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Shining the Bright Light on Police Interrogation in America

Mark A. Godsey*

RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE (Harvard University Press 2008)

I. INTRODUCTION

Richard Leo is uniquely suited to illuminate and critique the practices and legal standards surrounding police interrogation in America. Many courts and legal scholars through the years have opined on the legal standards adhering to confession law, without a deep understanding of how interrogation are actually conducted in the real world, or of the psychological pressure points that ultimately bear on the matter. Prior to entering legal academia, however, Leo served as an associate professor of psychology and criminology, and performed groundbreaking empirical research into how police interrogators obtain confessions and how their interrogations techniques affect suspects.1 Now, as a law professor at the University of San Francisco, Leo’s new book Police Interrogation and American Justice, deeply forges social science with legal scholarship to create an enlightening picture of the modern interrogation room, the contradictions and failures of our laws designed to regulate confessions, and the paths we must take to ensure the integrity and fairness of confessions in the future.

Although interrogation practices, long veiled from public eye, have remained one of the “darkest corners of the American criminal justice system,” Leo’s

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analysis, as he notes, is “based largely on the type of data most other scholars do not have access to: direct observations of hundreds of police interrogations.” (P. 5.) Leo’s additional research includes attendance at numerous police interrogation training seminars, analysis of interrogation training manuals published from 1940 to the present, and conducted in-depth interviews over the past decade with scores of interrogators and suspects. His research further includes a thorough review of police reports, trial transcripts, and interrogation tapes of more than 2,000 felony cases involving confessions. (P. 5.) It is fair to say that there are few, if any, scholars who have witnessed the interrogation battlefield from the trenches, as has Leo.

Leo blends his knowledge of interrogations in practice with his deep understanding, as a law professor and legal scholar, of American interrogation law. His powerful combination of law, psychiatry, and hands-on experience gives Leo a perspective on police interrogation that few others share.

Leo provides his insights on questions that he understands are broader than the interrogation rooms where they play out. He writes:

As a symbolic matter, police interrogation is a microcosm for some of our most fundamental conflicts about the appropriate relationship between the state and the individual and about the norms that should guide state conduct, particularly manipulative, deceptive, and coercive conduct in the modern era. In short, police interrogation and confession-taking go to the heart of our conceptions of procedural fairness and substantive justice and raise questions about the kind of criminal justice system and society we wish to have. (P. 1.)

Moreover, police interrogations are a frequently repeated scene in cinema and television because they are a “richly textured narrative and morality play involving innocence and guilt, good and evil, and justice and injustice . . . . The drama and power struggle of interrogation hold our rapt attention as they feed our vicarious desire for justice, catharsis, and ultimately, resolution and restoration.” (P. 2.)

Leo’s purpose is to highlight contradictions imbedded in American police interrogation methods and the law designed to regulate them. The overarching contradiction is that the police need confessions to solve crimes, but there is almost never a good reason for a suspect to confess. The tension created by this inherent contradiction leads to several additional contradictions: interrogations remain secret in what is considered one of the most democratic and open societies in the world; police have created “scientific” interrogation techniques that are, in reality, unscientific and unreliable; the law requires that confessions be voluntary, but interrogations are successful because they are designed to convince suspects that they have no choice but to confess; “the truth” is the stated goal and virtue of police interrogation, yet police routinely rely on lies and deception to obtain confessions; police view confessions as reliable, while in reality they are “orchestrated” and “constructed” by the police in a way that is often misleading.
and unreliable; and juries view confessions as the most probative evidence of guilt, but they are, in fact, quite often unreliable or even patently false.

While complaints about police interrogation methods have sometimes centered on police brutality, fair play, or human dignity, Leo's loudest complaint is the risk of false confessions by innocents that modern interrogation techniques sometimes produce and modern confession law fails to adequately regulate. Thus, his ultimate suggestions for reform focus on policy and doctrinal improvements to reduce the number of false confessions and ensure that confessions admitted at trial are trustworthy. Among these suggested reforms are implementing a legal corroboration requirement for confession admissibility in the courtroom, and requiring the videotaping of what takes place in the interrogation room from beginning to end.

Let me admit at the outset that with respect to me, at least, Leo is preaching to the choir. Leo's research has been very important in my own development as a confessions-law scholar. I am a fan. When I first met Richard a few years ago, I was shocked that he was not an elderly white-haired professor with a cane, such is the depth of his body of work. And as the director of an Innocence Project, the problem of false confessions is not just an abstract scholarly interest to me, but something with which I have had to grapple in real life.

While many in law enforcement may object to Leo's analysis and conclusions, he is not an enemy of police interrogation. He argues, and I agree, that when done properly, police interrogation is "an unmitigated social benefit" that renders "enormously important outcomes." (P. 2.) He notes that he has trained police interrogators in numerous states, and served on advisory committees to police departments. (P. 8.) Leo contends that it is critical not to undermine the ability of the police to perform their important function of interrogating suspects, but rather to educate others so that the quality and reliability of confessions can be improved.

Nevertheless, based on my own experiences in attempting to reform interrogation practices in my home state, I know that many will read Leo's book as a broad attack on the institution of police interrogation. Some will write it off as a liberal diatribe of a scholar who does not "understand what the police are up against, and what really goes on in the interrogation room." Unfortunately, because many police departments continue to resist opening up their procedures to examination and study, and continue to resist videotaping of interrogations, a procedure that would provide a comprehensive record for further study, we will be


unable to fully resolve this dispute. Until law enforcement allows closer scrutiny of its practices, they are on thin ice when attacking Leo’s conclusions.

This review is divided into three parts. Part II summarizes Leo’s empirical findings with respect to interrogation procedures in the real world. Part III examines Leo’s suggested reforms. Part IV offers my own critiques and insights.

II. THE INTERROGATION PROCESS IN AMERICA

A. Police Interrogation and the Adversary System

Leo asserts that the proper role of the police is to gather case information in a "neutral and dispassionate manner" at the "preadversary stage" of the criminal process. (P. 19.) The information police collect must be as complete and unbiased as possible, because, in the first instance, prosecutors must use this information to decide whether to charge the suspect, and therefore, commence formal adversarial proceedings against him. When the adversary system later officially commences with the filing of criminal charges, judges, defense lawyers, and ultimately juries rely on the integrity of the neutral fact-finding process performed by the police. Historically and today, police have gone to great lengths, through court testimony and other information disseminated to the public about the investigation process, to cast themselves in this neutral fact-finding role.

If police, on the other hand, are committed to the prosecutorial agenda in their fact-collecting process, and develop evidence in a biased manner with the end of obtaining a conviction, then the formal adversary system starts off-kilter. The perceptions about the case held by the crucial actors in the real adversary system—prosecutors, defense lawyers, judges and juries—become distorted. This can lead to erroneous results through a "garbage in, garbage out" sequence.

Based on his empirical research, including many interviews with police interrogators, Leo asserts in Chapter 2 that the police have internalized the values and goals of the adversary system. They see themselves solely as foot soldiers for the prosecution in a war zone—a combat arena. They are "highly partisan, strategic, and goal directed." (P. 11.) They are trained to assume that the suspects they interrogate are guilty, and that all suspects will initially lie about their guilt. (P. 22.) Detectives perceive the innocent man in the interrogation room as an "urban legend perpetuated by naïve liberals, muckraking journalists, or self-serving criminal defense attorneys." (P. 22.) Their job, as interrogators, is to obtain a full confession, which they then label as "the truth." Moreover, the interrogation process is aimed not simply to obtain an "I did it" confession, but to manipulate from the suspect a police-orchestrated narrative designed to ensure a conviction, and even better, a conviction by guilty plea. (P. 22.)

Thus, the reality, says Leo, is that the police interrogation process is not a neutral, "Just the facts, Ma’am", evidence-gathering process. Leo writes, "Once police have decided to interrogate a suspect, they have, in effect, crossed the line that separates police work from prosecutorial work. They have aligned themselves
with the prosecution in orientation and goal; their function at this point becomes more prosecutorial than investigative.” (P. 23.)

In one of many contradictions that pervades the interrogation process, the police shield their true roles from the courts and the public by keeping interrogations hidden from public view, and then putting a spin on what actually occurs in the interrogation through their well-developed “external impression management” strategies. (P. 35.)

The police not only hide their role in the adversary system from the courts and public, they also hide it from the suspects they interrogate. Modern interrogation is “fraudulent” not only because police are permitted to lie to suspects about the evidence they have collected (fingerprints, DNA tests, etc.), but because detectives seek to create the illusion that they share a common interest with the suspect and that he can escape or mitigate punishment only by cooperating with them and providing a full confession. Although the suspect’s self-interest would usually be best served by remaining completely silent, interrogators seek at every step to convince him that what is in their professional self-interest is somehow in his personal self-interest. The entire interrogation process is carefully staged to hide the fact that police interrogators are the suspect’s adversary. While they portray themselves as seeking only to “collect the facts” and to help the suspect if he cooperates, they, of course, try to construct a damning case against him. (P. 25.)

Leo asserts that the “genius and fraud of psychological interrogations... lies in its ability to persuade... the suspect to view the act of self-incrimination—and thus self-conviction—as both logical and rational under the circumstances.” (P. 28.)

The interrogation process is additionally fraudulent because suspects rarely get the attractive deal that detectives imply that they will get from self-incrimination. Typically, those who confess receive the opposite of what they were promised—“more and higher charges, more and harsher punishment.” (P. 33.) Thus, the suspect is deceived not only about the role of the police in the interrogation process, but the consequences of confessing.

I suspected when first reading Leo’s assertions here that he was preparing for an Escobedo-type argument that suspects must have an attorney present in the interrogation room, pursuant to the Sixth Amendment right to counsel. Indeed, Leo makes a case, reminiscent of arguments heard during the Escobedo era, that police interrogation is the most crucial and most adversarial part of our criminal justice system. He ultimately does not take the Sixth Amendment route, as we will see, perhaps because he deems such a remedy unlikely to be adopted, or perhaps because he sees such a remedy as snuffing out police interrogations altogether—a medicine he does not espouse.

Rather, Leo makes the case that police interrogators see themselves as foot soldiers for the prosecution in our adversary system with two goals in mind: to provide an introductory context for his later recitation of how interrogations unfold.

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step-by-step in the real world, and to help us understand how police attitudes can ultimately lead to unreliable confessions. This last point sets the stage for his concluding chapters, where he lays out his recommended reforms.

Admittedly, Leo describes the values and goals of detectives during interrogations in absolute and broad terms. One might criticize his analysis by suggesting that he paints with too broad of a brush. It is Leo does not mean to suggest, however, that in every interrogation the police automatically assume the suspect is guilty, and that in every interrogation the police attempt to bend the suspect's confession to fit their desired version of the facts, regardless of the truth. Rather, Leo is generically describing overarching values that, according to his research, permeate police culture today.

In any event, my response to such criticism strikes a theme that will be frequently repeated in this review. Leo has examined and studied actual interrogations, and conducted interviews with real detectives and suspects, perhaps to a greater extent than any other scholar today. If law enforcement critics wish to rebut Leo's perhaps overbroad generalizations, they need to open up the interrogation process to scrutiny by more widely adopting the videotaping requirement that has been urged by many scholars, legislators, and courts or years.

B. Police Interrogations in the Real World: Yesterday and Today

1. Exchanging the nightstick for the polygraph machine

Chapters 2 through 5 of Leo's book describe the evolution of the real-world interrogation process in the past century. Leo asserts that an historical understanding of the evolution of interrogation process is necessary to an understanding of police attitudes toward interrogation today. (P. 46.)

Chapter 2 is dedicated to the "third degree," which describes the physically brutal interrogation techniques frequently employed by detectives to coerce confessions from suspects prior to the Supreme Court's 1936 decision in Brown v. Mississippi.\(^5\) The tortuous interrogation tactics utilized in this era have been adequately described in prior publications\(^6\) and even in popular media, and need not be recounted in great detail here.

Leo states that the use of the third degree waned after Brown through the 1940s, dissipated even more during the 1950s, and then became rare to "non-existent" by the 1960s. (P. 45.)

Acknowledging our country's unfortunate history of interrogation practices is important, however, because Leo contends that many aspects of modern interrogation practices evolved from the third degree. The Wickersham Report,

\(^5\) 297 U.S. 278 (1936).

\(^6\) See, e.g., NAT'L COMM’N ON LAW OBSERVANCE AND LAW ENFORCEMENT, REP. ON LAWLESSNESS IN LAW ENFORCEMENT (WICKERSHAM COMM’N REP.) (1931).
the Brown decision, and later Miranda v. Arizona, forced detectives to alter interrogation strategies from physical torture to psychological coercion. But many vestiges of the third degree remain. Specifically, the basic values and goals embraced by detectives in the interrogation room remain fixed in a third-degree mentality. Namely, the suspect subjected to interrogation is always guilty, he will lie about his guilt, and the detective must use whatever means and tricks he can legally get away with to obtain not just a confession, but an orchestrated narrative that will guarantee a conviction. (P. 77.) The basic goal of interrogation is the same as it was a century ago: convince the suspect that he has no option but to confess, and that it is in his self-interest to do so. Leo notes that this mentality is at odds with our constitutional requirement that confessions be voluntary to be admissible in court.

The police’s insistence on secrecy, and keeping the public and courts in the dark about what occurs in the interrogation room, is another attitude that was burned into police culture in the era of the third degree, and to which police departments continue to cling today. (P. 77.)

