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Essay

*1123 THE FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE

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We live in interesting times, and the times are especially interesting for those of us who work in the field of constitutional criminal procedure. In a series of essays, I have sought to explore the foundations of the field--to lay bare, and elaborate upon, the "first principles" of the Fourth, Fifth, and Sixth Amendments. [\[FN1\]](#) These essays have already begun to provoke heated controversy over some of my specific doctrinal claims. [\[FN2\]](#) (As I said, we live in interesting times.) In this brief review essay, I shall try to pull the camera back, highlighting some of the general features of my "first principles" project. In the process, I hope to say a few words about the past and present of constitutional criminal procedure, and a few more words about its future--in courts, in Congress, in classrooms, and in conversations everywhere in between.

I. WHERE ARE WE, AND HOW DID WE GET HERE?

A. The Past

As a subfield of constitutional law, constitutional criminal procedure stands as an anomaly. In many other areas of constitutional law, major Marshall Court opinions stand out and continue to frame debate both in courts and beyond. In thinking about judicial review and executive power, we still look to *Marbury v. Madison*; [\[FN3\]](#) in pondering the puzzle of jurisdiction-stripping, we go back to *Martin v. Hunter's Lessee*; [\[FN4\]](#) in reflecting on the scope of Congress' enumerated powers, *1124 and related issues of federalism, we re-examine *McCulloch v. Maryland*; [\[FN5\]](#) in considering vested property rights, we return to *Fletcher v. Peck* [\[FN6\]](#) and *Dartmouth College v. Woodward*; [\[FN7\]](#) and so on. But no comparable Marshall Court landmarks dot the plain of constitutional criminal procedure.

It is often thought that the explanation for this anomaly lies in another Marshall Court landmark, *Barron v. Baltimore*. [FN8] Most criminal law, the argument goes, is state law; Murder, rape, robbery, and the like are generally not federal crimes. Under *Barron*, the constitutional criminal procedure rules of the Bill of Rights did not apply against states, and so the Marshall Court predictably heard few cases raising issues of constitutional criminal procedure.

Barron is indeed part of the story, but only part. For the federal government was very much in the crime-fighting business in the first century of the Bill of Rights. For constitutional scholars, perhaps the most vivid example of early federal criminal law comes from the infamous Sedition Act of 1798; but we must also not forget the territories. Perhaps the most central and sustained project of the federal government in its first century was the "Americanization" of this continent through territorial expansion, organization of territorial governments, and eventual admission to statehood of these territories. [FN9] In the territories, the federal government did indeed enforce garden-variety criminal laws against murder, rape, robbery, and so on. And the Bill of Rights very much applied to these criminal cases, even under *Barron*. Territorial law was, constitutionally speaking, federal law.

But--and this is the key point--for virtually the entire first century of the Bill of Rights, the United States Supreme Court lacked general appellate jurisdiction over federal criminal cases. [FN10] This little-known fact helps explain why, for example, the Sedition Act prosecutions in the late 1790s--which raised the most important and far-reaching constitutional issues of their day--never reached the Supreme Court for ultimate judicial resolution. [FN11]

By the time Congress decided to give the High Court general appellate review *1125 over federal criminal cases in 1891, the sun was already setting on the Territorial Era. Thus, the criminal cases the Supreme Court heard under the new jurisdictional regime were indeed a skewed lot, with disproportionately more federal customs violations, tax evasions, and bootleggings than murders, rapes, and robberies. It was this era, of course, that gave birth to the controversial exclusionary rule.

Then came the Warren Court, which overruled *Barron* and began applying the Fourth, Fifth, and Sixth Amendments directly against states, under the banner of selective incorporation. With many, many more state criminal cases fueling its docket, the Warren Court proceeded to build up, in short order, a remarkable doctrinal edifice of Fourth Amendment, Fifth Amendment, and Sixth Amendment rules--the foundations of modern constitutional criminal procedure.

But these foundations were none too sure. On a lawyerly level, some of the Warren Court's most important criminal procedure pronouncements lacked firm grounding in constitutional text and structure. Key rulings ran counter to early case law both in lower federal courts and in state courts construing analogous provisions of state constitutions. Precisely because so few Marshall Court cases existed, this break with Founding-era understandings was less visible. On key issues, the Warren Court seemed to contradict itself, laying down sweeping rules in some cases that it could not quite live by in other cases. [FN12] On a political level, many of the Warren Court's constitutional criminal procedure pronouncements did not sit well with the American electorate. The guilty too often seemed to spring free without good reason--and by this time the guilty regularly included murderers, rapists, and robbers and not just federal income tax frauds and customs cheats. In a constitutional democracy, the People, in

the long run, usually prevail. Federal judges may be, at times, "insulated" and "countermajoritarian," but majorities elect Presidents, and Presidents, with the advice and consent of Senators, pick federal judges.

And so, with Earl Warren's retirement, and Richard Nixon's election on a "law and order" platform, the Counter-Revolution began. But the foundations of this Counter-Revolution are also none too sure. Like the Warren Court, the Burger and Rehnquist Courts have at times paid little heed to constitutional text, history, and structure and have mouthed rules one day only to ignore them the next. [\[FN13\]](#) If the Warren Court at times was too easy on the guilty, the Burger and Rehnquist Courts at times have been too hard on the innocent.

B. The Present

Where does all this leave us today? At a crossroads. On at least four different levels, I submit, the present is a particularly ripe moment for a fundamental rethinking of constitutional criminal procedure, and for a choice among competing visions.

***1126** Consider first the level of Supreme Court doctrine. At this level, constitutional criminal procedure is, to put it bluntly, a mess. For more than a quarter of a century, the Burger and Rehnquist Courts have busily reshaped Warren Court doctrine in this field. But often, the Court has chosen to proceed by indirection. Warren Court landmarks are distinguished away rather than overruled; [\[FN14\]](#) old cases are hollowed out from within, but the facade remains--or does it? And so United States Reports now swells with language bulging this way and that, at virtually every level of generality and specificity.

But the problem runs even deeper. For starters, many of the contradictions came from the Warren Court itself. The Warren Court told us that the Fourth Amendment requires warrants and probable cause for all searches and seizures. [\[FN15\]](#) But in *Terry v. Ohio*, [\[FN16\]](#) Chief Justice Warren himself, writing at the peak of his reign, told us that frisking is a "search" that does not require warrants or probable cause. [\[FN17\]](#) Indeed, *Terry* quoted the Amendment as simply banning unreasonable searches and seizures, and declined even to recite the Amendment's language about warrants and probable cause. [\[FN18\]](#) The Warren Court told us that the Constitution requires exclusion of illegally obtained evidence. [\[FN19\]](#) But in *Terry*, the Court warned against a "rigid and unthinking application of the exclusionary rule." [\[FN20\]](#) The Warren Court told us that the exclusionary rule derived from a synergy between the Fourth Amendment and the Fifth Amendment Self-Incrimination Clause. [\[FN21\]](#) But in *Schmerber v. California*, Justice Brennan--the playmaking guard of Earl Warren's team--sharply separated the Fourth and Fifth Amendments. [\[FN22\]](#) In so doing, Justice Brennan and the Court clearly held that a man could indeed be obliged to furnish evidence--his very blood, no less--against himself in a criminal case. And the logic of that clear holding, as I have explained elsewhere, [\[FN23\]](#) left both the exclusionary rule and broad theories of self-incrimination exclusion dangling in midair, with no principled support, constitutionally speaking.

