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When the Cure for the Fourth Amendment is Worse than the Disease

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ARTICLES

WHEN THE CURE FOR THE FOURTH AMENDMENT IS WORSE THAN THE DISEASE

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> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.
>
> William Pitt the Elder

> Most people don't even realize that the same search warrant requirements that protect a man's castle also bar the police from searching the pockets of the seamy-looking character suspected of selling marijuana to the man's school-age children.
>
> Fred P. Graham, *The Self-Inflicted Wound*

I. INTRODUCTION

Professor Akhil Reed Amar has written a provocative article on the Fourth Amendment.[1] Professor Amar claims to be a friend of the Amendment, which may explain why his article is one of the few articles on the Fourth Amendment to appear in the *Harvard Law Review* since 1921.[2] The Fourth Amendment guarantees our right to be free

* Professor of Law, Boston University. I owe special thanks to Yale Kamisar who provided valuable comments and insights on this Article. I also want to thank Stan Krauss and Karen Scent who read a draft of this Article during its preparation.

1. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

2. *See* Walter E. Dellinger, *Of Rights and Remedies: The Constitution As a Sword*, 85 HARV. L. REV. 1532 (1972); Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921); Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49

from unreasonable governmental searches and seizures.[3] Professor Amar calls the amendment "a priceless constitutional inheritance," "a beauty to behold," and "one of our truly great Amendments."[4] Insisting that he comes to praise the Fourth Amendment, "not to gut it,"[5] he urges a new way of thinking about the Amendment. While highly critical of the reasoning and doctrine of the Supreme Court cases on the Amendment, he proposes an "attractive alternative approach"[6] to understand and preserve the liberties embodied in the Fourth Amendment.

Consider a few examples of Professor Amar's new model of Fourth Amendment thinking: "[What does the Fourth Amendment require?] The words of the Fourth Amendment really do mean what they say. They do not require warrants, even presumptively, for searches and seizures. They do not require probable cause for all searches and seizures without warrants."[7]

When the police act illegally, what should be done with the fruits of their illegality? State officials should be free to exploit unconstitutional police conduct because "[c]riminals get careless or cocky; conspirators rat; neighbors come forward; cops get lucky; the truth outs; and justice reigns—or so our courts should presume, and any party seeking to suppress truth and thwart justice should bear a heavy burden of proof."[8]

> Is electronic surveillance constitutional?
>
> The problem [with electronic surveillance] is trying to stretch the Warrant Clause to cover [it] . . . .
>
> . . . .
>
> Now secrecy does not necessarily equal unconstitutionality. But it does raise a problem [a problem we are largely blind to so

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HARV. L. REV. 566 (1936); *see also* Yale Kamisar, *Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation*, 76 HARV. L. REV. 1502 (1963) (book review).

3. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

4. Amar, *supra* note 1, at 761.
5. *Id.*
6. *Id.* at 800.
7. *Id.* at 761.
8. *Id.* at 794.

> long as we continue to see warrants as always necessary, always the solution, and never the problem]. And if the answer to our problem does not lie in a secret newfangled warrant, neither does it lie in probable cause. It lies in reasonableness. Simply put, are secret searches and seizures reasonable?[9]

When blacks and poor people are the routine targets of law enforcement tactics, how should such tactics be analyzed?

> To justify a search or seizure that lands with disproportionate impact on poor persons, or persons of color, the government may at times claim that the poor or the non-white are also disproportionate *beneficiaries* of the scheme, because the government search is designed to reduce the risk that they will be victimized by violent crime, or drugs, or what have you. The interests of victims are hard to squeeze into the language of probable cause and warrants but comfortably fit under the canopy of reasonableness. Make no mistake, the issues of race and class—of both the target of the search or seizure and the victim of crime—will not be easy to sort out, but once again we will be asking the right questions, honestly and openly.[10]

Who should have the final word on whether a particular search or seizure is constitutional?

> [G]overnment should generally not prevail—at least on the issue of reasonableness—if the citizen can persuade a jury of her peers. "Reasonableness" is largely a matter of common sense, and the jury represents the common sense of common people. Threats to the "security" of Americans come from both government and thugs; the jury is perfectly placed to decide, in any given situation, whom it fears more, the cops or the robbers. This judgment, of course, will vary from place to place and over time.[11]

Professor Amar's discussion of the Fourth Amendment proceeds on several different levels. He states that the modern Court's Fourth Amendment doctrine is a "vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse."[12] According to Amar, the foundation of the Court's case law—judicial warrants; probable cause for many searches and seizures; and the exclusion of illegally obtained evidence—is at odds with the text and history of the Amendment.

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9. *Id.* at 803.
10. *Id.* at 808 (footnote omitted).
11. *Id.* at 818 (footnotes omitted).
12. *Id.* at 758.

Moreover, Amar believes the results in many cases are inexplicable. "Criminals go free, while honest citizens are intruded upon in outrageous ways with little or no real remedy."[13] Legal scholars only compound the problem. They "ponder every nuance of the latest Supreme Court case, but seem unconcerned about the Amendment's text, unaware of its history, and at times oblivious or hostile to the common sense of common people."[14]

Although Amar advocates several solutions to the problems he sees, two primary planks form the heart of his refurbishing of Fourth Amendment law. First, he wants to shift the Court's focus away from judicial warrants and the probable cause requirement, and instead concentrate on the touchstone of the Fourth Amendment—reasonableness.[15] In his view, the "core of the Fourth Amendment . . . is neither a warrant nor probable cause, but reasonableness."[16]

Second, Amar wants to eliminate the exclusionary rule as a remedy in cases where officials discover evidence in violation of the Fourth Amendment. He believes that "civil juries and civil damage actions in which government officials were held liable for unreasonable intrusions against person, property, and privacy"[17] will repair the harm caused by police illegality. Civil damage actions are "deeply rooted in our Fourth Amendment tradition whereas criminal exclusion is wholly unprecedented." Moreover, civil remedies "make much more sense, *as deterrence*" than the exclusionary rule.[18] If his vision of the Fourth Amendment is adopted, Amar contends it will protect honest people from outrageous police invasions, without providing guilty defendants the windfall of excluding reliable evidence from their criminal prosecutions.

II. HISTORICAL SAFEGUARDS AND REASONABLENESS

Professor Amar argues that the text and history of the Fourth Amendment are on the side of innocent citizens and aligned against the guilty among us. He writes that the Court and others have ignored the words of the Fourth Amendment. All the Fourth Amendment commands is that government officials act reasonably when they

13. *Id.*
14. *Id.* at 759.
15. *Id.* 801-11.
16. *Id.* at 801.
17. *Id.* at 759.
18. *Id.* at 798.

intrude on our privacy and property. This view of the Amendment, Amar claims, comports with its text, is consistent with the intent and understanding of the Framers and eighteenth century authorities, and makes the most "common sense" when we seek to apply the Amendment to today's search and seizure problems.[19]

The concept of reasonableness makes eminently good sense—provided it is applied in a manner that does not undermine the values embodied in the Fourth Amendment. I am not opposed to common sense when interpreting the Fourth Amendment.[20] Who is? But Amar's readers are ill-served if they believe that the Fourth Amendment simply calls for reasonable police behavior. Further, I do not oppose consulting history when interpreting the Fourth Amendment. But the history and development of the Fourth Amendment includes a lot more than Professor Amar is willing to concede.

The history of the Fourth Amendment is about controlling executive power. Amar's thesis that the Fourth Amendment only requires that police intrusions comport with "common sense" is simply wrong.[21] Reasonable judgment and common sense should play a role in the ongoing formulation of search and seizure law. But "reasonableness" cannot be the end of the matter.[22] Amar's vision of the

19. *Id.* at 757-61.

20. *See* Albright v. Oliver, 114 S. Ct. 807, 815 (1994) (Ginsburg, J., concurring) ("A person facing serious criminal charges is hardly freed from the state's control upon his release" from physical custody. This view of the definition and duration of a "seizure" under the Fourth Amendment comports with "common sense" and "common understanding."); Mapp v. Ohio, 367 U.S. 643, 657 (1961) ("[O]ur holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense.").

21. As one historian of the amendment has observed, "[t]he history that preceded the Fourth Amendment . . . reveals a depth and complexity that transcend [its] language. . . . The amendment expressed not a single idea but a family of ideas whose identity and dimensions developed in historical context." William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602-1791, at 1555 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

22. As a textual matter, reasonableness is the touchstone of the Fourth Amendment's initial clause. One might even concede that this text gives meaning to a proper interpretation of the entire Amendment, and still find that warrants and probable cause play important parts in enforcing the Fourth Amendment.

For example, before the police are permitted to invade my home or secretly listen to my telephone conversations, it is very "reasonable" to require that they present objective evidence of my criminality to a neutral magistrate. If the magistrate agrees with their assessment, it is also reasonable that the magistrate confine the scope of their search to those areas and objects that justify the intrusion. Similarly, if FBI agents plan an arrest—a major disruption in anyone's life—is it not "reasonable" that they first persuade a magistrate that the government has sufficient grounds for the arrest?

Amendment is delusive because it does not grapple with the hard reality that "the fourth amendment is quintessentially a regulation of the police—that, in enforcing the fourth amendment, courts *must* police the police."[23]

Amar begins his critique of current Fourth Amendment doctrine by constructing several straw men, which he attacks as inimical to the notion that reasonableness "is the ultimate touchstone for all searches and seizures."[24] Consider, for example, Amar's criticism of the "warrant preference" rule, which holds that a judicial warrant is a necessary precondition of a reasonable search unless good reasons call for proceeding without one. He argues that the Fourth Amendment does not expressly provide for such a rule. He also writes that there is no historical support for the rule in eighteenth- or nineteenth-century thinking on the subject.[25] Amar then concludes:

> The problem with the so-called warrant requirement is not simply that it is not in the text and that it is contradicted by history. The problem is also that, if taken seriously, a warrant requirement makes no sense. [There are several] common-sense counterexamples to the notion that *all searches and seizures must be made pursuant to warrants.*[26]

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23. Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 371 (1974); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 295 (1993) ("The fourth amendment exists for the very purpose of enhancing individual liberty by constraining government power.").

24. Amar, *supra* note 1, at 768.

25. In another part of his article, Amar states: "Strictly read, the Warrant Clause applies only to search warrants akin to traditional search warrants—warrants for contraband, stolen goods, and the like." Amar, *supra* note 1, at 765.

This description of the Warrant Clause is curious. Although Amar criticizes the Court and others for "sloppy textual" analysis, *id.* at 800, he is willing to ignore the text of the Warrant Clause. That clause provides: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. As a matter of text, the Clause is not limited to traditional warrants. When the Framers wanted to limit the scope of warrants, for instance, by requiring probable cause, oath, and particularity, they did so explicitly. If the Framers intended the Warraut Clause only to extend to contraband or stolen goods, they could have said so. As a historical matter, there is abundant evidence that the Framers' generation knew that specific warrants were used in contexts that went beyond warrants for contraband and stolen goods. *See* Cuddihy, *supra* note 21, at 1298 (footnote omitted):

> [S]pecific warrants proliferated in a double sense during and after the revolution. Both the usages of that warrant and the states that used it multiplied after 1776. Before the revolution, only Massachusetts had emplaced the specific warrant as its usual method of search and seizure, and most other colonies had only used it to find stolen property. After the revolution, many states introduced specific warrants, and they applied them to an expanding range of purposes: revenue collections, hunting Tories, replenishing the army, and more.

26. Amar, *supra* note 1, at 767-68 (emphasis added).

Professor Amar is correct: The text of the Fourth Amendment does not expressly provide for a warrant preference rule. Amar, however, cites no one who argues that "all searches and seizures must be made pursuant to warrants."[27] Only Amar makes this claim, and he asserts it to attack a proposition that is not at issue. Many people have advocated that the Court take the warrant preference rule seriously.[28] Proponents of the warrant preference rule, however, have never claimed that the rule is textually based or derived from express references to eighteenth-century thinking about the meaning of the Fourth Amendment. Instead, they argue that the rule is designed to promote the central premise of the Fourth Amendment, which is to control police discretion.[29]

But Professor Amar never discusses whether the warrant preference rule reasonably restrains police investigatory power. Many of the Justices and law professors, who Amar holds responsible for the current "mess"[30] associated with search and seizure doctrine, have long argued that the Fourth Amendment is a "profoundly anti-government document[ ]"[31] that is designed to control the discretion and authority of law enforcement personnel. Why doesn't Amar directly confront this position? Maybe Amar believes that judges have no

27. *Id.* at 768. At another point he says: "We have now seen at least eight historical and commonsensical exceptions to the so-called warrant requirement. There are many others—but I am a lover of mercy. And by now I hope the point is clear: it makes no sense to say that *all* warrantless searches and seizures are per se unreasonable." *Id.* at 770 (emphasis added) (footnote omitted).

28. Justice Felix Frankfurter was one of the early supporters of the warrant preference rule. *See* United States v. Rabinowitz, 339 U.S. 56, 68-86 (1950) (Frankfurter, J., dissenting); Harris v. United States, 331 U.S. 145, 161-62 (1947) (Frankfurter, J., dissenting); Davis v. United States, 328 U.S. 582, 595 (1946) (Frankfurter, J., dissenting).

29. Do advocates of the warrant preference rule claim that the history surrounding the adoption of the Fourth Amendment supports their view? Absolutely! Proponents like Justice Frankfurter, *supra* note 28; Professor Amsterdam, Amsterdam, *supra* note 23, at 396, 397-98, 411-14; and Jacob Landynski, JACOB LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 42-44 (1966), have all claimed "that history and experience of the founding fathers support the view that a search is unreasonable unless authorized by a warrant." Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 204 (1993).

Advocates of the warrant preference rule do not, however, rely on a narrow, textual reading of the Amendment's language. Nor have they chosen to focus solely upon the primary concerns that preoccupied the Framers, to wit, general warrants and writs of assistance. Instead, they emphasize the substance of the evil that motivated the Framers in adopting the Fourth Amendment—namely, an unchecked executive discretion to search and seize. *See, e.g.*, Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 574-75 (1983); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 294-98 (1984).

30. Amar, *supra* note 1, at 761.

31. Amsterdam, *supra* note 23, at 353.

business telling police officers whether and how they should investigate and apprehend suspected murderers and drug dealers. But if judges do not restrain the police when they investigate the presumed bad guys, they will have no mechanism to control the police when they decide to investigate the rest of us.

Professor Amar also cites four categories of warrantless intrusions that were permitted around the time the Fourth Amendment was adopted. According to Amar, these counterexamples to an implied warrant rule "make clear that, if a warrant requirement truly did go without saying, leading eighteenth- and nineteenth-century authorities did not think so."[32]

Again, Amar has resolved a nonissue. Proponents of the warrant preference rule have never claimed that eighteenth- and nineteenth-century authorities share their view about the phraseology of the Fourth Amendment. Proponents of the warrant preference rule have looked to history to discover the broad themes that compelled the Framers to establish a constitutional principle against governmental searches and seizures. Those who proposed the Fourth Amendment did so because they "opposed leaving the power to search and seize solely in executive hands."[33] In their day, the abuse of executive search and seizure powers primarily manifested itself in the form of general warrants and writs of assistance.[34]

Today, law enforcement officials have a greater array of weapons to invade our privacy and personal security. Certain investigatory tools obviously did not exist when the Fourth Amendment was adopted; other police practices still used today existed in 1791, but were not on the revolutionary agenda, or may have never been considered subject to regulation under the Constitution. What did the

32. Amar, *supra* note 1, at 767.

33. Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 620 (1982).

34. Writs of assistance were used by British customs officials to facilitate enforcement of the trade laws in the American colonies. "The writ empowered the officer and his deputies and servants to search, at their will, wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their suspecting eye." NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 54 (1937) (footnote omitted). The writ, although not a search warrant in the traditional sense because it did not authorize a search, was a court order to constables, peace officers, and subjects of the Crown to assist customs officers in the execution of their duties. The writ "merely vouched for the identity of the customs officers who by their commissions were authorized to search." O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, *in* THE ERA OF THE AMERICAN REVOLUTION 40, 45 (Richard B. Morris ed., 1939).

Framers think about eavesdropping? What did they think about frisking suspicious persons? Was the power of subpoena a seizure? Did it require judicial authorization? Did the Framers consider undercover spies and informants a type of search that a judge could order by warrant? How would the Framers react to having the "knock and announce" rule eliminated in cases where the police suspect that contraband is inside a private home?[35]

Following Amar's advice, we should first examine the text of the Amendment for answers to these questions. The text, of course, provides no answers. That leaves us with the views of eighteenth- and nineteenth-century legal authorities (and the vagaries of twentieth-century juries) under Amar's scheme. But do we really want the existence and breadth of our interests in privacy and personal security to turn on the values and understanding of the eighteenth or nineteenth century? Professor Amar does not.[36] Many individuals probably share Justice Oliver Wendell Holmes' conviction that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[37] As Professor Carol Steiker wrote, the Fourth Amendment's vague text "positively invites constructions that change with changing circumstances."[38]

Professor Amar also argues that our constitutional ancestors opposed general warrants and writs of assistance,[39] but expressed no concern with warrantless searches.[40] Here is an example of how history can be misleading if one is not careful. Everyone, including Amar, agrees that the Framers opposed general warrants. The Framers opposed such warrants because these warrants granted executive

35. *See* Charles Patrick Garcia, Note, *The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 COLUM. L. REV. 685 (1993). While the text of the Fourth Amendment is silent on the point, there is clear and convincing evidence that the Framers' generation strongly opposed nocturnal and unannounced searches, and believed such searches were unconstitutional. See Cuddihy, *supra* note 21, at 1508-13.

36. " 'Reasonableness' is not some set of specific rules, frozen in 1791 or 1868 amber, but an honest and sensible textual formula to organize candid jury deliberations and fair jury decisions." Amar, *supra* note 1, at 818.

37. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

38. Carol Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994).

39. Actually, Professor Amar is dismissive of the impact that writs of assistance had on the history and development of the Fourth Amendment. *See infra* notes 51-75 and accompanying text.

40. Professor Amar notes that:

> Nor have proponents of a warrant requirement uncovered even a handful of clear statements of the "requirement" in common law treatises, in the debates over the Constitution from 1787 to 1789, or in the First Congress, which proposed the Fourth

officers discretionary power to conduct indiscriminate searches.[41] The evil associated with discretionary power was that officers could use their authority to conduct unjustified and arbitrary searches.[42] Unjustified and arbitrary intrusions, whether they be searches or seizures, threaten the privacy and liberty interests of all persons.

Now, let us return to Amar's theory that warrantless intrusions did not trouble the Framers.[43] Amar is right that the Framers did not go on record as opposing all warrantless searches. Amar is also correct that the text of the Fourth Amendment does not proscribe all warrantless searches and that eighteenth-century precedents support certain types of warrantless intrusions. General, discretionary searches by government officers were widespread in the states when

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Amendment. On the contrary, when we consult these and other sources, we see a number of clear examples that disprove any implicit warrant requirement.

Amar, *supra* note 1, at 763. As examples, Amar cites arrests without warrants, searches pursuant to arrests, searches of ships under the Act of 1789, and successful searches and seizures. *Id.* at 764-68.

41. *See* LASSON, *supra* note 34, at 54. In *Wilkes v. Wood*, which Amar calls "*the* paradigm search and seiznre case for Americans," Amar, *supra* note 1, at 772, Chief Justice Pratt described the evil of general warrants this way:

> The defendants claimed a right, under precedents, to force persons houses, break open escrutores, seize their papers, upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.

Wilkes v. Wood, 98 Eng. Rep. 489, 498 (1763).

42. *See* Amsterdam, *supra* note 23, at 411.

43. Justices and scholars have made a similar claim. Chief Justice Rehnquist and Justice White have been long-time critics of the rule. *See, e.g.*, Robbins v. California, 453 U.S. 420, 438-39 (1981) (Rehnquist, J., dissenting) (criticizing warrant preference rule); Steagald v. United States, 451 U.S. 204, 224-25 (1981) (Rehnquist, J., dissenting); Payton v. New York, 445 U.S. 573, 615 (1980) (White, J., dissenting); Coolidge v. New Hampshire, 403 U.S. 443, 510-21 (1971) (White, J., concurring in part and dissenting in part). Justice Scalia has voiced similar concerns. *See* California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring in the judgment) ("The Fourth Amendment does not by its terms require a prior warrant for searches and seizures. . . . What it explicitly states regarding warrants is by way of limitation upon their issuance rather than reqnirement of their use.").

