"We the People" and Our Enduring Values

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Let me give you a lesson in American history: James Madison never intended the Bill of Rights to protect riffraff like you.¹

Akhil Amar² chides legal scholars for believing that the current system of criminal procedure, both substantive and remedial, is constitutionally compelled. He writes, “Scholars should know better, but too few of those who write in criminal procedure do serious, sustained scholarship in constitutional law generally, or in fields like federal jurisdiction and remedies” (p. 115). Amar believes, as I do,³ that criminal procedure has been impoverished by its failure to connect to “larger themes of constitutional, remedial and jurisdictional theory” (p. 115). But as one who has done serious, sustained scholarship in all the areas Amar mentions — or so I like to think — I have grave concerns about Amar’s first principles and their remedial implications. As an admirer of his work in the field of federal jurisdiction, I have been deeply puzzled by his treatment of the Fourth, Fifth, and Sixth Amendments, which is fundamentally at odds with his attitude toward the substantive and remedial structure of the remainder of the Constitution.

My thesis is that Amar has been led astray by the very fact that these amendments are about criminal procedure. His attitude toward crime and criminals has led him to conclude that the first principles underlying the criminal procedure amendments are the protection of the innocent and the pursuit of truth. Indeed, he conflates even these two principles, so that the pursuit of truth becomes

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¹ J.B. Handelsman, NEW YORKER, Aug. 13, 1990, at 35 (caption in cartoon depicting judge talking to defendant).
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another way of saying that the innocent must be sorted from the guilty. Amar’s monolithic focus on protecting the innocent is wrongheaded as a matter of constitutional text, history, structure, and spirit. It has led him to make startling claims about the reach of the Fourth, Fifth, and Sixth Amendments and the remedies that ought to flow from their violation.4

It is important to examine Amar’s claims carefully for a number of reasons. First, Amar is absolutely correct about the need to discuss the values animating constitutional criminal procedure. Amar’s ambition is nothing less than to “fundamentally reorient the field” (p. ix). He is energetic and fearless in his determination to examine a concededly ingrown, contradictory, and polarized field from a fresh perspective. He seeks to take nothing for granted, and he does succeed in raising hard questions about some of the Warren Court’s conventional wisdom. It seems de rigeur to refer to Amar’s analysis as provocative,5 and surely he would not excite so much critical comment if he had not hit a nerve. Amar deserves appreciation for taking great intellectual risks. He is correct that it is time to take a long, careful look at the current state of criminal procedure and ask whether we are comfortable with the values and interests it embodies, whether it is a workable system, and where it fits in the greater constitutional scheme.

Second, it is important to respond to Amar’s substantive analysis because it rests on assumptions that are disturbingly ascendant in current criminal jurisprudence. Amar’s analysis must be critiqued for its misidentification of the values of innocence and truth seeking as animating the criminal procedure amendments, its focus on ultimate disposition and away from process, its unworkable remedial proposals, and its consistent undervaluing of the concern with the abuse of governmental power. Ironically, despite Amar’s sense of his scholarship in this area as revolutionary, the same values and assumptions he espouses have increasingly informed the Court’s criminal procedure jurisprudence. In my opinion, this ap-

4. For example, he advocates jettisoning the warrant and probable cause requirements in favor of a flexible reasonableness analysis that he argues would permit more direct recognition of the innocence-protecting, truth-seeking values he espouses — and then jettisoning the exclusionary rule for violations of this reasonableness standard. Pp. 31-45. He advocates admitting virtually all physical fruits of compelled testimony because of their reliability, and compelling criminal suspects to testify in pretrial hearings. P. 47. He comes perilously close to suggesting that the right to counsel is a right against erroneous conviction of the innocent, rather than a right belonging to all those accused of crime. Pp. 138-41.

proach signals a deeply unfortunate turning away from “enduring values that Americans can recognize as our values” (p. 155).

Finally, it is important to respond to Amar’s analysis because it is Amar’s analysis. He is a highly respected legal scholar with a well-deserved reputation for brilliant iconoclasm. His early works advocated a generous and attractive vision of full remediation for governmental wrongs, and indeed this theme recurs in his current work. Yet, despite his stated desire to integrate the criminal procedure amendments into the Constitution as a whole, his vision for these amendments is far less generous or attractive. More accurately, its superficial attractiveness lies in its appeal to simplicity and “common sense” — dangerous attributes when they jibe so neatly with the reflexive us/them attitude that too often pervades debate in this area. In practice, Amar’s proposals would weaken greatly the substantive and remedial structure undergirding the Fourth, Fifth, and Sixth Amendments. Amar has testified in Congress and elsewhere on these issues, advocating, among other things, an end to the exclusionary rule. Such testimony coming from one viewed as a liberal, civil libertarian law professor is extremely powerful — and extremely troubling. Thus, the disjunction between Amar’s views on protections for noncriminal litigants and his views about criminal defendants must be illuminated.

I. “WE THE PEOPLE” AND OUR ENDURING VALUES

Amar’s chapter on the future of constitutional criminal procedure contains a key paragraph about his interpretive vision for this field:

A Constitution proclaimed in the name of We the People should be rooted in enduring values that Americans can recognize as our values. Truth and the protection of innocence are such values. Virtually everything in the Fourth, Fifth and Sixth Amendments, properly read, promotes, or at least does not betray, these values. [p. 155]

This paragraph cries out for the punch line: “What do you mean, we?” I do not mean this comment glibly. Amar’s assumptions about what we value, and indeed about who we are, are deeply problematic. Amar claims, here and throughout the book, to be describing societal values that are both deeply rooted in history and at the core of contemporary concerns. To the extent he roots his claim for enduring values in the concerns of the Founders, his historical analysis is unpersuasive. It suffers from precisely the same flaw as does his analysis of the contemporary factors shaping the evolution of the criminal procedure amendments: it consistently underplays or even denigrates the concern for the abuse of govern-

mental power. This concern is our value in the sense that it animated the framers, and in the sense that it has endured. The exclusive focus on truth and innocence reads out the values of fairness, judicial integrity, equality, and, most of all, the political concern for the abuse of government power that — I will argue — are the enduring values we do and should recognize as our values.

When Amar fails to include the fear of abuse as one of our enduring values, it is important to understand how he defines the “We.” He consistently uses the phrase “We the People” to describe innocent people, as, for example, when he suggests that instead of excluding tainted evidence, damages ought to be assessed to comfort victims of violent crimes, which would “be more apt to make the people ‘secure in their persons, houses, papers, and effects’ than would freeing murderers and rapists.” There is “We the People,” and then there are the criminals.

There are a number of problems with a theory of criminal procedure that rests on separating the innocent from the guilty and ensuring that innocent people are protected and guilty people are not. Even assuming that truth and innocence are the values that belong at the pinnacle of the hierarchy, Amar makes several errors. He employs a simplistic, whodunit version of the concept of innocence. In addition, although he identifies the pursuit of truth as a primary value, he conflates the pursuit of truth with the protection of innocence. Finally, his chronology is problematic: he assumes that innocence can be determined prior to determining what protections are due.

A. When Truth and Innocence Are Overrated

[The thing is, you don’t have many suspects who are innocent of a crime.... If a person is innocent of a crime, then he is not a suspect.

—Remarks of Attorney General Edwin Meese

In exalting the value of innocence protection, Amar has signed on to one of the fastest growing, and most dangerous, trends in contemporary criminal jurisprudence: the trend toward separating the innocent from the guilty before determining what protections to afford. Taken to its logical extreme, it has the potential to gut constitutional protection for those accused of crime.

7. P. 29. In Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1180 (1991), Amar says that “the core rights of ‘the people’ were popular and populist rights — rights which the popular body of the jury was well suited to vindicate,” as opposed to countermajoritarian rights. As I will discuss later, this assessment bodes ill for the protection of unpopular groups such as those accused of crime, as well as racial minorities and the poor. See infra text accompanying notes 134-39.

Consider the Fourth Amendment. In a group of cases in the late 1970s and early 1980s dealing with the definition of a search and the requirements for standing — a group of cases that Amar calls “one sensible corner of current Fourth Amendment law” (p. 112) — the Court transformed the *Katz v. United States* reasonable expectation of privacy test into a legitimate expectation of privacy test. Whereas *Katz* itself had found a reasonable expectation of privacy in the contents of a phone call, despite the fact that the call concerned illegal gambling activities, *United States v. Jacobsen* and *United States v. Place* put a moral spin on the reasonableness standard. These cases held that a suspect had no legitimate expectation of privacy in illegal activity — that he could assert a Fourth Amendment claim only to the extent that the government intruded on his noncriminal activities. In *Rawlings v. Kentucky*, the Court held that a suspect had no legitimate possessory interest in contraband and thus could not complain about the seizure of that contraband, though he was ultimately convicted of its possession.

In short, the question of whether a defendant can claim Fourth Amendment protection now hinges on whether the defendant can show, at the outset, that his noncriminal activities were intruded upon. The focus is squarely on the nature of the interest asserted, rather than on whether society ought to tolerate the techniques police use to intrude upon these “illegitimate” interests.

14. See *United States v. Jacobsen*, 466 U.S. at 140-41 (Brennan, J., dissenting); *see also United States v. Payner*, 447 U.S. 727 (1980) (refusing, for lack of standing, to review a government sting operation that included hiring a female private detective to entertain a Bahamian bank official so that IRS agents could steal his briefcase, photocopy over 400 documents, and use the contents against the suspect). The Court’s refusal to suppress the evidence in *Payner* came despite the fact that the sting was organized precisely to take advantage of the fact that neither man would have standing to challenge the misconduct. See 447 U.S. at 742-43 (Marshall, J., dissenting); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather Than an “Empirical Proposition?”* 16 CREIGHTON L. REV. 565, 636-38 (1983) (condemning the *Payner* decision on these grounds); *see also Whren v. United States*, 116 S. Ct. 1769 (1996) (refusing to adopt a rule against pretextual searches); *Olive v. United States*, 466 U.S. 170 (1984) (permitting unregulated searches of open fields on suspect’s property by focusing on the suspect’s reasonable expectations, rather than the need to control police intrusions); *United States v. Morrison*, 449 U.S. 361 (1981) (holding that, absent prejudice, dismissal of indictment was inappropriate though investigator’s meeting with defendant outside counsel’s presence and suggestion that defendant retain different counsel was a deliberate violation of the Sixth Amendment); *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991) (holding that conduct of law enforcement officers in eavesdropping on conversations between defendant and his counsel was not reversible error absent prejudice).
Amar approves of this line of cases because it advances the value he identifies as most important: protecting the innocent. He would call these police actions searches and seizures, but would find them reasonable because he believes reasonableness incorporates the "common sense" intuition that the Fourth Amendment protects law abiding citizens and victims, not criminals. He says:

And the reason these searches were reasonable is that, although they could ruin a drug runner's day, they posed little threat to the privacy interests of law abiding folk. Lawbreakers as such have no legitimate interest in privacy, and are at times entitled to less peace of mind than are the law-abiding. [pp. 112-13]

Whether the introduction of the evidence is achieved through narrow definitions of search, expansive definitions of reasonableness, or eviscerating the exclusionary rule, each of these paths leads to the same troublesome destination: a belief that it is possible and desirable to identify the guilty prior to trial — and indeed prior to the suppression ruling — and to deny them the right to complain about governmental misconduct. This belief is based on a credulous acceptance of the possibility of intruding only upon the "illegitimate" interests of guilty suspects and a recasting of the criminal procedure amendments as personal rights of the good guys. The case law exhibits a utopian — or dystopian — faith in the possibility that technology can find ways to discern only illegal activities, without intruding upon legitimate privacy expectations — a faith apparently unshaken by technology's failure to rise to the challenge, or by the danger of post-hoc justification. Indeed, as Justice Brennan

15. To be precise, he does not approve of classifying the police actions as "nonsearches" and "nonseizures." He calls current definitions of search and seizure narrow and "unjustified" (p. 19) and argues in favor of expanding them in order to bring more conduct within the Fourth Amendment. He would, however, uphold the searches and seizures as reasonable. In addition, he would not exclude the fruits of such searches, even if the searches were found unreasonable, because "contraband or stolen goods . . . were never one's property to begin with. . . ." P. 22.


17. The dog sniff cases provide an illustration of the fallibility of methods designed to expose only illegal interests. In United States v. Lyons, 957 F.2d 615 (8th Cir. 1992), the court confronted the case of a drug-detecting dog who became agitated and tore the package in two, spewing the contents on the floor and ingesting cocaine. The court determined that the dog's conduct could be likened to a "natural occurrence" and could not be attributed to the police — thus, no search had occurred. There have also been numerous cases in which such dogs have badly bitten their quarry, and one in which a dog killed a burglary suspect. See David G. Savage, When Bites Are Worse Than Barks, A.B.A. J., Sept. 1996, at 38; Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988). Even if the "sniff" goes as planned, moreover, it cannot be separated neatly from the intrusions that accompany it. See United States v. Place, 462 U.S. 696, 710 (1983) (holding that seizure of luggage during 90-minute wait for dog to arrive was unreasonable); Doe v. Renfrow, 451 U.S. 1022 (1981) (Brennan, J., dissenting from denial of cert.) (arguing that dog sniff of high school students is an unconstitutional search). See also Kamisar, supra note 5, at 960-64 (advocating that intrusion must be evaluated in light of entire chain of events).
pointed out, the focus on the illegitimate product of the search threatens the fundamental principle that "[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light."18

On a similar note, in his discussions of Gideon v. Wainwright19 and the right to counsel in both the Fifth and Sixth Amendment contexts, Amar makes plain his belief that the only true purpose of supplying counsel is to ensure that the innocent are not wrongly convicted. In the Fifth Amendment self-incrimination context, his concern is with the possibility of an unreliable confession — one elicited from a defendant who is actually innocent. He believes that out-of-court protections should be keyed to minimizing this danger. Thus, he advocates a supervised, civilized "deposition approach" to interrogation, coupled with compulsion for suspects to talk truthfully (pp. 76-77).

Though Amar's proposals in the Fifth and Sixth Amendment contexts diverge significantly from current law, the seeds are there. The ever-expanding notion of harmless error reflects the belief that so long as the trial verdict correctly separates the innocent from the guilty, constitutional error during the trial need not be addressed.20 Recently, in Arizona v. Fulminante,21 the Court even extended harmless error analysis to the admission at trial of coerced confessions. Strickland v. Washington22 held that ineffective assistance of counsel is not reversible error unless it likely affected the outcome of the trial. Innocence appears to be on an inexorable rise to the top of the values hierarchy — except, ironically, when to recognize innocence would expand, rather than contract, the rights of defendants.23

18. Jacobsen, 466 U.S. at 140 (Brennan, J., dissenting) (quoting Byars v. United States, 273 U.S. 28, 29 (1927)); see also United States v. Di Re, 332 U.S. 581, 595 (1948) (holding that a post-hoc justification for a search is impermissible). Amar notes with at least a hint of approval that at common law, ex post facto success was a complete defense to an unlawful search or seizure. P. 7.


23. See, e.g., Herrera v. Collins, 506 U.S. 390 (1993) (holding that absent exceptional circumstances a claim of actual innocence is not by itself sufficient reason for a federal court to entertain a habeas petition, because it does not rise to the level of a constitutional claim); see
In this section, I will discuss two major objections to identifying innocence as one of our core values. First, Amar’s conception of innocence is simplistic and unworkable, and his belief in the possibility of sorting the innocent from the guilty before determining what process is due is both unrealistic and ill-advised. Second, there are serious normative problems with claiming innocence-protection as a core constitutional value — either historically or currently.

The first step in illustrating the dangers of enshrining innocence is to examine Amar’s use of the term. Amar treats innocence essentially as the question of “did he do it or not?” The innocent in his world are those who did not commit murders, rapes, armed robberies, and other violent crimes: those who are or could be threatened by the murderers and rapists.24

There are several problems with basing an overarching theory of criminal procedure on such notions of innocence. First, notice that Amar’s paradigmatic guilty person is a murderer or other violent felon. Indeed, the murderer’s bloody knife appears again and again in the pages of this book.25 Yet empirical data indicates that the exclusionary rule that is the target of many of Amar’s policy arguments has almost no negative impact on the prosecution of these violent crimes. To the minimal extent that evidence is suppressed, suppression occurs most often in drug cases.26

Second, as the reach of criminal law expands, it becomes more and more difficult to isolate Amar’s paradigmatic innocent person. In 1954, Professor Louis Shwartz observed, “The paradoxical fact is that arrest, conviction, and punishment of every criminal would be a catastrophe. Hardly one of us would escape, for we have all at


24. The book is replete with comments like: “even a good lawyer cannot always save an innocent but unpersuasive-sounding client from being demolished on the stand,” p. 85; “even an innocent person may say seemingly inculpatory things under pressure and suspicion and when flustered by trained inquisitors,” p. 71; “indictments can at times be laced with technical legal language that an accused person — especially, perhaps, if wholly innocent (say, in a case of mistaken identity) — may not understand,” p. 139; and “to throw out highly reliable evidence that can indeed help us separate the innocent from the guilty — and to throw it out by pointing to the Constitution, no less — is constitutional madness,” p. 155.


26. See Thomas Y. Davies, A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests, 1983 AM. B. FOUND. RES. J. 611, 614-15, 637-38; Yale Kamisar, “Comparative Reprehensibility” and the Fourth Amendment Exclusionary Rule, 86 Mich. L. Rev. 1, 26 n.120, 27-28 (1987); Maclin, supra note 5, at 44; see also The Jury and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial: Hearing on S. 3 Before the Senate Comm. on the Judiciary, 104th Cong. 143 (1995) [hereinafter Hearing] (statement of Prof. Thomas Y. Davies) (positing that if similar statistics were available and analyzed today, they would reflect an even lower number of lost arrests, due to the more flexible probable cause standard and the good faith exception).
one time or another committed acts that the law regards as serious offenses." The difficulties in remaining "innocent" have multiplied in the past several decades. The Court permits various intrusions, including custodial arrest, for a host of minor traffic infractions, such as driving with a burned-out tail light or license plate light, failing to signal a turn, driving seven miles over the speed limit, or having a loud muffler. Cars may be pulled over at sobriety checkpoints. Even pedestrians are not exempt from the long arm of the law. The growing administrative state offers numerous opportunities to violate regulatory statutes. Homes may be searched for faulty wiring, students may be searched for cigarettes, and back yards may be surveilled for marijuana plants. Can any one of us confidently claim long-term innocence in the face of so many opportunities to become a lawbreaker?

Finally, even if we confine the conversation to the paradigmatic violent felon, the hurdles are insuperable. For one, Amar's view ignores the degrees of culpability and the degrees of punishment that must be assessed in, for example, a homicide investigation. Michael Seidman said it well:

Since ultimate truths, even of the factual variety, are notoriously elusive, separating the innocent sheep from the guilty goats can be a difficult task. Moreover, much of the system's time and effort is often diverted from this task to the infinitely more subtle and intractable job of differentiating between types of goats. Even if the defendant is guilty, the questions remain how guilty he is and what we should do with him.

28. See Carol M. Bast, Driving While Black: Stopping Motorists on a Subterfuge, 33 CRIM. L. BULL 457, 482-86 app. A (1997). See also David Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 SUP. CT. REV. 271, 298-99 (observing that because almost everyone violates traffic rules sometimes, this means that the police, if they are patient, can eventually pull over anyone they are interested in questioning).
30. See Norimitsu Onishi, Giuliani Crows as Theft Suspect is Caught on Jay Walking Charge, N.Y. TIMES, Feb. 21, 1998, at B1 (jaywalker unable to produce identification was brought to station, found to be a robbery suspect, placed in a lineup, and booked).
35. Moreover, even those who have broken no law at all are at risk of being subjected, albeit mistakenly, to overbearing police tactics. See, e.g., Bob Herbert, Reprise of Terror, N.Y. TIMES, Mar. 12, 1998, at A25 (recounting two completely mistaken police intrusions on the same day in each of which the police conduct was shocking and egregious).
A defendant who unquestionably has committed a homicide may be exonerated for acting in self-defense or convicted of voluntary or involuntary manslaughter. What, for example, would Amar do with a case like Spano v. New York? Spano, a 25-year-old, unsophisticated, emotionally unstable immigrant with a poor command of English, was indicted for capital murder. Spano did not involve strong-arm tactics that led to a false confession. The defendant really did kill the deceased, and eyewitness testimony was available to corroborate his confession. Instead, the case involved unconscionable police tactics which overbore the defendant's will, including lying and betrayal by a police officer who he thought was his close friend, repeated denials of his requests to see his attorney, and nearly twelve hours of incessant nighttime questioning. Spano showed the value of a confession to law enforcement — it enabled prosecutors to add to their homicide case Spano's statements that the deceased was always "on his back," "always pushing" him, and that he was "not sorry" he had shot him. What might have been voluntary manslaughter or even self-defense could now be prosecuted successfully as first-degree murder. Is there room in Amar's world view for gradations of factual innocence, or does the fact that Spano really did shoot and kill a man irrevocably categorize him as guilty?

Amar's attitude toward factual innocence reminds me of a question that countless laypeople asked me when I was an appellate defender: how could I defend people I knew were guilty? An example I often used to illustrate the difficulty of "knowing" whether my clients were guilty, despite the fact that they had all been convicted of felonies, was my defense of Rosa Bennett. Ms. Bennett was a battered woman who unquestionably had shot and killed her husband. Ms. Bennett testified that her husband had come home drunk and had physically and verbally abused her over a period of several hours. In doing so, he tore and bloodied her sweatshirt. In fear for her life, she shot him. The state claimed that, contrary to Bennett's assertion, it did not have in its possession her torn and bloodied sweatshirt that would have corroborated her claim that her husband had attacked her. Indeed, the state's case rested on the lack of any physical evidence supporting Bennett's claim that she had acted in self-defense. Fortunately, an inventory slip revealed that the state indeed had taken the sweatshirt from the crime scene. The Illinois Appellate Court reversed her conviction. Even so, Bennett was not ultimately found "factually innocent." She was convicted of voluntary manslaughter rather than murder and was released from prison immediately rather than

serving several additional years. Does she fall into the group of law-abiding innocents whom Amar finds worthy of protection, or is she one of the lawbreakers who receive such benefits as right to counsel and right to discovery only as an unavoidable byproduct of their provision to the law-abiding?

The descriptive problems with identifying the innocent are accompanied by another obstacle: the chronology problem. At what point should it be determined who are the innocent who are worthy of constitutional protection, and who are the guilty who are unworthy? It is often impossible, as it was with Rosa Bennett or Joseph Spano, to separate the effects of evidentiary rulings from the ultimate degree of guilt or innocence. The difficulty of making this determination at the outset was one salient lesson of the evolution from *Betts v. Brady* to *Gideon v. Wainwright*, an evolution of which Amar speaks with approval (p. 140). Because Clarence Earl Gideon had a retrial, with counsel, in which witnesses were adequately cross-examined and the jury was introduced to the state's burden of proving guilt beyond a reasonable doubt, it was possible to determine that he had been wrongly convicted in his first trial. How will we ever know whether Betts was wrongly convicted?

The concept of guilt or innocence gives no guidance in determining his need for counsel. Amar and the current Supreme Court would agree that a *Gideon* violation cannot be harmless error, but they both miss the larger lesson — that the concept of innocence provides no coherent measure of what procedures ought to be followed pretrial or at trial.

Amar claims innocence as a core value of the framers as well as of contemporary society. Yet Amar's conception of innocence is especially ironic and troubling because it is so relentlessly apolitical and ahistorical. The colonists whose victimization led to the Revolution were, for the most part, guilty as charged. They did smuggle molasses for the manufacture of rum as well as other contraband, and they did violate the sedition laws. Their factual innocence was hardly the source for the outrage of the colonists.

42. In an article in the 1962 University of Chicago Law Review, Professor Kamisar took a fascinating and extensive look at the record of the Betts trial. He found the record to be rife with error — suggestive lineup, failure to exclude witnesses from the courtroom while other witnesses testified, possible fabrication of evidence, ambiguous identification, failure to summon key subpoenaed witnesses, and more. In addition to error, the record reflects innumerable lost opportunities to make a stronger defense — failures to call certain witnesses, failures to cross-examine, Betts's own decision not to take the stand, failures to object to evidence, and Betts's questionable decision to use an alibi defense, among others. See Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. Chi. L. Rev. 1, 42-56 (1962).
The outrage stemmed from official repression and abuse — in the way the crimes were defined, in the way investigations were conducted, and in the way convictions were obtained. Perhaps Amar would like to argue that those were political dissidents, not real criminals like our current rapists and murderers, and that therefore they were entitled to protections to which current real criminals are not entitled. But he makes no case for the claim that the concern for official lawlessness animating the Founders differs in kind from the concern for official lawlessness that continues to affect our society today.43

What degree of liberty would our citizens — including our less powerful citizens — experience under Amar's proposals? The dangers of Amar's focus on innocence are well illustrated by the widespread problem of racially and sexually discriminatory law enforcement. Amar makes a powerful claim for his proposals — that they will better enable questions of racial and sexual discrimination to be taken seriously (p. 150). But if this is the goal, his analysis will have — to use his phrase — an "upside-down effect" (p. 28). As I will discuss in detail below, the Court currently uses innocence as a way of avoiding questions of racial pretext, discriminatory enforcement, bad faith, sexual harassment, and other forms of official abuse. The focus on innocence is a very poor means of achieving equality of treatment; instead, it works to inhibit it.44

One final significant problem with the focus on innocence is that it ignores the concept of reasonable doubt. Amar treats the notion of innocence as if it were objectively ascertainable, rather than an often difficult task of sorting out conflicting and ambiguous evidence. Indeed, if factual innocence were as readily ascertainable as Amar suggests, it might raise questions about the need to give the state a handicap. Amar makes statements such as: "[W]e must remember that integrity and fairness are also threatened by excluding evidence that will help the justice system to reach a true verdict" (p.

43. Consider the words of Professor Louis Schwartz:
Make no mistake about it. These are not rules for the protection of the innocent alone. They are rules which operate and were intended to operate before anyone could decide whether the suspect was innocent or guilty . . . . Their particular usefulness to the "guilty" is no accident, for many of these rules were written into the Constitution by real "criminals," fresh from experience as smugglers, tax evaders, seditionists and traitors to the regime of George III. Theirs was no mawkish sentimentality for miscreants. They understood, as we must understand, that the law enforcement net cannot be tightened for the guilty without enmeshing the innocent; that decent law enforcement is possible without impairing the bulwarks against injustice and tyranny; and that the worth of a society will eventually be reckoned not in proportion to the number of criminals it crucifies, burns, hangs or imprisons, but rather by the degree of liberty experienced by the great body of its citizenry. There have never been more determined law enforcers than Nazi Germany or the Soviet [Union].
Schwartz, supra note 27, at 158.

44. Amar suggests that the reasonableness focus will permit courts to focus on equality of treatment. Here, too, his logic is upside-down. See infra text accompanying notes 83-104.
What Amar fails to acknowledge is that, given the difficulties and ambiguities of weighing the evidence, and the impossibility of omniscience, a tiebreaker is needed. Further, he simply seems to reject the notion that the tie should go to the defendant — that it is better to let several guilty men go free than to convict one who is innocent.

Amar pays tentative lip service to the state’s burden, but he appears uncomfortable with it. Amar does not seem to accept that the state’s burden reflects and flows from the recognition that the Bill of Rights exists to help correct a severe power imbalance between the defendant and the awesome power and massed resources of the state. This power imbalance, which Amar recognizes and decries in every other area of scholarship, is invisible in his work on criminal procedure. The world he describes here is one in which the state and the defendant are on an equal footing in the contest to establish the truth. Indeed, any burdens and presumptions that do exist should work in favor of the prosecution:

Given the almost metaphysical difficulties in knowing whether the bloody knife or some evidentiary substitute would have come to light anyway, should not the law strongly presume that somehow, some way, sometime, the truth would come out? Criminals get careless or cocky; conspirators rat; neighbors come forward; cops get lucky; the truth outs; and justice reigns — or so our courts should presume, and any party seeking to suppress truth and thwart justice should bear a heavy burden of proof. [pp. 26-27]

This quotation brings us face to face with, not just Amar’s conception of innocence, but his conceptions of truth and justice. Let us turn to an examination of truth, and its interactions with innocence and justice, in Amar’s hierarchy of values.

Amar says that the pursuit of truth and the protection of innocence are the first principles animating the Fourth, Fifth, and Sixth Amendments. But when he talks about the pursuit of truth, it becomes clear that it, too, is merely a subsidiary of the primary value — protecting the innocent. For example, he refers to “the basic trial value of truth seeking — sorting the innocent from the guilty” (p. 3). He criticizes “modern doctrines that — in the name of the Constitution, no less — exclude evidence the public knows to be true” (p. 119). He goes on to say that “the gap between public truth and truth allowed in the courtroom can demoralize the public,

45. See, e.g., p. 142 (“Counsel’s line here is a fine one — between asking questions that imply factual innocence and asking questions that merely imply reasonable doubt — but, in principle, a workable one.”).
47. See infra notes 105 and 106 and accompanying text.
48. See Bandes, supra note 3, at 1022-31.
whose faith in the judicial system is a key goal of the public trial ideal” (p. 119); and again: “Truth and accuracy are vital values. A procedural system that cannot sort the innocent from the guilty will confound any set of substantive laws, however just. And so to throw out highly reliable evidence that can indeed help us separate the innocent from the guilty . . . is constitutional madness” (p. 155).

Thus, truth, accuracy, and reliability seem to possess no identity independent of their service to the ideal of protecting the innocent. Truth becomes another way of asking whether the suspect really did what he is accused of doing. Each trial is an individual exercise in assuring that the correct person is put behind bars — nothing more.49 Amar’s equation of this exercise with the public interest is especially interesting, because it suggests that societal values are affirmed by a just conviction. This comment in itself would not be startling, but there is no counterbalancing recognition that the public interest is served by any values that do not promote sorting the innocent from the guilty.

