BOOK REVIEW

THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES. By Akhil Reed Amar.[1] New Haven, CT: Yale University Press. 1997. Pp. xi, 272. Hardcover, $30.00.

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It is hard to say if Akhil Amar has chosen his time well, or if the times have chosen him. Whichever it is, Amar's recent writings on constitutional criminal procedure, now collected in a single volume, have certainly captured the moment. His work has drawn some praise, along with unusually pointed criticism.[3] This is not surprising, for when a scholar of Amar's stature enters a field calling for ambitious changes, others in the field will respond. As advertised, Amar is indeed addressing the "first principles" of constitutional criminal procedure.

This work, which has captured the spotlight, could also capture the future of criminal procedure. This is a time when the field of criminal procedure badly needs a new set of organizing principles. For at least a generation, the U.S. Supreme Court's

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2. Professor of Law, Wake Forest University. This is as good a time as any for full disclosure: I am a long-time friend of Akhil Amar. In fact, in 1987, Akhil publicly promised to my newborn son Andrew that the Yale Law School would admit him to its class of 2012. See Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 Yale L.J. 281, 281 fn. † (1987) ("This story was composed for . . . Drew Wright, YLS 2012 . . ."). Only the reader can decide if I have been both a true and truthful friend; only time will tell if I have hurt Andrew's admissions standing.

3. See Stuart Taylor, Jr., *Rethinking the Fifth Amendment (Again)*, Legal Times 27 (July 17, 1995); Donald 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); Morgan Cloud, *Searching through History; Searching for History*, 63 U. Chi. L. Rev. 1707 (1996). Amar's impact on this area has been especially striking because his work appeared without warning. Amar's earlier writings had focused on questions of constitutional theory and structure, including the nature of the Bill of Rights.

criminal procedure "revolution" has created the framework for discussion. Warren Court decisions such as *Mapp v. Ohio*[4] focused attention on the constitutional dimension of criminal procedure. Along the way, these cases created plenty of new obligations for state law enforcement officers, prosecutors, and judges.

Since then, vigilance among academic watchers of the Supreme Court has been the animating spirit of criminal procedure. Most observers and teachers of criminal procedure have devoted themselves to following the latest word from the Supreme Court. We have judged the cases in light of the Court's earlier pronouncements, and have debated how far the Court has departed from the trajectory established in those Warren Court decisions.[5] If the Supreme Court grants *certiorari* in a case, the issue becomes important enough to debate; if the Supreme Court has not yet addressed a question, it can wait.

This way of thinking about criminal procedure has grown less satisfying and relevant over the years. For one thing, the Supreme Court has tried to make itself less prominent, by leaving more questions to legislatures, state courts, and other institutions. In many areas, the Court's self-denial has succeeded, and these other legal institutions have rushed in to set policy and create principles where the Supreme Court left them room to do so. Even where the Court has continued to announce constitutional principles to guide criminal procedure, it has not moved in a direction that most observers wanted to see. When academic commentary grows more hopeless and irrelevant with each passing year of Supreme Court decisions, the commentators eventually find a way to reconcile themselves to a new reality.[6] They change the conversational subject.

If vigilance in Supreme Court watching can no longer be the staple of criminal procedure, what will replace it? Has Amar given us a new conversational framework, to succeed our gen-

4. 367 U.S. 643 (1961).

5. For an insightful recent effort to explain trends in the Supreme Court's criminal procedure jurisprudence, see Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466 (1996).

6. For instance, Scott Sundby has proposed that a rhetoric of "mutual trust" might prove more relevant and persuasive to the U.S. Supreme Court than a rhetoric of privacy rights, when it comes to evaluating government searches and seizures. Scott E. Sundby, *"Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen*, 94 Colum. L. Rev. 1751 (1994).

eration-long debate about the Supreme Court's departure from the Warren Court revolution?

I believe that Amar has indeed changed the framework for discussing some of the Supreme Court's work. In particular, this book could break our dependence on U.S. Supreme Court precedent, and change the criteria for what makes a strong argument in constitutional criminal procedure. But I have greater doubts about a second element of Amar's program. He claims that constitutional criminal procedure needs to become more like "mainstream" constitutional law in its methodology. However, this is not what the future holds for criminal procedure. The distinctive structure of the institutions developing criminal procedure principles will always create a criminal procedure with a different flavor. Constitutional law in the criminal justice field must develop a more complete theory of how constitutions can accommodate many interpretations by many different institutions. It must create more elaborate ways for constitutional and nonconstitutional sources of law to interact. Criminal procedure, in short, needs a more refined etiquette, a set of expectations for respectful interaction.

