REVIEW

Dirty Harry and the Real Constitution

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I. PROLOGUE: DIRTY HARRY, 1977

I didn't see Dirty Harry until my freshman year in college, in 1977, at a $1 Midnight Madness showing at the university center. But it was a memorable event: a rowdy, college audience cheering as one for the quintessential 1970s anti-hero hero, hard-bitten Inspector Harry Callaghan of the San Francisco Police Department, played by the squinting Clint Eastwood, as he did battle with a truly evil serial killer/child-kidnapper—and with the upside-down, criminal-coddling legal system that freed this monster to kill and terrorize more victims.

It would be dramatizing to say that this flick led me to law school (and to my brief stint as a federal prosecutor), but one scene does remain blazed in my memory twenty years later. Inspector Callaghan—"Dirty Harry"—has agreed to carry the ran-

† Associate Professor of Law, University of Minnesota Law School. The reader should be aware that Akhil Amar and I were accidental law school roommates at Yale in 1982-83 and argued frequently and vehemently about some of the very same issues discussed here. Our disagreements remained friendly, however, and Professor Amar and I remain friends today (despite our disagreements). Friendship does not keep me from taking potshots at him in print, when he deserves them (as he does, to some extent, here). See, for example, Michael Stokes Paulsen, Double Jeopardy Law After Akhil Amar: Some Civil Procedure Analogies and Inquiries, 26 Cumb L Rev 23, 23 n 1 (1995). Our association, however, may help explain why I find much to agree with in this book: I evidently have been a bad influence on him. See note 15.

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som to the kidnapper/killer/terrorist (known as “Scorpio”) that the softheads in the Department have decided to pay off. Harry believes that Scorpio intends to kill his child kidnap victim anyway (if he hasn’t done so already). Harry grudgingly makes the delivery, the deal goes down, but Scorpio decides to kill Harry off, too. Harry barely escapes, managing to wound Scorpio severely with a switchblade to the leg.

With time running out—the killer’s ransom demand said that the fourteen-year-old girl was buried alive, with oxygen enough only until 3 A.M.—Harry tracks Scorpio to a hospital and eventually to the football stadium basement where Scorpio lives. Harry scales the fence, breaks into the caretaker’s quarters and finds the rifle that had been used in earlier murders. Scorpio, alerted to Callaghan’s presence, attempts to flee, hobbling across the football field. When the stadium lights go on, Harry shoots Scorpio in the other leg with his .44 magnum (“the most powerful handgun in the world”). Scorpio is, by this point, unarmed. Harry approaches, points his .44 at the thug’s head and demands to know where the kidnap victim is. Scorpio refuses, and cries for a lawyer. (“I am entitled to a lawyer!”) Harry then steps on the thug’s wounded leg with all his weight and demands again to know where the little girl is. (Half the midnight college crowd cheers; half groans audibly; everybody gasps.) Screaming in agony, crying out for his rights, and still begging for a lawyer, the kidnapper finally reveals where the girl has been hidden—buried, really—and the San Francisco Police Department shortly thereafter finds her body, dead.

That scene is painful, but the next one is perhaps equally painful. Inspector Callaghan has been called in to the DA’s office:

DA: I’ve just been looking over your arrest report. Very unusual piece of police work. [Sardonically:] Really amazing.

HARRY: [Mistaking this for a compliment:] Yeah, well, I had some luck.

DA: [Standing up:] You’re lucky I’m not indicting you for assault with intent to commit murder!

HARRY: [Squinting:] What?

DA: Where the hell does it say you’ve got a right to kick down doors, torture suspects, deny medical attention and legal counsel?! Where have you been?! Does Escobedo ring a bell? Miranda?! I mean you must have heard of the Fourth Amendment! What I’m saying is

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1 The dialogue is from my transcription of the video, *Dirty Harry* (Warner Bros 1971). Bracketed stage directions, scene characterizations, and snide asides are mine.
Dirty Harry

that man had rights.

HARRY: [Scowling:] Well I'm all broken up about that man's rights.

DA: You should be. I've got news for you, Callaghan, as soon as he's well enough to leave the hospital he walks!

HARRY: [Incredulous but calm:] What are you talking about?

DA: He's free!

HARRY: You're letting him go?

DA: We have to. We can't try him.

HARRY: And why is that?

DA: Because I'm not wasting half a million dollars of the taxpayers' money on a trial we can't possibly win. The problem is we don't have any evidence.

HARRY: Evidence? What the hell do you call that?! [gesturing to the high-powered rifle he recovered from a locker in the janitor's room underneath the stadium]

DA: I call it nothing, zero.

HARRY: Are you trying to tell me that ballistics can't match the bullet up to this rifle?

DA: [Condescending and bitter:] It does not matter what ballistics can do. This rifle might make a nice souvenir, but it's inadmissible as evidence.

HARRY: And who says that?

DA: It's the law.

HARRY: Search warrant? A girl was dying!

DA: She was in fact dead, according to the medical report.

HARRY: But I didn't know that!

JUDGE: [Matter of factly, with a scholarly air:] Well, in my opinion the search of the suspect's quarters was illegal. Evidence obtained thereby, such as that hunting rifle for instance, is inadmissible in court. You should have gotten a search warrant. I'm sorry, but it's that simple.

HARRY: [Squinting again:] Search warrant? A girl was dying!

DA: The court would have to recognize the police officer's legitimate concern for the girl's life, but there is no way they can possibly condone police torture. All evidence concerning the girl, the suspect's confession, all physical evidence, would have to be excluded.
HARRY: There must be something you can get him on.

JUDGE: Without the evidence of the gun, and the girl, [scoff and shake of the head from side to side] I couldn't convict him of spitting on the sidewalk. Now the suspect's rights were violated, under the Fourth and Fifth, and probably the Sixth and Fourteenth Amendments.

HARRY: And Ann Mary Deacon? What about her rights? I mean she's raped and left to die in a hole. Who speaks for her?

II. MAGNUM FORCE: AKHIL AMAR, 1997

Inspector Harry Callaghan was right: The law is crazy. I thought so at the time I saw Dirty Harry (when I didn't have the foggiest idea of what “Escobedo” was) and now, finally, twenty years later, Professor Akhil Amar has explained why this intuition was, and is, right. The Constitution, Amar argues—contrary to virtually everybody writing in the field—emphatically does not demand such an upside-down, two-wrongs-make-a-right, baby-with-the-bathwater approach to what is misleadingly called “constitutional” criminal procedure. Under Amar’s powerfully argued and relentlessly iconoclastic readings of the Fourth, Fifth, and Sixth Amendments, Scorpio can be tried and convicted before he kills and terrorizes again.

The Fourth Amendment, by its plain terms, requires that searches and seizures be reasonable, not that they all be pursuant to warrants (which Amar shows were strongly disfavored during the founding era). The amendment contemplates, where this rule is violated, traditional tort-law remedies against officers committing common law torts (Inspector Harry Callaghan committed a number of them), by removing the defense of “official authority” where a search or seizure was unreasonable. The presence of a warrant is a strong argument for reasonableness, but not an absolute one. The absence of a warrant takes away from the officer the potential immunizing effect of a warrant for what would otherwise be ordinary torts. For Amar, the amendment might further contemplate, in modern times, equitable or even criminal remedies directed against the offending officer (such as the DA’s allusion to the possibility of criminal prosecution for assault). But the amendment never requires, of its own force, exclusion of probative physical evidence. Thus, the rifle is admissible evidence, along with anything else Harry found in Scorpio’s room (pp 1-45).

Furthermore, the Fifth Amendment privilege against self-incrimination is a peculiarly trial-oriented, testimonial privilege of a criminal defendant not to have his own utterances used
against him at trial if those utterances were compelled (physically, psychologically, or by judicial process). But it does not require exclusion of reliable physical evidence—“fruits”—obtained as a result of such (inadmissible) compelled utterances. Although Amar accepts Miranda (somewhat inexplicably—a point I will develop at length presently), the result of his exposition of the Fifth Amendment privilege is that Scorpio’s statement of the girl’s whereabouts is inadmissible, but the body itself is admissible evidence (pp 46-88). That gives the District Attorney the gun (linking Scorpio to earlier killings) and the body, along with Callaghan’s testimony about everything except Scorpio’s statement as to where the girl’s body can be found. (As for deterring police brutality, Amar would again repair to tort law remedies and the Fourth Amendment’s prohibition of unreasonable searches and seizures of persons, rather than transform a limited testimonial privilege into an engine for judicial regulation of police practices. It is the Fourth Amendment, not the Fifth, that limits the third degree.) (pp 68, 87-88).

What about Scorpio’s plea for a lawyer? The Sixth Amendment, Amar argues, is about protecting the innocent and seeking the truth, through fair, speedy, and public trials, the right to confront adverse witnesses and the right to call one’s own (pp 89-144). (His textual explication of the two Sixth Amendment “witness” clauses and, indirectly, of the right to “compulsory” process, reinforces his argument for a narrow reading of the Fifth Amendment privilege not to be “compelled” to “be a witness” against oneself.) (pp 93-94). The right to the assistance of counsel exists to effectuate these other Sixth Amendment rights, all for the sake of protecting innocence (including the “innocence” interest in not being held to a higher degree of culpability than warranted for one’s wrongful acts). Guilty folk might incidentally benefit from the Sixth Amendment’s rules, but that is not the point of the rules. The point is permitting the accused to vindicate his innocence, by according him the procedural weapons with which to do so. Extending somewhat beyond that, the right to counsel provides for a balance of power in the courtroom (which, again, can be seen as innocence-protecting).