Let’s examine these values in the context of the jury trial. If the sole duty of the trier of fact were to establish factual innocence, then the jury would not be the best body to perform this duty. The jury symbolizes societal willingness to risk nonconviction for the sake of other values. One such value is the community’s ability to mete out justice or exercise mercy on a local level. If the trier of fact were expected merely to weigh the proof and apply the law, a judge would be able to perform this duty at least as well as a jury. Amar recognizes this. He talks at length of the colonists’ distrust of magistrates, for example, and their preference for juries, who, presumably, would nullify the oppressive laws of the Crown.50 He says the proper response to crime is not merely good factfinding but moral judgment by the community via the jury (p. 124). The question then becomes, if a jury trial is important for reasons other than determining factual innocence, what are those reasons?

Perhaps Amar addresses this issue by his use of the phrase “normative innocence,” which he defines as “I did it, but I did not thereby offend the public’s moral code,” in contrast to “factual innocence,” which he defines as “I didn’t do it” (p. 90). But it is difficult to tell what “normative innocence” encompasses. If the phrase encompasses values that provide a counterweight to factual inno-

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49. In the criminal context, Amar seems oddly derisive of the idea that the trial serves a public norm-creation function. See, for example, his discussion of the “Leavenworth lottery,” pp. 137-58, discussed infra at text accompanying notes 178-180.

50. Pp. 11-12. He also argues that the jury is less corruptible than the judge, and that fear of judicial corruption was a major reason for the colonial preference for jury trials. P. 121. Tracey Maclin argues that Amar’s history is incomplete and selective and that the vast majority of colonial judges refused to issue writs in the face of demands by the Crown, though it meant risking their livelihood. See Maclin, supra note 5, at 21-25.
cence, such as all the moral, political, visceral, and other community values a jury might bring to bear, does this also lead to a concept of normative truth — a truth which is moral and political, as well as factual? If so, how does Amar square this with his evident faith that guilt and innocence are objectively ascertainable? Moreover, if finding the truth becomes a moral rather than a factual search, which might lead to acquitting a factually guilty person because of government oppression, then why should this idea of truth not encompass other nonaccuracy values, such as the need to exclude oppressively gained evidence to preserve judicial integrity?

Amar talks frequently about evidence the public knows to be true or that will help the justice system reach a true verdict. He does not come to terms with some essential truths about the trial-related rights — that they set up hurdles for the government in order to attempt to counterbalance the threat of overzealous government prosecution, that they create a risk of nonconviction for the sake of process rights,51 that these process rights must inhere across the board in order to ensure both justice and the appearance of justice, and that norms are created that transcend the particulars of individual cases. Truth is just one of the values encompassed by justice. As for truth itself, we should remain wary of those who claim special access to it.

B. The Values Animating Our "Profoundly Anti-government"52 Constitution

Amar’s scholarship on the criminal procedure amendments was published as a series of articles before becoming a book. The article on the Fourth Amendment in particular,53 and the Fifth Amendment article to a lesser extent,54 have elicited substantial critical commentary.55 Articles by Donald Dripps, Yale Kamisar, Tracey Maclin, and Carol Steiker take varied approaches to assessing

51. See, e.g., Conner v. The Commonwealth of Pennsylvania, 3 Binn. 38 (Pa. 1810) (“The suggestion that the party might escape is not of the least importance; it might be made in any case, and thus turned into an instrument of the grossest oppression. The Constitution prefers the escape of ten culprits, to the adoption of a practice which might lead to the imprisonment of one innocent man.” Therefore, the warrant must be based on probable cause and oath or affirmation.).


55. See supra note 5 (listing articles). Amar’s article on the Sixth Amendment, Akhil Reed Amar, Foreword: Sixth Amendment First Principles, 84 GEO. L.J. 641 (1996), was published shortly before this book’s publication. I therefore suspect the reactions to the Sixth Amendment work will come in the form of book reviews rather than responses to the article.
Amar's work. Each is must reading for those who wish to evaluate Amar's approach to criminal procedure — including his historical analysis, his assessment of the development and state of current doctrine, his political and policy choices, his jurisprudence, and his methodology. Despite their differing approaches, the articles sound one common theme: that a great, and perhaps fatal, weakness in Amar's analysis is its failure to confront the fact that the criminal procedure amendments are meant to control governmental abuse and overreaching.

As I have indicated, I share this view. In his focus on innocence, Amar reads a host of precious values out of the Constitution. Many of these values serve to address the inequality of power between the government and the individual and the need to curtail abuse of that power. Amar is well aware of the governmental oppression that shaped the Constitution. In noncriminal contexts, as I will discuss below, governmental accountability is one of Amar's highest values. But in the criminal context, he finds it too easily trumped by another value: getting the bad guys.

Amar rests his conclusion that law enforcement interests trump concerns for governmental abuse on the following reasoning. First, he assumes that the interests of the prosecution and the defendant are on par, an assumption that fails to confront the difference between the rights of the defendant, which are constitutionally enshrined, and the interests of the prosecution, which are not. Second, he unfairly weights the interest in prosecution by assuming that it is congruent with the interests of society, or "the people." In doing so, Amar makes some peculiar assumptions about who "the people" are and how the people's trust and confidence should be earned. He assumes that "the people" is an entity completely separate from those accused of crime. Indeed, he seems to assume that "the people" gain when all the evidence comes out and when the guilty are put behind bars. He says, for example: "[w]hen the murderer's bloody knife is introduced, it is not only the government that profits; the people also profit when those who truly do commit crimes . . . are . . . convicted" (p. 26). But the presumption of innocence, evidentiary protections, the concern for judicial integrity, and the control of governmental misconduct are all societal interests. Except for those as sure as Amar that they can identify the bad guys and that the bad guys are not us, these protections them-

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56. See, e.g., p. 25 ("[W]e must remember that integrity and fairness are also threatened by excluding evidence that will help the justice system to reach a true verdict.").

57. He adds the "rights" of victims to this side of the equation as well. See, e.g., p. 26 ("When rapists, burglars, and murderers are convicted, are not the people often more 'secure in their persons, houses, papers and effects?'").
selves increase societal trust and confidence in the fair and even-handed administration of the criminal justice system.58

Amar’s focus on innocence and what he calls truth-seeking impedes recognition of many of these values. Evidentiary rules exclude substantial amounts of evidence that are “true” and “accurate” in some sense of the words, but which are inflammatory, prejudicial, irrelevant, or redundant.59 Exclusion often serves values other than truth and accuracy. This is particularly true of Fourth Amendment exclusionary rules, which, as Seidman says, pose the pure case for the efficacy of truth-denying rules.60 But it is also true of the dignitary concerns underlying the right against self-incrimination61 and the assurance of fair trials for all defendants contained in the Sixth Amendment.62 Respect for the autonomy and dignity of the accused, the assurance of fair and evenhanded processes, concern for the integrity and accountability of the institutions that administer criminal procedures — these are all truth-disabling values at times. They impede, and are intended to impede, the government from doing all it can to put the guilty behind bars, at least when the government attempts to do so in derogation of other values.

Amar would not be particularly disturbed by my objection. Indeed, his whole point is that the values that impede truth-seeking are the wrong values, precisely because they impede truth-seeking. Unfortunately, even apart from the questionable and controversial historical and doctrinal support he garners for his argument and even apart from his failure to account for the vast changes in society in general and police practices in particular since the time of the framers, and even apart from the violence his proposals would do to dignity, autonomy, and evenhanded process, Amar’s proposals should also be faulted because they will not achieve much of what he himself wants to achieve. Let us assess his proposals in light of

58. As I have observed elsewhere, the legitimacy of the jury system, historically, depended in large part on the good opinion of those whose cases it adjudicated. If the jury system maintained the appearance of justice in the eyes of the accused, it was more likely that the community would accept its decisions as just. See Bandes, supra note 3, at 1046; see also Barbara Allen Babcock, Voir Dire: Preserving “Its Wonderful Power,” 27 STAN. L. REV. 545, 552 (1975).

59. See U.S. v. Quasar, 671 F.2d 732 (2d Cir. 1982) (unfair prejudice may be present when inflammatory or otherwise shocking physical evidence or photographs are offered); see also U.S. v. Bowers, 660 F.2d 527 (5th Cir. 1981).

60. See Seidman, supra note 36, at 449.

61. See Murphy v. Waterfront Comm., 378 U.S. 52, 55 (1964) (stating that privilege reflects many of our fundamental values and noble aspirations, including our desire to protect against statements elicited by inhumane treatment, our sense of fair play and our respect for the inviolability of the human personality and each individual’s right to lead a private life).

62. See Duncan v. Louisiana, 391 U.S. 145, 158 (1968) (stating that the right to a jury trial is essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants).
the dignity and judicial integrity values to which he assigns a low priority, as well as in light of the equality value he holds dear.

1. Dignity

Amar's proposals denigrate dignity in both expected and unexpected ways. Predictably, they are based on a lack of concern for the dignity of the "guilty." But in addition, they would promote widespread assaults on the dignity of society at large.

Assuming for the moment that the innocent can be sorted neatly from the guilty, one deeply troubling aspect of Amar's elevation of innocence is its corollary: that the guilty are not entitled to protection. In my view, every human being is entitled to some dignity.63 Even someone who has murdered in cold blood is entitled to a lawyer at his trial to ensure fair process, a warrant before his home is searched to ensure reason for the intrusion, warnings before he decides whether to confess to ensure free will and lack of coercion, and, at bottom, the recognition that he is still a part of the human community. Amar, as I understand it, simply disagrees with the proposition that the guilty are entitled to dignity by virtue of their humanity.64 At that level of disagreement, the Constitution and the Federalist Papers can advance the conversation only so far.

Ironically, Amar's proposals would also damage the dignity of those he seeks to protect. Amar briefly acknowledges that his reasonableness regime brings the danger of "too much arbitrariness and ad hoc-ery, unbounded by public, visible rules . . ." (p. 38). His solution to the problem is that "a broader search is sometimes better — fairer, more regular, more constitutionally reasonable . . ." (p. 38). This is precisely the reasoning behind the ever-growing category of special needs searches, extending governmental invasions of privacy to high school athletes, customs employees, railroad employees,65 members of the President's cabinet66 and others not usu-

64. Amar does recognize that forcible pumping of a suspect's stomach "without sufficient justification is horribly wrong." P. 251 n.43. Of course, the "sufficient justification" escape hatch raises questions about what Amar would consider adequate justification for forcible stomach pumping. Apparently, he advocates an ad hoc reasonableness inquiry in these cases, too. He would allow judges to weigh the invasiveness or humiliation of the examination or act against the gravity of the charged offense and the importance of the evidence to the prosecution's case. P. 83. Under such criteria, it seems likely that Professor Maclin is correct that the Rochin holding itself might not survive. See Maclin, supra note 5, at 52-53 (discussing Rochin v. California, 342 U.S. 165 (1952)).
66. See ROBERT REICH, LOCKED IN THE CABINET 46 (1997) for an amusing description of the urine test administered to the Secretary of Labor.
ally considered part of the "criminal class," without the requirement for individualized suspicion or a warrant. Amar would like to extend this reasoning beyond special needs cases, to cases in which criminal activity is suspected. He suggests that if such searches land disproportionately on certain groups, such as poor persons or persons of color, the government may claim that such groups are also disproportionate beneficiaries of the scheme, because the search is designed to reduce their risk of victimization. Thus, Amar advocates widening the net that will enmesh both innocent and guilty. In evaluating Amar’s proposals, we should recall Professor Schwartz’s warning that “the worth of a society will eventually be reckoned not in proportion to the number of criminals it crucifies, burns, hangs or imprisons, but rather by the degree of liberty experienced by the great body of its citizenry.” Most of all, we should recall the words of Justice Jackson, written three years after he returned from prosecuting the Nuremberg defendants:

[O]ne need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of [Fourth Amendment] rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

2. Abuse of Power

Amar is derisive about the values of judicial integrity and fairness, which he calls a “slogan [which] sits atop a pile of dubious assumptions and inferences” (p. 25). Amar discusses these values

67. See Note, “Special Needs” and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 HARV. C.R.-C.L. L. REV. 529, 541-42 and nn.96-100 (noting that lower courts have permitted suspicionless drug testing of emergency medical technicians, Federal Bureau of Prisons employees, certain Department of Education employees, Detroit police officers, and airline industry employees in safety-sensitive positions). Scott Sundby makes an insightful point in this regard. He argues that the very category of special needs searches is a shift from the usual presumption of innocence: it permits government “to treat citizen as rule-breaker even in the absence of a fair probability that the citizen is not obeying the law.” Scott E. Sundby, “Everyman’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751, 1799 (1994).

68. P. 32 (calling the present regime “upside down.”). Special needs searches have already been extended to some criminal investigations. See Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (permitting sobriety checkpoints).

69. This reasoning was properly rejected in Pratt v. Chicago Hous. Auth., 848 F. Supp. 792 (N.D. Ill. 1994) (holding the CHA housing sweeps violative of the Fourth Amendment). If a group desires to be searched, each member of the group is free to consent to a search. It is powerless, however, who have to choose between rampant crime and the wholesale waiver of constitutional rights. See Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (“Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent.”).

70. Schwartz, supra note 27, at 157, 158.

and their impact on the exclusionary rule in a section entitled “Modern Moves” (pp. 25-31). The discussion is revealing both for what it says and for what it leaves unexamined. Amar discusses judicial integrity and fairness solely in the context of the exclusionary rule, and thus he dismisses them in part because other American civil courts and criminal courts in other countries do not use the rule but do not lack integrity (pp. 25-31). But judicial integrity and fairness are not just “slogans” or “moves” to defend the exclusionary rule; they are both important values in their own right, and aspects of a larger concern animating the Constitution: concern about lawless and abusive governmental tactics.

Amar treats judicial integrity as a purely symbolic concern — and one we can no longer afford to honor. He treats it as if it exists in a vacuum, unconnected to police abuse. I will discuss Amar’s consistent practice of isolating and atomizing governmental conduct in more detail in the next section. Here is one excellent example of how it works: Amar can dismiss the need for exclusion of tainted evidence because he focuses solely on the ultimate product of the trial, which he views as the verdict. He fails to focus on the entire chain of governmental conduct and misconduct at issue.72 Then he defines his task as determining which is more harmful to the acceptability of the verdict, the use of tainted evidence at trial or the failure to convict one whom the people know to be guilty. But evidence does not spring fully formed into the courtroom. It was obtained through police misconduct on the street, and often makes its way to court through additional police misconduct as well as the misconduct of other governmental agents. Police sometimes coerce confessions, make wrongful searches, write false police reports, or fail to turn over exculpatory evidence, and then lie, both out of court and in court, about having done so.73 Such police conduct is repugnant regardless of whether it affects the innocent or the guilty. The court’s use of evidence obtained through police misconduct compromises the fairness and integrity of the trial. The judicial use of tainted evidence not only fails to condemn governmental lawlessness but also encourages it to continue, by sending the clear message that the evidence is welcome and will increase the chances of conviction.

Why police misconduct is not repugnant in its own right, even when it is directed at the guilty, is an issue Amar never confronts directly. For example, he says:

72. Kamisar makes this point powerfully in his critique of Amar and Lettow’s proposal to admit the fruits of compelled statements. See Kamisar, supra note 5, at 960-64; see also Amar & Lettow, supra note 54.

73. See Bandes, supra note 23, at 514-15 & nn.73-76.
Once we realize, as did the Founders, that we must provide deterrent remedies for innocent citizens, we can put an analytically proper remedy in place, and exclusion is no longer necessary to deter. And, not coincidentally, our proper remedial scheme will be right side up, making innocent citizens whole and denying guilty defendants windfalls. [p. 138]

In other words, there is simply no need to deter police from illegally searching or seizing the guilty — if the guilty avoid subjection to such illegal police conduct as a byproduct of the protection of the innocent, then they receive a windfall.

Nor does Amar explain why police misconduct should be laundered by placing it in the hands of court personnel. He elides the fact that the very use of tainted evidence has serious consequences that are both symbolic and pragmatic. It threatens both the equitable stance of the court and the appearance of justice, thus compromising the court's authority to pass judgment on the lawless. As the Supreme Court observed, "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard for the charter of its own existence."\(^{74}\) As Justice Holmes similarly observed in his famous dissent in \textit{Olmstead}, "[N]o distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed."\(^{75}\)

But this concern is not merely symbolic. The refusal to condone police misconduct provides a judicial check on the continuation of the unconstitutional behavior.\(^{76}\) The judicial use of wrongly obtained evidence, conversely, has the real world effect of encouraging the police to continue breaking the law, because it gives them every incentive to do so.\(^{77}\) Even in Amar's universe of values, this is a highly problematic result, because such lawbreaking will not be confined to the guilty. But in addition, Amar's willingness to condone a judicial system comfortable with the use of illegal evidence helps explain his dismissive attitude toward "fairness." He sees it as a process value which is important only when it affects the innocent. His approach is firmly fixed on the bottom line — the reliability of the conviction, the search, the confession, and little concerned with.


\(^{75}\) Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).


\(^{77}\) See infra text accompanying notes 150-172.
the way in which the conviction, the contraband, or the confession is obtained.

The same bottom-line approach characterizes his Fifth and Sixth Amendment analysis. His overriding concern about confessions is with their reliability, and the means by which they are obtained seem to concern him most when they impinge on reliability. His concern about the right to counsel is with ensuring vindication of the innocent, and his argument for the right contains no theoretical support for the notion that all accused persons are entitled to counsel. It would have been interesting to see a more nuanced treatment of some of the attorney misconduct issues that often arise. For example, it is unlikely that Amar would object to improper closing arguments, or perhaps even shoddy and unprepared counsel, where there was sufficient independent evidence of guilt. He describes the importance of a public trial in terms of factfinding, in terms of normative judgment toward the accused, and in terms of the education of jurors. But he barely mentions its importance in terms of safeguarding the fairness of the process and in preserving the appearance of justice (p. 122).

The right Amar recognizes is, simply put, the right not to be wrongly convicted. Safeguards governing the conduct of police investigative techniques or the conduct of trial carry little weight unless they can be shown to have affected this ultimate right. The argument is, taken to its logical conclusion, an efficiency argument — one that devalues process and all that process protects, and asks only whether the correct result was achieved.78

Amar’s singular focus on the ultimate right is exemplified by his high regard for the inevitable discovery and independent source doctrines, to which he complains that courts have given “too little rein.”79 These doctrines are premised on the assumption that the

78. Although Amar says he breaks with Judge Posner’s “crude cost-benefit analysis” (p. 35 and n.168), he does not explain how his theories stop short of Judge Posner’s efficiency model, see, e.g., Hessel v. O’Hearn, 977 F.2d 299 (7th Cir. 1992). Indeed, in his analysis of how a remedy would work in the speedy trial context, Amar argues that a guilty person who was wrongly incarcerated premtrial but who would eventually be incarcerated posttrial deserves no remedy, because his detention “does not appear to have caused any incremental deprivation of liberty.” P. 111 (referring to Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971)). This reasoning recalls one of the cruder examples of Judge Posner’s application of economic principles to constitutional values: his argument that the victim in DeShaney v. Winnebago County Dept. of Soc. Servs., 812 F.2d 298 (7th Cir. 1987), had no right violated, as he “would probably have been no better off if the negligent caseworker had never intervened; he would simply have been beaten into a vegetative state by his father that much earlier.” Archie v. City of Racine, 847 F.2d 1211, 1225 (7th Cir. 1988) (Posner, J., concurring). See also Susan Bandes, The Negative Constitution: A Critique, 88 Mich. L. Rev. 2271, 2290 (1990).

79. P. 156 (arguing for expansion of the inevitable discovery doctrine in the Fourth Amendment context). See also p. 60-61 (arguing that in the Fifth Amendment context, law should establish an irrebuttable presumption that the truth and the fruits of compelled testimony would have come to light anyway).
police should be put in the position they would have been in had they not violated the Constitution, as it is more important to solve crimes than to create disincentives for police misconduct.\textsuperscript{80} Would Amar's theories not validate a confirmatory search,\textsuperscript{81} for example, on the theory that the police could have obtained a warrant, and therefore should not be penalized for conducting a warrantless search in order to save the time it would take to go downtown? Would they not validate knowing and repeated improper closing arguments by a prosecutor, so long as the evidence against the defendant was overwhelming in each case? Would they not validate threats of violence calculated to elicit a confession, if independent reliable evidence of the defendant's guilt existed? Do they not adopt Justice Powell's position in \textit{Kimmelan v. Morrison},\textsuperscript{82} that the failure to object to illegally seized but reliable evidence does not constitute ineffective assistance of counsel? If not, Amar has not explained why not.

3. \textit{Equality}

Amar's tendency to downplay or ignore the concern with police misconduct leads to many of his most troubling, and normatively unattractive, "big ideas."\textsuperscript{83} Most troubling of all, it directly interferes with one of his dearly held goals — to promote equality of treatment.

Amar's proposal to replace the requirements for warrants and probable cause with a reasonableness regime is a case in point. Amar's use of textualism takes him to a very odd place. He reasons that the colonists feared judges above all, and that therefore they

\begin{itemize}
\item \textsuperscript{80} Cf. \textit{Murray v. United States}, 487 U.S. 533, 542 (1988) (adopting the independent source doctrine, based on the rationale that while government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied); \textit{Nix v. Williams}, 467 U.S. 431, 441-44 (1984) (adopting the inevitable discovery doctrine, based on the rationale that police should not be put in a worse position than they would have occupied absent their unlawful conduct); Donald Dripps, \textit{Living with Leon}, 95 \textit{YALE L.J.} 906 (1986) (arguing that the deterrence rationale requires that government illegality should place government in worse position than it would otherwise have occupied). Indeed, as Professor Kamisar points out, Amar's and Lettow's Fifth Amendment argument to admit all physical fruits of coerced confessions would actually put the police in a \textit{better} position than they would have been in, absent their misconduct, since it would admit the fruits regardless of whether they would have been discovered in any event. \textit{See} Kamisar, \textit{supra} note 5, at 1004.
\item \textsuperscript{81} A confirmatory search is a warrantless search conducted by police in order to determine whether it is worth the trouble to get the requisite warrant. \textit{See} \textit{Murray}, 487 U.S. at 547 (Marshall, J., dissenting) (discussing confirmatory searches). Amar comes close to approving confirmatory searches. P. 26.
\item \textsuperscript{82} 477 U.S. 365, 396 (1986) (Powell, J., concurring).
\item \textsuperscript{83} \textit{See} p. 65 ("What's the Big Idea?"); \textit{see also} Akhil Reed Amar, \textit{The Fifty-Seventh Cleveland-Marshall Lecture: The Bill of Rights and Our Posterity}, 42 CLEV. ST. L. REV. 573, 585 (1994) (discussing the importance of finding "the big idea," or core concept, underlying constitutional provisions).
\end{itemize}
did not mean to elevate the judicial warrant requirement (pp. 10-17). Rather, they meant to give power to juries (pp. 10-17). Amar has been criticized for his reading of history and for his on-again, off-again textualism. But even apart from these grave problems with his analysis, he makes some outrageous leaps. He reasons that because the warrant requirement was not very important to the framers, neither was the probable cause requirement that is nested in the same clause. Therefore, the linchpin of the Fourth Amendment must be the other clause — reasonableness. He accuses supporters of probable cause of "doubly flawed logic," but this is precisely the problem with his own reasoning. He uses his misreading of the historical importance of the warrant clause to "drag[ ] along its yoked mate, the probable cause requirement" — or drag them both down together, to be precise.

Once Amar has disposed of the Warrant Clause and the probable cause requirement, he argues that a reasonableness regime would accomplish a number of goals. He argues that it would allow a more calibrated notion of what searches ought to be permitted. For example, more serious crimes might require less reason for intrusion (p. 33). A reasonableness regime would permit the interests of victims to be placed in the balance (pp. 37-38). It also would allow the jury to do much of the balancing, because "the jury is perfectly placed to decide, in any given situation, whom it fears more, the cops or the robbers." On top of all that, a reasonableness regime would allow us to deal more openly and honestly with questions of race and gender discrimination (p. 38).

Amar is undoubtedly correct that a reasonableness regime would encourage more of a sliding scale, more balancing, more concern for victims, and more room to factor in fear of robbers, or respect for cops. But all this is a good thing only for someone who

84. See Maclin, supra note 5, at 4-25; Steiker, supra note 5, at 826-30.
85. P. 18. Tracey Maclin's article contains an excellent and extended rebuttal to Amar's historical arguments against the importance of the warrant clause. See Maclin, supra note 5, at 10-25; see also Hearing, supra note 26, at 133-38 (statement of Prof. Thomas Y. Davies) (refuting Amar's contention that reasonableness was the Framers' core concern).
86. Amar never really explains how he can read them both nearly out of the Fourth Amendment while still taking the text seriously. He explains that the "warrant" and "probable cause" language cannot mean what some scholars claim, because the language does not say, and cannot mean, that warrants and probable cause are required in all cases. See p. 152. See also Akhil Reed Amar, The Fourth Amendment, Boston, and the Writs of Assistance, 30 Suffolk U. L. Rev. 53, 74-75 (1996). But this is a straw argument. He cites no one who argues that the presumption in favor of warrants should be irrebuttable. See Maclin, supra note 5, at 5-8. In any case, Amar does not explain the prominence of the language in the text of the Fourth Amendment, nor does he explain the "puzzling persistence of the warrant requirement." Steiker, supra note 5, at 847.
87. P. 44. But see Steiker, supra note 5, at 850 ("[J]uries will almost always fear the robbers more than the cops, but this fact does not necessarily mean that everything the cops do is 'reasonable.'").
believes that the police can be trusted to make these determinations without meaningful prior guidelines. The puzzling question is why someone with Amar's knowledge of and sensitivity toward the Civil Rights era and its legacy would believe such a thing.

Amar cites *Terry v. Ohio*\(^88\) to support his claim that his proposed reasonableness analysis will advance the values of equality. He says it is "probably no coincidence" that *Terry*, which carved out exceptions to the probable cause and warrant requirements, contained "one of the most open discussions of race to date" (p. 37). But in fact, *Terry* is both a cause and a prime illustration of the damage that reasonableness analysis has done to equality values in the Fourth Amendment context. Though *Terry* has been salutary to the extent it has brought street level practices within the reach of the Fourth Amendment, it has been a disaster to the extent its reasonableness analysis has begun doing exactly what Amar advocates: swallowing up the Warrant Clause. Thanks to *Terry* and its progeny, we need not speculate about the effects of a reasonableness regime. We can simply observe that nearly every time the *Terry* balancing methodology has been employed, the needs of law enforcement have outweighed the rights of defendants.\(^89\) We can also note that the street level practices *Terry* sought to regulate through this balancing regime are rife with massive, race-based harassment and abuse.\(^90\) And when the Court has acknowledged racial concerns in this context, it has found pretextual stops\(^91\) or drug courier profiles\(^92\) to be reasonable, without regard to race. Some lower courts have found race to be a reasonable profiling factor in authorizing a *Terry* stop under some circumstances.\(^93\)

Many of the most flagrantly discriminatory abuses of police power take place in the context of traffic stops. These include persistent and notorious patterns of stopping disproportionate numbers of black motorists for minor violations — for example, a

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\(^{88}\) 392 U.S. 1 (1968).


\(^{92}\) See *United States v. Sokolow*, 490 U.S. 1 (1989); see also *Michael Higgins*, *Looking the Part*, A.B.A. J., Nov. 1997, at 48, 50 (describing airport stops apparently based solely on race or alienage, such as stopping passengers with Arabic-sounding surnames).

\(^{93}\) See *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992). *But see City of St. Paul v. Uber*, 450 N.W.2d 623 (Minn. Ct. App. 1990) (stating that racial incongruity is not a proper basis for a *Terry* stop). See also *Sklansky*, *supra* note 28, at 317 (arguing that although *Terry* itself made explicit its concern with race, that "theme has largely disappeared from Fourth Amendment law").
burned-out tail light or a failure to signal a lane change — and then finding various pretexts to search their cars or persons for drugs. The Court has declined every opportunity to regulate this misconduct. It has given police wide latitude to make warrantless custodial arrests, refusing to require any local rulemaking on the subject of what sorts of crimes may lead to custodial arrests. It has refused to inquire into whether police conduct was pretextual — that is, whether a reasonable officer would have made an arrest based on the conduct at issue. It has refused to require an officer who has completed a Terry stop to inform the suspect that he is free not to answer subsequent questions unrelated to the purpose of the stop. It consistently has reaffirmed that its only concern is whether the officer had the authority to make the arrest or search. In other words, was the motorist guilty of driving with a burned out taillight, or was he not? Was he driving with an expired license or not? If he was not factually innocent of the crime charged, the Court finds no cause to complain about further search.

We also should note that if juries are asked whom they fear more, the cops or the robbers, evidence shows that race will likely figure — to the detriment of minorities — in their decisions about whom to fear and whom to value. For example, the Baldus studies have demonstrated that race plays a significant role in determining which defendants are sentenced to die. There is something chilling about Amar’s frequent use of the term “common sense.” Experience shows that our folk wisdom about who is “just plain folks” often acts to exclude those who are not “like us.” Of course, these are not results that Amar desires — quite the opposite. But his regime will not protect minorities. His structure simply does not account for police behavior in the real world.


96. See Whren, 116 S. Ct. at 1772-74.


98. See Whren, 116 S. Ct. at 1774; Robinson, 414 U.S. at 235.

99. See Whren, 116 S. Ct. at 1774; Robinson, 414 U.S. at 236. The Court also has raised substantial hurdles to claims of racially discriminatory enforcement. See United States v. Armstrong, 116 S. Ct. 1480 (1996).


102. See p. 32 (discussing common sense (tort) reasonableness).

perience shows again and again that preclearance,\textsuperscript{104} limits on discretion, and neutral third parties are essential when the opportunities for abuse and discrimination are as rampant as they are on the street. It is true that these safeguards will also act to protect the bad guys — there is no way around it.