The third-degree era taught police departments that the easiest and most expedient way to investigate a case was to coerce a confession from a suspect at the front end of the investigation. In a sense, it made police investigators lazy, hampered the development of their broader investigative skills, and fostered the habit of leaning on the “home run” confession to clear their crowded case dockets. Leo asserts that this over-reliance on confessions, learned during the earlier era, remains a hallmark of police interrogation today. Leo writes:

[T]he decline of the third degree is also a story about the persistence of police institutions and behavior. For the structure of early American interrogation remains largely intact to this day, even if the content has changed . . . . As in the era of the third degree, the primary goal of police interrogators is not to elicit the truth per se but to incriminate the suspect in order to build a case against him and assist the prosecution in convicting him. And interrogation still often occurs in secrecy. Contemporary American police have skillfully adapted to the norms of the adversary system, but like their predecessors, they do not aspire to be impartial fact-finders. Rather, they are still essentially agents of the prosecution. And they also continue to exercise a virtual monopoly of power at the front end of the criminal justice system, manipulating suspects to provide damning testimonial evidence against themselves before any of the adversary system’s checks and balances can be meaningfully applied. The seeds of modern interrogation were sown in the era of the third degree, and they have left an indelible, if largely hidden, imprint on contemporary police methods. (P. 77.)

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Before turning to his depiction of modern interrogations, Leo pauses in Chapter 3 to describe the emergence of new interrogation weapons developed by police departments to secure confessions without physical violence. Leo asserts, in short, that police interrogators have traded the nightstick and Billy club for pseudo-scientific lie detection devices. Indeed, the police now employ lie detection techniques as a means of coercing confessions. They do so by routinely coaxing the suspect under interrogation into taking a polygraph so “we can close the case and let you go.” They then invariably inform the suspect that he has failed the polygraph—even if he actually passed. Supported by the aura of scientific proof of guilt, a suspect told he has failed the polygraph often comes to believe that he must be lying and simply does not remember committing the crime, or, as the interrogator is eager to verify, that all hope is lost, no one will now believe his innocence, and that confessing to obtain the implied mitigation in punishment is the only rational option.

Leo cites studies showing that polygraphs and the like are accurate no more than sixty to seventy-five percent of the time. (P. 89.) Even more troubling is the fact that, when inaccurate, they are more likely to classify a truthful suspect as a liar rather than a lying suspect as truthful. Furthermore, behavior analysis—reading the suspect’s nonverbal cues and then classifying him as truthful or untruthful—is even more unreliable and prone to error. (Pp. 98–99, 104–05.) And worse still, police interrogators often receive just a day or two of training in “demeanor evidence,” and leave convinced that they can “see through” lying suspects, when studies suggest that even an expert well-trained in such techniques has mastered a “science” that has no verifiable reliability.

As a result of police training manuals and interrogation seminars, police officers possess a deep belief in the “oracle-like” status of the polygraph and other lie detection methods. Leo argues that the contemporary reliance on these sham techniques for “divining truth” is no better than trial by ordeal in ancient societies. (P. 81.)

Apparently however, the polygraph alone “was not an adequate substitute for the third degree. Police reformers also turned to the field of psychology, which like the polygraph carried the symbolism and authority of modern science.” (P. 80.) From these related arenas, “the house of modern psychological interrogation was built.” (P. 80.) Today, interrogation is comprised of two elements: “the studied detection of deception and the use of psychologically manipulative methods.” (P. 80.)

2. Modern interrogation

Modern interrogation techniques, Leo contends, are seeped in fraud, manipulation and deception. (P. 120.) Police have developed fraud-based interrogation techniques because they assume that every suspect under interrogation is guilty and needs some coercion and trickery to come clean, and because the police “view themselves as agents of the prosecution and thus the
suspect's adversary.” (P. 120.) Fraud and psychological coercion are present in all four stages of modern interrogation outlined by Leo: the “softening up” phase, the *Miranda* warning phase, the interrogation proper, and the post-admission phase. (P. 121.)

The “softening up” stage comes first. The goal of this stage is to disarm the suspect by making him believe that the police simply need to ask him a few questions to help them solve the crime. The encounter is called an “interview” rather than an interrogation. The subject is typically told either that he is not a suspect, or that the police just need a few minutes of his time so that they can check him off the suspect list. (Pp. 121–23.) Hidden from the suspect is the fact that the interrogators have prejudged his guilt, that he is about to be intensely interrogated, and that the sole goal of the interrogators is to obtain a confession for the prosecution. (P. 122.)

The first step is to establish a rapport with the suspect. Police will often flatter or ingratiate themselves with the suspect to create the appearance of a nonadversarial relationship. One detective explained the goal of this stage to Leo as follows: “I don’t care whether it is rape, robbery or homicide . . . the first thing you need to do is build rapport with that person . . . I think from that point on you can get anybody to talk about anything” (P. 123.) In short, police interrogation is the first and perhaps most adversarial part of the adversary system, but the “softening up” stage is designed to turn that truth on its head.

After the police have convinced the suspect that the purpose of the “interview” is nonadversarial, and built a rapport with him, the next stage is to move the suspect past the *Miranda* warnings while convincing him that he need not invoke any of his rights. Leo contends that police have “developed multiple strategies to avoid, circumvent, [and] nullify” *Miranda*, and indeed, “work ‘Miranda’ to their advantage.” (P. 124.)

One way that detectives avoid *Miranda* is to falsely tell the suspect that he is not in custody and that he is free to leave at any time. Because *Miranda* warnings are only required when the suspect is in custody, police will “invite” the suspect to the station for an “interview,” and inform him that: “You’re here on a voluntary basis. You elected to come in here on your own and I appreciate that, okay? And I told you on the phone I had no intention of arresting you.” (P. 125.) The officer’s true intention—interrogating the suspect until he confesses and then placing him under arrest—is, of course, never revealed.

Another way police interrogators frequently attempt to avoid *Miranda* is simply to read the suspect his rights and then move straight into the questioning without giving the suspect a chance to absorb the warnings or invoke them. If the “softening up” stage has been executed properly, a suspect will feel it is unnecessary or inappropriate to invoke his rights. If the suspect begins answering the officer’s questions, as they typically do, courts will hold that he has implicitly waived his rights. (Pp. 125–26.)

Police interrogators increase the chances that the suspect will not invoke his rights by minimizing, downplaying, and de-emphasizing the importance of the
warnings. The goal is to convince the suspect that the *Miranda* warning/waiver procedure is “akin to standard bureaucratic forms that one signs without reading or giving much thought to.” (P. 126.) The softening up stage, which precedes the warnings, is important here, because it establishes a “norm of friendly reciprocation and the expectation that the suspect will comply.” (Pp. 126–27.) Police interrogators further deemphasize the warnings by reading them in a “perfunctory tone” and “bureaucratic manner.” They do so without pausing or making eye contact with the suspect, all while implying that the warnings are merely a “matter of routine” and that it is a “foregone conclusion” that the suspect will waive them. (P. 127.) In some instances, the interrogator will expressly inform the suspect that the warnings are an unimportant formality that needs to quickly be “dispensed with” so that the police can interview him and check him off the suspect list. (P. 127.) In other cases, interrogators will persuade the suspect that he must waive *Miranda* and talk, because it will be his only chance to “[T]ell his side of the story” and get the matter cleared up quickly. (Pp. 128–29.)

Leo contends:

If the Supreme Court in *Miranda* sought to “level the playing field” by having detectives notify the suspect that they are his adversary and that the suspect’s best interest may not be served by making statements that will be used against him, then the strategies that American interrogators use to obtain signed waivers have, in effect, turned *Miranda* on its head. *Miranda* is often little more than a continuation of the softening up phase of the interrogation. As in other stages, the detective’s strategy is to create the illusion that he and the suspect share the same interest and that compliance is to the suspect’s advantage. (P. 128.)

After the *Miranda* warnings, the interrogator may ask the suspect a few questions, but then quickly moves on to the third stage. At this stage, the focus changes from asking the suspect questions to “telling him the answers and imploring him to confess.” (P. 132.) The aim of the third stage is to move the suspect from denial to admission. At the base of every interrogation is the same message: “the suspect stands to receive intangible or tangible benefits and avoid harms in exchange for an admission—ideally a full confession—to some version of the offense.” (P. 133.) His confession is “quid pro quo for an end to the interrogation and avoidance of the worse-case scenario—harsher treatment or punishment.” (P. 133.)

Police interrogators induce suspects to confess by introducing negative incentives and offering positive incentives. Negative incentives “break down the suspect’s resistance, reverse his denials; lower his self-confidence; and induce feelings of resignation, distress, despair, fear, and powerlessness.” (P. 134.) After the suspect is broken down, positive incentives are offered “to motivate him to see the act of complying and admitting to some version of the offense as his best available exit strategy and option, given his limited range of choices and their
likely outcomes.” (P. 134.) The Los Angeles Police Department’s interrogation training manual captures this strategy by encouraging detectives to tell suspects: “You did it. We know you did it. We have overwhelming evidence to prove you did it. But the reason makes a difference. So why don’t you tell me about it.” (P. 134.)

Common negative incentives include harsh accusations that the suspect committed the crime, and accusations that he is lying. These accusations are repeatedly made. The suspect’s denials are cut-off, and attacked with further and repeated accusations. Repeated accusations exert psychological pressure on the suspect, and shift the burden of proof. Suspects rarely understand that the prosecution has the burden of proving the case against them. The message instead is that the interrogation will not end until the suspect convinces the police of his innocence, or confesses. Because the police make clear that they do not believe that he is innocent—and never will—the only option to end the interrogation becomes a confession.

Police interrogators strengthen their position at this stage by using false evidence ploys. Evidence ploys are used to convince the suspect that he has no choice but to confess. These tricks include falsely telling the suspect that an eyewitness saw him commit the crime, that his fingerprints have been found on the murder weapon, that his crime was caught on tape by a hidden video camera, or that his DNA was found on the victim’s body. Because suspects rarely understand that the police can lie to them during an interrogation, they begin to see their position as hopeless. (Pp. 138–44.)

At this point, polygraphs and other forms of lie detection are typically brought into the picture. Suspects are told, “It’s 100 percent accurate. There’s no fault in it.” (P. 145.) Suspects are then invariably told that they failed the polygraph. This ploy is intended to “break down a suspect’s resistance by persuading him that he has been exposed, that his denials are futile, and there is no escape from the necessity of admitting guilt.” (P. 145.) This process of accusations, attacking denials, and using false evidence ploys is repeated over and over, often combined with raised voices, screaming, and relentless badgering. As one suspect recounted to Leo:

They just kept on and on. Hounding and hounding and hounding. Finally, I said yes, so they’d just leave me alone . . . . I don’t even know what they said . . . . I tried to repeat what they said. I try to ask them. “I don’t know what you’re talking about.” I was just tired. It was just like arguing with her. Finally . . . they told me I was done . . . . I thought I was going home. I didn’t go home. It was just like a big dream, just like something that just never happened . . . . I was so tired. It was like being so confused. (P. 148.)

After a suspect is convinced that no one will ever believe his claims of innocence, and that his situation is hopeless, interrogators dangle some positive
incentives. The basic idea of positive incentives is simple: he will receive less punishment or "some form of police, prosecutorial, or juror leniency if he confesses, but he will receive greater punishment if he does not." (P. 151.) Combined with this incentive is a warning that this is the suspect's only chance to receive mitigation. It is "your opportunity to present your side of the story... before it is too late." A common phrase uttered by interrogators is: "For me to help you, I need to hear your side of the story. . . . I need to understand what happened." (P. 151.)

After the suspect breaks down and makes an admission—"Okay, I'll tell you what you want to hear. I did it"—the final stage of interrogation begins. This post-admission stage involves the construction of a narrative. Leo describes this stage not as the confession-taking stage, but the confession—"making" stage. (P. 166.) He asserts that if the suspect's details do not match the interrogator's vision of the crime, the detectives will remain adversarial and combative, and will repeat many of the negative and positive incentives introduced in the pre-admission stage. The post-admission narrative is not a document in which the interrogator simply acts as a stenographer; "[r]ather, it is actively shaped and manipulated—with the suspect's participation to be sure, but at the interrogator's direction." (P. 166.) If the suspect's narrative does not fit the detective's expectations, the interrogation continues, with facts often supplied by the detective, until the suspect and detective have a meeting of the minds on all important details. (P. 167.)

The detective's goal is to obtain a story that not only fits his conception of the crime, but that will be believable and dramatic in court, thus guaranteeing a conviction. The five things good interrogators strive to obtain in this last stage are: (1) a coherent and convincing script; (2) a description of the suspect's motives and explanations; (3) a display of knowledge of the crime's intimate details that would only be known by the true perpetrator; (4) a description of what the suspect was feeling at crucial moments; and (5) a strong acknowledgment that the confession is voluntary. (P. 168.)

Leo states that these five goals are obtained through intense pressure. Detectives often suggest emotions and motives for the suspect to adopt. They might, through their questioning and badgering, reveal nonpublic facts about the case that the suspect understands he is supposed to incorporate into his narrative. (Pp. 170, 172.) A trick used by interrogators to make the confession appear more reliable is, after the narrative is complete, to personally write it out by hand while intentionally inserting errors on trivial facts. The interrogator will then ask the suspect to review the confession and correct any errors by replacing incorrect facts with correct ones, and to initial each change. In court, the marked up confession, replete with corrections by the suspect, gives the appearance of a defendant who was in full control in the interrogation room and directing even the intimate details of the confession with confidence. (P. 176.)

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8 Leo provides numerous examples of this police practice of intentionally inserting mistakes for the suspect to correct and the powerful effect such corrections later have in court, in Tom Wells
C. The Result: False Confessions and Miscarriages of Justice

Many American courts have for years "reasoned that police deception during interrogation is legally permissible because it is not 'apt to lead an innocent suspect to confess.'" (P. 190.) Surveys and interviews of jurors, police officers, and prosecutors suggest that this belief is widespread. (Pp. 196–97.) Leo’s extensive body of work on the subject, however, summarized in Chapters 6 and 7, demonstrates otherwise. He calls this misimpression the “myth of psychological interrogation.” (P. 197.) The myth is perpetuated because of the secrecy surrounding modern interrogation; most people simply do not understand how highly manipulative, deceptive and stressful interrogation can be. (P. 197.)