***1127** So too, the Burger and Rehnquist Courts have failed to live up to their articulated principles. The post-Warren Court has admitted that the exclusionary rule lacks constitutional footing [\[FN24\]](#) but

has kept the rule nonetheless. The Court has failed to build up alternative remedial schemes that would protect innocent people from outrageous searches and seizures, and would also deter future government abuse. In *Los Angeles v. Lyons*, decided in the heyday of the Burger Court, the majority simply looked the other way when Los Angeles police officers engaged in obviously brutal, possibly racist, and at times deadly chokeholds of presumptively innocent citizens. [FN25] The post- Warren Court has, at times, admitted that warrants are not the ultimate Fourth Amendment touchstone; reasonableness is. [FN26] But in *Zurcher v. Stanford Daily News*, the Court worshipped the warrant and blessed the most constitutionally unreasonable of searches--paper searches of anti-government newspapers. [FN27] The *Stanford Daily News* was not even alleged to have been engaged in criminal wrongdoing, and yet it, too, got the back of the judicial hand.

When judges either must strain against dominant doctrine to explain easy cases (like *Terry* and *Schmerber*), or actually get easy cases wrong (like *Lyons* and *Zurcher*), they have obviously taken a wrong turn somewhere. Hence a desperate need for returning to, and rethinking, first principles.

Consider next the level of Supreme Court personnel. We now stand at a generational changing of the guard. With the retirements of Justices Brennan, Marshall and White in the early 1990s, none of those who shared the bench with Chief Justice Earl Warren now sits. Two-thirds of the current High Court never even sat with Chief Justice Warren Burger. [FN28] Very few of the current Justices have much of a personal stake--as an author or dissenter--in the elaborate doctrinal structures that have been built up and then whittled down in constitutional criminal procedure. The swing Justices [FN29] today are highly intelligent and relatively nonideological. They just want to do what is right--and so here again, there is a desperate need for a clear statement of what are, or should be, the first principles in the field. Again, precedent alone cannot guide the way--even for those Justices who steer by precedent as their polestar--because precedent in this field is so regularly contradictory or perverse.

Now turn to the level of congressional and national political conversation. Here too, we are in the midst, it seems, of a generational changing of the guard. After a *1128 half-century of Democratic domination, the House now sits in Republican hands. At first, it might seem implausible that a bare majority of the House and Senate could radically rewrite criminal procedure policy. Intra-branch filters like the committee system and the filibuster rule can slow things down and force slim majorities to yield to strong minorities; and of course, there is always the possible presidential veto to consider. But even if a mere majority cannot unilaterally prevail in enacting law, it can often unilaterally define a national agenda--holding hearings to shine a national spotlight on certain issues while pushing other issues off the stage. When the Democrats controlled, they did not schedule many hearings on affirmative action or on the exclusionary rule--wedge issues that might have splintered the Democratic coalition of minorities, liberal elites, and the working class. But with Republicans in charge, the exclusionary rule and other issues of criminal procedure have indeed leaped onto the agenda, and many different proposals now jostle for attention. [FN30] Political debate about criminal procedure will no doubt heat up even more in 1996, with presidential, congressional, and state campaigns waged in the wake of the ballyhooed "trial of the century" in which many believe that a guilty man got away with murder. But which, if any, of the various proposed reforms now swirling about would actually move America in the right direction? Yet again, we see the need for an overall framework of analysis and vision of proper first principles.

Finally, let us consider the level of academic scholarship. On this level, too, we stand near a generational changing of the guard in constitutional criminal procedure. Those who in their youth led cheers for the Warren Court are moving towards, or have already passed into, their retirement years. Dramatic trends are at work in the academy generally. In constitutional law, textualism and originalism have staged a come-back; economic analysis has reconfigured many curricular fields; critical race theory and feminism insistently urge us to ask "the race question" and "the gender question" everywhere; and so on. How will a new generation of constitutional criminal procedure scholars reshape the academic orthodoxies we have inherited?

In a series of "first principles" essays, I have put forth my vision of how constitutional criminal procedure must be reshaped. In what follows, I shall try to summarize and explain some of the key elements of this vision.

II. WHERE SHOULD WE GO FROM HERE?

A. Constitutional Methodology

To begin with, we must distinguish constitutional criminal procedure from criminal procedure generally. Not all sensible rules of criminal procedure can or ***1129** should be constitutionalized. [\[FN31\]](#) The Constitution--when read in light of its text, history, and structure, its doctrinal elaboration in precedent, the need for principled judicial standards, and so on--simply may not speak to some issues. This is, of course, one of the reasons we have legislatures--to make sensible policy where the Constitution permits choice. Legislative solutions can be adjusted in the face of new facts or changing values far more easily than can rules that have been read into the Constitution.

Consider, for example, the so-called exclusionary rule. I have attacked this as a rule of constitutional criminal procedure. This rule is, quite simply, not in our Constitution. I have not claimed that the Constitution prohibits exclusion, only that it does not require it. In some times, and in some places, a legislative scheme of exclusion might be sensible--a two-by-four between the eyes to get the attention of mulish police. I have emphasized the costs to innocent victims of such exclusion schemes, but a legislature certainly could decide that the benefits outweigh the costs for now. If the facts change over time--if, say, police are now generally more sensitive to Fourth Amendment issues than they were in 1961--a legislature is free without embarrassment to change the law. A court, however, is not likewise free to rule one day that the Constitution requires exclusion as a matter of principle, and then to disregard that very principle the next day.