II. AMAR’S ATOMISTIC CONSTITUTION

[T]he Constitution draws its life from postulates that limit and control lawless governments, not postulates that limit and control citizens in their efforts to vindicate constitutional rights.\textsuperscript{105}

I have long admired Amar’s federal courts scholarship. Perhaps, in retrospect, it was an instance of reading what I wanted to into another’s scholarship, but I do not think so. Certain values emanate from Amar’s work on government liability: the constitutional mandate for full remediation; the inherent value of constitutional rights — independent of their private law analogues and independent of the will of the majority; the flexible and evolving nature of constitutional norms; the overriding importance of governmental accountability; and the systemic nature of much governmental misconduct, and therefore the need for systemic remedies to combat it.\textsuperscript{106} I also have admired Amar’s determination to read the Constitution as a whole and to identify its overarching values.\textsuperscript{107}

In Amar’s treatment of the criminal procedure amendments, these values are lost, or at least very hard to find. Here he seems blinded to the deep structure of the substantive and remedial model he champions elsewhere. The most salient characteristic of his analysis in this area is its tendency toward atomization — of governmental conduct, of the interests of defendants, of remedial options, and ultimately, of the Constitution itself — as Amar’s analysis in this area stands in isolation from even his own approach toward the remainder of the Constitution. In this section, I will examine the ways in which Amar’s ideas about criminal procedure diverge from the values of connectedness, accountability, full remediation, the inherent value of rights, and an evolving Constitution. I divide the analysis into two sections. The first section argues

\begin{itemize}
\item[104.] Amar allows that “[p]reclearance might also help firm up the record of what facts the government had before the intrusion, thereby preventing officials from dreaming up post hoc rationalizations” and that at times prior approval from a “more neutral and detached decision maker” might be needed to pass constitutional muster. Pp. 38-39. But his baffling proposal is that the decision to require preclearance should be “pragmatic, contingent, and subject to easy revision” and should be based on whether preclearance is reasonable under the particular circumstances. Pp. 38-39. He offers no further details of who would make these decisions, at what point in the proceedings, and based on what actual criteria.
\item[105.] Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1485 (1987).
\item[106.] See id.; Amar, The Bill of Rights as a Constitution, supra note 7.
\item[107.] See, e.g., Amar, supra note 7, at 1131 (calling for a holistic interpretation of the Bill of Rights and the Constitution).
\end{itemize}
that Amar views the constitutional rights of the accused — or at least, those he would view as justly accused — as having no inherent value, but instead as worthy of protection only to the extent they jibe with majoritarian preferences. The second section examines his atomistic view of the wrongful conduct these amendments seek to regulate and the remedies that should flow from their violation.

A. What is the Worth of Unpopular Rights?

Amar has often spoken with admiration of the principles embodied in the cases of Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics and Ex Parte Young. For example, in First Principles, Amar advocates "a Section 1983/Ex Parte Young/Bivens model featuring before-the-fact prevention via injunctions and after-the-fact compensation and deterrence via damages" (p. 115). Amar explained that the major achievement of Bivens and Young was their recognition of the self-executing nature of the Constitution, and therefore of the Court's power to infer a damage action directly under the Constitution. He lamented the fact that the promise of Bivens was only partially fulfilled, as it permitted only a suit against individual, possibly judgment-proof, officers and not against the governmental entity, though "a governmental wrong ... seems naturally to call for governmental liability."

Why was it so important for Bivens and Young to recognize the self-executing nature of constitutional rights, and what precisely is it that these cases recognized? Prior to Bivens, the only damage remedy generally provided for unconstitutional searches was a private trespass suit against the agent. The other possible source of a damage suit was a statute, though it is well known that there was no federal statutory cause of action available to Webster Bivens. The importance of Bivens and Young was twofold. It flowed from their recognition that, first, the constitutional right itself has inherent value, apart from its incidental congruence with common law or private law protections (pp. 106-07), and second, the constitutional right has value apart from the willingness of an elected legislature


110. See Amar, supra note 105, at 1507-08.

111. Id. at 1507-08.

112. See id. at 1506-07.

113. See Bivens, 403 U.S. at 410 (1971) (Harlan, J., concurring) ("For people in Bivens' shoes, it is damages or nothing.").
to grant it statutory protection.\textsuperscript{114} The problem with the cases, as both Amar and I have pointed out, is that the recognition is incomplete — the Court is too tied to the private law model to create the enterprise liability that would provide full remediation and the most effective assurance of governmental accountability.\textsuperscript{115}

In light of Amar's admiration for the \textit{Bivens} principle, it is surprising to find that his views of the criminal procedure protections paint a considerably less generous portrait of the worth of the underlying rights and the need for full remediation. What is the worth of the rights of the accused? Oddly, Amar heaps a host of conditions on the recognition of these rights. These conditions are directly antithetical to the ideals of \textit{Bivens}. In fact, several of them are in conflict with the very notion of the Constitution as a countermajoritarian document that will safeguard rights despite the popular will. It seems that Amar will assign value to the criminal procedure rights only if at least one of the following conditions is met:

1. The right jibes with tort or property notions.
2. The legislature passes a statute recognizing the right.
3. A jury is willing to compensate the loss of the right.
4. The remedy for the right is spelled out in the Constitution.

1. \textit{The Right Jibes with Tort or Property Notions}

Amar's reliance on the common law antecedents of criminal procedure is particularly surprising. He uses the Constitution's "background common law principles" both to define the rights involved and to define the proper remedies — specifically, to argue against the exclusionary rule. As to the definition of the right, for example, he argues that tort law, because it is keyed to the invasion of the search itself, "focuses precisely on the scope of the [Fourth Amendment] violation" (p. 158) in a way that our current regime, which focuses on exclusion and deterrence, does not. He argues that the language protecting security in "'persons, houses, papers, and effects' should remind us of the background common law principles . . . [of] the law of tort."\textsuperscript{116} He criticizes the exclusionary rule because it is based on no common law antecedents and because


\textsuperscript{115} P. 110. See Bandes, supra note 114, at 325-34.

\textsuperscript{116} P. 20 (referring to the language of the Fourth Amendment). See also pp. 152-53 (repeating the assertion that the Fourth Amendment conjures up tort law).
“tort law remedies were . . . clearly the ones presupposed by the Framers of the Fourth Amendment.”

Yet the central lesson of *Bivens* was precisely counter to these arguments. *Bivens* stated, most famously, that an abuse of power by a governmental agent is different and more serious than a similar abuse by a private person. It rests on the insight that there is a constitutionally significant difference between a trespass, battery, or false imprisonment by a private person and an illegal search or seizure by a government agent, and that both the scope of the right and the nature of the remedy need to reflect that difference. It observed that “[o]ur cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law.” *Bivens*’s achievement — its recognition of the self-executing Constitution — was made possible by its rejection of the notion of a suit against government as a tort-like proceeding between private parties. Its limitation — its failure to recognize governmental liability — was a product of its vestigial loyalty to the private rights model.

Amar attempts to finesse the inconvenient parts of the tort model — such as its inability to accommodate enterprise liability — by arguing that it must be “supplemented,” (p. 159) “translated,” (p. 159) and “brought into the twenty-first century” (pp. 29-30). Conveniently for his thesis, he finds that the twenty-first century version of the framers’ intent would accord precisely with his proposals. The modern version would account for the vast changes in government, police practices, and race relations since colonial times by upgrading “the civil model rather than inventing out of whole cloth a criminal one” (p. 30). It would compensate the innocent but not the guilty, it would replace the warrant and probable cause requirements with a regime of “common law (tort) reasonableness” and it would permit class aggregation techniques, civil injunctions, a ten percent sentencing discount for defendants with valid Fourth Amendment claims, and enterprise liability, but not the exclusionary rule. Why? Because “[t]he modern-day

117. P. 21. *But see Hearing, supra* note 26, at 133-38 (statement of Prof. Thomas Y. Davies) (offering an interesting historical account of the late appearance of the exclusionary rule).


120. *See Steiker, supra* note 5, at 830-44. Amar responds to Steiker’s point that police are far more organized and dangerous than they were in the 1780s by suggesting that “we should further ask whether violent criminals are also more organized and dangerous.” P. 197 n.190.

121. Pps. 32-35. Amar suggests that tort concepts of reasonableness must be understood in the context of constitutional law. He illustrates with examples of how the protections of the First, Fifth, and Fourteenth Amendments should be read in conjunction with the Fourth Amendment. Pp. 35-40. But these illustrations fail to address a basic point — how the constitutional concept differs from the tort concept as to the Fourth Amendment itself.
equivalent of a horse and buggy is a car, not an Andy Warhol poster.\textsuperscript{1122}

Amar never deals with the evidence — both empirical and anecdotal — that tort remedies have been massively ineffective in cases against police officers. For multiple reasons, including lack of incentive to sue, lack of jury sympathy for defendants, state-law immunities, and the fact that police misconduct often consists of small, incremental violations rather than dramatic episodes, the likelihood of significant damage awards is extremely small.\textsuperscript{1123} Moreover, even a longstanding series of large settlement awards, totalling tens of millions of dollars a year, has failed to cause cities like New York or Chicago to re-examine their policies on police brutality, or even to discipline the individual officers involved.\textsuperscript{1124}

Amar advocates the use of minimum presumed damages in Fourth Amendment cases (p. 42). Ironically, the Court’s current treatment of presumed damages is grounded in the tort law principles Amar espouses and gives direct evidence of the worth of the rights in a private law context. In \textit{Carey v. Piphus}\textsuperscript{1125} and \textit{Memphis Community School District v. Stachura},\textsuperscript{1126} the Court held that damages could be awarded based not on any inherent or presumed value or importance of constitutional rights, but only on the \textit{actual injury suffered}, with possible consideration of punitive damages in the former case. The actual injury would be measured by \textit{... tort concepts!} If the plaintiff had not suffered a common law harm such as bodily injury, economic or property harm, or emotional distress, he could recover no more than one dollar in nominal damages.


\textsuperscript{123} See Meltzer, supra note 76, at 272 & n.125, 284; see also Amsterdam, supra note 52, at 429-30.


\textsuperscript{125} 435 U.S. 247, 266-67 (1978) (stating that only nominal damages are available for the violation of a constitutional right, absent proof of “actual injury”).

\textsuperscript{126} 477 U.S. 299, 310 (1986) (stating that no compensatory damages are available for the “abstract importance of constitutional rights”).
Such is the worth of the right when viewed against the background of state and common law.\textsuperscript{127}

2. \textit{The Legislature Passes a Statute Recognizing the Right}

Much of Amar's proposed regime, particularly in the Fourth Amendment context, depends on legislative enactment, as several commentators have noted.\textsuperscript{128} One such proposal is enterprise liability (p. 41). Amar makes, as he has elsewhere, a powerful case for the importance of enterprise liability in regulating the police. In addition, Amar wants legislatures to fashion rules delineating the search and seizure authority of governmental officials. Indeed, he announces that legislatures are obligated to do so (p. 43). He also believes that legislatures will be moved to do so when they see governmental entities paying damage awards (p. 41).

The problem is not with the content of the proposals themselves. The problem is that Amar presents them as a package — enact these proposals and jettison the exclusionary rule. The package is not addressed merely to scholars. Not only has Amar written in favor of jettisoning the exclusionary rule, he has testified to that effect before Congress.\textsuperscript{129} It may be clear to his scholarly audience that he offers a package. It is unlikely to be clear to congressional foes of the exclusionary rule that Amar's opposition is conditioned on their responsibility, or that of their state counterparts, to enact broad-based remedies like enterprise liability, intrusive remedies like state-level rulemaking, and unorthodox remedies like a ten-percent sentence discount for defendants with valid Fourth Amendment claims — substituting for the other ninety percent a structural remedy that will flow to the benefit of law-abiding citizens. Amar often writes as if lawmakers of all three branches of government enact overarching plans — as if they decide to weaken one protection only when strengthening another. Is it not also possible that lawmakers hostile to criminal defendants will weaken protections across the board?

The other part of the problem is that to assume any of these proposals will be adopted is, to borrow Amar's phrase from another context, "pure fantasy" (p. 157). Amar talks about the twentieth century's "woeful failure to nurture the civil model" (p. 30), but of course he cannot point to a historical period in which such a model was even partially adopted to regulate police, and he cannot explain why the current period — so hospitable to draconian crime preven-

\footnotesize{\textsuperscript{127} See Bandes, \textit{supra} note 114, at 331-32. 

\textsuperscript{128} See Maclin, \textit{supra} note 5, at 59-65 (criticizing Amar's reliance on legislative action); Steiker, \textit{supra} note 5, at 848-49 (questioning the use of legislative action in Fourth Amendment damage awards). 

\textsuperscript{129} See \textit{supra} note 6.}
tion legislation — should be different. As others have pointed out, the history of statutory attempts to regulate police departments has amounted to a "wholesale 'legislative default'" from the inception of professional policing until today.\footnote{130}{See Steiker, supra note 5, at 835 (citing Amsterdam, supra note 52, at 378-79). See also id. at 848-49.} \textit{Mapp} held the exclusionary rule applicable to the states only when they utterly abdicated their responsibility to adopt alternative means of police regulation, despite ample warning that they must do so.\footnote{131}{See Yale Kamisar, \textit{Remembering the "Old World" Of Criminal Procedure: A Reply to Professor Grano}, 23 U. Mich. J.L. Reform 537, 565 (1990) (recalling that during the 47-year period between \textit{Weeks} v. United States, 232 U.S. 384 (1914), and \textit{Mapp} v. Ohio, 367 U.S. 643 (1961), "none of the many states whose courts permitted the use of illegally obtained evidence developed an effective alternative safeguard"); Maclin, supra note 5, at 60.} \textit{Bivens} itself is the paradigmatic case in which the Court had to act to protect Fourth Amendment rights because Congress had not done so. \textit{Bivens} stands for the proposition, which Amar elsewhere holds dear, that every wrong deserves a remedy. The legislature will not act unless it perceives, at minimum, an ongoing pattern of violations.\footnote{132}{See Meltzer, supra note 76, at 288-89.} The exclusionary rule, on the other hand, is predicated on the duty of the courts to remedy violations in every case before them.

Amar says that "proper methodology of constitutional criminal procedure does not blind itself to practical effects" (p. 154). Considering practical effects is never more important than when a highly respected scholar suggests real-world changes in criminal procedure to bodies with the power to change the law.\footnote{133}{See id. at 288-89 (detailing obstacles to legislative enactment of remedies against police misconduct).}

3. \textit{A Jury Is Willing to Compensate the Loss of the Right}

In his article "The Bill of Rights as a Constitution," Amar states that "the central role of the jury in the Fourth Amendment should remind us that the core rights of 'the people' were popular and populist rights — rights which the popular body of the jury was well suited to vindicate."\footnote{134}{Amar, supra note 7, at 1180.} Although Amar also says that "the key role of the jury was to protect ordinary individuals against governmental overreaching,"\footnote{135}{Id. at 1183.} apparently he is using the word "ordinary" to describe individuals who were seeking to vindicate popular, majority rights, as opposed to the countermajoritarian rights he argues were not a core concern until the time of the Fourteenth Amendment.\footnote{136}{See id. at 1180.}

Even if we assume the correctness of Amar's colonial history, it tells us little about the role of the jury in our post-Fourteenth
Amendment, pluralistic society. Is Amar really arguing that the jury’s role is to protect only popular majority rights against government overreaching, and to allow unpopular minorities to fend for themselves? To unpack this claim would take far more space than I have here, but that argument raises serious questions about both the nature of the Bill of Rights and the nature of the Constitution itself, not to mention the relevance of changing conditions to constitutional interpretation. As Carol Steiker points out, Amar describes the transformation of the First Amendment after Reconstruction from a protection for popular speech to a protection for unpopular speech. Why not bring the same recognition to the criminal procedure amendments?¹³⁷

Reluctantly I must conclude that Amar really does believe that in the criminal realm, the role of the jury is to vindicate “popular rights” — an oxymoron, in my opinion. There is ample evidence of this throughout the book, such as his assertion that “the jury is perfectly placed to decide, in any given situation, whom it fears more, the cops or the robbers” (p. 44), or his assertion that “[w]hen rapists are freed, the people are less secure in their houses and persons” (p. 30). In the Fourth Amendment context, the dominant legal issue for the jury, under Amar’s proposals, would be whether the police conduct was reasonable. The reasonableness calculus would permit the jury to balance, in each case, the importance of the law enforcement interest, the severity of the crime, the interests of the victims, as well as whom the jury fears more. The jury would make these decisions in light of its common sense.

As I said earlier, much is chilling about this formulation. Let us consider Amar’s plan in light of his desire to advance the principle of equality. He asserts, “[I]n a variety of search and seizure contexts, we must honestly address racially imbalanced effects and ask ourselves whether they are truly reasonable” (p. 37). As I have discussed elsewhere, juries are made up of human beings whose common sense often allows them to empathize most closely with those who are most like them. “As for people from backgrounds — ethnic, religious, racial, economic — unlike [their] own, however, there is a pervasive risk that [their] ability to empathize will be inhibited by ingrained, preconscious assumptions about them.”¹³⁸ Their notions of common sense also may permit them to assume that their

¹³⁷ See Steiker, supra note 5, at 844-46. See also Amar, supra note 7, at 1150-52.

assumptions and prejudices are factually based. As Amar explicitly recognizes, jurors' fears may drive their decisions when criminal defendants are concerned. The Baldus studies demonstrated as much, and more — that these fears are often racially based. Amar believes that the jury will sort out the innocent from the guilty and will despise only the guilty. Even apart from the simplistic notion of guilt and innocence this belief bespeaks, it also reflects an amazing faith that all those "we" care about will be on the right side of the scales.

4. The Remedy for the Right Is Spelled Out in the Constitution

The most ironic deviation from Amar's Bivens paradigm is his argument against the exclusionary rule on the ground that "[t]he text of the Fourth Amendment says nothing about criminal exclusion" (p. 107). As he puts it later: "This rule is, quite simply, not in our Constitution" (p. 150). This is the classic argument that proves too much. As Amar himself notes, the "only provision in the entire Constitution addressing the technical issue of remedies with any specificity" is the protection of habeas corpus (p. 106). Of course, none of the remedies he suggests in the Fourth, Fifth, or Sixth Amendment contexts is in the Constitution — not structural injunctions; or any kind of equitable relief; or the Bivens action, which has often been attacked on the same grounds; or even judicial review itself, much less a ten-percent sentencing discount for defendants with valid Fourth Amendment claims. I feel sure — given his prior scholarship — that Amar would not argue that the failure of the Bill of Rights to spell out specific remedies renders the first ten amendments merely precatory.

But my complaint really is not about Amar's inconsistency in claiming textual support for his arguments touting some implied remedies and trashing others. It is about the fact that asking for explicit textual support for particular remedies is directly antithetical to the holding and spirit of Bivens. Apparently, Amar would like to defend his allegiance to Bivens on the ground that Bivens holds in favor of a damage remedy. But if this is all Bivens says, it


140. See Baldus et al., supra note 101; see also McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987) (assuming arguendo the accuracy of the Baldus studies' statistical findings); Johnson, supra note 139, at 1019-21 (discussing what exactly Justice Powell accepted about the Baldus studies).


142. See Bandes, supra note 114, at 312-14.
does not say very much. Its more important point — that the remedy is not dependent on legislative enactment — is lost in Amar's analysis. As I have argued elsewhere, "requiring a clear statement of judicial . . . power . . . protects the political status quo from the possibility of judicial reform. It ratifies the choices of the powerful, and relegates the powerless to explicit legislative remedies they are unlikely to secure." 143 If the worth of the right depends on what is spelled out in the Constitution, on legislation, on jurors' common sense, and on congruence with common law, the dollar permitted by Carey v. Piphus 144 might be an optimistic assessment.

B. Atomizing Constitutional Wrongdoing

In this section, I argue that Amar's treatment of the criminal procedure amendments is flawed by his tendency to atomize the governmental misconduct at issue. I first discuss Amar's atomistic portrayal of the constitutional wrongs themselves. Specifically, I discuss the ways in which Amar disaggregates complex chains of governmental misconduct, portraying them as a series of discrete, individual acts connected by simple, mechanistic causal links. Second, I argue that the atomistic view of wrongs leads to an atomistic view of the proper remedies. The view of wrongs as discrete rather than interconnected is consistent with narrow notions of what is preventable, with an emphasis on damage actions, and with a somewhat jaundiced attitude toward the concept of the private attorney general. I examine each of these remedial notions.

The tendency to atomize governmental conduct is common enough, 145 but its appearance in Amar's jurisprudence is surprising and inconsistent. In Of Sovereignty and Federalism, Amar makes an eloquent case for enterprise liability. His "first principle" in those pages is the maxim that where there is a right, there should be a remedy. 146 He explains that individual liability is often an inadequate remedy for government wrongdoing for a number of reasons, such as the fact that "[p]ervasive and systematic illegality will not always be traceable to specific individuals who can be called to account" and the fact that "the governmental entity will often be in a far better position than any individual officer to restructure official conduct in a way that avoids future violation of rights." 147 Amar's strong position for enterprise liability, and the reasoning he uses to advance it, suggest to me not only that he places a high value on

143. Id. at 314.
145. See Susan Bandes, Narrative Coherence and the Anecdotal Turn: Stories of Police Brutality (manuscript on file with author).
146. See Amar, supra note 105, at 1485-86. See also p. 41.
147. Amar, supra note 105, at 1487-88.
government accountability, but also that he recognizes the complex ways in which individuals can act together to create systemic mis-
conduct and the importance of deterrence to systemic reform.

On a particularized and literal level, Amar’s proposals for re-
forming criminal procedure in First Principles are consistent with
his proposals in the earlier article. Amar consistently argues for
injunctive and damage actions, coupled with enterprise liability.
But here again the generous and protective spirit that animates the
earlier work is transformed when the criminally accused are the
beneficiaries. The larger insight of enterprise liability — that com-
pensating each individual may not constitute full remediation when
government is the wrongdoer — is lost.

1. Atomizing Governmental Wrongs

Amar defines governmental wrongs atomistically and narrowly.
Amar’s earlier insights about the ways in which pervasive and sys-
temic illegality occur are hard to find in this arena. Here, instead,
he is much more likely to view systemic conduct as a series of iso-
lated instances. To begin, he views police conduct as a series of
discrete, unconnected acts as opposed to part of a causal chain. He
finds the search of the white powder in Jacobsen148 or the dog sniff in
Place,149 for example, to be reasonable because he is willing to
see them as discrete acts, with no connection to the intrusive
searches and seizures that often follow at their heels.150 He argues
that physical fruits of compelled confessions ought to be admissi-
able, because he makes little connection between the illegal interrogation
and the later discovery of its fruits. As Kamisar says, Amar focuses
“exclusively on the last step of a multistep course of action by the
police.”151 As I argue above, this focus can be explained, at least in
part, by his lack of interest in process values and by his overriding
concern for his bottom line: the accuracy of the conviction.

In addition, Amar’s attitudes toward causation shed light on his
unwillingness to see linkages. Consider his attitude toward the
fruit-of-the-poisonous-tree doctrine. Amar takes issue with the
doctrine because it would engender a “causation gap.” In other
words, it raises the possibility that suppression might occur in cases
in which the primary illegality was not a but-for cause of the intro-
duction of its fruits into evidence.152 Based on the possibility of

151. Id.
152. The two examples he gives of evidence excludable because of a causation gap, see
pp. 26-27, would both be admissible under current exceptions to the exclusionary rule: the
good faith and independent source exceptions.
such situations, he would jettison the fruit-of-the-poisonous-tree doctrine. This reasoning is unconvincing. The disagreement cannot really be about the mechanics and proof of but-for causation. As Justice Andrews explained in his dissent in *Palsgraf*, the length of the causal chain depends on what social goals we want to accomplish. In early exclusion decisions like *Silverthorne*, the Court wanted to preserve the integrity of the courts by ensuring proper routes for review of evidence. In later decisions like *Wong Sun*, the grounds for the poisonous tree doctrine had shifted, and the Court was concerned about deterring future police misconduct — up to a point. Though *Wong Sun* is premised on the assumption that but for the initial illegality, the subsequent evidence would not have been obtained, the doctrine itself sweeps less broadly than would a but-for test. Yet it is still too broad for Amar's taste. He prefers to assume that, somehow, the truth will come out, justice will reign (pp. 26-27), and the causal link will not be provable. Amar says, "Consider... the nice-sounding idea that government should not profit from its own wrongdoing. Our society, however, also cherishes the notion that cheaters — or murderers, or rapists, for that matter — should not prosper" (p. 26). The questions are, how much are we willing to trade to try to ensure that cheaters, murderers and rapists will not prosper? And when we have traded away so much that it interferes with our own prosperity and dignity, will there still be time to turn things around?

As I discussed earlier, one of the values Amar is too willing to trade away is judicial integrity. Amar's "causation gap" discussion is another example of his proclivity for atomizing conduct. He will not make the causal link between police misconduct and the introduction of the fruits of crime in court. On a purely descriptive level, he approaches the integrity of the judiciary as if it floats free from the actions of other governmental entities — as if what happens on the street has no bearing on what happens in the courtroom. This approach is problematic not only because it views the court's integrity so narrowly, but also because of its implications for the deterrence rationale. Naturally, once one rejects the causal link between the introduction of evidence at trial and the improper

153. Amar admits as much when he says "even if a defendant could conclusively establish but-for causation, the bloody knife should still come in as evidence." P. 27.
157. In *Wong Sun*, the police made a concededly illegal entry into the sleeping quarters of Toy. The police reaped several fruits from this entry, including narcotics and Wong Sun's confession. The Court recognized that Wong Sun's confession would not have been obtained had it not been for the illegal entry. Nevertheless, it found that, due to intervening circumstances, the confession was sufficiently attenuated from the initial illegality that police could not have predicted it at the time they entered Toy's residence. 371 U.S. at 491.
gathering of that evidence, exclusion will not seem like an effective way of deterring the police.

2. Remedial Implications

Amar uses a combination of current doctrine and proposals for reform to disconnect police misconduct from what occurs in court. For example, Amar thoroughly approves of the Court's current holding that a Fourth Amendment violation is complete at the time of the search or seizure, not when the evidence is introduced at trial.\footnote{158. P. 151 (discussing United States v. Leon, 468 U.S. 897, 905-06 (1984)).} Conversely, although the Court finds that the Fifth Amendment violation \textit{does} occur when the confession is admitted at trial (p. 24), Amar suggests that we "enforce the clause itself by excluding confessions and allowing fruits" (p. 61). In the real world, the theoretical debate about when the violation is complete seems singularly unhelpful. As to all police investigative techniques, whether limited by the Fourth, Fifth, or Sixth Amendments, or some combination of the three, a judicial open door policy creates obvious incentives for police.

\textit{a. Deterrence.} Amar ignores the evidence that police think about admissibility when performing searches and seizures as well as when eliciting confessions.\footnote{159. See infra notes 161-67 and accompanying text.} He makes the point that police conducting \textit{Terry} stops to keep the peace will not be deterred by the threat of exclusion (p. 157). But he says little about the converse point — that police usually conduct seizures, searches, and confessions in order to gain admissible evidence leading to a conviction. Police, "engaged in the often competitive enterprise of ferreting out crime,"\footnote{160. Johnson v. United States, 333 U.S. 10, 14 (1948).} are generally willing to conform to rules rather than lose evidence and convictions, but they cannot be expected to ignore gaping loopholes and incentives to cut corners.

Recall the reaction to \textit{Mapp}\footnote{161. Mapp v. Ohio, 367 U.S. 643 (1961).} by urban police departments like New York and Los Angeles, who argued that with the advent of the exclusionary rule, they would for the first time have to begin following the dictates of the Fourth Amendment.\footnote{162. See Kamisar, supra note 26, at 43; Yale Kamisar, \textit{The Exclusionary Rule in Historical Perspective: the Struggle to Make the Fourth Amendment More Than 'an Empty Blessing,'} 62 \textit{Judicature} 337, 347-48 (1979).} The rule deters, and disconnections between rule and remedy\footnote{163. See Carol S. Steiker, \textit{Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers,} 94 \textit{Mich. L. Rev.} 2466, 2532-51 (1996) (discussing the concept of "acoustic separation").} decrease deterrence.\footnote{164. Amar claims that the rule both overdeters, by preventing any use of tainted evidence, even if it might have come to light anyway, and underdeters, by permitting police to}
If police want a confession, they may be willing to risk an illegal arrest since they can "cleanse" the illegality by transporting the suspect to the station to interrogate him. Susan Klein talks about the Tucson Police Department's practice of interrogating suspects in violation of Miranda because they believed "that such statements might be held voluntary and thus could be used to impeach the defendant, to keep him off the stand, or to deprive him of an insanity defense." United States v. Payner is a classic example of the knowing and cynical use of standing doctrine to insulate an illegal search from challenge and ensure that its fruits will be admissible. Theoretical distinctions about when the violation is complete fail to describe the complex interaction of multiple players using a variety of investigative techniques.

Of course, Amar does recognize that police departments at times need systemic reform. His arguments for enterprise liability are powerful (p. 41), although it should be noted that once his substantive reforms were adopted, police departments would not be liable for all that much — mostly whatever a jury was willing to find unreasonable. But even as he takes Professor Stuntz and others to task for acting "as if the choice is tort law or exclusion" (p. 157), Amar demands a choice — tort law and enterprise liability instead of exclusion. What, then, is the problem with exclusion? Why is tort law, of all things, more desirable?

b. Damages. Building on his assumption that the wrongs are discrete and unconnected, and look like private law wrongs, Amar argues that damages are a logical remedy. If the police officer was wrong to coerce a confession from the defendant, but there are no causal links among the interrogation, the actions of other officers in seizing its fruits, and the action of the court in introducing those fruits, then we are not dealing with a complex web of governmental hassle people from whom they expect to find no evidence. P. 157. The overdeterrence argument seems to ignore the significant limits the Court has placed on the exclusionary rule since Mapp. Nix v. Williams, 467 U.S. 431 (1984), for example, permits the use of tainted evidence if it would have come to light absent the illegality. The underdeterrence argument has some truth to it; the exclusionary rule does not effectively deter police from hassling people in situations not likely to lead to evidence. But this observation does not support Amar's argument against the rule. First, Amar's proposals, such as damage actions, would be equally ineffective at deterring hassling. See supra note 125 and accompanying text. Second, if effective remedies for police hassling did exist, they could exist in tandem with the exclusionary rule, rather than replace the rule. Cf. Meltzer, supra note 76, at 184-85 (discussing overdeterrence and underdeterrence objections).