But none of these rights, properly construed, gives the accused an entitlement to exclude probative evidence, or to avoid criminal responsibility because of the errors of others (as opposed to obtaining tort law relief for unjustified restrictions on liberty or impairment of reputation, argues Amar, reprising his Fourth

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2 See text accompanying notes 37-51.
Amendment theme). Still less does the right to counsel entitle the accused to use the services of a lawyer for the purpose of thwarting the truth-seeking functions of a trial and of pre-trial proceedings, such as by presenting, arguing, or turning a blind eye to perjured testimony, a point with important implications for legal ethics. Finally, the right to counsel, along with all other Sixth Amendment rights, attaches only when the individual stands “accused” (for which the Fifth Amendment requires a grand jury indictment, for capital or “otherwise infamous” crimes). Judge Bannerman of the appellate court notwithstanding, nothing in the Sixth Amendment gives Scorpio a right to a lawyer while Inspector Callaghan steps on Scorpio’s wounded leg to learn the location of the dying girl. Whatever evidence is otherwise admissible consistent with the Fourth and Fifth Amendments is not rendered inadmissible by Dirty Harry’s failure to honor Scorpio’s request for a lawyer.

These conclusions are, to the academic criminal procedure establishment, absolutely outrageous. And they have been greeted with expressions of outrage, anger, and fits of intemperateness befitting the vigor and rigor of Professor Amar’s assault on that establishment. (The book is a collection and slight re-editing of Amar’s earlier articles on the Fourth, Fifth, and Sixth Amendments, and of short essays on juries and remedies, and have thus been a central part of the academic debate for several years already.) Amar, who comes at the field from the perspective of a broad-gauged constitutional law scholar, not that of a criminal law practitioner turned academic, argues that “the 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” (pp ix-x). And his conclusions are backed up by an impressive mastery of textual analysis, constitutional structure, constitutional history, constitutional precedent (including

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Amar has written several other articles on constitutional criminal procedure (see, for example, Akhil Reed Amar and Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum L Rev 1 (1995); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L J 1807 (1997)), but the three “First Principles” articles that comprise the bulk of this book are the ones that have defined the debate between Amar and his critics.
precedent with deeper roots than the 1960s), constitutional remedies, and simple logic.

Amar has hit them where they live. While his analysis is vulnerable at several junctures—chiefly, in my view, where he tries to defend his left flank and so fails to follow his methodological premises to their proper conclusions—he has the establishment dead to rights on questions of interpretive methodology. The Constitution—the words of the text, the historical understanding of those words, their structural, logical, and linguistic relation to one another and to larger constitutional principles—does not support anything at all resembling the regime of "constitutional criminal procedure" under which we now suffer. Dirty Harry's basic instinct was right. He just needed the constitutional scholarship of Akhil Amar to cover his back.

My goal in the remainder of this review is twofold. First, in Section III, I analyze the impact of Amar's scholarship on the methodologies and ideologies of constitutional criminal procedure, concluding that Amar brings an important methodological corrective to present criminal procedure scholarship—one that the academic criminal procedure establishment rightly finds threatening, and to which it has responded, predictably, with more ferocity than persuasiveness. Second, in Section IV, I argue that, in at least one respect (the Fifth Amendment privilege against self-incrimination), Amar's analysis misfires—but not in the direction his critics think. Amar's own methodology and evidence better support the yet more radical conclusion that the privilege is not triggered by police interrogation in any form, but only by formal judicial compulsion backed by force of law, suggesting that the Supreme Court's truly serious doctrinal errors are its decisions in *Miranda v Arizona*\(^4\) and *Griffin v California*,\(^5\) not the relatively peripheral issue of the scope of "immunity" required to satisfy the Fifth Amendment.

III. SUDDEN IMPACT: THE GENERATIONS, METHODOLOGIES, AND IDEOLOGIES OF CRIMINAL PROCEDURE

Professor Amar’s entry into the field of constitutional criminal procedure, beginning with his article on the Fourth Amendment in 1994 (now Chapter One of the book), has had a dramatic and immediate effect on legal scholarship in this area, reinvigorating the debate by launching a frontal assault on its most fundamental premises. Amar has joined a small cadre of under-forty

\(^5\) 380 US 609 (1965).
scholars who have brought new excitement and interest to this area: Paul Cassell at Utah, Donald Dripps at Illinois, Nancy King at Vanderbilt, Tracey Maclin at Boston University, Carol Steiker at Harvard, Bill Stuntz at Virginia, Ron Wright at Wake Forest. What had been a relatively stagnant discussion, nibbling at the margins of small doctrines, counter-doctrines, and sub-doctrines, has been rocked by Amar’s challenge to the principles that had framed the debate for thirty years or more.

Amar’s approach, both in its method and in its results, is a major challenge not only to the Supreme Court’s body of caselaw, but also to the prevailing academic orthodoxy about the Fourth, Fifth, and Sixth Amendments, an orthodoxy that has reigned since the Warren Court’s criminal procedure revolution during the 1960s. That revolution, both in the courts and in the academy, has shown remarkable resilience in surviving the personnel changes of the Burger and Rehnquist eras. The dominant paradigm of constitutional criminal procedure today uses the specific provisions of the Fourth, Fifth, and Sixth Amendments as springboards for an active, affirmative judicial role in reforming criminal procedure practices to protect the rights of criminal defendants and meet the perceived needs of contemporary society to be free from police tyranny (on the one hand) and from rampant, unpunished criminal activity (on the other).

While the Burger and Rehnquist Courts chipped away at the margins of the Warren Court’s criminal procedure revolution, they did not mount a truly serious assault on its essential methodological premises. The different generations of the Court simply had different perceptions of how to balance the various needs of society with the interests of criminal defendants, and of how these amendments might best be interpreted to serve those needs. The Warren Court emphasized defendants’ rights as the most important, unaddressed policy concern. The Burger Court emphasized, as a counterweight, the needs of society for “law-and-order.” The Rehnquist Court has continued the same instrumentalist project as the Burger Court, but with less division, less opposition, and (consequently) less enthusiasm.

The interpretive methodology, however, has remained largely the same: an emphasis on policy and practicality, and on inferences and extrapolations from the text, in the service of (differing views of) outcomes thought to contribute to a sound and just criminal justice system. In this area of constitutional law, however, there has been a relative lack of interest, consistent over time and across ideological divides, in constitutional text, historical subtext, or the larger context of the document as a whole.
Critics of the Warren Court charged it with “judicial activism” in this area (among others), for disregarding precedent and pushing its own policy agenda. Critics of the Burger and Rehnquist Courts (typically, defenders of the Warren Court’s product) have leveled essentially the same charge. And both groups of critics have been right. The intense sniping at the margins has camouflaged a large and ironic area of agreement on method: William Rehnquist looks like a right-handed William Brennan, not a different breed of animal.

While constitutional law in general has enjoyed over the last half-generation (or suffered, depending on your view) an intense resurgence of debate over the primacy of text, original intention, and constitutional structure, criminal procedure has been an enclave largely removed from this debate. In part, this may be attributable to the fact that “criminal procedure” and “constitutional law” are kept in separate rooms of the (now-)traditional law school curriculum. The Warren Court criminal procedure revolution essentially gave rise to its own discrete discipline and its own distinct law school course. None of the major constitutional law casebooks any longer contains extended discussion of the Fourth, Fifth, and Sixth Amendments as subjects of constitutional law study in their own right. And why should they? Those topics are covered elsewhere in the curriculum—in massive casebooks (like the Kamisar, LaFave, and Israel tome) reflecting the explosion of caselaw in this area in the last thirty-five years.

A half-generation ago, things were different. Paul Freund’s popular Harvard casebook, in its 1967 (third) edition, used by many law students in the late 1960s and 1970s, discussed the Fourth, Fifth, and Sixth Amendments, just as it discussed the First, as an important chunk of constitutional law material, taking up more than two hundred pages of the text. The 1970 version of Gerald Gunther’s famous casebook (then still “Gunther and Dowling”) devoted well over a hundred pages to the subject as well, including a full chapter entitled “Procedural Rights in the Administration of Criminal Justice” that addressed search and seizure, the Fifth Amendment privilege and Miranda, the right to counsel, fair trial, confrontation clause rights, double jeopardy, cruel and unusual punishment, and excessive bail. Kamisar, La-

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Fave, and Israel’s massive *Modern Criminal Procedure* casebook did not appear on the scene until 1965, quickly needed another edition by 1966, and did not reach full bloom until its third (1969) and fourth (1974) editions. By 1980, its fifth edition engulfed 1635 double-columned pages. Meanwhile, Gunther’s 1980 *Constitutional Law* casebook had whittled its discussion of criminal procedure to just twenty-five pages, addressed almost exclusively to the issue of “incorporation” of Bill of Rights provisions by the Fourteenth Amendment. The Freund book followed the same pattern. The preface to the 1977 (fourth) edition was explicit about the change:

This expansion [of other material], together with the inclusion of recent decisions, has obviously required some countervailing compression . . . . Partly this has been accomplished through . . . a substantial reduction in the coverage of the guarantees of criminal procedure. The latter topic, which is dealt with in courses on criminal law, has been retained insofar as it raises problems of federalism.

Gerald Gunther had formally announced a similar retreat in 1975.