A critic might object that the Supreme Court has never really said that the Constitution requires exclusion as a matter of principle but only that exclusion is one apt remedy to deter. And, the critic might argue, a court is free to fashion flexible remedies one day and adjust them the next. Such a critic, however, would be wrong about both Supreme Court case law and constitutional remedial theory. In about twenty cases, decided over almost a century, the Supreme Court practiced exclusion in the name of a requirement of the Fifth Amendment Self-Incrimination Clause, in tandem with the Fourth Amendment. [\[FN32\]](#) Exclusion was not merely a ***1130** judicially-fashioned, empirical and

deterrence-based remedy for an antecedent Fourth Amendment violation. It was also, and more importantly, a right under the Self-Incrimination Clause: Introducing illegally obtained evidence at trial would itself violate the Fifth Amendment. The paradigm here was a diary wrongfully seized from a criminal defendant and then read against him at trial: reading the diary in court was itself seen as akin to compelling a defendant to "witness" against himself, in violation of self-incrimination principles. Only this argument from principle explains some of the most basic features of the Supreme Court's case law. Only this provides the justification for exclusion as a constitutional mandate. Only this explains why exclusion applies in criminal cases but not civil cases. Only this explains why illegal arrests are different from illegal searches. Only this explains so-called "standing" rules. [\[FN33\]](#)

But, I have argued, this argument from principle rests on an incorrect reading of the Constitution. [\[FN34\]](#) Today, the Supreme Court agrees. [\[FN35\]](#) But if so, then exclusion must fall. The critic's deterrence/remedy gambit fails as a matter of constitutional law. Once we admit--as the Supreme Court now does [\[FN36\]](#)--that a Fourth Amendment violation is complete at the time of the search, and that no new violation occurs when evidence is admitted at trial, we are admitting that exclusion is not logically linked to the scope of the violation. Judicial remedies must fit the scope of the right. For example, a court is not free, as a matter of constitutional law, to play the "Leavenworth lottery": Because the government violated the constitutional rights of A, judges spin the wheel and spring some lucky (but unrelated) convict B from Leavenworth. This scheme might indeed deter--and a legislature might have the power to enact this into law--but courts have no such power as a matter of traditional remedial theory. And with the Fourth-Fifth fusion argument having been shattered by Schmerber, Fisher, and Leon, [\[FN37\]](#) exclusion is analytically indistinguishable from the "Leavenworth lottery."

As these last points suggest, the Constitution is not some ventriloquist's dummy that can be made to say anything the puppeteer likes. Yet it is remarkable how little *1131 attention many leading scholars and distinguished judges have paid to the text of the Constitution while busily making criminal procedure pronouncements in its name. Perhaps this is because so much of the debate, both academic and judicial, took shape in the early to mid-1960s, when textual argument in constitutional law often drew smirks from sophisticated lawyers. But most of the major Warren Court pronouncements did draw, at least in part, on text, and stood on the shoulders of that giant of constitutional textualism, Justice Hugo Black. Exclusion in *Mapp* was required by the words and spirit of the Fourth and Fifth Amendments, said Justice Black in providing the critical fifth vote [\[FN38\]](#)--echoing repeated invocations in Justice Clark's opinion for the Court (at least six, by my count). [\[FN39\]](#) Incorporation of the Bill of Rights against the states, reminded Justice Black in *Duncan*, simply followed the words and spirit of the Fourteenth Amendment as a whole, including its Privileges or Immunities Clause. [\[FN40\]](#) Warrants and probable cause, said the Warren Court, were required because the text of Fourth Amendment implicitly said so; its words made no sense otherwise. [\[FN41\]](#) Florida could not try Gideon without a lawyer, Justice Black wrote for the Court, because the Sixth Amendment's words provided for a "right of counsel" and the Fourteenth Amendment's words incorporated fundamental rights against states. [\[FN42\]](#) *Miranda* must go free, said the Court, because he was in effect compelled to be a witness against himself in a criminal case in violation of the words and spirit of the Fifth Amendment. [\[FN43\]](#) And so on.

What's more, sophisticated constitutional lawyers today no longer scoff at textual argument. Unlike

Coach Lombardi on winning, we do not consider text "the only thing," but we do think it is relevant--it is something--that the Fourth Amendment's text fails to require warrants and probable cause for all searches and seizures; and that this failure makes lots of sense. Surely it is relevant that the Fourth Amendment says nothing about exclusion, and that if it did, it surely does not distinguish between civil and criminal cases. Surely it is relevant that the Fourth Amendment's words about the people's right to be secure in "their persons, houses, papers and effects" conjure up tort law, which does protect these interests. Surely it is relevant that when Colonel Oliver North is forced to testify before Congress and his words are never admitted against him in his criminal trial, but ***1132** testimonial fruits do come in, Colonel North has never been compelled to be a witness against himself in a criminal case. Surely it is relevant that the Sixth Amendment speaks only to rights of the "accused." Surely it is relevant that, if I testify about what my mom told me one day, my mom is not in any ordinary-language sense a "witness" within the wording of the Confrontation Clause. Surely it is relevant that in other clauses featuring the word "witness"--such as the Treason Clause [\[FN44\]](#)--the Constitution uses the word in its plain-meaning sense.

Textual argument is, as I have said, a proper starting point for proper constitutional analysis. Sometimes, plain-meaning textual arguments in the end must yield to the weight of other proper constitutional arguments--from history, structure, precedent, practicality, and so on. [\[FN45\]](#) And so the astonishing thing is not that someone might find the above-catalogued textual points to be outweighed at times by other arguments. Rather, the astonishing thing is that these textual points are almost never made, or even seen. This is true even when the text, carefully read, explains most or all of the leading cases in a given area, or when the text resonates with obvious common sense. In virtually every other area of constitutional law, such a state of affairs is unimaginable. I think it cannot last much longer in the area of constitutional criminal procedure. The field may have evolved as an insular ecosystem unto itself, but global changes in constitutional law discourse must soon affect the atmosphere here, too.

Similar points can be made about constitutional history and structure. English common-law antecedents of the Fourth, Fifth, and Sixth Amendments, as well as early state and federal cases, certainly belong in a proper conversation about constitutional criminal procedure. The fact that English courts have never excluded evidence on Fourth-Amendment-like grounds, and that no American court, state or federal, ever did so during the first century after Independence surely deserves some mention. [\[FN46\]](#) So too with the fact that England has never excluded "fruits" of immunized testimony or coerced confessions, [\[FN47\]](#) and the fact that the English rule reigned as the dominant one in Congress and in American courts prior to the Supreme Court's 1892 Counselman [\[FN48\]](#) case for testimonial immunity, [\[FN49\]](#) and until the 1960s for coerced confessions. [\[FN50\]](#) Similarly, it must matter that early courts never claimed that the "only" remedy for speedy trial violations was dismissal with prejudice.

***1133** Structurally, we must pay close attention to how different parts of our Constitution fit together, textually and practically. Textually: Shouldn't "reasonableness" under the Fourth Amendment be read in light of other constitutional values--of property, privacy, equality, due process, free speech, democratic participation, and the like--affirmed in other amendments? Shouldn't Seventh Amendment juries play some role in determining Fourth Amendment reasonableness, just as they play a role in determining reasonableness generally in tort law? Why should preclusive ex parte warrants be worshipped in the Fourth Amendment when they so obviously present genuine Fifth Amendment due process problems of

notice and opportunity to be heard? Wouldn't it be nice if the word "witness" could have the same meaning in the Treason Clause, the Self-Incrimination Clause, the Confrontation Clause, and the Compulsory Process Clause? Practically: Hasn't an overbroad reading of the Fifth Amendment Self-Incrimination Clause betrayed the accused's explicit Sixth Amendment right to compel witnesses in his favor? [\[FN51\]](#) Hasn't that overbroad reading also obstructed the defendant's explicit Sixth Amendment right to a speedy trial? [\[FN52\]](#) Thus, hasn't our Fifth Amendment doctrine ended up helping guilty defendants while hurting innocent ones?