165. See New York v. Harris, 495 U.S. 14 (1990); Steiker, supra note 163, at 2517.
166. See Susan R. Klein, Miranda DeConstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide, 143 U. PA. L. REV. 417, 441 & n.98 (1994). See also Jan Hoffman, Police Tactics Chipping Away at Suspects' Rights, N.Y. TIMES, March 29, 1998 at 1 (reporting that in California, many police departments train officers that they have "little to lose and much to gain" by continuing to interrogate suspects despite invocation of Miranda protections).
167. 447 U.S. 727 (1980); see also supra note 14 and accompanying text.
misconduct, but simply a single wrongdoing officer. Why should he not simply be assessed damages, as if he were an ordinary batterer or trespasser?

The problems with this formulation are both symbolic and highly pragmatic. As I discussed above, a tort judgment against an officer who is treated like a tortfeasor is not the same as a judgment that a governmental official violated one's constitutional rights. Symbolically, the tort judgment fails to provide the "[a]ffirmation of the . . . [r]ights" that the plaintiff is seeking and that permits the development of constitutional precedent. Practically, damages have not been shown to be an effective way of deterring or reforming a governmental entity.

Amar argues that damages are needed in situations in which "a constitutional violation has already occurred out of court [so that] a court cannot really prevent it" (p. 116). This formulation speaks volumes about Amar's views on prevention and deterrence. Because he atomizes conduct so habitually, he has an extremely narrow idea of what can be prevented. If the police officer is not influenced in his behavior by whether his coerced confession or illegally seized contraband will be admissible at trial, then the officer's conduct cannot be prevented by threatening to exclude the evidence. But in "[r]eal life" (p. 9), the officer is influenced by exclusionary sanctions, and his conduct is therefore preventable. The admission of the evidence constitutes judicial default and judicial encouragement of illegality. It places the government's imprimatur on illegally obtained evidence in the case at bar, and it sends street-level officers the unmistakable message that such evidence is also welcome in future cases.

c. The Private Attorney General. Amar recognizes that the criminal defendant is meant to be a sort of private attorney general but argues that he is "the worst kind" (p. 28). He is self-selected,
self-serving, unrepresentative of law-abiding citizens, often despised by the public, unsophisticated, and focused only on exclusion, and he "rarely hires the best lawyer" (p. 28). The exclusionary rule rewards him "precisely because he is guilty" (p. 156).

I wonder how many of these arguments Amar would countenance in a noncriminal context. His criticism of the defendant has a number of odd features, for example. The ideal plaintiff usually is described as someone who will litigate the case strenuously, has concrete facts to litigate, and is in an adversarial position toward the opposing party. In all these regards, the criminal defendant seems to fit the bill. He certainly is adverse to the state, which seeks to convict and imprison him. He has a ripe case replete with concrete facts, and harm that is certain to occur if he loses. His motivation to litigate the case strenuously is his desire for liberty — an impeccable motive at least as good as the pecuniary and property interests the Court prefers.

Amar would prefer litigants like those "the NAACP sought out . . . to revive the equal protection clause . . ." (p. 28). I agree with him that ideological zeal can make for a good plaintiff, although he and I have the weight of Supreme Court precedent against us in this regard. But is it either necessary or workable to ask plaintiffs in precedent-setting cases to be motivated primarily by altruism? In Mark Tushnet's book, Making Civil Rights Law, he recounts that when the NAACP Legal Defense Fund was mounting its legal attack on restrictive covenants, it often represented plaintiffs who were largely motivated by the desire to acquire a family home. In my own experience at the ACLU, I found my clients were motivated by a variety of complex motives, which could not be neatly separated into the self-serving and the altruistic. Would Amar suggest a litmus test for unselfish ideological commitment when a Title VII plaintiff sued to get her job back, or a Nazi sued because he could not get a parade permit, or a victim of police brutality sued for a large monetary award? Is it necessary to ask whether altruism was Webster Bivens's primary motivation for suing? Moreover, if altruism is the standard, it seems to comport

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174. Notice that being "self-serving" in Amar's terms is not very different from being a plaintiff with a concrete stake in the outcome and the requisite adversarial zeal.

175. See Bandes, supra note 173, at 258-63.


177. See Mark V. Tushnet, Making Civil Rights Law 86-96 (1994); see also Truth-Telling on Race, THE NATION, Dec. 15, 1997, at 3 (recounting Thurgood Marshall's struggle to represent plaintiffs "more interested in acquiring a family home than in advancing civil rights through a test case").
poorly with Amar's preferred tort vehicle, which provides only money damages as a remedy.

What of Amar's claim that the criminal defendant is the "worst kind" of private attorney general because he is unsophisticated and cannot afford the best lawyer? On its face, this assertion is highly questionable. Even apart from those who can afford the Johnny Cochrans and Barry Schecks who litigate strenuously in criminal cases, criminal defendants have the right to representation by the public defender's office — a group of lawyers with a high level of expertise in criminal matters. In any case, in what other legal field would Amar require a litigant to be sophisticated and flush enough to afford expensive representation? Is he really suggesting a standard whereby precedent should be made by those who can afford the best lawyers, rather than those who themselves possess the characteristics of good plaintiffs?

Amar's attitude toward private attorneys general in the criminal context is ambivalent at best. He likens the exclusionary rule to playing the "Leavenworth lottery," which he describes as: "Because the government violated the constitutional rights of A, judges spin the wheel and spring some lucky (but unrelated) convict B from Leavenworth" (pp. 151-52). But in a sense, what he describes here is the private attorney general mechanism, which permits A to make law that will also affect unrelated B. Indeed, it also describes a number of other mechanisms for judicial norm creation and enforcement, including injunctive relief, the overbreadth doctrine, the Bivens remedy, class action suits, and the very act of setting precedent which will bind future litigants. It would be difficult to find a case in which only A was affected, though such a case would more likely be a private law matter than one in which constitutional issues were litigated. I do not think Amar's objection is really directed at most private attorneys general, but at "convicts" who get "lucky" and are sprung from prison.

Amar's complaints about criminal defendants as private attorneys general are not, I think, importable to noncriminal contexts. The key phrases here are that the defendant is "despised by the public," "unrepresentative of the larger class of law-abiding citi-

178. See, e.g., People v. Robinson, 402 N.E.2d 157, (1979) (refusing to adopt a per se rule against appointment of the public defender when another member of the same office has a conflict with the case). The Illinois Supreme Court said, "In many instances the application of such a per se rule would require the appointment of counsel with virtually no experience in the trial of criminal matters, thus raising, with justification, the question of competency of counsel." 402 N.E.2d at 162.

179. See Bandes, supra note 173.

180. If the exclusionary rule is not constitutionally based — an assumption I reject, see Bandes, supra note 114, at 336 n.225 — then not only is the Leavenworth lottery illegitimate, but so is the Court's attempt to make the rule binding on state actors.
zens," and rewarded "precisely because he is guilty" (pp. 28, 156). The complaint is really the familiar one — the true first principle of Amar's book — that criminals should not walk. But people who are despised are often precedent-setting litigants — witness the prevalence of Jehovah's Witnesses and communists in the United States Reports.181 Some might be rightly despised, such as Nazis and racists,182 and some might be wrongly despised. Some of the wrongly despised are lawbreakers — like Hardwick,183 or Baird,184 or Shuttlesworth.185 The dividing lines are not as clear as Amar implies. He apparently does truly believe that he can draw a circle around "We the People" and shut others out;186 that inside the circle are those “good” colonial lawbreakers like John Peter Zenger, William Penn and John Wilkes, and all the rest of us who deserve to be safe in our houses, papers, and effects; and that outside the circle are the bad guys who should be denied protection to the fullest extent possible without infringing on the rest of us.

CONCLUSION

In a lecture he gave in 1994, Amar offered five lessons about the Bill of Rights, and about communicating the teachings of the Bill of Rights. The lessons were entitled: (1) keep it simple; (2) find the big idea; (3) tell a story; (4) connect the dots; and (5) remember the People.187 In First Principles, Amar has had mixed results in living up to these lessons. He has told a simple, powerful, and understandable story about the criminal procedure amendments — one which “will be comprehensible to ordinary citizens”188 and scholars alike. He has centered it around a big idea, or group of core concepts, about the rights involved. He has done so “in a way that others may learn from or clearly take issue with.”189 On all these


187. See Amar, supra note 83, at 585-86.

188. Id.

189. Id.
grounds, he has succeeded admirably. But I do not believe he has connected the dots. Amar says the Constitution is not a grab bag of separate, unrelated clauses, but a central weakness of his analysis is that he does reserve these three amendments for separate treat-
ment, despite his protestations to the contrary. His treatment of these amendments, and the protections they afford, is inseparable from the other weaknesses in his book. The story he tells is too simple. It sacrifices the complexity of governmental conduct and the play of competing societal forces for a clean narrative line whose very simplicity is dangerous — because it confirms fears and prejudices that thrive on oversimplification. The most dangerous oversimplification of all is his failure to heed his own admonition to "remember the people." He does not see that "We the People" includes us all.
DID MILITARY JUSTICE FAIL OR PREVAIL?

Robinson O. Everett*


The subject of war crimes is now receiving significant attention. On March 13, 1998, the United States Senate, by a vote of 93-0, adopted a resolution urging the President to call on the United Nations to create a tribunal to indict and try Saddam Hussein for his "crimes against humanity." In the recent past, United Nations tribunals have tried crimes against humanity perpetrated in the former Yugoslavia and in Rwanda.

With Administration backing, Congress has also recently enacted legislation intended to confer jurisdiction on the federal district courts to try certain war crimes of which American nationals are perpetrators or victims. The War Crimes Act of 1996 — which is based on the power of Congress to define and punish offenses against the law of nations — originally concerned "grave breaches" of only the Geneva Convention of 1949; but, as later amended, it punishes violations of both the Geneva and Hague Conventions. Congress apparently intended this grant of war crime jurisdiction to federal district courts to supplement, not supersede, the jurisdiction over violations of the law of war — part of the law of nations — long exercised by American military commissions and general courts-martial.

The War Crimes Act was prompted by the experience of a former Air Force pilot, who, after being shot down and spending several years in a North Vietnamese prison, was concerned about the seeming absence of statutory authorization for the punishment of persons who mistreat prisoners of war. Certainly the concern


5. How the former pilot, Mike Cronin, persuaded a freshman Congressman, Walter Jones, Jr. (R, N.C.), to introduce the war crimes bill and how Jones, in turn, obtained bicameral approval of the legislation within a few months is itself a fascinating story — which
about the welfare of prisoners of war is quite appropriate — and perhaps overdue.⁶

Although the impetus for recent war crimes legislation has been a perceived need to assure the availability of a forum to try persons who commit war crimes against American victims, we must never overlook the possibility that Americans may perpetrate war crimes against others. The recent commemoration of the thirtieth anniversary of the My Lai Massacre, which took place on March 16, 1968, is one reminder of this possibility.⁷ Publication of Son Thang: An American War Crime, Gary D. Solis’s gripping account of an incident that took place almost two years after My Lai, provides another.

Death Comes to Son Thang

On the evening of February 19, 1970, a five-man patrol went out from Marine Company B of the 1/7 Battalion to search for Viet Cong activity. At the time — and later during court-martial proceedings — the patrol was referred to as a “killer team,” a term that does not appear in any Marine Corps manual or instruction. According to Solis, the term was “essentially unique” to the battalion in which these five Marines were serving (p. 29). One platoon sergeant defined the concept quite simply: “They go out in small teams of four to five men and search out hamlets for weapons, rice, different types of caches, and to make contact with the enemy, and kill as many as possible” (p. 29).

Two of the Marines involved had spotty disciplinary records. Heading the killer team was Randall Dean Herrod, a part Creek Indian from Calvin, Oklahoma, who had enlisted in the Marine Corps sixteen months before. In Vietnam, Herrod had engaged in heroic conduct — including saving the life of his platoon leader, 2d Lt. Oliver L. North. He received the Purple Heart, was recommended for a Silver Star, and was promoted to lance corporal. However, apparently displeased with a transfer to the 1/7 Battalion,

⁶ On April 9, 1998, the National Prisoner of War Museum was dedicated in Andersonville, Georgia, honoring the estimated 800,000 Americans who have been held as prisoners of war. According to the National Park Service, the numbers of American prisoners of war, and those who died in captivity, for the Civil War and the wars of this century were: “Civil War: approximately 462,000 Confederate prisoners held, 26,000 died; 211,000 Union soldiers held, 30,000 died. World War I: 4,120 held; 147 died. World War II: European Theater, 95,532 held; 1,124 died; Pacific Theater, 34,648 held, 12,935 died. Korean War: 7,140 held; 2,701 died. Vietnam War: 766 held; 114 died. Persian Gulf War: 23 held, none died.”


he had absented himself without leave for two months. This absence resulted in a special court-martial sentence of reduction in grade to private, forfeitures of seventy dollars pay for three months, and three months of confinement. The confinement was subsequently suspended.  

Pvt. Michael A. Schwarz — a twenty-one-year-old from rural Pennsylvania who was the oldest member of the killer team — had been in Vietnam for four months, but had been in his current battalion for less than a week. In his prior unit, Schwarz had disciplinary problems and had been considered for administrative discharge because of "unfitness" (p. 38). It is not uncommon — although not often admitted — to transfer disciplinary problems to other units. Schwarz, who in his prior unit had participated in several reconnaissance patrols, was the killer unit's point man, slightly ahead of his comrades (pp. 37-38).

The other three members of the team had not previously been in trouble as Marines. Pfc. Thomas R. Boyd and Michael S. Krichten were both nineteen. Boyd had been a member of the 1/7 Battalion since August 1969 and had experienced heavy combat activity in Vietnam. Krichten's record was almost identical; he had joined the 1/7 Battalion within four days of Boyd, from which time "they had served in the same fire team of the same squad of the same platoon" (pp. 38-39). Eighteen-year-old Pfc. Samuel A. Green, Jr., the only African American on the killer team, had arrived in Vietnam less than a month before, and this was his first patrol. Green and Boyd had pre-enlistment problems as juveniles; Green had spent twenty-three months in a juvenile facility. However, none of the men had experienced disciplinary problems while in the service (pp. 38-40).

Son Thang 4 was a small hamlet on the boundary of a free-fire zone — a geographic area "designated by the South Vietnamese government as pre-approved for the employment of military fire and maneuver because they were ostensibly free of Vietnamese civilians" (p. 40). From Hill 50, where the members of the "killer team" were located, it was only a few hundred yards to Son Thang, but it took about half an hour for the team to cover this distance. 

As the patrol came to a group of the village's rough, thatch-roofed huts — generally referred to by the Marines, and many others, as "hooches" — Schwarz, acting at Herrod's direction, entered one and found it empty. The team turned their attention next to another hooch about twenty-five yards away. Surrounding it, they called to those inside to come out. Four Vietnamese emerged — a fifty-year-old woman, a twenty-year-old woman (who was

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8. Pp. 36-37. Although Herrod and everyone else thought of him as a "private" on February 19, 1970, his reduction from lance corporal took effect a few days later. P. 37.
blind), a sixteen-year-old girl, and a five-year-old girl. Schwarz went inside to search and found no one there. At about this time, Herrod shot one of the women and then, according to some accounts, gave orders to kill all of these Vietnamese. All four females were killed by point-blank firing (pp. 44-45).

As they moved back towards the hooch Schwarz had first entered, the killer team heard voices from inside. This time Schwarz found six Vietnamese women and children, and they were ordered out. All were killed, apparently upon orders of Herrod. The dead were a forty-three-year-old woman, a twelve-year-old boy, two ten-year-old girls and two little boys — one five and the other three years old. Next the five Marines moved to a third hooch. This time six more Vietnamese were killed — again all women and children (pp. 46-47).

Marines at the team's nearby home base heard loud bursts of gunfire and were concerned about the patrol's welfare. However, in response to radio inquiries, the killer team reported that they had some confirmed enemy KIAs — killed-in-action. A few minutes later when they arrived back at their unit, Herrod and some other members of the patrol recounted at an initial debriefing that they had spotted some Viet Cong, set up a hasty ambush, and killed at least six of the enemy (pp. 49-50).

Lt. Louis R. Ambort, the company commander of the five Marines, apparently initially accepted the account they provided. But later — prodded by questions from Maj. Richard Theer, his battalion operations officer and an exemplary Marine — Ambort became suspicious and further questioned the members of the team. Now they told him that they had killed a number of women and children after being fired upon by their victims. This explanation satisfied him for the moment. Theer, however, was not satisfied. The next day, a patrol sent to Son Thang found the bodies of sixteen women and children. Theer began his own initial investigation and eventually obtained statements from the members of the killer team that made it appear likely that serious crimes had been committed.9

9. Pp. 51-56, 59-64. As Solis points out, commentators have differed as to whether the murder of hundreds of Vietnamese noncombatants by Army troops at My Lai was a war crime. Maj. Gen. George S. Prugh, the Judge Advocate General of the Army, expressed the view that the victims, citizens of an allied nation, South Vietnam, were not enemies protected under the Geneva Conventions and that their murders were like other homicides involving citizens of a host nation. P. 57. Telford Taylor, a chief prosecutor at Nuremberg, expressed the contrary view that, since My Lai was considered to be controlled by the Viet Cong with enemy resistance to be expected, it was "hostile territory" within the meaning of the Hague Convention and that the laws of war applied. Id. A similar issue could be raised as to the homicides at Son Thang — which was located only about twenty-five miles from My Lai. The members of the killer team believed that they were killing enemies, however, and perhaps their belief should be the governing consideration.
As a result of Maj. Theer's investigation, members of the killer team were charged with the murder of sixteen noncombatants in violation of the Uniform Code of Military Justice. After a formal pretrial investigation pursuant to Article 32 of the Code, military judge Maj. Robert Blum recommended that all five killer team members be tried by general court-martial on charges of premeditated murder.

**The Trials**

Pfc. Krichten was never tried. Following a time-honored defense tactic, his military counsel negotiated immunity in return for an agreement to testify truthfully (p. 89). Krichten, the only member of the killer team without prior civilian or military convictions, had not been in charge and by all accounts had been less involved in the killings than Herrod or Schwarz. Thus, he was an especially suitable candidate for a deal; certainly from the prosecutor's standpoint it was helpful to have an eyewitness — particularly one whose testimony would not require an interpreter.

The charges against the other four accused were referred for separate trial, rather than a joint trial (p. 107). This choice seems understandable, since separate trials would probably be simpler for the judge and prosecutor, as well as less confusing for the triers of fact. Moreover, a joint trial would have presented issues as to the admissibility and use of the incriminating statements made by the various accused. In separate trials the statements made by each

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10. 10 U.S.C. § 832 (1994). Unless waived by an accused, a pretrial investigation under Article 32 of the UCMJ is a prerequisite for trial by a general court-martial. Unlike a grand jury, its proceedings are open, the accused is represented by counsel, and the defense has a right to cross-examine government witnesses and present its own evidence. See 10 U.S.C. § 832(b) (1994). However, even if the pretrial investigating officer recommends against trial, this recommendation is not binding on the commander who convenes a general court-martial. See 10 U.S.C. § 832, 834 (1994).

11. Maj. Blum had also been the military judge who tried Herrod for his unauthorized absence. P. 36.

12. Lt. Ambort, company commander of the killer team members, was separately charged with failure to obey a division order to report any incident thought to be a war crime; dereliction of duty for failing to take effective measures to minimize noncombatant casualties and not ensuring that his men were aware of the rules of engagement; and making a false official statement as to one matter concerning the killer team's activities. P. 91. These charges were investigated under Article 32 by Lt. Col. James P. King — who years later served as the senior Marine judge advocate. Pp. 93, 100. King recommended nonjudicial punishment for Lt. Ambort for making a false official statement. P. 102. In accordance with this recommendation, Ambort received a letter of reprimand — which inevitably has a very adverse effect on the career of a Marine officer — rather than facing trial by general court-martial on some theory that, as commander of the members of the killer team, he bore responsibility for the sixteen murders.

accused could be received against that accused without a limiting instruction.\textsuperscript{14}

The first trial was that of Pfc. Schwarz. This accused, whose IQ was far below average, was among Marines who had been enlisted under relaxed recruiting standards then in effect in the Armed Services.\textsuperscript{15} From the beginning, the trial did not go well for him. Schwarz was represented by military counsel who unsuccessfully made several pretrial motions, including one contesting the admissibility of Schwarz's pretrial statement.\textsuperscript{16} Especially damaging, however, was the testimony of Krichten. He swore that he had seen Schwarz personally participate in killing Vietnamese at the first and third hooches. However, on cross-examination, some of Krichten's answers tied in with a defense that Schwarz was only following orders (pp. 141-44).

The company commander, Lt. Ambort, testified for the defense as to the hazards posed to the Marines by Vietnamese civilians — even those nine to twelve years old. According to Ambort, his "company policy" was to "[t]reat [noncombatants] with the utmost of suspicion, but make sure, you know, protect them as well as you can" (p. 148). With this and other testimony, the defense sought to suggest that the Son Thang victims were not necessarily innocents.

Schwarz himself took the stand — partly in order to explain his incriminating pretrial written statement. His testimony suggested that to some extent his shooting of the civilians had been a response to a directive to the killer team from their leader, Pvt. Herrod. Subsequently, in a forceful argument, military defense counsel contended that Schwarz had been acting under a perceived duty to obey an order from the leader of the patrol (pp. 158-64).

The members of the general court-martial received detailed instructions from the military judge on such matters as aiding and abetting, mistake of fact, extent of any duty to obey illegal orders, testimony of an accomplice, and presumption of innocence. After deliberating, the officers composing the court-martial found

\textsuperscript{14} An enlisted defendant is tried by a general court-martial composed solely of officers, unless the defendant exercises the statutory right to request that at least one-third of the court-martial members be enlisted persons. See Article 25(c)(1), UCMJ, 10 U.S.C. § 825(c)(1) (1994). Thus, if there are two defendants, and either submits a request for enlisted members, that defendant will be tried by a court with some enlisted members and the co-defendant will be tried separately by an all-officer court. Consequently, a defendant can obtain a severance from a co-defendant by requesting enlisted members.

\textsuperscript{15} Pp. 108, 116. In October, 1966, the Department of Defense directed that 100,000 persons with "category four" intelligence be enlisted annually — even though some better qualified volunteers would have to be turned aside to meet this quota. The effect of "Project 100,000" on discipline was harmful. See pp. 116-18.

\textsuperscript{16} Under Article 31 of the Uniform Code, pretrial warning requirements are imposed which go far beyond those required by Miranda. See 10 U.S.C. § 831 (1994). One issue concerned compliance with Article 31 in taking Schwarz's statement which the government offered.
Schwarz guilty of premeditated murder of the twelve Vietnamese at the second and third hooches. A sentence of life imprisonment was then imposed (p. 185).

Pfc. Boyd, whose trial commenced soon after that of Schwarz, was also a Project 100,000 recruit. However, unlike Schwarz, the charges against him were for unpremeditated, rather than premeditated, murder. Moreover, unlike Schwarz, he was represented not only by a Marine lawyer but also by a civilian attorney — Howard Trochman, who was from Boyd's hometown, Evansville, Indiana, and was an avowed critic of the Vietnam War. Trochman neither asked nor received compensation for his representation, and he even paid his own expenses (pp. 189-91).

Lt. Col. Paul A. St. Amour, the military judge who had tried Schwarz, was also to preside over Boyd's trial. From his observation of St. Amour during the preceding trial and his evaluation of the attitude of typical court-martial members, Trochman decided to gamble on a trial by judge alone (p. 192).

The Government case was much the same as in the trial of Schwarz. However, Krichten, who was a close friend of Boyd, offered testimony indicating that the accused had fired over the head of the civilians and had consciously avoided killing any of them. Furthermore, Boyd's own testimony that he had religious convictions against killing and had not fired at the Vietnamese was corroborated by others. Because of a reasonable doubt as to Boyd's guilt, the military judge acquitted him of all charges (pp. 196-99).

On August 13, 1970, seven weeks after Boyd's acquittal and less than six months after the killings, Pfc. Green's trial began for sixteen unpremeditated murders. His military defense counsel offered the defense that Green had not actually shot anyone and that, with no combat experience before the Son Thang incident, he was too junior and inexperienced to be considered an aider and abettor. Green decided to exercise his statutory right to have enlisted members of his court-martial and, after challenges had been exercised, he was tried by a court-martial with three officer members and two senior noncommissioned officers. Lt. Col. St. Amour was again the military judge. Rather than seeking to show that Green personally killed anyone, the prosecutor focused on showing that Green

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17. P. 183. Schwarz was not, however, found guilty of the first four murders. In a general or special court-martial, findings of guilt require only a two-thirds vote, rather than unanimity. See Article 52, UCMJ, 10 U.S.C. § 852(a)(2) (1994).

18. Maj. Blum had recommended that all five members of the killer team be tried for premeditated murder. While this recommendation was followed with Schwarz and Herrod, p. 225, Boyd and Green were charged only with unpremeditated murder. Pp. 194, 206. Although Solis does not explain the reason for this difference in the gravity of the charges, it is consistent with the differences in the roles of the five Marines. Schwarz was the leader of the killer team, and Herrod, the point man, was more directly linked with the killings than either Boyd or Green.
shared in the criminal purpose and thus was liable as an aider and abettor. Krichten's testimony that Green had fired at all three hooches supported this theory (pp. 204-08).

The defense emphasized, on the other hand, that Herrod and Schwarz had been the primary actors and Green had been in the background. Green, testifying in his own defense, maintained that although he had fired, he purposely aimed to miss and that he had been acting only upon the repeated orders of Herrod, whom he believed to be an experienced leader (p. 207). The military judge's instructions basically followed those given in the trial of Schwarz. The members of the court-martial found Green guilty of fifteen counts of unpremeditated murder. The sentence adjudged by the members was five years confinement and a dishonorable discharge. Green believed the sentence to be excessive. However, to others — including myself — it appears remarkably lenient. In this instance, as Solis agrees, any effort to portray Green, the only African American on the "killer team," as a victim of racial bias would lack foundation in fact (pp. 210-12).

The case of Pvt. Herrod, the last to be tried, aroused great interest in his home state of Oklahoma, and 160,000 citizens signed a petition in his behalf that was sent to the Commandant of the Marine Corps (pp. 217-18). Like Boyd, Herrod received uncompensated representation, from experienced Oklahoma civilian attorneys. Additionally, 1st Lt. Oliver North, whose life Herrod had saved, assisted the defense team in every way possible. Meanwhile, Lt. Col. St. Amour had been unexpectedly transferred to Japan; and Navy Commander Keith Lawrence was sent from the Philippines to act as military judge for Herrod, who was charged with sixteen premeditated murders. Herrod was tried by a panel of seven officers — a colonel, a lieutenant colonel, four majors, and a captain — all of whom had combat experience. In North's view,

19. As Solis notes, the defense counsel failed to request an instruction on accomplice testimony — despite being almost invited by the judge to do so. P. 179. He offers no explanation for this omission, and none readily occurs to me.

20. In a court-martial, if the members of the court-martial decide on guilt or innocence, they also adjudge the sentence. See Article 52, UCMJ, 10 U.S.C. § 852(b) (1994). There is no way for a servicemember to have the members determine guilt and the judge adjudge sentence. I have strongly urged a change of the Uniform Code in this regard.

21. Denzil D. Garrison, Republican leader of the Oklahoma state senate, was defending the nephew of a man who had helped save his life during the Korean war. He recruited Gene Stipe, a Democratic state senator, who was a seasoned defense attorney with some prior military trial experience. Each lawyer paid his own way to Vietnam. Later, there were two other Oklahoma volunteers. Pp. 218-20.

22. The panel had originally consisted of eight members, but a lieutenant colonel had been challenged. P. 229. In a general court-martial, the Government and the defense each have a peremptory challenge. Although Solis does not state specifically that the member was removed by a defense challenge, I assume this occurred because this would be consistent with the "numbers game" played by counsel in general courts-martial. Since a finding of guilty
this was advantageous to the accused, because "only men who had served in combat could appreciate the pressures that Herrod must have been under" (p. 229).

Krichten’s testimony was detailed and damaging to Herrod. In a 1996 letter to Solis, defense attorney Garrison referred to the Government’s presentation as a "sophomoric prosecution." However, Solis’s recital of Krichten’s testimony suggests to me a contrary conclusion. In any event, the defense countered with evidence about extensive Viet Cong activity in the Son Thang area a few days before and even evidence suggesting that the patrol itself had been fired upon. Herrod’s former battalion commander testified for the defense as to the difficult situation in which the members of the patrol found themselves. Oliver North, who had paid his own way to Vietnam to testify for Herrod, was an effective character witness.

Herrod, whose military intelligence test scores were quite high, also testified effectively on his own behalf. According to him, there had been some enemy fire, which his team had returned; and some civilians were killed in the crossfire. He asserted in his defense, "I do not now, and I did not then, feel that I had killed anyone it wasn’t necessary to kill" (p. 245). Thereafter, Dr. Hayden Donahue, a prominent Oklahoma psychiatrist, and an expert on battle fatigue among World War II veterans, gave his opinion that Herrod probably was suffering from this condition at the time of the killings. Having been in extensive combat and faced death on a daily basis, Herrod’s reasoning had been supplanted by instinct.

After brief rebuttal evidence, the case was presented to the members of the court-martial. Apparently they were greatly impressed by the skill of the defense team and, on the other hand, considered the Government’s case to be weak. Since there was less than the necessary two-thirds vote to convict of premeditated murder, the panel considered lesser included offenses and decided on an acquittal across the board.

Solis poses the question of whether jury nullification had been operative (p. 256).

must be rendered by a two-thirds vote, the mathematical odds favor an accused tried by seven members than by six or nine; challenges are often exercised with this in mind.


25. Pp. 253-55. Solis — apparently on the basis of interviews conducted many years later with some of the court members — recounts that initially the vote was four to three on the premeditated murder charge, although memories differed as to whether the majority was for conviction or acquittal. "Unaccountably, as the seven officers considered the lesser offenses, the vote swung not toward conviction of a less serious charge, as one would expect, but more strongly toward acquittal." Pp. 254-55.
THE AFTERMATH

In September 1970 — shortly after his acquittal — Herrod returned to the United States for out-processing from the Marine Corps. His twenty-two months as a Marine had included fifteen months in Vietnam, including two months of unauthorized absence and six months of pretrial confinement. In December 1970, he finally received the Silver Star for which he had been recommended long before. Around the same time, Krichten and Boyd both completed their Vietnam tours of duty and were honorably discharged. Schwarz and Green were transferred to a naval prison in Portsmouth, New Hampshire to serve their respective sentences.