Following the division of subject matter, there has been (by and large) a division of legal scholars. With few exceptions, criminal proceduralists are not broad-gauged “constitutional law types.” They are, by and large, civil libertarians, former criminal prosecutors and defense attorneys, and those with interests in the criminal justice system. They are (usually) not constitutional generalists or big-picture constitutional theorists. At the same time, constitutional law scholars have become largely content to leave this separate province alone. It is taught by criminal procedure “specialists.” After all, the subject is no longer covered in the

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11. Gerald Gunther, *Constitutional Law: Cases and Materials* xx (Foundation 9th ed 1975) (“Over the years, some areas once staples of constitutional law courses have developed such an identity and complexity of their own as to warrant treatment as separate disciplines. What was once the fate of administrative law, for example, has now become appropriate for the constitutional requirements of criminal procedure. Some samples of those developments are retained, for the light they throw on the general evolution of due process standards and the incorporation controversy; but full treatment of the details is left to other courses.”).
Dirty Harry constitutional casebooks. Besides, it has become a world of technical rules: rules for bottles; rules for bottles in jackets; rules for bottles in jackets in cars; rules for bottles in jackets in trunks of cars; rules for bottles in jackets in trunks of cars that are moving, that were stopped for traffic violations, or at checkpoints, or during emergencies, or incident to arrest. Big Think constitutional law theorists have no use for such arcana. Accordingly, the Fourth, Fifth, and Sixth Amendments have come to be treated by mainstream constitutional law scholarship as backwaters; and, returning the compliment, the field of criminal procedure seemingly has ignored, or dismissed, the important methodological debates within constitutional law as just so much irrelevant, impractical nonsense. The two distinct schools of scholars never swim in each other’s streams and have little regard for each other’s work.¹²

Enter Akhil Amar. Professor Amar is, first and foremost, a big-picture constitutional law scholar and theorist. He does not come at criminal procedure as a criminal proceduralist. He has not practiced criminal law and procedure, from either side. He is neither a partisan of the Warren Court criminal procedure revolution nor a law-and-order conservative. (Politically, Amar is a moderate-to-liberal Democrat.) Instead, Amar came to the field of criminal procedure along a road less travelled: structural (as distinguished from rights-focused) constitutional law.

Amar’s early scholarship focused on structural features of the Constitution—Article III and federal jurisdiction, sovereign immunity, federalism.¹³ His intriguing 1991 article, *The Bill of Rights as a Constitution*,¹⁴ focused on the structural aspects of the Bill of Rights, pressing the theme that the Bill of Rights is itself a

¹² Professors J.M. Balkin and Sanford Levinson have noted that the regrettable effects of such a division work both ways: just as criminal procedure specialists tend to treat the Fourth, Fifth, and Sixth Amendments “not as constitutional law issues but as administration of justice issues,” constitutional law scholarship suffers from omission of relevant discussions from Supreme Court cases involving these provisions, from a perceived “shrinking of the Bill of Rights,” and from the loss of “the sense of a Bill of Rights whose component parts are interrelated with each other.” J.M. Balkin and Sanford Levinson, *On the Notion of Canonicity* 36 (unpublished manuscript on file with U Chi L Rev).


“constitution”—that is, a continuation of the 1787 Constitution’s essentially structural project of dividing power among various institutions (adding press, church, militia, and juries to the original Constitution’s legislative-executive-judicial trinity of powers), not simply a catalogue of discrete, unrelated individual rights. Amar’s analysis of the Fourth, Fifth, and Sixth Amendments—the project that has culminated in The Constitution and Criminal Procedure—is an outgrowth of that earlier project of thinking about “The Bill of Rights as a Constitution.” That 1991 article contained a short prototype of the Fourth Amendment analysis that eventually grew into Chapter One of Amar’s book. It also contained an extensive discussion of the centrality of criminal and civil juries in the overall structure of the Bill of Rights, an insight that ripened into the final chapter of Amar’s book, the “appendix” on reforming the jury (pp 161-78). Thus, unlike most academics writing in the area of criminal procedure, Amar seems less to have chosen the field than to have gravitated toward it, almost unintentionally, as a consequence of broader interests in the overall structure, logic, and cohesiveness of the Constitution as an integrated political and legal document.

Amar’s book reflects that path and those broader interests. The book is, in a sense, not merely about search and seizure, self-incrimination, and the rights to trial, jury, and counsel, but also about the proper understanding of those specific rights within the broader scheme of liberty and institutional checks created by the Constitution. The approach is marvelously original—yet faithfully originalist, in that it seeks to reclaim original meaning(s) lost through generations of disuse or misuse. Amar’s approach yields stunning insights, ignored by more “mainstream” criminal procedure scholarship, into the history, original meaning, and contemporary (mis)application of the Fourth, Fifth, and Sixth Amendments. In so doing, Amar’s scholarship has quite thoroughly enriched our understanding of these provisions.

Amar’s work, however, does not start from the same ideological premise as nearly all previous scholarship about criminal procedure since the Warren Court revolution. Most notably, it does not focus on, or emphasize, the rights of the individual criminal defendant. It is not clear whether this is a true blind spot in Amar’s scholarship; he appears simply to wish to emphasize that

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10 See id at 1175-81. At one point in the “Bill of Rights” article’s discussion of the Fourth Amendment, Amar credits me for one of his formulations about the relationship between the Warrant Clause and the Reasonableness Clause. Id at 1180 n 218. I am honored that this is the one and only part of his earlier discussion that Amar explicitly repudiates in his book. See p 181 n 8.
which has been neglected. And he does emphasize different, neglected aspects of individual rights—the right of innocent citizens to effective remedies for unreasonable searches and seizures, undistorted by the effects of the exclusionary rule; the right of innocent defendants to vindication through effective rights of compulsory process and confrontation, undistorted by a guilty witness’s privilege against self-incrimination; the right of citizens in general to serve on juries and vindicate the rights of others; the right of the public to be safer from crime.

In shifting the emphasis, however, Amar has provoked a veritable barrage of sharply critical—even hostile—attacks from scholars defending the existing Warren/Burger/Rehnquist paradigm. Some of the attacks have been measured and sophisticated. Others have been less so, bordering on the personal and hysterical. In some ways, the fact of the counterattacks, and their occasional vehemence, should not be surprising. In a sense, Amar has launched an (imperialistic?) attack on Criminal Procedure as a separate subject of legal scholarship, attempting to re-capture that field for Constitutional Law’s empire. In doing so, he has denounced practically everything ever written by the most important leaders of the (separatist?) criminal procedure academy. The tone of the counterattacks sometimes has had the feeling of the impassioned rhetoric of a resistance movement directed at an evil, invading army, as if Amar’s scholarship were the moral equivalent of the Anschluss. Amar is a newcomer to criminal procedure; worse, he is a (mildly) disrespectful interloper, who is not shy about claiming that he has “elegantly solved” perennially thorny constitutional problems (p 76). Who is this Yale constitutional-law parvenu who thinks he can waltz into the field


17 H. Richard Uviller, Book Review, The Lawyer’s Bookshelf, NY L J 2 (April 18, 1997). Professor Uviller’s review calls Amar an “academic exhibitionist” whose “penchant for careless outrage is annoying.” Id. The nicest thing Uviller has to say is that Amar has “a respectable employer (Yale University Law School),” id—itself a dubious observation. I address some of Uviller’s other errors presently. See text accompanying notes 19-21.

Other scholarly attacks on Amar have been quite harsh, but less vitriolic and personal. See, for example, Yale Kamisar, On the “Fruits” of Miranda Violations, Coerced Confessions, and Compelled Testimony, 93 Mich L Rev 929 (1995); Donald A. Dripps, Akhil Amar on Criminal Procedure and Constitutional Law: Here I Go Down That Wrong Road Again, 74 NC L Rev 1859 (1996); Tracey Maclin, When the Cure for the Fourth Amendment is Worse than the Disease, 68 S Cal L Rev 1 (1994).
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of criminal procedure, without having practiced law a day in his life (let alone criminal law), and turn the whole field on its head with three articles in three years?!\(^{18}\)

The answer is that Amar is a constitutionalist with a distinctive methodology, powerful on its own terms, that poses a genuine threat to the criminal procedure establishment. Amar’s project largely succeeds—on its own terms. The main question separating Amar from his critics—and it is a huge chasm that divides them—is whether those are the terms on which the debate should be waged. Much of the academic counterattack on Amar can be seen as a concerted attempt to defend a paradigm—the Warren Court paradigm—against an invading interpretive methodology. But the counterattacks frequently misfire in their attempts to characterize and critique Amar’s methodology, in part because Amar’s method is not easy to pigeonhole into two-dimensional portraits of “textualism” or “original intent.” The critics, perhaps because they are criminal proceduralists rather than constitutionalists, at times seem unable (or unwilling) to grapple in a thoughtful way with questions of interpretive methodology.

Consider, for example, the critique offered by Professor Richard Uviller.\(^9\) Uviller writes simply: “Claiming affinity with Justices Hugo Black and Antonin Scalia, Amar is a textualist” and clumps Amar with “his mentor Scalia.”\(^8\) This is absurd reductionism. Mistaking Akhil Amar for Justice Scalia is a little like mistaking Stephen Breyer for Robert Bork. I suppose if one is standing far enough out in left field and has an insufficiently powerful lens (or just isn’t trying very hard), they all look pretty much the same. But that is not the kind of mistake serious constitutional scholars would make. Amar is many things, but he’s no Antonin Scalia.

Actually, the difficulty is that Amar is many things. The passage from which Uviller probably draws his absurd reductionism is contained in a footnote early in Amar’s Fourth Amendment chapter, where he notes his methodological ecumenism and how it draws on the views of a wide range of justices. “In trying to take constitutional text and history seriously, I follow the lead of Jus-

\(^{18}\) For a mild variant of this attitude, see Dripps, 74 NC L Rev at 1561 (cited in note 17) (“The recent entry into the criminal procedure field of Akhil Amar, the brilliant, quirky Yale constitutionalist, is a signal development.”). Compare Dershowitz, Slate (cited in note 16) (Amar’s “absence of hands-on experience with our current criminal-justice system—his lack of feel for how it actually works—puts him at a perceptible disadvantage when seeking to strike this exquisitely delicate balance [between truth and considerations of privacy or equality].”).

\(^9\) Uviller, NY L J at 2 (cited in note 17).

