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THE FOURTH AMENDMENT AND THE LIMITS OF THEORY: LOCAL VERSUS GENERAL THEORETICAL KNOWLEDGE

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The commentators are remarkably unanimous: The Supreme Court cases construing the Fourth Amendment are a mess that lacks coherence and predictability, and fails to communicate the contours of the field.¹ They attribute all this to the

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¹ See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759-61 (1994); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349-52 (1974); Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 399 (1994); Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment*, 25 VAL. U. L. REV. 383, 384 (1991); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 474-75 (1991); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468-70 (1985); Daniel J. Capra, *Prisoners of Their Own Jurisprudence: Fourth and Fifth Amendment Cases in the Supreme Court*, 36 VILL. L. REV. 1267, 1268-69 (1991); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 200-02 (1993); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1564 (1996); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201-02 (1993); Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 587 (1989); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 4 (1991); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1174 (1988); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 383-86 (1988); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 19-20 (1988);

same problem: There is no general theoretical knowledge of the Fourth Amendment that animates the cases. The commentators all have, in a sense, the same solution: The Supreme Court should adopt the views of the commentators to straighten out the mess.² There is one small problem: None of the commentators agree on what the proper Fourth Amendment theory is. Each focuses on different aspects of a set of interrelated issues, each apparently has a unique view of the proper interpretive theory to be applied to the Constitution, and they all disagree as to the relevant desiderata of both the Fourth Amendment itself and constitutional interpretation generally, except in one matter. Remarkably, they all agree that the problem is one of failure of analysis, and that the goal is to get the general theory right.³ Ironically, in their efforts to provide that general theory, they have produced a cacophony of voices as inconsistent and conflicted as the very cases they are criticizing. Imagine for a moment a world in which the judges were critically commenting on the commentators. The judges would say of the commentators precisely what the commentators say of the judges: The articles and books construing the Fourth Amendment are a mess that lacks coherence and predictability, and fails to communicate the contours of the field.

We think the commentators are partially right, and partially wrong. They are right—their own efforts prove this beyond any shadow of a doubt—that there is no general theory, thus no general theoretical knowledge, of the Fourth Amendment. They are wrong that no general theoretical knowledge means there is no knowledge of the Fourth Amendment, or that Fourth Amendment law is a mess. There is abundant knowledge of the Fourth Amendment; it just happens to be quite local in nature rather

Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1974).

² See, e.g., Amar, *supra* note 1, at 819; Amsterdam, *supra* note 1, at 416; Baccigal, *supra* note 1, at 424; Berner, *supra* note 1, at 405; Bookspan, *supra* note 1, at 529; Bradley, *supra* note 1, at 1500; Cloud, *supra* note 1, at 292; Maclin, *supra* note 1, at 202; Slobogin, *supra* note 1, at 4; Strossen, *supra* note 1, at 1266.

³ See, e.g., Craig M. Bradley, *The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429, 429 (1993) (commenting on how the Supreme Court is "lost in the strange city of Fourth Amendment law" and proposing a way out); Dripps, *supra* note 1, at 1635 (commenting on the "arbitrary quality of the *entire regime* of constitutional criminal procedure") (emphasis in the original); *id.* at 1637 (referring to the "mass of contradictions . . . border[ing] on disgrace"); *id.* at 1637-39 (proposing an alternative).

than theoretical. In our view, the commentators have also made a deeper, and much more interesting error. They have each accepted uncritically the belief that the proper task is to create a general theory of the Fourth Amendment.⁴ We, by contrast, think that this assumption is itself the crucial variable needing analysis, and that upon being analyzed leads to the conclusions that the Fourth Amendment does not lend itself to general theoretical knowledge, that the imposition of any particular theoretical position would likely worsen rather than improve what is being modeled (although our conclusion here is tentative and sensitive to the difficulty of proving a negative), and that instead the production of local knowledge is to be encouraged and facilitated. Establishing these points is the burden of this article.

We proceed in the following manner. In Part I, we briefly review the remarkable depth and sophistication of Fourth Amendment knowledge. We are content with a brief review because we think the fact is obvious almost to the point of banality that how the Fourth Amendment applies to an extremely wide range of human behavior has already been worked out fairly clearly by the Supreme Court—certainly clearly enough for government work,⁵ even if not clearly enough to satisfy those who think the precision of mathematics or formal logic is the proper desideratum. Further support for this proposition is provided by the relative paucity of new Supreme Court cases and the absence of a robust set of issues in need of clarification by the Court—there is not all that much left to be decided.⁶ To be sure, there is

⁴ Several Fourth Amendment scholars have paused before arriving at the conclusion that a general theory of the Fourth Amendment is needed to solve the purported “mess” of the Fourth Amendment. Although the following authors propose general theories, their work has aided our own. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 76 (1997); Wasserstrom & Seidman, *supra* note 1, at 104-05; Scott E. Sundby, *Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 *COLUM. L. REV.* 1751, 1752-56 (1994).

⁵ Scott Sundby has usefully pointed out that “[a]part from this chorus of academics, an occasional civil liberties lawyer, and a disenchanting dissenter or two,” complaints about the freedom-eroding confusion of Fourth Amendment law have, “largely . . . gone unheard . . . by both the judiciary and the public at large.” Sundby, *supra* note 4, at 1751-53.

⁶ One undecided issue is the limits upon police use of thermal imaging equipment. Issues presented by new technology, such as thermal imaging, are different from whether “probable cause” or “reasonable suspicion” are satisfied given the evidence in particular cases. Ambiguity about the quantum of evidence needed for government intrusion will always confront Fourth Amendment law. Occasionally, cases

much disagreement about whether previously arrived at solutions should be modified, but not whether the solutions exist.

The criticisms of the commentators do not focus on the local level; they focus on the relationship between localities. They are right that there is tension between various categories of Fourth Amendment analysis, and we point some of this out as we go along. They see the tension between categories as the problem of the Fourth Amendment; we see it as the inevitable consequence of the relevant phenomena. We draw support for our conclusion from the remarkable scope of disagreement among the commentators, which we demonstrate in Part II.

We think we can explain the apparent lack of categorical consistency in the Supreme Court cases, the proliferation of local knowledge, and the inconsistency of the commentators. All three derive from the nature of the relevant phenomena under investigation, coupled with a failure of the commentators to analyze whether the analytical tools they are employing are appropriate for their task. In Part III, we develop these points. All the analytical efforts of the commentators reflect strong commitments to the tools of generalization and deduction—rules, in short. They are attempting to generalize the Fourth Amendment into a small enough set of theoretical propositions to permit logical operations to be done to the propositions. If this reduction can be accomplished, the “logical errors” of the Court, and other commentators, can be spotted and corrected, through substituting a commentator’s logic. More importantly, at least to society, by doing so the relevant behavior of relevant governmental actors can be rule bound and some value optimized or maximized, such as freedom, equality, privacy, or efficiency.

Some forms of inquiry are amenable to such methods, such as mathematics, formal logic, and some of the sciences. Others are not, and here is the crucial error of the commentators, in our view. They have all assumed that, to use Friedrich Hayek’s powerful dichotomy, the Fourth Amendment, and constitutional law more generally, is in essence a made system, like mathematics, a tree farm, or a centrally planned city or economy. We

involving overlaps in categories come up for decision, such as *United States v. Redmon*, 138 F.3d 1109 (7th Cir. 1998) (en banc), *petition for cert. filed*, 67 U.S.L.W. 3149 (U.S. June 8, 1998) (No. 98-243), deciding that a garbage can within the curtilage of a house could be searched without a warrant, choosing, in other words, the garbage can category over the curtilage category.

think they are wrong. It is more like, and maybe just is, a grown system, like the common law, a rain forest, or a city that developed spontaneously. The two systems generate different kinds of knowledge, different solutions to problems, and are amenable to different kinds of intervention. Made systems are amenable to top down analytical efforts—such as those all the Fourth Amendment commentators engage in; grown systems are amenable to bottom up market solutions—such as the proliferation of local knowledge through a common law process, such as the Supreme Court has (unconsciously) engaged in. Mistaking the one for the other can lead to disastrous consequences, such as introducing rabbits into Australia, thalidomide into pregnant women, or general theoretical solutions into the Fourth Amendment. We discuss Hayek's point and the limits of formal analytical tools in Part III.

PART I: THE LOCALIZED KNOWLEDGE OF THE FOURTH AMENDMENT

Given the general appraisal of the Fourth Amendment as a mess, one might conclude that there is very little knowledge as to its operation. In fact, Fourth Amendment law is close to a model of clarity. Virtually every significant aspect of human interaction has already been provided for in a relatively clear set of rules. The justification of any particular result and how it bears on results reached in other areas are different matters. Consider the following:

Houses: There is substantial, and clear, knowledge of the rules governing the application of the Fourth Amendment to houses. Houses can usually be entered by law enforcement officers only upon probable cause with a search warrant.⁷ Some exigent circumstances permit entry without a warrant, such as the imminent destruction of evidence or a dangerous condition (including hot pursuit of a dangerous felon).⁸ An arrest warrant issued on probable cause for the owner or occupier of a premises suffices to permit entry to find and arrest that person, if there is reason to believe that the suspect is within the house at the time

⁷ See *Minnesota v. Olson*, 495 U.S. 91, 98-100 (1990) (holding that an overnight guest in a house may not be arrested without a warrant absent exigent circumstances); cf. *Oliver v. United States*, 466 U.S. 170, 176-79 (1983); *Hester v. United States*, 265 U.S. 57, 59 (1924).

⁸ See *Olson*, 495 U.S. at 100.

of execution of the warrant, but not for any other person; nor does an arrest warrant suffice to permit entry of any other home for the purpose of affecting the non-owner/occupier's arrest.⁹ A probationer/parolee's home may be searched upon reasonable cause, as long as the search is conducted pursuant to a valid regulation concerning probationers (and parolees).¹⁰ Bugs of houses require probable cause and warrants,¹¹ unless they are situated on live bodies who are not trespassers.¹²

When the question mutates from "what" are the demands of the Fourth Amendment with regard to houses to "why" they are what they are, ambiguity sets in. Why is an arrest warrant sufficient to search for the person named in his home? Why not require a search warrant? Why is no warrant, nor probable cause for that matter, needed to search the home of a probationer/parolee? Why is a search warrant needed to search the ruins of a home apparently destroyed by arson perpetrated by the owner?¹³ Why is electronic surveillance "the greatest leveler of human privacy ever known" if planted secretly in the bedroom but not if planted secretly on a lover?¹⁴ And so on.

Cars: Very definite knowledge exists about cars. Cars and their contents can be searched on probable cause without warrants.¹⁵ The search can occur on the street or at the station house.¹⁶ A search of a car on probable cause is permissible even though the car is completely immobile.¹⁷ The passenger compartment of a car may be searched pursuant to the search incident to arrest of an occupant of the car, regardless of probable cause or warrants.¹⁸ The passenger compartment of a car may be "Terry frisked" upon an officer's reasonable belief that a suspect is dangerous and may gain immediate control of a weapon.¹⁹ The driver of a car may be ordered out of the vehicle when stopped

⁹ See *Steagald v. United States*, 451 U.S. 204, 221-22 (1981).

¹⁰ See *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987).

¹¹ See *United States v. Karo*, 468 U.S. 705, 714-15 (1984).

¹² See *United States v. White*, 401 U.S. 745, 751 (1971).

¹³ See *Michigan v. Tyler*, 436 U.S. 499, 506 (1978).

¹⁴ *White*, 401 U.S. at 756 (Douglas, J., dissenting) (asking exactly the same question we ask in the text).

¹⁵ See, e.g., *Chambers v. Maroney*, 399 U.S. 42, 52 (1970); *Carroll v. United States*, 267 U.S. 132, 155-56 (1925).

¹⁶ See *Chambers*, 399 U.S. at 52.

¹⁷ See *Cardwell v. Lewis*, 417 U.S. 583, 593 (1974).

¹⁸ See *New York v. Belton*, 453 U.S. 454, 462-63 (1981).

¹⁹ See *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983).

for a lawful purpose,²⁰ as may a passenger.²¹

Again, most of the "what" questions have clear answers; "why" questions considerably less so. Why are cars free from the warrant requirement? Why can drivers be ordered out of their cars based on no suspicion whatsoever? And so on.

Terry Stops: Very definite knowledge exists about the subject of this conference—"stops and frisks" or "Terry stops." The police may forcibly stop an individual and frisk him for weapons upon reasonable suspicion that the suspect is or is about to be engaged in the commission of a crime of violence.²² Terry stops may also be made for the investigation of drug trafficking.²³ The police may stop an individual upon reasonable suspicion that he was involved in or is wanted in connection with a completed felony.²⁴ The police may use hearsay from informants to establish the reasonable suspicion necessary for a Terry stop.²⁵ The police may also use flyers from other police departments for a Terry stop of a person wanted for the commission of a felony.²⁶ Police may conduct a weapons search of those areas of the passenger compartment of a car where weapons may be hidden upon reasonable suspicion that the stopped individual is dangerous and may gain immediate control of weapons.²⁷ The police may seize luggage upon reasonable suspicion that it contains narcotics.²⁸

"Why" questions particularly haunt the *Terry* line of cases. Why can the police do what a judge could not authorize? Why is the concern about pretextual searches nonexistent in the precise area where they are most likely to be used by police? If the concern of Terry stops is police safety, why have they been extended to personal property, such as baggage, and to non-violent narcotics criminals, such as drug couriers?

Search Incident to Arrest: The Fourth Amendment law governing searches conducted incident to an arrest is crystal clear. A police officer who makes a lawful custodial arrest may search

²⁰ See *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977).