Professor Telford Taylor has been the academic trailblazer for those rejecting the warrant preference rule. *See* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41 (1969) ("[O]ur constitutional fathers were not concerned about warrantless searches, but abont overreaching warrants."); *see also* Gerard V. Bradley, *Present at the Creation? A Critical Guide to* Weeks v. United States *and Its Progeny*, 30 ST. LOUIS U. L.J. 1031, 1041 (1986) ("Warrantless searches, then as now, were the rule rather than the exception, and each of the thirteen colonies, and then states, as a common statutory practice, anthorized them.").

the Fourth Amendment was proposed.[44] But what does this history reveal? For starters, it reveals that early Americans did not always practice what they preached. Law enforcement practices frequently did not satisfy constitutional ideals. That discretionary searches and seizures were the norm in early America provides scant evidence that they were constitutionally correct—then or now.

The Fourth Amendment makes a pledge to the American people. It states an ideal; it is not a constitutional wrench that "locks-in" search and seizure practices of a vanished era. The Amendment was a symbolic response to a tradition and historical period that showed scant respect for individual privacy. As constitutional historian Leonard Levy observed: "The Fourth Amendment would not emerge from colonial precedents; rather, it would repudiate them."[45]

Keeping this history in mind, perhaps, Amar's readers will pause before they dismiss the warrant preference rule as constitutionally

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44. The discretionary search survived until the very eve of the Fourth Amendment. Despite constitutional prohibitions of general warrants by eight states from 1776 to 1784, general search warrants remained a staple of American use and legislation throughout the Revolutionary and Confederation periods.... Six states legislated general searches to collect their customs duties in the decade preceding 1788. Pennsylvania even adopted writs of assistance outright. New Hampshire and New York enacted such searches as weapons against game poaching and the hoarding of gunpowder, while Georgia and South Carolina continued their slave patrols [which utilized general seizures and searches].

William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371, 398-400 (1980); Cuddihy, *supra* note 21, at 1264 ("The new state governments oversaw the most draconian, promiscuous searches and seizures that transpired on American soil. The same states whose constitutions renounced the general warrant simultaneously engineered its most vigorous and extensive usage.").

45. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 224 (1988). The adoption of the Fourth Amendment signaled that "old ways" of thinking should no longer be accepted.

> The Fourth Amendment represented an American extension of the English tradition that a man's house was his castle. Governmental interests in Great Britain and the colonies remained largely outside that tradition. Specific warrants were not the orthodox method by which English and colonial law restrained official powers of search. Indeed, no single dominant theme or restraint existed. The requirement that all search warrants be specific, the heart of the Fourth Amendment, accordingly eularged the tradition's scope, for it controlled searches by the government to a degree never previously attempted. Although aged British precedents supported an undefined right against unreasonable searches, the particular mechanism by which the Fourth Amendment defined and enforced that right was neither ancient nor British.

Cuddihy & Hardy, *supra* note 44, at 400.

unacceptable,[46] and they may not embrace his suggestion that warrantless intrusions are not constitutionally troublesome.[47] Although we will never know for sure, it is certainly imaginable that the same individuals who proposed the Fourth Amendment as a commitment to individual liberty and privacy, and who Amar says despised general warrants, would—if put to the constitutional test—vigorously reject *warrantless* searches exhibiting *the same characteristics* that marked general warrants.[48] This is certainly a "common sense" argument.[49]

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46. The warrant requirement, as it was once applied by the Court, prevents the type of "cost-benefit" analysis that Amar favors. The warrant requirement tells us, and the police, that unsupervised searches should not be the norm, that warrantless intrusions must be justified by more than convenience, and that police discretion should be restrained. Our constitutional ancestors probably had similar thoughts in mind when they advocated a constitutional provision regulating governmental searches and seizures. After all, why bother establishing a fundamental "right" if that right is disposable anytime the government or a jury finds it to be an obstacle to achieving some other social utility?

47. Critics of the warrant preference rule are on shaky ground when they intimate that our constitutional ancestors were apathetic toward warrantless intrusions. As William Cuddihy has already documented, the Fourth Amendment's censure of the general warrant

> was part of a larger scheme to extinguish general searches categorically. The implicit unconstitutionality of general searches without warrant predated the amendment. In the most widely publicized protests on the search process prior to the amendment the Continental Congress, in 1774, had unconditionally condemned promiscuous, warrantless searches by customs and excise officers. While the Constitution was being ratified, moreover, nearly as many authors had execrated general excise searches without warrant as had similar searches by warrant, and the protests came from both Federalists and Antifederalists.

Cuddihy, *supra* note 21, at 1499-1500 (footnotes omitted). Later, in 1791, when the First Congress passed an excise tax that authorized warrantless searches of certain businesses, "apocalyptic protests" were heard from some quarters that such searches would invade the privacy of citizens. *Id.* at 1502-07.

48. Professor Amsterdam has explained the point succinctly:

> Surely then the Court has done right to seek some part of the meaning of an "unreasonable" warrantless search by asking what the condemnation of general warrants and writs implies about the nature of "unreasonable" searches and seizures. This is not to assert that the standards of reasonableness for searches with and without warrants must be the same, but merely that warrantless searches exhibiting the same characteristics as general warrants and writs must be deemed unreasonable if there is no principled basis for distinguishing them from general warrants and writs.

Amsterdam, *supra* note 23, at 411.

49. Amar does note that, under the common law, warrantless searches were subject to *post hoc* judicial review, "in which the jury loomed large." Amar, *supra* note 1, at 772. And he might reply to my concerns by noting that a civil jury would have condemned a search pursuant to writs of assistance just as it condemned the broad warrant issued in Wilkes v. Wood, 98 Eng. Rep. 489 (1763).

But if this is so, then why intimate that warrantless searches pose no constitutional concern when such searches obviously do not check discretionary police power, just as general warrants and writs of assistance did not restrain goverumental authority?

Further, Amar's emphasis on civil juries, rather than judicial warrants and probable cause, to define "reasonableness" is not textually based. The language of the Amendment says nothing about juries and offers no evidence whatsoever about whose perspective, judicial or civil jury, the provision was "designed to privilege." Amar, *supra* note 1, at 781.

So Amar's history lesson is really beside the point. Rather than focus solely upon particular practices that may or may not have preoccupied the Framers, historical analysis and constitutional originalism are helpful tools when they instruct us on the broad principles that motivated the Framers.[50] Again, the broad value that inspired the Fourth Amendment is restraint of police power and discretion. When the history surrounding the Fourth Amendment is presented in this manner, Amar's readers may not be as convinced as he is that warrantless searches are generally constitutional.

Amar also contends that the uproar in the colonies over writs of assistance was unimportant to the Framers' thinking and immaterial in the development of the Fourth Amendment. He writes that the "writs of assistance controversy . . . went almost unnoticed in debates over the federal Constitution and Bill of Rights."[51] What he calls "the writs of assistance controversy" is Amar's way of describing *The Writs of Assistance Case of 1761*, also known as *Paxton's Case*,[52] which involved a petition by several Boston merchants to prevent the issuance of new writs of assistance after the death of George II. The Boston merchants were represented by James Otis, Jr.[53] Amar writes that the "leading historical account of the Fourth Amendment found only a single reference to the writs of assistance in debates leading up to

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The Reasonableness Clause of the Amendment does lend itself to an interpretation that allows jury trials to play an important part. But this same text also supports an interpretation that emphasizes judicial warrants and probable cause. The latter interpretation is preferable because the typical target of police intrusion will lack the resources and standing in the community to succeed in a civil damage action. *See infra* part VII.

50. This point of constitutional interpretation was well put long ago:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.

Weems v. United States, 217 U.S. 349, 373 (1910).

51. Amar, *supra* note 1, at 772.

52. JOSIAH QUINCY, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVIDENCE OF MASSACHUSETTS BAY 1761-1772, app. I at 395-540 (1865) (Horace Gray's notes). For an analysis of the title of the case, see Cuddihy, *supra* note 21, at 766 n.25.

53. The background and aftermath of the case is reviewed in M.H. SMITH, THE WRITS OF ASSISTANCE CASE (1978). Smith's book has been described as an "impressive accomplishment" and "a truly exhaustive study" of the English and colonial American history dealing with writs of assistance. Bruce H. Mann, *The Writs of Assistance Case*, 11 CONN. L. REV. 353, 354, 355 (1979) (book review); *see also* Cuddihy, *supra* note 21, at 757-824 (detailing the history of the case).

the Amendment, and that reference came from the pen of Mercy Otis Warren, the sister of [James Otis, Jr.]."[54]

Here is another instance where Amar's readers should pause for a moment. It is true that Nelson Lasson's landmark book on the Fourth Amendment makes only one reference to the Boston *Writs of Assistance Case* in the debates that produced the Fourth Amendment.[55] However, Amar does not inform his readers that Lasson and other historians describe resistance to writs of assistance throughout the colonies as a major cause of the American Revolution. Lasson devoted an entire chapter of his four-chapter book to chronicling the impact of colonial opposition to writs of assistance. This chapter of Lasson's book, entitled "Writs of Assistance in the Colonies," begins this way:

> On this side of the Atlantic, the argument concerning the validity of general warrants centered around the writs of assistance which were used by customs officers for the detection of smuggled goods. Contemporaries generally accepted it as a fact, and historians agree, that the controversy on this question which took place in Massachusetts in 1761, the first serious friction between the British custom-house officers and the colonists, was "the first in the chain of events which led directly and irresistibly to revolution and independence."[56]

If writs of assistance were an unimportant subject—if they played only a minor part in the adoption of a general principle against government search and seizure practices—why does O.M. Dickerson, another historian of the colonial period, begin his article on the writs this way: "American histories without exception list writs of assistance as one of the active causes of the American Revolution."[57] Dickerson writes: "Obviously there is something about writs of assistance that has never been brought to light. There was popular objection to them, not merely in Massachusetts but in practically all the colonies."[58]

If writs of assistance were not a major factor in rallying colonial opposition to British search and seizure practices, why did John Dickinson denounce the writs in his series of essays on constitutional law

54. Amar, *supra* note 1, at 772 n.53.

55. LASSON, *supra* note 34, at 89 n.40.

56. *Id.* at 51 (quoting *Introduction* to ALBERT BUSHNELL HART, LEAFLETS, No. 33).

57. Dickerson, *supra* note 34, at 40.

58. *Id.* at 43.

under the name *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies*?[59] Dickinson's essays on the writs

> appeared in the Philadelphia press in the last week of January 1768. By the spring it was available everywhere in a complete pamphlet set of the Farmer's Letters. It was around this time that customs officers in the various colonies were applying to their respective courts for Townshend writs of assistance.[60]

According to one historian of the Fourth Amendment, Dickinson's essays "had a pervasive, deep impact on colonial legal opinion and provided one of the foremost American precedents for the Fourth Amendment."[61]

Finally, if Amar is right that writs of assistance were a trifling matter in the colonies, then Telford Taylor—whom Amar lavishly praises for "his brilliant study of the Fourth Amendment"[62]—must be wrong when he writes: "The writs of assistance were anathema in the colonies, and [James] Otis' argument against them was well known among the founding fathers."[63] Amar's suggestion that the writs of assistance controversy had little impact on the development of the Fourth Amendment is contradicted by William Cuddihy's monumental study of the Fourth Amendment's origins. Cuddihy found that James Otis' "proclamation that only specific writs were legal was the

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59. JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES (1903).

60. SMITH, *supra* note 53, at 492-93. Dickinson's essays on the writs includes the following:

> By the late act, the officers of the customs are impowered to enter into any HOUSE, warehouse, shop, cellar, or other place, in the *British* colonies or plantations in *America*, to search for or seize prohibited or unaccustomed goods, *&c*; on "writs granted by the superior or supreme court of justice having jurisdiction within such colony or plantation respectively."
>
> . . . .
>
> I am well aware, that writs of this kind may be granted at home, under the seal of the court of exchequer: But I know also, that the greatest asserters of the rights of *Englishmen* have always strenuously contended, that *such a power* was dangerous to freedom, and expressly contrary to the common law, which ever regarded a man's *house* as his castle, or a place of perfect security.
>
> If such a power was in the least degree dangerous *there*, it must be utterly destructive to liberty *here*. For the people there have two securities against the undue exercise of this power by the crown, which are wanting with us, if the late act takes place. In the first place, if any injustice is done *there*, the person injured may bring his action against the offender, and have it tried before INDEPENDENT JUDGES, who are NO PARTIES IN COMMITTING THE INJURY. *Here* he must have it tried before DEPENDENT JUDGES, being the men who GRANTED THE WRIT. . . .
>
> If this power is abused *there*, the parliament, the grand resource of the oppressed people, is ready to afford relief . . . . But what regard can *we* expect to have paid to our assemblies . . . .

Id. at 493.

61. Cuddihy, *supra* note 21, at 1122.

62. Amar, *supra* note 1, at 764.

63. TAYLOR, *supra* note 43, at 38.

first recorded declaration of the central idea to the specific warrant clause" of the Fourth Amendment.[64] Cuddihy also noted that "[b]y repudiating writs of assistance as general search warrants, colonial authors, intellectuals, and judges contrived the ideology that the specific warrant clause of the Fourth Amendment expressed. Otis [and others] were most significant, for they had not only deprecated the promiscuous search but advocated the specific warrant as its replacement."[65]

Although Amar does not mention it, there was widespread revolt against writs of assistance throughout the colonies.[66] From Massachusetts Bay Colony to East Florida, merchants, sailors, and ordinary citizens condemned writs of assistance because these pieces of paper "were even more arbitrary in their nature and more open to abuse than the general warrants"[67] condemned in *Wilkes v. Wood.* James Otis, Jr. railed against the writs of assistance because the writs granted customs officers "a power that places the liberty of every man in the hands of every petty officer."[68] If the writs were legalized, Otis declared:

> Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient.[69]

Of course, Professor Amar's readers may be scratching their heads by now. He has suggested that warrantless searches presented no significant constitutional questions for the Framers. He has also dismissed the impact that writs of assistance had on colonial thinking concerning search and seizure law. We now know, however, that this description of the nature and scope of the writs of assistance controversy is incomplete. Amar's readers are undoubtedly asking themselves whether James Otis, Jr. (or the people he represented) would have denounced the practice of customs officers if the King of England or the Surveyor of the Port of Boston had simply told customs

64. Cuddihy, *supra* note 21, at 769 (footnote omitted).

65. *Id.* at 1131.

66. *See* Dickerson, *supra* note 34, at 43 ("There was popular objection to [writs of assistance], not merely in Massachusetts but in practically all the colonies."); Cuddihy, *supra* note 21, at 1002-1132 (detailing colonial reaction to writs of assistance search).

67. LASSON, *supra* note 34, at 54.

68. SMITH, *supra* note 53, at 342.

69. *Id.* at 344.

officers they could exercise their authority without acting pursuant to general warrants or writs of assistance? Certainly Otis would have vigorously opposed warrantless searches by customs officers that exhibited *the same characteristics* that marked writs of assistance. In fact, Otis argued that a writ was not valid unless it survived challenge "by judicial process."[70]

Amar implies that controversy over the writs was confined to the Massachusetts Bay Colony. This suggestion, however, conflicts with the historical conclusion that "[t]here was popular objection to [the writs], not merely in Massachusetts but in practically all the colonies. The reaction was too widespread and too deep to be explained by local happenings in a single colony or by the single forensic effort of any local politician, however popular."[71] Indeed, "[o]f all the colonies, Virginia appears to be the one where the issue over writs of assistance was most stubbornly fought. It was the largest and most populous colony and had more ports of entry than any other."[72] Amar's readers will be surprised to learn that "[w]hat happened in Massachusetts is tame compared with the struggle in Virginia."[73] Merchants and homeowners throughout the colonies resisted because the writs granted customs officers too much discretion to invade their privacy. None of the historical studies noted above indicate that colonial opposition to the writs was linked to the existence *vel non* of any post-intrusion remedy, such as a right to sue customs officers after the fact.[74] Antagonism arose because the writs were, as South Carolina Judge William Henry Drayton characterized them, "of a more pernicious nature than general warrants."[75]

Other evidence undercuts Amar's thesis that the abuse associated with warrantless search authority was not a precursor in the development of the Fourth Amendment. Hostility to such authority "had

70. *Id.* at 354; *see* Illinois v. Krull, 480 U.S. 340, 362-63 (1987) (O'Connor, J., dissenting) (discussing Otis' argument that specific warrants issued by judges were distinguishable from the writs of assistance).

71. Dickerson, *supra* note 34, at 43.

72. *Id.* at 72.

73. *Id.* at 73.

74. George G. Wolkins, *Daniel Malcolm and Writs of Assistance*, 58 MASS. HIST. SOC'Y 5, 5-36 (Oct. 1924-June 1925) (describing Daniel Malcolm's resistance to customs officers searching his cellar). Malcolm resisted because "the officers declined to name the informer, a formality he thought the law required; that [the customs officer] had used him with great rudeness, and that for his part he would risk his life rather than submit to search unless the law allowed it!" *Id.* at 18.

75. LASSON, *supra* note 34, at 75.

been accumulating for over a quarter century" when a 1754 Massachusetts liquor excise reform bill was proposed.[76] While the proposed law did not authorize searches of private homes, this fact did not temper the protests of those who compared the bill to Sir Robert Walpole's failed efforts to reform British excise laws in 1733. Walpole's excise scheme was killed, in part, because many British citizens were convinced that his scheme invited oppressive search practices.[77] Similar tactics were used to attack the 1754 law, and Massachusetts merchants and residents of urban towns were quick to revive the ghost of oppressive searches proposed by Walpole.[78] The sharp reaction to the 1754 Excise Law reflected deep-seated opposition to several types of warrantless and general warrant searches that "agitated the colony" in the middle of the eighteenth century.[79]

Another noteworthy example of opposition to warrantless searches that exhibited the same characteristics of general warrants and writs of assistance was the controversy associated with search *ex officio*. Before the issuance of the first writ in Massachusetts Bay in 1755, customs officers conducted warrantless searches under an assumed power of forcible entry *ex officio*. A detailed historical study of this period[80] confirms that many Massachusetts colonists vigorously opposed these warrantless searches. The uproar caused by *ex officio* searches forced Governor William Shirley to issue his own warrants to customs officers.[81] Shirley's gubernatorial warrants were "general in

76. SMITH, *supra* note 53, at 112-14; Paul S. Boyer, *Borrowed Rhetoric: The Massachusetts Excise Controversy of 1754*, 21 WM. & MARY Q. 328 (1964); Cuddihy, *supra* note 21, at 725.

77. The background and opposition to the Walpole proposed Excise Scheme "to tax wines and tobaccos, not as a custom duty upon importation, but after warehousing and as the goods were withdrawn for home consumption" is discussed in LASSON, *supra* note 34, at 40-41; Boyer, *supra* note 76, at 340-41.

78. Symbolic of many of the attacks was the following letter:

> But besides the Excise itself, the propos'd Manner of exacting it, is what cannot but give very great Disgust, that it should be in the Power of a petty Officer to come into a Gentleman's House, and with an Air of Authority, demand an Account upon Oath of the Liquor he has drank in his Family for the year past . . . .

SMITH, *supra* note 53, at 112.

79. Cuddihy, *supra* note 21, at 725. The other intrusions that generated opposition included searches under a local impost tax, *ex officio* searches by British customs officers, proposed general warrants to recover records in a banking scandal, and the impressment of seamen by the British Navy. *Id.* at 725-33.

80. SMITH, *supra* note 53, at 115-21. In a review of Smith's book, Professor Bruce Mann wrote: "The scholar who stands on Smith's shoulders to study the fourth amendment will have a remarkable view." Mann, *supra* note 53, at 366.

81. The history of *ex officio* search is discussed in detail in SMITH, *supra* note 53, at 108-21; *see also* Maclin, *supra* note 29, at 219-23.

form and effect"[82] and authorized forcible entry in the case of resistance. Later, Shirley discarded gubernatorial warrants and ordered customs officers to apply for writs of assistance from the Superior Court.[83]

When the proposed federal Constitution was debated in the Virginia Convention, Patrick Henry stressed the need for a provision regulating governmental searches. Henry protested that federal excisemen could use general warrants to search cellars and bedrooms and seize any person without evidence of any crime. Henry protested against suspicionless searches whether or not carried out pursuant to general warrants.[84] Would anybody at the Convention have dared responded: "Settle down Pat, we'll solve your problem, we'll abolish general warrants—we'll just let federal officers conduct searches whenever and wherever they want without acting pursuant to general warrants. Congress will simply enact a law that permits it." In sum, the search and seizure practices of British authorities were opposed

82. SMITH, *supra* note 53, at 121. The persons and events responsible for the origin and demise of Shirley's gubernatorial warrants are documented in fascinating detail by Smith. *See id.* at 118-23.

83. LASSON, *supra* note 34, at 56; SMITH, *supra* note 53, at 122. It was brought to Governor Shirley's attention that the governor had no statutory authority to issue writs of assistance. The applicable statute provided that writs should issue from a court. *See id.* at 121 (The Act of Frauds of 1662, officially entitled An Act for preventing Frauds, and regulating Abuses in his Majesty's Customs, 1662, 13 & 14 Car. 2, ch. 11 (Eng.) "expressly laid down that the writ of assistance should be from the Court of Exchequer, which identity no governor of provincial Massachusetts conceivably could pretend to.").