\(^8\) Id.
tices Black and Scalia," Amar writes (p 179 n 4). But he goes on in the same footnote to connect up his method with pronouncements from Justices Stevens, White, Jackson, Stewart, Marshall (both John and Thurgood), Blackmun, Harlan (the younger), and Brennan as well. Amar explicitly embraces critical race theory and feminism as aids in understanding what should constitute constitutional "reasonableness" under the Fourth Amendment—an idea that does not exactly resonate with Scalia's jurisprudence, at least not in any judicial opinion or article I can recall. Elsewhere, Amar appeals to the "spirit" of constitutional language and to premises "plainly presupposed" by language that does not precisely say what (he infers) seems to be implicit. He explicitly distinguishes between his "plain-meaning approach sensitive to letter and spirit and, on the other hand, wooden literalism" (p 132).

Amar is a textualist in the broad sense that he takes text seriously, seeks to interpret a provision (where fairly possible) in a manner that makes sense of its actual wording, and as a rule abjures anti-textual methodology that would lead to interpretations affirmatively contrary to the words employed. As others have recognized, this is textualism of a sort, but it differs in important respects from the approaches of others for whom that label would be far more apt. But Amar is not a textualist if by that is meant that his interpretive method is limited by the words of the text. (Indeed, I argue below that Amar is far too willing to countenance atextual arguments for certain activist judicial interpretations of the Fifth Amendment.) Amar looks liberally—sometimes too liberally—to other sources of constitutional meaning besides text: history, constitutional structure, precedent, and even policy. He does, however, have a fairly clear hierarchy concerning the relative authority of these sources (essentially, the

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21 Uviller has a strange take on Amar's discussion of the insights of feminism into what constitutes "unreasonableness" in a government search. Amar employs examples of searches that might be especially unreasonable because of their sexually harassing or intimidating circumstances, or because of gender differences between the searcher and the searched (p 38). (Amar makes much the same point with respect to race, at p 37.) Uviller seems to miss the point entirely and instead comes irresponsibly close to implying that Amar's examples reflect personal perversity. Uviller, NY L J at 2 (cited in note 17). This kind of personal attack has no place in serious discussion of serious constitutional issues.

22 See also p 94 ("A sensible Sixth Amendment jurisprudence must begin with plain meaning, but it must not end there.").

order just listed), and an implicit set of rules concerning when it is appropriate to move down the hierarchy from one source to the next. In this sense, Amar is better described as a practitioner of a holistic “constructivist coherence” method.24

As a somewhat eclectic, yet disciplined, constructivist coherence interpreter, Amar takes text very seriously indeed and requires an especially convincing argument from history, constitutional structure, precedent, or policy to rebut what seem to be straightforward readings of straightforward texts. When history confirms the presumptive plain meaning of a plain text, Amar stands ready to close the door, but still leaves it open a crack in case an especially compelling structural, policy, or pragmatic argument suggests a different result.

Similarly, where text alone fails to supply a clear answer—that is, where a word or phrase is susceptible to a range of linguistically faithful interpretations—Amar looks first to history for insights as to which understanding might be preferable. Amar is no serf to “original intent,” but history matters. Indeed, even a seemingly straightforward provision must be interpreted in a way that is sensitive to the historical context in which the provision was enacted and to what folks at the time thought the provision meant and how they intended it to operate. Significantly, though, when searching through history for guidance in interpreting a legal text, the search parameters—what constitute relevant data, the use to which that data can be put—are established by the constraints of the text, the meaning of which the historical data is supposed to help enlighten (not replace). History, used in aid of constitutional interpretation, is only relevant to the extent that it coheres sensibly with constitutional text. It may not supplant or contradict the text. If it does, it is interesting history, but reliance thereon is bad constitutional law. The framers and ratifiers adopted a legal text, not a history.25 Some commentators who


25 Scholarly criticisms of “law office history” frequently miss the mark on this point. Often, such criticisms fall into a form of parochial pseudo-intellectual snobbery that fails to consider the essentially instrumental nature of historical analysis within the enterprise of legal interpretation. (Or, perhaps, such criticisms recognize the instrumental nature of historical inquiry for legal analysis, but resent it.) “Law office history” may be bad history if it means selective or partial use of history, because an incomplete or one-sided portrait is historically inaccurate. But “law office history” is bad law if it does not discriminate in identifying that part of the historical data that genuinely informs the meaning of a legal text. The historian looks at a roomful of senators and sees one hundred different nuanced views—and rightly so. The lawyer sees a law that passed by a vote of 51-49 and looks at
have challenged Amar’s historical analysis in support of his Fourth Amendment interpretation seem to have made this mistake of equating originalist interpretations of a legal text with the bare study of history per se.26

Moreover, even on their own terms, the critics’ attacks on Amar’s history fail. Amar’s presentation of the historical supporting evidence has thrown down a simple gauntlet. Amar’s dare, in essence, is the following: Show me the early state constitutional provision or amendment proposal by a ratifying state that contains a warrant requirement (or warrant “preference”) or that explicitly links the “unreasonableness” of a search to the presence or absence of a warrant. Show me a founding-era statement by a prominent (or, for that matter, obscure) framer, rati fier, anti-federalist, scholarly commentator, or judge supporting either a warrant requirement or the exclusionary rule. Show me

the arguments and explanations of those who were critical to its passage—and rightly so. Therein lies the difference. The text adopted constrains the historical inquiry to a narrower sphere of relevance—for purposes of doing legal history and legal interpretation. Legal interpretation and history have different rules of what is relevant. See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 11 (Knopf 1996) (“It is not the province of the historian to decide questions of law.”).

Those who ignore this difference employ a fairly standard strategy. First, the “law office interpreter” is accused of having ignored some of the history relevant to the general issue being considered. Second, it is argued that this history is considerably more indeterminate and ambiguous than the account relied on by the law office interpreter. (Both charges are almost always easy to support.) The next step, and the classic error, is to infer from the assertedly more comprehensive consideration of history—despite its stipulated ambiguity—some broad lesson or general principle, formulated at a fairly high level of generality, which is then read back into the legal text as if it were a determinate legal rule commanded by a determinate text. It is easy to play this trick on the Fourth Amendment, because the background history is so rich and extensive.

Professor Morgan Cloud, in his recent review of William Cuddihy’s doctoral thesis (which Cloud uses as an occasion for criticizing Amar’s use of Fourth Amendment history), falls into this pattern of error rather badly in my view. See Morgan Cloud, *Searching through History; Searching for History*, 63 U Chi L Rev 1707, 1710, 1730-47 (1996). Cloud begins by ignoring the words of the Fourth Amendment, noting instead that different theorists have read it different ways. He then notes that search and seizure history is ambiguous, that the law was dynamic and changed much over time, id at 1716-17, and that the historical data has been read in any of a number of ways, id at 1723. Next, he leaps to a high level of abstraction, finding that “[a] significant part of the historical record” supports the general principle that “the Framers acted to eliminate search and seizure methods that permitted the arbitrary exercise of discretion and were conducted without good cause, whether or not warrants were employed.” Id at 1729. Finally, Cloud reads that abstract principle back into the text of the Amendment, finding that history “supports the conclusion . . . that the Fourth Amendment rejects both warrantless general searches and general warrants as unreasonable.” Id at 1723-24. The result is unsatisfactory as legal analysis, and seems to reflect a methodology far more subject to criticism as an improper use of history than is Amar’s.

26 On Amar’s use of history, in addition to Professor Cloud’s writing (see note 25), see Maclin, 68 S Cal L Rev at 4-25 (cited in note 17); Steiker, 107 Harv L Rev at 826-28 (cited in note 16).
any Fourth Amendment case (or state constitutional counterpart) where exclusion is the remedy, anywhere in America, any time in the first hundred years of our nation's history.

Amar has thus stated, clearly and directly, what would constitute historical evidence falsifying his thesis, and challenged his critics to put up or shut up. So far as I can tell, these challenges have gone unanswered. In light of all this, it simply will not do to accuse Amar of choosing selectively from the historical record. Amar's synthesis—which makes entire sense of the Fourth Amendment text as written, which is no small feat—finds substantial historical support, and his opponents cannot find comparable historical warrant (so to speak) for the present liberal-orthodox synthesis.

Beyond text, structure, and history—but, for Amar, rigorously subject to the requirement of consistency with these criteria—lie considerations of precedent, policy, and pragmatism. Precedent is relevant to Amar, but not in the absurd sense that one can never look any further back than the Warren Court, or that one must slavishly treat the most recent Supreme Court pronouncement as equivalent to the Constitution itself. Judicial decisions must reflect and explicate the Constitution's text, history, and structure, not supplant them. Often, an earlier generation's caselaw made better sense of the text and was more consistent with the original understanding (from which it was not as far removed in time and social context) than is later caselaw.

It is thus not at all surprising that Amar's answers differ from those of the Warren, Burger, and Rehnquist Courts. Nor is it a particularly salient critique that Amar's reading is not consistent with a great deal of recent judicial precedent. That is, after

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27 Maclin's response to Amar's Fourth Amendment article offers no such evidence. Maclin, 68 S Cal L Rev 1 (cited in note 17). Cloud's argument does not address these points, but instead addresses Amar's rhetorical flourish that "juries, not judges, are the heroes of the Founders' Fourth Amendment story," Cloud, 63 U Chi L Rev at 1730 (cited in note 25), quoting Amar, 107 Harv L Rev at 771 (cited in note 3), by noting several early statutes where specific warrants were required as a predicate to a search. Cloud, 63 U Chi L Rev at 1737-43 (cited in note 25). This evidence, however, is not responsive to Amar's point-in-chief, which is that the Warrant Clause's specific requirements do not establish that warrants are invariably required for constitutional reasonableness. The text of the Fourth Amendment does not say that they are, and nothing in Cloud's historical analysis contradicts this point.