²¹ See *Maryland v. Wilson*, 519 U.S. 408, 413-15 (1997).

²² See, e.g., *Long*, 463 U.S. at 1034; *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

²³ See *United States v. Sokolow*, 490 U.S. 1, 11 (1989); *Florida v. Royer*, 460 U.S. 491, 498-99 (1983).

²⁴ See *United States v. Hensley*, 469 U.S. 221, 229 (1985).

²⁵ See *Adams v. Williams*, 407 U.S. 143, 147 (1972).

²⁶ See *Hensley*, 469 U.S. at 232.

²⁷ See *Long*, 463 U.S. at 1048-50.

²⁸ See *United States v. Place*, 462 U.S. 696, 706 (1983).

an arrestee's person,²⁹ the area within the arrestee's "immediate control"³⁰ and, if the arrest occurs within a home, areas "from which an attack could be immediately launched" or a weapon secured.³¹ The police may search containers found on a person or in the immediate area of the person at the time of arrest.³² Incident to an arrest of an occupant of an automobile the police may search the passenger compartment of a car and containers found in the passenger compartment of the car.³³ Search incident to arrest doctrine applies to any lawful arrest regardless of the seriousness of the substantive crime.³⁴

The "what" questions of search incident to arrest doctrine are simple to answer. They may be summarized in a simple phrase: Creative or careful police officers have essentially unlimited powers to search people and places incident to a custodial arrest for even the most mundane crime. The "whys" are derivative of this broad search and seizure power. Why is search incident to arrest doctrine applicable to crimes that are not serious or violent? Why may a police officer search an arrestee's automobile once the arrestee is moved from the automobile? If an automobile of an arrestee may be searched even when the arrestee is taken from the car, why is it unconstitutional for a police officer to search the entire home of an arrestee? Why isn't the intensity of the search incident to arrest limited to its objectives—weapons and evidence—like the intensity of a Terry frisk is limited to its objectives?

Border and Roving Patrol Stops: The Fourth Amendment law governing border and roving patrol stops is a litany of local knowledge that is easy to understand, and for the most part, apply. Without individualized suspicion or a warrant, the police may stop and search at the border, or its functional equivalent, all who enter the United States.³⁵ Upon reasonable suspicion of criminal activity, those stopped at the border may be subjected to prolonged detention and invasive searches.³⁶ Roving border

²⁹ See *United States v. Robinson*, 414 U.S. 218, 235 (1973).

³⁰ *Chimel v. California*, 395 U.S. 752, 763 (1969).

³¹ *Maryland v. Buie*, 494 U.S. 325, 333-34 (1989).

³² See *United States v. Chadwick*, 433 U.S. 1, 14-15 (1977); *Robinson*, 414 U.S. at 224-25, 235.

³³ See *New York v. Belton*, 453 U.S. 454, 462-63 (1981).

³⁴ See *Robinson*, 414 U.S. at 234.

³⁵ See *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

³⁶ See *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985).

patrols which focus upon specific individuals as the targets of investigatory stops require reasonable suspicion of illegal presence in the United States.³⁷ No suspicion of illegal presence in the United States is required for stops at fixed checkpoints.³⁸

Once again, the why questions revolve around the clear scope of wide ranging authority to search. Why is the border a magical point which lessens the expectation of privacy? Why are limited, discretionary invasions of privacy unacceptable, but massive unthinking invasions perfectly dandy?

Inventory Searches: Quite definite knowledge exists about inventory searches. Warrants and probable cause are not required for routine inventory searches of lawfully impounded vehicles.³⁹ Inventories conducted at the discretion of an officer are permissible, as long as they are conducted according to standard police procedure and are for reasons other than the search for evidence of criminal activity.⁴⁰ Containers found in an inventoried vehicle may be opened without a warrant or probable cause.⁴¹ There is no requirement for a warrant or probable cause to conduct an inventory search of personal effects or containers found on an arrestee as long as the search is conducted according to established inventory procedures.⁴²

The pattern stands in bold relief: It is because we know so much about what the police can search as part of an inventory search that the "why" questions are pressing. Why no warrants or probable cause? Why no distinction between dangerous objects and containers? Why not a locked container exception or a personal papers exception to the "no search warrants needed" aspect of this area of the Fourth Amendment? Why do inventory searches require standardized procedures, but probable cause searches do not?

Electronic Surveillance: A great deal is known about electronic surveillance. Absent consent of one of the parties, a search warrant is needed to conduct electronic eavesdropping on telephone conversations.⁴³ Installation by the government of a pen register on a telephone line to record the numbers dialed on

³⁷ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-83 (1975).

³⁸ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976).

³⁹ See *South Dakota v. Opperman*, 428 U.S. 364, 372-73, 382-84 (1976).

⁴⁰ See *Colorado v. Bertine*, 479 U.S. 367, 375-76 (1987).

⁴¹ See *id.* at 376-77 (Blackmun, concurring).

⁴² See *Illinois v. Lafayette*, 462 U.S. 640, 643, 648 (1983).

⁴³ See *Katz v. United States*, 389 U.S. 347, 358 (1967).

a specific telephone line is not covered by the Fourth Amendment.⁴⁴ The installation of an electronic tracking device in property is not a search for purposes of the Fourth Amendment as long as the bugged property is not withdrawn from public view.⁴⁵ By contrast, warrantless "monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence."⁴⁶ Conversations between a police confederate and another person that are recorded by an electronic recording device are not protected by the Fourth Amendment.⁴⁷

Electronic surveillance runs a close second to "Terry stops" for generating provoking theoretical questions. Why is "wiretapping" of phone conversations heavily governed by the Fourth Amendment while essentially no restrictions govern the electronic surveillance of conversations between police confederates and targets of police investigations? Why no restrictions on smuggling electronic tracking devices into the property of targets of police investigations? Why does the consent of one party allow the wiretapping of conversations with another, unconsenting person? And so on.

Open Fields and Curtilage: One last example: The law governing open fields and curtilage is definite. Searches of open fields are not covered by the Fourth Amendment.⁴⁸ Searches of curtilage are covered by the Fourth Amendment.⁴⁹ Use of a helicopter to search curtilage is not covered by the Fourth Amendment as long as the search is conducted from publicly navigable airspace in a non-intrusive manner without interfering with the intimate life of the searched party.⁵⁰ Fixed-wing aircraft flying in public airspace using sophisticated cameras to examine industrial plants is not a search covered by the Fourth Amendment.⁵¹

Why is a curtilage different from open fields? Why do public regulations on airspace serve as a baseline for judging searches

⁴⁴ See *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979).

⁴⁵ See *United States v. Knotts*, 460 U.S. 276, 282, 284-85 (1983).

⁴⁶ *United States v. Karo*, 468 U.S. 705, 714 (1984).

⁴⁷ See *United States v. White*, 401 U.S. 745, 752-53 (1971).

⁴⁸ See *Oliver v. United States*, 466 U.S. 170, 176-77 (1984).

⁴⁹ See *United States v. Dunn*, 480 U.S. 294, 300-06 (1987); *Oliver*, 466 U.S. at 178 (Powell, J., concurring).

⁵⁰ See *Florida v. Riley*, 488 U.S. 445, 450-52 (1989).

⁵¹ See *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986).

when trespass laws do not? Last, and certainly not least, why does the privacy of citizens depend on how or where the police choose to invade their interests? One kind of search invading a particular interest is not permissible, whereas a different kind invading precisely the same interest is.

The Fourth Amendment comprises a list of rules that apply to easily recognizable behavior and to easily identifiable interactions between individuals and the state in the context of the instrumentalities of modern life.⁵² Although the modern intellectual tendency is to map our understanding of the Fourth Amendment using general claims about reasonable expectations of privacy, in practice the focus is on houses, cars, borders, arrests, and so on. Compared to tax codes, environmental regulation and national security issues, all of which have significant constitutional implications, the implications of the Fourth Amendment are fairly easy to grasp (keeping them all in one's head at once would be a chore—but that is true of any area of the law).

Two criticisms have been addressed to our analysis of the local knowledge of the Fourth Amendment, which we answer here. First, some have argued that we simply are wrong about the clarity of the Fourth Amendment. Second, and relatedly, others have claimed that our concession that we cannot explain "probable cause" and similar standards is somehow damaging to our case. We can provide reasons to doubt the significance of the first point; the second is simply wrong, but in an interesting way.

As to clarity, we admit that we do not have obvious objective criteria to apply to determine whether the local knowledge of the Fourth Amendment generates fairly clear knowledge of its parameters. To some extent, one must simply survey the landscape as we laid it out and judge for oneself. However, regardless of whether the local knowledge we have laid out, which looks to the commonalities of life to determine the reach of the Fourth Amendment, is clear, it is necessarily clearer than its competitor, which is "reasonable expectations of privacy." "Reasonable expectations of privacy" involves the interaction of numerous intersecting variables, some of which, maybe many of which, are continuous. One example makes the point obvious. Car win-

⁵² What probable cause "is" or reasonable suspicion "is" is a different matter, but those are intractable no matter what the theory. They are factual matters, not theoretical ones.

dows can range over infinite gradations from clear to impenetrable.⁵³ A theory of reasonable expectations of privacy would have to differentiate not only this continuous variable, but its interaction with other similar variables, such as how far open the windows or doors were, and so on. The present rules of the Fourth Amendment—its local knowledge—avoid many such continuous variables without creating any new ones, and thus necessarily are clearer. Maybe not “clear”—we leave that to the reader to decide—but necessarily “clearer.”

The second criticism, our concession that we do not explain “probable cause” and its siblings is damaging to the argument, rests upon an important mistake. The mistake is that this criticism reifies “probable cause.” “Probable cause” is not a thing; it is a probability measure, a burden of persuasion in other words. The relevant “things” in the picture are what must be established to the level of probable cause, such as that there is a person believed to be a murderer in the house and who is dangerous in some fashion. What specific evidence equates to any burden of persuasion cannot be said in advance about any aspect of the human condition. Think of the analogous question applied to a standard legal element, such as “cause in fact.” The argument would be that the evidence necessary to establish cause in fact by a preponderance of the evidence (or beyond reasonable doubt, or whatever) could be stated a priori. This is obviously false.⁵⁴ For the same reason, this criticism of our argument is mistaken. All theories of the Fourth Amendment will face the same issue of establishing “probable cause”;⁵⁵ this is a fact of life applicable to all material facts. Ironically, the only method of reducing the analytical indefiniteness of “probable cause” would be not to treat it as a probability measure, and instead to generate another type of local knowledge (e.g., the word of a first time citizen

⁵³ One critic took our argument about clarity to task for neglecting, to paraphrase the point, that these rules all disappear when the police have what they can reasonably consider consent given by someone whom they can reasonably think was authorized to give it. This “criticism” actually demonstrates further the local clarity of the Fourth Amendment. No matter how complex and detailed the various rules are, they disappear in the face of consent, thus permitting a search, a point our experience suggests is well known to the police.

⁵⁴ See Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604 (1994).

⁵⁵ Unless, of course, the probable cause standard is not deployed as a tool in Fourth Amendment analysis.

informant is, or is not, enough), as Professor Alschuler has argued (although not in these terms).⁵⁶

Admittedly, we do not know how the local knowledge of the Fourth Amendment—the various treatments of the commonalities of life—coheres; there is a quite simple explanation for this ignorance—it does not cohere. We do not know the underlying principle that ties the Fourth Amendment together because there isn't one. We attempt an admittedly sloppy, but we hope nonetheless interesting, inductive proof of that proposition in the next section through a demonstration of the remarkable inconsistency of the commentators, an inconsistency that puts the inconsistency of the cases themselves to shame. We then proceed to give a more formal basis for the proposition that there is not, and could not be, a simple theoretical design for the Fourth Amendment in Part III, at least not one that would be computable in real time. If we are right about this, then legal scholars should stop looking. Coherence and consistency, like every other good, are only relatively valuable. The search for the one, best way of forcing the Fourth Amendment into a coherent whole may blind rather than enlighten us to the nature of the problem, and may lead to the adoption of purported solutions to problems that are worse than the disease—the constitutional equivalent of introducing rabbits into Australia.

PART II: THE COMMENTATORS AND THE LACK OF A UNIFIED THEORY OF THE FOURTH AMENDMENT

We referred earlier to the cacophony of voices of the commentators. That, in fact, is an understatement, save in one particular. Everyone who writes on the Fourth Amendment agrees that the state of the field is intellectually lamentable and in need of analytical reform. So far as we can tell, however, there is not a single example of two authors agreeing on exactly what the problems are or (let alone “and”) how they should be solved. Each author—and there are many of them—praises some aspects of other scholars' work and some of the cases, criticizes much of the scholarship and many of the cases, and adds something unique to the conversation. If there were some essential feature to the Fourth Amendment, beyond the language of the

⁵⁶ See Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984).

amendment itself and its apparent conceptual disorder, we have no doubt that by now it would have been discovered by this prodigious effort of very talented people, and the uncovering of its truth would have begun to bring about consensus. That the air remains filled with the contending voices is strong evidence of part of our thesis, in particular that no unifying, true theory of the Fourth Amendment exists to be found. That the efforts of the commentators almost perfectly reflect the cases they are criticizing suggests to us that the causative factor of both is the underlying phenomenon at issue. The relevant world being appraised is simply as disorderly as the efforts of court and commentators suggest; it lacks both simple causative forces and easily identifiable explanatory variables. The world of the Fourth Amendment is not the world of mathematics and formal analysis; it is instead the world of rain forests and spontaneous growth.