As these last points make clear, proper methodology of constitutional criminal procedure does not blind itself to practical effects. Indeed, though my "first principles" essays have always sought to respect text, history, and structure, they have also sought to make good common sense, motivated by the simple idea that constitutional criminal procedure should protect the innocent, and not needlessly advantage the guilty.

B. The Substance of Process

This commonsensical point, I submit, is the essence of our Constitution's rules about criminal procedure and so I shall repeat it: The Constitution seeks to protect the innocent. The guilty, in general, receive procedural protection only as an incidental and unavoidable byproduct of protecting the innocent because of their innocence. Law breaking, as such, is entitled to no legitimate expectation of privacy, and so if a search can detect only law breaking as such, it poses little threat to Fourth Amendment values. [\[FN53\]](#) By the same token, the exclusionary rule is wrong, *1134 as a constitutional rule, precisely because it creates huge windfalls for guilty defendants but gives no direct remedy to the innocent woman wrongly searched. The guiltier you are, the more evidence the police find, the bigger the exclusionary rule windfall; but if the police know you are innocent, and just want to hassle you (because of your race, or politics, or whatever) the exclusionary rule offers exactly zero compensation or deterrence. [\[FN54\]](#)

Truth and accuracy are vital values. A procedural system that cannot sort the innocent from the guilty will confound any set of substantive laws, however just. And so to throw out highly reliable evidence that can indeed help us separate the innocent from the guilty--and to throw it out by pointing to the Constitution, no less--is constitutional madness. A Constitution proclaimed in the name of We the People should be rooted in enduring values that Americans can recognize as our values. Truth and the protection of innocence are such values. Virtually everything in the Fourth, Fifth, and Sixth Amendments, properly read, promotes, or at least does not betray, these values.

If anyone believes that other nice-sounding, but far less intuitive, ideas are also in the Constitution, the burden of proof should be on him. Here are two examples: (1) "The Constitution requires that government must never profit from its own wrong. Hence, illegally obtained evidence must be excluded." (2) "No man should be compelled to be an instrument of his own destruction. Hence, reliable physical fruits of immunized testimony should be excluded." These sound nice, but where does the Constitution say that? And are we truly willing to live by these as constitutional rules? The first would require that the government return stolen goods to thieves, and illegal drugs to drug-dealers. But this has

never been the law. The second would prevent coerced fingerprinting and DNA sampling. This, too, is almost impossible to imagine in practice. [\[FN55\]](#) By contrast, the innocence-protection rock on which I stand, and the specific Fourth, Fifth, and Sixth Amendment derivations therefrom, are things that we can all live by, without cheating.

*1135 C. Light From Afar

My vision of constitutional criminal procedure borrows from and builds on insights elaborated in other scholarly fields. Consider, for example, how much we constitutional criminal proceduralists can learn from what might at first seem a most unlikely source: tax scholarship. In developing a now-classic framework of analysis, Professor Stanley Surrey brought into view the "upside-down" effect of certain tax subsidies: By subsidizing certain private activity via tax deductions rather than direct governmental outlays, the federal government effectively gave greater subsidies to high-bracket taxpayers than to low-bracket taxpayers. In light of the purposes underlying some subsidies, argued Professor Surrey, this distributional pattern of benefits was perverse-- "upside down" in Professor Surrey's famous phrase. [\[FN56\]](#)

Professor Surrey understood that both direct expenditures and tax deductions could subsidize and create incentives, but with very different distributional consequences. A similar focus on distribution helps explain one of the many ways in which the exclusionary rule is so perverse--upside down, if you will. Both tort law and evidentiary exclusion seek to create incentives--both seek to deter misconduct--but with very different distributional patterns. Under proper tort law, the guilty man never recovers more simply because he is guilty; [\[FN57\]](#) but the exclusionary rule rewards the guilty man, and only the guilty man, precisely because he is guilty. This is the "bite" of the rule, the lever by which it moves the police to repent and reform. Under the Self-Incrimination Clause, fruits-immunity similarly rewards the guilty without helping the innocent. Indeed, it rewards the guilty in ways that hurt the innocent. Constitutional criminal procedure must cleanse itself of these and other similarly perverse "upside down" rules.

It is often claimed that the exclusionary rule and fruits-immunity never truly "reward" the guilty. Had the government not searched illegally or compelled the testimony, the argument goes, the government would not have the fruit, and so exclusion of the fruit never creates a windfall for guilty defendants, but only *1136 restores the status quo ante. [\[FN58\]](#) But this glib argument ignores what I have called the "causation gap," encompassing all the possible ways in which the fruit might very well have come to light anyway. Courts have given too little rein to anti-exclusionary doctrines such as inevitable discovery; and where eventual fruits discovery is only probable, or possible, rather than inevitable, permanent exclusion creates huge windfalls for many guilty defendants.

With issues of incentives, deterrence, distribution of reward, and causation so obviously important, it should be plain that criminal procedure scholars can also learn important lessons from tort law scholarship. The text of the Fourth Amendment presupposes tort law, and the Founders repeatedly invoked the idea of punitive damages to "deter"--their word [\[FN59\]](#)--unreasonable searches and seizures. Originalism and functionalism converge here, for the Founders understood deterrence far better

than many sophisticated modern-day scholars. Consider, for example, the following passage from Professor Stuntz in favor of the exclusionary rule:

Thus, the difficulty with [tort] damages boils down to this: no one knows how to value damages for illegal searches with any accuracy ... Overdeterrence is a special concern ... Underdeterrence, however, is also a serious problem [\[FN60\]](#)

Now, Bill Stuntz is a friend of mine--and there is no one in the field whose work I respect more--but there are so many things wrong with his functionalist defense of the exclusionary rule that it is hard to know where to start. Here, and elsewhere, Professor Stuntz acts as if the choice is tort law or exclusion--but nobody (and surely not Professor Stuntz) really thinks so. No one proposes that tort and tort-like remedies be abolished. To do so would be insane--like declaring open season on those whom the cops know to be innocent, but do not like, and want to hassle. Exclusion alone could never be sufficient.

But if so, the wrinkles of tort law must be ironed out regardless of whether we keep or scrap exclusion. For the Webster Bivenses of the world--innocent citizens hassled by government--it will always be "damages or nothing" [\[FN61\]](#) and courts will need to fashion sensible rules about damage remedies here just as they do everywhere else in tort law. And if at the end of the day there is, as Professor Stuntz believes, a real risk of overdeterrence, how does that argue for adding--not, I repeat, substituting--whatever additional deterrence comes from exclusion?