No one can put a percentage on the number of confessions that are false. But the advent of widespread post-conviction DNA testing has revealed that false confessions are disturbingly more common than most believe. Indeed, DNA testing is like a crystal ball, allowing us to look back at old cases and see with great clarity whether a confessor is truly guilty. The DNA revolution can be a great learning moment for the criminal justice system, if we are open to the lessons taught.

False confessions are one of the leading causes of wrongful conviction of the innocent, second only to eyewitness misidentification. The following chart (p. 244) depicts various studies of wrongful conviction cases, and the number and percentage of those convictions that relied on false confessions:

<table>
<thead>
<tr>
<th>Author/year</th>
<th>No. in study</th>
<th>No. of false confessions</th>
<th>% Wrongful convictions due to false confessions</th>
</tr>
</thead>
<tbody>
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<td>Bedau and Radelet (1987)</td>
<td>350</td>
<td>49</td>
<td>14</td>
</tr>
<tr>
<td>Leo and Ofshe (1998, 2001)</td>
<td>60</td>
<td>60</td>
<td>N/A</td>
</tr>
<tr>
<td>Warden (2003)</td>
<td>42</td>
<td>25</td>
<td>60</td>
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<td>Innocence Project (2007); Garrett (2008)</td>
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9 See INNOCENCE PROJECT STATISTICS, http://www.innocenceproject.org/understand/.

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Leo outlines the four ways in which confessions can be discredited. One way is when it is later conclusively proven that the crime did not occur. In one case, for example, several defendants were convicted of murder based on their confessions and a witness’s testimony that the defendants had killed her newborn baby and disposed of the body. Scientific evidence later established, after the defendants spent years in prison, that the woman had never had a baby; she had had a tubal ligation operation that prevented her from getting pregnant. (P. 241.)

The second way confessions are proven false occurs when it is demonstrated that it would have been physically impossible for the defendant to have committed the crime. In three different Chicago cases, for example, defendants who confessed were later proven to have been in jail on the date that the crimes occurred. (P. 241.)

Third, a confession is proven false when the identity of the true perpetrator is later discovered. Chris Ochoa, for example, spent years in prison for armed robbery, rape, and murder, until the true perpetrator came forward, confessed, and led the police to the murder weapon and bag where he had hidden the fruits of the crime. 1

The final, and most common, way, that a confession is proven false is when DNA evidence conclusively clears the inmate. Examples of this method are too numerous to discuss. Indeed, today, 234 individuals have been conclusively proven innocent through post-conviction DNA testing, with the number constantly on the rise. 11 An alarming percentage of these innocent suspects falsely confessed as a result of extreme psychological interrogation. I have personally handled two false confession cases in Ohio that are not counted in this group of 234.

Common sense tells us that this number is just the tip of the iceberg. The majority of serious crimes, like armed robbery and murder, are often “non-DNA” cases. In these cases, the crime occurred in such a way that the perpetrator did not leave his or her DNA at the scene. 12 And in most would-be DNA cases, the police do not preserve the DNA after conviction and appeal. In Ohio, for example, in two-thirds of the cases where inmates have sought post-conviction DNA testing, the crucial DNA that could have proven innocence or guilt once and for all had

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10 For details of Chris Ochoa’s exoneration, see http://www.innocenceproject.org/Content/43.php.

11 See Innocence Project website for profiles on all 220 cases, at http://www.innocenceproject.org/.

12 For example, if A walks up to B in his backyard and shoots and kills him, and then leaves the scene, it is likely that no DNA will exist to identify A as the perpetrator. The fact that most DNA exonerations have occurred in rape cases is simply because rape is the type of crime where the perpetrator most often leaves his biological material. DNA testing in rape cases has proven many rape confessions to be false.
been destroyed or lost by the time the inmate requested testing. This percentage is typical of the sorry state of DNA preservation in other states as well.

There is no qualitative difference between cases in which DNA testing exists to prove innocence and the vast majority of the remaining cases where no DNA is available. The same interrogation techniques are used in both types of cases. The 234 DNA exonerations, with the alarming number of false confessions these cases have laid bare, are just a small percentage of the total number of cases where false confessions may have occurred. The confessions in the remaining cases, however, cannot be demonstrated true or false because no conclusive check exists on the backend to verify the validity of the confession. By any measure, however, the myth that innocent suspects simply do not confess is patently wrong.

Leo next outlines three types of false confessions based on a typology developed by Kassin and Wrightsman. A voluntary false confession occurs when a citizen suddenly confesses on his own, subject to no police coercion. The mentally disturbed defendant in Colorado v. Connelly falls into this first category.

The coerced-compliant false confessor, on the other hand, is a suspect who privately knows while he is confessing that he is innocent. This type of suspect confesses because the extreme interrogation tactics, including false evidence ploys, convinces him that his situation is hopeless, he will be convicted, and that the only way he can get the interrogation to end, and simultaneously avoid harsher punishment, is to tell the interrogators what they want to hear. This type of confessor comes to rationally believe that confessing is his only option, and the lesser of two evils.

The final type of false confession is the coerced-internalized confession. This type of suspect, hearing the “overwhelming” evidence of his guilt the police have laid at his feet during the interrogation, and not knowing that this evidence is fabricated, comes to doubt his own memory and believe that he must have committed the crime. This type of confessor comes to believe that he either committed the crime while sleepwalking or in an alcohol-induced blackout, or that

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14 Id.
17 Perhaps the best examples of how false confessions occur can be found in Richard Leo’s new nonfiction work, with Tom Wells, THE WRONG GUYS, see supra note 8. In this book, Leo describes from beginning to end how several defendants in that case gave coerced-complaint confessions to a crime they did not commit.
he has simply suppressed his memories of the crime because they are too painful to accept.\textsuperscript{18} (Pp. 210–225.)

Although false confessions are highly counterintuitive, and often difficult to wrap one’s mind around, one can understand how they occur by reading examples—by examining the actual case studies. Leo provides numerous detailed case studies of each type of false confession. Each story is uniquely compelling. A reader of these case studies can come to fully understand how the suspect would falsely confess as a result of extreme psychological pressures. Other compelling depictions of how false confessions can be manufactured are found in John Grisham’s nonfiction work \textit{The Innocent Man},\textsuperscript{19} and in Leo’s co-authored nonfiction story, entitled \textit{The Wrong Guys},\textsuperscript{20} which describes the numerous false confessions made by the “Norfolk Four.” Although providing narrative depictions of interrogations that led to false confessions is beyond the scope of this review, readers who wish to understand this phenomenon should read one of these two excellent books.

There is more to the story. Part of the problem, says Leo, is that detectives are engrained with the belief that all suspects they interrogate are guilty. Training seminars have convinced detectives that they are “highly accurate human lie detectors,” thus building false confidence in their biased intuition of guilt. Leo asserts that this phenomenon is both wrong and dangerous. (P. 226.) He writes:

In the more than 2,000 interrogations I have studied, I have rarely encountered interrogators who remember most of the specifics from the laundry list of supposed nonverbal and verbal indicators of deception taught by interrogation training firms such as Reid and Associates. Rather, detectives tend to confidently believe that they can reliably infer whether a subject is lying or telling the truth based on their own intuitive analysis of his body language and demeanor. They sometimes refer to their superior human lie detection skills as stemming from a “sixth sense” common to police detectives. The unfortunate effect is that interrogators will sometimes treat their hunch (or “gut”) as somehow constituting direct evidence of the suspect’s guilt and then confidently moving to an aggressive interrogation. In my analysis of disputed confession cases, I have found that interrogators are often more certain in their belief in a suspect’s guilt than the objective evidence warrants and tenaciously unwilling to consider the possibility that their intuition or

\textsuperscript{18} Joe Dick, one of the Norfolk Four described in Leo’s book \textit{THE WRONG GUYS}, see supra note 8, provided several coerced-internalized false confessions. Dick’s interrogators were so convincing that he continued to falsely believe that he had participated in the crime many months later.

\textsuperscript{19} JOHN GRISHAM, \textit{THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN} (Doubleday 2006).

\textsuperscript{20} See \textit{THE WRONG GUYS}, supra note 8.
behavioral analysis is wrong. These tendencies may be reinforced by an
occupational culture that teaches police to be suspicious generally and
does not reward them for admitting mistakes or expressing doubts in
their judgment. (P. 229.)

False confessions also occur because, in cases in which little evidence of guilt
exists, the detectives are convinced in their "gut" that the suspect is guilty, so they
become Hell bent on obtaining a confession. (Pp. 229–30.) In cases where ample
evidence of guilt exists, on the other hand, police may not need a confession or
may decide to refrain from interrogation altogether. As a result, extreme
psychological interrogation occurs most often when police have relied on little
more than their own hunch or intuition to determine guilt. And, as Leo has
demonstrated, these intuitions and gut-feelings are often wrong. Thus, extreme
psychological interrogations do their work most often in cases where strong
evidence of guilt is lacking, and thus, in cases where suspects are most likely to be
innocent.

A confession is usually seen by actors in the criminal justice system—
prosecutors, defense attorneys, judges and jurors—as one of the most powerful
indicators of guilt. (P. 248.) As a result, when a false confession exists, it is often
admitted into evidence at trial and the defendant is convicted as a result of his
confession. Studies show that once a suspect falsely confesses, he possibly has
more than an eighty percent chance of being wrongfully convicted. (Pp. 250–51.)

III. THE NECESSARY REFORMS: POLICY DIRECTIVES FOR THE FUTURE

Leo's suggested reforms not surprisingly revolve around the necessity of
reducing false confessions. At the outset, he rejects the idea of abolishing police
interrogation. He believes that interrogation, properly done, is both a necessary
and valuable tool to solve many crimes. (P. 271.) He further dispenses with the
suggestion of others that the interrogation function be performed by prosecutors,
magistrates, or judges. (P. 271.) Leo contends that prosecutors and judges should
remain unburdened by the interrogation process, to ensure that they do not become
tainted by the inquisitor's role. (P. 271.)

The reforms Leo urges come in two forms: legal and practical. Leo first
suggests reinvigorating the reliability rationale of the due process voluntariness
test. Reliability played an important role in determining the admissibility of
confessions for much of American jurisprudential history, until the Supreme Court

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21 To further illustrate the point, DNA testing performed at the FBI laboratory of suspects
identified by police investigation excluded 20 percent of the primary suspects, and resulted in a
match with the primary suspect in only about 60 percent of the cases. U.S. DEP’T OF JUSTICE,
OFFICE OF JUSTICE PROGRAMS, PUB. NO. 161258, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE
STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xxviii (June 1996).
undermined that policy rationale in *Colorado v. Connelly.* I have previously echoed these same concerns, noting that *Connelly* was ironically decided shortly before the DNA Revolution commenced, which cleanly laid bare the problems with false confessions and the dire need for a reliability focus in determining confession admissibility.

Leo’s primary legal focus is on the creation of a new reliability test. A judge should not admit a confession into evidence, Leo argues, unless he or she has weighed three factors and determined the confession is trustworthy. These factors are:

1. whether the confession contains nonpublic information that can be independently verified, would be known only by the true perpetrator or an accomplice, and cannot likely be guessed by chance;
2. whether the confession led the police to new evidence about the crime;
3. whether the suspect’s postadmission narrative fits the crime facts and other objective evidence.

This “totality of the circumstances” analysis should be performed after the court has determined that the confession is voluntary. The prosecution would have the burden of establishing trustworthiness by a preponderance of the evidence. Of course, for this sort of analysis to work properly, all interrogations would have to be videotaped from beginning to end. Judges would need an objective record by which to analyze and weigh these three prongs. As discussed later, Leo believes that taping should be a universal requirement.

The legal basis for such a reliability test can be found in Federal Rule of Evidence 403. Although an unreliable confession may still be minimally relevant under this rule, it is not particularly probative of the suspect’s guilt. And because confession evidence weighs so heavily in the minds of jurors, an unreliable confession is unfairly prejudicial to a defendant and devastating to the innocent.

Leo’s primary practical reform goes hand-in-hand with the new reliability test—a requirement of universal videotaping of interrogations from beginning to end. He notes that this reform has picked up momentum in recent years, with several states now requiring taping either by statute or court decree.
Similar legislation is pending in several states across the country, including my home state of Ohio.\(^{25}\)

Leo believes, and I agree, that a broad requirement for videotaping interrogations is the single most important reform. (P. 296.) The benefits of this reform are legion. First and foremost, videotaping creates a clean, objective, and comprehensive record of an interrogation—the equivalent of instant replay. This would prevent false confessions from leading to wrongful convictions in three ways. First, after-the-play scrutiny of police conduct would help professionalize police departments. It would ensure that police play within the bounds of permissible interrogation techniques. Second, it would allow experts to analyze the tape before trial. This opportunity is crucial because expert witnesses could look for earmarks of reliability or falsity, such as whether the police fed the suspect facts to adopt, or whether the suspect truly came up with nonpublic facts on his own. Third, videotaping would provide judges with an objective record to make the three-pronged inquiry in Leo’s new reliability test.

Taping protects the police by preventing suspects from making false claims that they were abused in the interrogation room, or that the police officer failed to recite Miranda warnings. It removes secrecy from this important part of our adversarial process and “eliminates the gap in our knowledge that the Supreme Court complained of more than four decades ago in the Miranda decision.” (P. 297.) Law enforcement agencies benefit because a tape recording of a reliable confession is rock-solid evidence at trial. (P. 301.)

Taping also furthers the investigative abilities of the police. Indeed, things said by a suspect during an interrogation may seem unimportant at the time. As the investigation progresses, however, new facts give rise to new angles. A tape allows the police to go back and capture the suspect’s original statements that, without such a clean record, might have been forgotten by the interrogators or gone unnoted. (Pp. 300–01.)