84. *See* LASSON, *supra* note 34, at 92-96. It is interesting to note that the Virginia Convention, at the urging of Henry and others, passed a series of recommended bill of rights:

> The fourteenth section of [this] lengthy bill of rights treated the subject of search and seizure, a subject which had occupied a very prominent place in the debates in the Convention. *The provision was broader than the analogous clause in the Virginia Bill of Rights whieh had only concerned itself with general warrants. The proposed section added the principle of security from unreasonable search and seizure* and also the necessity of oath or affirmation.

Id. at 95-96 (emphasis added). If Henry and the other sponsors of this recommended provision were only concerned with general warrants and untroubled by warrantless searches, as Amar's theory holds, there was no reason to recommend an amendment that went beyond prohibiting general warrants. They must have believed that a broader provision was necessary. *Cf. id.* at 103 (footnote omitted):

> [As initially proposed,] the Amendment was a one-barrelled affair, directed apparently only to the essentials of a valid warrant. The general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequently to the issuance of warrants without probable cause, etc. . . . [In the final version of the Amendment,] [t]he general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against "unreasonable searches" was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment.

because of the arbitrary power exercised by customs officers and Crown officials. The Fourth Amendment was adopted to deter federal officers from exercising similar unrestrained power.[85]

Before Amar's readers endorse his implication that warrantless searches were constitutionally acceptable for the Framers, and thus should not trouble today's Court, they should consider the insight of political scientist Jacob Landynski, who wrote:

> The Fourth Amendment was not a construct based on abstract considerations of political theory, but was drafted by the framers for the express purpose of providing enforceable safeguards against a recurrence of highhanded search measures which Americans, as well as the people of England, had recently experienced. These abuses, which in the American colonies took place largely in the fifteen years before the American Revolution and which extended over a much longer period of time in England, had done violence to the ancient maxim that "A man's house is his castle." . . . The antecedent history of the Fourth Amendment . . . has two principal sources: the English and American experiences of virtually unrestrained and judicially unsupervised searches, and the action that had already been taken by some of the states to guard constitutionally against a recurrence of this abuse. From these tributaries flowed the Fourth Amendment.[86]

Landynski's reference to "highhanded search measures" and "unrestrained and judicially unsupervised searches" experienced by Americans, of course, is a reference to writs of assistance.

Landynski also explains why the language of the Amendment, albeit lacking an express warrant preference rule, nevertheless supports an interpretation that includes such a rule. The Fourth Amendment contains two clauses—the first merely provides a general right to be free from unreasonable searches and seizures, the second outlines the requirements of a valid warrant. Landynski notes that the Fourth Amendment's initial clause is given meaning and content by the Warrant Clause.[87]

Put another way, the Warrant Clause defines and interprets the Reasonableness Clause. The Warrant Clause informs the judiciary of

85. *Cf.* Illinois v. Krull, 480 U.S. 340, 362 (1987) (O'Connor, J., dissenting) ("Statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment. This Court has repeatedly noted that reaction against the ancient Act of Parliament authorizing indiscriminate general searches by writ of assistance, 7 & 8 Wm. III, c. 22, § 6 (1696), was the moving force behind the Fourth Amendment.").

86. LANDYNSKI, *supra* note 29, at 20.

87. *Id.* at 43.

the type of search that is reasonable and therefore presumed permitted by the Amendment—a search that is consistent with the procedural safeguards of probable cause, particularity, and judicial scrutiny. An interpretation that detaches the Reasonableness Clause from the Warrant Clause runs the risk of making the Warrant Clause "virtually useless."[88] But Amar sees it differently; warrants are never required.[89]

Amar writes that proponents of the warrant preference rule misunderstand the vision of the Framers. Colonial history, Amar claims, discloses that "the King's judicial magistrates in America were at times hard to distinguish from His executive magistrates"[90] and that warrants "were the friends of the searcher, not the searched."[91] As he sees it, "juries, not judges, are the heroes of the Founders' Fourth Amendment story."[92] Why juries? Amar believes that compared to judges, jurors, both then and now, are more trustworthy, independent of the government, understanding of their fellow citizens, and less corrupt. Judges, on the other hand, were (and still are) appointed by politicians from the central government, on the government payroll, and working in a system in which executive officials can forum-shop for judges sympathetic to their interests. Moreover, judges issue warrants through an *ex parte* procedure that denies notice and a hearing to the target of the search.[93]

Once again, Amar adopts a very narrow slice of history. He suggests that judges were insensitive to the complaints of colonists aggrieved by British searches and seizures. This description ignores several well-documented historical studies that conclude that "judges in colonial America . . . were defying and defeating British overlordship years before a single soldier took to the field."[94]

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88. *Id.* at 44.

89. Amar, *supra* note 1, at 762 ("[W]arrants are not required, but any warrant that does issue is per se unreasonable if not supported by probable cause, particular description, and the rest.").

90. *Id.* at 773.

91. *Id.* at 774.

92. *Id.* at 771; *see also* Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 363 (1994) (discussing Amar's claim about juries).

93. Amar, *supra* note 1, at 773.

94. SMITH, *supra* note 53, at 5; *cf.* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 105-07 (1992 ed.) (describing the angry reaction of colonists when Crown officials sought to remove life tenure status of colonial judges; without such tenure "the possibility of having an independent judiciary as an effective check upon executive power would be wholly lost").

Amar's description of colonial judges conflicts with the conclusion reached by another chronology of this historical period:

> The real significance of the battle over the writs of assistance with the American Commissioners of Customs lies in the almost universal opposition of the colonial courts. In general the argument was that they would not grant a warrant they were not legally authorized to grant, the practice of the Court of Exchequer to the contrary notwithstanding. It is strangely like the arguments of 1761 that it was the office of the courts to decide the legality of the warrant. The other significant factor of the controversy is the correspondence of the colonies with each other to establish a common front on this legal question. Connecticut, Rhode Island, Virginia, and Massachusetts, at least had corresponded and one of the justices of Connecticut had journied out of his own colony sounding the opinion of the judges elsewhere. It was something more than a local question and with such a widespread legal discussion it is hardly to be wondered if a fourth amendment was proposed for the American Constitution.[95]

Amar's declaration that "the King's judicial magistrates in America were at times hard to distinguish from His executive magistrates,"[96] is also inconsistent with O.M. Dickerson's description of colonial judges:

> It took courage for judges to refuse writs of assistance when demanded by the customs officers, since they held their commissions at the will of the Crown and were dependent for their salaries upon the revenues collected by the Customs Commissioners. . . . In the face of such formidable pressure from official sources it is surprising that the judiciary from Connecticut to Florida, with one exception, stood firm in opposing the legality of the particular form of writ demanded of them and continued in their judicial obstinacy through six years of nearly constant efforts to force them to yield.[97]

In the final analysis, it is wrong to suggest that most colonial judges were enemies of the people and had no qualms about issuing broad general warrants that invaded the privacy of colonial America. "In the period 1769-72, no colonial court beyond New Hampshire or Massachusetts granted the general writ that the customs authorities wanted, and most included constitutional or legal exegeses in their

95. Joseph Frese, Writs of Assistance in the American Colonies 300 (1951) (unpublished Ph.D. dissertation, Harvard University).

96. Amar, *supra* note 1, at 773.

97. Dickerson, *supra* note 34, at 74.

grounds of refusal."[98] Although Amar is unwilling to acknowledge the point, others have documented that the "reactions of the colonial judges to writs of assistance represented a repudiation of the door-to-door searches that the writs caused and a significant step towards the Fourth Amendment."[99]

Amar's response to this uncontroverted history is to dismiss the significance of the writs of assistance controversy in the shaping of the Fourth Amendment.[100] Far more important than writs of assistance, in his view, was *Wilkes v. Wood*. *Wilkes* "was *the* paradigm search and seizure case for Americans."[101] This portrayal of colonial thinking is a bit curious. Why does Amar slight Otis' contributions in the Writs of Assistance case?

> It was in the writs of assistance case in Boston in 1761 that the American tradition of constitutional hostility to general powers of search first found articulate expression. The intercolonial rejection of the Townshend writ of 1767 had the recent Wilkesite general warrant cases in England to draw upon, but in 1761 those great landmarks of the common law were still in the future. The Massachusetts protest anticipated them. It was an American original.[102]

The Framers were certainly capable of dissecting more than one historical controversy. No one contests the impact *Wilkes* had on colonial attitudes toward general warrants.[103] The *Wilkes* case, however,

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98. Cuddihy, *supra* note 21, at 1066-67.

99. *Id.* at 1091.

100. For someone who claims fidelity to the freedoms and values embodied in the Fourth Amendment, it is ironic that Amar discounts the writs of assistance controversy. As Professor Lasson has written, writs of assistance

> were even more arbitrary in their nature and more open to abuse than the general warrants of the *North Briton* cases. The warrants in those cases, it is true, authorized the apprehension of undescribed persons and the indiscriminate seizure of their papers, but they were connected with a particular case of libel and consequently were necessarily limited to some extent not only in object, but what is more important, in time. . . . The more dangerous element of the writ of assistance, on the other hand, was that it was not returnable at all after execution, but was good as a continuous license and authority during the whole lifetime of the reigning sovereign. The discretion delegated to the official was therefore practically absolute and unlimited. The writ empowered the officer and his deputies and servants to search, at their will, wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their suspecting eye.

LASSON, *supra* note 34, at 54 (footnote omitted).

101. Amar, *supra* note 1, at 772.

102. SMITH, *supra* note 53, at 7. Of course, it has already been noted that the colonists demonstrated constitutional hostility to warrantless, suspicionless searches as early as 1754. *See supra* notes 76-83 and accompanying text.

103. Americans would rather remember winners than losers. John Wilkes won his lawsuit and became a hero for many Americans. James Otis, Jr., on the other hand, was losing co-counsel in the *Writs of Assistance Case*, suffered from a mental disorder, and was subsequently

was not the only event that influenced the Framers' thinking about search and seizure law. The Fourth Amendment was molded in a crucible in which many events and individuals played a part in producing the final product.[104]

The Fourth Amendment is about controlling government power. The Amendment reflects, *inter alia*, the influence of Lord Mansfield, who wrote: "[i]t is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer."[105] The Amendment also embodied the thinking of Chief Justice Pratt and James Otis, Jr., both of whom decried the evils of unchecked discretionary power of executive officers.[106] The Amendment also represented the thinking of Patrick Henry, who reminded the members of the Virginia Constitutional Convention that freedom and liberty demand that discretionary search and seizure powers of executive

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lampooned by the colonial press as a mental misfit. SMITH, *supra* note 53, at 474-75. "That 'the first scene of the first Act of Opposition to the arbitrary Claims of Great Britain' had no immediately recognizable hero is understandable: the popular side lost." *Id.* at 498. Despite his legal defeat, Otis remained "the authentic American prophet of Fourth Amendment constitutionalism," who died after being struck by a bolt of lightning, but not before he had a chance to upbraid two customs officers whom he claimed had wrongfully seized him without a warrant. *Id.* at 497.

104. As Professor Amsterdam notes:

> [A] rare combination of events . . . was required in order to bring the controversies over general warrants and writs of assistance to a head: the hassles between Lord Bute and the Whigs, the furor over the cider tax, the battle of the *Monitor* and the *North Briton* against the government newspapers, the government's apoplectic reaction, and the catalytic personality of the fiery Wilkes in England; in America, the uneven and then progressively oppressive enforcement of the customs laws, the expiration of the writs of assistance after the death of George II at a time of stiffening colonial resistance, and Otis' seizing of the opportunity to make a major issue of the writs.

Amsterdam, *supra* note 23, at 398.

105. Leach v. Money, 96 Eng. Rep. 320, 323 (1765).

106. In Wilkes v. Wood, 98 Eng. Rep. 489, 498 (1763), Chief Justice Pratt (who later became Lord Camden) condemned the authority of the English messengers who searched Wilkes' home pursuant to a general warrant because it granted "a discretionary power . . . to messengers to search wherever their suspicions may chance to fall."

In the *Writs of Assistance Case*, Otis objected that writs of assistance were illegal because they authorized "a power that places the liberty of every man in the hands of every petty officer." SMITH, *supra* note 53, at 342.

officers " 'be restrained within proper bounds.' "[107] The warrant preference rule is a twentieth-century construction of the Fourth Amendment that is designed to restrain the discretion of police power—a relevant concern today as it was in 1791.[108]

III. PROBABLE CAUSE

Like the warrant preference rule, Professor Amar asserts that the probable cause requirement "stands the Fourth Amendment on its head."[109] The requirement of probable cause "applies only to 'warrants,' not to all 'searches' and 'seizures.' None of the other warrant rules—oath or affirmation, particular description, and so forth—sensibly applies to all searches and seizures; and the Court, bowing to the text and common sense, has never so applied them."[110] He also writes that a probable cause requirement defies common sense because "surely it cannot provide the standard for all searches and seizures."[111]

To prove his point, Amar asserts that society and the Court are unwilling to apply a strict probable cause rule to several types of searches. For example, a strict probable cause rule is not applied to x-ray searches at airports, building code inspections, and prison searches. A probable cause rule in these contexts would be "downright silly."[112] Amar then denounces the supporters of the probable cause requirement for characterizing certain governmental intrusions as non-searches or non-seizures when it would be impractical to apply

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107. LASSON, *supra* note 34, at 93 (quoting 3 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 445-49 (1876)).

108. *See* Cloud, *supra* note 23, at 297-98; Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1395-96 (1989):

> [T]he warrant process no longer functions as it did in the colonies, for when the fourth amendment was adopted, warrants were used to *confer* authority on law enforcement officials that they would not otherwise possess, while in today's world, the warrant requirement works to *limit* the sweeping authority that these officers would otherwise possess.

109. Amar, *supra* note 1, at 782.

110. *Id.* Amar claims that the Framers intended to discourage executive officers from seeking warrants. "They wanted to *limit* this imperial and ex parte device, so they insisted on a substantial standard of proof—and even that standard, understood in context, justified searches only for items akin to contraband or stolen goods, not 'mere evidence.' " *Id.*

Amar also writes that "no fixed constitutional requirement of probable cause was imposed" on warrantless searches and seizures because it was understood that such intrusions "would be accountable to judges and juries in civil damage actions after the fact." *Id.* Warrantless searches simply had to be reasonable. *Id.*

111. *Id.* at 783.

112. *Id.*

a strict probable cause standard to such intrusions. He also contends that these same advocates have watered down the probable cause standard by their willingness to allow searches that have a low probability of success.[113]

Two of these complaints raise arguments which are red herrings. Although he criticizes "Justices and other supporters"[114] of the probable cause requirement, Amar fails to identify those "Justices and other supporters" who contend that consent searches, metal detectors, administrative inspections, prison shake-downs, frisks for weapons, or grand jury subpoenas are not searches or seizures under the Fourth Amendment. In fact, advocates of a strong probable cause requirement have generally criticized the Court's contraction of Fourth Amendment freedoms in the cases described by Amar.[115]

Second, the individuals responsible for "a possible watering down of the text"[116] regarding the meaning of probable cause are not the "Justices and other supporters" of a strong probable cause rule. Rather, it is conservative members of the Court, like Chief Justice Rehnquist[117]—whom Amar praises and stands shoulder-to-shoulder with[118]—who are responsible for diluting the probable cause standard.

Professor Amar is more straightforward when he concedes that his substitute for the probable cause rule—reasonableness—is a flexible test that accommodates "different levels of cause in different contexts, and not always a high probability of success, if, say, we are searching for bombs on planes."[119] Amar favors a reasonableness model because it allows judges and juries to use their common sense.

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113. *Id.* at 783-85.

114. *Id.* at 783.

115. *See, e.g.*, Wayne R. LaFave, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1186-99 (1983) [hereinafter Lafave, *Vagaries*] (criticizing the reasoning of Illinois v. Gates, 462 U.S. 213 (1983), which rejected the Court's previous definition of probable cause); Wayne R. LaFave, *The Forgotten Motto of* Obsta Principiis *In Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291, 295-304 (1986) (criticizing the Court's definition of what is a "search" under the Fourth Amendment); Wasserstrom, *supra* note 29, at 274-75, 329-40 (criticizing the probable cause analysis of *Illinois v. Gates*); *id.* at 374-87 (criticizing the Court's definition of what is a "search" under the Fourth Amendment).

116. Amar, *supra* note 1, at 784.

117. Justice Rehnquist's opinion in Illinois v. Gates, 462 U.S. 213 (1983), has been the subject of diverse criticism. For citations, see YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES-COMMENTS-QUESTIONS 205 (8th ed. 1994).

118. *See* Amar, *supra* note 1, at 760 n.4.

119. *Id.* at 785.

Every case is different; fixed, rigid rules prevent practical responses to vexing problems. Who can oppose reasonableness?

But that's the rub. In theory, everybody loves common sense, and few align themselves against reasonableness.

> But if some discipline is not enforced, if some categorization is not done, if the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity is not restrained, then we shall have a fourth amendment with all of the character and consistency of a Rorschach blot.[120]

Professor Amar is very good at pushing certain Fourth Amendment "hot buttons." Of course society will oppose a strict probable cause rule if it prevents metal detectors from being used at airports. Everyone is in favor of secret service agents scanning crowds at presidential events without warrants and probable cause to believe that any specific person is a threat to the President. These examples tug at our emotions, but they are hardly the stuff of pressing or "cutting edge" Fourth Amendment problems.[121]

Nor do these examples undermine the probable cause rule as it is applied in most cases. The probable cause rule is designed to keep government agents out of matters of privacy and away from our personal possessions unless they have a convincing justification for

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120. Amsterdam, *supra* note 23, at 375.

121. I do believe that metal detectors and secret service agents are conducting "searches" when employed in the manner described by Professor Amar. Should such searches require probable cause? If forced to provide an answer, I would say no, though I recognize my response will not answer Professor Amar's critique of the Court's doctrine.

The problem here is that no one insists that probable cause "provide the standard for all searches and seizures." Amar, *supra* note 1, at 783. Obviously, the government has (and will) undertake certain searches and seizures unsupported by probable cause, which may be "reasonable." Supporters of the warrant and probable cause requirements have never claimed that these rules are foolproof. These rules, however, are effective in restraining police power when applied in the typical case where police are investigating you or me.

But if Amar is correct, why exempt "arrests" from his thesis that probable cause is not required for warrantless intrusions? He notes that "certain intrusive subcategories of warrantless action—arrests, for example—might generally require 'probable cause' at common law." *Id.* at 782. It is no answer to reply that the common law required probable cause for arrests because "[t]he old common law rule is, of course, nowhere frozen into the Fourth Amendment's text." *Id.* at 795 n.138. And it is not hard to imagine juries finding the arrest of notorious suspects "reasonable," despite an absence of traditional probable cause. Indeed, there is ample evidence that many in our society are ready and willing to find searches of private homes—highly intrusive activity during any era—"reasonable" even in the absence of a traditional degree of probable cause. *See* Rob Gurwitt, *Transform the Projects*, N.Y. TIMES, May 7, 1994, at 23 (defending suspicionless, warrantless searches at public housing projects); Vincent Lane, *We Search to Save Lives*, N.Y. TIMES, May 7, 1994, at 23 (offering a defense of suspicionless, warrantless searches of Chicago public housing projects).

intruding. This specific goal is consistent with the general purpose of the Amendment: to control official discretion. Is this rationale really so hard to follow; does it lack common sense?

In a similar vein, Amar scolds those who have elevated the probable cause requirement as the "sine qua non of reasonableness."[122] This approach betrays common sense because it ignores "a global truth that makes intuitive sense to police officials and citizens alike: serious crimes and serious needs can justify more serious searches and seizures."[123] Amar then complains that the Court's doctrine is too confused to recognize his insight.

Anyone familiar with the modern Court's Fourth Amendment doctrine knows that this protest is not credible. For at least the last two decades, and maybe longer, the Court has expanded the powers of law enforcement officials and restricted our Fourth Amendment freedoms.[124] This contraction of the Fourth Amendment has been defended as necessary to fight the "War on Drugs" and other crime waves that politicians have discovered. If it is true that the Justices follow election results, no one can fault the Court's feel for the electorate's political pulse.

If anyone, however, is to be blamed for failing to recognize "a global truth," it is Professor Amar himself. What really seems to bother Amar about the probable cause and warrant requirements is that these rules hinder police investigations. But that is the intent.

> The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. That is not a political outcome impressed upon an unwilling citizenry by unbeknighted judges. It is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power.[125]

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122. Amar, *supra* note 1, at 801.

123. *Id.* at 802.

124. Cloud, *supra* note 23, at 279 ("If we accept that 'the police win' is a unifying principle in these cases, then the doctrinal confusion of the Supreme Court's recent fourth amendment decisions evaporates."); Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 39-43 (1987).

125. Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983).

As a substitute for the probable cause and warrant requirements, Amar insists that a model of general reasonableness, normally implemented by a civil jury, will make us more secure in our persons, houses, and property. For example, when police target black men for investigation, Amar lectures that "we must honestly address racially imbalanced effects and ask ourselves whether they are truly reasonable."[126] In answering that question, Amar notes that the "interests of victims are hard to squeeze into the language of probable cause and warrants but comfortably fit under the canopy of reasonableness."[127]

Is Professor Amar serious? Consider the following example of what some individuals have labeled "reasonable" police intrusions: In December, 1986, Sheriff Harry Lee of Jefferson Parish, Louisiana, announced that his officers would:

> stop everybody that we think has no business in the neighborhood.... It's obvious that two young blacks driving a rinky-dink car in a predominately white neighborhood—I'm not talking about on the main thoroughfare, but if they're on one of the side streets and they're cruising around—they'll be stopped.[128]

One businessman, whose car had been recently vandalized, responded, "I was tickled to death [to hear Sheriff Lee's announcement]."[129]

In Chicago, police and housing officials have conducted dragnet "sweeps" of the predominately black Cabrini-Green apartments and other public housing buildings. These sweeps include: inspection teams going through buildings from top to bottom, searching every apartment unit for weapons, drugs, and illegal tenants; the installation of metal detectors at building entrances; requiring tenants and visitors to display identification to enter buildings; and police officers routinely stopping and frisking young black males found in and around buildings.[130] Although individual tenants, represented by the American Civil Liberties Union, objected to these tactics, many residents

126. Amar, *supra* note 1, at 808.

127. *Id.*

128. J. Michael Kennedy, *Sheriff Rescinds Order To Stop Blacks In White Areas*, L.A. TIMES, Dec. 4, 1986, § 1, at 18.

129. Frances Frank Marcus, *Order on Halting Blacks is Rescinded in Louisiana*, N.Y. TIMES, Dec. 4, 1986, at A1.

130. *See* Matt O'Connor, *ACLU Charges CHA Violates Tenant Rights*, CHI. TRIB., Nov. 19, 1992, Chicagoland, at 2; Patrick T. Reardon, *Without Sweeps, CHA Crime Might Be Worse*, CHI. TRIB., Oct. 26, 1992, Chicagoland, at 1; Don Terry, *Chicago Housing Project Basks in a Tense Peace*, N.Y. TIMES, Nov. 2, 1992, at A10. For a traditional legal discussion of the Chicago

applauded the searches.[131] As one angry letter to the editor put it: "[T]he ACLU argues that these measures would turn the development into 'internment camps.' But the residents can tell you that the gangs have already accomplished that. There can be no greater threat to the liberties of CHA residents than the murderers and drug dealers."[132]

State and federal law enforcement agents have been using racially inspired drug courier profiles for at least two decades.[133] Most federal judges, following the lead of the Supreme Court, have looked the

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sweeps, see Steven Yarosh, *Operation Clean Sweep: Is the Chicago Housing Authority 'Sweeping' Away the Fourth Amendment?*, 86 Nw. U. L. REV. 1103 (1992).

131. *See, e.g.*, Terry, *supra* note 130, at A10 ("Like many other residents, Ms. [Earnestine] Geater and her 27-year-old sister, Ella, said that living with the searches and the metal detectors was better than dying with gangs and guns and drugs. 'If it's going to stop all the shooting, then it's all right by me,' Ella Geater said.")

As violence increased, Chicago Housing Authority Chairman Vincent Lane instituted a policy of warrantless searches of every apartment where gunfire was heard coming from unknown locations. Insisting that this policy would not " 'trample on the rights of residents,' " Lane testified in federal court that "residents are asked to sign a document allowing the search for weapons . . . but [conceded that] the search takes place even if objections are raised." Matt O'Connor, *Gun Sweeps at CHA Defended*, CHI. TRIB., Sept. 1, 1993, Chicagoland, at 3.

When the ACLU filed a lawsuit objecting to these warrantless searches, a group of residents sought to intervene in the lawsuit to voice their support for the searches. The residents' group contended that the ACLU's position that the searches were unconstitutional was not supported by a majority of the residents who live in Chicago Housing Authority buildings. *See* Matt O'Connor, *ACLU Suit Opposed by CHA Leaders*, CHI. TRIB., Feb. 25, 1994, at 3.

After a federal judge enjoined housing officials from further sweeps, Pratt v. Chicago Housing Authority, 848 F. Supp. 792 (N.D. Ill. 1994), the Clinton Administration weighed in on the side of those favoring warrantless sweeps. *See* Guy Gugliotta, *Clinton Lets Police Raid Projects; Warrantless Searches Said to Be Needed For Tenant Safety*, WASH. POST, Apr. 17, 1994, at A1; Gwen Ifill, *Clinton Asks Help on Police Sweeps in Public Housing*, N.Y. TIMES, Apr. 17, 1994, at 1. For a critique of the administration's proposal, see Tracey Maclin, *Public Housing Searches Ignore the Constitution*, CHRISTIAN SCI. MONITOR, May 24, 1994, at 19.

132. John Campbell, *ACLU, Cabrini*, CHI. TRIB., Nov. 8, 1992, Perspective, at 2.

133. For a candid admission that such a policy exists, see the comments of Police Chief John Maccarone of Depew, New York: "We're dealing with either blacks, Hispanics, Dominicans or Haitians. These are the couriers. We lean on them heavily here." Dan Herbeck, *Transit-Site Drug Arrest; Spur Racism Allegations*, BUFF. NEWS, Jan. 30, 1994, at 1. For a discussion of how race plays a role in investigatory seizures, see John M. Burkoff, *Non-investigatory Police Encounter*, 13 HARV. C.R.-C.L. L. REV. 681 (1978); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1504 (1988); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677-81 (1994); Sheri Lynn Johnson, *Race and the Decision To Detain a Suspect*, 93 YALE L.J. 214 (1983); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1323-26 (1990); *cf.* Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 859 (1985) (noting that one drug enforcement agent testified that " 'the profile in a particular case consists of anything that arouses his suspicion.' " (quoting United States v. Chambliss, 425 F. Supp. 1330, 1333 (E.D. Mich. 1977))).

other way when confronted with evidence that these profiles give police agents too much discretion to stop and detain those they consider "suspicious."[134] Most jurors will find, as one federal district court recently concluded, that the use of race-based profiles—notwithstanding their lack of objective criteria—furthers the government's interest in stemming illicit narcotic trade.[135] Everyone is frustrated with the unsuccessful "War on Drugs." A 1989 public-opinion poll disclosed that "62 percent of those questioned said they would be willing to give up 'a few of the freedoms we have in this country' to significantly reduce illegal drug use."[136] If a majority of the public is willing to sacrifice the Fourth Amendment to stop illegal drug use, why should anyone believe that jurors in civil damages cases will protect the Fourth Amendment rights of guilty drug couriers? Jurors will not respect the rights of black teenagers who keep illegal drugs and guns in their apartments. Many jurors will applaud police officers who stop "two young blacks driving a rinky-dink car in a predominately white neighborhood."

Professor Amar declares that "common-sense reasonableness could straighten out Fourth Amendment thinking and writing,"[137] and offers electronic surveillance as one area in need of such straight talk. After disapproving the Court's reasoning in *Katz v. United States*,[138] because neither the text nor the intent of the Warrant Clause contemplate regulation of electronic surveillance, Amar says that the key to resolving this constitutional puzzle is not probable cause but simply reasonableness. "Simply put, are secret searches and seizures reasonable? Regardless of one's answer, at least one will be asking the right question—talking sense rather than nonsense."[139]

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134. *See* Cloud, *supra* note 133, at 859.

135. *See* United States v. Travis, 837 F. Supp. 1386, 1396 (E.D. Ky. 1993):

> [T]he court is deeply disturbed that such an overwhelmingly disproportionate number of the encounters and arrests at the [Cincinnati] Airport involve minorities. . . .
>
> The court's intuition tells it that there are probably a uumber of white couriers going through the Airport who are escaping scrutiny because the agents are focusing on minority females coming from Los Angeles. However, the court does not believe the agents are doing this with a discriminatory motive; it is probably just the course of least resistance.
>
> The court has no jurisdiction in this case to order the agents to alter their methods to lessen the discriminatory impact. . . . It must be noted that the court's only options in this case are to grant or deny the motion to suppress. As explained, the precedents require that the motion be denied. To do otherwise would free guilty drug couriers.

136. Richard Morin, *Many in Poll Say Bush Plan Is Not Stringent Enough; Mandatory Drug Tests, Searches Backed*, WASH. POST, Sept. 8, 1989, at A1.

137. Amar, *supra* note 1, at 802.

138. 389 U.S. 347 (1967).

139. Amar, *supra* note 1, at 803 (footnote omitted).

Under Amar's remodeled Fourth Amendment, government officials would neither have to seek judicial warrants nor possess probable cause of criminal activity before engaging in electronic surveillance. All they need is reasonableness. But whose reasonableness? The Attorney General of the United States? The local sheriff? Joe Six-pack? Amar says civil juries should decide. But how will juries consider surveillance operations that are typically implemented in the early stages of a criminal investigation? Should the local district attorney call together a group of citizens and sample their thinking about the "reasonableness" of the contemplated surveillance?

Although critical of the fact that under current law, targets of electronic surveillance "may never learn that they have been searched and that their words have been seized—or they may find out years after the fact,"[140] Amar never explains how electronic surveillance should work under his model. When will the targets of electronic surveillance have their day in court before a civil jury? After incriminating evidence has been discovered and criminal convictions secured? Can the government present such evidence to the jury to show that the search was "reasonable"? Interestingly, Amar is equivocal on this point.[141] Amar's refurbished Fourth Amendment is a godsend if you trust law enforcement officials to decide which individuals and organizations should be the targets of secret government snooping. Such a scheme, however, will do little to control the discretion of law enforcement officials to employ electronic and covert devices that invade the privacy and personal security of persons.[142]

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140. *Id.*

141. *Id.* at 819 n.233 ("[I]f the key issue is ex ante reasonableness, judges can disallow testimony of ex post success if they believe the prejudicial effect of this testimony would prevent juries from treating Adam and Bob equally.").

142. Professor Amar does say that:

> Due process values may even call for judicial preclearance of certain types of government searches and seizures, if there are good reasons for suspecting strong and systematic over-zealousness on the part of certain segments of executive officialdom. In some situations, a search or seizure could be deemed constitutionally unreasonable because no prior approval was sought from a more neutral and detached decisionmaker.

Id. at 810. But Amar makes clear that the "judicial preclearance" he has in mind is a far cry from traditional judicial warrants, and "would not be a per se requirement of all searches and seizures, nor even a presnmptive mandate, subject to well-defined categorical exceptions. Rather it would apply only when it was reasonable—and only *because* it was reasonable." *Id.* Amar's formulation for restraining "over-zealousness" by executive officialdom reminds me of what former Vice President Walter Mondale asked during the 1984 presidential campaign, "Where's the beef?"

What will this "judicial preclearance" consist of? Presumably it will not be a finding of probable cause since we know how Amar feels about that requirement. Amar might say that a

IV. POLICE POWER IN THE REAL WORLD

As this discussion indicates, Professor Amar's remodeled Fourth Amendment has two fundamental flaws: First, there are absolutely no criteria for controlling police power and discretion. Second, Amar's entire discussion is oblivious to modern law enforcement practices and how society and the judiciary typically respond to those practices.

This reasonableness model, which has "common sense" as its baseline,[143] is nothing more than a sliding scale approach that will produce "more slide than scale."[144] Although Amar insistently maligns the doctrine of the current Court as inattentive to the common sense of the community, the Court's rulings in many ways mirror the type of Fourth Amendment framework Amar favors. Take one example: Rather than rely upon judges and objective standards to check police power, Amar says we should focus on things like "the importance of finding what the government is looking for."[145] But this is exactly what the Court has been doing in cases that challenge the government's authority and means to look for and confiscate illegal drugs. Among the legal profession and other Court watchers, it is common

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judge would have to find the surveillance "reasonable." When will "preclearance" be required? Amar says, "only when it was reasonable—and only *because* it was reasonable." Who is talking nonsense now? And how will this preclearance procedure decide what is reasonable? According to Amar, "[t]his determination of reasonableness would be pragmatic, contingent, and subject to easy revision." *Id.* Amar may believe his way of thinking comports with common sense, but I see this type of "straight talk" as a license for abuse by government officials.

And what about cases of government surveillance—either electronic or human—where there are no "good reasons for suspecting strong and systematic over-zealousness"? Is judicial preclearance required when the local police chief or district attorney wants to undertake a "garden variety" phone tap? Amar does not say. Before this mode of "common seuse" is adopted, some may want to consider Professor Herman Schwartz' description of how electronic bugging has been implemented in the real world.

> [E]xcept where the crime actually involves the phone, wiretapping is of little value in gathering evidence. Few criminals of any sophistication discuss specific crimes on the phone. Wiretapping is really an *intelligence* weapon, designed to obtain bits and pieces of information about one's enemies. These bits and pieces rarely tell much, if anything, about any particular crime. Instead, they reveal friendships, associations, life styles, and the like, so-called "strategic intelligence" at most.

HERMAN SCHWARTZ, TAPS, BUGS, AND FOOLING THE PEOPLE 30-31 (1977).

143. "Common sense tells us to look beyond probability to the importance of finding what the government is looking for, the intrusiveness of the search, the identity of the search target, the availability of other means of achieving the purpose of the search, and so on." Amar, *supra* note 1, at 801.

144. Amsterdam, *supra* note 23, at 394.

145. Amar, *supra* note 1, at 801.

wisdom that the most serious casualty in the "War on Drugs" is the Fourth Amendment.[146]

What else explains the reasoning and result of a Court which finds, incredibly, that bus and train passengers feel free to ignore armed law enforcement officers who stand in narrow aisles and ask passengers if they are carrying illegal drugs,[147] if not a focus "on the importance of finding what the government is looking for"—illegal drugs? Nothing else could account for the Court's conclusion that the Fourth Amendment is not implicated when police officers seize and look through a citizen's garbage for evidence of illegal drug possession,[148] if not a focus "on the importance of finding what the government is looking for"—illegal drugs.

If the Court is not already doing what Amar proposes, what else explains the Court's conclusion that no search has occurred within the meaning of the Fourth Amendment when police trespass on a person's property;[149] take pictures of a person's backyard from a police airplane;[150] photograph the inside of a person's greenhouse from a police helicopter;[151] allow specially-trained canines to sniff a person's luggage;[152] and install electronic monitoring devices in a person's possessions and property,[153] if not a focus "on the importance of finding what the government is looking for"—illegal drugs? When law professors complain about these cases and others of similar ilk, their

146. *See, e.g.*, Cloud, *supra* note 133, at 856-57; Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated By The Open Fields Doctrine)*, 48 U. PITT. L. REV. 1 (1986); LaFave, *Vagaries*, *supra* note 115, at 1222-23:

> [I]t is almost as if a majority of the Court was hellbent to seize any available opportunity to define more expansively the constitutional authority of law enforcement officials.
>
> . . . .
>
> Just how one explains this headlong rush into the conferral of broader police power is hard to say. . . . But it just may be that this trend is attributable in part to a perception by the Court that more law enforcement tools are essential to combat the drug traffic.

147. Florida v. Bostick, 501 U.S. 429 (1991).

148. California v. Greenwood, 486 U.S. 35 (1988).

149. United States v. Dunn, 480 U.S. 294 (1987); Oliver v. United States, 466 U.S. 170 (1984).

150. California v. Ciraolo, 476 U.S. 207 (1986).

151. Florida v. Riley, 488 U.S. 445 (1989).

152. United States v. Place, 462 U.S. 696 (1983).

153. United States v. Karo, 468 U.S. 705 (1984); United States v. Knotts, 460 U.S. 276 (1983).

criticism is not about "ponder[ing] every nuance"[154] of the Court's rulings, but is directed at the Court's "hostility to the Fourth Amendment."[155]

Amar argues that the "intrusiveness of the search"[156] is a more important factor than probable cause. The Court and Amar are in lockstep on this point, as indicated by, *inter alia*, the Court's continued expansion of the *Terry* doctrine.[157] The *Terry* rule began as a narrow exception to the warrant and probable cause requirements, justified by a compelling need for the safety of patrol officers.[158] Predictably,[159] this narrow exception has been stretched and distorted so that government intrusions are now permitted in a variety of contexts that have nothing to do with the safety of patrol officers or the circumstances at issue in *Terry*.

The so-called *Terry* rationale has been expanded by the Court to sanction: seizures of personal property on less than probable cause;[160] temporary seizures of persons for the purpose of fingerprinting;[161] temporary seizures of persons in order to identify, to question, or to obtain additional information;[162] detention of persons to investigate anonymous tips;[163] detention to determine whether the person has committed a crime that represents no immediate threat to the investigating officer;[164] detention of persons who fit the government's profile of drug couriers;[165] removing drivers from their vehicles during routine traffic stops;[166] detention of persons who are not under arrest to

154. Amar, *supra* note 1, at 759.

155. Steven Duke, *Making* Leon *Worse*, 95 YALE L.J. 1405, 1423 (1986) ("The major solution to Fourth Amendment opinions that make no seuse . . . is not to revise the opinions with more plausible rationales but to confront the root problem—judicial hostility to the Fourth Amendment.").

156. Amar, *supra* note 1, at 801.

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

158. *Id.* at 30 (holding that to frisk a suspect for weapons is permissible "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous").

159. *See id.* at 39 (Douglas, J., dissenting) ("[I]f the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime.").

160. United States v. Place, 462 U.S. 696, 702-06 (1983).

161. Hayes v. Florida, 470 U.S. 811 (1985).

162. United States v. Hensley, 469 U.S. 221 (1985).

163. Alabama v. White, 496 U.S. 325 (1990).

164. Florida v. Rodriguez, 469 U.S. 1 (1984); Florida v. Royer, 460 U.S. 491 (1983).

165. United States v. Sokolow, 490 U.S. 1 (1989).

166. Pennsylvania v. Mimms, 434 U.S. 106 (1977).

facilitate police searches of private homes;[167] searches of the interior of automobiles for weapons on less than probable cause;[168] searches of automobiles to discover vehicle identification numbers;[169] searches of school children by school officials;[170] searches of homes *after* the execution of an arrest warrant;[171] and seizures of contraband found on persons *after* officers determine that the suspect does not possess a weapon.[172] How has the Court accomplished all of this? By focusing on "the intrusiveness of the search [or seizure]"[173] and abandoning the probable cause requirement, just as Amar proposes.

Amar also apparently believes that the "identity of the search target"[174] is a more pertinent factor than probable cause or the availability of a judicial warrant in deciding the reasonableness of a search. Again, the Court and Amar are singing from the same songbook if one examines the Court's "special needs" cases.[175] Under this line of cases, the Court permits ("encourages" better describes the Court's reasoning) exceptions to the probable cause and warrant requirements "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' "[176] The "special needs" cases rely heavily on the fact

167. Michigan v. Summers, 452 U.S. 692 (1981).

168. Michigan v. Long, 463 U.S. 1032 (1983).

169. New York v. Class, 475 U.S. 106 (1986).

170. New Jersey v. T.L.O., 469 U.S. 325 (1985).

171. Maryland v. Buie, 494 U.S. 325 (1990).

172. Minnesota v. Dickerson, 113 S. Ct. 2130 (1993).

173. Amar, *supra* note 1, at 801.

174. *Id.*

175. Although it was not decided under the "special needs" rationale, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), is another recent example of the Court focusing on the identity of the search target, at the expense of judicial oversight and probable cause standards. The issue in *Verdugo-Urquidez* was "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." *Id.* at 261. While rejecting the argument that the Amendment applies in this context, Chief Justice Rehnquist, relying, *inter alia*, on the text and historical origins of the Amendment, concluded "that 'the people' protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 265.

176. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)); *see also* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (holding that government interest in ensuring safety of railroad employees and travellers is special need justifying departure from usual warrant and probable cause rules in administering drug and alchohol tests to employees); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (holding that U.S. Customs Service may administer drug testing without a warrant in order to protect government interest); New York v. Burger, 482 U.S. 691 (1987) (holding that New York statute regulating junkyards establishes a government interest in eradicating auto theft that outweighs the privacy interests of the property

that the target of the intrusion has a relationship with the government that "exists independent of the search."[177] Yet, the problem with the Court's "special needs" cases—the same problem that pervades Amar's reasonableness model—is that "government may infringe privacy pretty much as it wishes, unconstrained by any serious judicial review."[178]

The striking aspect about Amar's proposed facelift for the Fourth Amendment is its indifference to the rough-and-ready world in which Fourth Amendment principles are tested. Justice Robert Jackson, whom Amar applauds for recognizing that "more serious crimes may justify more expansive searches,"[179] understood how the Fourth Amendment worked on the street. Justice Jackson warned his colleagues that "the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit."[180] The tone of Professor Amar's article contrasts sharply with Justice Jackson's warning about police discretion. Amar writes as if the only individuals affected by the Court's Fourth Amendment pronouncements are "grinning criminals getting off on crummy technicalities,"[181] and innocent citizens who have lost respect for the Fourth Amendment.