But Professor Stuntz's problems are only beginning. Suppose that we really did have to choose between tort law and exclusion. Tort law risks overdeterrence and ***1137** underdeterrence--but so does the exclusionary rule! (So does any solution.) The underdeterrence of exclusion is obvious. For starters, it has no bite--no bark, even--when cops want to hassle someone they know to be innocent, from whom they expect to find no evidence. But even when police expect to and do find evidence, the exclusionary rule underdeters by allowing government to get the drugs off the street or return the stolen goods to their rightful owner, to use the evidence in a civil suit against the searchee, or to use the evidence in a criminal suit against anyone else. Exclusion also can greatly overdetter, as we have seen, by preventing government from ever using critical evidence (or its fruit) against the searchee, even though that evidence (or its fruit) might otherwise have come to light.

Perhaps Professor Stuntz thinks that the exclusionary rule's unavoidable overdeterrence and underdeterrence will somehow cancel each other out, leaving us with something that Goldilocks would call "just right." But like the story of the three bears, this is pure fantasy. Tort law, by contrast, is logical and realistic--tort law remedies can be squarely tailored to fit the tortious wrong of unreasonable search and seizure. Unlike exclusion, tort law is thus not inherently mismatched, and is far more likely to reach the right amount of overall deterrence. Punitive-damage multipliers can always be cranked up or down to achieve a given overall level of deterrence; whereas exclusion cannot be adjusted at the margins without raising serious "Leavenworth lottery" issues.

Let us now summarize, on purely functional grounds, the contrast between tort law and exclusion. The upside-down exclusionary rule skews benefits towards the guilty; tort law is "right-side up." The precise amount of deterrence from exclusion turns on a whole range of accidental contingencies: whether a

search seeks evidence as such, whether a search uncovers evidence, whether that evidence may be used in other ways (civilly, or against other criminal defendants), whether other evidence will suffice to convict the target, and whether the unavoidable causation gap will be big or small. Tort law, by contrast, focuses on the invasion of the search itself--its intrusiveness, its outrageousness, its violence, etc. Put a different way, exclusion is simply not linked, analytically speaking, to the scope of the violation, which occurs before a criminal trial, not during it. Tort law focuses precisely on the scope of the violation. Professor Stuntz thinks that Fourth Amendment doctrine should focus more on police violence. [\[FN62\]](#) I agree--but the exclusionary rule simply does not work here; whether the cops punched me in the nose is almost never analytically--or even causally--linked to whether they found evidence in my house. [\[FN63\]](#) Exclusion would thus achieve the right amount of ***1138** overall deterrence only by the wildest of coincidences, like the broken watch that tells the correct time twice a day. Finally, tort law payment comes from the wrongdoing government, whereas the visible sight of grinning criminals freed by exclusion localizes savage "demoralization costs" on identifiable crime victims. This last phrase, of course, comes from Professor Michelman's classic analysis of the Just Compensation Clause, [\[FN64\]](#) a clause that, as I have shown, resembles the Fourth Amendment in some ways. [\[FN65\]](#)

The "demoralization costs" concept reminds us that beyond tort law, narrowly defined, lies the broad field of law and economics generally. Here too, constitutional criminal proceduralists have much to learn. Perhaps the biggest lesson is the importance of ex ante incentive effects. [\[FN66\]](#) Overprotection of some rights may trigger strategic reactions that will lead to predictable underprotections elsewhere. The exclusionary rule tempts judges to deny that Fourth Amendment violations occurred; something similar occurs under the draconian rule requiring dismissals with prejudice for all Sixth Amendment Speedy Trial Clause violations. If all searches really do require warrants and probable cause, judges will strain to deny that some intrusions really are "searches." If we prevent the government from freezing a suspect's story in place early on in a civilized deposition, we may drive interrogation underground into far more potentially abusive fora; we will also encourage surprise searches, sting operations, and other serious intrusions. Precisely because courts overprotect the guilty by excluding testimonial fruit, they undermine other defendants' explicit right to compel incriminating testimony from third-party witnesses--a right of surpassing importance to innocent defendants. More generally, if doctrine creates an overly intricate matrix of trial rights, the government may react by trying to hold fewer trials, thereby forcing defendants into harsher plea bargains. In general, plea bargaining may tend to punish guilty and innocent alike--or to advantage those with powerful lawyers--rather than to sift the innocent from the guilty. For many innocent defendants, less may be more: ***1139** less trial procedure may mean more trials, and thus more chance to prove their innocence.

Just as "less" can sometimes be "more," "different" can at times be the "same": Some of the Founders' basic vision must be "translated" into our legal culture. [\[FN67\]](#) Entity liability is one example; since the locus of government decision-making has shifted over two hundred years from the individual constable to the police department, so should the locus of de jure liability for constitutional torts. By contrast, various exclusionary rules are bad "translations" because they impose "upside-down" effects that were anathema to the framing generation, and are hateful to the general citizenry even today.

Administrative law is in some ways a modern-day translation of tort law--with workers' compensation boards and OSHA rules displacing common-law negligence suits. Similar translations may make sense

in constitutional criminal procedure. Administrative compensation schemes with "right-side up" recovery patterns may sensibly supplement, and perhaps in places supplant, individual (and more cumbersome) tort suits. Citizen review panels within police departments can serve functions akin to common-law style juries. Speedy trial framework statutes can regularize pretrial process. The list could go on. Because some of those schemes are distinctly unconstitutional, whereas I have emphasized constitutional criminal procedure, I have perhaps devoted less attention to administrative schemes than they deserve. But my relative de- emphasis must not be mistaken for hostility.

If constitutional criminal procedure must attend to constitutional law, it also must attend to criminal law and procedural law. Criminal procedure must work to vindicate rather than undermine sensible norms of substantive criminal law. At one specific level, my framework links up the criminal procedural rule against compelled self-incrimination based on a fear of false confession, and the sensible substantive criminal law doctrine of *corpus delicti*. At a more general level, my procedural vision seeks to vindicate substantive norms by emphasizing accuracy and truth-finding in adjudication. Process should be arranged to separate those who did violate the substantive law from those who did not. If some substantive criminal laws--drug laws, perhaps--are bad policy, then let us change them directly rather than trying to offset or neuter them with procedural gimmicks that will also obstruct our efforts to enforce uncontroversially sensible criminal laws, like laws against murder, rape, and robbery. At times, however, some procedural rules will have a differential impact on different crimes. [\[FN68\]](#) For example, a rule excluding compelled testimony but admitting compelled fruit casts a happy substantive shadow: It will help political and religious dissenters without giving much aid and comfort to murderers. Blasphemy and libel tend not to generate *1140 physical fruit, but murder results in dead bodies, bloody knives, and the like. Criminal proceduralists must carefully attend to the ways that procedure can affect substantive enforcement policy for good or for ill. At the most general level, things do not "cancel out" if we exclude half the evidence, catch half the truly bad guys, and then simply double the punishment for those unlucky enough to get caught. The social norms underlying sensible substantive laws are best reinforced with high detection, and quick (though not necessarily severe) punishment. "War on crime" rhetoric needs to be channelled away from savage penal policies, towards strategies that lead to high detection and quick, reliable adjudication.