I

Although Amar makes a number of intriguing claims about constitutional criminal procedure, they all flow from a central methodological insight. When courts and others must interpret the provisions of a constitution relating to the criminal process, they should use the same constitutional methods that constitutional interpreters use in other settings. As Amar puts it,

> [T]he kind of constitutional law discourse and scholarship that now dominates criminal procedure is generally, in a word, *bad* constitutional law–constitutional law insouciant about constitutional text, ignorant of constitutional history, and inattentive to constitutional structure. . . . Good constitutional criminal procedure must be, first and foremost, good constitutional law–developed with respect for things like text, history, and structure. (pp. ix-x)

Amar's book lives up to this promise. It uses classic constitutional law methodology in creative and surprising ways to shed light on many longstanding arguments of criminal procedure, and to offer a unified take on the subject.

Amar's constitutional methodology places text, history, and structure at the forefront. He also mentions "practicality" or common sense as an important interpretive device: "proper methodology of constitutional criminal procedure does not blind itself to practical effects." (p. 154) Supreme Court decisions from the past, and their consistency over time, move back into the shadows. This is not to say that Amar ignores precedent entirely, as a glance at the book's extensive table of cases will show. What the Supreme Court has said about the Bill of Rights over time matters, but where the precedent is self-contradictory and confused (as it frequently is on criminal procedure questions), Amar is quicker than most interpreters to abandon the least attractive lines of cases.

This is a recipe for radicality, but it produces more changes in rationales than changes in case outcomes. In one of his more striking claims, Amar uses textual and historical methods when he argues that we should abandon the "exclusionary rule" as the primary remedy for improper searches and seizures.[7] (pp. 20-31) He points out that the text of the Fourth Amendment does not mention exclusion of evidence, even by implication. The argument then looks to early American practice under the Fourth Amendment, which relied solely on tort actions against government agents who carried out improper searches or seizures. Then, building on the observations of John Henry Wigmore,[8] Amar points to the practical harms that exclusion of reliable evidence has on judges interpreting the Constitution and on the public's confidence in the system.

Textual and historical arguments also lead Amar to the claim that there is no "preference" for warrants built into the Fourth Amendment, despite the announcement of such a preference in many Supreme Court decisions. Instead, the Fourth Amendment commands only that searches and seizures be "reasonable." (pp. 3-17) The requirements for issuing a warrant appear in a separate clause in the text, and do not explicitly modify the more general requirement of "reasonableness" that appears in the first clause. Similarly, the "probable cause" mentioned in the text, Amar argues, is not the presumptive level of

7. For the earlier version of Amar's arguments on this score, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994).

8. John H. Wigmore, 4 *Wigmore on Evidence* §§ 2813-84 (Little, Brown, and Co., 2d ed. 1923). Amar adds an argument based on precedent, by suggesting that the original exclusionary rule cases were an attempt to enforce the Fourth and Fifth Amendments simultaneously.

justification that the government must give for all searches and seizures. (pp. 17-20) Once again, "reasonableness" provides the general standard for searches and seizures to satisfy; the text requires probable cause only for warranted searches. Historical arguments also support each of these claims about warrants and probable cause. For instance, Amar points to eighteenth-century statutes authorizing warrantless searches and searches based on a justification less than probable cause, and finds no early declarations that warrants or probable cause are ordinarily necessary to demonstrate the reasonableness of a search or seizure. (pp. 7, 18)