The best proof of the remarkable lack of coherence to the appraisals of the commentators is to read them yourself. For our purposes, we need to summarize briefly the voluminous material, and thus risk the very problem of inappropriate reduction that this article is warning against. Nonetheless, here goes.

The literature on the Fourth Amendment can roughly be characterized as raising three general problems, and virtually all the commentators can be sorted based on which of the three they view as the central problem. As we shall see, however, the three "central" problems of the Fourth Amendment do not bear any obvious relationship to each other, and thus no general solution to the set of problems can be derived. In addition, there are disagreements among the authors who adhere to one of these basic views. We identify and analyze the work of one author who well represents each of the three problems, and use the work of those three to locate much of the rest of the Fourth Amendment literature as well. The three central problems of the Fourth Amendment, and their paradigmatic representatives are 1) the constraint of police discretion, as represented by Anthony Amsterdam's work, 2) the implications of linguistic and historical analysis, as represented by Akhil Reed Amar's work, and 3) the implications of resource constraints, as represented by William Stuntz's recent pioneering work. We take each of these views in turn. We sketch out the basic arguments of each, the basic criticisms that have been leveled, and, as we move from one ar-

gument to the next, we demonstrate just how incompatible these various perspectives are.

A. *Discriminatory Police Behavior.*

In his justly famous *Perspectives on the Fourth Amendment*,⁵⁷ Anthony Amsterdam developed a theoretical approach to the Fourth Amendment that explained the critical issues of the Fourth Amendment in terms of the discretion permitted for discriminatory searches and seizures. In essence, Amsterdam converted one important problem of the Fourth Amendment into a way of thinking about every major Fourth Amendment issue. Amsterdam's theoretical approach to the Fourth Amendment turned on a now infamous devil's choice for Fourth Amendment adjudication, the choice between a monolithic Fourth Amendment and a sliding scale Fourth Amendment.⁵⁸ Although Amsterdam identified several other issues animating Fourth Amendment adjudication, the distinction between a monolithic and a sliding scale Fourth Amendment is the heart of his argument, the leitmotiv woven through his article.⁵⁹ The distinction between a monolithic and a sliding scale Fourth Amendment, between an atomistic and a regulatory perspective, in turn is simply a surrogate for the argument that discriminatory searches and seizures are the problem to be solved with the Fourth Amendment. Implementing any law entails deciding whether a monolithic or a graduated approach is required, because this is simply a way of asking to whom is allocated discretion over the formation and application of the law in question.

That to Professor Amsterdam the core issue of the Fourth Amendment is police discretion is evident. He introduces the distinction between an atomistic and regulatory approach early in his lengthy article,⁶⁰ and returns to it often. He asserts that "a fundamental question about the Fourth Amendment is what method should be used to identify the range of law enforcement practices that it governs and the abuses of those practices that it

⁵⁷ Amsterdam, *supra* note 1. Published at the same time, making basically the same central point, but without so much elaboration, was Wayne R. LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127.

⁵⁸ See Amsterdam, *supra* note 1, at 367.

⁵⁹ See *id.* at 377, 394-5, 405, 416-19.

⁶⁰ See *id.* at 367.

restrains."⁶¹ At one point, he admits that one of his arguments is subject to the criticism that:

I am paying only lip service to the view that the Fourth Amendment is a collection of portable little spheres of interest in which you and I and the defendants plunge about like swimmers in so many diving bells. Rather, I am treating it as a general regulation of police behavior. And, if I am going to do that, I might as well do it honestly by admitting that the regulation of police behavior is what the Fourth Amendment is all about.⁶²

And again, "I continue to believe that the limits of American society's effective control over the largest part of the spectrum of police powers and potential abuses depend upon the scope given to the Fourth Amendment."⁶³

He reiterates his basic argument at the end when he proposes "two safeguards which . . . would strongly improve the operation of the amendment":⁶⁴

The first is a requirement that police discretion to conduct search and seizure activity be tolerably confined by either legislation or police-made rules and regulations, subject to judicial review for reasonableness. The second is a flexible administration of the exclusionary rule that would serve to keep the exercise of police search and seizure powers within the boundaries of the purposes for which the powers are given.⁶⁵

And finally at the end of his journey, he explicitly admits that "[t]he atomistic conception is, I think, too narrow."⁶⁶ It is, as he said earlier, the regulation of the police that matters.

The focus on discretion is also clear in Amsterdam's only sustained effort to develop a response to his parade of horribles. Modern scholars seem to neglect the burden of Amsterdam's third lecture:

The rule of constitutional law that I urge is simple, having like all Gaul only three parts: (1) Unless a search or seizure is conducted pursuant to and in conformity with either legislation or

⁶¹ *Id.* at 369.

⁶² *Id.*

⁶³ *Id.* at 377.

⁶⁴ *Id.* at 409.

⁶⁵ *Id.* at 409-10; *see also id.* at 411 (explaining that unjustified and arbitrary searches are the issues, and they have been "indissolubly linked throughout the pre-constitutional history of the Fourth Amendment"); *id.* at 412 ("What searches and seizures, if any, can then be exempted from judicial control consistently with a concern against unjustified and arbitrary exercises of the search power?").

⁶⁶ *Id.* at 432.

police departmental rules and regulations, it is an unreasonable search and seizure prohibited by the Fourth Amendment. (2) The legislation or police-made rules must be reasonably particular in setting forth the nature of the searches and seizures and the circumstances under which they should be made. (3) The legislation or rules must, of course, be conformable with all additional requirements imposed by the Fourth Amendment upon searches and seizures of the sorts that they authorize.⁶⁷

The solution, in short, is administrative rule making under the auspices, and threat, of judicial review.

Professor Amsterdam's article is a magnificent effort, worthy of the adulation bestowed upon it. However,

1. Consistency is not his greatest virtue (not, as we discuss below, that it ought to be):

What I should like to do during these three days is not to articulate any single, comprehensive theory of the Fourth Amendment. It is rather to identify and to discuss a number of basic issues that complicate the development of a single, comprehensive Fourth Amendment theory. Even for a lone theoretician—for a monarchical, everlasting Fourth Amendment enforcer—the complications would render a coherent construction of the Fourth Amendment exceedingly difficult.⁶⁸

But, it is clear beyond argument that his basic point is just that a coherent construction of the Fourth Amendment can, and should, be rendered: The central concern of the Fourth Amendment is abusive police behavior that is to be controlled through legislative or police rule making under the watchful eyes of the courts.

And again: "When I say, as I shall, that the Court has not confronted these basic Fourth Amendment issues in any systematic way, I am not implying that it could or should have done so."⁶⁹ But of course that is precisely what he criticizes the Court for not doing, and urges them to do in the future consistently with his coherent construction of the Fourth Amendment. He goes so far as to say, without a hint of irony, that the Court "is obliged to give an internally coherent reading to the unreasonableness clause and the warrant clause as expressions of repudiation of the general warrant."⁷⁰

⁶⁷ *Id.* at 416-17.

⁶⁸ *Id.* at 352.

⁶⁹ *Id.*

⁷⁰ *Id.* at 410.

Early on in his massive effort, he recognizes a serious constraint on the power of the Court to regulate the police: "It demands a great deal of the Court to ask that it develop coherent principles for the definition of 'searches' and 'seizures' without knowing what is going to come out of that box in Meridian, Mississippi or New York City tomorrow."⁷¹ True enough, but the inability to see the future is a general constraint on rule making, not one limited to the courts. Unless the argument is for incoherent rule making by the police or legislatures, one wonders why their lack of prescience is not just as serious a matter as the Court's.

2. Consistency may be an overrated virtue, but a little bit of it is usually good. There is very little to be found here. Amsterdam relentlessly criticizes the work product of the courts, and in particular the Supreme Court. He begins his article with a sentence that the reader realizes before finishing the first paragraph is a deliberately massive understatement: "For clarity and consistency, the law of the Fourth Amendment is not the Supreme Court's most successful product."⁷² By the end of the second paragraph, he has asserted that the Court's Fourth Amendment cases are more confused than its tax decisions, which is a rare honor. Throughout his article, he argues time and time again that this or that case is mistaken, and this or that opportunity was missed by the Court.⁷³ In fact, the Court even got the biggest issue of all flatly wrong: "Plainly, the Supreme Court is operating on the atomistic view."⁷⁴ In the end, though, his solution is to urge that the Court insist that police discretion be regulated in the public interest as a matter of constitutional command, with this very same Court sitting atop the proliferation of self-restricting rules to be extracted from the country's police forces, something like Congress and its relationship to federal agencies. What would give anyone any reason to

⁷¹ *Id.* at 387.

⁷² *Id.* at 349.

⁷³ *See id.* at 383-86 (criticizing *United States v. Katz*, 389 U.S. 347 (1967), for not providing a way of understanding the complexity of the behavior which must be regulated by the Fourth Amendment); *id.* at 405 (criticizing *Johnson v. United States*, 333 U.S. 10 (1948), for the failure to require police to warn persons stopped for questioning that they may walk away without answering); *id.* at 416 (criticizing *United States v. Robinson*, 414 U.S. 218 (1973), and *Gustafson v. Florida*, 414 U.S. 260 (1973), for not outlawing that search).

⁷⁴ *Id.* at 367.

think that the Court would do better in the guise of a federal agency charged to law enforce in the public interest than it does in its traditional capacity is left to the imagination. Moreover, rather plainly the work product of the Court over the last ten years has gone in exactly the opposite direction of that desired by Professor Amsterdam.⁷⁵

3. And speaking of Congress, what exactly (or even approximately) is the distinction between a court and a legislature?

4. History and text are dismissed—text with the back of the hand, history with a bit of an argument. “The third and fourth problems in developing a satisfactory general theory of the Fourth Amendment’s scope can be stated in one sentence. Its language is no help and neither is its history” (a point he elaborates).⁷⁶ We are not fans of excessive focus on the text or history, either, but it is a bit difficult to understand what an interpretation of a text consists of if it relates neither to the language being interpreted or the general issues thought to be referred to by the conceptually nonexistent text.

5. How it is that the Fourth Amendment’s central purpose could be limited to an institution that did not exist at all in 1791, barely existed in 1868, and did not take its modern form until this century is simply not addressed except to the extent that he argues that history is not confining.

6. More deeply, and frankly completely shattering to Amsterdam’s core argument—that “the limits of American society’s effective control over the largest part of the spectrum of police powers and potential abuses depend upon the scope given to the Fourth Amendment”⁷⁷—is the recent work by William Stuntz, discussed below, that describes the much more powerful forces at play than discretionary police behavior.

7. Last, there is a deep conceptual problem at the base of Amsterdam’s argument. He begins with Justice Jackson’s often quoted remark that the Fourth Amendment concerns “the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself.”⁷⁸ Instead of spinning out the range of po-

⁷⁵ See *supra* Part I.

⁷⁶ See Amsterdam, *supra* note 1, at 395. For the historical elaboration, see *id.* at 395-401.

⁷⁷ *Id.* at 377.

⁷⁸ *Watts v. Indiana*, 338 U.S. 49, 61 (1949) (Jackson, J., concurring).

sitions implicit in this quote (redistributional possibilities; law as a guarantor rather than threat to privacy, and so on), Amsterdam takes Justice Jackson's remark as evidence that "[t]he Bill of Rights in general and the [F]ourth [A]mendment in particular are profoundly anti-government documents."⁷⁹ This, in turn, only makes sense based on the assumption that the Fourth Amendment protects some pre-existent baseline of privacy which is not substantially the product of governmental action.

This argument is profoundly puzzling, although versions of it proliferate in the literature. It is puzzling for a number of reasons. There is no question that the Bill of Rights was adopted in part to satisfy concerns that the original Constitution did not adequately protect certain rights from the interference of the central government. Still, the Bill of Rights did not affect the power of the states, and states had a much more immediate impact on their citizens than did the central government. More importantly, the Bill of Rights and the Fourth Amendment are not "documents," save in a trivial sense. Rather, they are amendments to a document, and the document as amended cannot bear the construction given to it as "profoundly anti-government." It is instead a rough blue print for the creation of a government of extensive, even if enumerated, powers to reign over a huge landmass with a burgeoning population.

Professor Amar believes—more evidence of conceptual disarray among the commentators—that the Bill of Rights standing alone cannot bear Professor Amsterdam's interpretation:

[T]he Bill of Rights protected the ability of local governments to monitor and deter federal abuse, ensured that ordinary citizens would participate in the federal administration of justice through various jury-trial provisions, and preserved the transcendent sovereign right of a majority of the people themselves to alter or abolish government and thereby pronounce the last word on constitutional questions. The essence of the Bill of Rights was more structural than not, and more majoritarian than counter.⁸⁰

The entire argument rests upon the curious notion that there was a form of privacy predating governments, and that governments must be stopped from intruding into this private

⁷⁹ Amsterdam, *supra* note 1, at 353.

⁸⁰ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1133 (1991).

sphere. Without governments, and relatively strong ones at that, no notion of privacy would have even marginal significance. Stable governments able to enforce the law are the only guarantors of privacy on a large scale. Without effective governments, privacy is a function of force, and benefits only the few that possess the necessary means to secure it. Moreover, basic conceptions of privacy are constantly changing and evolving in the light of new conditions in society. As that occurs, the boundary between governmental officials and citizens, as well as that between individual citizens, gets adjusted and readjusted, largely through the law. The Fourth Amendment may have been designed to put a brake on certain discrete ways in which those readjustments might conceivably be made, but to rest an argument upon the assertion that the Constitution or any of its parts is "profoundly anti-government" is to make a deep and profound mistake.