During the Vietnam War twenty-seven Marines were convicted of murder and other crimes against civilians, and only in seven cases was confinement adjudged for less than ten years. Schwarz’s life sentence was not unusually severe but Green’s sentence was remarkably lenient.26 It was the task of Maj. Gen. Charles F. Widdecke, the commanding general of the First Marine Division who had convened the four general courts-martial, to review the Schwarz and Green convictions. In light of Herrod’s acquittal, Widdecke’s staff judge advocate — his legal advisor — recommended that Schwarz’s sentence be reduced to twenty years confinement. Displaying extraordinary leniency toward a Marine convicted of fifteen premeditated murders, the general reduced the confinement from life to one year. He similarly reduced Green’s sentence. Thereafter, the Navy Court of Military Review affirmed the findings of guilt and the reduced sentences. Both Schwarz and Green received dishonorable discharges.

Subsequently, the convictions and sentences, as reduced, of Schwarz and Green were affirmed on appeal. No clemency was granted either accused by the Navy Discharge Review Board — which could have changed the characterization of the dishonorable discharge. Later, James H. Webb, who had been a contemporary of Oliver North at the Naval Academy and also served as a Marine officer in Vietnam, took a great personal interest in Green’s case and helped present it to the Board for Correction of Naval Records.27 In 1978, that Board changed Green’s dishonorable discharge to a general discharge — which, although not an “honorable discharge,” is “under honorable conditions.” Green never learned of this partial vindication because in 1975 he had killed himself af-

26. The sentences adjudged against the twenty-seven Marines were not extraordinary when compared with sentences of civilian courts for similar misconduct. Pp. 266-68.

ter unsuccessfully seeking to attack his court-martial conviction col-
laterally in a federal district court (p. 291).

CONCLUSIONS

Solis's qualifications to write *Son Thang* are unique. He served
in the Marine Corps for twenty-six years, including two tours of
duty in Vietnam as an assault amphibian officer — the first in 1964
as a platoon leader and the second in 1966 as a company com-
mmander. Subsequently, after becoming a lawyer, he served for
more than eighteen years as a judge advocate, tried more than 450
cases as chief prosecutor for the First and Third Marine Divisions,
and later served two terms as a general court-martial judge before
Military Law in Vietnam*, is an excellent history of Marine Corps
courts-martial in that conflict (pp. xiii-xv).

Probably as a result of his own unique experience, Solis does a
remarkable job of providing his readers an understanding of the
mental processes of the five members of the killer team. His ac-
count of the investigation that was undertaken makes clear that —
at least in some instances — commanders and military lawyers are
willing to unearth and disclose the possible existence of embarrass-
ing war crimes perpetrated by American servicemembers.28 His ex-
planation of the American military justice system is understandable
and free of military jargon. His insights into the tactics of both
prosecutors and defense counsel are excellent.

Solis concludes that although the Son Thang “trials were re-
minders of humanity’s aspiration to do justice,” on a more basic
level “the Son Thang trials were a failure” (p. 293). The results of
the trials show that the military justice system carried out its
prosecutorial function “deficiently, its effort wanting in several sig-
nificant respects” (p. 293). In his view, the potential significance of
the suspected offenses was such that Marine lawyers should have
been involved initially in taking the statements of the killer team
and of other potential witnesses. The absence of this participation
created a significant risk that the statements obtained would be
held inadmissible at trial — and indeed some statements were ob-
jected to, although unsuccessfully. Solis also believes that more ex-
perienced lawyers should have been assigned to both prosecute and
defend the general courts-martial arising out of Son Thang. He
writes, “If the 1st Division lacked the requisite specialists, then

28. Maj. Robert Blum, who conducted the pretrial investigation of the Son Thang kill-
ings, later served as a military judge in the Marine Corps and retired as a colonel. P. 76. In
1957, Blum was my student in a military law seminar at the U.N.C. School of Law, and I had
a great respect for his ability and seriousness of purpose. I was pleased that my favorable
impression then is confirmed by Solis’s account of the pretrial investigation Blum conducted.
prosecutors, defenders, and administrators sufficient to the task should have been brought to Hill 327 from other in-country commands, even from state-side commands, if necessary. It had been done before when multiple homicides were to be tried” (p. 294). Solis criticizes the prosecution for granting Krichten immunity too quickly and then not adequately monitoring him.29 Finally, Solis notes the question raised by some experienced judge advocates as to whether the military justice system can function effectively under wartime conditions in places like Vietnam (p. 296).

Without being Pollyannish, I must express my own view that under the circumstances the military justice system worked remarkably well at Son Thang — especially when one considers that the Military Justice Act of 1968 had made major changes in the system only a few months before the Son Thang killings and that those changes were still being assimilated. Admittedly, any prosecutorial decision to grant immunity — either testimonial or transactional — to a co-accused has a potential for inequity; but I am hesitant to criticize the choice made to immunize Pfc. Krichten.30 I also do not criticize the prosecution’s use of separate trials. Separate trials, rather than a joint trial, do create additional administrative burdens for the prosecution and permit defense counsel in the later cases to learn from the mistakes of their predecessors. However, in this instance I believe the use of separate trials was a wise choice — especially since any accused could have obtained an automatic severance by exercising his statutory right to have enlisted members on his court. Moreover, the wisdom of the choice to try Schwarz first was confirmed by his conviction of twelve premeditated murders and the life sentence the court-martial handed down.31

Although the success of the civilian counsel in obtaining acquittals for Boyd and Herrod would suggest the wisdom of utilizing the services of such attorneys — especially if rendered at the attorney’s own expense — I would not infer that the military lawyers who prosecuted were simply outmatched. For example, even in a case involving a war crime, the accused usually has not been recommended for a Silver Star and cannot call as a character witness someone — in this instance Oliver North — whose life he has saved

29. P. 295. Moreover, Solis would have referred to trial the charges against Lt. Ambort on the premise that this company commander “like Lieutenant Calley’s superior, Captain Medina, should have been made to account for his actions. If, like Medina, he be acquitted, so be it.” Pp. 295-96.

30. Admittedly, at Boyd’s trial the prosecutor — a different prosecutor from the one who tried Schwarz — was apparently surprised by Krichten’s favorable testimony to his good friend Boyd; and perhaps this reflected inadequate preparation. Pp. 196-97. However, if a prosecutor tries to control an immunized witness — which Solis seems to suggest be done — this tactic may give rise to persuasive defense complaints.

31. Presumably, these favorable results would have strengthened the Government’s hand for plea-bargaining purposes.
in combat. Moreover, that psychiatric testimony on battle fatigue might create a doubt as to the mens rea of an accused should not be too surprising in an era when acceptance of the abuse excuse is not uncommon.

In short — with the possible exception of General Widdeke’s extraordinary reduction in Schwarz’s sentence from life imprisonment to one year of confinement — I would not view the outcome of the Son Thang trials as examples of “so-called military justice.” Instead the results fall within the wide range not uncommon for contested cases in many contemporary systems of justice. Certainly, none of these trials could be unfavorably compared with that of O.J. Simpson. Of course, I do not want to suggest that the military justice system was flawless — whether in 1970 or today. Many improvements have been made in the interval; and others are probably needed. For example, in combat areas some streamlining of military justice might be appropriate to conserve resources.

The most important achievement of Solis’s Son Thang, however, is to make clear that Americans in uniform, like soldiers from other countries, may commit war crimes. In most instances, as in the trials at Son Thang, the offenses committed will not be charged as war crimes — that is, the accused will not be prosecuted under provisions dealing with violations of the law of war based on congressional power under Article I, section 8, clause 10. Instead, where servicemembers on active duty are involved, the charges will be preferred under routinely used articles of the Uniform Code of Military Justice — such as Article 118, 10 U.S.C. § 918 (murder), or Article 120, 10 U.S.C. § 920 (rape) — which rely on congressional power “[t]o make Rules for the Government and Regulation of the land and naval Forces.” Regardless, however, of the charge that might be preferred or of the court, military or civilian, that might try the case, it is important that Americans be constantly aware that our own servicemembers have committed war crimes in the past.
and may commit them in the future. This awareness will in turn generate efforts by the armed services to screen recruits, to educate servicemembers about conduct that might constitute a war crime, and to explain to them that the defense of obedience to superior orders will not be available with respect to actions that should reasonably be perceived to be war crimes.

_Son Thang_ is a well-conceived and well-executed explanation of an important event in recent American history. Readers of the book will obtain a much better understanding of what conduct may constitute a war crime and of the difficulties in successfully prosecuting alleged war criminals.

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37. Solis points out that two members of the killer team had scored very low in mental tests and probably would never have been recruited under the standards usually applied by the Armed Services. Pp. 116-18. However, it is sobering to recall that Herrod, who led the team, had a substantially above-average grade on his military intelligence test.
Whatever it is, you should clean up this city here because this city here is like an open sewer, you know? It's full of filth and scum, and sometimes I can hardly take it.”

What is it about New York City that has, in the last few years, spawned a series of books attacking the criminal justice system and describing a community in which victims' needs are compelling while the rights of the accused are an impediment to justice? Why does this apocalyptic vision of the system persist, despite statistics demonstrating the sharpest decline in the city’s and the nation’s crime rates in decades? What explains the acute detachment from the accused that is at the core of this series of books?

In Virtual Justice: The Flawed Prosecution of Crime in America, Richard Uviller adds his voice to those of his fellow New Yorkers, including Professor George Fletcher and Judge Harold Rothwax, who have recently advocated reforms of the criminal system. Among the reforms they advocate are sharp constrictions of the exclusionary rule, the right to counsel, the privilege against self-incrimination, the peremptory challenge, and the admissibility of
expert testimony. Although ostensibly examining these same issues with the balance of a scholar rather than the voice of an advocate, Uviller's wish list is remarkably congruent with those of the more contentious Fletcher and Rothwax. And like the work of Fletcher and Rothwax, the premise of Uviller's analysis is flawed: the procedural protections he criticizes simply have not effected dramatic changes in the investigation and prosecution of crime and the sentencing of defendants.

Criminal justice in New York City is, like the city itself, hardly a national prototype. In terms of volume alone, the system is peculiarly burdened. In addition, New York presents combined demographics of race and class, of access to education, housing, employment, and of the availability of weapons and drugs that

5. See Fletcher, supra note 4, at 28-33, 229-36, 254-55 (use of expert testimony); id. at 250-51 (peremptory challenges); Rothwax, supra note 4, at 35-65 (exclusionary rule); id. at 88-106 (right to counsel); id. at 66-87, 186-97 (privilege against self-incrimination).

6. Of the 1,864,000 violent crimes reported nationally in 1994, 497,960 occurred in the nation's cities. Of this number, 136,522 — 28% of all urban violent crimes — were committed in New York City. Breaking this statistic down by crime, New York City was the scene of 72,540 (11%) of the nation's 659,870 robberies, 26,665 (2.5%) of the nation's 106,014 forcible rapes, 1,561 (6%) of the nation's 24,526 murders, and 59,755 (5%) of the nation's 1,135,000 aggravated assaults. See U.S. Dept. of Justice, Crime in the United States: Uniform Crime Reports for the United States: 1994, at 60, 138, 238 (1995).

New York City employs 38,000 police officers, more than any other police force in the country. See Amnesty Intl., United States of America: Police Brutality and Excessive Force in the New York City Police Department 3 (June 1986).

7. For example, 47.9% of all persons in New York City were non-Hispanic white, 26.3% black, 22.1% Latino (Hispanic), 6.5% Asian or Pacific Islander, and .3% American Indian, Eskimo, or Aleut. See Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of the Population: General Population Characteristics: United States 468 tbl. 266 (1992).

8. The Census Bureau estimates that 16.3% of families in New York City had incomes in 1989 that were below the poverty level. See Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of the Population: Summary of Occupation, Income, and Poverty Characteristics: Metropolitan Areas 77 tbl. 3. In 1996, approximately 1,007,000, or 11.7% of New York City residents received public assistance and 15.7% received food stamps. See David Firestone, A Portrait of the City, Painted by the Numbers, N.Y. Times, Sept. 22, 1996, at 43.

9. In 1990, 31.7% of New Yorkers over age 25 had not completed high school. Twenty-three percent had a bachelor's degree or higher education. See Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population: Social and Economic Characteristics: Urbanized Areas at 15 tbl. 1. The public school system in New York is precipitously close to collapse. In the past year, the system has experienced the most severe overcrowding in decades, with 91,000 more students registered than it can comfortably accommodate. See Pam Belluck, Classes Open in New York City, in Closets, Hallways, Cafeterias, N.Y. Times, Sept. 5, 1996, at A1.

10. In New York City in 1996, some 107 families sought emergency housing daily. There were 5693 families in temporary shelter, staying an average of 223 days. There were 356,000 families on the waiting list for public housing. See Firestone, supra note 8.


appear nowhere else in the United States. This does not, however, prevent Uviller, and other observers, from extrapolating from New York’s experience to conclusions about “Criminal Justice” and the “Prosecution of Crime in America.” Reliance on so idiosyncratic a model cannot help but produce distortions, and this is one of the pitfalls of Uviller’s book.

Those distortions can perhaps be explained and even corrected by examining them as products of a distinctly New York sensibility. Certain crimes have become as closely associated with New York City as Broadway and the Empire State Building. These crimes contribute to the sensibility I try to describe in this review, and I believe that they might go some way toward explaining the subject, tone, and point of view of Uviller’s book. The 1964 murder of Catherine “Kitty” Genovese is perhaps the oldest, in our contemporary consciousness, of a long series of episodes that have come to define the New York criminal paradigm: inexplicable brutality met by outrageous indifference. It is now a fixture of urban mythology that Kitty Genovese’s assailant committed three separate and ultimately fatal assaults on her, leaving and returning repeatedly, while her neighbors listened to her screams for thirty-five minutes without calling the police.13 More recent examples include attacks on young women in Central Park in 1989 and again last year,14 the deaths of the young daughters of Joel Steinberg and Awilda Lopez,15 and the controversial subway shootings by Bernhard Goetz.16

These cases have shaped the city’s consciousness of itself. Many New Yorkers live with the impression that they are under siege and cannot walk the streets, ride the subway, or enter Central Park without falling prey to criminal offenders. There is a corresponding impression that all offenders in New York City are inhuman sociopaths, Zodiac killers, and Sons of Sam.17 Media coverage in New York and nationally compounds the fear of crime,18 not only by de-

voting disproportionate attention to the extremes, but also by conveying the sense that few criminals are caught and fewer still are convicted or punished. Of course, none of these impressions is accurate. The vast majority of crimes and offenders are ordinary, the same as one would find elsewhere in the country, although more numerous. Furthermore, New York City crime rates have dipped dramatically in recent years, demonstrating unambiguously that New York is a safer place now than it has been in a long time. Yet the mythology of crime in New York seems to transcend the truth. Consequently, a bunker mentality persists among longtime denizens of the city, who cling to a grim image of their own community that they could, if they would, relinquish.

With fear of crime — rather than facts about crime — dominating the debate, the legislative landscape is littered with minimum mandatory sentencing provisions, “three strikes” statutes, modifications of the juvenile justice system to allow youthful offenders to be tried as adults and sentenced to adult correctional facilities, reintroduction of the death penalty or broadening of its reach, and crusades to diminish the quality of inmate life. Record-

crime on the three major network television news shows tripled from 571 stories in 1991 to 1,632 stories in 1993 — despite the fact that crime declined slightly over that period” (citing 1993 — The Year in Review, MEDIA MONITOR Jan.-Feb. 1994)).

19. See generally PHILIP SCHLESINGER & HOWARD TUMBER, REPORTING CRIME: THE MEDIA POLITICS OF CRIMINAL JUSTICE 184 (1994) (quoting DORIS GRABER, CRIME NEWS AND THE PUBLIC 39 (1980) (“[An] exaggerated picture is presented of the incidence of the most violent kinds of crime, while the incidence of lesser crimes is minimized[.]”); THE REAL WAR ON CRIME, supra note 18, at 71 (“Newspapers also tend to present a distorted view by focusing most of their attention on sensational crimes rather than the vastly more numerous nonviolent offenses.”)).

20. The proliferation of “real life” entertainment television programs like America’s Most Wanted and Unsolved Mysteries, as well as the emphasis on unsolved violent crimes in television magazine programs like 60 Minutes, 20/20, and Hard Copy fuels this misperception. See THE REAL WAR ON CRIME, supra note 18, at 70 (noting that one scholar has coined the term “mean world” syndrome “to describe how heavy viewers of television violence increasingly feel that their own lives are under siege.”), citing GEORGE GERBNER, TELEVISION VIOLENCE: THE ART OF ASKING THE WRONG QUESTION, CURRENTS IN MODERN THOUGHT at 396, July, 1994.

21. See Glaberson, supra note 2.


24. See, e.g., MASS. GEN. LAWS ch. 119, § 6 (1990) (requiring certain offenses committed by juveniles to be tried in the adult system).


26. See, e.g., Neal R. Pierce, Dos and Don’ts for Saner Prisons, 28 NATL. J. 1653 (Aug. 3, 1996) (quoting former Massachusetts Governor William Weld for his view that prisons should be “a tour through the circles of hell”).
breaking percentages of people — particularly men of color — are behind bars,\textsuperscript{27} and prison construction projects have exploded.\textsuperscript{28} The political rhetoric that propels these initiatives is bipartisan.

In the judicial branch, these same forces produced New York Judge Harold Rothwax, who toured the radio call-in show circuit to promote \textit{Guilty: The Collapse of Criminal Justice}, a book that boasts of his conversion from a civil libertarian and defense attorney to an angry conservative disgusted by both criminal defendants and the attorneys who represent them. The book brims with righteousness and fury, unabashedly condemning all defendants\textsuperscript{29} as well as their counsel.\textsuperscript{30} While it enjoyed a great deal of attention in

\textsuperscript{27} See \textit{The Real War on Crime}, supra note 18, at 101-03 (noting that African-American men are incarcerated at a rate six times that of white men, although they make up less than seven percent of the population, and that, in 1994, one out of every three African-American men between the ages of 20 and 29 in the entire country was under some form of criminal justice supervision (citing MARC MAUER, AMERICANS BEHIND BARS: THE INTERNATIONAL USE OF INCARCERATION, 1992-1993 (Sept. 1994); MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER (Oct. 1995))).

\textsuperscript{28} See \textit{The Edna McConnell Clark Found.}, AMERICANS BEHIND BARS 5 (1992) (reporting that “[i]n fiscal 1989, $6.7 billion was spent on the construction of new prison space across the country, a 73 percent rise over the previous year,” that this construction “increased state and federal capacity by 128,000 beds,” and that New York State opened 27 new prisons between 1983 and 1990 (citing Corrections Compendium)).

\textsuperscript{29} In a defining anecdote, Judge Rothwax tells of a conversation he had with his mother early in his career as a lawyer:

When I was a fresh, young defense attorney, one of my first cases was a man who was charged with robbery. I took my job as his advocate very seriously. During that period, I was visiting my mother and I proudly told her, “I’m representing a man accused of robbery.”

She frowned. “What did he do?”

“He’s charged with robbing an old man coming home from a store,” I told her.

She looked at me with horror, and I could see the pride in her son the lawyer quickly slipping away. “How can you represent a man like that?”

I explained patiently. “Well, Mom, he tells me he’s not guilty.”

My mother gazed at me pityingly, as though I was the most naive creature on earth, and said with a sigh, “Son, if he can rob, he can lie.”

I often think of my mother’s words on that day. They serve as my reminder, a tickler to my conscience. Even the most sacred idea is open to scrutiny. And even as we search for truth, we all too often give credence to a lie.

Rothwax, supra note 4, at 34.

\textsuperscript{30} Judge Rothwax argues, “There are many places we can look for a cure to the out-of-control adversary system. But perhaps the best place to start is with a serious reevaluation of the role of the defense attorney.” Id. at 139. His premise is that “[s]adly, the culture that the defense lawyer inhabits today is one that says it’s okay to push the envelope, to brush against the ethical barrier and occasionally slip over.” Id. at 130. In one of his less vitriolic passages, Judge Rothwax observes that:

Given the probability that the defendant is guilty, the defense attorney knows that the defendant will win \textit{only} if counsel is successful in preventing the truth from being disclosed — or, failing that, misleading the jury once it is disclosed. So, when the defendant is guilty, the defense attorney’s role is to prevent, distort, and mislead. Id. at 141 (emphasis in original); see also id. at 135 (claiming that defendants, most of whom are guilty, are “yearning neither for an accurate reconstruction of the facts nor for an error-free trial”).
the popular press,\textsuperscript{31} it was dismissed by legal scholars and jurists as "lopsided,"\textsuperscript{32} and a "jeremiad."\textsuperscript{33}

With \textit{Virtual Justice}, Uviller takes Judge Rothwax's populist theme into the academic setting, couching in disarmingly bland prose the same radical thesis: that many of the rules of criminal procedure that have evolved through the last thirty years of constitutional adjudication hamper law enforcement excessively and should be curtailed or repealed. Despite the fact that Uviller has buffed up Judge Rothwax's arguments with some sane discussion and occasional nods to the counterargument, he ends up right where Rothwax started. \textit{The Collapse of Criminal Justice} and \textit{The Flawed Prosecution of Crime in America} pander to the same fears and exploit the same distorted perceptions. The surprise is that Uviller's sugar coated version of Rothwax's tirade is much harder to swallow.

\section{NYPD Blues: A Plea for More Police Discretion}

Uviller's major point is that the Supreme Court's readings of the Fourth, Fifth, and Sixth Amendments are not justified. According to Uviller, "the continuous struggle between effective illegality and the blunter but prouder tactics of lawful law enforcement" (p. 109) has been wrongly resolved:

Though the Constitution was certainly drafted with the common-law model in mind, the fundamental catalogue of rights and obligations that found their way into the text do not require the full adversary mode that we have engrafted onto it. The citizen can be secure against unreasonable searches and seizures with far greater scope for court-sanctioned investigations. Our ingrained notions of the limits of interrogation and the consequences of silence are not dictated by the words of the Fifth Amendment that none shall be compelled to be a witness against himself. And certainly the right to the assistance of counsel in one's defense does not necessitate the adversary circus or the lawyerly shield against the fair acquisition of evidence against the accused defendant. \textsuperscript{[pp. 309-10]}

To prove his point, Uviller examines the criminal process in the conventional arrest-to-trial sequence, using a "modest collection of tales" that are fictional but, he says, not "altogether fictitious" (p. xv) to depict "common and perplexing events in the collection of evidence and the trial of criminal cases" (p. xv). He then applies his long experience as a scholar and, more surreptitiously, as a prosecu-

\textsuperscript{31} See, e.g., Bernard Gavzer, \textit{Is Justice Possible?}, \textsc{Boston Globe}, July 26, 1996, Parade at 1, 4-6.

\textsuperscript{32} See, e.g., \textit{id.} at 6 (quoting Professor Yale Kamisar of the University of Michigan).

\textsuperscript{33} See, e.g., Sol Wachtler, \textit{Crime and Punishment}, \textsc{New Yorker}, July 15, 1996, at 72, 74 (reviewing \textit{Guilty} and other books on criminal justice, with passing reference to \textit{Virtual Justice}).
tor, to tease out of the narratives an assortment of problems that, he contends, produce a system of "virtual," rather than true, justice.\textsuperscript{34}

As a result of this choice of narrative structure, the book's tone shifts awkwardly from the Mickey Spillane diction of the "tales" to Uviller's own more ponderous analytic prose.\textsuperscript{35} Many of the fictional passages suggest a fascination with the gadgets and jargon of police work — such as crownlights (p. 29) and bullhorns (p. 243), "perps" (p. 58), "mopes," and "The Job"\textsuperscript{36} — that is especially discordant with the tone of mastery that dominates the remainder of the book. While Uviller plainly strives for diversity among his fictional characters, with male and female police officers, prosecutors, and judges, he often slips into hackneyed stereotypes of gender and

\textsuperscript{34} While acknowledging the "congruence" between the "virtual justice" produced by the system and the "true justice" for which the system strives, Uviller notes:

But I also know that there are elements in the process — systemic flaws — that tend to bend virtual justice without distorting its apparent correspondence to true justice. In places, law fails the needs of the investigators, of the lawyers, of the fact finders; at critical junctures action is improvised and adversary confrontations cast the players in roles that do not enhance the reliability of the synthesis. It is these aspects of the process on which I will focus. Here, perhaps, we may see whether the virtual justice generated by the adversary system has an acceptably close correspondence to the true justice that our collective libido demands.

P. xiv.

Uviller's conception of justice as a response to libidinous demands perhaps explains the irrationality of many of his criticisms as well as his proposed solutions.

\textsuperscript{35} I am not the first to observe that Uviller strives for authenticity by emulating the hard boiled prose of writers like Mickey Spillane. See Book Note, The Eyes of the Law, 103 Harv. L. Rev. 1390, 1392 (1990) (describing Tempered Zeal, Uviller's earlier book, as "[s]ounding more like Mickey Spillane than Clifford Geertz"). The comparison stems from Uviller's rather self-conscious use of "street" language like this:

Detective Bailey reaches over, slips the photo out of the book, and reads the information on the back. So far so good, she thinks. At least it doesn't rule him out. Not like the victim we had in here last week who described a perp as six-four, maybe five, then ID'd a shot of a mope five-eight. Or the vic last month who made a positive on a heavy hitter who was doing four-to-eight at the time the crime went down.

P. 41. In addition, like Spillane's, Uviller's fictional passages often rely upon cliché, like "the unfinished donut," p. 15, and extremely mannered diction, like "Lauren hijacked Mike's cup, took a sip of bad coffee, cold now," p. 101.

These narratives contrast abruptly with Uviller's own authoritative, and at times even patronizing, voice:

In the pages ahead, I shall conduct a short tour of this bedeviled edifice. . . . Perhaps an odd, habitual turn of the legal mind will be amusing, perhaps an unsuspected doctrinal wrinkle will raise a casual eyebrow. Harmless sport. Disappointing, perhaps, to some who seek more aggressive commentary. But it is my prime purpose merely to engage, to reveal, and to share some of the wonder I feel as I wander through these familiar premises.

Pp. xiv-xv.

\textsuperscript{36} P. 42. This fascination perhaps has its roots in Uviller's sabbatical experiences "riding" with a division of the NYPD, and documented in a previous book. See H. Richard Uviller, Tempered Zeal: A Columbia Law Professor's Year on the Streets with the New York City Police (1980). Virtual Justice does not refer to this experience.
ethnicity. All of this makes it somewhat difficult to take the serious stuff seriously.

Although it appears from the opening chapter, "Overview of the Criminal Justice System," that Virtual Justice is written for an audience of readers who have not received a legal education, much of the detail would seem to hold little interest for anyone but lawyers. Conversely, however, the book is too simplistic for most lawyers. Consequently, it occupies an intermediate zone in which it is both too sophisticated for some and too superficial for others.

In addition, many of the problems to which Uviller applies his two narrative voices are so esoteric that they merit neither the overly stylized "tales" he develops in order to frame them nor the lengthy exegeses he then supplies. For example, Uviller's first issue — the difficulty police face when seeking a warrant to search a murder scene if the premises on which the body is found are not those of the victim — can hardly be said to have a significant impact on the "prosecution of crime in America," as his title promises. He describes the issue as a "genuine legal hole" (p. 24) formed by the particularity requirement of the Fourth Amendment's warrants clause and the impossibility, in his view, of knowing in advance of

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37. In one "tale," he writes that "Katherine was swept off her feet by Manuel's legendary Latin ardor." P. 200. In another, he presents a gay character, Bruce, whose "earliest memory was the time his father had discovered a doll that Bruce had found in the attic and liked secretly to dress up and play with in his room." Pp. 271-72. Uviller appears to attribute Bruce's sexual orientation to this episode, in which his father "murder[s]" the "baby," "violently slamming its sweet bewigged head against the wall until it breaks." P. 272. Later in the narrative, Bruce's longing for his father's approval drives him to join the Marines. P. 272.

38. For example, in chapter 11, Uviller strives at length to explain the nuances of rules relating to admissibility of character and conduct evidence, and the risk that exceptions language might swallow the rule against propensity evidence.

39. See, e.g., p. 261 ("In recent years, urged by the women's movement, psychologists have studied cases of women who eventually strike back after being viciously abused by their partners over an extended period. From these clinical studies, they have crafted what is now called the 'battered-spouse syndrome.'"). In addition, as this example illustrates, Uviller often presents well-settled concepts as recent developments.

40. Uviller emphatically denies that these tales are "artificial — the sort of hypothetical puzzles that generations of law students have grappled with in classrooms, never to encounter again." P. xv. Despite this disclaimer, I think he would be hard-pressed to demonstrate that many of the tales are, as he insists, "true to life." P. xv. The Arab-American police officer working undercover to infiltrate the "Islamic Friendship Federation," who, the district attorney fears, "may be going over," p. 161, is one such unlikely tale.

41. U.S. Const. amend. IV ("[N]o warrant 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.").

Uviller attributes this "legal hole" to the decision of the Supreme Court in Mincey v. Arizona, 437 U.S. 385 (1978), in which it declined to recognize an exception to the warrant requirement for crime scene searches. Although Uviller explicates the decision in Mincey, he does so without noting that the 1978 decision was unanimous on this point, and that it refuted Uviller's position regarding crime-scene searches and, more generally, the needs of law enforcement, by restating the following fundamental principle:

Moreover, the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would
a search “what particular item of evidence might be found on the scene” (p. 24). Despite qualifications — he notes that “[i]t is . . . difficult to say how often warrants are sought for crime scene searches and with what results”42 and that “[o]nly those whose security was invaded and against whom the evidence is offered have standing to exclude it” (p. 24) — Uviller nevertheless selects that single issue to epitomize his first chapter heading, “Virtual Legality in the Field” (p. 13).