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owner); O'Connor v. Ortega, 480 U.S. 709 (1987) (plurality opinion) (holding that it is unreasonable and disruptive to require a state hospital to get a warrant to enter employees' desks or file cabinets for work-related reasons).

177. William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 555 (1992); *see also* Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87 (discussing the constitutionality of drug testing in the workplace).

178. Stuntz, *supra* note 177, at 554. Legal scholars on the left and right have universally criticized the Court's special needs cases. For a review of this criticism, moving from left to right, see, for example, Tracey Maclin, *Constructing Fourth Amendment Principles From the Government Perspective: Whose Amendment Is It, Anyway?*, 25 AM. CRIM. L. REV. 669, 671-75, 719-42 (1988); 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, 1194-1207 (1988); 3 & 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE §§ 10.2(a), 10.3(d), 10.10(d), 10.11(b) (2d ed. 1987 & Supp. 1993); Gerald S. Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295 (1992); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 25-28, 34-37 (1991); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 397-404 (1988); Schulhofer, *supra* note 177; Stuntz, *supra* note 177.

179. Amar, *supra* note 1, at 801.

180. Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting). In this opinion, Justice Jackson wrote of his belief that there are "many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." *Id.* at 181.

181. Amar, *supra* note 1, at 799.

Oh, were it all so simple. The Court often decides Fourth Amendment rules at a level of abstraction and policy that observers of the criminal justice system find bewildering. On the streets and in the local precincts and courthouses, however, a different world exists.

> In the real world, police chiefs, under great pressure to reduce crime, pass that pressure on to officers, evaluating them almost exclusively by how many arrests and convictions they chalk up. Some officers—though not most—respond by overlooking constitutional niceties and conduct willfully illegal searches.... The targets are simply left humiliated, resentful and—since cops are not foolish enough to do these things before audiences—without means of proving what happened.... [Furthermore,] police who conduct illegal searches do not go around admitting that on witness stands.[182]

Professor Amar wants common sense to be the lodestar of Fourth Amendment rules. In the real world, police stop automobiles driven by black teenagers because the officer's common sense tells him that "with blacks 'there is always a greater chance of something wrong.' "[183] A black man found in a white neighborhood is detained and questioned because the officer "feels the person does not belong there. This may be an unwholesome perception, but the policeman's experience tells him it is by and large valid."[184]

In the real world, common sense is exercised by police officers who do not fully advise persons of their right to refuse an officer's request to search their vehicles or property.[185] The average person,

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182. James J. Fyfe, *Don't Loosen Curbs on Cop Searches*, WASH. POST, Feb. 27, 1983, at B1.

183. MICHAEL K. BROWN, WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM 170 (1981).

184. JONATHAN RUBENSTEIN, CITY POLICE 263 (1970). When asked why his officers concentrate on minorities in their investigations of suspected drug couriers, Police Chief John Maccarone of Depew, New York responded: " 'Unfortunately, that's who the couriers are.... I don't believe it's unfair. We have to do everything we can do to stop drugs from coming in. The honest, upright citizen—black or white—knows that what we are doing is fair.' " Herbeck, *supra* note 133, at 1.

185. *See* LIBERTY AND SECURITY: A CONTEMPORARY PERSPECTIVE ON THE "CRIMINAL JUSTICE REVOLUTION" OF THE 1960s, at 60 (Proceedings of the Third Annual Symposium of the Constitutional Law Resource Center, Drake University Law School, Apr. 4, 1992). During a panel discussion on the Fourth Amendment, the Commissioner of the Iowa Department of Public Safety, Paul Wieck II, was candid in his admission that officers of the Iowa State Police do not inform motorists of their right of refusal when officers request consent to search their vehicles:

> TRACEY MACLIN: I'm not familiar with the procedures included on the card [carried by officers of the Iowa State Police] that the commissioner raises, but I would be interested in knowing whether the Iowa Patrol inform people of their right to refuse when they stop them on the highway and want to search their car.... I would also be interested in knowing whether the Iowa police or the State Patrol let the individual know that he or she has the right to go when they come up to someone without reasonable suspicion or probable cause.... If Iowa procedures include such notice, I would

unaware of the existence and scope of her rights (or the rights of the third party whose property is targeted for search), is unlikely to say no to an officer; moreover, common sense (the type of "common sense" that is not discussed in Amar's article) tells this individual that challenging the authority of the police is not a wise move.[186]

Professor Amar finds common sense so appealing that he is able to declare:

> A broader search is sometimes better—fairer, more regular, more constitutionally reasonable—if it reduces the opportunities for official arbitrariness, discretion, and discrimination. . . . The broader, more evenhanded search is sometimes more constitutionally reasonable even if the probabilities are lower for each citizen searched.[187]

Amar's theories about common sense that encourage "broader, more evenhanded" intrusions will be implemented by individual officers who "will push [Fourth Amendment safeguards] to the limit."[188] Sobriety roadblocks, for example, are praised because they allegedly eliminate officer discretion. In the rëal world, however, roadblocks are rarely operated without a substantial degree of discretion and authority given to officers on the scene.[189]

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applaud Iowa for that, but it's not something the United States Supreme Court has required.

PAUL WIECK II: In short, my answer is no, no, and no.

Id.

186. *See generally* ALBERT J. REISS, JR., THE POLICE AND THE PUBLIC 53 (1971) (noting that a disproportionate amount of police antagonism is aimed at citizens who will not defer to their authority); REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 21-33 (1991) [hereinafter CHRISTOPHER COMMISSION] (documenting complaints of Los Angeles residents of brutality and aggressive police responses when citizens challenge authority and practices of police); Jon Van Maanen, *Street Justice, in* POLICE BEHAVIOR: A SOCIOLOGICAL PERSPECTIVE 296, 298-99 (Richard J. Lundman ed., 1980) (discussing patrolman-to-citizen exchanges as challenges to state authority). The Court's refusal to acknowledge this reality is discussed in Tracey Maclin, *Justice Thurgood Marshall: Taking The Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 799-812 (1992).

187. Amar, *supra* note 1, at 809 (footnote omitted).

188. Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

189. *See* James B. Jacobs & Nadine Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. DAVIS L. REV. 595, 598-99 n.10, 656 (1985); *id.* at 652 (current Fourth Amendment rules "provide police officers with powerful temptations to exploit drunk driving roadblock stops to carry out general law enforcement 'check-ups.' Indeed, at virtually every drunk driving roadblock for which arrest data are available, there have been substantially more arrests or summonses for offenses other than drunk driving.") (footnote omitted); Matthew L. Wald, *Police Roadblocks Casting Wide Net for Drunk Drivers*, N.Y. TIMES, July 2, 1994, at 25 (of the 1485 drivers stopped at a Stratford, Connecticut sobriety checkpoint, only one was charged with drunkdriving; other drivers were charged with narcotics and gun possession, driving unregistered cars, and driving without wearing seat belts).

Sobriety checkpoints are run by officers who must decide: which motorists will be waved through or stopped for longer periods; which drivers' eyes to examine and whether a motorist's eye movements and pupil size indicate intoxication or merely the effects of high blood pressure and the taking of a prescription drug;[190] which drivers to subject to field testing; which cars to search; and which motorists to apprehend because of "furtive" movements.[191] Amar's common sense model provides no criteria or standards (other than "reasonableness") to check this type of police discretion and authority.

Amar may believe that jurors in civil damages lawsuits can separate the reasonable from the unreasonable intrusions, but I doubt that his reasonableness model will be any different from the reasonableness scheme Professor Amsterdam cogently criticized a generation ago.[192] In Amar's theoretical world, jurors will decide what is reasonable. But if there are no concrete procedures or standards for police to follow, jurors in the real world will defer to police determinations of what was reasonable, as most civilians already do with respect to police judgment generally.

I suspect that Amar knows this but does not want to admit it. Perhaps he wants a reconditioned Fourth Amendment because it will provide greater flexibility for law enforcement personnel to undertake more searches and seizures. After all, we live in times when the issue of crime is the lead story in the media and on every politician's agenda.[193] Everyone wants more "law and order." Elections often

190. *See* Joe Mahoney, *Troopers Learning to Interpret Suspect's Glaze*, TIMES UNION (Albany, N.Y.), June 30, 1992, at B1 (state trooper recalled "one case in which troopers determined that a man initially suspected of being intoxicated was actually experiencing the effects of high blood pressure and had taken prescription medication for that condition").

191. *Cf.* Seth Mydans, *Powerful Arms of Drug War Arousing Concern for Rights*, N.Y. TIMES, Oct. 16, 1989, at A1 (In Volusia County, Florida, highway signs were posted warning motorists of a drug roadblock ahead; sheriff deputies would detain vehicles that slowed down or made U-turns to avoid the search.).

192. Amsterdam, *supra* note 23, at 393-94 (footnotes omitted):

> The complaint is being voiced now that fourth amendment law is too complicated and confused for policemen to understand or to obey. Yet present law is a positive paragon of simplicity compared to what a graduated fourth amendment would produce. The varieties of police behavior and of the occasions that call it forth are so innumerable that their reflection in a general sliding scale approach could only produce more slide than scale. . . . Under [a reasonableness model], "[r]easonableness is in the first instance for the [trial court] . . . to determine." What it means in practice is that appellate courts defer to trial courts and trial courts defer to the police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable.

193. *See, e.g.*, Larry Rohter, *In Wave of Anticrime Fervor, States Rush to Adopt Laws*, N.Y. TIMES, May 10, 1994, at A1.

turn on the public's perception of a candidate's toughness on the issue of crime. Police are told to "crack down" on drug dealing, tighten enforcement of drunk driving laws, and make our streets safe. "[S]erious crimes and serious needs can justify more serious searches and seizures."[194] Much of the public already believe that constitutional restraints handcuff the cops and assist criminals. People are ready for change, and if that means further sacrifice of Fourth Amendment values, so be it.[195]

The public does believe that crime is a pressing problem. Many share the view that "serious crimes and serious needs can justify more serious searches and seizures." But Amar jumps the track when he argues that these moods should guide the Court's Fourth Amendment jurisprudence. This conception is not wrong because "cracking down" on the drug trade or enhancing citizen safety on the streets is bad policy; promoting crime control is desirable public policy. But these policies must be pursued within constitutional limits. Some say that citizen support for warrantless invasions, like frisks for weapons, drug roadblocks, and apartment sweeps, are pertinent to determining the reasonableness of these tactics.[196] But Fourth Amendment rights are

194. Amar, *supra* note 1, at 802.

195. When Dragnet sweeps by the Chicago Housing Authority—which included, *inter alia*, warrantless searches of every apartment—were challenged as violative of the Fourth Amendment, the public official responsible for initiating these searches expressed the mood of many who are ready to resort to drastic measures: " 'We are not infringing on rights; we are restoring rights,' said Vincent Lane, chairman of the Chicago Housing Authority. 'We are restoring our residents' rights to a safe and decent environment.' " Mydans, *supra* note 191, at B10.

Similarly, when a task force of the Long Beach, California Police Department was accused of conducting illegal searches and seizures of persons found near the downtown area, Deputy Chief Gene Brizzolara defended the actions of his officers, and noted that the police had the backing of the public. Explaining which individuals are stopped, a task force officer said he "decides to stop 'anyone you see who you wouldn't want your wife, mother or daughter coming in contact with.' " Chris Woodyard, *Long Beach Task Force Told to Act Within Law*, L.A. TIMES, Oct. 1, 1987, at A1.

196. At a White House press conference, the Acting Associate Attorney General described the Clinton Administration's position on warrantless sweeps of housing projects in the following manner:

> What we think is very important here . . . is, one, local circumstances really control what is reasonable in a particular case. The whole Fourth Amendment is premised on the concept of reasonableness. And reasonableness is a balancing of need against the intrusion. . . .
>
> . . . [W]hat's important, I think, about allowing the voice of the tenants to be heard through tenant organizations or otherwise is that you have evidence in the clearest form that you can have of what the people who are affected by both the emergency need and also by the intrusions that are involved—how they feel about it.
>
> Now, this is not to say that the Fourth Amendment is somehow subject to majority rule; of course, it's not. It is, however, to say that in assessing a particular case what the level of need versus intrusion is, that it's very important to consider how the people

personal, they are not subject to majority rule. If ninety-nine percent of the tenants of a Chicago housing project favor warrantless sweeps of their homes, they are free to open their doors for the police anytime they wish. Their desires, no matter how reasonable, should not control the Fourth Amendment rights of those who want to protect their privacy.

Amar's vision of the Fourth Amendment is wrong because a reasonableness model will not restrain police power and discretion. Current Fourth Amendment principles do provide a modicum of restraint on the exercise of police power. The warrant process undoubtedly delays the process of searching and seizing a person's property. Requiring police officers to possess objective evidence of criminality before undertaking a seizure or conducting a search prevents certain intrusions from occurring. "But this is not an unintended *result* of the Fourth Amendment's protection of privacy; rather, it is the very *purpose* for which the Amendment was thought necessary."[197] I wonder whether Professor Amar agrees with this?

V. THE EXCLUSIONARY RULE DEBATE

> I believe in the principle of the exclusionary rule. . . . Without the exclusionary rule, police investigating a murder or something would be like a criminal released into the midst of society. They would abuse it. I don't want the rule eliminated, I just want the right to do my job and to prove my cases without being sued. I agree with the rule. It shouldn't be abolished. Society shouldn't be left without the rule.
>
> Statement of a Chicago Narcotics Officer[198]

The exclusionary rule of the Fourth Amendment prohibits the introduction of physical or other evidence in the prosecution of a case where such evidence was obtained by an illegal police intrusion. Professor Amar wants to abolish the rule. He believes the rule conflicts with the "presupposed"[199] remedy the Framers had in mind for Fourth

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who are there view it. And for that reason, I think a lot about this policy is really local specific.

Press Briefing by Secretary of Housing and Urban Development Henry Cisneros and Acting Associate Attorney General Bill Bryson 11 (Apr. 16, 1994).

197. New Jersey v. T.L.O., 469 U.S. 325, 357 (1985) (Brennan, J., concurring in part and dissenting in part).

198. Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1051 (1987) [hereinafter Orfield, *Exclusionary Rule*].

199. Amar, *supra* note 1, at 786.

Amendment claims and destroys the "basic trial value of truth seeking—sorting the innocent from the guilty."[200] Amar employs dramatic images to make his points about the havoc caused by the rule. Regrettably, Amar spends too much energy decrying the exclusion of a hypothetical "murderer's bloody knife,"[201] and not enough time analyzing how the exclusionary rule works in the real world.

Professor Amar is troubled when evidence of a person's guilt is excluded from a prosecution because the police ignore or violate a defendant's Fourth Amendment rights. This is wrong, he writes, because society

> cherishes the notion that cheaters—or murderers, or rapists, for that matter—should not prosper. When the murderer's bloody knife is introduced, it is not only the government that profits; the people also profit when those who truly do commit crimes against person and property are duly convicted on the basis of reliable evidence. When rapists, burglars, and murderers are convicted, are not the people often *more* "secure in their persons, houses, papers, and effects?"[202]

Scare tactics of this sort do not make convincing analysis. Despite the inflated and histrionic claims of its critics, the exclusionary rule has not been responsible for the release of dangerous criminals who prey on society. The largest figure cited by Justice White, a longtime foe of the rule, for cases lost "due to nonprosecution or nonconviction of individuals arrested on felony drug charges is probably in the range of 2.8% to 7.1%."[203] In an exhaustive study on the impact of the rule—a study that Professor LaFave called "the most careful and balanced assessment of all available empirical data,"[204]—Professor Thomas Davies found that the "most striking feature of the data is the concentration of illegal searches in drug arrests (and possibly weapons possession arrests) and the extremely small effects in arrests for other offenses, including violent crimes."[205] Davies concluded that "available empirical evidence casts considerable doubt on both the

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200. *Id.* at 759.

201. *Id.* at 793.

202. *Id.*

203. United States v. Leon, 468 U.S. 897, 907 n.6 (1984) (citing Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 680).

204. Wayne R. LaFave, *"The Seductive Call of Expediency":* United States v. Leon, *Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895, 904.

205. Davies, *supra* note 203, at 680.

alleged 'high costs' of the exclusionary rule and the purported prevalence of 'legal technicalities' as the cause of illegal searches."[206]

The exclusionary rule's greatest impact is felt in drug and weapons possession cases.[207] Suppression of the "murderer's bloody knife," Amar's favorite stalking horse, is infrequent.[208] For example, empirical data of almost 7500 cases in a nine-county study of criminal courts in Illinois, Michigan, and Pennsylvania disclosed that "[n]one of the motions [to suppress evidence] granted in offenses against persons involved exceptionally serious cases such as murder, rape, armed robbery, or even unarmed robbery. The motions granted were in indecent exposure, simple battery, and aggravated assault cases."[209] This same study found that the cases lost due to Fourth Amendment exclusion did not typically involve serious offenses or defendants who would have served long prison terms: "Of the 40 defendants who were not convicted because of suppression of physical evidence, over 20% (9) would have received less than one month in jail, an additional 33% (15) would have received less than two months. Only one could have expected more than one year."[210]

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206. *Id.* at 688.

207. *Id.* at 637-38 (footnotes omitted):

> Although serious students of the rule have known for at least a decade that the effects of the rule are clustered in arrests for drugs, weapons possession, and other "victimless" offenses (i.e., those in which enforcement is initiated by police without victim complainants), various critics have persisted in trying to link the rule to releases in violent crime arrests.

Davies further notes that:

> [Research on the exclusionary rule] does tell us something about the "countless guilty criminals" that escape through the exclusionary rule. They are not "robbers" or "murderers." Instead, [those] who escape are offenders caught in the everyday world of police initiated vice and narcotics enforcement. Their offenses are usually true victimless crimes in the sense that there is no civilian complainant.

Thomas Y. Davies, Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 Nw. U. L. REV. 740, 774 (1974).

208. Just as our "system for enforcing fourth amendment law ought to be built around the ordinary case, not the exceptional one," William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 897 (1991), our view of how the exclusionary rule works should not be tainted by imagining horrible events that rarely happen in the real world.

209. Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 596 n.47.

210. *Id.* at 602. Professor Davies' data disclosed that the exclusionary rule seldom hinders the prosecution of violent crimes. His study of California data for a five-year period (1978-1982) found that "illegal search problems were given as the reason for prosecutors' rejections of only 8 of 11,836 homicide arrests (0.06% or 6 in 10,000), 13 of 14,328 forcible rape arrests (0.09% or about 1 in 1,000), 117 of 68,632 robbery arrests (0.17% or a little less than 2 in 1,000), and 189 of 135,881 assault arrests (0.13% or a little over 1 in 1,000)." Davies, *supra* note 203, at 645. Davies' study concluded: "Arrestees released because of illegal searches tend not to have had especially serious records and not to have been charged with especially serious offenses; most

Why are Amar's readers not given any of this evidence? Of course, Amar's readers—even after being apprised of these statistics—might still be troubled by the potential for exclusion in any given case. While this concern is understandable, these readers should also know that even when defendants are successful in their suppression motions, police and prosecutorial officials are still free to use illegally obtained evidence and its fruits against the defendant in many instances. As Professor Steven Duke put it, the "efficacy of a meritorious [suppression] motion has been so diluted by the . . . Court . . . as to convert the exclusionary rule into chicken broth."[211]

Amar's emotional query—"[w]hen rapists, burglars, and murderers are convicted, are not the people often *more* 'secure in their persons, houses, papers, and effects?' "[212]—is a good debater's stratagem. But Professor Amar is too good of a constitutional scholar to take this position seriously. He knows that the Fourth Amendment was not designed to protect people against rapists, burglars, and murderers. Like the other provisions of the Bill of Rights, it was intended to protect people against lawless government intrusions. The point of the Fourth Amendment is to check police discretionary power to search or seize. Professor Amar should not engage in "word games"[213] with the language of the Amendment and suggest that its purpose is furthered by making people feel safe from criminals.[214]

In attacking the exclusionary rule, Professor Amar returns to the history of the Framers:

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would not have been sentenced to prison if convicted. Fewer than 7% are rearrested for violent crimes." *Id.* at 680 (footnotes omitted).

211. Duke, *supra* note 155, at 1414 (discussing the many ways prosecutorial and police officials are able to use illegally obtained evidence against a defendant).

212. Amar, *supra* note 1, at 793.

213. *Id.* at 769.