28 One of Amar's most interesting insights, attributable in part to the fact that he is a constitutional law generalist, not just a criminal proceduralist, is that a great deal of doctrinal development in criminal procedure, from Boyd to Weeks, was Lochner-era thinking and reflected Lochner-era judicial activism focused on protecting property rights and economic liberties (pp 22-25, 62).

29 That is the thrust of Professor Kamisar's response to Amar. 93 Mich L Rev 929
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all, presumably part of Amar's point in writing the book. The difference between Amar's approach and that of Professor Yale Kamisar, for example, is that they employ opposite interpretive hierarchies. Kamisar, perhaps the dean of the liberal-orthodox criminal procedure establishment, starts from the bottom of Amar's interpretive ladder—with policy premises concerning substantively desirable approaches to protection of the rights of criminal defendants, and with Warren Court precedent circa 1967 (which largely reflected these policy premises). Kamisar never works up to serious consideration of constitutional text, history, or structure. For Kamisar, it is sufficient refutation that Amar's approach to the Fifth Amendment calls into question thirty-odd years of judicially crafted reform of police practices that might not otherwise have taken place (and thirty-odd years of academic criminal procedure scholarship that has worked within that paradigm). For Amar, however, Kamisar's refutation is insufficient because it does not seriously wrestle with the text, history, and structure of the Constitution.

Professor Donald Dripps attacks Amar's Fourth Amendment analysis on somewhat different grounds. Dripps's critique consists essentially of three propositions. First, Dripps contends that Amar's theory is not entirely original, but is similar to views advanced by Telford Taylor and Richard Posner. (This is true, and Amar credits Taylor and Posner with important contributions on which he has attempted to build.) (pp 5, 179 n 5). Second, Dripps argues that Amar's interpretation must be wrong because it was not embraced when Taylor or Posner advanced earlier versions of it. Third, Dripps criticizes Amar's distinctive variant of these earlier theories—an aggressive reinvigoration of civil remedial schemes for Fourth Amendment violations, including repudiation of certain immunity doctrines—as too "politically counterfactual" ever to be adopted.

Dripps's critique is unimpressive, primarily because it seems so unresponsive. If Amar is right, it is no rebuttal to his argument about constitutional meaning that it is "politically counterfactual" or that earlier variants of the argument have not (yet) taken hold with the courts. Sure Amar's position is politically

(cited in note 17).


Dripps, 74 NC L Rev 1559 (cited in note 17).


Dripps, 74 NC L Rev at 1620 (cited in note 17).
counterfactual, but so what? The legal argument against *Plessy* was politically counterfactual for a good long time. An academic legal argument’s political or judicial success should be determined by its soundness, not the other way around.

Unlike some other critics within the criminal procedure establishment, however, Dripps voices a warm welcome to the incursion of constitutional theory into criminal procedure. But like Kamisar and others, he has an inverted hierarchy of what should count most in constitutional interpretation. In a revealing footnote, Dripps writes that, in their reply to Kamisar on the Fifth Amendment, Amar and his co-author Renee Lettow “fall back from precedent to text and history.”

Dripps’s remark unwittingly frames the central issue here, which is methodological: Is reliance on text and history really a “fallback” position when precedent does not support one’s preferred interpretation? Do we read legal texts through the lens of precedent and policy, first and foremost? Or do text, history, and structure constitute (as Amar maintains) the true “first principles” of constitutional interpretation, for the Fourth, Fifth, and Sixth Amendments no less than for any other constitutional provision? Amar’s critics appear to recognize the importance of his methodological challenge, but not fully to understand it on its own terms. If Amar’s method is right—if traditional principles of constitutional analysis should govern the provinces of constitutional criminal procedure—then the entire field of constitutional criminal procedure is due for an overhaul. That indeed is the burden of Amar’s book, and it is a burden he largely succeeds in bearing.

**IV. THE GOOD GUYS, THE BAD GUYS, AND THE UGLY FIFTH AMENDMENT**

If there is a chink in Akhil Amar’s text-history-structure-coherency armor, it is in his analysis of the Fifth Amendment privilege against self-incrimination. His reinterpretation of the self-incrimination clause is brilliant, packed with insights, makes a certain amount of good, practical, common sense, and is in virtually every way superior to present doctrine and mainstream scholarly analysis. But it is almost surely wrong—not, however,
for the reasons his liberal critics suggest, but because he does not go far enough in correcting judicial overreading of the scope of the privilege.

For the same reasons that Amar’s account of the Fourth Amendment is so compelling—it takes the text seriously and gives each clause its common and original understanding, presenting a holistically sound and sensible interpretation—his account of the Fifth Amendment feels incomplete and unconvincing. The problem seems to be that Amar very badly wants to make good policy sense out of the constitutional privilege against self-incrimination and to make that policy cohere with the Sixth Amendment’s emphasis on procedural protections designed to vindicate the innocent and assure reliable convictions. But it simply cannot be done with the words the framers left us. The Fifth Amendment means what it says and what it says is fairly ridiculous, at least to modern sensibilities.

Briefly stated, Amar’s central thesis is that the Fifth Amendment privilege (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”) should be understood to bar the introduction at an accused’s criminal trial of his compelled testimonial communications, but not of the non-testimonial evidentiary “fruits” resulting from such communications. (Thus, in the Dirty Harry scenario, the dead girl’s body is admissible physical evidence. The only thing excluded is Scorpio’s incriminating statement saying where she was buried.)

Amar accepts, however, the standard, Warren Court-era notion of what constitutes Fifth Amendment “compelled” testimony and thus does not challenge court-imposed restrictions on police stationhouse interrogation (Miranda\footnote{Miranda v Arizona, 384 US 436 (1966).}) and on prosecutorial comment at trial on a defendant’s silence (Griffin\footnote{Griffin v California, 380 US 609 (1965).}). Indeed, Amar would be willing to allow courts to expand Miranda. His testimony-excluded-but-fruits-admitted rule would permit, in his view, a “civilized alternative” to police interrogation in the form of formal, under-oath depositions of suspects before magistrates, under pain of contempt. (Amar’s models here are grand jury testimony and civil discovery.) (p 70). A suspect invoking the privilege could not have his verbal statements introduced against him at a criminal trial, but any derivative evidence would be admissible, giving the police the more reliable evidence they really want (in Amar’s view). In return, though, “a deposition approach would limit abusive police tactics.” Amar continues:
The basic insight uniting pre-Warren Court voluntariness cases like Brown v. Mississippi and Warren-era landmarks like Miranda and Escobedo would be preserved and strengthened: we need to rein in unsupervised police officers who might be tempted to abuse suspects. The best way to do this is to shift interrogation from police stations to magistrates’ hearing rooms (p 76).

The vice of Miranda, according to Amar, is that the Court failed to require the use of lawyers, magistrates, and recorders—and from a civil libertarian perspective, this has been its undoing. Miranda also failed to create strong incentives for suspects to talk and to tell the truth—and from a crime control perspective, this has been its undoing. The deposition model would combine both perspectives: the suspect would be protected from abuse and intimidation but must answer truthfully (p 76).

With all due respect, the deal Amar offers is almost embarrassingly naive (in addition to being judicially activist). If the analogy is to civil discovery, police questioning is more akin to ordinary witness interviews, outside the discovery process, not formal depositions. Such interviews would not disappear with the advent of an additional, formal “discovery” process. If unsworn confessions and incriminating statements are useful law enforcement tools (and they are), police will continue to conduct stationhouse and squad car interrogations. If the concern is that such questioning is inherently coercive, such coercion will con-

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39 In fairness, Amar concedes that “[o]n the other hand, more relaxed schemes are also compatible with the testimonial immunity approach” and goes on to sketch what those alternative regimes might look like (p 77). It is thus not entirely clear whether Amar thinks that Miranda, or something like it, is constitutionally required. He straddles the fence on this point: “The [existence of a] range of possible police station schemes compatible with testimonial immunity is hardly unique or embarrassing. Rather, it reflects the fact that the self-incrimination clause historically addressed formal testimonial compulsion in judicial settings . . . “ (p 77). In a moment, I will set forth an alternative theory of the Fifth Amendment based precisely on this last point—that the privilege is concerned with requiring a person to be a witness against himself, under the compulsion of formal judicial process. Where I differ with Amar is in his willingness to extend the privilege to “the informal compulsion of the modern police station,” and to countenance “creative adaptation of Founding principles” in order to achieve this result (p 77).

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tinue to exist—unless the courts impose some sort of Mega-Miranda rule prohibiting police questioning, as a rider to Amar's civilized deposition. That, of course, would be every guilty suspect's (and his lawyer's) fondest dream—not to mention a wildly atextual invention that would make Miranda look like a model of judicial restraint. The suspect would surely be entitled to consult with counsel prior to Amar's civilized deposition. The incentives to lie will still exist by virtue of Amar's rule concerning admissible fruits. (The suspect will promptly be informed of this rule by competent counsel, creating greater temptations to unethical lawyering in the form of a “lecture” on the implications of the new use-fruit rule, verging on counseling the client to lie.) Anyone who has ever taken a “civil(ized) deposition” knows what happens when an intelligent adverse witness has been “prepped” by counsel.

Police will soon enough see this coming, and will do everything possible to circumvent Mega-Miranda and the civilized deposition. If one is concerned about abusive interrogation techniques, those will simply get pushed back earlier in the process, before the suspect is fully a “suspect” or before he is in “custody.” It simply does not seem realistic to think that “the use of depositions and pretrial judicial examination would curb the temptation to police abuse” (p 87). It seems equally likely to exacerbate it, relocate it, or simply leave it unchanged.