Recording also saves time and money, drastically cutting down on the time police, prosecutors, judges and juries must litigate disputes regarding what was said in the interrogation room. When interrogations are recorded, fewer pretrial suppression motions are made, and fewer claims are made that the police neglected Miranda’s dictates. (Pp. 301–02.) Finally, recording improves relations between the police and public. By “removing secrecy from interrogations, recording should increase public perceptions of the legitimacy of the criminal justice system more generally.” (P. 303.)

Studies show that taping does not decrease the frequency of confessions. (P. 303.) And complaints about cost have not been borne out by departments that have adopted such requirements. In this day and age, recording equipment is

inexpensive, hours of recording time can be saved on an expensive digital hard drive, and any minimal costs are offset by the cost-benefits of reduced litigation to the entire criminal justice system. (P. 303.) Objections from law enforcement about operator mistakes or equipment failure are resolved in states that have a recording requirement by implementing "safety valves," or exceptions when recording is not possible or resulted from unintentional error. (P. 304.)

Finally, Leo proposes several "piecemeal" reforms to fight against false confessions. These reforms include improving police interrogation training, requiring probable cause to interrogate, prohibiting implicit and explicit threats and promises, banning false evidence ploys, imposing time limits on interrogations, providing additional protections for vulnerable populations such as the mentally handicapped and juveniles, embracing in-court expert testimony on the reliability or unreliability of confessions, and improving jury instructions.²⁶ Requiring probable cause to interrogate, and banning false evidence ploys, are perhaps the two most controversial of his suggested reforms. I will discuss these reforms further below.

IV. CRITIQUES, INSIGHTS AND ADDITIONAL REFORMS

Two broad questions were in my mind when I finished reading Leo's book. The first is whether Leo's conclusions about the attitudes of detectives toward interrogation and their suspects, how interrogations occur in the real world, and the frequency with which false evidence ploys and extreme psychological coercion are used, are entirely accurate. The second question is whether the problem of false confessions outweighs potential benefits to our society from modern forms of psychological interrogation. I cannot definitively answer either question.

Regarding the first question, I, like most scholars, am limited by the fact that I have not performed decades of empirical research as has Leo. To truly test Leo's claims I would have to review the tapes of the thousands of interrogations he has studied over the past decades, or perform my own empirical research to determine whether his sample set is representative.

We all have our beliefs and biases about police interrogation, however, whether stemming from television, scholarship, or real world experience. I have limited personal experience with interrogations. I participated in several

²⁶ The Supreme Judicial Court of Massachusetts ruled in 2004 that:
[The Supreme Judicial Court of Massachusetts ruled in 2004 that:
[W]hen the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention . . . and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care.

interrogations with federal law enforcement agents as an Assistant United States Attorney, including a twelve-hour interrogation in which the suspect ultimately made incriminating statements leading to a prosecution for murder. None of the psychological techniques or false-evidence ploys described in Leo’s article were used. But I was not present for the vast majority of police interrogations that I later introduced into evidence in court. And I have no real world experience, either as a participant or voyeur, outside of that limited realm.

My instincts suggest that Leo is more or less on point, however. Leo’s empirical research is extensive. He has probably witnessed, either live or on tape, more actual interrogations than many veteran police interrogators in high-crime urban centers. But, whether his conclusions are biased, I cannot say. This brings me to the point I made in the introduction of this review. I suspect that Leo’s most enthusiastic critics will be law enforcement personnel. Such critics should be deflected with a single point. If law enforcement personnel wish to prove Leo wrong, they must open up the process for further scrutiny and study. Those who hide the ball are on thin ice to complain that others have mischaracterized the situation.

I experienced my first resistance to videotaping interrogations in my first weeks as a federal prosecutor in 1995. A suspect and his attorney from another state came in for a “proffer session,” an “interview” conducted by an FBI agent and me to determine if he was a suitable candidate for cooperation against other suspects in the same conspiracy. The suspect’s attorney asked that the session be videotaped. It seemed like a reasonable request to me. I then asked my supervisor if I could videotape the encounter, but received a strong rebuff. I was informed that such a request was against the policies of the United States Department of Justice. The supervisor explained that the “public would not understand the things we have to do.”

More recently, as Director of the Ohio Innocence Project, I have worked to have videotaping legislation passed in Ohio. I have given talks in support of the legislation to prosecution groups, sheriffs associations, and police unions across the state. So far, I mostly have been met with stiff resistance. The chief of police of a major Ohio city was quoted as saying that the legislation demonstrates “a great distrust of law enforcement.” To law enforcement critics of Leo’s conclusions about police attitudes and values in the interrogation room, I respond that you do not have a leg to stand on until you allow widespread videotaping, so that Leo’s assumptions can be empirically put to the test by a variety of scholars across many spectrums.

My second question is whether the current risk of false confessions outweighs the benefits to society of intense psychological interrogation. We all know the

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27 See Dutton & Wagner, supra note 25.

maxim that it is “better that 10 guilty persons escape than that one innocent suffer.” But what if current interrogation methods result in one thousand convictions of murderers and rapists who would otherwise still roam the streets for each innocent person who falsely confesses? The bottom line is that we simply do not know—and cannot know—the true costs involved in the various tradeoffs between competing interests. It is quite possible that all of Leo’s suggested reforms could be implemented with little to no loss of prosecutions of the guilty. But Leo does not pretend to know. Rather, he identifies the problem of false confessions, which is real, and then prescribes medicine to remedy this problem without any report on the side effects of this medicine. Leo apparently believes that the current state of affairs is simply unacceptable regardless of the unknown costs his proposed reforms might entail. Where others fall on the spectrum of choices may be a matter of personal politics.

Nevertheless, I wholeheartedly agree with two of Leo’s suggested reforms: the need for universal videotaping and the need for judges to vigorously screen out unreliable confessions under Rule 403 for the reasons he stated. Videotaping opens up the process. It professionalizes interrogation practices. Detectives know that judges and juries will later scrutinize their behavior in the interrogation room. Detectives can still push hard for much needed confessions, but the eyes of outsiders provide a check against egregious practices. Videotaping also provides an objective record for future litigation. It cuts down on litigation by ending false claims of abuse or Miranda failure. Most importantly, it allows the interrogation to be reconstructed after-the-fact by experts and courts to determine a confession’s reliability.

And Leo’s case for a renewed emphasis on confession reliability as a prerequisite to admission is overwhelming. Leo selects Evidence Rule 403 as the regulator of unreliable confessions. I have made the case in a California Law Review article that a stringent requirement for confession reliability is inherent in due process. Through a series of doctrinal errors, beginning in Bram v. United States and culminating in Colorado v. Connelly, the Court stripped the reliability factor from the due process inquiry, even as DNA testing began to shed light on the serious problems of unreliable and false confessions resulting in wrongful convictions in this country. For both legal and policy reasons, reliability needs to find a home in our confession law jurisprudence. This home could rest both the Due Process Clause and in Rule 403, as Leo suggests.

31 168 U.S. 532 (1897).
33 See Godsey, Reliability Lost, supra note 2.
34 Id.
Leo’s other reforms—embracing expert witnesses on the reliability issue, improving police interrogation training, and creating new jury instructions to deal with the issue of unreliable confessions—are all needed reforms. Coupled with videotaping and a new thrust toward screening out unreliable confessions on the front end, these reforms together would go a long way toward minimizing the harmful impact of false confessions.

In one respect, I would go farther than Leo. Leo seems to give up on the ideal of improving *Miranda*, but I believe that *Miranda* can be revitalized to some extent, to help it achieve its intended function. I made the case in a *Minnesota Law Review* article that an additional warning should be added: “If you choose to remain silent, your silence cannot be used against you.”35 This warning was not part of the original *Miranda* warnings because the Court had not yet ruled in *Doyle*36 that post-*Miranda* silence is inadmissible. The Court in *Miranda* believed that this *Doyle*-warning was implicit; suspects will naturally understand that silence cannot be used against them.37 But Leo’s own empirical research has shown that suspects do not “get” this right as the *Miranda* Court believed. Many suspects feel they have no choice but to talk—and thus are compelled to speak—simply because of an erroneous belief that silence in the face of damning accusation will equate with guilt in the eyes of the jury.38

Leo established that *Miranda* has little effect, in part because detectives deemphasize it by reciting the warnings quickly, in a perfunctory tone and then launching into intense interrogation without giving a suspect the chance to absorb or consider his rights. His description made me suddenly consider a new way to combat this *Miranda* nullifying effect. Now that we are in the digital age, with universal taping of interrogation within our grasp, I would consider having *Miranda* warnings recited to suspects in custody by a judge or defense attorney via videotape. Much like the “seatbelt” video one watches on commercial airplanes, *Miranda* could be neutrally explained and emphasized in a way that ensures that suspects truly understand their rights and have time to consider them. Suspects could then verify in writing that they have watched the video, understand their rights, and wish to submit to questioning before interrogation commences. Some have suggested having suspects brought before a magistrate for *Miranda* warnings or interrogation. Leo asserts that this improperly crosses separation-of-power lines. But a video of a magistrate informing the suspect of his rights would help cure *Miranda*’s ills without infringing on the judiciary’s independent role.

Leo also urges the prohibition of any threats or offers during interrogations. I have a different—although somewhat similar—take on this issue. Although a full recitation of my admittedly complicated theories about penalties and offers are

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35 Godsey, *Reformulating the Miranda Warnings* supra note 2.
beyond the scope of this review, I have previously set forth an argument that the Self-Incrimination Clause was designed to regulate this matter to ensure that suspects are not penalized in any way for exercising their right to remain silent.\textsuperscript{39}

The reforms with which I continue to struggle are Leo's requirement for probable cause to interrogate and his proposed ban on false evidence ploys. Leo argues that detectives should, just like with search warrants, have to go before a magistrate and establish probable cause before they may interrogate a suspect. (Pp. 307-08.) I understand his reasons for setting forth such a requirement. Police interrogate more intensely the more they need a confession. They most need confessions in cases where other evidence of guilt is weak. The requirement of probable cause might reduce the risk of false confession.

I also suspect, however, that a large number of serious crimes are solved each year with reliable confessions that would not have been solved with such a probable cause requirement.\textsuperscript{40} If this were the only reform available at this time to combat the problem of false confessions, I might consider it. I think the proper balance can be struck, however, by requiring videotaping, a three-pronged reliability inquiry prior to confession admissibility, embracing expert testimony, and improving jury instructions. If the only evidence of guilt in a given case is the defendant's confession, having the interrogation on videotape, so that proper examination of the confession's reliability can be performed, sufficiently attacks the problem without eliminating otherwise reliable confessions and convictions that might be unattainable with such a probable cause requirement.

Finally, I do not have enough data to agree at this time with his proposed ban on false evidence ploys. Leo argues that it is hypocritical for detectives to hold out interrogation as a truth-seeking venture when they intentionally intersperse lies in the interrogation process. And while lying is generally unseemly as a cultural matter, I am not yet convinced that false evidence ploys do not result in a net gain in the pursuit of truth. I imagine, but lack data to back it up, that falsely telling a suspect his fingerprints have been found at the scene often results in a guilty suspect giving up the game and confessing, allowing scores of crimes to be solved.

In a recent Ohio Innocent Project case, I was convinced beyond probable cause that an alternate suspect committed the rape for which my client had spent more than a decade in prison. I interviewed the alternate suspect on the street along with a retired detective who volunteers for my organization. The alternate suspect made some strange and semi-incriminating statements, but did not confess. I must admit that although I did not lie to him, I was tempted to falsely tell him that our private DNA testing efforts put him at the crime scene. Why? Because I wanted to see how he would respond. I intuitively believed that he would not confess unless he knew that the game was over. If he did not confess in response to this news, I at least wanted to gauge his reaction. Did he quickly provide an

\textsuperscript{39} See Godsey, Rethinking the Involuntary Confession Rule, supra note 30.

\textsuperscript{40} Leo also does not explain how his requirement for probable cause would work in Terry stop scenarios based on reasonable suspicion.
explanation for why his DNA was at the scene, which could later be discounted through investigation? Did his response give the impression that he was expecting to hear such news and had premeditated a story to try to explain it away? Or was he genuinely stumped? This would have been supremely helpful information to obtain.

Without knowing how many true confessions and incriminating statements are obtained each year through false evidence ploys, I cannot say that their tendency to cause innocent suspects to falsely confess outweighs their potential benefits. And while I agree that a detective lying to a suspect during an interrogation is unseemly, I believe other reforms Leo has suggested are sufficient. Detectives will know that their actions will be caught on tape and viewed by a judge and jury at a later time. Detectives will be held accountable for their actions, and the factfinders will be able to determine whether the suspect’s responses merited the detective’s approach. The judge, making a reliability determination before admitting the tape into evidence, will be able to see whether the false evidence ploys eventually beat down the suspect and convinced him that he had no choice but to conjure up a false confession. Or, the judge will see that the false evidence ploy immediately led to strange and incriminating statements from the suspect, such as providing non-public information about the crime. Experts will be able to view such tapes as well, and offer their opinions as to whether the false evidence ploys had a detrimental effect on the truth seeking purpose of the interrogation.

V. CONCLUSION

Richard Leo body of work, summarized in Police Interrogation and American Justice, shines the bright light on police interrogation in American today. He depicts the values and structure of interrogation in a way that few, outside of the actual subjects/victims of interrogation, fully understand. Although I do not agree with all of his conclusions and proposed reforms, his work convincingly raises a point that we must heed: If we are to ensure the integrity and fairness of confessions in this country, we must adopt universal videotaping requirements across all jurisdictions, and develop new reliability tests to screen out false confessions.
Is There Too Much Criminal Law?

Stuart P. Green*


Is there too much criminal law? Are there too many overlapping criminal statutes, covering too much conduct, resulting in sentences that are too long? Douglas Husak says yes, and in this splendid book offers an original and persuasive explanation for why that is so.