This somewhat arcane problem becomes the vehicle for Uviller to advocate a radical expansion of police power. He proposes statutory authorization for judges to issue warrants to search “the scene of a recent crime of a certain level of gravity — perhaps named crimes like homicide, rape, arson, kidnapping” and to allow for the seizure of evidence “notwithstanding the inability of the police to particularly describe in advance the evidence they are looking for or to give any specific reason to think they will find it” (pp. 24-25). This proposal sounds very much like a general warrant,43 a practice that Uviller concedes was “a primary abuse by the colonial police — one of the precipitating causes of the revolution, some say.”44 Yet, as throughout Virtual Justice, Uviller urges this result-oriented

always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person’s home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Mincey, 437 U.S. at 393 (citation omitted). Certainly, one might critique the position implicit in Mincey that no search or seizure may take place except pursuant to a warrant as lacking historical or textual support, see, e.g., Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 4 (1997) (characterizing the Mincey rule as a “per se” approach to the Fourth Amendment that is plainly contradicted by a variety of historical sources), but Uviller does not bother to do so. Instead, he simply announces that the rule should be abrogated because it impairs law enforcement.

42. Pp. 26-27. There is nothing in Virtual Justice to suggest that Uviller attempted to gather such information. Moreover, Uviller offers no estimate of the frequency of the “legal hole” created when the premises to be searched are those as to whom the particularity requirement cannot be satisfied.

43. See Wilkes v. Wood, 98 Eng. Rep. 489 (P.C. 1763) (British decision declaring general warrants unconstitutional); 2 Legal Papers of John Adams 134-44, 142 (L. Kihvin Wroth & Hiller B. Zobel eds., 1965) (explaining why writs of assistance, a kind of general warrant, were illegal, including that “A man’s house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege.”); Tracey Maclin, The Central Meaning of the Fourth Amendment, 35 WM. & MARY L. Rev. 197, 224-26 (1993) (explaining one basis of the opposition of James Otis, Jr., to general warrants — that they could be issued to a customs officer who could search all private citizens’ homes or businesses without judicial oversight or accountability for the life of the warrant).

44. P. 23. Again, reasonable minds might differ on whether it was the specter of a general warrant that produced the language of the Fourth Amendment, see generally Carol S. Steiker, Second Thoughts About First Principles, 107 Harv. L. Rev. 820, 822-24 (1994) (citing examples of debate on the historical evidence of the Fourth Amendment’s meaning), or whether, instead, the Warrant Clause was adopted not to “reassure[ ] a search target” but to “bar[ ] a target from suing after the fact,” Amar, supra note 41, at 15. But Uviller ought to give some critical context for the proposals that he offers on so fundamental a point as this.
curtailment of a core civil liberty to free law enforcement from what he views as cumbersome and unnecessary technicalities, while offering very little legal or empirical support for the change.\textsuperscript{45}

Uviller suggests that his statute ought to be defensible as a variation on an inspection warrant,\textsuperscript{46} even while confessing the critical distinction: the inspection warrant has an administrative purpose while his crime scene warrant is all about finding evidence of a crime to be used to prosecute an individual.\textsuperscript{47} His reasoning becomes increasingly sloppy once the issue is joined; as the chapter draws to a close, he pleads, "Still, it does seem reasonable, doesn't it? And reasonability, remember, is at the heart of the Fourth Amendment . . . ."\textsuperscript{48}

As the book progresses, Uviller becomes more bold and expands his suggestion from the relatively infrequent context of crime scene searches to the far broader assertion that law enforcement agencies ought to be authorized to conduct door-to-door searches for firearms under this same rubric of administrative inspections. Noting only that the statute authorizing such a power "would have to be meticulously fair and even-handed" (p. 105), he pays mere lip service to the concerns that such a radical expansion of police power provokes. Acknowledging that "[a]ggressive police patrol carries an unmistakable whiff of fascism," he then brushes this concern aside with conclusory ease: "Believing as I do, it's hard to deny that the program is compatible with basic values of our society" (p. 108). Instead, Uviller unconvincingly repeats his refrain that "the key concept in the Fourth Amendment is reasonableness . . . a flexible idea [that] should take account of the urgency of social necessity as well as the unavailability of lesser intrusions to accomplish the purpose."\textsuperscript{49}

This sequence is repeated in succeeding chapters, as Uviller catalogs a series of problems he sees in the criminal system, without

\textsuperscript{45} Uviller makes no effort, for example, to root the "crime scene" approach to searches in any source of authority, either textual or precedential. His "solution," it seems, is not so much to be applauded for its creativity as closely scrutinized for its anomaly.


\textsuperscript{47} Uviller ignores this distinction in his suggestion that \textit{Camara} supports his proposal. \textit{Compare} p. 26 ("My argument, I must confess, is not quite as neat as it appears. These inspection searches — along with their warrantless siblings, the 'inventory searches' . . . — are frequently justified by their administrative aspect, a benign purpose compared with law enforcement objectives.") \textit{with Camara}, 387 U.S. at 530 ("Since the inspector does not ask that the property owner open his doors to a search for 'evidence of criminal action' which may be used to secure the owner's criminal conviction, historic interests of 'self-protection' jointly protected by the Fourth and Fifth Amendments are said not to be involved, but only the less intense 'right to be secure from intrusion into personal privacy.'" (footnote omitted)).

\textsuperscript{48} P. 26. The remainder of the sentence quotes the Amendment in full.

\textsuperscript{49} P. 105. Uviller offers no proof that a lesser intrusion — like a warrant based on probable cause — is unavailable.
attempting to substantiate them. He does not show that these problems occur with a frequency that matters, but instead characterizes them as grave enough not only to warrant his and our attention, but also to justify significant changes in criminal procedure. He laments the "inescapable conundrum" (p. 50) that an equivocal photo identification from a book of mug shots — "I can't be sure. The guy who robbed me looked meaner, angrier, you know what I mean? But it could be him" (p. 41) — coupled with a second witness's equivocal statement that the suspect "could be one of the [people in a photo array] but I really can't say for sure" (p. 42), does not amount to probable cause to arrest an individual and compel him to appear in a lineup. The "problem" in this scenario, as Uviller sees it, is that the police do not get to arrest the person that they have determined — or, more accurately, predetermined, given that there is insufficient evidence for arrest — must have committed the crime.

Once again, the remedy is far more dangerous than the illness: Uviller recommends adoption of a "Non-testimonial Identification" amendment to the Federal Rules of Criminal Procedure, a solution he attributes to "[s]ome unsung hero" of "more than twenty years ago" (p. 51), whereby "probable cause" would be watered down to "reasonable grounds" when police seek authorization to order an individual to appear in a lineup or to provide other nontestimonial evidence such as fingerprints, blood, and urine (p. 51). Uviller does not even consider the potential impact of this enhanced police power on citizens, let alone offer any analysis of competing rights and interests. Instead, he masks the significance of the change he proposes by describing it as "[n]eat, simple, and — as far as I can see — perfectly constitutional" (p. 51).

The danger of Virtual Justice is in such glibness. Unlike Rothwax, who boldly announces his contempt for the criminal defendant and considers it a virtue that his reform proposals will have painful costs for that constituency, Uviller dissembles, presenting controversial proposals as obvious boons and exploiting the tone of the scholar to disguise his bias as wisdom.

Like his colleagues Judge Rothwax and Professor Fletcher, Uviller is also highly critical of the exclusionary rule as a remedy for Fourth and Fifth Amendment violations. In the Fourth Amend-

50. I use the term "interests" rather than "rights" to avoid the circularity of defining the contours of the Fourth Amendment "right" by reference to the standard of probable cause. More important, I think it is crucial to reject the subtle distortion implicit in the use of the term "rights" to describe the power exercised by law enforcement and other governmental authorities.

51. See Rothwax, supra note 4, passim.

52. Pp. 69-70. Uviller, like Rothwax, advocates a rule of judicial discretion rather than the automatic remedy of the exclusionary rule. Pretending to ambivalence at first, he con-
ment context, he characterizes it as a “baroque minuet” (p. 80), “that ugly old monster” (p. 86), and a rule that causes us to “suffer the anomaly of lost prosecutions of guilty criminals in order to protect people against unreasonable invasions of security” (p. 85). Yet again he offers almost nothing to support his contention. Certainly, much is available in legal literature as to the empirical evidence of the exclusionary rule’s cost, even if that evidence’s significance is debated.53 Instead, he announces in conclusory fashion that the exclusionary rule is “the prime distortion factor in criminal verdicts, the gunk that clogs the court docket” (p. 86). Would his recommendations about the rule differ, one wonders, if he were aware that in one four-year period, the Second Circuit did not affirm a single suppression order?54

II. WHAT’S GOING ON: POLICE PRACTICES IN NEW YORK CITY IN THE 1990S

Uviller’s uncritical depiction of law enforcement is particularly surprising for a number of reasons. Prior to Virtual Justice, Uviller wrote Tempered Zeal,55 an account of his experiences during a sabbatical with the New York City Police Department. Tempered Zeal not only acknowledged, but also expressed concern about, the frequency of police perjury with respect to Fourth Amendment issues such as warrants and searches. He described the “most common form of police perjury” as “the instrumental adjustment,” which he defined as “[a] slight alteration in the facts to accommodate an unwieldy constitutional constraint and obtain a just result.”56 As Uviller explained:

[C]ops may insert a little invention to fortify the probable cause upon which a fruitful search was predicated. Add a small but deft stroke to

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54. See Gerald B. Lefcourt, Responsibilities of a Criminal Defense Attorney, 30 Loy. L.A. L. Rev. 59, 64-65 (1996). As it happens, Uviller’s recommendation — more frequent use of radio hookups between officers in the field and judges and magistrates with the authority to approve a warrant application — is hardly the “godsend” or the “beautiful deliverance,” p. 85, that he congratulates himself for proposing. Predicated as it is on another unproven conclusion — that “[t]he prime reason police do not go to court before they enter secure spaces is logistical. It’s a hassle,” p. 84 — Uviller’s hyperbole only underscores the superficiality of the solution.

55. See Uviller, supra note 36.

56. Id. at 115-16 (emphasis in original).
the facts — say, a visible bulge at the waistband of a person carrying a pistol. Just enough to put some flesh on the hunch that actually induced the officer to give the man a toss; it might make all the difference. Or a police officer, understandably eager to have the jury hear the bad guy’s full and free confession, might advance slightly the moment at which the Miranda warnings were recited to satisfy the courts’ insistence that they precede the very first question in a course of interrogation. That sort of thing. Although no one admitted it to me in so many words, I think most police officers regard such alterations of events as the natural and inevitable outgrowth of artificial and unrealistic post facto judgments that release criminals.

Given these observations, it is surprising that Uviller never puts two and two together: reducing probable cause to reasonable cause, coupled with the frequent “invention” that “fortif[ies]” probable cause, means a dramatic double reduction in the standard of proof for investigatory arrests — once in the word and once in the deed. What Uviller describes as a “hunch” beefed up by an “instrumental adjustment” is, under his proposal, watered down still further. At what level do we then find ourselves: bias?

In the eight years since Tempered Zeal, the issue of perjury among police, particularly New York City’s officers, has received extraordinary scrutiny, and the evidence available to Uviller and others clearly demonstrates that the problem he not only acknowledged, but purported to justify, has only been exacerbated. The 1994 report of the Mollen Commission, charged with investigating allegations of police misconduct in New York City, presented a disturbing picture of police perjury that was so pervasive that the term “testilying” was coined to describe it. The Commission reported

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57. Id. at 116. Uviller dares to defend police perjury by distinguishing between “[p]erjury that creates artificial evidence” and thereby “distorts the data being considered by the jury,” on the one hand, and “lies that result in a more complete picture of the events on trial.” He actually applauds this latter category of perjury as “contribut[ing] to the accuracy of the verdict.” Id. at 117.


There are certainly sufficient examples in the popular press of this kind of law enforcement, from Mark Fuhrman’s braggadocio in the O.J. Simpson case to the manipulations of racism by Susan Smith and Charles Stuart. The recent controversy surrounding U.S. District Judge Baer’s suppression of evidence in a drug case in the southern district of New York stemmed in part from his express acknowledgment of what more often lurks beneath the surface of many, if not all, criminal proceedings: that people of color have qualitatively different expectations of and experiences with law enforcement. See infra notes 75-76.

on such practices as "turnover arrests,"60 "collars for dollars,"61 and other forms of systematic perjury.62 The prosecutors who work with these officers demonstrated a level of knowledge that amounts to complicity: as one anonymous Manhattan A.D.A. noted, "No one looks down on it . . . . Taking money is considered dirty, but perjury for the sake of an arrest is accepted. It's become more casual. And the civil libertarians have no effective response to it. It's almost an intractable problem."63

During this same period in which Uviller bewailed the increased burden that current rules of criminal procedure have imposed on law enforcement, the New York City Police Department was ripped apart by a succession of scandals in precincts in the Bronx,64 Manhattan,65 Brooklyn,66 and Queens,67 involving an estimated 300 officers68 who used their status as police systematically to rob, beat,
and harass citizens. The Mollen Commission described "well-or-
ganized police 'crews' terrorizing minority neighborhoods" and
noted that they were "more akin to street gangs: small, loyal, flexi-
ble, fast-moving and often hard hitting." They engaged in a prac-
tice cryptically referred to as "doing doors"—"illegally raiding
drug dens for plunder"—and routinely used "sapgloves"—lead-
lined gloves—and heavy flashlights to assault men, women, and
teenagers that they encountered during these raids.

Moreover, since the publication of Virtual Justice, New Yorkers
witnessed an episode of police brutality that was as shocking for its
cruelty as for its suggestion that at least some police officers believe
they are free to act with complete impunity. The officer charged
with shoving a wooden rod into the rectum and then the mouth of
Abner Louima is alleged to have borrowed a pair of gloves from a
colleague in the public lobby of the stationhouse, stripped Louima
from the waist down in that public lobby, and then taken him in
handcuffs to the bathroom where he committed the assault. After
the attack, the officer is alleged to have led Louima to the holding
cell with his pants around his ankles and to have then walked
through the stationhouse hallway brandishing the stick. In the pe-
riod following disclosure of the assault, many observers suggested
that Mayor Giuliani's law enforcement policies had created that cli-
imate of perceived impunity.

While Uviller did not focus his book on these extraordinary epi-
sodes of corruption, his anxiety that law enforcement is inade-
quately equipped to address the problem of crime is significantly
undermined by their existence. The anxiety, it would seem, is bet-
ter suited to the prospect of these same officers enjoying a broader
range of discretion and authority. Quite simply, it is a problem of
credibility for Uviller to have omitted all reference to these contem-
poraneous developments.

69. Corruption in Uniform: Excerpts from What the Commission Found: Loyalty over

70. Selwyn Raab, Similarities in Inquiries into Crimes by Officers, N.Y. Times, Oct. 3,
1993, at A38.

71. See Selwyn Raab, Detailing Burglars in Blue: Violent Search for Booty, N.Y. Times,
Sept. 30, 1993, at B3 (quoting one ex-officer's testimony before the Mollen Commission that
he participated in five raids per day, that he used to "tune people up," a "police word for
beating people up," that "his sergeant encouraged him and two other rookies to assault
everyone found in suspected drug-trafficking locations," and that he did not fear arrest or
dismissal because of these activities because "[w]ho's going to catch us? We're the police.
We're in charge.").


73. See Dan Barry, Charges of Brutality: The Overview: Leaders of Precinct Are Swept
Uviller also fails to address an ancillary, and perhaps more insidious, problem that arises from police abuse: judicial tolerance of these practices. The heated public controversy surrounding the decision of U.S. District Judge Baer to suppress evidence seized by New York City police officers from the automobile of an African-American woman on a Washington Heights street demonstrates how pliant even life-tenured judges can be in the face of public and political pressure about crime.\(^7\) Judge Baer initially found, based in significant part upon the officers' lack of credibility, that the police lacked a reasonable suspicion that the defendant's car was involved in criminal activity at the time of the stop.\(^5\) He subsequently reversed himself, credited the testimony of the police, and rejected that of the defendant.\(^6\) Additional examples of judicial capitulation to anticrime rhetoric and prosecutorial pressures have surfaced nationwide.\(^7\) Uviller does not address the impact

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\(^7\) See Linda Greenhouse, *Rehnquist Joins Fray on Rulings, Defending Judicial Independence*, N.Y. Times, Apr. 10, 1996, at A1 (reporting that presidential candidate Bob Dole had suggested during a campaign appearance that Judge Baer should be impeached for his ruling and that Second Circuit Chief Judge Newman characterized the criticism as an "extraordinary intimidation").

\(^7\) See United States v. Bayless, 913 F. Supp. 232, 239-40 (S.D.N.Y. 1996) (finding that one officer's testimony "is at best suspect" and that he could not "keep from finding [the officer's] story incredible" and also expressing concern that the other officer involved was never called to testify although "presumably available to corroborate this officer's gossamer"). In addition, Judge Baer observed that in light of the findings of the Mollen Commission that permitted "residents in this neighborhood . . . to regard police officers as corrupt, abusive and violent," "had the men [alleged to have run at the sight of the officers] not run when the cops began to stare at them, it would have been unusual." 913 F. Supp. at 242.

\(^7\) See United States v. Bayless, 921 F. Supp. 211, 216 (S.D.N.Y. 1996), vacating 913 F. Supp. 232 (S.D.N.Y. 1996) (holding that defendant's "story is now less convincing" and that "with more evidence and upon review, the Government's version is more credible"). Indeed, Judge Baer did not merely reverse himself but concluded his opinion with a somewhat cloying apology and self-flagellation: "[u]nfortunately, the hyperbole (dicta) in my initial decision not only obscured the true focus of my analysis, but regretfully may have demeaned the law-abiding men and women who make Washington Heights their home and the vast majority of the dedicated men and women in blue who patrol the streets of our great City." 921 F. Supp. at 217. The passage stands in stark contrast to his earlier sense of being "shatter[ed]" by the lack of security of people of color in their own communities, 913 F. Supp. at 240, and his acid observation that "the same United States Attorney's Office which brought this prosecution enjoyed more success in their prosecution of a corrupt police officer of an anti-crime unit operating in this very neighborhood," 913 F. Supp. at 242.

\(^7\) See, e.g., Commonwealth v. O'Brien, 673 N.E.2d 552 (Mass. 1996) (reversing a trial court determination that a juvenile charged with homicide was amenable to rehabilitation and should therefore be tried in juvenile rather than adult trial court); Judy Rakowsky, *Judge Dismissed from O'Brien Case*, BOSTON GLOBE, Mar. 4, 1997, at A1 (reporting that supreme judicial court, exercising "power of general superintendence," removed trial judge after reversal to "eliminate controversies and unnecessary issues in further proceedings and in any appeal"). Carol Steiker has noted that even if the judicial will to address flagrant police misconduct existed, an array of procedural doctrines has either emerged or been greatly expanded that has had the effect of precluding any relief. See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466, 2468-69 (1996).
that reduced standards for police intervention might have when conjoined with an increasingly superficial judicial review of police conduct.

III. EMPATHY AND CONTEMPT: THE ROLE OF DEFENSE COUNSEL

Using similarly specious arguments to advocate radical reforms, Uviller shows disgust and frustration with a number of other well-established rules of criminal procedure, such as the right to counsel78 and the right against self-incrimination.79 But he reserves his

78. Uviller's subheading for his chapter on this part of the criminal process says it all: "Dramatic, Deceitful, and Dilatory Assistance." P. 132. Here he is arm-in-arm with Judge Rothwax, see Rothwax, supra note 4, at 79-82 (arguing that "interrogation and trial have disparate goals" and that "straightforward questioning in a nonhostile, nonthreatening environment . . . [is] the very essence of respect"), advocating a limit on the assistance of counsel that would keep counsel out of the investigatory phase of all criminal proceedings and allow them a role only at the trial itself:

As we have seen, critical stages may occur outside the courtroom — at lineup identifications, for example, and interviews with police or their covert agents at which some incriminating admission may be elicited. But the core of the counsel clause (the true meaning of the provision, some — like me — would argue) is the promise of professional assistance at the most critical stage: courtroom proceedings.

Pp. 136-37; see also H. Richard Uviller, Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint, 87 COLUM. L. REV. 1137, 1138 (1987) (characterizing the right to counsel as "the villain of the piece" and arguing that the right to counsel has been misapplied as "an artificial device of cloture on government efforts to obtain cognitive evidence").

Uviller ignores — or purposely avoids accounting for — the basic principle of trial advocacy holding that preparation in large part determines one's likelihood of success at trial. Assistance in the courtroom only is too little too late. But see id. at 1169 (arguing that "[m]ost" of the "critical" stages for purposes of the assistance of counsel "occur after the case has crossed the courtroom threshold, of course, but some may arise during the investigatory or preparatory stages").

In addition, Uviller does not account for the fact that the prosecution largely controls the time of indictment and hence the time that the right to counsel attaches. See, e.g., United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988) (declining to construe no-contact rule of ethics as limited to the moment of indictment, because "[t]he timing of an indictment's return lies substantially within the control of the prosecutor. . . . [who] could manipulate grand jury proceedings to avoid its encumbrances").

79. Pp. 123-31. Again, Uviller here is in perfect harmony with Rothwax, see Rothwax, supra note 4, at 79 (criticizing Miranda's reasoning as "result[ing] in a system where we deny people the opportunity to take responsibility for their criminal acts"), arguing, as did the judge, that "[t]he social imperative that has been with us at least since people began to write about social imperatives is that, along with their taxes, citizens owe the government a duty of disclosure." P. 111. This position amounts to little more than an expression of frustration with the drafters of the Fifth Amendment, which cannot more plainly state an abrogation of this duty in the context of criminal proceedings. Cf. Rothwax, supra note 4, at 230-31 ("What would be so wrong with a system that requested a defendant to testify in a court of law, on the record, and in the presence of his lawyers and the judge, after a showing of his probable guilt had been demonstrated by the evidence?!")

Uviller reveals his prosecutorial bias quite plainly at the chapter's end when, in response to the proposition that either "[a]ll but spontaneous confessions could be banned . . . [o]r . . . the moment of official accusation could be advanced to the point of arrest and the attached right of counsel decreed unwaivable except in the presence of counsel," he states, "[l]ooking boldly at the prospect of a law enforcement landscape stripped utterly of confession evidence, we cannot suppress a shudder." P. 130. He prophesies that if confessions are to be
particular contempt for criminal defense attorneys, presumptuously imagining a typical such lawyer and her attitudes toward her work and her clients in a manner that demonstrates a profound unfamiliarity with those who do this work. He proudly declares that he has actually dared to take the question to several acquaintances in the defense bar. "How can you do it?" I asked. "Case after case, year after year. Putting your own integrity on the line for a clientele that is, in the overwhelming proportion, guilty and ungrateful?" Most lawyers do not quarrel with the premise — at least those who know me well enough to be candid.

I do quarrel with the premise, and I am not alone.

suppressed based upon Fifth or Sixth Amendment grounds, "[p]ublic anger would be so intense, [he] can see the return of the lynch mob." P. 130.

80. Pp. 280-82. Uviller's fictional public defender turned judge, Karen Meadows, follows a trite trajectory from "[y]outhful idealism" that "inclined her to serve those she thought of as "victims of the system,"" to the discovery: that something was happening to her attitude. And she didn't like it. It started when she noticed a new, urgent tone in her voice as she told her friends, wryly, as she had so many times before, "I just wish I could have a client I like once in a while." It was not that she had never had a client who just might be innocent. Even some of the guilty ones had stories that could break your heart. But for the most part, her clients were indifferent, suspicious, unrepentant, and ungrateful. And, let's face it, they were in the main the predators of her community. Every now and then as Karen stood to challenge, discredit, even humiliate a victim of her client's callous aggression, she asked herself, Why am I doing this? There must be a better way to have fun while earning a living. Pp. 280-81.

81. P. 151. As if this were not bad enough, Uviller then offers his own answer, underscoring his contempt with such trivializing justifications as "It's fun," a category of rationale that he describes as "All my life, I've wanted to sass a cop and get away with it. Now I do that almost every day — and get paid for it!" P. 151.

Uviller's tirade against defense counsel spans several chapters and contains such observed truths as:
The defense lawyer, born to the role, is a person who is more concerned with appearances and perceptions than with underlying facts; who puts greater reliance in "personality" (including his or her own) than in knowledge; who has little concern for general public disapprobation despite a high ego investment.

P. 153.

Perhaps as bad as these distortions are the arrogance and condescension that accompany them. Uviller assures his readers that "I'm sorry, but I believe that in a calmer frame of mind even [defense attorneys] will recognize the traits in themselves and colleagues." P. 153. He observes, helpfully, that "[p]erhaps for this law professor, at least, the work of the defense Bar in the adversary system would seem less reprehensible if so many did not feel called upon, as a matter of diligence, to lie for their clients." P. 155.

Uviller attributes ego and "personality" only to defense counsel, and, worse, makes only defense counsel responsible for the perjury of their witnesses. For him, prosecutors can do no wrong. See infra note 82 (comparing ethical roles of prosecutor and defense counsel).

82. Like Rothwax, Uviller also embraces a remarkably lopsided vision of the respective roles of prosecution and defense. He believes, inexplicably, that for prosecutors, "public responsibility . . . is considerably broader than control. The prosecutor can do little, for example, about police brutality or perjury." P. 158. For defense counsel, conversely, Uviller proposes that "[s]urely, the lawyer should do more to discourage perjury" than raise a "rather mild objection" to his client's story. P. 232. Rothwax similarly limited his criticism to defense attorneys based upon his view that "[i]n a court of law, only the prosecution is assigned the task of seeking the truth." ROThWAX, supra note 4, at 129. Why? Every lawyer is responsible to the same extent for his or her own witnesses, and the rules of professional
The experience of those who practice as criminal defense attorneys is far different from the cartoon that Uviller offers as incontrovertible truth. Lawyers for those charged with crimes who face the full weight of the state's power suffer not from a contempt for those they represent, but rather from an overabundance of care that is continually challenged by the many biases latent in the criminal justice system. It is an excess of empathy, not the detachment that Uviller supposes.

Charles Ogletree writes about this characteristic of the public defender's relationship to his or her clients:

My relationships with clients were rarely limited to the provision of conventional legal services. I did not draw rigid lines between my professional practice and my private life. My relationship with my clients approximated a true friendship. I did for my clients all that I would do for a friend. I took phone calls at all hours, helped clients find jobs, and even interceded in domestic conflicts. I attended my conduct in this area make no distinction that is contingent upon the lawyer's role at trial. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1995) (prohibiting "[a] lawyer" from offering evidence "that the lawyer knows to be false").

Uviller further absolves the prosecution of responsibility for witness testimony by arguing that "if (as is sometimes the case) the prosecutor simply does not know whether the identification her witness swears to is accurate . . . the prosecutor is entitled to bring the facts out fairly and fully and let the jury decide." Pp. 192-93. Uviller's views on the respective roles of prosecution and defense echo those of Justice White in his partial dissent in United States v. Wade, 388 U.S. 218, 256-57 (1967), which is so lopsided as now to be deemed reversible error if read to a jury. See, e.g., Bardonner v. State, 587 N.E.2d 1353, 1358-61 (Ind. Ct. App. 1992) (reading Wade language during voir dire "not only negates the defendant's presumption of innocence, but also runs afoul of [the Indiana Rules of Professional Conduct]"). Compare p. 232 ("[T]he prosecutor is obliged to refuse to call witnesses believed to be false and to dismiss charges against a defendant believed to be innocent. Defense counsel is not charged with any public responsibility to the truth.") with Wade, 388 U.S. at 256 (White, J., dissenting) ("Law enforcement officers . . . must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of [a] crime . . . . But defense counsel has no comparable obligation to ascertain or present the truth."). Why is there no comparable entitlement on the part of defense counsel to be uncertain, and to present to the factfinder evidence that he or she does not "know" to be false? See infra text accompanying notes 83-86.

83. See, e.g., Michael J. Lightfoot, On a Level Playing Field, 30 Loy. L.A. L. Rev. 69, 73, 78 (1996) (criticizing the "one-sidedness" of the criminal system and noting that "young [criminal defense] lawyers learn after a short while that, for many clients, there is little they can do to achieve results that seem to be objectively rational and fair. The sense of hopelessness can become overwhelming to the point that it compromises the lawyer's dignity"); Lefcourt, supra note 54, at 61-62 ("Representing an innocent client is an easy situation for the public to support. In practice it is the hardest because of the overwhelming fear of loss.").