The text of the Fifth Amendment leads Amar to reject, at an even more fundamental level, the Supreme Court's jurisprudence of self-incrimination.[9] For Amar, the critical term in the text is "witness": no person shall be compelled to be a "witness" against himself or herself. This text, he argues, does not bar all efforts to compel a witness to help the government prove its case. Instead, it prevents the use in evidence of a defendant's testimony. This prohibition leaves the government free, however, to use the "fruit" of any compelled statement against the witness. (pp. 70-71) For instance, if the government compels a defendant (through threat of imprisonment for contempt of court) to describe where she hid the gun she used in an armed robbery, the government could not introduce her statement at trial, but it could introduce the gun and any fingerprints found on it. History again plays a supporting role in the argument, for many nineteenth-century cases held that the privilege against self-incrimination extended only this far, and it was commonplace in early American criminal justice for magistrates to question the accused before trial. (pp. 69, 78-82) Arguments based on the practical effects of legal rules also have relevance here. Amar points out that innocent defendants could, under this reading of the Fifth Amendment, compel the testimony of de-

9. One measure of the fundamental nature of Amar's critique in this area would be the proportion of the Supreme Court's decisions which he believes to be wrongly decided. On Fourth Amendment questions, Amar provides a rationale for the general direction of the Supreme Court's cases over the last generation. He rejects only a few of the holdings, but much more often rejects their confused rationales, along with much of the academic commentary criticizing those decisions. Amar also finds fault with only a few outcomes of Supreme Court decisions in Sixth Amendment areas over the last generation. On Fifth Amendment questions, however, his approach calls into question a greater number of the Court's holdings, and suggests that there is more unresolved tension within the Fifth Amendment case, originating in the Fifth Amendment cases *Schmerber v. California*, 384 U.S. 757 (1966), and the other "non-testimonial" evidence cases. (pp. 87-88)

fense witnesses who might otherwise invoke their own privilege against self-incrimination.[10]

Structural arguments, based on the relationships among different clauses of the Constitution, also form the basis for some of Amar's prescriptions. This species of argument is especially important to his views on the Sixth Amendment rights to speedy, public and fair trials.[11] This collection of guarantees, he claims, share a common theme. They all attempt to produce a trial which will, with the greatest accuracy possible, separate the innocent from the guilty.[12] The clauses of the Sixth Amendment "do not protect only *innocents*, but they do protect only *innocence*; they protect the guilty only an incidental by-product of protecting the innocent because of their innocence." (p. 91) Thus, any legal rules that divert attention from this truth-finding function of the criminal trial for the sake of controlling or punishing government misconduct run the risk of creating "upside-down effects"–rules that give the guilty more protection, often at the expense of the innocent.

Amar takes particular pains to criticize "the mother of all upside-down exclusionary rules": the Supreme Court's frequent declaration that dismissal is the only possible remedy for violations of the Sixth Amendment's speedy trial right. In most cases, he argues, this remedy does not fit the legal interests injured because of the delay, and provides a greater benefit to the guilty than to the innocent. Instead of dismissal, monetary damages (paid by the government) for loss of liberty or reputation would fully compensate most victims of delay. (pp. 96-116) Amar also notes the practical effects of the "dismissal only" rule, suggesting that the severity of the remedy has made judges reluctant to declare violations even when they plainly have oc-

10. For an earlier version of this argument, see Akhil Reed Amar and Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857 (1995).

11. For an earlier version, see Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 Geo. L.J. 641 (1996).

12. Amar's support for treating the pursuit of truth as the "deep principle" built into the structure of the Sixth Amendment is uncharacteristically thin. He points to the placement of several different guarantees of speedy trial, public trial, and fair trial in the same amendment (the Sixth). While it is possible to read each of these clauses in a way which emphasizes the pursuit of truth, they might also be read to serve alternative (and sometimes competing) values, such as preventing the most intrusive types of government behavior. The fact that these clauses appear together in one amendment does not reinforce one or the other reading of these clauses.

curred.[13] A more palatable set of remedies would lead to greater integrity in interpreting the rights.

The emphasis on reliable outcomes at trial also appears in the Sixth Amendment's confrontation clause, which allows a defendant to confront the "witnesses" against him. Here again, Amar wades into a long-running controversy of criminal procedure: the relationship between the confrontation clause and the hearsay rule. He argues that the Sixth Amendment's text and its structural emphasis on protection of innocence should allow courts to hear some reliable forms of hearsay. The confrontation clause, he says, only extends to statements of "witnesses" at trial or in formal trial-like settings such as depositions. It should not bar witnesses from describing hearsay statements by out-of-court declarants. (pp. 125-31)

Another structural argument enables Amar to make what are, in my opinion, his most important contributions to many of the criminal procedure controversies he discusses. Amar insists at every turn that the Bill of Rights is designed to strengthen the role of the jury, in government generally and in criminal justice in particular. The criminal jury was one of the few rights explicitly mentioned in the original Constitution (in Article III), and juries were among the top priorities of the state ratifying conventions as they proposed constitutional amendments which later became the jury provisions in the Fifth, Sixth and Seventh Amendments. The jury was the populist influence in the judicial branch, to counterbalance the judge, just as the House of Representatives was the populist influence in the legislative branch, to counterbalance the Senate.