His argument for a “minimalist” conception of criminal law takes an elegant form. Chapters 2 and 3, which contain Husak’s theory as to what kind of conduct can legitimately be subject to criminal sanctions, comprise the heart of the book: Chapter 2 considers what he calls his “internal constraints” on criminalization, those derived from within the criminal law itself, while Chapter 3 offers a discussion of what he calls “external constraints,” those that depend on a “normative theory imported from outside the criminal law itself.” (P. 55.) The first and last chapters function as bookends for the argument in the middle: Chapter 1 consists of a freestanding indictment of our bloated, overextended system of criminal justice, while Chapter 4 offers a critique of several alternative theories of criminalization: law and economics, utilitarianism, and legal moralism.

There is so much in this book that is smart and insightful that one is tempted just to sit back and admire it. That would probably not make for a very interesting review, however. Although I will highlight a few aspects of the book that seem to me particularly successful (including Husak’s potent critique of the law-and-economics approach to criminalization), my main focus will be on those areas where I see fault in his intricate argument. My criticisms center for the most part on formal rather than substantive aspects of his theory—not on the conclusions that he draws, most of which I agree with—but rather on the path that he takes to those conclusions. In particular, I take issue with the notion that the first four normative constraints on criminalization that he identifies—even if they are the right ones—can properly be found within the contours of criminal law itself. In addition, I offer several possible revisions to his theory (two constraints that seem to me redundant, another that might have been included but was not) and consider quibbles on several further points.

* Professor of Law & Justice Nathan L. Jacobs Scholar, Rutgers School of Law-Newark. Thanks to Vera Bergelson for her comments on an earlier draft.
I. SETTING THE STAGE

Husak begins his analysis, in Chapter 1, with a powerful critique of the overcriminalization phenomenon. Piling detail on top of detail, Brandeis-Brief-style, he paints a vivid picture of an American criminal justice system bursting at the seams: A large number of new, broadly reaching, and often overlapping criminal offense provisions have been enacted; police, prosecutorial, judicial, and prison resources have been squandered; and harsh new sentences have been authorized and imposed, impacting not only those who are convicted of crimes but also their families and communities. Arguing that we have “too much punishment” in the sense of both too many crimes and punishment that is disproportionate to the acts committed, he describes a range of doctrinal developments that have contributed to this surfeit of criminalization: outrageously broad conspiracy laws; the increased use of strict liability; newly minted drug, juvenile, white collar, and intellectual property offenses; and a plea bargaining regime that favors the prosecution at every turn. (P. 3.)

This is clearly a subject about which Husak feels passionate, and that passion comes through in his prose. He has, he says, “tried to maintain a sober and academic tone in describing this sorry state of affairs. Still, [he] can barely conceal [his] outrage about what [he] believe[s] to be an injustice of monstrous proportions.” (P. vii.) The unusual combination of philosophical rigor and adversarial zeal makes for a good read.

Indeed, the basic structure of the book reveals Husak to be something of an intellectual risk-taker. One would have expected that the question of overcriminalization would be addressed only after a theory of criminalization had been developed first. Analytically, this would have been the safe approach. But it would also have made for a less engaging book. Husak jump starts his analysis with a “presumptive and intuitive” case for his thesis that our system is overcriminalized. (P. 3.) In my view, his gamble pays off. By beginning his discussion in the real world of facts and figures rather than in philosophical speculation, he breathes life into what might have been a dry subject and allows the reader to see why the analysis that follows actually matters.

II. LOOKING FOR CONSTRAINTS WITHIN THE CRIMINAL LAW

Having set the stage with his presumptive case for overcriminalization in Chapter 1, Husak then turns in Chapters 2 and 3 to the core of the book, a normative theory to distinguish those uses of the criminal law that are justified from those that are not. Such a theory is necessary, Husak says, because “[t]he criminal sanction is the most powerful weapon in the state arsenal; the government can do nothing worse to its citizens than to punish them.” (P. 95.) It is here that most of the theoretical heavy lifting occurs.

The theory consists of seven basic limitations on the criminal law. As noted, he claims that the first four are “internal” to the criminal law in the sense that they
can be derived from within "the general part of criminal law, and from reflection about the nature and justification of punishment. (P. 103.) Any "adequate theory of criminalization," he says, "must include" these constraints. (Id.)

The first of the internal constraints is the idea that criminal liability should not be imposed unless statutes are designed to prohibit a "nontrivial harm or evil." (P. 66.) I agree with Husak that the requirement of harm should be regarded as the first principle of criminalization. I disagree with him, however, about the proper source of this principle.

According to Husak, several familiar defenses in criminal law—necessity or lesser evils, consent, and de minimis—are "unintelligible unless criminal offenses are designed to proscribe a nontrivial harm or evil." (P. 66.) "None of these three . . . defenses," he says, "can be interpreted or applied unless each penal statute is designed to prevent a nontrivial harm or evil." (P. 67.) Put another way, I understand Husak to be asserting that the existence of such defenses presupposes the existence of a nontrivial harm constraint.

The connection that Husak draws between the criminalization question and these "general part" doctrines is ingenious and insightful. It provides him with the opportunity to reflect on a whole host of significant issues in criminal law theory. And he is no doubt right that there are interesting parallels between the principles of criminalization and criminal law doctrine. I am not persuaded, however, that reference to criminal law doctrine can establish a principle of criminalization. Conceptually, the question of what kinds of conduct should be subject to criminal sanctions properly precedes the question of how various criminal law doctrines found in the general part should be formulated. Ultimately, Husak seems to be attempting to extract an ought from an is. Current criminal law justification doctrines may well presuppose a nontrivial harm constraint, but that hardly means that the nontrivial harm constraint is correct or justified. In my view, any justification for criminalization must come from some principle outside the criminal law, from an independent principle of justice.

Ironically, Husak's own account demonstrates exactly why the criminalization question ought to precede the substantive criminal law question. Assuming that our positive criminal law is as misguidedly overcriminalized as Husak says it is, there is no reason to think that our legislatures and courts will have done any better a job of creating a just general part. Husak is too careful a scholar not to recognize this problem. He acknowledges the "tension in claiming that we can extract normatively defensible constraints on criminalization from a system of criminal law that has serious normative deficiencies." (P. 76.) Unfortunately, there isn't much that can be done to relieve the tension. In my view, the attempt to draw

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1 Husak seems to be using the term "harm or evil" rather than just "harm" to refer not only to conduct that causes wrongful setbacks to the interests of others (in Joel Feinberg's phrase) but also to conduct that risks causing setbacks to interest. See (pp. 70–71) (quoting JOEL FEINBERG, HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW (1988)). It is unclear whether Husak would also allow criminalization of acts that cause harms to self or offense to others.
fundamental principles from the positive law, rather than from fundamental external principles of justice, is essentially a non-starter.

A similar problem of putting the conceptual cart before the horse undermines Husak’s account of his second constraint on criminalization, namely, that penal liability not be imposed unless the defendant’s conduct is wrongful. Here, Husak draws interesting connections to a collection of excuse defenses. Drawing on the work of Jeremy Horder, he argues that legal excuses (such as insanity or intoxication) “can be understood only against a background of criminal wrongdoing: If the defendant is not guilty of wrongdoing, there is nothing to excuse.” (P. 72.)

As in the case of the nontrivial harm principle, I agree with Husak that conduct that is not wrongful should not be subject to criminal sanctions. Once again, however, I do not believe that those principles can be derived from the substance of criminal law itself. As before, I think they must come from external sources, such as Mill’s or Feinberg’s wrongful harm principles.

My main problem with Husak’s third principle—the idea that “punishment is justified only when and to the extent it is deserved” (P. 82)—is whether it should even properly be regarded as a constraint on criminalization. More precisely, I am not convinced that the desert constraint necessarily adds anything to his theory of criminalization not already covered by his principles of nontrivial harm and wrongfulness.

There are three different senses in which Husak talks about the desert constraint. One is simply the idea that an actor, in order to be held criminally liable, should not have an excuse defense, such as insanity or intoxication. This constraint makes sense but seems already to have been covered by his wrongfulness constraint, which, as noted, references Horder’s account of excuses. As such, inclusion of this additional constraint would seem to violate the demands of Occam’s Razor.

Husak also uses the desert constraint to introduce into his analysis the idea that the conduct criminalized must somehow implicate the interests of the public at large and not merely those of individuals. As Husak puts it, “not all wrongdoing makes persons eligible for punishment imposed by the state. Private wrongdoing . . . does not render persons deserving of state punishment.” (P. 83.) I certainly have no quarrel with this point. But I do not understand why it is not enough, following the work of Antony Duff and Sandra Marshall, simply to incorporate

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the notion of "publicness" into the concept of harm. Under this approach, Husak's nontrivial harm or evil constraint would be rewritten to specify that criminal liability should not be imposed unless statutes are designed to prohibit a nontrivial harm or evil that affects or implicates the public interest. My criticism here, once again, is formal rather than substantive.

A similar formalistic problem bedevils a third aspect of Husak's desert constraint. According to Husak, "punishments may be undeserved when they are excessive. The desert constraint underlies the principle of proportionality...." (P. 83.) In other words, Husak seems to be saying that a theory of criminalization should take into account not simply whether given conduct should be subject to criminal sanctions, but also the extent of those sanctions. Once again, I am in full agreement with him on this point. But I am not convinced that the "amount of punishment" question is not also covered by the wrongfulness and harmfulness constraints. In general, I would think that the more wrongful and harmful a given type of act, the greater the amount of punishment it deserves.

The inclusion of the desert constraint highlights a deeper ambiguity in Husak's theory. Most of the time he is focused on whether a legislature should authorize criminal penalties with respect to a certain kind of conduct—a crime type. His theory is thus characterized as a "decision procedure for justifying criminal laws." (P. 55 n.3, emphasis altered.) Other times, however, he seems concerned with whether a prosecutor or judge or jury should apply criminal penalties to a specific defendant in a particular case, a crime token. Thus we have the inclusion of the desert constraint.

The two inquiries are related, of course, but they are nevertheless distinct. Legislatures are obliged to consider, prospectively, the extent to which certain kinds of harm and wrong are associated with certain types of conduct in the usual or typical case. They do not concern themselves with whether there might be excuses that diminish the desert of individual defendants in individual cases. That is precisely the sort of thing that prosecutors, judges, and juries look at, however. On the other hand, prosecutors and judges need not typically make judgments about whether an act is sufficiently harmful or wrongful to justify criminal penalties of a certain severity; that judgment has already been made for them by the legislature. Thus, there are some elements of the criminalization inquiry that are relevant to legislatures, but not to prosecutors, judges, and juries, and other elements that are relevant to prosecutors, judges, and juries, but not to legislatures. As far as I can tell, Husak's account seems to conflate these two distinct sets of decision procedure into one.

I am more impressed by Husak's fourth internal constraint, which he calls the burden of proof constraint. This constraint is framed as follows: "Because punishments implicate and potentially violate important rights—the right not to be deliberately subjected to hard treatment and censure by the state—the burden of proof should be placed on those who favor criminal legislation." (P. 100.) In explaining exactly what he has in mind here, Husak offers a helpful and typically engaging example:
Suppose the state decides to curb the problem of obesity by criminalizing the consumption of doughnuts. If we assume that the liberty to eat doughnuts is not especially valuable, the state should need only a minimal reason to dissuade persons from doing so. Clearly, the fact that doughnuts are unhealthy provides such a reason. This reason might justify noncriminal means to discourage consumption—increased taxation, bans on advertising, educational programs, and the like. But the interests implicated by a criminal law against eating doughnuts are much more significant. Persons not only have an interest in eating doughnuts but also have an interest in not being punished if and when they disregard the proscription. This latter interest is far more important than the former, and qualifies as a right. (Pp. 101–02.)

As an element in the criminalization decision procedure, this seems to me a helpful addition. In deciding whether to criminalize particular kinds of conduct, legislatures should consider not simply whether they are harmful and wrongful, and therefore worthy of proscription, but also exactly what it would mean to back up such proscriptions by means of liberty-infringing criminal sanctions.

III. LOOKING FOR CONSTRAINTS OUTSIDE THE CRIMINAL LAW

Chapter 3 offers a second set of constraints to supplement the first. These constraints derive from what Husak acknowledges is an admittedly controversial political theory about the conditions that “must be satisfied in order to justify infringements of the right not to be punished.” (P. 120.) Here, in appealing to considerations outside the body of criminal law itself, I believe Husak’s theory is on generally firmer footing than in Chapter 2.

Husak argues, first, that before a legislature can enact a penal statute, it must identify a substantial, and legitimate, state interest. The concern here is, as he acknowledges, “closely related” to the question raised by the harm or evil constraint. (Pp. 132–33.) But the focus is somewhat different. Much of the discussion here concerns whether the harms and wrongs caused by the putatively criminal act are the proper concern of the public. For example, everyone can agree that the state has a legitimate interest in preventing physical harms (such as those found in murder, rape, and assault), preventing forced transfers of property rights (such as those found in theft), and, perhaps more controversially, enforcing solutions to coordination (or collective action) problems. The harder issue is whether the state has a legitimate and substantial interest in expressing its disapproval of such kinds of conduct. This question, of course, lies at the core of punishment theory.

In this connection, Husak gives us an interesting account of the Supreme Court case of Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico. 6

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(P. 142.) The case involved a First Amendment challenge to a Puerto Rico statute that prohibited casino gambling-related advertising when aimed at locals but allowed it when aimed at tourists. In upholding the constitutionality of the statute, Husak says, the majority simply deferred to what it imagined to be the objectives of the legislation, making no serious effort to assess whether the state had a genuinely substantial interest in enacting the law. (P. 143.) His theory shows why such an approach is unacceptable. As he explains:

A minimalist theory of criminalization places the burden on the state to defend penal legislation. We must do our best to identify the real objective of the legislature, assessing the accuracy of our description by examining the degree of fit between means and ends. Only then can we determine whether this interest is sufficiently important to qualify as substantial and thus capable of overriding the right not to be punished. (P. 144.)