I would nonetheless accept Amar's proposal if it convincingly followed from the text, history, and structure of the Fifth Amendment. The Miranda expansion plainly does not, however, and on this point Amar is not being true to his text-history-structure principles. This is all the more disappointing because the rest of Amar's Fifth Amendment analysis—specifically, his central thesis that the privilege does not protect a defendant against compelled production of nontestimonial incriminating evidence—has much to commend it as a matter of text, history, structure, and even precedent. The key word of the text for Amar is “witness.” Drawing from the comparable and parallel usage of the word “witness” in the Sixth Amendment’s Compulsory Process and Confrontation Clauses, Amar argues that being a “witness” is about testifying—about words—and not about physical

41 Amar rightly criticizes such a conception of the right to counsel in his Sixth Amendment chapter (pp 141-44). 42 In his dissent in Miranda, Justice Harlan noted that rules designed to check police abuse can readily be circumvented by one intent on doing so, 384 US at 505 (Harlan dissenting) (“Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers.”).
evidence. He notes that the language of the Fifth Amendment differs from earlier state constitutional forbears in this respect, which more broadly protected a right of the accused not to be compelled to "furnish evidence" against himself.43

The key historical fact for Amar is that prior to 1892 the widespread rule in America concerning what evidence must be excluded in order to satisfy the Fifth Amendment (and state counterparts) was testimonial immunity, not use-plus-fruits exclusion.44 Indeed, Amar argues that it was "hornbook law as late as 1960"—and that it always was and remains the rule in England and Canada—that courts would not exclude fruits of compelled confessions (p 225 n 238).

Amar offers a related structural insight in support of his narrow reading of the privilege. If the rule is that any governmental compulsion of testimonial communications requires immunity from use of those statements plus immunity from evidentiary fruits derived from the statements, state governments may essentially grant significant immunity from prosecutions by other states and by the federal government, a result possibly violating structural principles of interstate comity and federalism (p 78). There may be a correlative separation of powers point here as well, not noted by Amar but supported by his structural federalism argument. When Congress confers immunity in a legislative hearing or investigation, it impairs the executive's ability to bring a subsequent prosecution. The result may be similar, in practical effect, to a one-house or single committee veto on executive enforcement of the laws.45 These difficulties do not disappear, but they are reduced substantially, if the privilege operates to exclude only the immunized testimony itself, not derivative evidentiary facts.

Certain precedents also support Amar's position. The key modern case for his analysis is Schmerber v California,46 a once-controversial (5-4 at the time) 1966 Warren Court case that is universally accepted today. Schmerber upheld against Fourth and Fifth Amendment challenge the taking of involuntary blood samples from the accused, and has been extended to involuntary fingerprinting, handwriting and voice exemplars, and lineups.

43 See pp 82, 227 n 247 (citing the Massachusetts Constitution of 1780 ("furnish evidence against himself") and the Pennsylvania Constitution of 1776 ("give evidence against himself").
44 In 1892, total ("transactional") immunity suddenly became the norm, under the rule of Counselman v Hitchcock, 142 US 547 (1892). See pp 57-58.
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Schmerber is the origin of the Court's doctrine that the privilege only applies to "evidence of a testimonial or communicative nature." For Amar, if Schmerber is right—and it has to be right, Amar argues, or absurd impairments of law enforcement follow—then logically the Fifth Amendment privilege must not exclude fruits of compelled testimony either. The general principle for which Schmerber may be seen to stand, Amar argues, is that a criminal suspect can indeed be compelled to furnish evidence against himself. Thus, compelled statements are excluded; but compelled production of evidence—including evidence obtained through compelled statements—does not violate the privilege.

Finally, Amar argues that his reading is necessary to make the Fifth Amendment cohere with the Sixth—in particular, with the Sixth Amendment right of an accused to compulsory process for obtaining witnesses in his favor. If the Fifth gives a (guilty) witness a right to refuse to testify in someone else's case, it deprives an (innocent) accused of his Sixth Amendment right to mount a defense by compelling witnesses to speak. This just cannot be right, Amar maintains, as it produces an upside-down world in which the guilty bad guy's right of silence trumps the innocent but indicted good guy's right to vindication, explicitly protected by the Compulsory Process Clause. The alternative is that the witness must be given (if the prosecution agrees—Amar notes the inequity of power in this regard (p 50)) an "immunity bath" so thorough as effectively to prevent the prosecution from subsequently prosecuting the guilty witness for his crimes. The no-exclusion-of-use-fruits principle, Amar argues, solves this dilemma: The innocent defendant can compel the guilty witness to testify, and only the statements themselves are excluded from the guilty witness's subsequent trial; all fruits derived from such statements are admissible. The accused's Sixth Amendment rights are protected without enabling conspiring mobsters to give each other immunity baths. Similarly, governments may grant testimonial use immunity in exchange for compelled legislative, grand jury, or trial testimony, without impairing too greatly the ability to prosecute the witness for his crimes.

47 Id at 761.
48 See p 67:

Though decided by the slimmest of margins in 1966, Schmerber is an absolutely central case today—the rock on which a great many cases and a considerable amount of crime detection policy have been built. Can anyone now imagine even a single Justice voting that government may not use an arrestee by forcing him to submit to photographing, fingerprinting, and voice tests whose results may be introduced in a criminal court?
These are good arguments—very good arguments—but not quite overwhelming ones. Significantly, however, at most these arguments justify abolishing Fifth Amendment “fruits” exclusion; they do not justify Amar’s (over)compensating Miranda expansion on the other side of the ledger—which has more the feel of an appeasing bone thrown to the potentially offended liberal criminal procedure establishment than of genuine textual, historical, or structural constitutional analysis. What really seems to drive Amar’s analysis on the stationhouse interrogation issue is his big-picture notion that the way to rationalize the privilege is to take one strand from its several, tangled historical justifications and weave it into the central animating principle behind the privilege. That principle, for Amar, is a central concern with the unreliability of compelled testimonial statements (but not derivative evidentiary fruits).

49 For example, as a textual matter: The idea of being a “witness” plausibly could mean, in both the Fifth Amendment and Sixth Amendment context, any person who presents testimony or physical evidence under oath to a judicial tribunal (or whose earlier such sworn representations are subsequently introduced in court). “Witnessing” might well involve more than simply testimonial communications. Wigmore and others thought that the difference between “furnish evidence against himself” and “be a witness against himself” were not substantive but stylistic. (Amar, whose treatment of evidence adverse to his thesis is very fair, acknowledges this fact, at p 227 n 247.) It thus could be that the state constitutional language is evidence of the probable intended meaning and scope of the federal constitutional language, rather than a sharp contrast to it. See Michael W. McConnell, The Origins and Historical Meaning of Free Exercise of Religion, 103 Harv L Rev 1416, 1455-66 (1990) (employing the latter methodology to explicate the probable meaning of the Free Exercise Clause, which uses more spare language than its state constitutional prototypes). Amar’s discussion does not decisively repudiate this possibility.

As for precedent, the Schmerber line is plausibly distinguishable on the ground that the evidentiary “fruits” of bodily samples, physical identity, and voice and handwriting exemplars never involve any compelled testimonial communication; evidentiary fruits derived from compelled statements do.

Finally, it is entirely plausible that the Fifth Amendment privilege simply does not cohere well with the accused’s Sixth Amendment right to compulsory process for obtaining witnesses—that the Fifth Amendment privilege is at odds with the constitutional system’s usual concern for truth-seeking and the protection of innocence. (Indeed, this is the hypothesis I will advance below: the Fifth Amendment privilege is a constitutional anomaly that does not cohere well with the usual goals of the criminal justice system and with other constitutional protections for the accused, and that it imposes unjustified costs on legitimate law enforcement.)

In noting the possible counterarguments to Amar’s points, I am not saying that Amar’s conclusion is necessarily wrong on the admissibility of use-fruits. I remain uncertain on this question, and I have no answer to his historical argument that testimonial immunity was the universally accepted American rule prior to Counselman. My point here is simply that Amar’s textual and structural arguments seem more vulnerable here than in his Fourth and Sixth Amendment arguments, and that this vulnerability should leave open the possibility of a yet better “constructivist coherence” understanding of the Fifth Amendment, of which Amar’s use-fruits thesis might or might not be a component. See note 24 for a discussion of “constructivist coherence.”
This is a dubious move—sharing much in common with the “atextual-historical-principle-level-of-abstraction-manipulation” problem for which I have criticized Amar’s Fourth Amendment critics. And it is in large measure a move unnecessary to Amar’s thesis, except as an attempt to make the Fifth Amendment cohere more neatly with Sixth Amendment first principles and to justify Miranda (and Miranda-plus) and Griffin v California’s no-comment-on-silence rule. On Amar’s reading, Miranda is about the unreliability of incriminating statements produced by unsupervised stationhouse interrogation. Griffin is rightly decided because an adverse inference of guilt from failure to testify is, to Amar, unreliable; it could end up punishing those who wish not to take the stand because they are inarticulate, or because they might be made (falsely) to look guilty, or because of prior convictions or other misconduct (pp 73-74). By way of contrast, Amar argues, physical evidence—however derived—is reliable stuff. A reliability principle thus buttresses the bright line between testimonial communications and use-fruits that Amar draws from his textual and structural analysis.

As others have argued, this move to a general principle of “reliability” truly is based on a somewhat selective reading of the history. Amar is honest about this, though, and is careful not to overstate his historical case. He freely acknowledges the “complexity and uncertainty” of the historical rationale for the privilege (p 68). His argument is simply that this is the only one of the historically obscure rationales that can coherently justify the presence of the Fifth Amendment privilege within the broader constitutional scheme. In short, “reliability” is the only principle that makes sense of the privilege today.