Laws against murder, rape, and robbery remind us of the importance of victims. Feminist theory is especially important here, given that women are more likely to be victims than to be criminal defendants. [\[FN69\]](#) And in asking the "race question" we must also remember that racial minorities are often the victims of crime, too. In thinking about feminism and critical race theory more generally, we should also ask about the race and gender of those doing the searching, seizing, questioning, and adjudicating: police, prosecutors, judges, and juries. All of these issues, I submit, are central to the idea of a truly constitutional criminal procedure.

III. CONCLUSION

Will judges, scholars, lawmakers, and citizens hearken to my call for a reconceptualization of the field? It is far too early to tell, but by nature I am an optimist. Some will no doubt oppose my vision--but others, I hope, will rally to the banner I have tried to raise. Debate will be vigorous--perhaps even

heated--but vigorous debate is healthy in a vibrant democracy. As I said, we live in interesting times.

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[FN1]. See Akhil Reed Amar, [Sixth Amendment First Principles](#), 84 GEO. L.J. 641 (1996); Akhil Reed Amar & Renee B. Lettow, [Fifth Amendment First Principles: The Self-Incrimination Clause](#), 93 MICH. L. REV. 857 (1995); Akhil Reed Amar, [Fourth Amendment First Principles](#), 107 HARV. L. REV. 757 (1994).

Because my essay today builds so directly on these three articles, I shall not clutter it with repeated citations to this trilogy. The reader interested in more elaboration of any of my claims here about the Fourth, Fifth, and Sixth Amendments is urged to consult the relevant article(s) in the trilogy.

[FN2]. See, e.g., Donald A. Dripps, Akhil Amar On Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again," 74 N.C. L. REV. 1559 (1996); Yale Kamisar, On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony, 93 MICH. L. REV. 929 (1995); Tracey Maclin, [When the Cure for the Fourth Amendment is Worse than the Disease](#), 68 S. CAL. L. REV. 1 (1994); Carol S. Steiker, [Second Thoughts About First Principles](#), 107 HARV. L. REV. 820 (1994).

[FN3]. [5 U.S. \(1 Cranch\) 137 \(1803\)](#). See generally Akhil Reed Amar, Marbury, [Section 13, and the Original Jurisdiction of the Supreme Court](#), 56 U. CHI. L. REV. 443, 445-53 (1989).

[FN4]. [14 U.S. \(1 Wheat.\) 304 \(1816\)](#). See generally Akhil Reed Amar, [The Two-Tiered Structure of the Judiciary Act of 1789](#), 138 U. PA. L. REV. 1499, 1499-1505 (1990); Akhil Reed Amar, A Neo-federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205, 205-19 (1985) [hereinafter Amar, Article III].

[FN5]. [17 U.S. \(4 Wheat.\) 316 \(1819\)](#). See generally Akhil Reed Amar, [Of Sovereignty and Federalism](#), 96 YALE L.J. 1425, 1451-55, 1512-17 (1987).

[FN6]. [10 U.S. \(6 Cranch\) 87 \(1810\)](#). See generally Akhil Reed Amar, [The Bill of Rights and the Fourteenth Amendment](#), 101 YALE L.J. 1193, 1198 n.21 (1992) [hereinafter Amar, Bill of Rights] (noting Fletcher states that Article I § 10 "may be deemed a bill of rights" for each state).

[FN7]. [17 U.S. \(4 Wheat.\) 518 \(1819\)](#). See generally AKHIL REED AMAR, THE CREATION AND

RECONSTRUCTION OF THE BILL OF RIGHTS Ch. 7 (forthcoming 1997).

[FN8]. [32 U.S. \(7 Pet.\) 243 \(1833\)](#). For discussion of Barron, see Amar, Bill of Rights, *supra* note 6, at 1198-1203.

[FN9]. See Akhil Reed Amar, [Some New World Lessons for the Old World](#), 58 U. CHI. L. REV. 483, 483-91 (1991); Denis P. Duffey, Note, [The Northwest Ordinance as a Constitutional Document](#), 95 COLUM. L. REV. 929, 942-44, 949-66 (1995).

[FN10]. See Amar, Article III, *supra* note 4, at 222 & n.63; Lawrence Gene Sager, [The Supreme Court 1980 Term--Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts](#), 95 HARV. L. REV. 17, 53 n.105 (1981).

[FN11]. Akhil Reed Amar, [Reports of My Death Are Greatly Exaggerated: A Reply](#), 138 U. PA. L. REV. 1651, 1670 (1990).

[FN12]. See *infra* text accompanying notes 15-23.

[FN13]. See *infra* text accompanying notes 24-27.

[FN14]. See, e.g., [Harris v. New York](#), 401 U.S. 222 (1971) (distinguishing but not overruling [Miranda v. Arizona](#), 384 U.S. 436 (1966)); [Kirby v. Illinois](#), 406 U.S. 682 (1972) (distinguishing but not overruling [United States v. Wade](#), 388 U.S. 218 (1967)); [United States v. Leon](#), 468 U.S. 897 (1984) (distinguishing but not overruling [Mapp v. Ohio](#), 367 U.S. 643 (1961)).

[FN15]. See, e.g., [Chimel v. California](#), 395 U.S. 752, 760-62 (1969); [Katz v. United States](#), 389 U.S. 347, 357-59 (1967).

[FN16]. [392 U.S. 1 \(1968\)](#).

[FN17]. [Id.](#) at 16-20.

[FN18]. [Id.](#) at 8.

[FN19]. See [Mapp v. Ohio, 367 U.S. 643 \(1961\)](#).

[FN20]. [392 U.S. at 15](#).

[FN21]. See, e.g., [Malloy v. Hogan, 378 U.S. 1, 8-9 \(1964\)](#); [Murphy v. Waterfront Comm'n, 378 U.S. 52, 74 \(1964\)](#); [Ker v. California, 374 U.S. 23, 30 \(1963\)](#); [Mapp, 367 U.S. at 646-47, 646 n.5, 656-57](#); [id. at 661-66](#) (Black, J., concurring).

[FN22]. [384 U.S. 757, 760-65, 766-72 \(1966\)](#).

[FN23]. See generally Amar & Lettow, *supra* note 1, at 886-87, 892-94, 919, 927-28; Akhil Reed Amar & Renee B. Lettow, [Self-Incrimination and the Constitution: A Brief Rejoinder to Professor Kamisar, 93 MICH. L. REV. 1011, 1012 n.5 \(1995\)](#); Amar, *Fourth Amendment First Principles*, *supra* note 1, at 788-90.

[FN24]. See [United States v. Leon, 468 U.S. 897, 905-06 \(1984\)](#).