Husak then turns to the second of his external constraints: not only must we determine whether a particular statute serves a substantial state interest, we must also ask "whether the law directly advances that interest." (P.145.) Speaking of the demand for empirical evidence that the legislative purpose will actually be served, Husak says, "[i]t is hard to think of a single innovation that would have a more profound impact on the phenomenon of overcriminalization. At the present time, persons may be subjected to hard treatment and censure, despite the complete lack of evidence that the statute in question will attain its objective." (P.145.)

Here again the strength of Husak's analysis, and much of the interest of the book, lie in his willingness to apply his theory to complex questions of public policy. Husak is particularly masterful in discussing the almost complete lack of evidence that drug laws advance their stated purpose—presumably, deterring citizens from using illicit drugs. He draws on his encyclopedic knowledge of the literature in this area to explain why such proscriptions likely fail to achieve such a goal. (P. 147.) For example, he explains that, in enacting drug laws, legislatures fail to take into account the extent to which prohibitions on certain drugs will: cause users to switch to other drugs (the substitution effect); make the use of certain drugs more attractive to certain users (the forbidden fruit effect); and, through incarceration, exacerbate the criminogenic tendencies of those who would otherwise be short-term users. (Pp. 147-48.)

Finally, Husak offers the third of his external constraints—namely, that the challenged offense be no more extensive than necessary to achieve its stated purpose. (P. 153.) Under this rule, the state must consider the possibility of alternative means of achieving its statutory purpose and must determine that there is no equally effective alternative that is less extensive than the statute in question. Among the concerns that Husak raises here is that criminalization might be overinclusive—that it might apply to conduct that does not actually cause, or risk, the harm or evil that the law is meant to proscribe. As he explains, offenses of risk
prevention, especially those involving proscriptions of drugs and guns, are particularly vulnerable to such a charge. (P. 154.)

Despite Husak’s ambitious attempt to develop a comprehensive set of constraints on criminalization, there is at least one factor that finds its way only partially, and then not explicitly, into his theory. I have in mind the costs of criminalization. A proposed criminal statute might directly advance a substantial state interest and be no more extensive than necessary to achieve such purpose, and yet its costs might still outweigh its benefits. Certainly the enactment of overinclusive legislation, and the consequent effect of chilling socially beneficial, or at least socially neutral, conduct counts as costs of criminalization. But there are other costs as well, less explicitly acknowledged. All forms of criminalization entail costs in terms of investigation, prosecution, adjudication, and punishment. Sometimes these costs are direct, such as paying salaries to police, prosecutors, public defenders, judges, prison guards, and probation officers. Other times they are indirect, such as when family members suffer because a parent or spouse is in prison, or when an offender has difficulty finding a job after release from prison. But the costs of criminalization also vary from crime to crime. For example, given the unusually heavy costs of prosecuting crimes such as welfare fraud, which fall mainly on the poor, we might decide that such legislation is not worth whatever benefits it might entail. As a result, we might decide to decriminalize.

IV. COMPETING ACCOUNTS OF CRIMINALIZATION

Having developed his own theory of criminalization in the middle chapters, Husak then offers, in the final chapter, a critique of several alternative theories of criminalization: law and economics (“L&E”), utilitarianism, and legal moralism. My focus here will be on the first of these alternative theories.

L&E scholars like Richard Posner claim that “[t]he major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange—the ‘market,’ explicit or implicit—in situations where . . . the market is a more efficient method of allocating resources than forced exchange.” Given detection, apprehension, and conviction rates of considerably

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8 Regarding indirect costs of criminalization, such as stress on families, single parents, stigma, harm to family dynamics, diminished earning potential, increased juvenile delinquency, and increased risk of abuse, see generally Invisible Punishment: The Collateral Consequences of Mass Imprisonment (Marc Mauer & Meda Chesney-Lind eds., 2002); John Hagan & Ronit Dinovitzer, Collateral Consequences of Imprisonment for Children, Communities, and Prisoners, in Prisons 121 (Michael Tonry & Joan Petersilia eds., 1999).

less than one hundred percent, simply requiring a defendant to compensate the victim for his loss after it has occurred is normally inadequate to serve as a deterrent. We need, in Posner’s words, “to impose additional costs on unlawful conduct where the conventional damages remedy alone would be insufficient to limit that conduct to the efficient level.” Guido Calabresi and Douglas Melamed called these supra-ordinary sanctions “kicker[s].” In the context of criminal law, we call such kickers “punishment.”

Husak is highly critical of the L&E approach. Like other retributivist theorists, he points out the pointlessness of postulating an “implicit market” that is “bypassed” when offenders intentionally murder or rape one another. (P. 184.) And he focuses on the inability of L&E to explain the singular role played by the concepts of culpability and blame in criminal law. He demonstrates the inability of L&E to explain, for example, why criminal law systems universally punish murder more severely than manslaughter and manslaughter more severely than negligent homicide. There is certainly no reason to assume that intentional homicide necessarily requires more deterrence than unintentional homicide. The reason we punish intentional homicide more severely than unintentional homicide is simply that the former is the more culpable act and therefore deserves more punishment than the latter.

Husak does not stop with what has become the standard retributivist critique of the L&E approach, however. He develops an argument that takes on L&E on its own turf. If there is any set of criminal offenses for which the L&E approach might make some sense, it is surely acquisitive offenses like theft and fraud. Unlike those who kill in a heat of passion, many thieves probably do make calculations about the costs and benefits of their conduct. Yet Husak offers a sophisticated argument showing why, even in the context of theft, the L&E approach is deeply flawed. (P. 183.)

First, he argues that, if promoting efficiency were the sole aim of the criminal law, it is hard to see why we would want to criminalize cases in which the thief values the good stolen more than its owner. (Id.) On their face, such transactions would seem to be efficient. For example, a poor person without other means of transportation may well be able to make better use of a wealthy person’s rarely-driven “backup” vehicle than the wealthy person himself. The transfer of such property, even when involuntary, would seem to reflect a net social benefit. And this is true even in situations that would not be recognized by the defense of necessity or choice of evils. L&E scholars respond that such thefts are not in fact

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13 The classic case involves D, a hiker, stranded in a snowstorm, hungry, cold, and without food or shelter to sustain himself, who breaks into an empty ski lodge and consumes various canned goods and uses firewood. Even if the hiker never reimburses the owner for his loss, there has still been a net gain in terms of social utility. The ski lodge owner uses his property only when he is on
efficient because of "secondary" costs, such as the costs of security and of avoiding victimization.\textsuperscript{14} But Husak calls them at their bluff, pointing out that such claims are nothing more than \textit{ipse dixit}, an "article of faith." (P. 183.)

Second, Husak argues that the idea that the function of criminal law is to protect markets is one that seems to apply only, or at least primarily, in capitalist societies, and that the task of justifying the criminal law is "no less onerous when economic activity is controlled by the state." (P. 184.) He points out the peculiarity of supposing that "the basic principles of criminalization will differ radically depending on the fundamentals of political economy." (Id.)

Finally, he takes issue with Posner's qualification of the L&E theory to the effect that coercive transfers of wealth are inefficient only when they are "pure." (Id.) According to Posner, a transfer of wealth is pure only when it is "not an incident of a productive act."\textsuperscript{15} In response, Husak points out, quite rightly, that plenty of lawful business activity involves transfers of wealth that are involuntary from the standpoint of the losers, and that Posner never offers a satisfactory account of how to distinguish such transfers from the illegal ones. (P. 184.)

Husak's critique of the L&E approach to criminal law seems to me a powerful one. Clearly, any account that focuses single-mindedly on the goal of efficiency will be inadequate to explain or justify the complexities of the criminal law. However, the choice need not be between focusing exclusively on costs and benefits (as the economists would have it) and ignoring them entirely (as retributivists like Husak would do). Economic analysis, and particularly the idea of punishment as a kicker, can at least provide a useful element in a hybrid theory of criminal law, one which takes account not only of retributive aims, but of deterrent ones as well.

V. THREE QUIBBLES

In an argument as sustained and complex as Husak's, there are bound to be points with which a reader will want to quibble. I offer three such quibbles here.

First is Husak's claim that the "absence of a viable account of criminalization constitutes the single most glaring failure of penal theory as it has developed on both sides of the Atlantic." (P. 58.) While I agree with him that the rationale for criminalization has often been neglected in the literature on criminal law theory, particularly in comparison to the rationale for punishment, I am nevertheless puzzled by his statement. What is arguably the single most significant work in Anglo-American criminal law theory in the last half century—namely, Joel


\textsuperscript{15} Posner, \textit{supra} note 9, at 1196.
Feinberg’s *Moral Limits of the Criminal Law* is a work that focuses explicitly on the criminalization question. Husak is hardly unaware of Feinberg’s contribution; he cites Feinberg as much or more than any other scholar in the field and explicitly acknowledges his debt to his methodology. (P. x.) So how can Husak say that there exists no viable account of criminalization? Presumably, Husak does not regard Feinberg’s theory as a true theory of criminalization. He may be right, but he never really explains why this is so. In addition, he fails to give sufficient attention to Jonathan Schonsheck’s earlier full-length study of the subject, entitled *On Criminalization.*

A second quibble is as follows: in his discussion of the amount of criminal law on the books, Husak cites one “theorist” who estimates that there are approximately 300,000 federal regulations enforceable through civil or criminal sanctions. (P. 10 n.24.) Although there is some ambiguity about exactly what is meant by federal “regulation,” the estimate is by almost any measure baldly overstated. Two more recent, systematic, and likely accurate estimates suggest that the number of federal criminal offenses is somewhere in the neighborhood of three or four thousand.

My final quibble involves Husak’s discussion of my own work. Husak seeks to show how his theory of internal constraints—requiring harm, wrongdoing, and desert—would apply to the category of offenses known as *mala prohibita.* He takes issue with my attempt to show that punishment may be deserved when persons commit crimes of this type. (P. 117.) He focuses in particular on my claim that tavern owners who violate a local ordinance that prohibits Sunday alcohol sales act wrongfully because they obtain an unfair advantage over those tavern owners who comply with the ordinance—and thereby cheat.

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16 Feinberg’s monumental effort comprises four volumes: *Harm to Others,* supra note 1; *Offense to Others* (1985); *Harm to Self* (1986); and *Harmless Wrongdoing* (1988).


18 The source of the estimate seems to have been as follows: A prominent white collar criminal defense lawyer named Stanley Arkin made the estimate in remarks at a conference on white collar crime held at George Mason University in October 1990. Arkin’s estimate was reported in an article by another practitioner who was present at the conference. See Thomas B. Leary, *The Commission’s New Option That Favors Judicial Discretion in Corporate Sentencing,* 3 FED. SENT’G REP. 142, 144 n.10 (1990). Leary’s article, in turn, was referred to by Professor John Coffee, in his oft-cited article, John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law,* 71 B.U. L. REV. 193, 216 n.94 (1991).


[W]hy do their profits not simply represent the fruits of capitalistic competition; what is the basis for describing the advantage gained by those establishments that sell alcohol on Sunday as an “unfair” case of “cheating”? Green’s account may explain the wrongfulness of a few offenses, such as paying subminimum wages to employees. But the particular example of the malum prohibitum regulation he selects probably has less to do with fair competition than with an attempt to enforce religious morality. Persons who break this law are not free riders who exploit a system of mutual forbearance by taking a privilege they withhold from others who are similarly situated. Again, they would allow (even though they would not prefer) all taverns to sell alcohol on Sundays. (Pp. 117–18.)

I believe that Husak misunderstands my point. It is not that Sunday closing laws are intended to ensure fair competition. My point is rather that one who fails to comply with such laws, when his competitors do comply, prima facie engages in unfair competition. From a moral perspective, the precise content of the rule is essentially irrelevant, the way it is in football, which requires ten yards for a first down. Ten yards may or may not be the rule that best furthers the underlying goals of athletic prowess and spectator enjoyment, but it is the rule, and violating it (say, by moving the ball after the whistle has blown) constitutes cheating. Provided that the rule itself does not unfairly promote the interests of one individual or group over others, I see no problem in saying that violation of such a rule constitutes a moral wrong.

VI. CONCLUSION

There is so much in this book that is smart and well-informed and reasonable that one feels churlish to focus on the negative. Such, however, is the nature of book reviews. I have focused on a number of points at which I believe Husak loses his otherwise sure footing, particularly in his central case for constraining criminalization. Such focus should not be understood as diminishing the importance of his achievement.

Some scholars make their mark as counter-punchers, criticizing the views of others and offering incremental changes to existing theory. Husak is as good as anyone at critique. But this book offers much more. He has taken on as big and as important a set of issues as there is in the philosophy of criminal law and has developed a lucid, closely argued, and highly original theoretical approach to their

21 Admittedly, the violation of Sunday closing laws was probably not the best example of a reasonable malum prohibitum offense. Imagine an industry in which the norm is staying open for business six days a week. If one were an observant Jew or Seventh Day Adventist, and therefore prohibited from working on Saturdays, one would, in fact, be unfairly disadvantaged by a law that prohibited opening on Sundays since one would be able to compete only on the other five days of the week.
resolution. The book stands as a significant milestone in an already distinguished career.
Proportionality for High-Tech Searches

Peter P. Swire*


Professor Christopher Slobogin of the Vanderbilt University Law School shows his mastery of the Fourth Amendment in Privacy at Risk: The New Government Surveillance and the Fourth Amendment. Slobogin argues with passion that we need a fundamental revision of Fourth Amendment jurisprudence. He begins the book by saying: "This book is about an insidious assault on our freedom and the failure of the law to respond to it." (P. ix.) The assault comes from a wave of new surveillance technologies and techniques. The failure comes from a timid Fourth Amendment jurisprudence that is allowing these techniques to spread with few limits from the courts.