The structural centrality of the jury figures in several of the controversies Amar discusses. For instance, because the Constitution views the jury as an incorruptible fact finder and a populist political institution, a defendant may not waive a jury trial in favor of a bench trial. (p. 120) Amar also supports the power of the jury to nullify unjust (or unjustly applied) criminal laws by refusing to convict despite overwhelming evidence. Similarly, he disapproves of devices such as special verdicts which increase the opportunities for the judge to control the jury. (pp. 122-23)

The importance of the jury also gives structural strength to Amar's Fourth Amendment claims, discussed above. When

13. Indeed, dismissal occurs so infrequently in practice that it is difficult to see why Amar directs so much of his fire toward this neglected doctrine.

Amar asserts that the Fourth Amendment does not embody a requirement or preference for warrants, he relies on many examples from early American practice where warrants were not required. A generations-old argument about the relationship between the warrant clause and the "reasonableness" clause has focused on the meaning of these early practices. Do these early examples demonstrate that warrantless searches were not generally considered unreasonable, or do they merely confirm that some exceptions to the warrant requirement are tolerable or appropriate?[14] Amar moves this shopworn debate to a different and more productive level: he clarifies how the enthusiasm for juries in the Constitution's founding era may have translated into a distrust of warrants.

Warrants, it seems, were not preferred because when a government agent obtained a warrant, it immunized him from later tort liability for any improper search.[15] Warrants took away the power of the jury. Hence, according to Amar, the Fourth Amendment mentions warrants primarily to prevent their overuse and to prohibit the broadest and most abusive forms of warrants. (pp. 10-17)

Because warrants today provide a way to obtain preclearance for searches, obtaining a warrant might help to establish reasonableness in some settings. (pp. 38-39) But constitutional reasonableness, says Amar, does not begin with warrants or probable cause. Instead, he pictures juries working with other institutions to give meaning to the reasonableness concept. Legislators and executive rulemakers provide two sources of enforcement: they can pass statutes and rules to specify what searches are acceptable. Judges provide another layer of enforcement, sometimes drawing on common law and constitutional law concepts (for instance, free speech principles in newspaper search cases) to define reasonableness. Finally, juries in tort actions based on improper searches or seizures can apply their own common sense definition of reasonableness, even

14. The classic formulations of the two leading theories appeared in Telford Taylor, *Two Studies in Constitutional Interpretation* (Ohio State U. Press, 1969) and Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (Johns Hopkins Press, 1937). More recent discussions of this issue, returning to the themes which Lasson and Taylor sounded, appear in Maclin, 68 S. Cal. Rev. (cited in note 3), and Cloud, 63 U. Chi. L. Rev. (cited in note 3).

15. For further discussion of this point, and the difference between general warrants and writs of assistance, see Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 Suffolk U. L. Rev. 53, 76-80 (1996).

where they do not agree with the definitions of other enforcers. (pp. 43-45)

On the whole, Amar does not pose new questions for criminal procedure; this book revisits classic debates of criminal procedure over the last generation. But Amar's interpretive method uncovers some new evidence in answer to those classic questions, and offers a way to prioritize the evidence which may have a bearing on the answers.[16]

II

So what are the book's prospects for the future? Will Amar's use of traditional constitutional methodologies replace vigilant Court-watching as the primary job of the criminal procedure observer? The answer to this question is, "Yes and no." Amar leaves one crucial methodological task undone, but makes a promising start on a second task which will be critical to the future of constitutional criminal procedure.

A

Amar deftly handles many knotty issues along the way in this book. He makes it look easy. But this virtuosity also makes it easy to overlook an important component missing from his methodology. An account of the Constitution in criminal procedure should give a sense of its own outer bounds. When does the Constitution no longer control our choices? When does it no longer offer even a sense of direction? There are times when the best response to textual, historical or structural evidence is to say that it helps very little in deciding a current controversy.