[FN25]. [Los Angeles v. Lyons, 461 U.S. 95 \(1983\)](#).

[FN26]. See, e.g., [New Jersey v. T.L.O., 469 U.S. 325, 340-41 \(1985\)](#); [Zurcher v. Stanford Daily News, 436 U.S. 547, 559-60 \(1978\)](#).

[FN27]. [436 U.S. at 565](#).

[FN28]. The post-Burger members are, in order of seniority, Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer.

[FN29]. Because of the current flux on the Court, almost every one of the Justices stands as a possible swing vote on at least some current issues of constitutional criminal procedure.

[FN30]. Examples include "victims' rights" bills, various death penalty proposals, habeas restrictions, "three strikes" laws, evidence proposals concerning prior bad acts, and jury reform bills (to name just a

few).

[FN31]. Here I echo the plea of the great Henry Friendly. See Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

[FN32]. [Malloy v. Hogan](#), 378 U.S. 1, 8-9 (1964); [Murphy v. Waterfront Comm'n](#), 378 U.S. 52, 74 (1964); [Ker v. California](#), 374 U.S. 23, 30 (1963); [Mapp v. Ohio](#), 367 U.S. 643, 646-47, 646 n.5, 655-57 (1961); *id.* at 661- 66 (Black, J., concurring); [Feldman v. United States](#) 322 U.S. 487, 489-90 (1944); [United States v. Lefkowitz](#), 285 U.S. 452, 466-67 (1932); [Olmsted v. United States](#), 277 U.S. 438, 462 (1928); *id.* at 477-78 (Brandeis, J., dissenting); [Gambino v. United States](#), 275 U.S. 310, 316 (1927); [Marron v. United States](#), 275 U.S. 192, 194 (1927); [Agnello v. United States](#), 269 U.S. 20, 33-35 (1925); [Carroll v. United States](#), 267 U.S. 132, 147-48 (1925); [Hester v. United States](#), 265 U.S. 57, 57-58 (1924); [Amos v. United States](#), 255 U.S. 313, 315-16 (1921); [Burdeau v. McDowell](#), 256 U.S. 465, 474-76 (1921); [Gouled v. United States](#), 255 U.S. 298, 306, 311 (1921); [Perlman v. United States](#), 247 U.S. 7, 13 (1918); [Weeks v. United States](#), 232 U.S. 383, 393, 395 (1914); [Adams v. New York](#), 192 U.S. 585, 594, 597-98 (1904); [Boyd v. United States](#), 116 U.S. 616, 630, 633-35 (1886). See generally Edward S. Corwin, *The Supreme Court's Construction of the Self- Incrimination Clause*, 29 MICH. L. REV. 1, 1-2, 13-16, 203-04 (1930) (carefully reading exclusionary case law as based on a Fourth-Fifth fusion theory).

The only major Supreme Court exclusion case that does not invoke the Fifth Amendment is [Silverthorne Lumber Co. v. United States](#), 251 U.S. 385 (1920). The government stressed the Fifth Amendment issue at length. Under [Hale v. Henkel](#), 201 U.S. 43, 75 (1906), corporations lacked Self-Incrimination Clause rights, and thus they could not demand exclusion. See [251 U.S. at 385-90 \(argument of the United States\)](#). Justice Holmes's three-page opinion for the Court never carefully addresses this argument, but instead offers us an epigram: Illegal evidence and its fruits "shall not be used at all." [251 U.S. at 392](#). But an epigram is not analysis--even when (I would say, especially when) it comes from Holmes. Analytically, Holmes's statement is simply false. The Government has always been allowed to use illegally obtained evidence in civil cases, in criminal cases against others, in keeping contraband, in returning stolen goods to their rightful owners, and so forth. Perhaps Silverthorne's technical disposition could be upheld nevertheless on the narrow theory that the case, in effect, did not exclude evidence in a criminal case on the basis of a constitutional mandate but simply quashed a subpoena in a collateral proceeding on supervisory power grounds.

[FN33]. For much more elaboration of these points, see Amar, *Fourth Amendment First Principles*, *supra* note 1, at 790-92.

[FN34]. See *id.* at 785-91; Amar & Lettow, *supra* note 1, at 922-28.

[FN35]. See, e.g., [United States v. Leon](#), 468 U.S. 897, 905-06 (1984) (rejecting Fourth-Fifth fusion

theory); [Fisher v. United States, 425 U.S. 391, 405-14 \(1976\)](#) (same).

[FN36]. See [United States v. Leon, 468 U.S. 897, 905-06 \(1984\)](#); [United States v. Calandra, 414 U.S. 338, 354 \(1974\)](#).

[FN37]. See supra notes 22, 35.

[FN38]. [Mapp v. Ohio, 367 U.S. 643, 661-66 \(1961\)](#) (Black, J., concurring).

[FN39]. [Id. at 646-47, 646 n.5, 655-57](#) (opinion of the Court) (quoting Boyd that Fourth and Fifth Amendments run "almost into each other"; noting "close connection between the concepts later embodied in these two Amendments"; stressing "conceptual nexus" between Fourth Amendment and rules against coerced confessions; suggesting that Constitution gives an "accused" a "privilege" against being "forced to give" "evidence"; suggesting that unreasonable seizures are "tantamount" to "coerced testimony"; and insisting that "the Fourth and Fifth Amendments" enjoy an "intimate relation").

[FN40]. [Duncan v. Louisiana, 391 U.S. 145, 165-67 & n.1 \(1968\)](#) (Black, J., concurring).

[FN41]. See, e.g., [Chimel v. California, 395 U.S. 752, 760-62 \(1969\)](#); [Chapman v. United States, 365 U.S. 610, 613-15 \(1961\)](#).

[FN42]. [Gideon v. Wainwright, 372 U.S. 335, 339-40, 341 \(1963\)](#).

[FN43]. [Miranda v. Arizona, 384 U.S. 436, 439, 442, 457-62, 467 \(1966\)](#).

[FN44]. U.S. Const. art. III, § 3 (generally requiring "two witnesses to the same overt Act" for treason).

[FN45]. See generally Richard H. Fallon, Jr., [A Constructivist Coherence Theory of Constitutional Interpretation, 100 HARV. L. REV. 1189 \(1987\)](#). For other powerful and illuminating accounts of interpretive methodology in constitutional law, see PHILLIP BOBBIT, *CONSTITUTIONAL INTERPRETATION* (1991); PHILLIP BOBBIT, *CONSTITUTIONAL FATE* (1982); Jed Rubenfeld, [Reading the Constitution as Spoken, 104 YALE L.J. 1119 \(1995\)](#).

[FN46]. See Amar, Fourth Amendment First Principles, *supra* note 1, at 786- 87, 789 n.123.

[FN47]. See Amar & Lettow, *supra* note 1, at 916-19.

[FN48]. [Counselman v. Hitchcock, 142 U.S. 547 \(1892\)](#).