Slobogin hopes to re-organize Fourth Amendment doctrine for high-technology searches around the Proportionality Principle, which focuses on the degree of intrusiveness of a government action. This book review first describes Slobogin’s main findings in areas such as physical searches of the home, physical searches of persons when in public, and government access to records held by third parties. It then underscores the importance of using the proportionality literature for an emerging controversy: searches of laptop computers and other electronic devices at the border without individualized suspicion. Finally, it focuses its comments on two topics that Slobogin does not address but which are clearly relevant to his project: the growing prominence of national security searches and the well-developed literature on the Proportionality Principle and government searches in other liberal democracies.

I. SLOBOGIN’S “PRIVACY AT RISK”

The structure of Slobogin’s book is straightforward. After a brief introduction, Slobogin introduces his Fourth Amendment framework, centered on the Proportionality Principle. He then examines three areas in detail: high-tech searches of the home; camera surveillance of public spaces; and surveillance of transactions through subpoenas and other means.

An implicit theme of the book is that there is a “new” government surveillance based on emerging technologies: newly powerful sensors feed data to

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the government; the data is stored in newly powerful computers; and computers are linked in newly powerful networks. These technological trends have occurred for many years, but legal issues based on new technology arise in new profusion since the widespread use of personal computers in the 1980s, the rise of the Internet in the 1990s, and pervasive cameras and other sensors even more recently.

In response, Slobogin proposes a framework for Fourth Amendment law premised first on the “Proportionality Principle.” This principle “allows courts to modulate the cause needed to carry out physical and transaction surveillance depending on its intrusiveness.” (P. 210.) This emphasis on intrusiveness is perhaps the single organizing theme of the book, and I discuss it in more detail below. Slobogin also supports what he calls the “exigency principle.” This holds that, “whenever there is time to do so, even surveillance authorized on less than probable cause will be subject to ex ante review by someone not involved in the search.” (P. 210.)

A. Surveillance of Private Places

Slobogin examines modern physical searches of the home. In this realm, *Kyllo v. United States* is generally considered the biggest recent victory for those who support stronger Fourth Amendment protections. As readers of this journal likely know, the Supreme Court in *Kyllo* concluded that the government could not use thermal imagers to measure the warmth of a home without a probable cause warrant. Privacy advocates salute *Kyllo* because of its holding of constitutional protections against a new, high-tech form of search.

Slobogin, though, “wonders whether *Kyllo* is a Pyrric victory.” (P. 51.) He persuasively analyzes a key loophole in *Kyllo*, which is that a warrant was needed where the technology, such as a thermal imager, was not in “general public use.” Slobogin calls this the “Wal-Mart test”—“if the item is available at Wal-Mart, it is likely to be affordable to and accessible by a large segment of the public.” (P. 57.) The problem, as Slobogin persuasively explains it, is that the cutting-edge technology of one year is on the discount shelf at Wal-Mart the next (or perhaps a couple of years after that). For instance, Wal-Mart sells night-vision binoculars that purport to permit magnified night viewing “even in total darkness.” (P. 57.) Police that peer into a home using such binoculars quite possibly can do so without a warrant, even after *Kyllo*.

In response, Slobogin argues that “the ubiquity of the enhancement device the police use is irrelevant.” (P. 73.) Similarly, “[s]o is any inquiry into whether the details observed through enhancement could have been viewed with the naked eye

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2 Id. at 41.
from a lawful vantage point."³ (P. 73.) Instead, Slobogin deploys the proportionality test, where validity of a search "would depend on the level of justification and the level of intrusion." (P. 73.) In the alternative, Slobogin would support legislation that would "ban nonconsensual, warrantless 'visual surveillance' of 'private locations.'" (P. 76.)

B. Surveillance of Public Places

After this discussion of surveillance of private locations, Slobogin's next two chapters address surveillance of public places. Closed-circuit television ("CCTV") cameras are already ubiquitous in the United Kingdom and may rapidly become so in the United States. The surveillance threat from CCTV increases greatly as such cameras become smaller, cheaper, more networked, equipped with zoom lenses, backed by electronic video storage and search, and more intelligent (with face recognition and other software enhancements).

For CCTV, the key precedent is United States v. Knotts, which found that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." ¹⁴ To overcome Knotts, Slobogin must first explain why the Constitution applies to public surveillance and then propose how judges could actually implement such constitutional protections. For the first task, Slobogin helpfully explains the variety of constitutional sources that could apply to CCTV surveillance. Slobogin underscores what he calls the "right to public anonymity." (P. 90.) Pervasive public surveillance can undermine freedom of speech and association, such as the right to anonymous political speech in McIntyre v. Ohio Elections Commission,⁵ or the privacy of membership lists in NAACP v. Alabama.⁶ The Due Process Clause protects both the right to travel, such as in Kent v. Dulles,⁷ and the right to repose and freedom from stalking, such as in state cases enjoining anti-abortion activists from videotaping people entering and leaving an abortion clinic. (P. 103.) The general right of privacy, traced to Griswold v. Connecticut,⁸ protects personhood and what Jed Rubenfeld has argued is "the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state."⁹ Slobogin also develops survey evidence that pervasive CCTV surveillance is considered

³ This "lawful vantage point" idea is important because of cases that allow surveillance without a warrant from low-flying aircraft, through a small hole in a wall or curtains, or through other chinks in a house's armor. Id. at 73.


⁸ 381 U.S. 479 (1965).

highly intrusive and thus, a violation of what society actually considers a reasonable expectation of privacy.

After assembling these arguments, Slobogin writes: "Surely if CCTV implicates the First Amendment, the due process rights to movement and repose, or the general right to privacy, it ought to implicate the Fourth Amendment as well." (P. 106.) As Slobogin explains, however, the problem is that the Supreme Court has adopted two linked doctrines: (1) the assumption-of-risk doctrine, whereby individuals have assumed the risk of being surveilled when in public; and (2) the public-exposure doctrine, whereby individuals have no right to privacy when in public. (P. 108.) Slobogin responds with a call for doctrinal change: "[W]hat is misguided is not the Court’s insistence on privacy as the linchpin of Fourth Amendment jurisprudence but its equation of Fourth Amendment privacy with the assumption-of-risk and public-exposure concepts." (P. 108.) The key doctrinal shift, in Slobogin’s view, is to have "an analysis grounded on the Court’s alternative, and arguably more fundamental, admonition that the Fourth Amendment’s scope be defined according to expectations of privacy that ‘society is prepared to recognize as ‘reasonable.’’" (P. 108.)

I have long been sympathetic to courts’ giving renewed emphasis to what constitutes a “reasonable expectation of privacy” in the light of changing technology.10 For CCTV and other public surveillance, however, I have been baffled by what role courts could usefully play. It has been difficult for me to imagine that a magistrate should issue a warrant before a camera could view a public street. More generally, it has been difficult for me to envision an administrable approach that says when a law enforcement official is allowed to take specific action to watch individuals who are in public. After all, the history of legitimate police activity has included the “cop on the beat,” keeping an eye out for suspicious behavior.11

Slobogin responds with a different and intriguing approach, with constitutional scrutiny focused on the creation of the camera or other surveillance system. Relying on his proportionality approach to the Fourth Amendment, Slobogin argues that “courts should set minimal guidelines and monitor police decisions to ensure that such surveillance is conducted in a reasonable manner.” (P. 118.) Slobogin favors a four-step set of requirements on law enforcement:

1. Justify the need for the particular camera system;
2. Develop policies for how each camera system operates;
3. Develop policies for the storage of camera records and information sharing with other entities;

4. Assure accountability to entities outside of law enforcement to comply with the first three requirements.

In my view, these four steps are entirely sensible as a matter of policy. Indeed, the steps closely track the Privacy Impact Assessments that the federal government began to use widely for new computer systems when I worked in the Clinton Administration, and which were required in federal law by the E-Government Act of 2002. In addition, Slobogin’s attention to information sharing is similar to my support for a “due diligence” process for government information-sharing programs.

Slobogin would go beyond these federal requirements in three ways, however. First, the requirements would apply to camera systems, which do not always qualify as the “computer systems” covered by the E-Government Act. Second, he would apply the four steps to state and local camera systems. Although some states have begun to do Privacy Impact Assessments for state computer systems, most state and local camera systems are installed without such a process. Third, and perhaps most importantly, Slobogin would require these procedures as a matter of constitutional law rather than public policy. This position seems to admit that public surveillance does not lend itself to the traditional authorization for surveillance of each individual (such as a stop-and-frisk under Terry v. Ohio) or of each place (such as a search warrant for a home). Instead, Slobogin essentially advocates that the Fourth Amendment apply to surveillance systems, with a rational bureaucratic process to ensure that the intrusiveness of the systems is matched with proportionate procedural protections. In my view, it is an intriguing thought that Privacy Impact Assessments could be required constitutionally, but that doctrinal shift is quite possibly larger than any United States court in the near future would undertake.

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12 The use of Privacy Impact Assessments for new computer systems became a best practice for federal agencies.


14 See Peter P. Swire, Privacy and Information Sharing in the War on Terrorism, 51 VILL. L. REV. 951 (2006).


16 392 U.S. 1 (1968).
C. Surveillance of Private Records

Slobogin next turns to the growing surveillance of private records, observing that “subpoenas and their progeny are far more important than physical searches of homes, businesses, and effects.” (P. 141.) His basic point is simple to state but complex to put into practice: “Not all recorded information warrants maximum protection from government intrusion. But much of it deserves far better protection than it receives today.” (P. 169.)

Slobogin goes into some detail on the history of subpoenas. In Boyd v. United States,17 the Supreme Court held under both the Fourth and Fifth Amendments that a subpoena could not compel an individual to turn over private papers.18 The Fifth Amendment protections against self-incrimination were mostly stripped away late in the twentieth century, in cases involving, for example, tax accountant records.19 The Fourth Amendment protections were stripped away under the so-called “third-party doctrine,” which provides that a third party that holds an individual’s records can provide those records to the government. Along with many other commentators, Slobogin criticizes third-party doctrine cases, such as United States v. Miller,20 where the Court found no Fourth Amendment protections for financial information voluntarily conveyed by a bank depositor to a bank. Slobogin is full-throated in his criticism: “[T]he Court simply defies reality when it says that one voluntarily surrenders information to doctors, banks, schools, and phone and Internet providers.” (P. 156.) Even if one accepts the “voluntary” nature of having those records available to a third party, “the Miller Court’s second key assertion—that one thereby assumes the risk that the third party will convey it to the government—is pure judicial fiat.” (P. 157.)

Slobogin’s doctrinal answer is to emphasize the distinction between government access to corporate as opposed to personal records. He agrees with William Stuntz that ready government access to corporate records is needed in order to administer many health, safety, and economic regulatory regimes. Slobogin emphasizes the importance, however, of respecting the autonomy of an individual acting in a personal capacity and the importance of using the Fourth Amendment to respect that autonomy. In my view, such a distinction between commercial and individual activity is far from easy to apply, as discussed in my own writing about how current information technology is blurring the distinction between “consumers” and “producers” in consumer protection law.21 It may be quite difficult, for instance, to determine when someone selling on eBay is acting “commercially,” with easier government access to records, as opposed to “in an

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17 116 U.S. 616 (1886).
18 Id. at 638.
individual or household capacity," analogous to an old-fashioned yard sale. With that said, however, Slobogin's approach has the distinct advantage of allowing the continuation of health, safety, and other desirable regulations while also protecting individuals' sensitive personal records that are increasingly held outside of the home.

To implement this constitutional doctrine, Slobogin provides a detailed proposal that would essentially create constitutional rules for what today is covered by the Electronic Communications Privacy Act. To simplify considerably, Slobogin's approach would very roughly track the categories under current statutory law but would be a notch or two stricter in many instances before the government could get access to transactional data. (P. 186.) When it comes to what he calls "envelope information"—the information about who sent or received a communication—Slobogin says he is convinced by empirical data and critiques of his earlier work that the rules should be stricter than he previously advocated. (P. 189.) Slobogin also proposes detailed, and somewhat complex, rules for data mining.

II. ASSESSING THE BOOK: THE PROPORTIONALITY PRINCIPLE AND OTHER ASPECTS

In my view, Slobogin's book largely succeeds in what it sets out to do. The book shows the author's mastery of Fourth Amendment doctrine. It is thoroughly researched and well-written, and the analysis of cases and doctrines merits the reader's confidence. I particularly like Slobogin's use of empirical surveys to inform a court's view of a "reasonable expectation of privacy." In that respect, it may be useful to draw on the history of survey evidence used in trademark litigation. In the Lanham Act and other trademark cases, the courts have often relied on consumer surveys to address issues such as whether there is a "likelihood of confusion" between two products. Survey evidence in both settings can help the legal system reach a better-informed decision about the relevant facts—the views of typical or reasonable individuals in society.

In my comments on the book, I first agree with the urgency of shifting to a proportionality approach, using the current example of border searches of laptops. I then argue that Slobogin's account would be ultimately more compelling if it were located in two crucial contexts—national security searches and the large international law literature on the Proportionality Principle.

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A. The Urgency of the Proportionality Test for Border Laptop Searches

The usefulness of the Proportionality Principle is effectively illustrated by a category of search that became much more prominent in 2008—border searches by Customs and Border Protection (CBP) of laptops and other electronic devices such as Blackberries. This issue has come into sharp focus since the April 2008 decision of the Ninth Circuit Court of Appeals in *U.S. v. Arnold*.

That panel clearly ruled that CBP can seize a laptop computer at the border and examine its contents without any reasonable suspicion of unlawful activity.

Although the Department of Homeland Security (DHS) did not provide a witness for the first congressional hearing on this issue, in June 2008, DHS subsequently articulated arguments about why it believes such suspicionless searches are appropriate. The basic argument is that the federal government has long had plenary power to do suspicionless searches at the border, so there is nothing new about searching laptops as well. The Department said: "Making full use of our search authorities with respect to items like notebooks and backpacks, while failing to do so with respect to laptops and other devices, would ensure that terrorists and criminals receive less scrutiny at our borders just as their use of technology is becoming more sophisticated."