214. Anticipating this point, Amar says that "[i]t is no answer to say that the Fourth Amendment, as originally designed, was intended to protect only against intrusions by government, rather than by private thugs." *Id.* at 793 n.135. He then offers that the Amendment's "text, history, structure, and early implementation do not support the exclusionary rule." *Id.* Maybe not, but what is the relevance of the exclusionary rule's historical origins to the question of whether the Amendment was designed to protect people against "rapists, burglars, and murderers"? Amar offers no evidence—other than his own question begging—to support the supposition that the Fourth Amendment was in any way intended to protect people from private actors.

Amar says that his argument "seeks to refute modern day policy arguments for exclusion, and surely it is fair on policy grounds to point out the modern-day threat posed by private violence unleashed by the exclusionary rule." *Id.* If Amar's criticism of the rule is fueled by the current threat of private violence, he should be candid about the extent and scope of that threat. As already noted, the impact of the rule has been marginal. The rule has rarely stood in the way of preventing society from convicting and imprisoning violent criminals.

> Tort law remedies were thus clearly the ones presupposed by the Framers of the Fourth Amendment and counterpart state constitutional provisions. Supporters of the exclusionary rule cannot point to a single major statement from the Founding—or even the antebellum or Reconstruction eras—supporting Fourth Amendment exclusion of evidence in a criminal trial.[215]

If constitutional interpretation was simply a matter of identifying whether a particular historical practice was permitted in 1789 or thereabouts, it would be better to appoint historians to the Court and leave the lawyers on the sidelines. The nation expects and deserves, however, a lot more from the Justices than a history seminar when our fundamental rights are at stake. As Telford Taylor, one of Amar's heroes, put it, "the framers meant the Constitution to mean more than it says, and more than they could conceive."[216]

Professor Amar is correct that the Fourth Amendment itself does not provide for an explicit remedy,[217] but advocates of the exclusionary rule have never claimed otherwise. It may also be true that the

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Finally, Amar writes that the "[f]ounding generation was acutely aware of the threat posed by unregulated private violence" and notes that

> [i]n assessing the "reasonableness" of any . . . government intrusion, we should consider whether an incremental government intrusion will be more than offset by a likely diminution in intrusion from private violence. If the reality of private violence threatening the security of the citizens' "persons, houses, papers, and effects" may be considered in determining when Fourth Amendment rights are violated, why can't it also be considered in fashioning Fourth Amendment remedies?

Id. (citation omitted). No matter how often the Framers may have thought about private violence in contexts unrelated to the Fourth Amendment, none of their thoughts on the subject will support the premise that the Fourth Amendment was in any way concerned with protecting people from private violence. If the Amendment itself is not concerned with private violence, what is the point of discussing private violence when debating the proper remedies for violation of the Amendment?

215. *Id.* at 786.

216. TAYLOR, *supra* note 43, at 13.

217. *See* Cuddihy, *supra* note 21, at 1530-34. According to Cuddihy's study of the origins of the Fourth Amendment, many of the precedents available to the Framers "were less informative of the Fourth Amendment's enforcement mechanism, for, unlike the trial[ ] involving Wilkes . . . they usually did not evaluate the power of government to search and seize in its own interest." *Id.* at 1535. Cuddihy explains that when the Amendment was proposed, several phenomena existed which undermined a coherent theory about how the Amendment would be enforced.

First, many of the lawsuits filed between 1784-1791 by targets of search and seizure "stemmed from adjudication between private parties that governments often enforced but in which they had not participated. . . . Powers of search, seizure, and arrest that directly involved the government were not in dispute." *Id.* at 1536-37.

Second, most of these lawsuits were initiated by creditors who sought an expansive scope of permissible search and seizure. "The common theme in the briefs of those plaintiffs was not that a government representative had gone too far in searching or seizing but that he had not gone far enough. Creditors and their attorneys challenged the limits of one kind of search and seizure

Framers never considered a remedy like the exclusionary rule.[218] So what? We do know that some of the Framers—including the author of the Fourth Amendment, James Madison—expected judges to play a role in the interpretation and protection of our fundamental rights.[219] We also know that "judges in colonial America . . . were

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at the very time that the authors of the amendment were setting limits to another kind." *Id.* at 1537 (footnote omitted).

Third, "American courts not only subjected officials to legal actions for searches and seizures but narrowed the extent of their official liability for undertaking them." *Id.*

Finally, the instances where government officers actually "paid for wrongful searches and seizures that they had undertaken were the exception rather than the rule." *Id.* at 1539. During the period before adoption of the Amendment, officers "suffered only when they stepped on uncommonly powerful toes." *Id.* at 1540.

218. We know the Framers were preoccupied with general warrants and writs of assistance. This emphasis on barring general warrants and writs, however, may provide an explanation for their failing to consider a remedy like the exclusionary rule.

It is not surprising that the Framers did not focus on *ex post* judicial review. By prohibiting overly broad warrants, the Framers may have thought "magistrates and judges would exercise vigilant *pre*-search control" over customs officers and their personnel. Kamisar, *supra* note 29, at 575. As already noted, many colonial judges did exercise pre-search control by refusing to issue new writs of assistance, despite repeated requests by British officials. In Massachusetts Bay Colony, new writs were issued, but customs searches virtually disappeared because the people rebelled against both the writs and customs searches. *See* LASSON, *supra* note 34, at 72; Maclin, *supra* note 178, at 707-13. In sum, searches and seizures by customs officials were severely hampered by a colonial judiciary and popular resistance aligned against unchecked executive authority.

Under these circumstances—where Massachusetts customs officers, even when armed with judicial warrants, were unwilling to execute searches and seizures, and judges in other colonies were turning down requests for writs—it is understandable why customs officers would not engage in searches and seizures without the sanction of any judge or magistrate. Thus, it is possible, although by no means certain, that the absence of a specific remedy of exclusion is explained by the Framers' confidence that judicial control at the pre-search stage would protect Fourth Amendment rights.

Justice Jackson, who Amar praises for his "commonsensical" attitudes about the Fourth Amendment, Amar, *supra* note 1, at 802, summarized the importance of pre-search control and the absence of post-search remedies from the Framers' agenda. Jackson characterized the Fourth Amendment in the following manner:

> [It] roughly indicate[s] the immunity of the citizen which must not be violated, goes on to recite how officers may be authorized, consistently with the right so declared, to make searches . . . [and then concludes] apparently because [the Framers] believed that by thus controlling search warrants they had controlled searches.

Harris v. United States, 331 U.S. 145, 195-96 (1947) (Jackson, J., dissenting), *overruled by* Chimel v. California, 395 U.S. 752 (1969).

219. Madison told his colleagues in the House of Representatives:

> If [a bill of rights is] incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

James Madison, Address to the House of Representatives (June 8, 1789), *reprinted in* THE MIND OF THE FOUNDER 224 (Marvin Meyers ed., 1973).

defying and defeating British overlordship years before a single soldier took to the field."[220] And we know that there is a continuing line of precedent—from the time of our constitutional ancestors to modern times—where those aggrieved by government search and seizure tactics have looked to the judiciary to enforce the values embodied in the Fourth Amendment.[221]

Under Professor Amar's interpretation, the exclusionary rule is an "awkward and embarrassing remedy"[222] because, *inter alia*, it lacks a textual basis and the support of eighteenth- or nineteenth-century authorities.[223] There is, however, another way to interpret the Amendment and its history—an interpretation that connects the broad aims of the Framers, rather than specific practices of their era, with the realities of today's society.

The Fourth Amendment, both textually and historically, has always provided "both procedural and substantive protections."[224] During the fifteen years prior to the Revolution, colonial judges sustained what today we might call one of the procedural components of the Amendment, by refusing to sanction *in advance* what they believed to be an illegal search or seizure. Today's judges act within that same tradition when they refuse to affirm or sanction intrusions *after the fact* because law enforcement officials forgo judicial authorization or lack objective evidence of criminality.[225] Judges, then and

220. SMITH, *supra* note 53, at 5.

221. *See* LANDYNSKI, *supra* note 29, at 47; United States v. United States Dist. Court, 407 U.S. 297, 317 (1972) (footnote omitted):

> The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.

222. Amar, *supra* note 1, at 785.

223. *Id.* at 785-87.

224. Albright v. Oliver, 114 S. Ct. 807, 827 (1994) (Stevens, J., dissenting). Amar agrees with this interpretation. Amar, *supra* note 1, at 811.

225. *Cf. Albright*, 114 S. Ct. at 827 (Stevens, J., dissenting) (citations ommitted) (emphasis in original) (footnote ommitted) (quoting Wolf v. Colorado, 338 U.S. 25, 27-28 (1949); Mapp v. Ohio, 367 U.S. 643, 655 (1961)):

> When the Court first held that the right to be free from unreasonable official searches was "implicit in 'the concept of ordered liberty,' " and therefore protected by the Due Process Clause of the Fourteenth Amendment, *Wolf v. Colorado*, . . . it refused to require the States to provide the procedures accorded in federal trials to protect that right. Significantly, however, when we overruled the procedural component of that decision in *Mapp v. Ohio*, . . . we made clear that we were "extending the *substantive* protections of due process to all constitutionally unreasonable searches—state or federal . . . ."

now, have been the enforcers of the Amendment.[226] If customs officers in the past had refused to obtain search warrants and proceeded on their own initiative without judicial sanction (which Amar admits they were unwilling to do), our constitutional ancestors most likely would not have been pleased if British vice-admiralty courts would have been permitted to use the fruits of such intrusions.[227] Yes, the exclusionary rule is judge-made law, but who else would be expected to establish this principle?[228] Professors Thomas Schrock and Robert Welsh were correct when they wrote that the exclusionary rule "is simply another name for judicial review."[229]

Amar and others might object that there is a big difference between a judge's refusal to sanction a search before the fact and her refusal to sanction a search *post hoc* by excluding relevant evidence of criminal behavior. These critics of the exclusionary rule dismiss the possibility that the Framers looked to the procedural safeguards in the Warrant Clause to protect the citizenry against oppressive intrusions. With hindsight, we can see that the Framers'

> trust in the warrant procedure was misplaced. We know now that so many searches are made without warrants that even if judges and magistrates had both the time and the desire to exercise vigilance in all of the relatively few cases in which warrants are sought they simply could not control searches by controlling search warrants.

Kamisar, *supra* note 29, at 578-79.

226. *See* Kamisar, *supra* note 29, at 592 ("The courts, after all, are the specific addresses [sic] of the constitutional command that 'no Warrants shall issue, but upon' certain prescribed conditions.").

227. In Massachusetts Bay Colony, for instance, violators of the customs law, which "included men of considerable standing in the province," SMITH, *supra* note 53, at 69, often sought writs of prohibition from the Massachusetts Superior Court to the court of vice-admiralty:

> At the behest of an unwilling defendant in a vice-admiralty process the Superior Court of the province, "wishing to maintain the Laws and Rights of . . . Courts of Record," would order the vice-admiralty court to "meddle not further" pending determination of its right to jurisdiction, and invite the judge and other officers of the vice-admiralty court to attend and show, if they could, that the case was indeed cognizable there. An adverse determination meant that this "temporary" writ of prohibition would be declared final. Oftener however persons to whom the temporary writ was addressed simply obeyed the order to "meddle not further" and let it go at that.

Id. (footnote omitted).

228. A more direct answer may be supplied by recognizing that the [Fourth] Amendment . . . restrains the power of the government as a whole; it does not specify only a particular agency and exempt all others. The judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected.

> . . . Because [searches and] seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence. Indeed, by admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single governmental action prohibited by the terms of the Amendment.

United States v. Leon, 468 U.S. 897, 932-33 (1984) (Brennan, J., dissenting).

229. Thomas S. Schrock & Robert C. Welsh, *Up from* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 325 (1974).

Now this is not simply my explanation of why the exclusionary rule is good law, but rather the Court's own explanation—in the landmark case of *Weeks v. United States*,[230] a case Amar never discusses. Rather than analyze *Weeks*, Amar spends several pages excavating and then reinterring *Boyd v. United States*,[231] offering an analysis that has no nexus to the real world of law enforcement. Professor Amar's readers should consider why the *Weeks* Court concluded that the exclusionary rule was an essential component of the Fourth Amendment:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law.[232]

Should judges close their eyes when guilty defendants are subjected to illegal police practices? No, replied the Court:

> This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . .

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230. 232 U.S. 383 (1914).

231. 116 U.S. 616 (1886); Amar, *supra* note 1, at 787-91. By criticizing *Boyd*, Professor Amar is beating a dead horse. No current scholar or proponent of the exclusionary rule advances the reasoning proffered by *Boyd*—fusing together the Fourth Amendment and the Fifth Amendment's Self-Incrimination Clause—as support for the rule. *Cf.* James Boyd White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 U. MICH. L. REV. 1273, 1283 (1983) (noting that "*Boyd* in all its aspects has been overruled"). Professor White utilizes some of the reasoning of *Boyd* to "construct what might be called a pure theory of the fourth amendment, reading something like this: one's property is constitutionally immune from seizure . . . and the government must forgo any benefits it acquires by the violation of such property rights." *Id.* at 1283.

Amar offers high praise for Telford Taylor's analysis of the Fourth Amendment's history. He relies upon and quotes at great length Taylor's views on how the Fourth Amendment should be interpreted. But if one reads Taylor's book closely, it is not clear whether he opposes the exclusionary rule; indeed, Taylor's closing sentence about Mapp v. Ohio, 367 U.S. 643 (1961), appears to suggest guarded respect for the ruling. Taylor notes that the division in *Mapp*:

> sharp as it was, did not concern the merits of the exclusionary rule. The disagreement concerned only the federal dimension of the constitutional question: should the states be left free to apply or not to apply the exclusionary rule according to state law? That is the issue on which the justices divided, and there is not a word in the dissenting opinions suggesting that the rule is intrinsically bad. Especially in view of the pre-*Mapp* trend in the state courts, I should think it likely that the case will weather even substantial changes in the Court's membership.

TAYLOR, *supra* note 43, at 20-21.

232. *Weeks*, 232 U.S. at 391-92.

> should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[233]

What would be the upshot if courts permitted the introduction of illegally obtained evidence in criminal trials?

> If [items] can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.[234]

Readers should compare the reasoning of *Weeks* to that proffered by Amar. For example, Amar writes:

> Given the almost metaphysical difficulties in knowing whether the bloody knife or some evidentiary substitute would have come to light anyway, should not the law strongly presume that somehow, some way, sometime, the truth would come out? Criminals get careless or cocky; conspirators rat; neighbors come forward; cops get lucky; the truth outs; and justice reigns—or so our courts should presume, and any party seeking to suppress truth and thwart justice should bear a heavy burden of proof.[235]

Let's see how this model would work in practice:

If the police illegally stop a motorist and find evidence of a crime during an unlawful search of the car, the fruits of this police misconduct should be admitted anyway. After all, the defendant might have become careless or might have become cocky and tried to match wits with the police believing the police would not search the door panels of the car: "Criminals get careless or cocky."[236]

If FBI agents illegally tap a phone conversation between two suspected mobsters plotting a conspiracy and overhear evidence of criminality, the fruits of their illegal actions should be admitted anyway, because one member of the conspiracy was bound to go to the feds

233. *Id.* at 392.
234. *Id.* at 393-94.
235. Amar, *supra* note 1, at 794.
236. *Id.*

and incriminate his colleagues. We should remember: "conspirators rat."[237]

If the police in Florida round up a dozen or so black teenagers because they fit the general description of two African-Americans who robbed and killed a victim in the vicinity and find evidence of the robbery on one of them, the evidence should come in anyway because somebody in the neighborhood is likely to identify the killer sooner or later. After all: "neighbors come forward; cops get lucky."[238]

Imagine the result if Amar's theories controlled when *Rochin v. California*[239]—the famous "stomach pumping" case—was decided. In that case, believing that Rochin was selling narcotics, three deputy sheriffs forced their way into Rochin's home and bedroom. The deputies found Rochin partially dressed and sitting on his bed. Rochin swallowed two morphine capsules, which the officers forcibly, but unsuccessfully, attempted to retrieve. Rochin was arrested and taken to a hospital where "a doctor forced an emetic solution through a tube into Rochin's stomach against his will."[240] The "stomach pumping" produced vomit, which contained the two morphine capsules.

Under Amar's model, Rochin would be unable to contest the admission of the morphine capsules at his trial. At best, Rochin would be left with a civil damage action against the officers or possibly the county sheriff's department. In the actual case, however, these options were available to Rochin,[241] but they were not enough. Thus was the reasoning of Justice Frankfurter, who delivered the opinion of the Court.

Justice Frankfurter reminded us that due process of law means that "convictions cannot be brought about by methods that offend 'a sense of justice.' "[242] The stomach pumping, of course, was a tort and a crime. But it did not matter to the Court whether the police who engaged in the stomach pumping, or the physician who helped them, had been or could be sued or prosecuted. Regardless of the availability of other remedies, the evidence obtained by the sheriffs could not be admitted even though it was reliable and highly probative of Rochin's guilt. Why not? Because admitting the morphine capsules,

237. *Id.*
238. *Id.*
239. 342 U.S. 165 (1952).
240. *Id.* at 166.
241. *See* Kamisar, *supra* note 29, at 614.
242. *Rochin*, 342 U.S. at 173.

reasoned the Court, would be "sanctioning" the police illegality and affording it "the cloak of law."[243]

Does Professor Amar agree with the reasoning and result in *Rochin*? If he approves of *Rochin*, why not *Weeks*? *Rochin* essentially adopts the reasoning of *Weeks* and its progeny under the guise of due process.[244] Sure, Rochin may have possessed narcotics, just as Weeks was involved in illegal gambling operations. Both probably were criminals. Both might have brought damage claims against the intruding law enforcement personnel, but that did not stop the Court from excluding the relevant evidence in their criminal prosecutions. As the *Weeks* Court stated, "[t]o sanction [illegal searches and seizures] would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[245]

Patrick Irvine also was an alleged criminal.[246] Police officers broke into his home and installed a concealed microphone in order to listen to conversations that occurred inside.[247] This illegal surveillance continued for over a month.[248] A sharply divided Court permitted the admission of the fruits of this police misconduct and affirmed Irvine's conviction. Acknowledging the availability of other remedies to combat illegal searches and seizures, dissenting Justice Frankfurter responded:

> Nor can we dispose of this case by satisfying ourselves that the defendant's guilt was proven by trustworthy evidence and then finding, or devising, other means whereby the police may be discouraged from using illegal methods to acquire such evidence.
>
> . . . If, as in *Rochin*, "[the conviction of Irvine] has been obtained by methods that offend the Due Process Clause," it is no answer to say that the offending policemen and prosecutors who utilize outrageous methods should be punished for their misconduct.[249]

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243. *Id.*

244. *Cf.* Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261, 267 ("All *Rochin* held is that when police conduct both violates the Fourth Amendment, *and also* 'shocks the conscience,' the conviction must be reversed.").

245. Weeks v. United States, 232 U.S. 383, 394 (1914).

246. Irvine v. California, 347 U.S. 128 (1954).

247. *Id.* at 131.

248. *Id.*

249. *Id.* at 148 (Frankfurter, J., dissenting) (citation omitted) (quoting Rochin v. California, 342 U.S. 165, 174 (1952)).

In his fight against the exclusionary rule, Professor Amar is not without supporters. In disparaging the exclusionary rule, Amar offers an 1822 circuit court opinion of Justice Joseph Story, which rejected an argument favoring the rule.[250] Amar also cites, *inter alia*, Dean Wigmore's "definitive scholarship"[251] which opposes the exclusionary rule.

I see nothing persuasive in Justice Story's opinion. In Amar's cited quote, Story says that evidence is often obtained from the defendant by "forcible and illegal means."[252] In other words: "We don't care how the police get the evidence so long as it is reliable; if the evidence is probative of guilt, then it gets in, period." That was once the prevailing view, but that view was rejected in the confession area as long ago as the 1940s, and, of course, rejected in *Rochin*. Some individuals may be convinced that a return to the "old days" would benefit society. Perhaps, but I do not want a return to times when "a short-sighted public tend[ed] to agree with the policeman, and feels satisfied and safe when an offender is beaten to a pulp, convicted, and sent to prison."[253]

Additionally, John Henry Wigmore's reading of the Fourth Amendment is also suspect. He wrote that the Amendment "implies both a civil action by the citizen thus disturbed and a process of criminal contempt against the offending officials."[254] Wigmore called the latter, "contempt of the Constitution,"[255] a rather imaginative reading of the Fourth Amendment's text indeed—the type of "extravagant," "sloppy,"[256] anti-textualist interpretation that Amar disfavors.[257] Wigmore favored admitting illegally obtained evidence, but proposed

250. Amar, *supra* note 1, at 786 (citing United States v. La Jeune Eugenie, 26 F. Cas. 832, 843-44 (C.C.D. Mass. 1822) (No. 15,551)).