There are some coherency problems even with this view, however. Most notably, it does not satisfactorily explain why, once a compelled statement has led to physical evidentiary fruits, the statements leading to the fruits cannot themselves be admitted. After all, they have been proven reliable in at least that respect. In the Dirty Harry scenario, for example, if you can admit the body that Scorpio told Harry where to find, why can’t you admit what Scorpio told Harry about where he could find the body? Certainly that much at least, was deadly reliable. Amar’s one paragraph footnoted response is uncharacteristically weak: “Nor are reliability concerns always cured by a physical corrobo-

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50 See note 25 and accompanying text.
51 See Alschuler, 94 Mich L Rev at 2638 (cited in note 16); Dripps, 74 NC L Rev at 1624 (cited in note 17).
ration test, because many confessions may concern internal mental states, where misunderstandings are quite likely” (p 228 n 265). In the end, Amar shrugs: “We need not say every coerced statement is unreliable, or every physical fact reliable; the Fifth Amendment lays down a bright-line rule, and as with any rule the rationale need not explain every instance of the rule’s application” (p 85).

Fair enough. But I submit that, even on Amar’s own terms, there is an alternative reading of the Fifth Amendment privilege that makes even better sense of the text and of the history—even as presented by Amar—than Amar’s own synthesis: The Fifth Amendment provides a privilege against compulsory judicial process to present sworn testimony against oneself for use in a criminal case.

Start with the text. Amar’s holistic textual argument tying together the word “witness” as used in the Sixth and the Fifth Amendments can be done one better: The Fifth says that “No person . . . shall be compelled . . . to be a witness against himself” and the Sixth, with striking parallelism, says that the accused has the right to “have compulsory process for obtaining witnesses in his favor.” Placed side by side, the inference is nearly inescapable: The compulsion referred to in the Fifth Amendment is the same as that referenced by the Compulsory Process Clause—compulsory judicial process, backed by the power of contempt and on pain of perjury for falsity. It means compulsion by force of law. It does not mean extra-legal coercion by government agents acting under color of law, but without actual authority to impose lawful punishment for refusal to speak. (That is another species of problem, sounding in both the Fourth Amendment’s prohibition of “unreasonable searches and seizures” of “persons” and the Fifth and Fourteenth Amendments’ prohibitions of deprivation of “liberty . . . without due process of law.” The law should supply a remedy for such violations, but it should be Amar’s remedial scheme for constitutional torts: compensatory and punitive damages, and perhaps injunctive relief.)

Thus, Miranda is wrong for the simple reason that custodial interrogation, not commanded by judicial process, with the suspect unsworn, simply falls outside the ambit of the Fifth Amendment’s prohibition of legal compulsion “to be a witness.” Dirty Harry can beat suspects all he wants, without Fifth Amendment consequence. Not only do reliable physical evidentiary fruits come in (Amar’s world), but the statements themselves come in too, if
Dirty Harry

The fruits come in on the straightforward theory that there has been no Fifth Amendment violation at all, not on Amar's trickier proposition that the amendment is violated by introduction of the incriminating statements but not by introduction of the fruits of such statements.

Griffin is wrong too, on this reading of the word "compelled" as referring to compulsory judicial process. The privilege is violated if (and only if) judicial process compels the defendant to testify against himself or else go to jail for contempt. But it does not follow that permitting the prosecutor to comment on a defendant's choice not to testify, and permitting the trier of fact to draw reasonable inferences therefrom, is compulsory process requiring the defendant to be a witness. As noted, Amar defends Griffin, weakly, on quasi-reliability grounds, arguing that it might lead to erroneous conviction of innocent but unpersuasive defendants who feel they need to take the stand in order to avoid looking guilty (pp 73-74). Once again, however, "reliability" here seems to be a sometimes-yes, sometimes-no, "more-prejudicial-than-probative" evidence law question dressed up as a rule of constitutional law. Without Amar's view of the privilege as centrally concerned with reliability, read back into the text as if stated therein as a rule, the Court's decision in Griffin is left with nothing in the text to support it.\(^5\)

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\(^5\) On this reading, "reliability" is not a constitutional mandate flowing from the Fifth Amendment, but a rule of evidence. It may well be that a coerced confession is not reliable and should therefore be excluded from evidence on the ground that it is more prejudicial than probative, see FRE 403, but that is different from saying that the Fifth Amendment requires exclusion as a flat rule. Amar makes this precise point in the Sixth Amendment context: Hearsay might be excluded as a common law rule of evidence, because it is (sometimes) unreliable, but that does not mean that the hearsay rule is constitutionalized by the Confrontation Clause (p 131).

\(^6\) See note 52.

\(^5\) Griffin is a particularly weak context in which to make an "unconstitutional conditions" type of argument, though that is what Justice Douglas's opinion for the Court tried to do. Comment on silence, Douglas wrote, "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Griffin, 380 US at 614. But adverse comment and adverse inference are penalties on the privilege only if the privilege itself entails a further right that the accused's refusal to testify not be the subject of comment or inference—which begs the question-in-chief.

Griffin is thus not at all like genuine unconstitutional conditions cases, where government "condition[s] one legal right, benefit, or privilege on the abandonment of another legal right, benefit, or privilege, the relinquishment of which the government would not have authority to command directly, unless the condition is directly germane to (in the sense of being practically inseparable from) the nature of the right or benefit itself." Michael Stokes Paulsen, A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups, 29 UC Davis L Rev 653, 664-65 (1996). What is the legal right or privilege a defendant is re-
I would not go so far as to say that my "compulsory judicial process" reading of the text is an unavoidable reading of the words themselves; other readings seem to be within the range of plausible understanding of the text. The insight into the meaning of what constitutes "compelled" testimony is a whole-text structural argument drawing on the Sixth Amendment to explicate the probable contextual meaning of "compelled," not an ineluctably "plain" meaning of the word itself. But this reading does cohere nicely with the words of the text, taken in context, and understood coherently across similar constitutional provisions. It is, in short, a textual argument much like Amar's, but one that makes better overall sense of the word "compelled."

Moreover, this reading of the text is strongly reinforced by a consideration of the relevant history—the next rung in Amar's interpretive hierarchy. In fact, the compulsory judicial process reading coheres far better with the tangled history as recounted by Amar than does Amar's own synthesis. Professor Albert Alschuler puts it this way in his recent and comprehensive review of the privilege's historical origins:

The history of the privilege, from the struggles over the authority of the High Commission through at least the framing of the American Bill of Rights, is almost entirely a story of when and for what purposes people would be required to speak under oath.\footnote{It is no exaggeration to say that all of the history presented and discussed by Alschuler (and by Amar) is consistent with the reading of the clause as limited to compulsory legal process.}

It is no exaggeration to say that all of the history presented and discussed by Alschuler (and by Amar) is consistent with the reading of the clause as limited to compulsory legal process.\footnote{The privilege is, moreover, something of an anachronism. It was designed, in all probability, to serve interests thought quite compelling at the time but regarded less highly today: (1) sparing a guilty defendant from the enormous temptation to lie under oath and, consequently, suffer eternal damnation in the fires of}

\footnote{Alschuler, 94 Mich L Rev at 2641-42 (cited in note 16).}

\footnote{Even the concern with torture appears to have been directed at historical practices where torture was used as legal process. Id at 2651 & n 95. While all of Alschuler's historical analysis supports my conclusion here, I should note that Alschuler does not embrace this conclusion himself, because he is not a textualist or an originalist. See id at 2667. For a series of historical approaches, including a revised version of Alschuler's essay, see generally R.H. Helmholz, et al, The Privilege Against Self-Incrimination: Its Origins and Development (Chicago 1997).}
hell; and, somewhat relatedly, (2) protecting the system from deception by the perjury that might well be expected under such circumstances. As Amar and others have noted, oaths and extratemporal consequences for lying were taken very seriously indeed by the founding generation.\(^7\) To be sure, the reliability strand is present in the history too, but the more central reliability concern giving rise to the privilege was the fear that guilty defendants would commit perjury, not that innocent defendants would be wrongfully convicted. As Amar notes, for example, defendants were disqualified at the time from testifying at all, basically because their testimony could not be trusted (p 66).

It is hard for the modern mind to get inside the heads of typical eighteenth century Americans, but it appears from the historical evidence, embraced by both Alschuler and Amar, that the following type of thinking would have been common: Most people swearing an oath to God to testify truthfully will do so, lest they suffer eternal damnation. A criminal defendant on trial for his life is subject to the same principle, but might succumb to the temptation to lie. The law should not lead the defendant into this temptation; to do so would be cruel and risk imposing far greater punishment on the defendant (eternal damnation of his soul) than that warranted by his crime (mere loss of life, limb, or liberty), merely because of his (already evident) moral weakness.

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\(^7\) See p 73 ("Those who framed the Fifth Amendment... believed that perjury was a mortal sin, resulting in eternal damnation: better to admit murder than commit perjury under oath. The power of oaths several centuries ago is abundantly clear from the Constitution itself, which requires oaths in several of its most important provisions, and from landmark opinions of the Marshall Court stressing oaths.") (footnotes omitted). See also Peter Westen, *The Compulsory Process Clause*, 73 Mich L Rev 71, 86-87, 90-91, 100, 111, 147 (1974); Alschuler, 94 Mich L Rev at 2645 (cited in note 16). See, for example, Justice Jacob Rush, *The Nature and Importance of an Oath—the Charge to a Jury* (1796), reprinted in Charles S. Hyneman and Donald S. Lutz, eds, *2 American Political Writing During the Founding Era: 1760-1805* 1015 (Liberty 1983) ("An oath, gentlemen, is a very serious transaction, and may be defined, a solemn appeal to God for the truth of the facts asserted by the witness, with an imprecation of the divine justice upon him, if the facts which he relates are false; or in the case of a promissory oath, if the party doth not fulfil his engagement.").