Amar's interpretive method does not give much guidance on how to account for equivocal evidence based on text, history

16. For example, Amar has (I believe) changed the type of evidence relevant to the relationship between warrants and reasonableness. Early American disputes focused on searches pursuant to improper warrants, and modern arguments have revolved around the meaning of that experience when it comes to unwarranted searches. Given the role of warrants to undermine the power of colonial juries, should the use of warrants in some settings be interpreted as the preferred practice, or a necessary evil to be limited? Amar suggests that some positive statements about warrants (and not just their appearance in statutes or in practice) should be necessary to show that warrants were considered the prototypical reasonable search during the founding period. While Cloud, 63 U. Chi. L. Rev. (cited in note 3), and others have pointed to the early use of warrants, and to statutes which provide for warrants (and for unwarranted searches in situations which we might describe today as "exigent circumstances"), this does not respond to the insight about the impact of warrants on juries.

and structure. As Amar acknowledges, his standard interpretive methods sometimes yield different answers. (pp. 94-95) But he does not develop here an explicit method for resolving conflicts among types of evidence, or ambiguous evidence within a single type.

History and text are uneven guides. These methods do exclude some possibilities, and resolve some questions. For other issues, history and text are merely suggestive; they push more in one direction than another. But how often do they help us select from viable options in criminal justice today? Especially when one considers that the criminal justice world is so profoundly changed from the 1790s (consider the fact that police departments did not even exist at the time), history might provide only a very rough insight into the meaning of some constitutional texts. When a historical practice is highly ambiguous or has no clear analogy in modern practice, perhaps the constitutional meaning of that history should be cast tentatively, or at a fairly high level of generality.

An example may show the wisdom of using history only for a general sense of direction. According to Amar, historical practices support the position that the Constitution does not require an exclusionary remedy for illegal searches and seizures. American courts did not exclude illegally-obtained evidence until the 1880s, and even then most states did not exclude evidence until the 1950s and 60s. Tort suits were the ordinary remedy through much of our constitutional history.

But the founding era represents only one phase of the history of remedies for illegal searches and seizures, and probably not the most illuminating phase. During the twentieth century, American courts have reflected on their long experience with tort remedies; many have found the remedies inadequate. After the U.S. Supreme Court adopted the exclusionary rule for the federal system in 1914,[17] some high state courts began to choose for themselves what remedy to require. At this point, state high courts endorsed or reaffirmed tort remedies, more often than not.[18] By 1949, state courts were obliged to enforce the Fourth Amendment to the federal constitution, along with the search and seizure provisions of their state constitutions. Yet the

17. *Weeks v. United States*, 232 U.S. 383 (1914).

18. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.) (rejecting a rule which would mean that "[t]he criminal is to go free because the constable has blundered").

choice of remedies remained in the hands of the state courts.[19] This time around, state courts were more inclined to choose the exclusion remedy, based largely on their review of the futility over time of the tort remedy. In *People v. Cahan*,[20] Justice Traynor of the California Supreme Court summarized his court's experience with tort remedies as follows:

> People v. Mayen [rejecting the exclusionary rule in California] was decided over 30 years ago. Since then case after case has appeared in our appellate reports describing unlawful searches and seizures against the defendant on trial, and those cases undoubtedly reflect only a small fraction of the violations of the constitutional provisions that have actually occurred. On the other hand, reported cases involving civil actions against police officers are rare, and those involving successful criminal prosecutions against officers are nonexistent. In short, the constitutional provisions are not being enforced.[21]

The *Cahan* decision moved to the center of national discussion about the exclusionary rule. It found a following because, these courts concluded, tort remedies had proven ineffective in most places.[22] It is difficult today to find examples of successful tort claims against a state or local government or a police officer, based on an illegal search.[23]

What is an interpreter of the Constitution to do when reviewing the history of remedies? Which history counts, the founding era remedies or the twentieth century reflections on experience with remedies? That depends on the precise question an interpreter asks. If a constitutional methodology leads one to ask which specific remedy the constitutional Framers would have chosen under their circumstances, the answer is quite clear.

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19. *Wolf v. Colorado*, 338 U.S. 25 (1949).