Even James S. Kunen, author of "How Can You Defend Those People?: The Making of a Criminal Lawyer and a harsh critic of his criminal experiences, described feelings of empathy during his experience at the Public Defender Service in Washington, D.C.:

Nor can you afford to feel a lot of sympathy for the clients . . . . Some of them earn the courthouse epithet "dirtball," but most of them are likable enough when you're trying to help them, and you'd have to be a moral moron not to see that they are victims, too. It's just that too much sympathy for the clients gets in the way of doing your job. You have to sell them on the advantages of doing five years instead of ten. You have to watch the iron doors closing behind them all the time.

clients' weddings and their funerals. When clients were sent to prison, I maintained contact with their families. Because I viewed my clients as friends, I did not merely feel justified in doing all I could for them; I felt a strong desire to do so.\footnote{Ogletree, Beyond Justifications: Seeking Motivations to Sustain Public Defenders, 106 Harv. L. Rev. 1239, 1272 (1993). Ogletree surveys the literature in this area and notes that defense attorneys experience “burnout” most often because of excessive caseloads, see id. at 1268, n.112 (citing NATIONAL INST. OF JUSTICE, ASSESSING CRIMINAL JUSTICE NEEDS 4 (1984)), as a result of which they must “appear regularly in court without adequate preparation or sufficient time to meet with clients,” id. (citing Stewart O’Brien et al., The Criminal Lawyer: The Defendant’s Perspective, 5 Am. J. Crim. L. 283, 301 (1977)). This source of burnout evinces an empathy with clients, rather than a disdain of them.}

In the real world of crime victims, as opposed to the tabloid world of true crime stories and America’s Most Wanted, the capacity for empathy is surprisingly strong and seems to be inversely proportional to our distance from the object.\footnote{Richard Delgado, Rodrigo’s Eleventh Chronicle: Empathy and False Empathy, 84 Cal. L. Rev. 61, 76-79 (1996) (discussing norm theory, which holds that “reaction to a [ ] person in distress varies according to the normalcy or abnormalcy of his or her plight in [another’s] eyes”). Delgado uses norm theory to explain why “[w]e find it easy to empathize with the victims of crime . . . particularly if they are middle-class people like us.” Id. at 89. As a second example, in shame, culture, and American criminal law, 89 Mich. L. Rev. 1880, 1932 (1991) (noting that “most punishment now tends to take place out of public view . . . [especially] in densely populated urban settings, where anonymity and disinterest in others’ lives often are governing rules of public interpersonal relations. Accordingly, the public can distance itself psychologically from the process and results of punishment”). This is certainly true in capital cases, in which the object of defense counsel is to “humanize” the defendant and thereby enhance jury empathy, a phenomenon well-illustrated by the respective defenses of, and sentences imposed upon, Timothy McVeigh and Terry Nichols, co-conspirators in the Oklahoma City bombing. It also accounts for the recent success of so-called abuse excuse defenses, in which a jury relieves an offender of criminal liability on grounds that the community outside the courtroom finds suspect or contrived. See generally ALAN M. DERSHOWITZ, THE ABUSE EXCUSE (1994).}

Not surprisingly, juries presented with the “stories” of actual people respond, as do their counsel, with empathy and compassion, not with contempt and detachment.\footnote{Toni M. Massaro, Shame, Culture, and American Criminal Law, 89 Mich. L. Rev. 1880, 1932 (1991) (noting that “most punishment now tends to take place out of public view . . . [especially] in densely populated urban settings, where anonymity and disinterest in others’ lives often are governing rules of public interpersonal relations. Accordingly, the public can distance itself psychologically from the process and results of punishment”). This is certainly true in capital cases, in which the object of defense counsel is to “humanize” the defendant and thereby enhance jury empathy, a phenomenon well-illustrated by the respective defenses of, and sentences imposed upon, Timothy McVeigh and Terry Nichols, co-conspirators in the Oklahoma City bombing. It also accounts for the recent success of so-called abuse excuse defenses, in which a jury relieves an offender of criminal liability on grounds that the community outside the courtroom finds suspect or contrived. See generally ALAN M. DERSHOWITZ, THE ABUSE EXCUSE (1994).}

It is in this respect that Uviller’s rhetoric begins to echo the crime rhetoric of the city from which he writes, accepting as truths things that are either distorted or in doubt, and then constructing elaborate and unnecessary remedies on their backs. The fundamental characteristic that unites Uviller and his cohorts with the police — and against existing rules of criminal procedure, criminal defendants, and their lawyers — is a want of empathy. Like Travis Bickle,\footnote{See generally TAXI DRIVER, supra note 1.} they rage against a tidal wave of crime that exists in the imagination, fueled by the media and by the isolation from others that is part of modern urban life.

It seems reasonable to ask that before we embrace changes that impair fundamental rights, there should be some demonstration that the flaws are real and have costs. If, instead, the flaws are imagined or the costs, if any, are minimal, then the only justification
for the reforms that Uviller advocates is the bare political preference for a different allocation of power between government and individual. In that case, give me Judge Rothwax, a wolf in wolf’s clothing, rather than the sheepishness of Virtual Justice.
Seamus Heaney’s moving words remind us that we live in an extraordinary time when, at sites of grave injustice ranging from the halls of government of Argentina and South Africa to the killing fields of Bosnia and Rwanda, “The longed-for tidal wave/Of justice can rise up,/And hope and history rhyme.”

Writers have attempted, in very different ways, to come to terms with the swelling of the tide of justice. For example, the philosopher Alan Rosenbaum, in a recent book about the prosecution of Nazi war criminals, argues that virtually every person implicated in the Nazis’ genocidal assault on Europe’s Jews should be prosecuted to the full extent of the law. His uncompromising position is “that not bringing suspected Nazi criminals to trial is flagrantly immoral and a serious assault on the basic values of civilization and on the conception of a democratic, rights-based society.” For Rosenbaum, moral factors always trump “rebuttable considerations like time and resource expenditures.”

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1. SEAMUS HEANEY, THE CURE AT TROY 77-78 (1990). This excerpt appears on the masthead of the journal Double Take.
3. Id. at xi.
4. Id. at 1.
Retroactive justice's dismissal of the practical stands in striking contrast to the approach taken by Carlos Santiago Nino's5 Radical Evil on Trial. The late Professor Nino's work is, in essence, a painstaking assessment of the practicality of retroactive justice.6 Nino traces the pragmatic pursuit of justice in Argentina and a number of other nations as each struggled to replace an oppressive regime with a popularly chosen successor. In doing so, he provides insight into the nature and likely prospects of contemporary efforts to secure justice around the world.

I. The Story of Argentina

Carlos Nino was deeply involved in Argentina's transformation, in the middle 1980s, from a military dictatorship to a democracy. He was a personal adviser to President Raúl Alfonsín, who oversaw the country's transition. Because of Nino's personal involvement with events and personal relations with some of the actors, passages of his book read more like a memoir than a scholarly assessment. But Nino succeeds in making his retelling of Argentina's story more than the reminiscences of a witness to history. In his hands, Argentina's recent struggles become a didactic experience from which powerful lessons may be derived about the practical prospects for retroactive justice.

In March 1976, the military launched a coup to oust Isabel Perón from the Argentine presidency. Once in power the military junta curtailed civil liberties, dissolved Congress, and replaced independent judges, government officials, and university personnel with ideologically vetted substitutes. Harsh antisubversive legislation was adopted, and a reign of terror was initiated. Alleged subversives and other opponents of the regime were abducted, tortured, and killed—all without the slightest justification or explanation. Many of those who disappeared were never heard from again, and those who were released eventually told of the most brutal mistreatment. Jewish detainees were frequently the target of anti-Semitic atrocities. Eventually, the military claimed that these grievous human rights abuses were justified by the exigencies of Argentina's "dirty war" against terrorism (p. 56). Even the military, however, conceded that the targets of its torture and murder campaign were seldom terrorists but rather "individuals considered

5. Professor Nino "held a chair in philosophy of law at the University of Buenos Aires and, starting in 1986, was a regular visiting professor at the Yale Law School." P. 207. He died suddenly and tragically in 1993 while the manuscript of this volume was still unfinished. Final preparation of the book was overseen by Professor Owen Fiss.

6. By "retroactive justice," Nino means legal proceedings that were not begun, or even possible, at the time the crimes were committed but have been made feasible by the fall of a repressive regime and its replacement by a democratic successor. P. viii.
threatening to the consolidation of the military’s political, social, and economic power” (p. 58).

As time passed, Argentine resistance to the military’s abuses grew. A number of human rights groups spearheaded this resistance, including Servicio de Paz y Justicia, whose leader, Adolfo Pérez Esquivel, received the Nobel Peace Prize after two years of detention (p. 59). Weekly demonstrations by the Madres de Plaza de Mayo underscored, for the world, the fact that thousands had disappeared. From about 1979 on, outside pressure, most particularly from the United States, began to focus substantial attention on military abuses and generate calls for redress and reform (p. 60).

By 1980, the military’s grip on Argentina was beginning to slip, due in part to internal and international pressure, but also reflecting the impact of a substantial economic downturn (p. 60). In December 1981, the military replaced its junta leader, General Eduardo Viola, with General Leopoldo Galtieri. The military’s position continued to deteriorate, and massive antigovernment demonstrations took place in the early days of 1982. In what seemed a desperate bid for public support, the military launched an invasion of the Falkland Islands, a small chain of British-controlled islands off the Argentine Coast. The British responded to this military adventure by sending an armada to retake the Islands. The Argentine army was overwhelmed and surrendered on June 14, 1982. This military disgrace led to Galtieri’s fall and further eroded the military government’s standing (p. 61).

By 1983, it had become clear that civilian replacement of the military regime was only a matter of time. The military attempted to insulate its members from liability by declaring that all acts undertaken during the dirty war were committed pursuant to “superior commands” (p. 62) and were, therefore, perfectly lawful as “due obedience” (p. 64). Civilian leaders unanimously rejected this claim, and the Radical Party’s candidate, Alfonsín, promised that, if elected, his government would put on trial those who were responsible for gross abuses of human rights. Faced with an enormous pool of potential defendants, Alfonsín labored to identify those who should be targeted for prosecution. He chose to focus on the planners of repression and those who acted beyond the scope of orders, rather than those who had simply abducted and tortured in the regime’s name. He made this distinction because he was convinced that otherwise there would be far too many defendants. In Alfonsín’s view, this likely would provoke the military into armed resistance. In September 1983, the military promulgated a “self amnesty” law (p. 64). Alfonsín rejected this gambit out of hand, while the other leading candidate, Peronist Italo Luder, seemed to equivocate about its legitimacy. Many in Argentina — including, per-
haps, the military — believed that the Peronists, who had never lost an open election, would take control of the government, thereby foreclosing the prospect of prosecution. Alfonsín, however, surprised the pundits by garnering fifty-two percent of the vote — aided, it would appear, by his strong stand regarding prosecutions.

Once in office, Alfonsín set his government about the task of discovering the fate of all those who had disappeared. He also sought to determine who ought to be tried for human rights abuses. His three fundamental principles were:

1. Both state and subversive terrorism should be punished.
2. There must be limits on those held responsible, for it would be impossible effectively to pursue all those who had committed crimes.
3. The trials should be limited to a finite period during which public enthusiasm for such a program remained high. [p. 67]

Alfonsín seemed to be searching for a realistic prosecutorial agenda that would appear evenhanded — hence the focus on subversives as well as the state — and would balance the demands of justice with the realities of limited judicial resources, the military’s violent opposition to widespread punishment, and a predictable decline in public enthusiasm if trials dragged on for too long. While struggling to fix this agenda, Alfonsín also set about reforming the judiciary by removing those judges compromised by adherence to the dubious legal initiatives of the military regime (p. 72).

Political and judicial realities led Alfonsín to curtail the reach and focus of his campaign for retroactive prosecution even further. As a means of garnering military cooperation and re-establishing the armed forces’ credibility, Alfonsín arranged to give military tribunals the first opportunity to consider charges against military defendants. These courts had the power to narrow the reach of prosecution substantially. According to Nino, Alfonsín was more concerned with the future than the past — with establishing the rule of law and deterring future violations of human rights. He conceived this as a necessary orientation in a still-divided Argentina facing an ongoing threat of military insurrection. Alfonsín did not want to bury the past, but he was not wedded to seeking criminal convictions of all those involved in past wrongdoing. As Nino summarizes, “While the pursuit of truth would be unrestricted, the punishment would be limited, based on deterrent rather than retributive considerations and on the need to incorporate every sector in the democratic process” (p. 68). This formula reflects the Argentine effort to forge a compromise that would punish grave misdeeds but leave society intact. This approach outraged human rights organizations, which bitterly attacked the government. Their protests had the ironic effect of drawing them into a bizarre alliance with the military, which also vigorously challenged Alfonsín’s approach.
Recognizing that a limited number of prosecutions could not de-
deliver a full accounting, Alfonsín determined to serve the cause of
truth — or full disclosure — by creating what, in recent days, has
come to be known as a truth commission.7 The task of this execu-
tive branch commission, referred to as CONADEP (the acronym of
its Spanish title), was to review fully the questions of dirty-war-era
torture and abduction. Its report was to be made within 180 days.
It was authorized to hear complaints from victims, receive volun-
tary testimony, and demand written statements from public officials
(p. 72). Human rights organizations initially refused to contribute
representatives to CONADEP, and the military viewed it with open
hostility. Yet the commission moved forward briskly. Complaints
poured in, and CONADEP examined thousands of charges. It also
inspected 340 clandestine detention centers and struggled tirelessly
to secure the identification of the remains of murder victims (p. 79).
Eventually, rights organizations began to cooperate, as they ob-
served the seriousness and scope of CONADEP’s work. At the end
of its allotted time, CONADEP issued a massive report detailing
the workings of the military government’s torture and disappear-
ance machinery. This report, entitled Nunca Más (Never Again),
was a powerful indictment of the old regime. CONADEP also
presented the courts with 1086 cases for judicial review (p. 80).

While things moved forward rapidly for CONADEP, the mili-
tary tribunals stalled. Their delays in considering the cases referred
to them and their hostility to retroactive justice eventually led to
the removal of the atrocity charges from military jurisdiction. In
the meantime, armed forces unrest grew and threats of revolt
multiplied.

Alfonsín renewed his efforts to narrow the ambit of prosecution.
The civilian courts, however, would not cooperate. They asserted
jurisdiction over a broad range of the crimes that the prior regime
had committed. In April 1985, while disputes raged about a
number of other cases, the “big trial” (p. 82) of the leaders of the
military junta began. This proceeding was fraught with symbolism
as the new judiciary sat in judgment of the leaders of the once all-
powerful armed forces. When, at the start of the proceedings,
counsel for one of the defendants behaved disrespectfully, his disci-
plinary arrest was immediately ordered. The message concerning
the shift in power could not have been clearer.

The judges presiding at the big trial heard an extraordinary ar-
ray of witnesses — 832 in all. These included military and civilian

7. See generally Priscilla B. Hayner, Fifteen Truth Commissions — 1974 to 1994: A Com-
parative Study, 16 HUM. RTS. Q. 597 (1994); Stephan Landsman, Alternative Responses to
Serious Human Rights Abuses: Of Prosecution and Truth Commissions, LAW & CONTEMP.
PROBS., Autumn 1996, at 81.
leaders, as well as torture victims, forensic scientists — who had examined the remains of victims — and a host of others (p. 84). One troubling aspect of the trial was its seeming disregard of most evidentiary restrictions — especially those concerning relevance and hearsay. The absence of evidentiary constraints meant that there was virtually no way to keep the case focused on the defendants in the dock. Instead, the court was inundated with questionable evidence touching on all aspects of the military’s dirty war. Hearsay was in constant use. The court was provided with lengthy secondhand recitations about the work of a number of investigative bodies, including the United Nations Human Rights Commission, CONADEP, and even the U.S. Department of State. In addition, the court heard a great deal of even more troubling hearsay, like the testimony of French Admiral Antoine Sanguinetti who recounted a meeting with Gen. José Montes [not a defendant at the trial], a foreign minister of the military government, during which he had inquired about the French nuns who had disappeared; Montes replied that it was strange to evince concern about those nuns when a manager of the Peugeot factory had been assassinated by the guerrillas.

This testimony intimated the callousness of all members of the military leadership and associated the defendants — whether fairly or not — with the disappearance and murder of a group of innocent nuns. In the end, a powerful case was made against the defendants, but a great deal of extraneous material was injected into the lengthy proceedings. The army reacted violently to the case. The trial was branded — not altogether unjustly — a “political show” (p. 84), and increasingly strident threats were voiced against Alfonsín’s government. The defendants and their counsel complained that CONADEP had framed a case to convict them unjustly — a charge that was hard to refute because of the court’s reliance on a summary of CONADEP’s work rather than on firsthand evidence. Outside the courtroom, a series of bombings took place and tensions grew.

Concerned because of military unrest, in October 1985, Alfonsín arranged an ex parte meeting with the judges presiding over the big trial. At that meeting the President pressed the judges to embrace publicly the principle of due obedience and thereby excuse those below the rank of military leader from retroactive liability (pp. 86-87). The judges rejected this proposal, and in December 1985, found five of the nine big-trial defendants guilty of a host of criminal charges. In March 1986, Alfonsín again met secretly with the judges to urge them to accept the due obedience idea (p. 90). When this gambit failed, the President began to explore other means of cutting off retroactive prosecution. One of these was a proposed executive instruction to military prosecutors that pending
cases against military leaders be concluded speedily and that cases against subordinates be halted immediately with acquittals. This proposal provoked the resignation of Judge Jorge Torlasco of the federal court of appeals and a chorus of protests from human rights organizations (p. 91). It was withdrawn, but not before it had the boomerang effect of stiffening judicial opposition to compromise. All during this period, military resistance and violence escalated, eventually calling into question the survival of the government.

Faced with what he perceived to be irreconcilable pressures threatening to tear Argentina apart, Alfonsín proposed and secured the passage of a “‘full stop’ law (punto final)” (p. 92) that imposed a sixty-day cutoff date on the filing of retroactive charges. This law was enacted in December 1986, despite substantial popular opposition. It too boomeranged, resulting in the hasty filing of hundreds of new criminal charges to beat the legislatively imposed filing deadline. During Easter week in 1987, the simmering military unrest came to a boil. Military officers in a number of localities voiced open defiance of the government. Despite Alfonsín's courageous handling of the immediate crisis — he went unarmed to a rebel base and talked its commander into surrendering — conditions continued to deteriorate (pp. 98-99). The political difficulties of the government were compounded by a sharp economic decline. Alfonsín struggled desperately to rein in the prosecutions. To this end, in June 1987, he convinced the Congress to adopt a due obedience law that protected virtually all soldiers below the rank of commander. As a matter of political strategy, this solution came too late. In September 1987, Alfonsín was voted out of office and replaced by Peronist Carlos Menem. With hyperinflation running rampant, Menem was invited to assume the presidency early. He did so and almost immediately issued pardons that freed many of the military leaders most responsible for the dirty war (p. 103). The following year Menem also pardoned the junta leaders convicted in the big trial.

The lessons to be drawn from the Argentine experience are many, some of them encouraging, but others sobering in the extreme. Democracy did triumph by sweeping away a repressive military regime. At the heart of that triumph was the will of the Argentine people to elect a president — Alfonsín — who promised to prosecute those who had grossly violated human rights. Democracy's victory was enhanced by the work of courageous political leaders, judges, and prosecutors who pressed cases against torturers and murderers despite profound risks. Perhaps as significant was the vindication of the principle of full public disclosure of the truth about the crimes of the past. By means of a truth commission — CONADEP — Argentineans explored and then publicized all that had happened during the dirty war. CONADEP was an unalloyed
success. It worked speedily, uncovered the true history of a tragic
time, and made that history public. It did so without provoking a
violent military response. In a dangerously riven society, CONADEP
began the process of healing through full disclosure. Its success,
and the success of other truth commissions in countries like
Chile,8 has not gone unremarked. In South Africa, Nelson
Mandela’s government turned to a truth commission to expose and
explore the crimes of the apartheid era.9 This choice speaks
volumes about the perceived power of truth as a tool for social
reconstruction.

The story is much less encouraging when the efficacy of criminal
prosecutions is considered. The criminal process worked too slowly
and too elaborately. It raised hopes that it could not satisfy and
fears that it allowed to fester. Argentina’s big trial was a real vic-
tory for the rule of law. But it came at enormous cost. The concept
of unbridled prosecution eventually became a stumbling block. The
832-witness proceeding swept virtually every sort of charge and
every imaginable kind of proof into the public arena. For the mili-
tary, this meant that every soldier had become a potential target for
prosecution. For the victims, this seemed to signal an opportunity
not just for social justice but for personal vindication. For human
rights organizations, this appeared to be the beginning of a process
to review every wrong done by the armed forces.

Argentina simply could not afford such a broad-ranging process.
It had neither the judicial resources nor the political will. Although
Alfonsín recognized this, he could never effectively channel the
proceedings. Moreover, the big trial invited both friend and foe
alike to assume that personalized criminal proceedings would be-
come the norm. Alfonsín tried, through the full stop and due obe-
dience laws, to impose prudential limits. In each case, his effort was
seen as too little, too late. In both instances, the government’s
strategy boomeranged: first fueling a hectic rush to get cases filed,
and then a cynicism that paved the way for mass pardons. The gov-
ernment’s dilemma led it to dubious ex parte negotiations with the
judiciary and indecisiveness that alienated friends and encouraged
foes. The trial mechanism and retroactive prosecution are critically
valuable tools in reasserting the power of the law, but they are no
panacea. Such tools must be used thoughtfully so as not to exhaust
the political and social resources of a fledgling democracy. This is
not an invitation to abandon trials, but rather a call for their judi-

37-38; see also José Zalaquett, Balancing Ethical Imperatives and Political Constraints: The
Dilemma of New Democracies Confronting Past Human Rights Violations, 43 Hastings L.J.

18, 1996, at 86.
cious use in the service of the broader aim of establishing a decent and durable society.

II. A Taxonomy of Issues Affecting the Feasibility of Retroactive Trials

Nino does not rely exclusively on the Argentine experience in attempting to assess the practical prospects of mounting retroactive trials to punish those responsible for massive human rights violations. Rather, he reviews events in more than a score of countries, ranging from post-1945 Germany to 1980s Chile. He concludes that while every nation's situation is unique, there are certain positive factors that facilitate trials as well as certain negative ones that pull in the opposite direction. He lists the following as positive factors:

- coercive nature of the process of transition
- legal discontinuities
- heinousness of the abuses
- absolute and relative quantity of the abuses
- social identification with the victims of the abuses
- sharpness of the trials
- leadership [p. 126]

Nino argues that the virtually ideal setting for retroactive justice was post-World War II Germany. By force of arms, the victorious allies had smashed the Nazi regime completely. The Germans had no means of mounting effective opposition to trials. All the Nazi-era laws and rules that might have been used to justify barbarous and criminal conduct had been swept away. Indeed, the Nazis' overarching racist dogma had been dealt a death blow. The heinous and vast nature of the Holocaust was becoming apparent to all those willing to make inquiry. Although the German people did not embrace Jewish and other victims, the victims were an object of genuine — if belated — humanitarian concern amongst those who prosecuted. The trials, while far from sharply focused, did not become absolutely unwieldy. The first prosecution concentrated, at least nominally, on twenty-four named individuals and moved at a pace that yielded a decision within ten months. Successive trials moved more swiftly still. Towering leaders, particularly the Nuremberg chief prosecutor, Supreme Court Justice Robert Jackson, drove the process toward a decisive and morally justified goal. Yet, despite all this, the prosecutorial process ran out of energy long before all those involved in awful criminal acts had been identified or prosecuted. Even the so-called de-Nazification program faltered

as the political realities of the Cold War made prosecution less attractive and German reconstruction more important.11

Few cases will have as many positive factors as Nuremberg. Indeed, many prosecutions will be inhibited by a range of problems. Nino identifies a series of such negative factors, including:

- consensual nature of the transition
- time span between deeds and trials
- social identification with perpetrators of abuses
- diffusion of responsibility
- cohesion of the perpetrators [p. 127]

If Germany was a virtually ideal setting for retroactive justice, Spain in the 1970s was its antithesis. Throughout that decade, Spain moved at an accelerating pace toward democracy. The death of the Spanish dictator Francisco Franco in 1975 opened the way for full-scale reform. Rather than prosecute Franco-era officials for the suffering they inflicted on Spaniards from 1939 onward, Spanish legislators, in October 1977, “enacted a general amnesty of all politically motivated crimes” (p. 17). The next year a constitution was adopted that firmly closed the door on retroactive justice. Nino suggests that the consensual nature of the Spanish transition — accomplished without force and through incremental steps toward democracy — undermined social support for trials (p. 17). Moreover, the most serious human rights violations committed by Franco’s government had occurred during and shortly after the civil war, which ended in 1939. There was, over time, a blurring of memory as well as an amelioration of divisions between pro- and anti-Franco citizens. Many had lived, worked, and even prospered under the slowly reforming Spanish dictatorship. In the end, there was, according to Nino, a strong social consensus to “let bygones be bygones” (p. 17).

Most shifts from oppressive regimes to democracy fall somewhere between these two extremes. In each case, Nino argues, there will be factors pushing toward and away from criminal prosecution. Nino’s taxonomy suggests that large numbers of prosecutions will seldom be either feasible or popular. The key goal of most states following the fall of an oppressive regime is not trials, but the establishment of a durable democracy. Retroactive prosecution may be an important step in that process, but it is not an end in itself. It must be harmonized with an array of other concerns. While the absolute shattering of the old regime may open the way for broad-based legal proceedings, even here practical limits on the scope and duration of trials will eventually be reached. Increasingly, therefore, truth-commission inquiry has been substituted for

retroactive prosecutions. The goal has not necessarily been to punish past criminal conduct, but rather to publicize it. In such instances, knowledge, rather than retribution, has been judged to be the fundamental building block of the future.

III. LESSONS ABOUT RETROACTIVE TRIALS THEMSELVES

Despite significant impediments, the world, over the past half century, has had significant experience with retroactive prosecution. Although it appears that the Nuremberg experience has created an enduring expectation that grave human rights abuses will be tried elaborately, the Argentine experience suggests that such trials are not without pitfalls. Nino remarks:

Even when the perpetrators of human rights violations are prosecuted, widespread criticism typically surfaces. Some people are disappointed at the contrast between the expectations of justice and the limited results of the strenuous proceedings. Others feel guilty about the omissions, recognizing that the ensuing power relations were responsible for the trials' shape. Still others feel great hypocrisy when those integrally involved in the abusive regime escape punishment, even retaining important public positions, or when those who were silent in the past suddenly become vociferous advocates of retroactive justice. Some grieve for victims of human rights abuses who were not sufficiently compensated, rehabilitated, or acknowledged. Others feel resentful when the victorious foreigners form tribunals that are biased, or when those foreigners press for rigid standards of justice which their own societies do not follow and which ignore the difficulties of nascent democracy. Still others realize that the popular impact of the trials is rather superficial and fleeting. [pp. 39-40]

Nino's initial observation in this passage underscores the problem of selectivity that the decision to prosecute poses. It is inevitable that a far smaller number will be prosecuted than are actually responsible. The difficulties of gathering proof and mounting trials necessitate narrowing the field of potential defendants. Often, as at the first Nuremberg trial, the defendants are chosen so as to serve a symbolic as well as an individual role in the criminal proceedings; they are tried not only for their own deeds but as proxies for all those who acted similarly. This means that others who may be equally guilty will not be tried. Such an arrangement is obviously open to criticism, but difficult to avoid so long as there are inadequate means to prosecute everyone.

The symbolic overtones of many prosecutorial decisions in retroactive justice cases carry other serious implications for the trials that are mounted. First, a mixed prosecutorial agenda — pursuing both actual and symbolic guilt — will often result in greater reliance on evidence regarding the character of the defendant than otherwise might be the case. Nino explains that this perhaps sur-
prising phenomenon arises out of a desire for retribution, heightened by the representative nature of the defendant and amplified by the felt need to redress all the wrongs perpetrated. As Nino sees it, retribution is only legitimate if deserved by the offender. "[T]he desert of the offender is gauged by his character — i.e., the kind of person he is" (p. 140). Hence, character evidence becomes a critical part of the proof despite many evidentiary systems' strong reservations about such material because of its prejudicial impact. Indeed, concerns about prejudice are most powerful when the crime charged is vast and the defendant is viewed as a representative of a group of malefactors.

A second result of a mixed-agenda prosecution is that when opportunities to bear witness are limited — because of a paucity of trials — and when the proofs presented are designed to serve symbolic as well as defendant-specific purposes, traditional notions of relevance likely will be stretched. Those with particularly poignant stories will be allowed to testify even though what they have to say has little direct bearing on the charges. It may be impossible for humane prosecutors to deny incredibly deserving victims an opportunity to confront their oppressors and address the world regarding their suffering. Moreover, the prosecutors often will either face a surfeit of proof or conceive their role as requiring an expansive presentation. In either case, they will find it exceedingly difficult to winnow their evidence.

A related evidentiary consequence of the mixed-objective prosecution is heightened use of hearsay materials. While many judicial systems impose no bar on hearsay, most view it as an inferior and often troubling form of proof. Yet it is likely to be particularly heavily relied upon in retroactive justice proceedings. Because expanded notions of relevance make the words and deeds of many more actors germane at trial, past writings and summaries of previous inquiries are necessary to allow the introduction of more proof without an endless queue of witnesses. Further, as events of importance to the trial slip further and further into the past, the dulling of

12. The American position is succinctly set forth in Fed. R. Evid. 404(a): "Evidence of a person's character or a trait of character is not [generally] admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ."

13. Such forces seem to have been at work in Argentina's big trial, in which an astounding 832 witnesses were called. Many told harrowing stories of torture and loss that were only tangentially related to the defendants in the dock. Even Nino's brief description of the trial makes it abundantly clear that relevance was viewed in the most elastic terms despite the impact of such an approach on the length and sharpness of focus of the trial.

memory and effects of natural attrition make it ever more likely that hearsay will be needed as a substitute for living recollection.¹⁵

Experience suggests trials are likely to be more effective if they are speedy and sharply focused. While the big trial had substantial value to Argentina, its length and lack of focus afforded the military an opportunity to mount increasingly effective resistance. Nino concludes that “[l]ong proceedings tend to undermine the success of trials, since public support, so vital for the success of the enterprise, may fade with the passing of time, as happened in Argentina after 1986” (pp. 124-25). He is similarly critical of “unwieldy” proceedings (p. 125). The tendency toward symbolism, lengthy witness lists, marginal evidentiary presentations, and hearsay all interfere with expeditious and narrowly focused proceedings, thereby jeopardizing the very cause they seek to vindicate.

IV. RETROACTIVE TRIALS IN OTHER CONTEXTS

Nino’s taxonomy presumes the recent replacement of an oppressive regime by a democratic successor. As Nino recognizes, this is not the only context in which retroactive trials may arise. They may occur when a particularly odious malefactor is seized long after the conclusion of his criminal career, as was the case with Adolf Eichmann. Alternatively, trials may be mounted at the behest of the outraged world community in response to massive human rights violations, as in the cases of both Bosnia¹⁶ and Rwanda.¹⁷ In these cases, the dynamics of prosecution may differ somewhat from those outlined above.

A number of the positive and negative factors Nino identifies as affecting prosecution will not apply with nearly the same force in a setting like the Eichmann trial or a United Nations Tribunal proceeding. In such cases, no transition to democracy colors proceedings or generates pressure for celerity. The applicable law, rather than serving as a barrier to prosecution, is likely specifically to allow the court to prosecute the alleged acts, as was the situation in the Eichmann trial,¹⁸ or may have even been enacted to found the tribunal.¹⁹ In neither case is a past legal regime likely to create impediments to prosecution. Political constituencies or populations sympathetic to the defendant are far less likely to have any signifi-

¹⁵. For example, Argentina’s big trial relied on vast quantities of hearsay from agencies like the United Nations Commission on Human Rights and CONADEP as well as a number of individuals. Pp. 83-84.
¹⁹. See supra notes 16-17.
cant impact on the society or international body mounting the case. Yet a number of the forces identified by Nino are still likely to be at work and to influence proceedings. In the Eichmann case, for example, awareness of the grievousness of the Holocaust had grown with time, and this played a major role in dictating the course of the prosecution. Similarly, there would never have been an Eichmann trial were it not for the intense identification of the prosecuting state with the victims of Nazi genocide.