There is, in short, much to praise, but equally much to doubt, about Amsterdam's approach to the Fourth Amendment, and similar approaches by others.⁸¹ His argument is analytically powerful because it focuses and explains, in theoretical language, one important question facing those who seek to understand the Fourth Amendment: the intersection between discretion allocating jurisdiction rules and equality under the law. Yet, it suffers from serious limitations. Serious questions about its conceptual soundness can be raised. Its basic assumptions about the nature of privacy are wholly unconvincing. It simply dismisses two issues that many believe crucial to an understanding of the Fourth Amendment: history and the relevant language. And it fails to address two of the most important issues that determine the scope of Fourth Amendment, or any other, rights: The implications of resource constraints on any theoretical right, and the ability of a complex system to adapt to change. Professor Amsterdam's effort to treat the Fourth Amendment as an analytical structure failed, in short. Ironically, the article closes with a quote from Holmes that apparently was invoked to justify the disregard in the article to history, and thus to free the reader to be persuaded by the analysis of the article.⁸² According

⁸¹ See, e.g., Alschuler, *supra* note 56; Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith'*, 43 U. PITT. L. REV. 307 (1982).

⁸² See Amsterdam, *supra* note 1, at 439.

to Holmes, "we must realize that [the framers] have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or hope that they had created an organism . . ."⁸³ We don't purport to know what Holmes had in mind when he wrote those sentences, but we think he was right to analogize the country to a living organism. However, the implications of that insight, while liberating, do not lead down the path Professor Amsterdam was pioneering. We discuss this point in Part III, below, but first we address the two main competitors in the literature to the discretion confinement approach of Amsterdam.

B. The Fourth Amendment, The Constitution, and Democracy: A Unified Theory

Akhil Amar's recent work, building on the efforts of Telford Taylor,⁸⁴ interestingly, Richard Posner,⁸⁵ and the general tendency within constitutional law over the last twenty years to return to textualist and historical arguments,⁸⁶ is the paradigm of an alternative approach to understanding the Fourth Amendment. Following Taylor, he argues that the two clauses of the amendment are separable, the warrant clause being a limitation of governmental immunity, not a definition of reasonableness. Following Posner, he advocates a tort remedy to replace suppression. Following a host of constitutional scholars, he adds to this an insistence that the Fourth Amendment be read as part of an integrated Constitution and that the whole be given a consistent, coherent theoretical foundation in democratic theory that is respectful of text and history. He summarizes his argument quite effectively:

The Fourth Amendment today is an embarrassment. Much of what the Supreme Court has said in the last half century—that the Amendment generally calls for warrants and probable cause for all searches and seizures, and exclusion of illegally obtained evidence—is initially plausible but ultimately misguided. As a

⁸³ *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

⁸⁴ See TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 19-114 (1969).

⁸⁵ See Richard A. Posner, *Rethinking The Fourth Amendment*, 1981 SUP. CT. REV. 49 (1981).

⁸⁶ See generally Steven G. Gey, *A Constitutional Morphology: Text, Context, and Pretext in Constitutional Interpretation*, 19 ARIZ. ST. L.J. 587 (1987).

matter of text, history, and plain old common sense, these three pillars of modern Fourth Amendment case law are hard to support; in fact, today's Supreme Court does not really support them. Except when it does. Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so. Meanwhile, sensible rules that the Amendment clearly does lay down or presuppose—that all searches and seizures must be reasonable, that warrants (and only warrants) always require probable cause, and that the officialdom should be held liable for unreasonable searches and seizures—are ignored by the Justices. Sometimes. The result is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse. Criminals go free, while honest citizens are intruded upon in outrageous ways with little or no real remedy. If there are good reasons for these and countless other odd results, the Court has not provided them.

Nor has the academy. Indeed, law professors have often been part of the problem, rather than the solution. . . .

. . . .

There is a better way to think about the Fourth Amendment—by returning to its first principles. We need to read the Amendment's words and take them seriously: they do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable. While keeping our eyes fixed on reasonableness, we must remember the historic role played by civil juries and civil damage actions in which government officials were held liable for unreasonable intrusions against person, property, and privacy. Thus, we need to recover the lost linkages between the Fourth and Seventh Amendments—linkages obscured by teaching the Fourth in Criminal Procedure and the Seventh in Civil Procedure. Also, we must self-consciously consult principles embodied in other parts of the Constitution to flesh out the concrete meaning of *constitutional* reasonableness. Finally, we must use twentieth-century legal weaponry like *Bivens* actions, class actions, structural injunctions, entity liability, attorney's fees, administrative regulation, and administrative remedies, to combat twentieth-century legal threats—technology and bureaucracy—to the venerable values protected by the Fourth Amendment.

In what follows, I shall first critique the current doctrinal mess and then attempt to sketch out a better way—a package

that, taken as a whole, strikes me as far superior to the status quo along any number of dimensions. It is more faithful to constitutional text and history. It is more coherent and sensible. It is less destructive of the basic trial value of truth seeking—sorting the innocent from the guilty. . . . Finally, my package, taken as a whole, can be understood by, and draws on the participation and wisdom of, ordinary citizens—We the People, who in the end must truly comprehend and respect the constitutional rights enforced in Our name.⁸⁷

Note the following about Professor Amar's argument:

1. We see in it the common pattern of Fourth Amendment scholarship. Professor Amar, like both his predecessors and contemporaries, finds the jurisprudence of the Fourth Amendment to be a mess—an "embarrassment" in his terms. Other commentators have not straightened out the mess—in fact, they have contributed to the problem. The objective is to tidy things up, to provide a "coherent and sensible package" for Fourth Amendment adjudication.

2. Amar's methodology is exactly the same as Amsterdam's in its focus on the theoretical inconsistencies in the cases and proposing a purportedly consistent substitute.

3. But, the objects of concern bear almost no relationship to each other. Amar's concern is primarily logical consistency for its own sake with, as we shall see, a passing gesture at history and text, and a weak preference for eliminating suppression (of evidence). Amsterdam's concern was his perception of street reality, of the ways in which discretionary power can be abused. Reading Amar, one gets hardly an inkling that discriminatory law enforcement has been one of the central issues of the last half of the twentieth century, one especially salient for the Fourth Amendment. Rather, text, history and consistency are the concerns. Reading Amsterdam, one gets the impression—indeed he says it explicitly—that text and history do not matter, although consistency purportedly does, and in any event what really matters is the abuse of governmental power. The two agree only that consistency matters, although they completely disagree as to the appropriate objective of the systematization.

4. But, like Amsterdam's, Amar's commitment to consistency, and for that matter to text and history, is weaker than

⁸⁷ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757-61 (1994) (citations omitted).

appears. Why this is so is never developed. Many commentators have pointed out difficulties in Amar's textual and historical analysis, which we will not reiterate in detail here.⁸⁸ With respect to consistency, consider just the following:

a. Amar criticizes the exclusionary rule but praises other "twentieth-century legal weaponry . . . to combat twentieth-century legal threats . . . to the venerable values protected by the Fourth Amendment."⁸⁹ But the exclusionary rule is part of "twentieth-century legal weaponry" designed to protect those values. Why separate it out for special treatment? The Fourth Amendment may not command the exclusionary rule, but neither does it command "Bivens actions, class actions, structural injunctions, entity liability, attorney's fees, administrative regulation, and administrative remedies."⁹⁰ So far as we can tell, it also explicitly forbids none of them. We are thus hard pressed to see any logical consistency at play; indeed, quite the opposite seems to be the case.

b. The distinction is not one of logic, apparently; it is instead one of policy: It is repulsive to let the criminal go free when you are in possession of the bloody knife.⁹¹ Presumably, however, the knife we are talking about was obtained by violating the "venerable principles" of the Fourth Amendment, which, had they been respected, would have resulted in this criminal having gone free, too, and the point of invoking all the weaponry of the twentieth century would be to stop such violations from occurring. Still, Amar responds, perhaps someone will make a mistake. For example, "[s]uppose the police could easily get a warrant, but fail to do so because they think the case at hand falls into a judicially recognized exception to the so-called warrant requirement."⁹² We would then, he asserts, have the spectacle of the walking guilty murderer. Taken as an empirical as-

⁸⁸ See, e.g., Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707 (1996); Dripps, *supra* note 1, at 1559; Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1 (1994); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994); George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819 (1997) (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)).

⁸⁹ Amar, *supra* note 1, at 759.

⁹⁰ *Id.*; see also Thomas, *supra* note 88, at 1837.

⁹¹ See Amar, *supra* note 1, at 794, 799.

⁹² *Id.* at 794.

sersion, this statement will almost always be false. His hypothetical is an example of the good faith exception to the exclusionary rule.⁹³ The second example he gives, of a search unjustified when committed but for which information "five minutes later" becomes available justifying it, is an example of inevitable discovery.⁹⁴

We do not mean to assert that no example could be given of the alternative rules—an exclusionary versus a tort regime—generating different results. It is possible. Our point is that it is trivial.⁹⁵ The point of the exclusionary regime, like the point of Amar's alternative, is to stop the inappropriate searches from occurring in the first place. If both worked perfectly, no bloody knives would wrongly be in the possession of the police, a point completely neglected. If neither works perfectly, then the question is the relative merits of the two. This point, too, is entirely neglected, leaving no reason to think that deploying "modern weapons" to replace the exclusionary rule would be better (or worse, for that matter).⁹⁶ In any event, it seems to us quite inconsistent to criticize the exclusionary rule on the basis of the bloody knife hypothetical where the replacement is designed to achieve the same result. It seems inconsistent to us to criticize

⁹³ The hypothetical is ambiguous. If an officer relied on a court decision later overturned, we doubt suppression would result. In addition, although the Supreme Court has not yet acted, lower courts are extending the good faith exception to warrantless searches. See *United States v. Williams*, 622 F.2d 830, 840-47 (5th Cir. 1980) (en banc), cert. denied, 499 U.S. 1127 (1981). Other lower courts are applying a "would have gotten a warrant anyway" rule to uphold such searches. For a discussion, see STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 426 (5th ed. 1996).

⁹⁴ See *Nix v. Williams*, 467 U.S. 431, 448 (1984).

⁹⁵ Richard Posner, for example, argues that there is a difference between the tort and the exclusionary rule approaches, to-wit that the exclusionary rule may exclude vital evidence whereas the damages rule permits the police the choice between forgoing the evidence and paying damages. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 683 (4th ed. 1998). This difference does indeed exist abstractly, but is of no practical significance. The exclusion cases are quite consistent. Exclusion is frequently allowed in low level drug cases, and very infrequently allowed in cases of serious or violent crime. This is precisely what would emerge from a tort regime. Damages would be sufficient to deter activity in the low level criminal cases, but not in the serious cases, for obvious reasons (damages will rarely be high in these situations, and thus will be paid when the stakes matter, such as in cases of serious criminality). Thus, as is our point, the results of the two systems would be highly similar even if gotten to by far different paths.

⁹⁶ Other commentators have made substantial arguments that it would be worse. See, e.g., Dripps, *supra* note 1, at 1563; Steiker, *supra* note 88, at 849-52.

the exclusionary rule because it impedes the search for truth,⁹⁷ while at the same time proposing an alternative designed to have precisely the same effect.

c. While we are on the topic, why are “twentieth century” remedies appropriate, but not twentieth century conceptions of the basic structure of the Fourth Amendment? Why is it too late in the day to doubt absorption of the Fourth Amendment into the fourteenth,⁹⁸ but not too late to doubt the century of development that followed the passage of the fourteenth amendment?

d. One last point about consistency. The attraction of Professor Amar’s approach is its promise to build a coherent structure from the text and history of the Fourth Amendment and the Constitution itself. Obversely, the ground to criticize Fourth Amendment jurisprudence is its ad hoc nature, as Amar does. The points above, and those of many of Amar’s critics,⁹⁹ indicate the lack of rigor in Amar’s method. Curiously, the textual promise of analytical rigor—the implicit commitment to go wherever the analysis demands—is denied in the footnotes: “My approach does . . . strive to keep faith with—indeed to build an overall framework uniting—many of the finest judicial utterances on the Amendment found in modern volumes of *U.S. Reports* and authored by a wide range of Justices.”¹⁰⁰ Why, exactly, is this a desideratum? If the “finest utterances” were all driven exclusively by text, history, and logic, we could understand it, but as he points out, they are also driven by “common sense,” “instincts,” “honesty,” and so on. If the point is, as it purports, sometimes, to be, that the Fourth Amendment is a mess because its jurisprudence has not been faithful to text, history, and logic, the solution, to be consistent, would be to look to text, history, and logic, and to be completely indifferent to the utterances, fine or otherwise, of those who have made it a mess.

The promise of bringing analytical rigor to the Fourth Amendment, to root out inconsistencies, has not been redeemed any more effectively in Amar’s work than in Amsterdam’s. He, like Amsterdam, has cobbled together an interesting argument from diverse sources, some historical, some textual, some logical, some policy-driven, with the only uniting feature that they re-

⁹⁷ See Amar, *supra* note 1, at 799.

⁹⁸ See generally *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

⁹⁹ See Thomas, *supra* note 88.

¹⁰⁰ Amar, *supra* note 87, at 760 n.4.

flect the idiosyncratic views of Professor Amar.¹⁰¹ One last example—nowhere is there a criterion for supporting the “fine” from the “not so good” judicial utterances; in this sense, Amar’s list is reminiscent of Justice Blackmun’s list of the fifty greatest baseball players of all time.¹⁰² Both lists may reflect deeply held beliefs of both authors, but the relationship between those beliefs and some external reality is a mystery.

