of the criminal/civil divide. Over the past few decades, the line between a civil and criminal action has become increasingly blurred. Administrative agencies impose sanctions for the violation of criminal statutes in civil fora, and federal convicts pay victims' restitution as part of their criminal sentence. In a series of cases in the early 1990s, the Court reacted by applying both the Fifth Amendment's double jeopardy clause and the Eighth Amendment's excessive fines clause to nominally civil actions that imposed what the Court considered to be punitive sanctions.[112] Thus, it appeared that the Court might either develop "middleground jurisprudence" (Mann 1992) for these actions, or put the government to a choice between a civil and criminal sanction for the same underlying conduct (Klein 1996).

Unfortunately, over the past two terms the Court instead has chosen to abandon this effort and bless whatever label a legislature places on a sanction. Neither permanent deprivation of an individual's livelihood, confiscation of an innocent owner's property, nor lifelong incarceration in a penal institute for the "mentally abnormal" is punitive because the legislature says

111. See also *McCleskey v. Kemp* (1987) (death penalty does not violate Equal Protection Clause despite disparate impact on blacks).

112. *United States v. Halper* (1989); *Austin v. United States* (1993); *United States v. Kurth Ranch* (1994).

that it is not.[113] The perhaps unanticipated consequence of the Court's decision to forgo any meaningful role in distinguishing remedial measures from punitive ones is that this will render the application of the Fourth, Fifth, and Sixth Amendments to any particular proceeding or investigation either uncertain or, more likely, unavailable. Should a "claimant" in a civil forfeiture proceeding or a "patient" in a civil commitment proceeding have no access to counsel or right to remain silent, then it seems to me we run the risk of punishing the innocent as well as undermining many of the other values inherent in our Bill of Rights (Klein 1999).

Finally, rather than devoting resources to the difficult task of preventing crimes and, failing that, solving those crimes that do occur, we as a society have taken the easier but much less constructive road of heaping multiple trials and draconian punishments on those guilty criminals we do manage to apprehend. For example, we catch very few of our drug traffickers, and despite the "war on drugs" have made nary a dent in the drug trade. However, when we do apprehend a dealer, we can and do prosecute him on the state and federal levels for drug distribution, on the federal level again for operating a continuing criminal enterprise or RICO, and on the state and federal levels again for forfeiture of all assets. The waste of resources from these successive trials (when one would certainly do) and lifetime incarceration (when a few years might be sufficient) is ignored. Arguments from scholars that the Fifth Amendment's double jeopardy clause (Klein and Chiarello 1998) and Eighth Amendment excessive punishment jurisprudence (King 1995) ought to bar some of these proceedings have been rejected by the Court.

CONCLUSION

Amar claims he comes to praise the Bill of Rights, not to gut it. Yet he would dismantle many of the barriers the Court has told us that the Constitution places between an individual's liberty and the awesome power of the state's law enforcement apparatus. We learn there is no need to place a neutral and detached magistrate between a suspect and a law enforcement officer before conducing a search or seizure. Further, Amar tells us that a defendant is not necessarily entitled to vigorous cross-examination of witnesses against her by a zealous advocate. We also discover that persons may

113. See, for example, *Hudson v. United States* (1997) (criminal charges not barred by double jeopardy where defendant suffered administrative monetary penalty and debarment based on same banking transaction); *Bennis v. Michigan* (1996) (confiscation of jointly owned automobile after husband used the vehicle as site for prostitution absent wife's knowledge and consent does not violate substantive due process); *Hendricks v. Kansas* (1997) (civil commitment of "sexual predator" into state prison hospital for the criminally insane after release from prison for same offense not barred by ex post facto or double jeopardy clauses).

constitutionally be compelled, on pain of incarceration, to answer questions from state officials regarding criminal activity.

Of course all of these "reforms" are facts in many societies—societies that are not built on the adversarial model of justice under which we presently live. In fact, on closer reflection, the adoption of Amar's total package of proposed reforms in the Fourth, Fifth, and Sixth Amendment areas would go a long way toward transforming our adversarial justice system into an inquisitorial one, and transforming our individual-rights-based culture into one that sublimates the individual citizen in order to empower the state. Perhaps the inquisitorial model of a criminal justice system is more in line with Amar's ideal, but I doubt that this is the society the Framers envisioned, nor is it my first principle or preference.

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