[FN49]. See Amar & Lettow, *supra* note 1, at 911-16.

[FN50]. See *id.* at 917 n.265.

[FN51]. Because current Fifth Amendment immunity is so broad, the government enjoys the right to immunize any witness, but defendants do not. (Otherwise a defendant could give all his partners in crime a powerful immunity bath.) With a narrower immunity rule in place, defendants could play on a level immunity field with the government, as required by the Sixth Amendment. For much more explanation, see Amar & Lettow, *supra* note 1, at 861-64, 901-903; Amar, Sixth Amendment First Principles, *supra* note 1, at 699-702.

[FN52]. Currently, government may often delay A's trial until it can convict his partner in crime B, who can then be obliged to testify against A without the usual high cost of Kastigar immunity. A narrower Fifth Amendment immunity rule would solve this problem, as I explain in Amar, Sixth Amendment First Principles, *supra* note 1, at 702.

[FN53]. See [United States v. Jacobsen, 466 U.S. 109, 122-23 & nn. 22-23 \(1984\)](#); Arnold H. Loewy, The Fourth Amendment as a Device for Protecting the Innocent, 81 MICH. L. REV. 907 (1983).

[FN54]. This is, of course, a point stressed by none other than Chief Justice Warren in [Terry v. Ohio, 392 U.S. 1, 14-15 & n.11 \(1968\)](#).

[FN55]. My analysis here calls into question the rule of [Rochin v. California, 342 U.S. 165 \(1952\)](#), as a constitutional mandate. To forcibly pump a person's stomach against his will and without sufficient justification is horribly wrong--an obvious Fourth Amendment violation--but the violation occurs when the stomach is pumped, not at some later point. Thus, the pumping is wrong regardless of whether the forced vomit is ultimately found to contain illegal drugs, whether the drugs are ever introduced as evidence, whether the evidence is introduced in a criminal (as opposed to civil) case, or whether a case is brought against the pumpee (as opposed to, say, a third-party drug pusher). Introduction of reliable

evidence--like drugs--is not itself an independent wrong, and exclusion of such evidence does not properly remedy the antecedent wrong of pumping: exclusion provides an upside-down aid to the guilty, and no remedy to the innocent whose vomit is drug-free. Consider also the possible "causation gap" created by exclusion: a timely and perfectly lawful Schmerber-like blood test might have generated comparable evidence of drug ingestion, and so exclusion may confer a kind of windfall on a guilty pumpee.

[FN56]. See generally STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* (1973); Stanley S. Surrey, [Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Government Assistance](#), 84 *HARV. L. REV.* 352 (1970); Stanley S. Surrey, [Tax Incentives as a Device for Implementing Governmental Policy: A Comparison With Direct Government Expenditures](#), 83 *HARV. L. REV.* 705 (1970).

Although Professor Surrey's specific approach is controversial in tax circles, no serious tax scholar can avoid thinking about, and confronting head-on, Professor Surrey's argument about "upside-down" effects. Yet many major scholars in constitutional criminal procedure seem to have spent their entire careers without ever seriously confronting the upside-down effect of various exclusionary rules.

[FN57]. See Amar, *Fourth Amendment First Principles*, supra note 1, at 795- 96 & n.139 (providing analysis and citations); see also DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 143 (2d ed. 1994); Daniel J. Meltzer, [Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General](#), 88 *COLUM. L. REV.* 247, 270 (1988).

[FN58]. See, e.g., Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 *U. MICH. J.L. REF.* 537, 568-69 (1990); Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 *MICH. L. REV.* 1, 36 n.151, 47-48 (1987).

[FN59]. See Amar, *Fourth Amendment First Principles*, supra note 1, at 776 & n.71, 777 & n.75, 798 & n.146.

[FN60]. See William J. Stuntz, [Warrants and Fourth Amendment Remedies](#), 77 *VA. L. REV.* 881, 905 (1991).

[FN61]. See [Bivens v. Six Unknown Federal Agents](#), 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment).

[FN62]. See William J. Stuntz, [Privacy's Problem and the Law of Criminal Procedure](#), 93 MICH. L. REV. 1016, 1060-77 (1995).

[FN63]. Professor Stuntz seems to recognize this problem, see *id.* at 1072, but then breezes by it in a way that would make "Leavenworth lottery" fans cheer, and traditional remedies scholars wince. His approach has also been squarely rejected in case law, see [Frisbie v. Collins](#), 342 U.S. 519 (1952); [Maryland v. Macon](#), 472 U.S. 463, 471 (1985). Cf. *id.* at 475-76 (dissenting opinion by Brennan and Marshall arguing for Stuntz-like approach while conceding that the Court's contrary approach was "following precedent"). A bit later in his discussion, see 93 MICH. L. REV. at 1074 n.210, Professor Stuntz again seems to miss the obvious ways that exclusion can overdeter because of causation gaps--gaps his approach two pages earlier would of course dramatically widen. And he continues to reveal real confusion about how damage remedies fit into his world, compare *id.* at 1072 n.201 with *id.* at 1073 & n.203. Some of this confusion may stem from an uncharacteristic inattention to the Coase Theorem. Cf. Amar, Fourth Amendment First Principles, *supra* note 1, at 812-13.

[FN64]. See Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1214 (1967).

[FN65]. On the similarities, see Amar, Fourth Amendment First Principles, *supra* note 1, at 790 n.126, 807-08, 809 n.188. On the differences, see Amar, Sixth Amendment First Principles, *supra* note 1, at 54.

[FN66]. See generally Frank Easterbrook, [The Supreme Court, 1983 Term-- Foreword: The Court and the Economic System](#), 98 HARV. L. REV. 4, 10-12 (1984). Among constitutional criminal proceduralists, Professor Stuntz has been a leading practitioner of ex ante incentive analysis in a wide range of intriguing and illuminating articles. See, e.g., Robert E. Scott & William J. Stuntz, [Plea Bargains as Contract](#), 101 YALE L.J. 1909 (1992); William J. Stuntz, [Lawyers, Deception, and Evidence Gathering](#), 79 VA. L. REV. 1903 (1993); William J. Stuntz, [Implied Bargains, Government Power, and the Fourth Amendment](#), 44 STAN. L. REV. 553 (1992).

[FN67]. See generally Lawrence Lessig, [Fidelity in Translation](#), 71 TEX. L. REV. 1165 (1993).

[FN68]. See generally William J. Stuntz, [The Substantive Origins of Criminal Procedure](#), 105 YALE L.J. 393 (1995).

[FN69]. In a recent essay, Professor Schulhofer seems to tiptoe up to, but not quite admit, the many and profound ways that feminism may call into question the generally pro-defendant stance of now-orthodox criminal procedure scholarship (including Schulhofer's own oeuvre). See Stephen J. Schulhofer, [The](#)

[Feminist Challenge in Criminal Law, 143 U. PA. L. REV. 2151 \(1995\).](#)

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