We wish to emphasize that this examination of the actual commitment of Professor Amar to consistency is not meant critically, just descriptively. As we mentioned above, we intend to explain below why consistency is an overrated value. Before doing so, however, we want, first, to add two points to the ongoing debate about Amar’s history that, like much of the work of his critics, suggests that he is overly optimistic about the ease with which lessons can be drawn from it. Second, we address briefly his proposed solution to the Fourth Amendment—put the matter in the hands of juries.

We make the two points about history merely to demonstrate further that the relevant universe is more complicated than Amar’s (or Amsterdam’s or anybody’s except possibly Stuntz’s) work recognizes. Remember, the main burden of this article is that the relevant universe is too complicated to be reduced to simple rules that are likely to accomplish their objectives. With that in mind, consider these two historical points:

Amar argues that “juries, not judges, are the heroes”¹⁰³ of the Bill of Rights, in part because “[i]n America, both before and after the Revolution, the civil trespass action tried to a jury flourished as the obvious remedy against haughty customs officers, tax collectors, constables, marshals, and the like.”¹⁰⁴ No evidence for this proposition has ever been produced, and there should be plenty of it. If at least four categories of state officials, and presumably more (“and the like”), were subject to the “flourishing” remedy of being hauled before juries, there should be thousands

¹⁰¹ As he says himself, “there is a better way to adapt to changes in the structure of government, and to bring the Fourth Amendment into the center of constitutional discourse today.” Amar, *supra* note 1, at 800. Maybe yes, maybe no, but Professor Amar is engaged in the same effort as virtually every other Fourth Amendment scholar—to effect a reconstruction of the field consistent with his own beliefs, largely regardless of the source of those beliefs.

¹⁰² See *Flood v. Kuhn*, 407 U.S. 258, 262-63 (1972).

¹⁰³ Amar, *supra* note 1, at 771.

¹⁰⁴ *Id.* at 786.

of such cases, and evidence of them should be easy to find. The only evidence so far produced is the "smattering of nineteenth-century cases" cited by Telford Taylor, not the avalanche of cases that a flourishing system would generate.¹⁰⁵ If there are only a small number of such cases, that would tend to confirm that the English cases such as *Wilkes v. Wood*¹⁰⁶ and *Entick v. Carrington*¹⁰⁷ must have been dear to the founders for their substantive principles of privacy and autonomy, not their remedial character.¹⁰⁸

This leads us to our last point about Professor Amar's work—his proposal to return the jury to its original heroic role. Here our primary point is again simply to demonstrate that the relevant universe is considerably more complicated than his analysis allows; in passing, we will also make one last point about consistency.

Professor Amar decries the lack of attention that criminal proceduralists give to general constitutional history. We, by contrast, think that a thorough grounding in evidence should be a prerequisite for anyone invoking jury models of decision making. Professor Amar's argument idealizes the historical jury and en-

¹⁰⁵ *Id.* at 786 n.105.

¹⁰⁶ 98 Eng. Rep. 489 (C.P. 1763).

¹⁰⁷ 95 Eng. Rep. 807 (C.P. 1765).

¹⁰⁸ We want to emphasize that our point is the lack of evidence. Maybe Professor Amar is right, maybe not, but the evidence is insufficient to justify his assertion. The mismatch between assertion and evidence occurs with some frequency in discussions of juries. Perhaps this comes from the relatively well known paeans to the jury from some of the founding generation. This neglects that the proper role of the jury was a contested, not an accepted, proposition. We discuss this in note 113, *infra*. Another example of the mismatch between evidence and assertion is in Albert W. Alschuler & Andrew G. Deiss, *A Brief History of The Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 874 (1994). After reproducing some of the gushing comments about juries, they proceed:

[J]uries and grand juries all but nullified the law of seditious libel in the colonies. Hundreds of defendants were convicted of this crime in England during the seventeenth and eighteenth centuries, but there seem to have been no more than a half-dozen prosecutions and only two convictions in America throughout the colonial period. Grand juries were reluctant to indict and petit juries reluctant to convict.

Id.

Maybe so, but this evidence establishes neither proposition. Without knowing how many cases were presented to grand juries, no conclusion can be drawn about their collective reluctance. Two convictions in "no more than" six cases establishes a conviction rate of at least 33%, which is not compared to conviction rates in any other category of crime, and in any event is too small a sample (or a set) to be of much significance.

tirely neglects its modern manifestation. We take these two points in turn.

The historical jury for Professor Amar, so far as we can tell, appears to have been a mini-constitutional convention, charged to be ever vigilant in the defense of freedom and liberty. As we pointed out above, we know of no evidence that very many juries spent much of their time engaged in cabining the authority of overzealous executives through civil liability (we look forward to seeing further submissions on the issue). Even if this was standard jury fare in the last part of the eighteenth century, the idea that juries were unconstrained defenders of popular prerogative bears virtually no relationship to what we know about juries at that time.¹⁰⁹

To the extent the Founders were, or we should be, influenced by the historical jury, it was a jury substantially controlled by the judiciary.¹¹⁰ Juries may not have been under the thumb of

¹⁰⁹ In the text we advance two claims about juries. Both are historical claims. First, it is clear that judges in 18th century England and America exerted significant control over juries through a virtually unlimited power to comment on evidence and the credibility of witnesses. Nor were these the only methods of jury control available to judges. Moreover, in America the power of juries (and thus judges) was a hotly debated topic upon which there was no consensus judgment. Thus, while it is true that for a brief time during the American Revolution juries were extolled as defenders of liberty, the history of juries in England and America before and after the American Revolution is one of significant control by judges. As we discuss in the text, even following a true revolt against judicial authority in favor of juries in the first part of the nineteenth century, American judges regained control over the jury. Second, we advance, in a tentative way, a claim about the English background to American search and seizure law. According to Sir William Holdsworth, English jurists did not understand cases such as *Entick v. Carrington* as involving a simple contest between individuals or juries and executive power. Instead, English jurists saw *Entick* and its cousins as assertions of the rule of law. Common law adjudication, as an affair of English constitutional law, was the issue and the judiciary saw itself as a defender of rights at common law that stood alongside executive and legislative rights and powers. There is little question, for example, that the search that occurred in *Entick* could have been authorized by Parliament, but it was not, and it was not consistent with the common law. Therefore, it was illegal. Had the courts not so believed, there would have been no jury verdict in favor of *Entick*. Indeed, as we point out in the text, there was no jury verdict in *Entick* on liability; it was limited to damages. Such cases, in short, were about the struggle over authority between branches of government, and were not examples of the independent role of the jury in protecting individual rights. See 10 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 658-72 (3d ed. 1975). See generally Douglas G. Smith, *Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 390-455 (1986). As Professor Amar's work indicates, this point is often neglected.

¹¹⁰ See Smith, *supra* note 108, at 390-422. In addition, the distinction between law and fact was and has remained a vibrant mechanism for preserving the power of

the executive, but they were under the thumb of the judiciary. Thus, they would not be under the thumb of the executive only if the judiciary were not as well. The judiciary protected its independence from the executive indirectly by protecting the integrity of the common law from executive usurpation. That is what cases such as *Entick v. Carrington* stood for. Juries were instrumental in that struggle, but they were by no means the point of it. What was being established, and later glorified, was not juries as a check upon executive authority but rather the common law.

The cases that Professor Amar primarily relies on for his view of English practice arose out of the publication of no. 45 of the *North Briton*, but he neglects important aspects of them. In *Wilkes*, “[t]he court of Common Pleas directed the jury that [the] warrant was illegal, and Wilkes was awarded £1,000.”¹¹¹ The jury did not decide that the Executive had overreached its authority; it merely assigned damages on the assumption that it had. In *Entick*, the “jury found a special verdict, and concluded by saying that, if the court found the defendants guilty of the trespass complained of, they assessed the damages at £300.”¹¹² The important blow for liberty was not struck by the jury; it was struck instead by Lord Camden’s opinion finding “the trespass complained of.”¹¹³

In the United States, the rebellion against judicial prerogative occurred in the first part of the nineteenth century, after the Constitution and Bill of Rights had been ratified.¹¹⁴ As a by-

judges over juries in England. See *id.*

¹¹¹ 10 HOLDSWORTH, *supra* note 108, at 659-60; see also *Wilkes*, 98 Eng. Rep. at 499.

¹¹² 10 HOLDSWORTH, *supra* note 108, at 660; see also *Entick*, 95 Eng. Rep. at 811.

¹¹³ 10 HOLDSWORTH, *supra* note 108, at 660-68.

¹¹⁴ In America, the jury has never been free of significant judicial control for any extensive period. While the revolutionary generation may have accorded juries wide power to interpret law and fact in criminal cases, 19th century judges reasserted control over juries. See Alschuler & Deiss, *supra* note 108, at 908; see also Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 600-06 (1993). By 1835, Justice Story held it a matter of course that judges decided law and juries found fact. See Alschuler and Deiss, *supra* note 108, at 907. As the 19th century rolled on, judges pried critical fact questions from juries by redefining substantive law. For example, the history of the tort doctrine of comparative negligence in the 19th century is one of judicial dominance. See Landsman, *supra*, at 606. Moreover, staples of direct judicial coercion of juries, such as directed verdicts, have always been common civil jury fare in America.

Even the shining moment of American jury power in the 18th century is not ex-

product of Jacksonian Democracy and the Populist movement, many states introduced restrictions through legislation and state constitutional amendment upon the power of trial judges, including restricting the right to sum up and comment on the evidence.¹¹⁵ Not surprisingly, the judicial response was the creation of innumerable common law *présomptions* that largely reallocated these powers to the trial judges and allowed them to reassert control over juries.¹¹⁶ Much of this occurred before the ratification of the Fourteenth Amendment, shutting off the argument that the adoption of the Fourteenth Amendment may have involved a reconstruction of the basic nature of jury trial anticipated by the Fourth Amendment. Again, we know of no evidence that anyone involved in the adoption of the Fourteenth Amendment was thinking of its significance for judge/jury relations.¹¹⁷

In any event, the modern jury looks much more like its late eighteenth century English counterpart than it does a continuing constitutional convention. While the explicit control devices of summary and comment are used much less frequently today, the legal system reified has discovered that other methods of jury control work quite well, and there are many of them. There are, first, the explicit forms of control, such as summary judgments, directed verdicts and judgment *n.o.v.s.*¹¹⁸ There are more indi-

actly what it is taken to be by those who romanticize the American jury. There was considerable disagreement in the late 17th century on the role of the jury in the administration of the law. The Constitution pointedly excluded a provision for civil jury trial. *See id.* at 598. The impeachment of Justice Chase hinged on the legitimacy of his comments on evidence to the jury, *see id.* at 603-04, and the vote in the Senate to impeach him on that question was not even close (16 out of 34), *see* Alschuler & Deiss, *supra* note 108, at 909. Most important, though, is the history of jury qualifications which grew up alongside the American jury from its inception. Eighteenth century juries were not representative of American society. Property, racial and gender qualifications abounded. *See id.* at 882-902. Controlling who sits on the jury is a very effective method of controlling outcome. Before the flowering of evidence law ever crowded in on the virtuous, democratic American jury of the revolutionary moment, a filter kept vast portions of American society from jury service, which undoubtedly produced a unanimity of viewpoint and outcome that could hardly be achieved in any other way.

¹¹⁵ *See* Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843, 855-59 (1981) [hereinafter Allen, *Presumptions*]; Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 336-38 (1980).

¹¹⁶ *See* Daniel M. Reaugh, *Presumptions and Burdens of Proof*, 36 U. ILL. L. REV. 703, 719 n.103 (1942).

¹¹⁷ On the other hand, we've never looked for it.

¹¹⁸ Now combined into judgments as a matter of law in the Federal Rules of Civil

rect, but nonetheless effective, control mechanisms scattered throughout the rules of evidence. Judges are empowered to exclude (and admit) evidence on relevancy grounds, as well as exclude evidence because of their assessment of the probative value/prejudicial impact relationship of discrete bits of evidence.¹¹⁹ Rather plainly, the power to control the admission of evidence can affect the ultimate decisions rendered. There is also a large number of discretionary powers over discrete types of evidence allocated to trial judges,¹²⁰ a perfect example being the residual exception to the hearsay rule that allows relaxation of the hearsay rule for idiosyncratic reasons.¹²¹ The lay opinion rule is another example,¹²² and there are many others.¹²³ Presumption and inference instructions remain a staple of the litigation environment, encouraging certain outcomes and mandating others, regardless of the personal views of the jurors.¹²⁴ Last, but by no means least, the power to control the substantive law, to fashion the elements and thus the material propositions that must be proved, is an enormous brake on jury discretion. Whether the fashioning is done by the common law or legislation, the result is to shift authority from the jury to a branch of government, the very government that under Professor Amar's view is supposed to be under the vigilant eye of the jury.¹²⁵

Professor Amar thus idealizes both the historical and the modern jury. He further romanticizes jury service. One of the benefits to come from his proposal is that "in the course of delib-

Procedure.

¹¹⁹ *In re Rhone-Poulenc Rorer Pharms., Inc.*, 138 F.3d 695 (7th Cir. 1998), demonstrates the wide ranging authority over the evidence possessed by trial judges. The case involves a multi-district litigation over HIV-contaminated blood solids, with approximately 140 plaintiffs. *See id.* During pre-trial discovery, defendants designated 137 common-issue experts. *See id.* at 697. The multi-district Judge limited them to 24. *See id.* at 696.

¹²⁰ *See* Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1104-18 (1984).