The factors of growing awareness of the crime and identification with its victims heightened the symbolic importance of the Eichmann trial for Israelis. Based on Nino's analysis, this would lead one to predict that Israel would mount a sprawling trial, seek to tell the story of the entire Holocaust, disregard evidentiary restrictions, and focus a great deal of attention on Eichmann's character. The Eichmann proceedings bear out these predictions. The Holocaust story and Eichmann's character became central focuses of the case. The prosecution called 121 witnesses who described in detail the entirety of Nazi genocide — whether it had anything to do with Eichmann or not. The government also introduced a mountain of documents, including the forty-two-volume record of the Nuremberg proceedings, the 3500 pages of the defendant's pretrial interrogation, and more than a half-dozen books. The documentary material was laced with all sorts of hearsay, and the witnesses stretched notions of relevance to the breaking point. Perhaps the best example of the court's attitude toward character evidence was its admission of a 1946 statement by Dieter Wisliceny, who, at the moment of his statement, was trying unsuccessfully to barter information for his life:

I considered Eichmann's character and personality important factors in carrying out measures against the Jews. He was personally a cowardly man who went to great pains to protect himself from responsibility. He never made a move without approval from higher authority and was extremely careful to keep files and records establishing the responsibility of Himmler, Heydrich and later Kaltenbrunner.

21. Id. at 350-54.
22. Id.
23. 9 Trial of Adolf Eichmann Record of Proceedings in the District Court of Jerusalem (Trust for the Publication of the Proceedings of the Eichmann Trial in cooperation with the Israel State Archives and Yad Vashem trans., 1992) [hereinafter TRIAL OF ADOLF EICHMANN] (Vol. 9 provides a microfiche of all exhibits submitted at trial.).
24. See Gideon Hausner, Justice in Jerusalem 322-408 (1966), for a detailed description of the Eichmann proceedings. Hausner was the chief Israeli prosecutor in the Eichmann case.
Eichmann was very cynical in his attitude toward the Jewish Question. He gave no indication of any human feeling toward these people. He was not immoral, he was amoral and completely ice-cold in his attitude. He said to me on the occasion of our last meeting in February 1945, at which time we were discussing our fates upon losing the War: 'I will laugh when I jump into the grave because of the feeling that I have killed 5,000,000 Jews. That gives me great satisfaction and gratification.'

Not only were such character analyses regularly admitted, they were zealously pursued by the court. At one point in the proceedings Judge Halevi — one of the members of the three-judge Jerusalem District Court trial panel — asked a key witness, Pastor Heinrich Grüber:

Dr. Grüber, you said that as a man of religion, a clergyman, you are, and always were, interested in the motivation of the people who were involved, and therefore you took notice of the character of the Accused, Eichmann. You said that you encountered the glacial manner of a man who is like a block of ice or marble and with a deep hatred. You said that, at first, you could not understand such a man at all — that is until you experienced the concentration camp. Is this behaviour not like the behaviour of Hitler and his henchmen which he used as an example? Conviction and punishment had everything to do with being like Hitler. Hence, character proofs of the sort Anglo-American-Israeli evidence rules generally frowned upon were energetically sought.

In the end, the problems of duration and focus so prominent in Argentina's big trial also affected the Eichmann prosecution. The trial lasted four months, and the decision took another four months. The trend toward lengthy prosecutions was exacerbated later, when Israel undertook its second Nazi war-crimes trial — that of John Demjanjuk in 1987. That trial lasted more than a year, became preoccupied with questions of the defendant's character, and founded on misidentification. These Israeli trials, like the ones Nino considers, have a great deal to teach us about the difficulties of retroactive prosecution. As the world moves forward with tribunals for Bosnia and Rwanda and debates the structure of a permanent international court, the lessons to be learned from past experience are especially valuable and deserving of attention.

25. 1 TRIAL OF ADOLF EICHMANN, supra note 23, at 201.
26. 2 TRIAL OF ADOLF EICHMANN, supra note 23, at 750.
V. ARE RETROACTIVE TRIALS WORTH THE EFFORT AND RISK?

Having reviewed the practical difficulties, Nino eventually turns his attention to the critical question of whether retroactive trials are worth the risk. He begins his examination with a discussion of the work of several scholars who have argued that prosecution is a mistake in settings like Argentina's — and perhaps more generally. Samuel Huntington suggests that when political costs significantly outweigh moral gains, trials should be avoided altogether. According to Huntington, even in the best of circumstances only the very highest leaders of a repressive regime should be tried — and these few only if the cases can be concluded in one year or less. Otherwise, the new government is courting political unrest and eventual blanket pardons.

Nino also considers the arguments of Bruce Ackerman, who, in a volume entitled *The Future of Liberal Revolution*, argues that postrevolutionary democracies often possess substantial moral capital but limited organizational resources. To get bogged down in a series of difficult retroactive trials is to risk squandering what little organizational resources exist, while frittering away moral capital. Ackerman, therefore, argues:

> It is simple to squander moral capital in an ineffective effort to right past wrongs — creating martyrs and fostering political alienation, rather than contributing to a genuine sense of vindication. Moral capital is better spent in educating the population in the limits of the law. There can be no hope of comprehensively correcting the wrongs done over a generation or more. A few crude, bureaucratically feasible reforms will do more justice, and prove less divisive, than a quixotic quest after the mirage of corrective justice.

Nino rejects these provocative assessments of the value of retroactive proceedings. He concedes that trials pose immense risks but sees prosecutions — at least in limited numbers — as "great occasions for social deliberation and for collective examination of the moral values underlying public institutions" (p. 131). His sense is that they can provide constitutive moments fundamental to the construction of a democratic tradition. In this view, trials are less important as a means of adjudicating individual guilt than as declarations of social values and concerns. They teach about the scope and nature of atrocities, showcase the rule of law, reduce the

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30. See id.
31. See id.
33. Id. at 72-73.
demand for private vengeance, and orchestrate public deliberations about the benefits of democracy (pp. 146-47).

I find myself troubled by the extent of Nino’s emphasis on the symbolic value of trials. They are, and should be treated as, a vital means of establishing the proposition that criminals can expect to be called before the seat of justice. We may not, as a practical matter, be able fully to achieve this end, but our goal ought to be to signal such an intention. While the political symbolism of trials is important, its value may be overstated. Using trials as political or social symbols tends to expand them, to call forth more evidence, more witnesses, more focus on character, and more hearsay. This may amplify public discourse — at least momentarily — but it may also set an untoward precedent. Such an approach intimates that all human rights trials should be conducted this way and is likely to produce slow, expensive, and overtly political proceedings. It would seem to me to be better to encourage the development of fairer, faster, simpler, more efficient trials. The thousands in Rwandan jails need to be tried, but the paraphernalia of Nuremberg is unlikely to be able to do the job. Societies, and even the world at large, may need some modicum of symbolism, but we should not lose sight of individualized justice and its essential tools, including rules of evidence, respect for prudential limits based on the concept of relevance, and a commitment to convict only the right person for the right offense. We should be mindful that justice is dispensed on a continuing basis and that our goal ought to be the creation of a truly workable system that can achieve the rule of law worldwide.

CONCLUSION

A great deal may be learned from Nino’s work.34 First, reality counts. In thinking about retroactive justice it is important to consider carefully the scope and focus of the prosecutions to be mounted. Sprawling, unfocused cases that pursue goals other than

34. Unfortunately, it must be noted that Nino’s book is seriously marred by editorial failure to identify and correct glaring lapses in spelling, grammar, and printing. Perhaps the lapses may be explained by Nino’s untimely death during the editorial process. Still, there seems little excuse for the Yale University Press’s editors not catching the misspelling of the word “planned” as “planed” (p. ix), for describing the vast number of Stalin’s victims as “unaccountable” rather than innumerable (p. 21), for using the word “then” instead of “them” (p. 136), and for dropping what appears to be at least one whole line of text (p. 161). This list of errors is far from exhaustive. It should be noted that there are also substantive errors in the text. On page 83, for example, “Erik [sic] Stover” is described as “the director of the American Science Association.” In reality Eric Stover was Staff Officer for the Committee on Scientific Freedom and Responsibility of the American Association for the Advancement of Science. See THE BREAKING OF BODIES AND MINDS: TORTURE, PSYCHIATRIC ABUSE, AND THE HEALTH PROFESSIONS at xiii (Eric Stover & Elena O. Nightingale eds., 1985). Surely the job can be done better. A book with so many important things to say deserves better editing and proofreading.
the conviction of a particular defendant for a specified crime are likely to generate serious justice-system problems. If not adequately addressed, these problems may defeat the prosecutorial effort. Second, alternatives to trials such as truth commissions may sometimes serve the interests of society more effectively than trials. Finally, if trials are to take place, they should be fast, simple, clearly focused, and sensitive to questions about the quality of the evidence. All these points need to be kept in mind as the world inches toward the monumental step of fashioning an international criminal court.
If "the color line," (in W.E.B. Du Bois's 1903 phrase and prophecy) was to be the twentieth century's greatest challenge for the domestic life and public policy of the United States, the law has had much to do with drawing its shape. No surprise, this. By now, legal theorists accept that law does not advance in preordained fashion, immune from the sway of political interest, belief systems and social structure. Still, it is hard to exaggerate how powerfully the law has shaped the life chances of Americans of African heritage, for good or ill, and in ways that we scarcely think of today.

The act of interracial marrying, for example, does not today evoke visions of criminality, although it once did. Thirty-nine states — including states in the North and West — had at one time passed laws forbidding intermarriage between persons of different race. Many of these laws were still in effect following World War II. If a black man had married a white woman in Virginia in 1966 the marriage would have been void ab initio, and they would each have been guilty of a felony. Loving v. Virginia, the 1967 case that freed interracial couples to marry, is only a footnote in Randall Kennedy's Race, Crime and the Law, but that is understandable.

The anti-miscegenation laws arose out of racial theories asserting that the children of "mixed" marriages would be defective. In one respect, these laws were often breached in practice. Black women were taken or raped regularly by white men who were rarely, if ever, punished (p. 35). Such children were sired in uncounted numbers, and then denoted as "Negro." The laws criminalizing intermarriage thus delegitimatized the offspring of relations between white men and black women so that they could not
inherit their father’s property. In another respect, the laws were rigorously enforced to prevent black men from having consensual sex with white women under any circumstances, including marriage. These laws implied that no rational, adult, white woman would agree to have sex with a black man. Any breaking of the sex-color line taboo between a black man and a white woman could be — and in the peculiar logic of the deep South should be — considered the moral equivalent of rape, even if blessed by the sacrament of marriage.

In the context of such racial theorizing, accusations of rape against black men made by white women were rarely disbelieved. Such accusations were likely to draw the unbridled viciousness of white vigilantes, who remained unpunished for the crimes they committed while carrying out lynchings — which often included whipping, torturing, burning, and eventually hanging the victim — the “strange fruit” of Lillian Smith’s acclaimed novel. Southern court records show that when a black man was accused of murdering a white man, he was usually not lynched, but was given a trial and, if found guilty, capitally punished. The accusation of rape, by contrast, was more likely to evoke the hot-blooded savagery of a lynching.

The institutions of southern justice — police and courts — typically ignored the crimes committed by those participating in the lynching. Southern blacks passed around stories, which became legends, about sex, terror, and the meaninglessness of the official legal order. Lynchings maintained the caste superiority of whites and the bloody etiquette of cross-racial sex, and it undermined any trust Americans of African descent might have had in the legal order. “Nothing has more nourished dreams of racial revenge,” Randall Kennedy, a former law clerk to Justice Thurgood Marshall and a Professor at Harvard Law School, writes, “than the knowledge that buried in American history are scores of black victims of lynching whose murderers, though known, escaped punishment” (p. 49).

No Race-Based Law Enforcement

This ignominious history of legal theory and practice is a necessary preamble to any understanding of race and crime in America today. For this reason, one has to wonder whether America is now ready for the message throughout Randall Kennedy’s recent book Race, Crime, and the Law — that in enforcing the criminal laws, the courts and the police should never base their judgments and actions on race.

Kennedy's position is scarcely that of a reflexive radical on the complex and polarizing issue of contemporary race and crime. He discusses and deplores how African Americans are doubly victimized by crime and argues that "the principal injury suffered by African Americans in relation to criminal matters is not overenforcement but underenforcement of the laws." Randall Kennedy, like Jesse Jackson, recognizes that disproportionate black criminality leads to understandable fears among potential victims, whether black or white. And like his mentor, Justice Marshall, he does not excuse "thuggery" when perpetrated by blacks. Kennedy's fair-mindedness concerning race and crime is further illustrated when, in discussing the now-mythic beating of Rodney King, a black victim of white police, Kennedy points out that the case was more complicated than is generally acknowledged by those familiar only with the portion of the videotape shown on television. At the Simi Valley trial, defense attorneys focussed the jury's attention on King's behavior leading to the beating. He was, after all, drunk, driving at high speed, and resisting arrest. Some use of escalated force was probably justified against him, although not the fifty-six powerful blows that were actually inflicted. At the Simi Valley trial, Kennedy reminds us, defense attorneys were able to point to subtleties that clouded the issue of whether the police harbored racist intent.

Kennedy unfolds his thesis - that the courts and the police should never base their judgments and actions on race - in discussions of five major issues: (1) the use of race as an indicator of suspiciousness; (2) the use of race-based peremptory challenges; (3)

7. P. 19. Homicide victimization rates for black males and females continue to be higher than for other segments of the population. Black males were 8 to 9 times more likely than white males to have committed a homicide during 1996; most of these homicides were intraracial. In 1996, about 9 out of every 10 murders involved victims and offenders of the same race when the race of the offender was known. See James Alan Fox, Trends in Juvenile Violence: 1997 Update (November 1997) (available at <http://www.ojp.usdoj.gov/bjs/abstract/tjrfox.htm>). Thus, as overall crime rates decline, so does crime committed by and against blacks.

the death penalty; (4) race-based jury nullification; and (5) race-based disparity in punishment.

The Propriety of Race as an Indication of Suspicousness

Kennedy devotes a significant portion of his book to a related issue, but one more subtle than police brutality. "By too easily permitting the police to use race as an indicia of suspiciousness," he writes, "courts also derogate from the idea that individuals should be judged on the basis of their own, particular conduct and not on the basis — not even partly on the basis — of racial generalizations" (p. 157). He asserts that it is never appropriate for police to use color as a proxy for criminality. Kennedy does, however, distinguish between cases where police act on the basis of a detailed description as opposed to "the use of racial categories as a probabilistic sorting device . . . to demarcate groups of persons who, because of their race, are viewed as more risky than other persons" (p. 137 n.*).

He recognizes that race can signal heightened criminality, just as it can indicate other "sociological facts," for instance, greater risk of early mortality, fewer employment opportunities, lower income and substandard housing. But such "sociological facts" do not, he says, "mean that the legal system ought to permit police to engage routinely in racial discrimination" (p. 145).

Kennedy points to a number of state and federal cases where courts have permitted police to stop and question someone who is "out of place": in a white neighborhood, as part of a drug courier profile, or in border checkpoints to subject the driver to questioning or search.8 Kennedy deplores the legal doctrines permitting police to equate blackness with increased risk of criminality because of the distrust, anger and discord they generate.

What are the probabilities of black violence? "It is beyond foolishness to regard American violence as solely, or mainly, or even distinctively a black problem," write Franklin Zimring and Gordon Hawkins.9 In part, they say, this is because American blacks tend to reside in places where social conditions precipitate the greatest violence by all races and partly because tendencies to lethal violence seem to be endemic to the United States.10 Nevertheless, in statistics generated by the Bureau of Justice Statistics in connection


10. See id.
with the President’s Initiative on Race we find that crime is disproportionately a black problem. Although most victims of violent crime are white (seventy-five percent in 1995), blacks are victimized at higher rates than whites. Blacks have higher arrest rates for violent crime than other segments of the population, although most persons (fifty-four percent) arrested for violent crime in 1995 were white. Moreover, despite recent declines, both homicide victimization and commission rates continue to be higher for blacks than for other segments of the population. At each age, black males are about eight to nine times more likely than white males to have committed a homicide during 1996.

If that is so, it raises a troublesome question: Is it necessarily wrong for police to be color conscious? We rely on police to be sensitive to subtle cues in their visual world. In my observations of police in the early 1960’s, I developed the concept of the “symbolic assailant,” that is, “persons who use gesture, language, and attire that the policeman has come to recognize as a prelude to violence.” More generally, police who are patrolling an area are supposed to develop a conception of the normal. They are supposed to understand who belongs there and which buildings generally have lights on in the darkest hours of the early morning. They are supposed to notice an older man parked in front of an elementary school. Is he a grandfather picking up a grandchild or a sexual predator? Kennedy would argue that such observations are legitimate. But suppose a police officer sees two black teenagers walking in a white neighborhood at two o’clock in the morning? In a society where the residential color line has so often been drawn, should we ask police to ignore the race of the teenagers? And if we did, would they?

Even if courts were to forbid police from noticing race, can courts actually affect police conduct in this delicate area? Will police simply not list race when it actually was a factor in stopping and questioning someone who fits a profile or appears suspicious to the police even if legal doctrine says they may not? Consider the following case. A police detective sees two men, Chilton and Terry, “casing” a jewelry store. Lawyers familiar with the landmark 1968 case of Terry v. Ohio know the rest of the story. The officer questions the men, decides that a crime is afoot, proceeds to pat them down, discovers guns and arrests them, along with a third man.

12. Id.
Detective Martin McFadden testifies that he had been patrolling in plainclothes at two-thirty in the afternoon, in an area of downtown Cleveland that he had been patrolling for thirty years. He says he saw something odd about these men. "Now, in this case when I looked over they didn't look right to me at the time."\(^\text{15}\)

The Warren court, while understanding that McFadden had less than probable cause to conduct his search, deferred to the practical needs of policing and permitted the limited pat-down search of Chilton and Terry and the seizure of their weapons, a major doctrinal shift in the law governing when police can lawfully stop and frisk suspects. Not mentioned in the Supreme Court decision is that the suspects were in fact black teenagers, as the N.A.A.C.P. Legal Defense Fund brief\(^\text{16}\) pointed out at the time. But was McFadden necessarily a racist? After all, Terry and Chilton were behaving suspiciously, they turned out to be armed and evidently were about to commit a crime. Yet is it credible that McFadden took no notice of their skin color but simply their behavior as part of what made them not "look right" to him at the time? More troubling, is it possible for a police officer not to factor skin color into his or her perceptions of not "looking right" in a society where skin color is so salient?

These are unsettling questions, especially for those like Kennedy — and me — who would prefer to erase skin color as a legitimate indicator of anything. As normative aspirations go, Kennedy's desire to eliminate race as an indicator of suspiciousness is commendable. It is a standard to which we and the courts should aspire. But I expect that in the real world of social and color stratification, disproportionate black criminality, and racism, it is inevitable that police will continue to use race as an indicator, as McFadden must surely have done. And like McFadden, especially if courts say that police cannot use race as an indicator, they won't report that they did, and will testify that what they saw was solely odd behavior.

**Race and the Jury**

Kennedy's insistence that skin color be irrelevant in the processing of those accused of crime extends as well to jury selection. Not until 1986 did the Supreme Court hold that the Equal Protection Clause prohibits prosecutors from using peremptory challenges to exclude blacks from juries. Since then it has outlawed racially-based peremptory challenges for the defense as well\(^\text{17}\). Judges can

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15. Terry, 392 U.S. at 5.
exercise more authority over attorneys in a courtroom than they can over police on the street. Kennedy is skeptical that courts can actually prevent prosecutors or defense attorneys from using peremptory challenges to shape the racial composition of the jury. Like Justice Marshall, he favors eliminating these challenges altogether, arguing that it is probably the only way to restrain attorneys who use race as a criterion in jury selection (p. 229).

**The Death Penalty**

Other components of the criminal justice system are more amenable to doctrinal authority. The Supreme Court could, if it chose, abolish the death penalty, but the present conservative court is not about to do so. Kennedy is masterful in describing the doctrinal ziggs and zags of death penalty jurisprudence, and offers an especially careful and knowledgeable analysis of the statistical data on race and execution.

In the most recent major Supreme Court case, *McCleskey v. Kemp*, the defense introduced a study showing that when victims were white in Georgia, perpetrators were four times more likely to be condemned to death than when victims were black. The Court conceded that the system was skewed against blacks who murdered whites, and against black victims, but held that the question was whether officials had discriminated against McCleskey in this case, not systemically. The Court ruled that they had not. As Kennedy recognizes, it would be a gruesome kind of affirmative action that sought to reduce racial discrepancies in capital punishment by "leveling up" and executing more blacks who murder black victims (p. 344).

Kennedy's discussion of racial fairness in the administration of the death penalty is careful, knowledgeable and nuanced, but his own position on the larger question — support or opposition to the death penalty — is relegated to a footnote (p. 345 n.*). I thought this a mistake, since what he says makes much sense, and deserves the kind of careful elaboration he gives to the question of racial fairness. Kennedy doesn't regard capital punishment as "unconstitutional per se," but opposes it partly because he fears mistakes and partly because he deplores "the lethal, collective, bureaucratic anger that the state displays when it puts a person to death" (p. 345).

But something else is hinted at in the footnote, a change of heart from fervent abolitionist to mild opponent. Kennedy writes that when he clerked for Justice Marshall he was forced into "[c]onstantly reading about the horrible crimes perpetrated by murderers sentenced to death" (p. 345). Evidently, the brutality of the

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murders and the pain of the victims cooled his abolitionist fervor. It is not easy to develop a purely rational position on capital punishment, although Justice Blackmun's argument — that the death penalty cannot be administered fairly — comes closest.

**Jury Nullification**

Punishment is altogether a difficult issue, especially when one can predict that a particular race or class will be disproportionately represented in the punishment apparatus. Some African-American legal scholars, notably Paul Butler in the *Yale Law Journal*, have advocated that black jurors nullify the evidence in cases where the black defendants are charged with what he describes as "nonviolent, *malum prohibitum* offenses, including victimless crimes like narcotics offenses."¹⁹

Kennedy will have none of this. Agreeing that African Americans have often been treated unjustly in the system of criminal justice, he rebuts Butler point by point, arguing that Butler bases his position on a one-dimensional vision. Yes, Kennedy acknowledges, the prosecution of the Scottsboro boys²⁰ was "horrible, [and] racially motivated," but both state and federal authorities intervened "in an extraordinary fashion" ultimately preventing their execution (p. 300). Similarly, Rodney King's victimization was later followed by the imprisonment of the perpetrators of the brutality after a federal civil rights prosecution. That aside, Kennedy avers, jury nullification will scarcely advance the cause of broad social reform that Butler advocates. Those who engage in nullification will have to say that they ignored the evidence for a larger cause, and few jurors are willing to do that. The jurors in the O.J. Simpson case, for example, did not admit to nullification of the evidence although one of the black members of the jury reportedly stated after the verdict, "We've got to protect our own" (p. 310 n.†).

**Drug Penalties**

Nevertheless, major scholars have argued that the criminal justice system, particularly the Draconian sentences given to black drug offenders, are needlessly and unfairly harsh.²¹ Part of the difficulty may arise from our lack of a traditional moral sense about the dangers of drug use and sale. We commonly share an aversion to murder, armed robbery and burglary, and regard these as serious

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²⁰. See *Weems v. Alabama*, 141 So. 215 (Ala. 1932) for the Scottsboro Boys' appeal to the Alabama Supreme Court for their rape conviction. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Supreme Court held that the defendants had been denied effective assistance of counsel.

crimes deserving punishment. Moreover, one doesn't have to be a law professor steeped in penal codes to understand — and approve — that intentional murder deserves the highest punishment the law can inflict, with armed robbery and burglary following in an ordinal sequence.

Our intuitions with respect to drug penalties are much less clear. What is the just desert for selling a few marihuana cigarettes? How about five or five hundred grams of cocaine? Should sale of crack be penalized differentially? Criminologists, including yours truly, have written and testified against the mammoth penalties for sale and use of drugs spurred by the war on drugs, and especially against its Draconian consequences for black youth who sell small amounts on the street.\footnote{22. No one has been more critical or effective than Michael Tonry. \textit{See id.}}

The most extreme example of a law discriminating against African-American males is the federal law which penalizes those who sell 500 grams of cocaine powder, an amount larger than what most street dealers possess, with a minimum of five years imprisonment. Yet a person selling five grams of crack cocaine, a relatively trifling amount, is also subject to a five-year minimum penalty.\footnote{23. \textit{See U.S. Sentencing Guidelines Manual} § 2D1.1 (1995) (discussing the 100:1 rule).} The color line is drawn sharply here. In 1993, the Bureau of Justice Statistics issued a report showing that the average sentence served by black prisoners in Federal prison (seventy-one months) was forty-one percent longer than the average served by whites (fifty months), while in the early 1980s the average time served by blacks was comparable to that of whites.\footnote{24. \textit{Douglas C. McDonald \& Kenneth E. Carlson}, U.S. Dept. of Justice, \textit{Sentencing in the Federal Courts: Does Race Matter?} 38, 42 tbl.3.4 (1993).} This did not happen because federal judges had turned into racists. The overriding reason was the 100:1 rule in the federal sentencing statute enacted by Congress in 1986, along with stiffer mandatory minimums for violent and gun crimes.\footnote{25. \textit{See, e.g.}, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 § 6371 (1988).}

This is not to say there is no difference between crack and powder cocaine; crack cocaine is powder cocaine dissolved in water, with baking soda added, then heated, then dried into hard, smokable pellets. In effect, if someone has cocaine, with little knowledge or effort they can easily create crack. Street samples of crack, for example, range from ten percent to forty percent cocaine by weight. Although cocaine and crack are not identical, they are not so different pharmacologically as to justify vast differences in punishment. So the structure of the current guidelines is equivalent, if eggs were...
illegal, to punishing the possession of omelets at 100 times the possession of raw eggs.

Two other big differences distinguish powder from crack cocaine. Powder cocaine is more likely to be sold in larger, more expensive amounts behind tightly closed doors. It is consequently harder to catch those who sell it than those who sell crack, sold mostly in crack houses or apartments known to neighbors and the police, or in the streets. Powder cocaine is the drug of the affluent, while crack is the drug of the poor. And because it is sold more openly, it is more threatening to community safety and cohesion. It is this feature of crack that has led many African-American politicians, and Randall Kennedy, to be more sympathetic to the distinction in penalties. "Surely," Kennedy writes, "it would be just and sensible for a government to punish more severely a person knowingly distributing a poison in a low-priced (say five-dollar) container as opposed to a high-priced (say fifty-dollar) container even if the poison in the two containers was otherwise identical" (p. 383).

But John P. Morgan and Lynne Zimmer, who carefully examined the evidence on the supposedly different effects of crack and powder cocaine, conclude that data from the National Institute of Drug Abuse show "that relatively few cocaine users actually become 'dependent' — whatever their route of administration — but that smoking cocaine by itself does not increase markedly the likelihood of dependence." They recognize that smoking cocaine produces a shorter and more intense high than nasal insufflation of cocaine in powder form. They argue further that crack has been made available to those parts of the population who are most vulnerable to the abuse of drugs.

But why should we legislate more severe punishment for persons selling the five-dollar containers to low-income street buyers if we learned that the sellers were themselves young, black, and poor, while the more affluent fifty-dollar sellers could afford to deal behind closed doors where they can cut up the powder into five-dollar containers to be sold to the street sellers? Why should we punish retailers more than wholesalers? After all, we demand capital punishment for large-scale cocaine traffickers. Moreover, one could argue, as Tonry does, that "the architects of the War on Drugs should be held morally accountable for the havoc they have wrought among disadvantaged members of minority groups." 27

27. Tonry, supra note 21, at 104.
At the conclusion of the book, in the very last paragraph, Kennedy backs off. He says he doesn't endorse the crack-powder differential. "Even if these policies are misguided," he concludes, "being mistaken is different from being racist, and the difference is one that greatly matters" (p. 386). Does Kennedy mean to suggest that we should censure only the explicit attention to race in law enforcement, but excuse disparate and punitive impacts so long as they result from good intentions? In other contexts, he finds that disparity in sentencing is an important measure of racism.\footnote{In a Virginia case discussed by Kennedy, Hampton v. Commonwealth, 58 S.E.2d 288 (Va. 1950), the defendant's attorneys showed that between 1908 and 1949, 45 black men, but not a single white man, had been put to death for rape. P. 312. In Coker v. Georgia, the Supreme Court prohibited imposing the death penalty for rape on grounds that the punishment was disproportionate to the crime. The death penalty, it held, is so "excessive" for rape that it violates the Eighth Amendment's "cruel and unusual punishments" prohibition. Coker v. Georgia, 433 U.S. 584 (1977). Kennedy notes, however, that racial disparity in rape sentencing still exists in many places, strongly suggesting that disparity is an important measure of racism. Pp. 72-74.}

**CONCLUSION**

*Race, Crime and the Law* is a work of high legal scholarship and a cry for constitutional justice. But for me, Kennedy's key chapter is "Race, Law, and Suspicion" where he deplores a judicial trend that he says threatens to turn legally and morally wrong police conduct into something that is acceptable. As a matter of principle, I agree with Kennedy, but believe that he underestimates the capacity of police to work around legal doctrine; especially where police are in the position of justifying their conduct in a procedural setting. More importantly, I have trouble reconciling Kennedy's powerful censure of the use of race in articulating suspicion of crime with his wishy-washy defense of the crack and powder cocaine distinction in Federal sentencing. In the real world of criminal law, of police, and of the courts, enforcement and sentencing policies around drugs loom far more significantly in the lives of young Hispanic and African-American males than the doctrine Kennedy properly criticizes. Kennedy might well argue that the disparity of punishment for rape, for example, is clearly footprinted in a history of racism, while the crack-powder sentencing disparity was not grounded in racial motives. That may be true. But in a society with a history of slavery and racial discrimination and with disproportionate criminality according to race and color that is likely traceable to that history, can we ignore disparate racial impacts when we are considering fairness? Perhaps someday, when equality is more of a reality. But, at present, race remains such a conspicuous factor in crime and crime policy that we cannot fail to notice sharp differences in the
fate of blacks and whites. As we approach the millennium, the color line of punishment — especially in the war on drugs — is all too evident.