The historical importance of oaths is relevant to the proper understanding of other constitutional provisions as well. Professor McConnell, in discussing the issue of exemption of Quakers from the requirement of oath taking, has noted the importance of such oaths. McConnell, 103 Harv L Rev at 1467 (cited in note 49) ("At a time when perjury prosecutions were unusual, extratemporal sanctions for telling falsehoods or reneging on commitments were thought indispensable to civil society."). In another context, I have relied heavily on the sanctity of oaths as an argument supporting coordinate legal review by each of the three branches of the federal government of the acts of the others. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L J 217, 257-62 (1994).
Thus the Fifth Amendment privilege. Indeed, the same line of eighteenth century thinking would go, the law should not even allow the criminal defendant to testify (thus the common law disqualification of the accused), because the incentives to perjury are so great. Moreover, the capacity of such perjured testimony to mislead the trier of fact is also great (because testimony under sworn oath is likely to be believed), which would lead to—here we have Amar’s point, modified—unreliable outcomes.

As Alschuler writes, “[i]f this understanding of the original understanding is correct, critics of the Fifth Amendment privilege have missed the mark. Although the intensity of the framers’ disapproval of sworn statements by suspects may seem foreign to us today, the policies that informed the privilege were coherent and compelling . . . .” Indeed, Alschuler concludes that the original understanding distinguished sharply between unsworn and sworn statements, and that fidelity to this understanding would mean that both Miranda and Griffin should be overruled.

The eighteenth century rationale for the privilege is no longer fashionable or even very comprehensible to most people today, however, and neither Alschuler nor (more surprisingly) Amar embraces it. Oaths are taken less seriously today (if they are taken seriously at all), fewer people believe in hell, and an oath is no longer thought to be effective because of extratemporal

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58 It is also true, as Amar and others note, that the privilege protected against thought crimes like religious heresy, but that cannot account for all of its scope, historically, nor for its presence in a Bill of Rights with a Free Speech Clause, a Free Exercise Clause, and an Establishment Clause. See p 66.

59 The real issue in Griffin is what should be the result when the common law disqualification is removed and all that is left is the privilege not to testify. Is it fair to comment on the defendant’s decision not to testify? In the framers’ world, the decision not to testify, under these circumstances, would send a strong signal: the defendant is guilty, but has a conscience unwilling to risk the fires of hell for testifying perjuriously. To a lesser extent, in today’s world one might draw the same inference (but for the mitigating effects of familiarity with the privilege and with Miranda). One could argue that the privilege makes less sense without the general testimonial disqualification and that it is unfair to allow a practice today that would not have been thought proper at the time the privilege was adopted. The better argument, though, is that the Fifth Amendment privilege plainly does not constitutionalize the common law disqualification, so that the privilege survives the abandonment of that disqualification. This does not, however, justify us in changing the meaning of the surviving constitutional privilege. It means that the privilege set forth in the text is, in this respect as in others, an anachronism.

I should also note at this point that, if the privilege is indeed centrally concerned with avoiding the temptations to perjury under oath, this casts further doubt on Amar’s bright line between testimony and use-fruits, for it seems inescapable that the incentive to lie will remain where a defendant, compelled to testify under oath, will have any physical evidence thereby obtained introduced against him. If the “point” (or a large part of the point) of the privilege, historically, is to spare the defendant this dilemma, Amar’s solution does not cohere with that strand of history.

60 Alschuler, 94 Mich L Rev at 2652 (cited in note 16).
consequences for false swearing. The only real bite behind an oath is the specter of a perjury prosecution, and perjury is notoriously difficult to prove. As Alschuler writes, “[t]he fires of hell have smoldered. Oaths have lost their terror and even their meaning.” Indeed, the ethos of today is that perjury is commonplace—almost expected and tolerated, it seems—from criminal defendants. Some would go so far as to suggest that the defendant has a constitutional right to testify that necessarily includes a right to testify perjuriously. We have come a long way since the eighteenth century, not all of it in a positive direction.

In light of these changes in common thinking, Alschuler throws up his hands: “In a very different world from that of the early American republic, restoring the original understanding of the Fifth Amendment privilege is impossible.” This is disappointing. It is a cardinal mistake of constitutional interpretation, conceived of as the task of explicating a provision’s meaning rather than seeking its improvement, to abandon the text, history, and structure of the constitutional privilege in order to create a new or improved one.

I fear that Amar, uncharacteristically, has fallen into this trap too. He very badly wants to make modern policy sense out of the Fifth Amendment privilege, to harmonize it with the principles of the Sixth Amendment, and to rationalize it so that it is

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61 Id at 2667.
62 See id at 2667-71 & nn 176, 177. See also id at 2671 & n 177 (urging that defendants be permitted to testify under oath or not, and without the threat of perjury); William J. Stuntz, Self-Incrimination and Excuse, 88 Colum L Rev 1227, 1229 (1988) (Fifth Amendment privilege should be understood as protecting silence in situations where “excusable perjury” might otherwise be expected).
64 Alschuler, 94 Mich L Rev at 2667 (cited in note 16).
65 Gary Lawson has put this point nicely, in a different constitutional context. Imagine that we adopted an entirely new constitution, so that our present one became merely a historical artifact, the meaning of which had no real-world consequences (much like the Articles of Confederation). How would we ascertain the meaning of this old (but now irrelevant) document other than by looking at its text (understood in accordance with the rules of language employed at the time), evidence of its original understanding and purposes, and its internal structure and logic? Like Lawson, I suspect that this method is not followed today “only because its descriptive interpretative conclusions are widely thought to have prescriptive adjudicative consequences” thought to be undesirable. Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv L Rev 1231, 1250 n 101 (1994).
66 This is unquestionably true for the Fifth Amendment privilege. The privilege, understood in accordance with its text and history, is not a very sensible thing to have around these days, as nearly all commentators appear to agree. See Dripps, 74 NC L Rev at 1564 (cited in note 17); Alschuler, 94 Mich L Rev at 2667-71 (cited in note 16); Stuntz, 88 Colum L Rev at 1232-42 (cited in note 62).
something we can be proud to have in our Constitution, rather than be embarrassed by its anachronistic and seemingly pro-criminal nature. The goal is noble, but the product falls short. Such a method reads text and history in light of a desire to reach sensible outcomes. In other words, it inverts Amar’s usual interpretive hierarchy and ignores the possibility that text and history do not support good policy. Maybe the Fifth Amendment privilege is simply a *bad privilege*, or at least one that no longer makes sense in a world without testimonial disqualification of the accused. Maybe the Fifth Amendment privilege *is* in some tension with the Compulsory Process clause, in that it requires either a regrettable immunity bath for a witness invoking the privilege (to some extent or another) or a violation of the apparent plain meaning of the right to compulsory process for obtaining witnesses. But that just reinforces the idea that the privilege is a *bad privilege*.\(^6\) Maybe the Fifth Amendment *is*, at some level, about (limited) protection of guilty bad guys, not about innocent good guys, and thus has more in common with Eighth Amendment prohibitions on cruel and unusual punishment (it’s pretty cruel for the government to pave the accused’s road to hell) than with Sixth Amendment protections for the innocent accused. Or maybe it is just a constitutional anomaly.

In short, Amar’s reading perhaps searches too hard for coherency and an attractive general principle where none exists, and this worthy effort causes him to discard too much contrary textual and historical analysis.\(^6\) Amar’s bright line between testimonial communications and derivative evidentiary fruits may yet be right; I view Amar as having legitimately reopened that

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\(^6\) There are possible alternative harmonizations, however, which I set forth here merely in the form of hypotheses: It is possible that the right of an accused to compulsory process for obtaining witnesses “*in his favor*” simply was not contemplated at the time as applying in a co-conspirator or co-defendant context (when both indicted conspirators would be disqualified from testifying anyway). Alternatively, *sans* disqualification and *sans Griffin*, maybe the dissonance between the two amendments is lessened by the ability of Defendant One to take the stand, testify truthfully, and argue to the jury the inference of guilt from Defendant Two’s refusal to be sworn. Neither of these answers strikes me as entirely satisfactory, though both would seem consonant with the historical original understanding. A third alternative is that Amar is right about the scope of the immunity that must be granted in exchange for compelling testimony—testimonial use immunity but not use-fruits immunity—but that his general theory of the Fifth Amendment as being concerned about reliability is unnecessary to this conclusion and unsound in its other applications.

\(^6\) In this regard, the last line of Amar’s Fifth Amendment chapter is revealing: “A legal system that ignores the truth is simply not doing its job, and neither is a court that cannot make the Constitution cohere” (p 88). I would counter: A constitutional privilege that thwarts the truth is not a very good privilege and should be duly repealed, but a court lacks legitimate authority to make it “cohere” by rewriting it.
question, within the scope of the privilege's limited domain (that is, where there has been compelled sworn testimony by dint of formal legal process). But he has missed the textual and historical evidence for that very limited domain, causing him to run in the wrong direction on *Miranda* and *Griffin*. And that is a significant shortcoming in his synthesis. The Fifth Amendment privilege may be a bad idea, an historical anachronism, and an undeserved protection of guilt. But limited to its proper domain, it is an ugly constitutional provision we can live with.

V. EPILOGUE

Dirty Harry eventually got his man—with a .44 magnum, not the law. The law was crazy, and it still is. Akhil Amar's book is a sustained intellectual argument for reconsideration of what has been done by "the law" (that is, the courts) in the name of the Constitution. It is an argument that needs, and deserves, to be taken seriously. It is time to put the Constitution—the real Constitution—back into "constitutional criminal procedure." Only then will Inspector Callaghan get a satisfactory answer to his questions:

What about Ann Mary Deacon? What about her rights [and the rights of innumerable other victims of crime]? . . . Who speaks for her?

The answer is that the Constitution speaks for her, and for all of us, if only we will let it.