¹²¹ *See* FED. R. EVID. 807.

¹²² *See* FED. R. EVID. 701.

¹²³ *See, e.g.*, FED. R. EVID. 201, 404(b), 609, 1008.

¹²⁴ *See* Allen, *Presumptions*, *supra* note 114, at 855-57.

¹²⁵ Also neglected is that jury service was tightly curtailed, which is another way to affect outcomes. *See* TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND 1200-1800, 397-98, (J. S. Cockburn & Thomas A. Green eds., 1988). For a discussion of the point in the context of American criminal juries, see Alschuler & Deiss, *supra* note 108, at 868, 903-11. As Alschuler and Deiss point out, as the jury became more democratic, judges reasserted their control over their decisions. *See id.*

erating and deciding, citizen jurors will become educated—will educate each other—about the meaning of the Constitution, about government policy, about competing conceptions of reasonableness, and about citizenship in a self-governing republic.”¹²⁶ Would that it were so, but it is not. Jury service is not an enlightening and deeply fulfilling act of civil responsibility in which the grand questions of the day are debated and decided by a group of common citizens. It is a tedious, costly, in some respects degrading, disruption of everyday life, which is why people tend more to avoid than volunteer for it. The typical life of a juror involves long stretches of unexplained isolation, interspaced with passive observation of difficult to understand legal and factual mumbo-jumbo, during which questions are not allowed and discussion about what has been observed is forbidden.¹²⁷

Moreover, the jury will find that its decision task is limited to determining the truth or falsity of specific legal elements, and virtually never—even were Amar’s scheme adopted—will those elements include “the meaning of the Constitution, . . . government policy, . . . competing conceptions of reasonableness, and . . . citizenship in a self-governing republic.” Nor would they be the subject of evidence at trial. Why not? Because no trial judge would allow the trial to get distracted by what the judges will view as peripheral if not legally immaterial propositions. Suppose a jury trial over the reasonableness of some search or seizure. The meaning of the Constitution will not be a fact to be found; the judge will instruct on it. Governmental policy will rarely be at stake; the question will be whether this search or seizure was reasonable or not. Competing conceptions of reasonableness will not be established by evidence; the judge will invariably say that is a matter at most for argument. To be sure, competing conceptions of reasonableness may underlie deliberation, but again this will rarely amount to the systematic examination of the matter. “Citizenship in a self-governing republic” will not be an edifying matter to be examined, but something to be endured.

Why will the judges not permit a trial that would even re-

¹²⁶ Amar, *supra* note 1, at 818-19.

¹²⁷ Some change may be coming. See Hope Viner Samborn, *Changing the Jury Tool Box*, A.B.A. J., Dec. 1997, at 22, 22-23 (discussing ABA proposals and experiments in Arizona).

motely resemble the patriotic rhetoric of Professor Amar? Because they have other things to do with their time. Suppose a trial judge, under the influence of Professor Amar's rhetoric, decided to the contrary, decided to let the parties contest the meaning of the Constitution in a § 1983 action, say. The trial would resemble the Simpson trial. The meaning of the Constitution is a hotly contested issue. For jurors to deal with it systematically, they would have to be educated about the matter; but even to understand the current debates, they would have to receive substantial legal training. Every trial would take forever to litigate. Like it or not, this will not come to pass.¹²⁸

Even if it did, the result would be to trade the inconsistency of the cases for the ad hoc determination of trials by juries. Juries decide facts quite well, we believe (and if this belief is wrong there is even less support for Amar's position), but there is no reason to believe—literally none at all—that they are adept at the consistent and systematic development of legal areas. The best analogue to Amar's proposal that juries decide reasonableness is jury decision over negligence. Juries have indeed played an important role in the development of the parameters of negligence, but the crucial role has been played by the appellate judges. They are the ones that have brought order to the cacophony of voices comprising the jury verdicts spread across the country.

We also wonder who would be paying for all this. Justice is valuable, but is not the only valuable commodity. Health, education, a vibrant economy, personal safety, and many other values, all compete with justice for scarce resources. Again, completely absent from Professor Amar's analysis is any recognition of the costs of his proposal and any argument why those costs should be borne.

Last, the mechanisms by which these widely dispersed and invariably inconsistent voices would impart their wisdom to governmental officials in order to protect the "venerable values" of the Fourth Amendment is a mystery. Part of Amar's idealization of the jury comes close to imaging the jury as Dworkin's Hercu-

¹²⁸ Amar does not ignore the judges, but his attention to them raises another puzzle. "[J]udges should concentrate their doctrinal energies on . . . cases . . . in which judges have strong reasons to suspect unjustified jury insensitivity to certain claims or claimants." Amar, *supra* note 1, at 817.

les.¹²⁹ Rather than the reality of thousands of juries over a widely dispersed area returning highly fact specific and often inconsistent verdicts, we would have one *jury* pronouncing the wisdom of the common person from on high,¹³⁰ directly instructing all lesser mortals, especially the lesser mortals who work for the government. It is an idealization that bears no obvious relationship to reality.

We thus see in Amar what we saw in Amsterdam—a program obviously driven by a search for the consistent theory to explain the Fourth Amendment, in which consistency is not well maintained, and innumerable relevant variables are ignored.¹³¹ Remarkably, the variables accommodated and ignored differ widely over the two. Amsterdam concentrates on the street reality, Amar on the demands of the logical unfolding of constitutional theory. Amsterdam's argument is devoid of concern about the relationship of the Fourth Amendment to the larger legal universe, Amar's is devoid of concern about life as it really is. Neither of them embed their arguments in the wider society of which the Fourth Amendment and the Constitution are only a small part. One scholar has begun this more difficult effort, and to his work we now turn.

C. The Implications of the Fourth Amendment, Privacy and the Modern Regulatory State, and the Costs of the Criminal Justice System.

Professor William Stuntz has brought yet another perspective to the meaning and implications of the Fourth Amendment,

¹²⁹ See RONALD DWORKIN, *LAW'S EMPIRE* 239 (1986).

¹³⁰ Professor Amar relies much on the idea of common sense, but as Jerry Fodor has recently observed, "as things now stand, we don't have a theory of the psychology of common sense that would survive serious scrutiny by an intelligent five-year-old." Jerry Fodor, *The Trouble With Psychological Darwinism*, 22 *LONDON REV. BOOKS*, Jan. 22, 1998, at 11, 11 (book review). We don't doubt the existence of common sense, but the matter is complicated. Compare (1) "Absence makes the heart grow fonder" to "Out of sight out of mind"; (2) "The early bird gets the worm" to "Haste makes waste"; (3) The story of the tortoise and the hare to "All work and no play makes Jack a dull boy"; (4) "Where there's smoke there's fire" to "You can't tell a book from its cover" or "Beauty is only skin deep." And so on. As John Casti has commented, "almost any observation—or its opposite—can be taken as a pithy encapsulation of everyday, garden-variety common sense." JOHN L. CASTI, *COMPLEXIFICATION: EXPLAINING A PARADOXICAL WORLD THROUGH THE SCIENCE OF SURPRISE 2* (1994).

¹³¹ Professor Carol Steiker has made analogous criticisms in her impressive critique of Professor Amar's work. See Steiker, *supra* note 88, at 821-25, 856-58.

and it is by far the deepest and most penetrating of the contemporary analyses of the Fourth Amendment. Unlike Amsterdam and Amar, and for that matter all other authors who have offered a positive theory of the Fourth Amendment, Stuntz sees clearly the extent to which the Fourth Amendment and the Constitution are embedded in larger issues that both define and constrain them. We have nothing but praise for Professor Stuntz's work, save in one particular that we discuss at the end of this section. We discuss his work for two reasons, besides to pay our respects, and those are that Professor Stuntz's take on the Fourth Amendment bears virtually no relationship to Amar's and Amsterdam's. That, to us, is the interesting phenomenon in need of explanation. Second, our one criticism of Stuntz's work leads to our general critique of Fourth Amendment scholarship.

Stuntz does not see the constraint of police discretion as the primary concern of the Fourth Amendment, as does Amsterdam, nor is he distracted by the allure of logical consistency or the implications of a simplified version of constitutional history.¹³² Rather, he sees that the Fourth Amendment and the Constitution are parts of the remarkably complicated social and political reality of the criminal justice system. He neglects only one point—that the criminal justice system in turn is part of an even more complex social and political reality encompassing the country as a whole.¹³³ The neglect of this point leads him to say, quite tentatively, that perhaps the problems that he has identified would have been resolved had the Court gone in a different direction than it has. We think we see here the distracting influence of the desire for logical consistency and simple theoretical solutions, and thus it is our only disagreement with him. We explain below.

Professor Stuntz's argument is composed of the following points:

1. The Fourth Amendment, along with many other impor-

¹³² In fact, he provides a considerably more persuasive history of the Fourth Amendment than does Amar. Stuntz shows that the historical roots of much of our criminal procedure, including the Fourth Amendment, comprise procedural tools used by English and American radicals to limit substantive law, which was the real target, rather than the articulation of fundamental principles, such as privacy. See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 *YALE L.J.* 393, 394-95 (1995).

¹³³ Which may lead to an infinite regress, but we are stopping at this point for the moment.

tant aspects of constitutional criminal procedure, was used by the founders to set procedural barriers in the way of disfavored substantive law.¹³⁴

2. The modern regulatory state must search and seize information for so many reasons in so many intrusive ways¹³⁵ that it is not possible to think of privacy as a category which exists independently of state construction or is beyond state control.

3. Procedural barriers to the modern regulatory state (the Fourth Amendment as a guarantor of privacy, for example) will not be respected because of the demands of the regulatory state.¹³⁶

4. The power of the modern regulatory state to craft and re-craft search and seizure devices in the face of opposition means that individuals may often prefer not to challenge the regulatory state given the new rules their opposition may produce.¹³⁷

5. Prosecutors, public defenders, judges, and, most importantly, legislatures have far more discretionary enforcement power in the criminal justice system than the police.¹³⁸

6. Legislatures dissatisfied with the procedural rules fashioned by courts can reduce the relative amount of resources available to take advantage of such rules, and in addition can largely nullify them through the modification or expansion of the contours of substantive criminal prohibitions.¹³⁹

7. The discretion one actor in the criminal justice system has is a function of the discretion of other actors and the limited resources of the entire criminal justice system.¹⁴⁰

8. Crime rates create inescapable resource constraints on the criminal justice system.¹⁴¹

9. Constitutional criminal procedure claims are less expensive to litigate than claims about the merits of the substantive claim at issue, thus resource constraints will skew the subject

¹³⁴ See Stuntz, *supra* note 132, at 394.

¹³⁵ See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1018-19 (1995).

¹³⁶ See *id.*

¹³⁷ See William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 555 (1992).

¹³⁸ See Stuntz, *supra* note 4, at 49-50.

¹³⁹ See *id.* at 7.

¹⁴⁰ See *id.* at 53-59.

¹⁴¹ See *id.* at 23-24.

matter of litigation toward the less expensive alternatives.¹⁴²

This list of conclusions, which by no means does justice to the depth and subtlety of his work, reflects a profound understanding of the interrelationship of the Fourth Amendment and the criminal justice system. What may have been true during the late eighteenth century is no longer even possible. The demands of the regulatory state are so vast and its resources are so great that privacy will not serve as the foundation for procedural barriers to substantive law. The regulatory state can simply remake the boundaries of privacy and refashion the criminal law at its whim. Nor does it make much sense to focus on cabining executive authority. Given certain believable ratios between crime rates, the resources of prosecutors and the resources of defense counsel, Stuntz shows that Fourth Amendment claims are either irrelevant or pathological. They are irrelevant because overworked prosecutors have more winners on the merits than they can possibly prosecute, and so procedural innovations will merely have an allocative effect. Fourth Amendment claims are pathological because they stimulate the use of a series of inexpensive procedural defenses that, perversely, prevent trials on the merits by absorbing the resources available for defense. Ironically, the much ballyhooed procedural revolution may thus generate more inaccurate verdicts at trial rather than fewer. Rich but guilty (as well as innocent) defendants have more tools with which to bedevil prosecutors, thus leading prosecutors to shift resources to the poor. The poor have inadequate resources to do anything other than a few cheap procedural moves, and thus the innocent poor will often be unable to make a serious defense on the merits.

We agree with—more accurately, have been convinced by—everything that Stuntz argues. Simple as that. His point is that the criminal justice system is a complex entity more like a living organism than a mathematical formula. Previous commentators have neglected that point, and note, for one last time, how there is virtually no relationship between the perspectives of Amar, Amsterdam and Stuntz. Our only disagreement with Stuntz is with this prescription, not his description. At the end of his analysis, he contends that courts should regulate the substance of the criminal law, the funding the criminal justice system re-

¹⁴² See *id.* at 38-40.

ceives and, perhaps, a few general areas of the law such as that covering police coercion. He maintains that this form of constitutional regulation of criminal procedure would reduce the pathologies of the Fourth Amendment without permitting unchecked executive discretion. Thus, Stuntz, like his predecessors, proposes a general theoretical solution to the problem of the Fourth Amendment. Here is where we think Professor Stuntz failed by not taking the next step in his argument, and falling back, instead, into the conventional search for the theoretical magic bullet.

The error lies in not seeing that the criminal justice system is itself embedded in a larger political system. It is perfectly plausible, looking just at his masterful description of the criminal process, that the error made by the Court was not attending to resource allocation and the contours of the criminal law. Suppose, however, that it had. Suppose a series of commands started coming down that said this or that act was not sufficiently culpable to justify being labeled a crime and that more resources had to be allocated to the criminal justice system. The first would involve the Court substituting its judgment on substance for that of legislatures. We know what happens in such cases—the political branches reassert control over the Court. This is clearly the lesson of the *Lochner* era, and may be the lesson of the Warren Court era, as well.