251. *Id.* at 787.

252. *Id.* at 786.

253. ERNEST JEROME HOPKINS, OUR LAWLESS POLICE: A STUDY OF THE UNLAWFUL ENFORCEMENT OF THE LAW 10 (1931).

254. John Henry Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 481 (1922); *see also* 8 JOHN HENRY WIGMORE, EVIDENCE § 2184, at 35 (3d ed. 1940) [hereinafter WIGMORE, EVIDENCE].

255. WIGMORE, EVIDENCE, *supra* note 253, at 40; *see also* Comment on Recent Cases, 9 ILL. L. REV. 39, 43-44 (1914) (calling the exclusionary rule "mechanical," "unnatural," and "antiquated").

256. Amar, *supra* note 1, at 800.

257. *See id.* at 759 ("*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 . . . ."); *id.* at 791-92 (criticizing the exclusionary rule as a "nontextual and unprecedented remedy").

that officers who violated Fourth Amendment norms be carted off to jail for thirty days.

Amar approvingly cites Wigmore, but Wigmore's "contempt of the Constitution" remedy is subject to some of the same criticisms that Amar directs at the current structure of Fourth Amendment law. Wigmore's remedy is too rigid because it does not recognize the common sense that is self-evident to police officers; "serious crimes and serious needs can justify more serious searches and seizures."[258] Officers will be sent to jail even though their transgressions might have occurred in the context of efforts to apprehend a murder suspect, or infiltrate a foreign terrorist conspiracy or discover the "bloody knife."

Wigmore's "contempt of the Constitution" remedy would not be popular with the citizenry, the police, or the judiciary. Or, so Amar might conclude:

> The ["contempt of the Constitution" remedy] renders the Fourth Amendment contemptible in the eyes of judges and citizens. Judges do not like [sending police officers to jail], so they distort doctrine, claiming the Fourth Amendment was not really violated. . . . If [jail for a police officer] is the remedy, all too often ordinary people will want to say that the right was not really violated. At first they will say it with a wink; later, with a frown; and one day, they will come to believe it. Here, too, unjustified expansion predictably leads to unjustified contraction elsewhere.[259]

Under Wigmore's remedy, police officers will go to jail when they violate the Fourth Amendment rights of some criminals—people "despised by the public"—people who are "often unrepresentative of the larger class of law-abiding citizens, and [whose] interests regularly conflict with theirs."[260] Imagine a judge who has to run for reelection applying Wigmore's proposal. How would the police react to Wigmore's "contempt of the Constitution"? What would be the result if, say, in the course of a year, a dozen or so police officers were jailed for thirty days for violating the Fourth Amendment? Police officers would stop making arrests and searches altogether. Wigmore started a tradition of bashing the exclusionary rule, but then expressed his love and affection for the Fourth Amendment by proposing a remedy that would never materialize in the real world.

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258. *Id.* at 802.
259. *Id.* at 799.
260. *Id.* at 796.

Amar continues this tradition in his tort remedy proposals. Because most Fourth Amendment claimants are "despised by the public,"[261] legislatures will be reluctant to enact any of the alternatives to the exclusionary rule that Amar suggests. Just as prosecutors and judges have been reluctant to pursue and jail law enforcement officials who violate the Fourth Amendment,[262] so too will judges be reluctant to jail police officers who commit "contempt of the Constitution" when investigating criminal suspects. But this raises another question. *Who should* move to exclude illegally obtained evidence? Members of the Daughters of the American Revolution? Even Amar concedes that "only a fraction of unconstitutional searches and seizures will ever come to light for judicial resolution."[263] On those rare occasions that do surface, Amar would have judges ignore the illegality and admit the illegally obtained evidence. Does he believe that the citizenry-at-large will rise up in revolt and demand a remedy? Of course not!

> It is precisely because . . . unreasonable searches or seizures rarely attract media attention or arouse the community—"[n]o other constitutional guarantee is so openly flouted with so little public outcry"—that courts should *not* rely on "other methods" of enforcement when the search and seizure guarantee is flouted.[264]

Because the people who are illegally arrested and illegally searched are often despised, and *because* they are usually "unrepresentative of the larger class of law-abiding citizens," is the reason why society needs a Fourth Amendment. Is it possible that the exclusionary rule is hated by Amar and others because it "flaunts before us the price we pay for the Fourth Amendment"?[265]

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261. *Id.*

262. *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 500-501 nn.2 & 4 (1993) (outlining the difficulties associated with the prosecution of police brutality cases); Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 796-97 (1993) (same). If successful prosecutions are rare in cases of police brutality, there is little, if any, reason to expect that police officers will be prosecuted where their transgressions of constitutional safeguards do not "shock the conscience." *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 438 (4th ed. 1994) (noting the dearth of prosecutions against law enforcement officers for violating the Fourth Amendment primarily because prosecutors are reluctant to press charges against police officers and juries are unwilling to convict police).

263. Amar, *supra* note 1, at 814.

264. Kamisar, *supra* note 29, at 613 (footnote omitted) (quoting Comment, 47 Nw. U. L. REV. 493 (1952)).

265. JOHN KAPLAN, CRIMINAL JUSTICE: INTRODUCTORY CASES AND MATERIALS 216 (2d ed. 1978).

VI. IS THE EXCLUSIONARY RULE A LATECOMER ON THE SCENE?

Professor Amar suggests that the exclusionary rule's late appearance on the constitutional horizon undermines its legitimacy.[266] This is a minor complaint. Much of constitutional law, as we know it, came *very* late in the day. As recently as 1957, the prevention and punishment of the lewd and obscene, and the profane and libelous, were thought to raise no First Amendment problems.[267] The first articulation of the clear and present danger test—what may fairly be called the genesis of free speech protection—did not come about until 1919.[268]

In the criminal procedure area, the Sixth Amendment right to counsel was not taken seriously by the Court until 1938,[269] and not applied to the states until 1963.[270] The Fifth Amendment prohibition against compelled self-incrimination was first made applicable to the states in 1964,[271] and not taken seriously by the police until 1966.[272] The Double Jeopardy Clause of the Fifth Amendment was not applicable to the states until 1969.[273] And it was not until 1972 that a majority of the Court decided that the Eighth Amendment's ban on cruel and unusual punishment "permitted [it] to pass judgment on the constitutionality of a state's procedures for imposing the death penalty."[274] By this measure, the Fourth Amendment's exclusionary rule—first adopted in 1914—is a constitutional "old timer."

Perhaps Professor Amar is impressed by the fact that (to continue the baseball metaphor) such "heavy hitters" as Justice Story and Dean Wigmore opposed the exclusionary rule. But what about the "heavy hitters" who are in the other dugout? Amar never mentions that Justices Holmes and Brandeis were adamant in their views that the Fourth Amendment—properly interpreted—contained an exclusionary rule. So were Chief Justices Stone, Hughes, and Warren, as

266. Amar, *supra* note 1, at 786-87.

267. *See* Roth v. United States, 354 U.S. 476 (1957); Beauharnais v. Illinois, 343 U.S. 250 (1952).

268. *See* Schenck v. United States, 249 U.S. 47 (1919).

269. Johnson v. Zerbst, 304 U.S. 458 (1938).

270. Gideon v. Wainwright, 372 U.S. 335 (1963).

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

272. Miranda v. Arizona, 384 U.S. 436 (1966) (requiring that police officers warn suspects of their right not to incriminate themselves when confronted with custodial interrogation).

273. Benton v. Maryland, 395 U.S. 784 (1969).

274. Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1151 (1991).

well as Justices Frankfurter,[275] Jackson,[276] Brennan, and Marshall,[277] to name a few. One who claims that reading the exclusionary rule into the Fourth Amendment is misreading its language and is defying history and common sense, ought to at least acknowledge that nearly seventy-five years ago Justice Holmes, who many acknowledge to be the greatest figure in American legal history, offered the following words when confronted with the government's claim to use illegally obtained evidence:

> The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.
>
> The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets . . . [it] may use the knowledge that it has gained [from the unconstitutional seizure]; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. . . . [Such a contention] reduces the Fourth Amendment to a form of words.[278]

In his relentless attack on the exclusionary rule, Professor Amar overlooks Justice Holmes' simple logic: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[279] Is Justice Holmes' interpretation of the Fourth Amendment "oblivious or hostile to the common sense of common people"?[280] I don't think so. Surely Holmes' reasoning is no more "contrived"[281] than a proposed ten percent discount of a defendant's sentence for violation of his or her rights,[282] or certainly no less

275. Although Justice Frankfurter wrote the Court's opinion in Wolf v. Colorado, 338 U.S. 25 (1949), which declined to impose the exclusionary rule on the states, Justice Frankfurter went out of his way to reaffirm the federal exclusionary rule. *Id.* at 28 ("Since [Weeks v. United States, the exclusionary rule] has been frequently applied and we stoutly adhere to it.").

276. Justice Jackson, who joined the *Wolf* opinion, also emphasized the need for a federal exclusionary rule. *See* Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting); Kamisar, *supra* note 29, at 566 n.6.

277. *See, e.g.*, United States v. Leon, 468 U.S. 897, 928-60 (1984) (Brennan & Marshall, JJ., dissenting).

278. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (citation omitted).

279. *Id.* at 392.

280. Amar, *supra* note 1, at 759.

281. *Id.* at 797 n.140.

282. *Id.* at 796.

"wacky"[283] than the establishment of "a 'Fourth Amendment Fund' to educate Americans about the Amendment and comfort victims of crime and police brutality, and thereby promote long term deterrence, compensation, and 'security.' "[284]

In 1927, Justices Holmes and Brandeis wrote two dissenting opinions which have subsequently been recognized as among the greatest dissents in the Court's history. Their arguments in *Olmstead v. United States*,[285] regarding why the exclusionary rule should apply to illegal as well as unconstitutional police conduct, essentially restate, albeit more eloquently, the reasoning in *Weeks*. Did Holmes and Brandeis fail to "read the Amendment's words and take them seriously"?[286]

VII. PROPOSED REMEDIES

Some of Professor Amar's substitutes for the exclusionary rule are intriguing, but they will not protect society from unlawful searches and seizures. He wants to discard the exclusionary rule and replace it with a civil damage action. The heart of his proposal mandates strict liability for government entities when officers violate the Fourth

283. *Id.* at 797 n.140.

284. *Id.* at 815.

285. 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

286. Amar, *supra* note 1, at 759. In *Olmstead*, Justice Holmes wrote:

> I think ... the Government ought not to use evidence obtained and only obtainable by a criminal act.... Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose.... We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.

277 U.S. at 469-70. In the same case, Justice Brandeis concluded:

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious.... To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Id. at 485.

Although Professor Amar never discussed Holmes' or Brandeis' views, he proffers the following which might be considered responsive to their reasoning:

> Consider next the nice-sounding idea that government should not profit from its own wrongdoing. Our society, however, also cherishes the notion that cheaters—or murderers, or rapists, for that matter—should not prosper. When the murderer's bloody knife is introduced, it is not only the government that profits; the people also profit when those who truly do commit crimes against person and property are duly convicted on the basis of reliable evidence. When rapists, burglars, and murderers are convicted, are not the people often *more* "secure in their persons, houses, papers, and effects?"

Amar, *supra* note 1, at 793. As already noted, this reading of the Fourth Amendment is not convincing. *See supra* notes 202-14 and accompanying text.

Amendment. "If the search or seizure is ultimately deemed unreasonable, the government entity should pay."[287] How will such a system work? Amar suggests that "[t]his system of liability could be fashioned by legislatures."[288]

Everything turns on the "could." Sure, strict liability "could" be imposed by legislatures, but it will not be.[289] How do I know? Consider the past: Almost half a century elapsed between the time when the Court first adopted the federal exclusionary rule in *Weeks* and the imposition of the exclusionary remedy on the states in *Mapp*. Throughout that forty-seven year period, "*none* of the many states whose courts permitted the use of illegally obtained evidence developed an *effective* alternative safeguard."[290] The situation in California, as described by Chief Justice Traynor, provides insight:

> In California six years elapsed between *Wolf v. Colorado* and [California's adoption of the exclusionary rule as a matter of state law], and all during that time we were painfully aware of the right begging in our midst. We remained mindful of the cogent reasons for the admission of illegally obtained evidence and clung to the fragile hope that the very brazenness of lawless police methods would bring on effective deterrents other than the exclusionary rule. . . . [But] it became all too clear in our state that there was no recourse but to the exclusionary rule. . . . [A] like reflection of nation-wide

287. Amar, *supra* note 1, at 813. At bottom, Amar's proposal reflects a "violate now and pay later," Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 255, 261 (1961), attitude toward the Fourth Amendment. Professor Dellinger, among others, has already identified the flaw inherent in this model:

> [Amar's] proposal would permit the government to buy itself out of having to comply with constitutional commands. . . . The fourth amendment does not grant the government the discretion to decide whether the benefits of infringing the public's right to be protected from unreasonable searches and seizures are worth some expenditure of the public's funds; the language of the amendment is an affirmative command.

Dellinger, *supra* note 2, at 1563; *cf.* Stuntz, *supra* note 208, at 904-05 ("If damages for violations are low . . . a government may be willing to 'buy' its way out of fourth amendment law by reimbursing officers for any damages they have to pay in losing lawsuits.").

288. Amar, *supra* note 1, at 813.

289. Proposals for alternative remedies to the exclusionary rule and beefing-up civil damage actions are not new. For at least 72 years, commentators have been urging the adoption of similar alternatives. For some of the early proposals see, e.g., Edward L. Barrett, Jr., *Exclusion of Evidence Obtained by Illegal Searches—A Comment on* People v. Cahan, 43 CAL. L. REV. 565 (1955); Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345 (1936); Virgil W. Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. U. L. REV. 46 (1957); William T. Plumb, Jr., *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337 (1939); John Henry Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479 (1922).

290. Yale Kamisar, *Remembering The "Old World" Of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REF. 537, 565 (1990).

> import must also have been developing in the Supreme Court of the United States.[291]

Consider the present: Where are all the governors, mayors, legislators, and city council representatives calling for a crackdown on unlawful police behavior and the imposition of strict liability for government entities that employ these rogue officers? Such calls are not heard because most people trust the police; political constituencies respond to calls for more "law and order," not to efforts to restrain the police. In words pertinent even twenty years later, Professor Amsterdam aptly summarized why no one should expect to find strengthened civil damage remedies or criminal sanctions for police officers who violate the Fourth Amendment:

> Legislatures have not been, are not now, and are not likely to become sensitive to the concern of protecting persons under investigation by the police. Even if our growing crime rate and its attendant mounting hysteria should level off, there will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control.[292]

Professor Amar must believe that today's politicians have the "political guts" to campaign for and to enact stronger tort and criminal sanctions against law enforcement personnel who violate the Fourth Amendment rules. Yet there is no evidence that this will happen soon.[293]

More importantly, even with stronger tort remedies, Professor Amar paints a misleading picture by intimating that the availability of

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291. Roger J. Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 324; *see also* Yale Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436, 440-444 (1964):

> Police and prosecutors [in the years immediately following *Mapp*] strenuously resist what they like to call "tighter restrictions" on their powers. But more often than not, what they are really bristling about is tighter *enforcement* of long standing restrictions. Thus, many in law enforcement reacted to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure *had just been written*! They talked as if and acted as if the exclusionary rule *were* the guaranty against unreasonable search and seizure. What disturbed them so much was that courts were now operating on the same premise.

Id. at 440.

292. Amsterdam, *supra* note 23, at 378-79.

293. *See, e.g.*, Patton, *supra* note 262, at 774-75 n.128 (describing California legislation that sought to address police misconduct but was defeated in the legislative process). Indeed, the "history of attempts to regulate police practices should make us extremely doubtful about reliance on legislatures to create effective remedial structures. . . . [L]ocal politicians have been notoriously complicit in the corruption of police departments." Steiker, *supra* note 38, at 849.

tort remedies will deter Fourth Amendment violations.[294] Although Professor Amar does not mention it, litigators know that tort actions for police misconduct are hard to win. Professor Dripps has summarized the inadequacy and meager results produced by civil remedies:

> Since 1971, [the Department of Justice reports that] plaintiffs have filed an estimated 12,000 *Bivens* actions. In only five cases have the defendants actually paid damages, and it is not known whether any of these involved illegal search and seizure. With respect to suits under 42 U.S.C. § 1983, the Department's research discovered "fewer than three dozen reported fourth amendment cases over the past 20 years." The Report [of the Department] identifies two obvious reasons for the failure of civil plaintiffs to enforce the fourth amendment: first, juries sympathize with the police and not with criminals; second, search and seizure activity, however unconstitutional, ordinarily does not cause the kind of actual damages that our tort system compensates.
>
> With respect to internal discipline, the Justice Department documents only seven investigations into fourth amendment violations by its agents since 1981; none resulted in the imposition of sanctions. The Department did obtain two criminal convictions for violation of fourth amendment rights, but the defendants were subsequently pardoned by the President.[295]

Even when lawsuits succeed, money awards and judicial pronouncements will not necessarily promote respect for the Fourth Amendment by police officers. Consider two examples from the real world: From 1986 through 1990, the City of Los Angeles paid over "$20 million in judgments, settlements, and jury verdicts in over 300 lawsuits against LAPD officers alleging excessive use of force."[296] Did such large sums stop LAPD officers from brutalizing Rodney King on March 3, 1991? Despite the large amounts paid by the city,

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294. Amar, *supra* note 1, at 798 ("The point is not simply that these civil forms of deterrence and private attorney generalship are deeply rooted in our Fourth Amendment tradition whereas criminal exclusion is wholly unprecedented. . . . The point is also that these traditional forms make much more sense, *as deterrence*.").

295. Donald Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REF. 591, 629 (1990) (footnotes omitted) (quoting OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 2, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE (1986), *reprinted in* 22 U. MICH. J.L. REF. 573 (1989)); *see also* CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION 508-10 (1993) (noting that the typical success rate for claimants in police misconduct cases is around 20% to 30%, which compares unfavorably to the success rate of 49% for plaintiff victories in contested personal injury actions).

296. CHRISTOPHER COMMISSION, *supra* note 186, at 56.

an independent commission found that high-ranking police officials in the Los Angeles Police Department did little or nothing to control misconduct by LAPD officers.[297]

Twice during the summer of 1989, Massachusetts Superior Court Justice Cortland Mather found that the "search on sight" policy of the Boston Police Department violated the constitutional rights of black teenagers.[298] In his first ruling, Justice Mather ruled that officers, pursuant to departmental policy, were deliberately harassing suspected gang members and their associates.[299] In his second ruling, Justice Mather concluded that the public statements of high-ranking police officials had, "in effect, [amounted to] a proclamation of martial law in Roxbury for a narrow class of people, young blacks, suspected of membership in a gang or perceived by the police to be in the company of someone thought to be a member."[300] One might have thought that these judicial findings were sufficient to deter Boston police

297. The Christopher Commission report further states:

> Senior and rank-and-file officers generally stated that a significant number of officers tended to use force excessively, that these problem officers were well known in their divisions, and that the Department did not do enough to control or discipline these officers. The officers interviewed felt that supervisors were not held accountable by their superiors for excessive use of force by their subordinates, and consequently supervisors paid little attention to the problem.

Id. at 34; *cf.* MIKE ROTHMILLER & IVAN G. GOLDMAN, L.A. SECRET POLICE; INSIDE THE LAPD ELITE SPY NETWORK 47-48 (1992) (describing the "test" that rookie police officers were expected to overcome):

> The idea was to find a fight and then wade in like a cop from hell. It was of course better to win, but even if the rookie lost, he could score points for tearing into his prey like a badger after a grizzly. That was what the veterans wanted to see.
>
> But there was yet another element to this rite of passage .... Not only would [a rookie officer] have to kick someone's ass, and soon, it had better be a black man. Aside from their very real prejudice toward blacks, veteran officers also recognized one very salient fact about white people: most were afraid of blacks. So taking on a white man, unless he were some kind of [Rocky] Marciano, just wouldn't be enough. The vets wanted to see how a rookie would respond to a black man in his face.

Id. at 48. *See generally* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW (1993) (detailing several instances of police brutality in Los Angeles and other cities).

298. Findings of Fact, Rulings of Law, and Order on Defendants's Motion to Dismiss Indictments, Commonwealth v. Phillips, Superior Court Criminal Action Nos. 079297-98 (Mass. Sup. Ct. Aug. 24, 1989) [hereinafter Findings of Fact]; Memorandum and Order on Defendants Motions to Dismiss Indictments, Commonwealth v. Phillips, Superior Court Criminal Action Nos. 080275-76 (Mass. Sup. Ct. Sept. 19, 1989) [hereinafter Motion to Dismiss].

299. The implications of the Department's policy are very disturbing. While the police act legitimately when they intensify patrols in high-crime areas, they must not allow encounters between officers and residents to turn into episodes of provocation and harassment. Here, the officers were apparently primed to see criminal acts and, all too predictably, acted in a way that would fulfill their prophecy.