20. 282 P.2d 905, 913 (Cal. 1955).

21. For an account of Justice Traynor's likely views on tort remedies more generally, see Dripps, 74 N.C. L. Rev. (cited in note 3).

22. See also *State v. Mills*, 98 S.E.2d 329 (N.C. 1957); *Rickards v. State*, 77 A.2d 199 (Del. 1950); Md. Code Ann. art. 35, § 5 (1951); R.I. Gen. Laws § 9-19-25 (1956).

23. Although there is little or no appellate case law reflecting successful tort claims based on illegal searches, local governments do often settle such claims before trial. Successful claims are most often based on improper use of force during seizure of a person. At least in New York City, these suits have not been linked to officer training or discipline. Deborah Sontag and Dan Berry, *The Price of Brutality: A Special Report. Police Complaints Settled, Rarely Resolved*, N.Y. Times at A1 (September 17, 1991).

On the other hand, the structure of the Constitution might lead an interpreter to ask a more general question. There is arguably a deep structure to the Constitution which presumes at least a minimally effective remedy for violations of rights.[24] If an interpreter asks which remedy or remedies would qualify as an effective one, the twentieth-century experience with remedies must loom large. It would suggest, at the least, that we should hesitate to conclude that we can make the tort remedy effective by abolishing immunities, providing for fixed damages and attorneys' fees, and so forth. If founding-era history exerts a force on constitutional interpretation, surely more than a century of experience must count for something, as well. (Amar might account for experience of this sort in his appeals to practicality as an interpretive source.) *Cahan*, and cases like it, suggest that a remedy with a track record of failure must prove itself as a supplement to the exclusionary rule before it can replace the exclusionary rule.

B

Although Amar's constitutional technique does not work out its own limits, this book does make progress on a second task that will be a necessary part of our constitutional criminal procedure in the future. A quick look around the criminal justice landscape in 1998 will reveal a huge number of institutions at work. Each is busy creating and interpreting laws to influence the investigation, prosecution, defense, and adjudication of criminal defendants. Their work looks far different today than it did thirty years ago.

Consider, for instance, state courts. Opinions from state appellate courts today show an awareness that they do far more than simply carry out the requirements of the latest U.S. Supreme Court decisions. State courts interpret their own constitutions, and can impose greater requirements on government agents than the federal Constitution imposes. They do typically look for guidance from Supreme Court decisions on analogous provisions of the federal Constitution, but they are equally likely to turn to the opinions of courts from other states. State courts also have final interpretive authority over statutes, regulations, and other sources of law which shape the outcome in a great many cases. And even when state courts "merely" apply the de-

24. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803).

cisions of the U.S. Supreme Court, they still make some of the most pertinent choices themselves. Supreme Court opinions typically leave much room for others to apply them in different ways, with very different consequences. Given the realities of limited direct appellate review in the Supreme Court and few opportunities for review in lower federal courts on habeas corpus, U.S. Supreme Court decisions mean exactly what state courts say they mean.

The same impression of state institutional vigor appears in the work of state legislatures in criminal justice. New criminal justice statutes appear almost every year in every state. These statutes sometimes clarify questions addressed with less certainty in judicial opinions; at other times, they take up entirely new topics. For instance, a great many statutes address the authority and discretion of a police officer to make an arrest in a family violence situation,[25] a profoundly important question that never appears on the radar screen of constitutional adjudication. Recall that these state institutions deal with over 95 percent of all the felonies adjudicated in this country every year, with the federal system handling about 5 percent of the felonies (and this ignores the even larger imbalance in misdemeanor cases in the state and federal systems).[26]

In a world where so many of the critical choices happen away from the U.S. Supreme Court, any view of constitutional criminal procedure must find a way to explain and shape the interaction between "the Court" and the courts (which are not necessarily "lower"). We need a rich sense of the many ways that constitutional law and non-constitutional law can interact in criminal justice.

Amar starts the long job of integrating federal constitutional law with other sources of law relevant to criminal justice. In the first place, Amar makes it possible to look beyond federal constitutional law by breaking the stranglehold of U.S. Supreme Court jurisprudence. Where Amar convinces readers that criminal procedure now has an unhealthy obsession with the minutiae of Supreme Court opinions, he clears some space for other inquiries to take place.