Now consider resource allocation. Resources have to come from somewhere. The Court cannot simply tell the Treasury to print more money and give it to prosecutors and defense counsel; if it did, the result would be the devaluation of the currency, thus imposing a tax on all other money holders in society. Choices would have to be made as to where the money was to come from. Perhaps the response would be to leave that matter to the legislature, but this is inadequate. Diverting money from one source to another can only be justified by a comparison of the relative cost and benefits of competing expenditures. Perhaps more money in the criminal justice system would be useful, but would it be better to spend marginal dollars there than on building roads, health care, education or the industrial infrastructure? Maybe yes, and maybe no, but the Court is in no position to make those judgments. If it tried, it would quickly be eliminated as a competitor by the political branches of government.

There is evidence on this proposition, too. The Warren

Court for a short period ignored the cost of its decisions, its jurisprudence generating perhaps the most problematic comment ever uttered by a sitting justice that “[t]he State’s fiscal interest is . . . irrelevant.”¹⁴³ It is now evident how wrong that was, as Professor Stuntz has demonstrated. We think he neglected the implications of his own work in this one particular area, however. The political system has more than adequate resources, which it is quite willing to deploy, to bring a Court to heel that attempts to extend its authority to substance and resource allocation on the massive scale that would be required to change significantly the criminal justice system.

To our way of thinking, every word that Professor Stuntz has written, apart from his concluding speculation about substance and resource allocation, makes the point that the criminal justice system is like a live ecological system, and that introducing magic bullets of reform into it may very well be like introducing rabbits into Australia. In the end, though, he opted for more rabbits. We try to explain why in the next section.

PART III: THEORETICAL VERSUS LOCAL KNOWLEDGE; MADE VERSUS GROWN ORDERS

At the conclusion of an impressive article plumbing the depths of the complexity of constitutional criminal procedure, George Thomas asserts that “the criminal procedure community has been right all along: There is no deep structure to constitutional criminal procedure.”¹⁴⁴ What he means by this, as do all the commentators making similar or antagonistic comments, is that there is no (or that there is a) deep analytical structure. Obviously, the system has an empirical structure. As Professor Thomas demonstrates, one can easily point to it and its various parts. Moreover, those parts surely interact in causal ways, as Professor Stuntz has so ably demonstrated. What we do not know is precisely, or even approximately, what all the relevant variables are, or how they interact. It is thus not that constitutional criminal procedure has no structure, it is that we do not know precisely what it is and how it operates.

Faced with salient ambiguity, the human mind searches for

¹⁴³ *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971).

¹⁴⁴ George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1848-49 (1997) (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)).

ways to organize it, to make sense of it, and thus all the efforts to provide a general theory of the Fourth Amendment. Those efforts have been a failure, if judged by normal canons of knowledge. The commentators do not even agree on what the central issues are, let alone how to accommodate them. Yet theorizing continues apace, with new scholarship on the Fourth Amendment appearing with astonishing regularity. Is all this effort just madness? Maybe, and maybe not, but it certainly is endemic to the human condition. We intend to explain here both the seemingly irresistible urge to generalize, and why in this case it is likely to be futile.

The human condition is dominated by the overwhelming complexity of the natural environment and suffused with contradictions. The ability to comprehend these points is both the glory and the bane of the extraordinary cognitive powers possessed by the human mind (or brain, perhaps). On the one hand, the human mind sits atop the evolutionary processes of the natural universe with its exhilarating capacity to explore, understand, and manipulate its environment, and its concomitant ability to extend its reach beyond mere survival to intellectual and artistic endeavors. On the other hand, the mind perceives deeply disturbing phenomena, such as the inevitability of its own demise and that it is indeed faced with an overwhelmingly complicated environment apparently full of contradictions that make it difficult to bring order to the chaos. The two points are related: Bringing at least some order is useful to survival, for otherwise the demise of the organism and its progeny is likely to be hastened. A child walks down to the river and is eaten by an alligator. Another child wants to take a swim. If the parents threw up their hands and said, "The universe is too complicated to figure out. Go ahead and take a swim," the second child dies too soon, and the entire genetic line would soon die out. The ability to generalize and the impulse to engage in it are thus useful to survival, and consequently probably hardwired into the brain.

Whether hardwired or not, the impulse to generalize is apparently rivaled only by reproduction as one of the main springs of human activity. Humans are engaged in a never-ending struggle to reduce the complexity of their sensory inputs into rules, principles, algorithms, guidelines, and so on. The best form of a generalization is an algorithm or theory that permits

useful lessons to be generated or deduced, for this allows the generalization an extended domain, as it were. To permit generalizations to be used in this form in turn requires a strong commitment to consistency. Without consistency, deduction is of no use at all because anything and everything may be derived. We provide, with just a hint of irony, the general form of this argument. Assume X, and -X. From this inconsistency any proposition at all is derivable, as the following proof demonstrates:

1. X (from our assumptions)
2. X or Y (where Y can be any proposition at all) (step 1 and the addition rule)
3. -X (from our assumptions)
4. Therefore Y (whatever Y is) (steps 2 and 3 and the disjunctive syllogism).¹⁴⁵

This is a perfectly general proof whose truth is obvious from inspection and in which the term Y can stand for any proposition whatsoever: that the moon is made of green cheese, or that the moon is not made of green cheese; that theorizing about the Constitution is possible, or that theorizing about the Constitution is not possible; that Professor Amstersdam's or Amar's or Stuntz's theory of the Fourth Amendment is true, or that they are not true. And so on.

Obviously, the human effort to generalize has had enormous payoffs. Mathematics and many of the sciences are good examples (as is the flourishing of the species). Many areas of life do not seem amenable to similar treatment, however. There is no useful mathematics of social intercourse, for example, nor do we know how to model such a basic human attribute as common sense. The reason is that these areas involve too many variables to reduce to a small enough number of propositions to permit logical computations within our resource constrains. Formal examples of the problem of computational complexity can be given:

1. The three body problem. Although there are approximations, there is no correct mathematics of the gravitational effects of three interacting bodies. The matter gets completely hopeless as a few more bodies are added.¹⁴⁶
2. Suppose, consistent with our commitment to consistency,

¹⁴⁵ See Ronald J. Allen et al., *The Double Jeopardy Clause, Constitutional Interpretation and the Limits of Formal Logic*, 26 VAL. U. L. REV. 281, 291 (1991) (citing IRVING M. COPI, *INTRODUCTION TO LOGIC* 348-49 (6th ed. 1982)).

¹⁴⁶ See, e.g., CASTI, *supra* note 130, at 40-42.

we wanted to maintain a consistent belief set. We could check for the consistency of our beliefs through a truth table. Or could we? We assume it is not controversial that every normal human being has thousands, probably hundreds of thousands, of beliefs. Quoting Christopher Cherniak:

How large a belief set could an ideal computer check for consistency in this way? Suppose that each line of the truth table for the conjunction of all these beliefs could be checked in the time a light ray takes to traverse the diameter of a proton . . . and suppose that the computer was permitted to run for twenty billion years, the estimated time from the "big-bang" dawn of the universe to the present. A belief system containing only 138 logically independent propositions would overwhelm the time resources of this supermachine.¹⁴⁷

3. As one of us said once before:

Perhaps the truth table method is not the way to go. Perhaps we should think of deciding cases as more like proving theorems in boolean algebra. This is not going to work either. Once more quoting Cherniak, "To prove theorems of only 617 symbols or fewer would require a network with so many boolean elements that, even if each were the size of a proton (with infinitely thin interconnecting wires), the machine would exceed the volume of the entire known universe."¹⁴⁸

4. Another example: "A simple calculation based on the average numbers of words per sentence and the number of choices that could sensibly be made for each word shows that there are a hundred times more meaningful sentences than the number of seconds since the beginning of the universe."¹⁴⁹ Which, by the way, explains the inexhaustible creativity of literature, as an analogous point explains the similar inexhaustible creativity of music.

5. Better yet: Suppose a salesman needs to go to twenty interconnected cities. There is no means of computing the shortest path for him to take that goes through each city once. Another example: "Given a knapsack of fixed volume and a collection of objects with fixed volume and worth, [the task is to] maximize

¹⁴⁷ CHRISTOPHER CHERNIAK, *MINIMAL RATIONALITY* 93 (1986).

¹⁴⁸ Ronald J. Allen, *Constitutional Adjudication, the Demands of Knowledge, and Epistemological Modesty*, 88 NW. U. L. REV. 436, 444 (quoting CHERNIAK, *supra* note 147, at 90).

¹⁴⁹ Steve Jones, *The Set Within the Skull*, 44 N.Y. REV. BOOKS 13 (Nov. 6, 1997) (reviewing STEVEN PINKER, *HOW THE MIND WORKS* (1997)).

the value placed in the sack. . . . [W]hen the number of objects is relatively small, computers and humans can find the solution easily. As the size of the problem becomes even modestly large, finding a solution is extremely difficulty [sic].¹⁵⁰

Moreover, notwithstanding the charms of consistency, we are all walking contradictions. We venture to say that virtually everyone believes two contradictory propositions: that the universe had a beginning and that it did not have a beginning. Everyone thinks the universe had a beginning because all things must begin somewhere, sometime. Everyone also thinks the universe did not have a beginning because whatever is asserted to be the beginning of the universe leads to the question, what preceded that moment in time? And the answer is that something must have. If this contradiction is not to your fancy, we suggest you will not be hard pressed to find another to take its place. Does absence make the heart grow fonder, or is it the case that out of sight means out of mind? Thus, were we to take our commitments to formal modeling seriously, we would believe that every proposition can be deductively demonstrated to be true. Or false. Or both.

Of course, no one other than some literature professors and a few philosophers thinks all propositions are true, false, and both true and false, all at the same time. We know some things are true, not because of analysis but because of observation. We know the moon is not made of green cheese, even if from certain prior commitments (the universe had a beginning; the universe did not have a beginning) we can deduce that it is. We chose in such circumstances to forego the deduction and rely on observation. We also know, or at least think we know, some things are true by analysis. Many branches of mathematics are examples. This works by agreeing to exclude the acidic effects of some contradictions, such as the competing hypotheses about the universe, and operating purely locally, as it were. The two, observation and analysis, can also work together. Logical contradictions that emerge from our beliefs can lead us to check

¹⁵⁰ Eric Kades, *The Laws of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory for the Law*, 49 RUTGERS L. REV. 403, 440-41 (1997). The problem is NP-complete, which means the time it takes to compute a solution increases exponentially with increased variables. For an illuminating discussion see *id.* The salesman and knapsack problems are discussed at *id.* 437-41.

our beliefs locally, even if we cannot do so globally. Similarly, observations can lead to adjustments in our analysis, as occurred in a sense to set theory and mathematics following the production of Russell's famous paradoxes.

The moral of this part of the story is that there are numerous intellectual or cognitive tools that may be put to good, or to bad, use in attempting to understand any particular phenomenon. Some tasks require certain tools, others different ones. Bulldozers are wonderful for building roads, but are unwelcome in surgical units.¹⁵¹ Friederich Hayek saw this point clearly in his distinction between grown and made orders.

A made order originates from the design of its creator. In contrast, a grown order, or spontaneous order, such as a market or a common law system, arises without a plan. It has orderly features, but these result from equilibrium rather than from someone's design. For instance, biological systems, natural languages, . . . and the common law all possess grown order attributes. Hayek argued that each type of order has its own appropriate explanatory technique. Made orders are appropriately explained by inquiring into the intent of the designer. For instance, what did the condominium association intend when it prohibited large animals? Conversely, grown orders cannot be explained in this manner. The appropriate method of explaining grown orders is positive theory.¹⁵²

Natural languages are grown orders; mathematical languages are made orders. The common law is a grown order; the sales contract is a made order. Spontaneity versus a plan. The free market is a grown order; communist economies are (try to be) made orders. . . . Consider the following two sets of pictures that visually portray the distinction. The first set is of two forests: the first a picture of an unmanaged tropical forest, and the

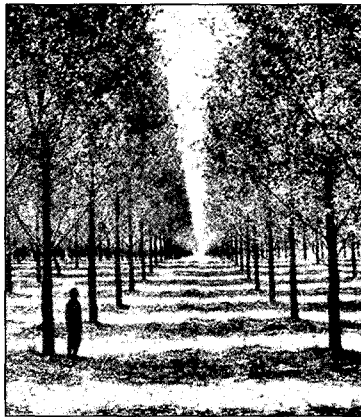
¹⁵¹ Cf. Ronald J. Allen, *Rationality, Algorithms and Juridical Proof: A Preliminary Inquiry*, 1 E & P 253 (1997).