Findings of Fact, *supra* note 298, at 6.

300. Motion to Dismiss, *supra* note 298, at 3.

officers from intentionally abusing the Fourth Amendment rights of black males. But this was just the beginning.

On October 24, 1989, a white couple, Carol and Charles Stuart were found shot after leaving a hospital in an inner city neighborhood. Ms. Stuart died from the shooting, while her husband survived his wounds. The assailant was described by Mr. Stuart as a black male, around six-feet tall, and approximately thirty years old. The shooting occurred within two months after the Boston police promised to continue their policy of stopping and frisking those suspected of gang activity.[301] The upshot of these two incidents was predictable. Black and hispanic males throughout the city were stopped, questioned, searched, and in some cases, strip-searched on the streets of Boston. Actually, Charles Stuart killed his wife. In a typical response to the illegal conduct of his officers, Police Commissioner Francis M. Roache offered the lame excuse that " '[t]here are going to be occasions when officers can't go back to textbooks when making stops.' "[302]

None of this should come as a surprise. "Policing" the police has been, is, and always will be a difficult task. Juries are reluctant to return judgments against police officers; verdicts often "turn upon jurors' assessments of plaintiffs' character rather than upon the merits of the police action."[303] Individual officers remain unaffected by civil damage awards if they know that money will not be taken from their pockets.[304] Civilian review boards, commonly hailed as a panacea for police abuse and illegality, do not work in isolation and are often

301. Doris Sue Wong, *Police Vow to Continue Searches*, BOSTON GLOBE, Aug. 31, 1989, at 31.

302. Peter S. Canellos, *Police Searches Questioned*, BOSTON GLOBE, Jan. 14, 1990, at 1.

303. SKOLNICK & FYFE, *supra* note 297, at 203; *see also* Douglas L. Colbert, *supra* note 262, at 548 (noting reasons for jury sympathy).

304. As one commentator noted:

> Section 1983 suits generally do not deter abusive police behavior, except in rare instances when there is either a large award, media attention, or both. This lack of deterrence comes about because "[m]any officers lose nothing as a result of being sued. It costs them nothing financially, it never results in discipline, it has no effect on promotion, and it does not affect the way officers are regarded by their peers and superiors."

Patton, *supra* note 262, at 767-68 (alterations in original) (footnotes omitted); *see also* Edward J. Littlejohn, *Civil Liability and the Police Officer: The Need for New Deterrents to Police Misconduct*, 58 U. DET. J. URB. L. 365, 409 (1981) ("Although the City of Detroit's liability in police cases has been substantial in recent years, it is not clear that these damage payments have had a positive effect on police misconduct." An attorney for the City noted, " '[M]any officers just don't care. The city is going to pay the judgment so it is the city's problem. In fact we sometimes have problems getting minimal cooperation from officers in the sense they are clients who have an interest at stake.' " (footnote omitted)).

weak substitutes for effective control of police misconduct.[305] Finally, when police officers are rarely disciplined for their misconduct, as is the case in many jurisdictions,[306] they have absolutely no incentive—other than personal professionalism—to comply with constitutional commands.

In the real world, tort actions, internal police proceedings, criminal sanctions and civilian review boards are ineffective alternatives to the exclusionary rule.[307] Some critics of the exclusionary rule understand this reality but do not seem to care.[308] But even under Amar's construct, things will not change very much.

VIII. JURIES AND "REASONABLENESS"

As substitute for the exclusionary rule, Professor Amar wants to impose strict entity liability. This is a nice proposal, but before government entities are forced to hand over large damage awards, juries will have to find that officers violated the Constitution. What criteria will jurors use to decide this question? "Reasonableness."

> "Reasonableness" is largely a matter of common sense, and the jury represents the common sense of common people. Threats to the "security" of Americans come from both government and thugs; the jury is perfectly placed to decide, in any given situation, whom it fears more, the cops or the robbers. This judgment, of course, will vary from place to place and over time.[309]

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305. As one expert noted:

> Civilian review is right in principle, and even desirable in practice, but it isn't going to solve the problem.... [T]he truth is, no review board that is obliged to take all sorts of complaints from the public about incidents on streets and in station-houses is ever going to be able to substantiate more than a small percentage of them. In most cases, supposing that the complaint makes sense on its face, there will either be no witnesses except the officer and the complainant, or independent witnesses will be impossible to find. Even in a case where there are witnesses, a fair investigator, after sifting all the evidence, is often going to find that its meaning is equivocal.

Paul Chevigny, *A Review Board Is No Panacea*, NEWSDAY, Oct. 7, 1992, Viewpoint, at 42.

306. *See, e.g.*, Edward J. Littlejohn, *The Civilian Police Commission: A Deterrent of Police Misconduct*, 59 U. DET. J. URB. L. 5, 44 (1981); Patton, *supra* note 262, at 790-91 nn.208-10.

307. "The effectiveness (or *ineffectiveness*) of alternatives to the exclusionary rule in the *real* world, the only one we have, has been the subject of a vast literature. The overwhelming consensus is that civil suits, criminal prosecution, injunctions' review boards, and internal police discipline are sadly inadequate." Kamisar, *supra* note 290, at 562.

308. *See* Dripps, *supra* note 295, at 629 ("[O]ne is left with the uncomfortable belief that conservatives favor alternatives to the exclusionary rule because they do not deter.").

309. Amar, *supra* note 1, at 818 (footnote omitted).

The current tort regime for suing the police is bad enough with its low probabilities of success and structural disadvantages (largely created by the Burger and Rehnquist Courts) for claimants of police misconduct. Amar's proposal would take the system from bad to worse. Why? Currently, in order to recover damages directly from a federal, state, or municipal law enforcement officer (that is, damages from the officer in her "individual" capacity), the plaintiff must establish that the officer violated one of the plaintiff's "clearly established statutory or constitutional rights of which a reasonable person would have known."[310] In order to recover damages from a municipality which employs a local officer (that is, damages from an officer in her "official" capacity), the plaintiff must establish that municipal policy or custom caused the violation of one of the plaintiff's statutory or constitutional rights.[311] As troubling as these rules are,[312] they at least provide *some* concrete standards for decisionmakers to assess when considering the constitutionality of an officer's conduct.

Under Amar's proposal, all standards and procedural safeguards would be cast to the winds. Instead of determining whether it was objectively reasonable for an officer to believe that he or she had probable cause to make an arrest or search, jurors would consult their own common sense about the appropriateness of the officer's conduct. Rather than decide whether a reasonable officer would have forcibly entered a person's house at midnight without a warrant or exigent circumstances to look for a suspected fugitive, a jury would decide

310. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In Anderson v. Creighton, 483 U.S. 635 (1987), the Court explained that a "law enforcement officer who participates in a search that violates the Fourth Amendment may [not] be held personally liable for money damages if a reasonable officer could have believed that the search comported with the Fourth Amendment." *Id.* at 636-37. This language suggests that officers must have reason to know that the specific conduct at issue was prohibited by the Constitution.

311. *See* Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978). The Eleventh Amendment bars suits against state officers in their official capacity. Relying on statutory language, the intent of Congress and the purpose behind the Eleventh Amendment, in Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), the Court ruled that a state, or an official of the state while acting in his official capacity, was not a "person" within the meaning of 42 U.S.C. § 1983 (1988). Those who claim federal agents violated their Fourth Amendment rights might consider suing the federal agency responsible for employing the guilty agents. In FDIC v. Meyer, 114 S. Ct. 996 (1994), however, a unanimous Court recently held that a *Bivens* damage action may not be brought against a federal agency that employs a supervisor who has allegedly violated the constitutional rights of the plaintiff.

312. For a critique of the Court's jurisprudence in this area, see David Rudovsky, *Police Abuse: Can The Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465 (1992).

"whom it fears more, the cops or the robbers."[313] Is there any doubt how most jurors would answer this question?

Under Amar's system, the availability and scope of Fourth Amendment freedoms would vary depending upon locale and the mood of the jury venire. Black males subjected to the racist stop and search tactics of Boston police officers might have had trouble winning their claims in the aftermath of the Carol Stuart shooting, or in a context in which a police captain publicly announces, " '[p]eople are going to say we're violating [gang members'] constitutional rights, but we're not too concerned about that. . . . If we have to violate their rights, if that's what it takes, then that's what we're going to do.' "[314] After all, as Amar tells us, "the jury is perfectly placed to decide, in any given situation, whom it fears more, the cops or [alleged black assailants or gang members]."[315]

Under Amar's system, a jury hearing a challenge to a police roadblock that randomly searches vehicles in order to catch drunk drivers, drug couriers, or gun haulers, would not be bothered with legal technicalities. Rather, they would decide whether any of these suspects represent a greater threat to their "security" than the police. Standards like probable cause and reasonable suspicion, and procedural mechanisms like judicial warrants would not guide jury deliberations; instead, jurors would discuss among themselves "how the Fourth Amendment, rightly understood, protects them" and, I would add, learn how the Fourth Amendment can be manipulated to deny protection to the "rapists, burglars, and murderers"[316] who make people feel "*less* secure in their houses and persons."[317]

313. Amar, *supra* note 1, at 818.

314. L. Kim Tan & Gary Witherspoon, *Police Zeroing in on Gangs*, BOSTON HERALD, May 19, 1989, at 5.

315. Amar, *supra* note 1, at 818. Of course, a black plaintiff suing the Boston police in federal court might have a slight advantage if the majority of the jury panel comes from Roxbury or Dorchester, rather than the predominately white suburbs that surround the city. This possibility, apparently, does not trouble Amar: "Th[e jury's] judgment, of course, will vary from *place to place* and over time." *Id.* at 818 (emphasis added).

316. Amar, *supra* note 1, at 793.

317. *Id.* at 799.

IX. DO WE REALLY WANT A "NEW" FOURTH AMENDMENT DOCTRINE?

When discussing the substance and remedies embodied in the Fourth Amendment, we should always focus on the way the Amendment works on the streets. This is where Amar's article is most unsatisfying. For example, he expends a lot of energy condemning the exclusionary rule and discussing the harms caused by the rule. While Amar's imagery is captivating—"[w]hen the murderer's bloody knife is introduced, it is not only the government that profits; the people also profit when those who truly do commit crimes against person and property are duly convicted on the basis of reliable evidence"[318]—he ignores the evidence indicating that violent felons rarely go free because of the exclusionary rule.[319]

If the exclusionary rule is really so monstrous, what will Amar's readers think when they discover that "90% of [the] respondents [in an empirical study which interviewed judges, prosecutors, and public defenders from Cook County, Illinois] believe the exclusionary rule to be the *best* possible remedy, or could think of no better alternative."[320] What will they think when they learn that *all* of the narcotics officers interviewed in another empirical survey *opposed* elimination of the exclusionary rule?[321] How will they react to the findings of Professor Milton Loewenthal, who interviewed New York City police

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318. *Id.* at 793.

319. *See supra* notes 202-14 and accompanying text.

320. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 126 (1992) [hereinafter Orfield, *Deterrence*].

321. Orfield, *Exclusionary Rule*, *supra* note 198, at 1051. The following excerpts are illustrative:

> When asked whether the exclusionary rule should be kept as is, scrapped, modified to include an across-the-board "good faith" exception, or modified in some other way, all of the officers responded that the rule should be preserved with a good faith exception. Many of them remarked that the rule was necessary as a limit on police behavior. One officer explained:
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> > I believe in the principle of the exclusionary rule. . . . Without the exclusionary rule, police investigating a murder or something would be like a criminal released into the midst of society. They would abuse it. I don't want the rule eliminated, . . . I agree with the rule. It shouldn't be abolished. Society shouldn't be left without the rule.
>
> Officer 26 noted:
>
> > If you abolished the exclusionary rule you would be turning the police department loose. It would be like a military state of some sort. That situation has enormous possibility for abuse. . . .
>
> And Lieutenant Karczewski, the head of Special Enforcement, commented:
>
> > Of course there has to be an exclusionary rule. I don't want this to be a police state. There have to be guidelines.

Id. at 1051-52.

officers to determine their views of the exclusionary rule?[322] He found "strong evidence that, regardless of the effectiveness of direct sanctions, police officers could neither understand nor respect a Court which purported to impose constitutional standards on the police without excluding evidence obtained in violation of those standards."[323]

Amar says current Fourth Amendment doctrine and legal scholarship is based on "sloppy textual and historical analysis,"[324] and "hostile to the common sense of common people."[325] He writes that "the Amendment presupposes a civil damage remedy, not exclusion of evidence in criminal trials."[326] The Fourth Amendment's global command sounds in "constitutional tort law."[327] But what will his readers think when they learn that a study of Chicago narcotics officers revealed uniform opposition to a tort system for enforcing the Constitution?[328] How will his readers react when they learn that ninety-three percent of the judges, prosecutors, and public defenders interviewed in a study thought a system based on tort remedies would function worse than an exclusionary rule system?[329] What reaction will they have when they read the following description from a State's Attorney?

> The exclusionary rule is there to maintain the integrity of the court system. A tort system would screw this up—tainted evidence in court yet the officer is paying a fine. Doesn't that make the court dirty? . . . [The exclusionary rule] is not there to control police behavior. It is there for the integrity of the courts.
>
> . . . The exclusionary rule gives the impression that the court system is as clean as clean can be. . . . The exclusionary rule goes a long way in giving that presumption . . . to maintain the integrity of the Constitution. To idealize the Constitution is a goal in itself. The

322. Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24 (1980).

323. *Id.* at 29.

324. Amar, *supra* note 1, at 800.

325. *Id.* at 759.

326. *Id.* at 758.

327. *Id.*

328. [Chicago narcotics] officers also were asked if they thought a "system in which victims of improper searches could sue police officers directly would be better than the exclusionary rule." All of the officers responded "no." This question was followed up by asking the officers, "What would be the effect of civil suits for damages on police work?" Twenty-one of the officers (95 percent) responded that police would be afraid to conduct the searches they should make.

Orfield, *Exclusionary Rule*, *supra* note 198, at 1053.

329. Orfield, *Deterrence*, *supra* note 320, at 126.

> Constitution is not a pragmatic road map but an ideal that has to be maintained. One of the ways to maintain that ideal is through the exclusionary rule.[330]

Amar tells his readers that "[t]he Fourth Amendment today is an embarrassment,"[331] search and seizure law is a "mess,"[332]—"a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse."[333] He wants to remedy this situation not with standards and procedural safeguards like probable cause and judicial warrants, but with common sense, which he claims is lacking in Fourth Amendment jurisprudence.

Amar's assertion is not shared by police officers in the field. A researcher found that Chicago narcotics officers do not believe that Fourth Amendment law is unduly complicated.[334] As one officer explained current Fourth Amendment rules: "It is the same thing over and over again. . . . Basically all it is is common sense."[335] In the real world, "[n]ot only are search warrants sought in relatively few investigations but the number of law enforcement officers who seek warrants is quite limited."[336] Professor Amar never mentions that most searches and seizures are performed without a warrant.[337]

Professor Amar wants tort actions to be the centerpiece of Fourth Amendment law. Like suppression hearings today, tort claims of police misconduct will turn on the testimony and credibility of law enforcement officials. Knowing this to be true, Professor Amar should examine the age-old problem of police perjury. Police perjury, "lying—to suspects, to judges, to members of the public, and to one's

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330. *Id.* at 130.

331. Amar, *supra* note 1, at 757.

332. *Id.* at 800.

333. *Id.* at 758.

334. Orfield, *Exclusionary Rule*, *supra* note 198, at 1035-38.

335. *Id.* at 1038 n.93.

336. RICHARD VAN DUIZEND, ET AL., THE SEARCH WARRANT PROCESS 17 (1984).

337. *Id.* at 19 (noting that the vast majority of searches are done without warrants); *id.* at 107:

> For a host of reasons, police officers . . . eschew the [warrant] process. It is burdensome, time-consuming, intimidating, and confusing, and there are many easier ways to get the evidence under exceptions to the warrant requirement. It is not surprising, therefore, that many officers tend to regard the warrant option as a last resort.

In United States v. Watson, 423 U.S. 411 (1976), the Court ruled that warrantless arrests can be constitutional, provided there is probable cause for the arrest.

own superiors—is an integral feature of urban police work, a 'subcultural norm rather than an individual aberration.' "[338] In some jurisdictions, police perjury appears to be rampant.[339] Does Amar believe that police officers will not perjure themselves in *Bivens* and section 1983 cases?

Finally, Amar declares that his Fourth Amendment model "is more faithful to constitutional text and history. It is more coherent and sensible. And it is less destructive of the basic trial value of truth seeking—sorting the innocent from the guilty."[340] To the uninitiated, this "traditional" way of thinking about American criminal procedure is undoubtedly attractive. But the attraction disappears if one considers the "flip-side" of this "old" way of thinking—the way police officials once thought before *Mapp* was decided.

> The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled [until 1961] that evidence obtained without a warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?[341]

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338. Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 12 (1993) (quoting Jerome H. Skolnick, *Deception by Police*, CRIM. JUST. ETHICS, Summer/Fall 1982, at 40, 42-43); *see also* ROTHMILLER & GOLDMAN, *supra* note 297, at 31-34; DAVID SIMON, HOMICIDE, A YEAR ON THE KILLING STREETS 462 (1991):

> [T]he only point in the legal process where law officers can be expected to lie routinely or, at the very least, exaggerate, is probable cause.... The courts can't acknowledge it, but in the real world you watch a guy until you're sure he's dirty, then you jack him up, find the dope or the gun and then create a legal justification for the arrest.

339. *See, e.g.*, Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department 36-43 (1994) (Police perjury and falsification are "probably the most common [types] of police corruption facing the [New York City] criminal justice system, particularly in connection with arrests for possession of narcotics and guns." The Commission discovered one investigation of police perjury where prosecutors recommended against prosecuting police officers because " 'many of the jurors may agree with the police officer's decision to ignore the constitutional niceties of the Fourth Amendment to win the war against drugs' and because 'it may be very difficult to generate among the jurors the feelings of outrage necessary to convict a police officer for abusing the system.' " *Id.* at 42.); Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1; Joe Sexton, *Perjury of Some Types Is Called Widespread Among Officers*, N.Y. TIMES, Apr. 23, 1994, at A27.

340. Amar, *supra* note 1, at 759.

341. Sidney Zion, *Detectives Get a Course in Laws*, N.Y. TIMES, Apr. 28, 1965, at 50, *quoted in* Yale Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than 'An Empty Blessing,'* 62 JUDICATURE 337, 349-50 (1979); *see also* Loewenthal, *supra* note 322, at 29 ("Indeed, most police officers interpret the *Wolf* case as not having imposed any legal obligation on the police since, under that decision, the evidence would still be admissible no matter how it was obtained."); Kamisar, *supra* note 290, at 444 ("prior to

Would these readers welcome an "earlier" vision of police work?

> Judge 11, a former state's attorney during the 40's and 50's, stated, "[The police] don't pump stomachs anymore. We did that before. They have abandoned the crutch more." Judge 9, a state's attorney in the 1960's explained: "The Supreme Court's decisions stopped the beatings. When I was a prosecutor before *Miranda* and *Escobedo* [v. Illinois, 378 U.S. 478 (1964)], police broke into these people's houses . . . . The Supreme Court stopped the beatings and made life cleaner.[342]

Put another way, I believe Amar's readers would agree with former Justice Potter Stewart's conclusion that "[r]efurbished"[343] visions of the Fourth Amendment must take into account the realities of our criminal justice system. A short time before his death, Stewart wrote:

> [T]he exclusionary rule has been accepted, however grudgingly, as the embodiment of our nation's commitment to ensuring that the fourth amendment's restraints on the power of government are zealously observed. Indeed, to some less-informed observers of the criminal justice system, it has replaced the fourth amendment itself as the source of the prohibition against illegal behavior by law enforcement officials.[344]

X. CONCLUSION

Professor Amar has written a challenging article on the Fourth Amendment. Although I disagree with many of his proposals and conclusions, Professor Amar should be congratulated for calling our attention to the Fourth Amendment.

The Fourth Amendment protects rights that Americans like to brag about in the abstract. Too many, however, are reluctant to enforce these rights in the real world. Such ambivalence is understandable: "The comfort of Freedom's words spoken in the abstract is always disturbed by their application to a contested instance. Any rule of police regulation enforced in fact will generate pressure to weaken the rule."[345] For the good of liberty, all of us should resist the inevitable efforts to weaken the Fourth Amendment.

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the adoption of the exclusionary rule, state and constitutional provisions had had virtually no effect on police attitudes and actions at even the most superficial level").

342. Orfield, *Deterrence*, *supra* note 320, at 124.

343. Amar, *supra* note 1, at 761.

344. Stewart, *supra* note 125, at 1386.

345. Paulsen, *supra* note 287, at 256.