Amar makes a further contribution to the true task at hand. Particularly in his chapter on the Fourth Amendment, Amar of-

25. See 22 Okla. Stat. § 40.3; Gen. Stat. Conn. § 46b-38b; Iowa Code § 236.12.

26. Bureau of Justice Statistics, U.S. Department of Justice, Felony Sentences in the United States, 1994 (July 1997, NCJ-165149).

fers a picture of different institutions at work. As I mentioned earlier, Amar suggests several "overlapping, reinforcing" enforcement regimes. The legislature would have some authority to define and to enforce "reasonableness" in searches and seizures: "In cases of borderline reasonableness, the less specifically the legislature has considered and authorized the practice in question, the less willing judges and juries should be to uphold the practice." (p. 43) Amar would give similar authority to administrators (including police departments) to promulgate rules or guidelines that "publicly spell out more concrete search and seizure policies . . . ." (pp. 43-44) Judges and juries would add to the mix their own views about the reasonableness of searches or seizures.

To my way of thinking, the most interesting feature of this vision is its interactive quality. Amar does not propose only that the Constitution sets basic principles, while non-constitutional law fills in the details. Rather, each of the institutions at work on the concept of "reasonableness" can influence the views of others. Constitutional reasonableness turns on the quality of the work which many different institutions have done. At least, says Amar, this is true in close cases. Need it be only in close cases?

This is a constitutional "etiquette." It promotes–and here I draw on the rigorous legal analysis of Miss Manners[27]–the ability to co-exist and to listen to others with respect, without denying the depth of the differences between one person (or institution) and another.

Unfortunately, Amar does not consistently show this same sensitivity to the many institutions at work when he takes up the "first principles" of the Fifth and Sixth Amendments. His passing observations about non-constitutional law in these chapters usually just note that some sources of law (such as rules of evidence dealing with hearsay) sometimes require more than the relevant constitutional clause (such as the confrontation clause). (pp. 125-31) Surely there is more to say here.[28] It seems plausi-

27. Judith Martin, *Common Courtesy: in which Miss Manners Solves the Problem that Baffled Mr. Jefferson* (Atheneum, 1985). In this book, Martin explains the function of an "artificial" and uniform set of manners in a democratic society: it makes possible the peaceful co-existence, in public spheres, of those with the most profound differences. Her account draws in part on that other "etiquette writer," Alexis de Tocqueville.

28. Amar does make some intriguing gestures in this direction, when he points to the importance of "framework" statutes such as the Speedy Trial Act, (p. 236, n.77) and the Privacy Protection Act of 1980, which gave heightened protection from searches to the media. (p. 41)

ble, for example, that practices in misdemeanor courts around the country might influence our views on the Sixth Amendment's "right to counsel."

The prominence of other institutions in criminal justice, and the need for a new constitutional etiquette here, may distinguish criminal procedure from other fields. Is there another field of constitutional law which affects so many government agents, supported by so much government money, carrying out so many different activities, and governed by so many sets of rules? The very size and structure of the criminal justice system probably means that constitutional criminal procedure will remain a distinctive field. It will keep a distinctive set of concerns about those who interpret and apply legal norms daily, and about the "practicality" and cost of legal decisions. To the extent that Amar hopes to reunite constitutional criminal procedure with the rest of constitutional law, there are some powerful forces working against him.

CONCLUSION

Creative interpretation of a constitution poses a danger. If the constitution is said to resolve many specific choices facing the criminal justice system, even where text, history, or structure offer limited or equivocal evidence, the constitution crowds out other sources of law. This is especially troubling in a system, such as the criminal justice system, where there are so many who must create and interpret the law, where conditions change so profoundly over time, and where the practical costs of legal rules are so hard to imagine. Amar's book explains much of what is wrong with our current jurisprudence, and something about our alternatives. But this multi-source interpretive method does not mark the outer boundaries of its own explanatory power.

The future of criminal procedure takes heed of its past, but that still leaves more choices open than it resolves. Our future must also lie in watching small developments from lots of sources, creating a common law method for a world where many who are not judges now make legal rules. Amar has helped to break the constitutional habit of looking to the U.S. Supreme Court for most of our criminal procedure. The task that remains is to say exactly what happens when we take our cues from many institutions rather than one.