¹⁵² Mark F. Grady, *Positive Theories and Grown Order Conceptions of the Law*, 23 SW. U. L. REV. 461, 461 (1994) (citing FRIEDERICH A. HAYEK, *LAW LEGISLATION, LIBERTY: RULES AND ORDER* 35-54 (1973)). A fair question would be what takes the place of price in Hayek's model. See FRIEDERICH HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER: THE USE OF KNOWLEDGE, IN SOCIETY* 77 (1948). The answer is the effort of the parties through their lawyers. The parties and their lawyers have the correct incentives to obtain and present facts and arguments to the judges for decision. However, we should point out that our use of the Hayekian distinction is heavily metaphorical. Another helpful metaphor is the judges as a network, talking to each other about different factual scenarios.

second of a managed woodlot. The second set of pictures compares two urban centers: the first of the city of Bruges as it was around 1500 A.D.; the second of Chicago in 1893.¹⁵³

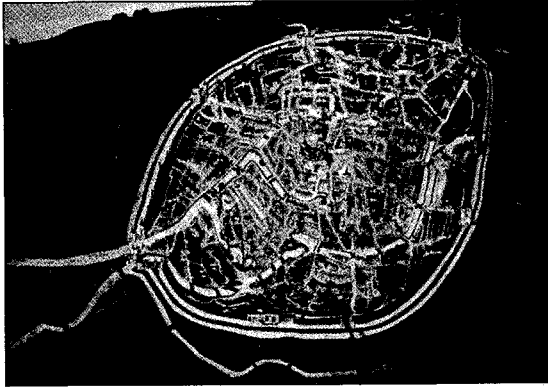


Unmanaged Tropical Rain Forest
reprinted from *Unasylva*, FAO, vol. 31, no. 126, at 29.

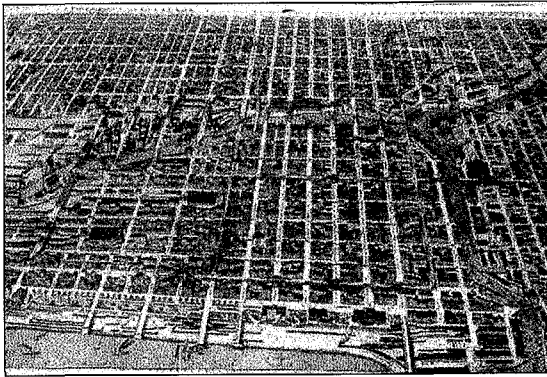


Poplar Plantation in Hungary
reprinted from *Unasylva*, FAO, vol. 36, no. 145, at 29.

¹⁵³ The textual material is borrowed from Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 995 (1996).



Bruges, circa 1500, *reprinted from* Mark Girouard, *Cities and People: A Social and Architectural History* (1985).



Bird's-eye view of Chicago, circa 1893, *reprinted with permission from* Chicago Historical Society.

These two pairs of photographs well demonstrate the distinction between grown and made order. The unmanaged tropical forest grows “wild,” uncontrolled by a central authority; it is the embodiment of complexity. It teems with life forms in an ongoing struggle for survival. And that struggle is unpredictable. If one wonders whether a certain flower, bush or tree will die or flourish, no algorithm will provide the answer. If the forest is chaos, the woodlot is serenity. All is in place here, all in order.

A single determining principle, the maximizing of lumber production from a certain species of tree, governs all. It governs what is planted and what is rooted out. It governs the physical layout of the land and crop, and what nutrients are introduced to the soil. Virtually anything at all about the area can be predicted by asking its relevance to the production of wood.

We see these same patterns in the two cities. Bruges grew spontaneously over time. No zoning laws controlled the placement of buildings or roads, no central authority laid out a plat. Numerous individuals made individual choices in light of their own interests over time, and the city grew organically. Indeed, the architecture of the city looks remarkably like that of a living cell. Chicago is the quintessential planned city. Nothing disrupts the geometric lines and angles but a natural feature of the landscape, the river. Even that was not left untouched, as the city planners decided that its course should be reversed, which it promptly was. Chicago serves the value of efficient transportation; Bruges is the sum of the interaction of untold numbers of individual values. Anyone knowing the intent of the city fathers could predict the physical layout of Chicago; there is not even an analogous question to ask of Bruges. Once again, order and chaos.¹⁵⁴

The distinction between spontaneous and made orders has a crucial significance for both the analysis and "reform" of an entity, although we use the point differently than Hayek did. He focused on the origin of systems; our focus is on their complexity.

Made orders usually possess a limited number of variables, and thus those variables may be manipulated in order to produce predictable outcomes. If the woodlot suffers a drought, watering will promote growth. If the soil becomes too acidic, it can be treated, and so on. Spontaneous orders are extremely complex; introducing reforms into spontaneous systems leads to much more unpredictable consequences. Introducing a new vine as ground cover around the periphery of the forest may result in the forest's destruction as the vine, freed from its natural enemies, grows out of control and chokes out all other plant forms. Unintended, unanticipated consequences are much more likely to result from the introduction of change into a spontaneous order

¹⁵⁴ See *id.* at 996-97.

than a made order.¹⁵⁵

A perfect example of unintended side effects is the introduction of rabbits into Australia that we have been referring to throughout this paper. They were introduced either as a source of sport or of food. They came close to taking over the continent:



The Result of Uncontrolled Rabbit Breeding
reprinted from Peter Luck, This Fabulous Century at 341
(Landsdowne Press, Sydney 1981).

In essence, the Fourth Amendment is, as we have been suggesting, a grown, spontaneous system, in Hayek's terminology. In ours, it has too many variables to yield its essence to logical analysis designed to generate decision algorithms. Its subject matter encompasses virtually every human action and interaction imaginable, from the most public to the most private act, from public statements to private thoughts recorded in a secret diary, from the affairs of the homeless to those of Dow Chemical, from participating in illegal drugs markets by users and sellers to illegal restraints of trade by Archer, Daniel, Midlands. There are too many variables to accommodate algorithmically,

¹⁵⁵ See *id.* at 997.

some of which, as we mentioned earlier, are continuous, which compounds the problem.¹⁵⁶ All of which, in significant part, explains why the commentators all see different things when they look at the Fourth Amendment, and why their prescriptions all differ. It is also why the effort to control discretion has been a failure, the constitutional equivalent of introducing rabbits into Australia. The ecological system of the Fourth Amendment responded to it in unpredictable and unmanageable ways. The belief of the commentators, in short, that the criminal justice system or the Fourth Amendment or privacy will reduce to simple variables, a simple theory, is unjustified. Some things are just more complicated than that.

Are we, then, simply at the mercy of an uncontrollable monster? No. We can always introduce rabbits and see what happens, and remember that introducing rabbits into Australia was great for the rabbits. Perhaps sometimes magic bullets will work out in acceptable ways. The Supreme Court's voting rights cases seem to us to be an example.¹⁵⁷ Moreover, cautious, incremental change, with a sensitive awareness of the need for close monitoring and adjustment can be done with a reasonable prospect of favorable outcomes—as the common law demonstrates so well. Adjustments can come from other sources besides the courts, of course. Whatever the sources, we suggest this is the path to take. Rather than more futile efforts at grand theorizing, attention should be paid to the localities. The proliferation of local knowledge should be applauded and encouraged rather than criticized. The model to apply to the Fourth Amendment is the model of the common law, with its tremendous capacity to adjust to quite fine distinctions.¹⁵⁸ The Supreme Court should

¹⁵⁶ See generally MURRAY GELL-MANN, *THE QUARK AND THE JAGUAR: ADVENTURES IN THE SIMPLE AND COMPLEX* (1995).

¹⁵⁷ The voting rights cases appear to us to be the best example of a magic bullet from the Supreme Court that worked out pretty well and did not cause serious and lamentable unanticipated consequences. We hasten to emphasize that we have not thought through every aspect of constitutional law from the perspective of this paper.

¹⁵⁸ It is not much of an overstatement, maybe none at all actually, that legal scholarship is under the dominion of a single view of what "rationality" might mean. That view focuses, excessively in our view, on rules and deduction. There are competing conceptions of rationality. For one that maps much more easily on to the common law process, see Tim Van Gelder, *What Might Cognition Be, If Not Computational?*, 96 J. PHIL. 345 (1995). Van Gelder's, *The Dynamical Hypothesis in Cognitive Science*, will be a target article in a forthcoming issue of BEHAVIORAL AND

largely stay out of the business, contenting itself, as it has lately, to making a few general pronouncements and leaving the real business to the trial courts, and to a lesser extent the courts of appeals. That effort will from time to time generate a need for a more global decision, and the Court can provide it when sensible, but again always cautiously. Legislative oversight should consist in a similar effort, with discriminating legislative adjustments made as called for by the circumstances of the times.

Were our recommendation followed, the task of the Fourth Amendment scholar would change significantly. We are recommending foregoing the high rhetoric of what passes for constitutional theorizing and engage instead in the task of discovering the true nature of the system, to metamorphose from rhetoricians to scientists, as in our view Professor Stuntz already has. This may take some of the fun out of it, but it would increase the probability of a positive effect. One of the undiscussed truisms of modern law school life is the general irrelevance of the constitutional theorizing coming out of the law schools. We think we have explained this phenomenon.¹⁵⁹ The people running the system in all branches of government have at least an intuitive grasp of both the highly complex entities with which they deal and the untoward effects of introducing rabbits into Australia. They are thus cautious pragmatists who almost always will proceed slowly and cautiously.

As they should. It is very difficult to believe that the world would be a better place if the legal system reacted quickly to the

BRAIN SCIENCES. Another is connectionism. See PAUL THAGARD, *CONCEPTUAL REVOLUTIONS* (1992). Without referencing any of these points, Professor David Strauss has argued that the common law provides a more accurate model of the reality of constitutional practices than does its hierarchical alternative. See David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). We have tried to explain why that is so. Quite clearly, cases tend to be decided analogically when a dispositive precedent is not on point. A recent example is *U.S. v. Redmon*, 138 F.3d 1109, 1111 (7th Cir. 1998) (en banc), *petition for cert. filed*, 67 U.S.L.W. 3149 (U.S. June 8, 1998) (No. 98-243), which stated:

As we approach this search problem we shall not endeavor to fashion some convenient rule to fit all situations. . . . Each case of this nature will involve the weighing of all the relevant factors and the exercise of a fair judgment with due regard for the important constitutional guarantees as defined by Supreme Court and other conforming precedents.

Id.

¹⁵⁹ As we have another. The complaints of the Fourth Amendment scholars about the conceptual incoherence of their field have counterparts in many other substantive areas of law, for the same reasons we have developed herein.

latest developments in legal theory. The universe generates real constraints on our options. Neglecting that point has led to the virtual irrelevancy of modern constitutional scholarship. Unlike Professor Amar, we do not think Fourth Amendment scholars should read more constitutional theory so much as they, and other constitutional scholars, should become familiar with methodologies and their limits, analytic and empirical, that can be employed to discover facts.

We are acutely aware that we have said nothing about substance—about what it is that the common law of the Fourth Amendment would or should focus on. That is because we think that no such list can be compiled that would be of any serious utility. That is not to say that none of the components of the list could be identified. Obviously the Fourth Amendment will be seen as having to do with privacy, autonomy, dignity, human rights more generally, exercise of discretion, abusive police practices, demands of law enforcement, crimes rates, resources, the relationship between substantive rights and remedial measures, linguistics, theories of interpretation, separation of powers, political theory in general, and on and on and on. Even if a complete list could be fashioned, it would have too many elements to permit a description of the relationship between them. The most that can be hoped for is to permit knowledge to develop from the ground up, with thousands of different loci rather than one, and with them interacting more in the nature of a network rather than a hierarchy. As we noted above this does not preclude intervention from time to time from on high, but it inverts the normal way of thinking about constitutional theory (but not, take note, the common law).

Some have criticized us for, in essence, being defeatists.¹⁶⁰ Who knows, the argument has been advanced, when someone will have a breakthrough analogous to the progression of astronomy and physics from Ptolemy, to Copernicus, to Newton, to Einstein? Well, yes, who knows? When we survey the landscape

¹⁶⁰ At the conference, one participant appeared to think it a telling point that our paper was itself a theory about the Fourth Amendment, perhaps believing that to show a contradiction. In this respect, we respectfully suggest that she missed our basic point. This paper is not anti-theoretical. Far from it. Our objective has been to examine the nature of the relevant problem and the tools that so far have been brought to bear upon it. Our self-conception, self-conceit, perhaps, is that this is a highly theoretical paper, but one that ties its theoretical aspects to the real world around it.

of the Fourth Amendment, we see nothing like the progression of theories in astronomy and physics, where new, more powerful explanatory theories arise to absorb their predecessors.¹⁶¹ We see instead something akin to the search for the secret of turning lead into gold. Not to be critical of alchemy—alchemy did advance knowledge; it led to chemistry.¹⁶² But it did not lead to knowledge of how to change lead into gold. The various searches for simple theories of the Fourth Amendment have also advanced knowledge on many fronts, but not on the one to which the efforts were directed. At some point, one needs to reflect on the lessons of the field as a whole in order to make sensible decisions concerning the issues worth pursuing. We think the field of criminal procedure has reached just such a point.

One last irony. Many commentators have complained that Professor Amar has stood constitutional criminal procedure on its head.¹⁶³ Our complaint is that he and his critics have not (and thus, an irony within an irony, as we add our voices to the cacophony addressing the Fourth Amendment). They all accept the normal hierarchical implications of standard constitutional theory, and neglect the implications of the common law and markets. We think they have improperly appraised the object of their inquiry.

¹⁶¹ See IMRE LAKATOS, *Falsification and the Methodology of Scientific Research Programs*, in CRITICISM AND THE GROWTH OF KNOWLEDGE 91 (1965); KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 27-48 (2d ed. 1965).

¹⁶² See 1 THE NEW ENCYCLOPEDIA BRITANNICA 226 (15th ed. 1989); AARON J. IDHE, *THE DEVELOPMENT OF MODERN CHEMISTRY* 3-31 (1984).

¹⁶³ See the superb article, Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. REV. 1559, 1563 (1996) (Professor Amar "believes . . . that prevailing criminal procedure doctrine is constitutionally upside-down").