There are many reasons for objecting, as a matter of law and policy, to suspicionless border searches of laptops. I have testified in Congress about a number of such reasons. In essence, though, the point is that searches of laptop computers are more intrusive than traditional physical searches at the border, even the occasional decision by a border agent to copy a few pages from a journal. Consider four reasons, among others one could develop, about why laptop searches are more intrusive. First, laptop searches last longer. The search of a backpack is complete when the traveler leaves the border. For a typical laptop, the government can make a copy of the hard drive and then search every file at its leisure. Second, the scale of laptop searches is far greater. A border agent might read a page or a few pages in a physical search. The typical laptop today has eighty gigabytes of storage—many orders of magnitude more intrusive. Third, a laptop search is like searching your home in terms of what is likely contained within. Laptops today often contain family photos, medical records, finances, personal diaries, and all the other detailed records of our personal lives. Fourth, laptops quite often contain confidential and privileged information, including journalists’ notes about an investigative story, trade secrets and other key business information, and much more. Lawyers’ laptops quite possibly contain attorney-client privileged

23 523 F.3d 941 (9th Cir. 2008).

24 *Id.* at 948.

information, all revealed to the government when the border search results in the copying of the hard drive.

Using traditional Fourth Amendment analysis, the Court of Appeals in *Arnold* found the case to be an easy win for the government—there is a traditional border search power, and so the government need not justify its search of a laptop computer. The court found unpersuasive the analogy to intrusive physical searches such as body cavity searches, where the Fourth Amendment does require at least reasonable suspicion even at the border.²⁶

By contrast, a Fourth Amendment oriented around the Proportionality Principle would have given advocates and the court far more room to make factual arguments about the intrusiveness of a laptop search compared with the traditional suitcase or backpack search at the border. A Fourth Amendment that insisted on Slobogin’s Exigency Principle also would have insisted that the Department of Homeland Security have effective policies in place in advance, before carrying out these sorts of intrusive searches. In short, the border laptop setting illustrates the usefulness of Slobogin’s approach.

### B. The Incompleteness of a Fourth Amendment Approach

Slobogin’s book takes on the large task of proposing a new, integrated approach to Fourth Amendment law for high-technology searches. It may seem a bit unfair to critique such an effort for being too narrow in scope. Nonetheless, the task of the book is too narrow in two key respects.

First, Slobogin’s discussion of criminal procedure law does not address the intersection with the growing phenomenon of national security searches and seizures. For wiretaps, a majority of wiretap orders occur under the Foreign Intelligence Surveillance Act (FISA) rather than under law enforcement authorities.²⁷ The update of FISA enacted in 2008 will continue that trend toward widespread use of national security authorities.²⁸ National Security Letters (NSL) are used by the government to get telephone, banking, and other records without need for recourse to a judge. Although the Justice Department said as recently as 2004 that NSLs had been used only “scores” of times, evidence came to light that instead they have been used at a rate of over thirty-thousand times per year since September 11.²⁹ Significant discussion of technology and civil liberties increasingly requires a discussion of both law enforcement rules, which Slobogin

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²⁶ *Arnold*, 523 F.3d at 945–46.
discusses, and national security rules, which he does not. Going forward, we will need an integration of law enforcement and national security authorities to come to any meaningful conclusions about the state of civil liberties in an era of evolving technologies.

Second, for this reader, there was a striking omission from the book. Slobogin’s single biggest emphasis in the book is on the importance of the Proportionality Principle. He would like that to become the fundamental principle of Fourth Amendment jurisprudence. As discussed above, he provides intricate doctrinal recommendations for how that principle could apply to physical searches, public activities, and surveillance of private records. Slobogin fails, however, to integrate his project into the rich international literature on the Proportionality Principle. Vicki Jackson has written recently on the pervasiveness of the Proportionality Principle:

[I]n Canada, Germany, the European Court of Human Rights, India, Ireland, South Africa, and on occasion even in the United States, courts or tribunals invoke the basic concept of proportionality not only to review the propriety of sanctions, but also to measure the legality of a wide range of government conduct through some form of means-ends analyses. In a number of countries, proportionality analysis is treated as a general principle of public law, applicable not only to constitutional law, but also to administrative and even to international law questions.30

In reviewing a book on the principle by Canadian David Beatty,31 Jackson summarizes how it applies: “[A] distinguishing feature of proportionality analysis is its eschewal of doctrinal sub-categories, its commitment to returning to foundational questions of constitutional purpose in structuring analyses of challenges to government action, and its requirement that the government come forward with justifications for statutes that infringe on protected rights.”32

This summary of the Proportionality Principle closely matches the way that Slobogin would approach issues such as CCTV surveillance: (i) eschewal of doctrinal sub-categories (Slobogin would apply Fourth Amendment protections to “public” actions); (ii) returning to foundational questions of constitutional purpose (Slobogin articulates constitutional values that justify protection of “public” actions); and (iii) a requirement that the government come forward with justifications for its actions (Slobogin would require the government to articulate policies in advance, and have review in general by judges or others who did not propose the surveillance).

32 Jackson, supra note 30, at 804.
The European Union applies the Proportionality Principle to the range of issues covered by Slobogin’s book. Article 8 of the European Convention on Human Rights provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.\(^\text{33}\)

In the past decade, the European Court of Human Rights has upheld personal rights under this Article for areas including CCTV,\(^\text{34}\) telephone interception,\(^\text{35}\) and secret government files.\(^\text{36}\) It has also provided guidance on how much “law” must be provided in advance to make government surveillance lawful.\(^\text{37}\)

In a new article, UK Professors Ian Brown and Douwe Korff emphasize that the European Court of Justice has accepted data protection as a fundamental, constitutional issue that should be applied in accordance with the jurisprudence of the European Court of Human Rights.\(^\text{38}\) They summarize the emerging European jurisprudence, founded on the Proportionality Principle, that applies to government access to personal data.

[The courts] require a legal basis for any collection, storage, use, analysis, disclosure/sharing of personal data for law enforcement and anti-terrorist purposes—but a vague, broad general statutory basis is not sufficient. Such processing must be based on specific legal rules relating to the particular kind of processing operation in question. These rules must be binding, and they must lay down appropriate limits on the statutory powers such as a precise description of “the kind of information that may be recorded,” “the categories of people against whom surveillance measures such as gathering and keeping information may be

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"taken" and the circumstances in which such measures may be taken. Legislation must include a clearly set out procedure to be followed for the authorisation of such measures, limits on the storage of old information and on the time for which new information can be retained. It must also include explicit, detailed provision concerning the grounds on which files can be opened, the procedure to be followed for opening or accessing the files, the persons authorised to consult the files, the nature of the files and the use that may be made of the information in the files. Such rules can be set out in subsidiary rules or regulations—but in order to qualify as “law” in Convention terms, they must be published.39

This summary gives a sense of modern jurisprudence for government surveillance in the democracies of Europe.

The next question is what, if anything, we in the United States should learn from the extensive jurisprudence outside of the United States about the Proportionality Principle. Vicki Jackson has argued in the Harvard Law Review for what she calls “engagement” with foreign constitutional sources of law: “[T]he constitution's interpreters do not treat foreign or international material as binding, or as presumptively to be followed. But neither do they put on blinders that exclude foreign legal sources and experience.”40

I find this engagement approach to be entirely sensible. European governments, regulators, courts, and citizens face many of the same law enforcement and national security issues as the United States. The recent European decisions apply constitutional principles to precisely the sorts of issues that Slobogin analyzes and that we are facing in this country—CCTV, telephone wiretaps, and sensitive personal records held in databases. Where the Europeans create legal protections, and those structures appear stable and workable, then arguments from law enforcement that they are unworkable become less persuasive.

A useful analogy is how other courts looked to opinions by Judge Cardozo and other out-of-state judges during the common-law heyday of torts and contracts in the U.S. No one considered out-of-state decisions to be binding or hierarchical authority. Nonetheless, such decisions could readily be persuasive authority—a source that a responsible judge should consult for insights into facts and legal reasoning. When Slobogin omits reference to the large literature on the Proportionality Principle, he foregoes a major persuasive argument for his proposed reworking of the Fourth Amendment. Many of his proposed solutions have persuasive precedents in the law of other democratic legal systems. An

39 Id. at 8.
informed consideration of the Proportionality Principle should examine those precedents.41

III. CONCLUSION

Christopher Slobogin has done a large public service by reconceptualizing how the Fourth Amendment should apply to high-technology searches. The emerging problems with searches of laptops at the border further exemplify the reasons to support the Proportionality Principle at the level of either constitutional or statutory law, where greater intrusiveness of government action leads to greater safeguards. The next challenge is how to integrate this impressive theory of the Fourth Amendment into the broader international debates about the Proportionality Principle, as well as to seek to unify our understanding of how legal protections should apply both to Fourth Amendment searches, covered in this book, and national security searches, which are not.

41 One objection to learning from Europe on this issue is less persuasive than it might appear at first glance. The objection would be that Europe simply imposes stricter privacy rules than the United States, as shown by the E.U. Data Protection Directive that went into effect in 1998. This stricter privacy regulation has indeed long been true with respect to data held by the private sector, as I have written about at length. See Peter P. Swire & Robert E. Litan, None of Your Business: World Data Flows, Electronic Privacy, and the European Privacy Directive (1998). The common wisdom, however, has been that it is the United States that has a stronger libertarian view when it comes to surveillance by the government. The Europeans, by contrast, have often allowed the government greater scope to gather personal data for use in the social-welfare states of Western Europe. When it comes to issues relevant to the Fourth Amendment, then, the baseline assumption has been that the United States historically has been stricter in important respects than Europe. It is thus an especially acute criticism of current Fourth Amendment jurisprudence if individual rights protections in the U.S. fall significantly below those in Europe. This is not an instance of a generalized European preference for privacy regulation; instead, comparison with current European constitutional law shows a lack of protections under the Fourth Amendment compared with nations that historically have often been less protective than the U.S. of individual rights in this sphere.
Search and Seizure History as Conversation:  
A Reply to Bruce P. Smith

Andrew E. Taslitz*

I. INTRODUCTION

In a recent review of my book, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868,* in the pages of this journal, Professor Bruce P. Smith said, "This is an ambitious, provocative, empathetic, and prodigiously researched book." He also described it as "strange" in a good way, drawing a parallel between the history recounted by C. Van Woodward in his seminal book, *The Strange Career of Jim Crow,* in which Woodward recounted obscure historical events leading to the reign of Jim Crow, while I addressed "themes in the history of criminal procedure that have long escaped attention."

I thank Professor Smith for these words because, as an author, I was pleased to read them and hope that they might convince potential readers of my book to see it as a worthwhile project, whatever its flaws. The bulk of Professor Smith’s review was, however, far more critical of my effort. I have no interest in writing a detailed, heavily-footnoted response to those criticisms (though I will not footnote every proposition, I will offer some meaty footnotes for controversial points or where I believe it enhances the argument). In any event, several other reviewers of my book have a very different take on it than does Professor Smith, and I do not want to re-plough the ground that they have worked—though I hope interested readers of this essay will take a look at their reviews for some startlingly different perspectives from Smith’s.

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3 Id. at 678 (citing C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955)).

matters that I see as underlying my dispute with Professor Smith. Furthermore, I bother writing at all primarily in the hope of advancing dialogue on the subject.

For those readers who have not read my book, I first offer a micro-synopsis. The bulk of the book is devoted to detailing the too oft-ignored history of search-and-seizure practices during the nineteenth century struggle over slavery. These practices were aimed not only at subordinating slaves themselves, but also at silencing and intimidating their white supporters. At various times, this struggle over search-and-seizure practices was waged in such elite fora as judicial opinions and congressional and political debates. But the struggle was also embodied in the day-to-day lives of the slaves, abolitionists, anti-tyrannical Northern whites, whites unfriendly to nationwide emancipation, and the slave masters themselves. The struggle came to be understood as one about the very meaning of the American republic, and this tug-of-war continued through Reconstruction, altering understandings of constitutional search-and-seizure principles in important ways.

My principal legal argument (as opposed to historical argument) is that the Fourteenth Amendment is best read as applying these revised understandings of search-and-seizure to the states as a matter of constitutional law. One way (but not the only way\(^5\)) to capture this application is to view the Fourteenth Amendment as incorporating the Fourth Amendment against the states, in effect creating a "Reconstructed Fourth Amendment." To better envision the historical continuities and discontinuities involved in this act of reconstruction, my book begins with a brief chapter on the events leading up to the "Original Fourth Amendment,"

\(^5\) See TAsLITZ, supra note 1, at 284 n.40 (exploring an alternative understanding, and explaining the book’s relevance even to those thinkers who reject the idea of the incorporation of most of the Bill of Rights against the states in favor of a more expansive freestanding Fourteenth Amendment due process approach to constitutional search-and-seizure issues).
ratified in 1791. In doing so, I tell a familiar story but emphasize under-weighted aspects of that history, such as concerns about freedom of movement rather than only privacy, the role of Lockean thought in search-and-seizure principles, the fear of humiliation at the hands of the state, and the link between theories of political representation and search-and-seizure practices. In particular, I emphasize the *communicative function* of those practices, the ways in which they send messages about, and thereby affect, the distribution of power in society.

Here, as in later chapters, I view the relevance of history to law as a conversation—sometimes in deed, other times in word—between elites and ordinary people. Although the work is primarily one of history, I briefly draw admittedly contestable “lessons” from that history to illustrate how it potentially plays a role in altering a variety of modern Fourth Amendment rules, principles, and constitutional methodologies. But the lessons are drawn not to articulate a thorough set of Fourth Amendment rules for modern times, nor to craft yet another comprehensive “foundational” theory of constitutional interpretation in this area. Rather, the lessons seek to spark debate about the modern legal relevance of devoting greater attention to nineteenth century history in crafting modern constitutional search-and-seizure doctrine.

Along the way, the book seeks to savage the view of the Fourth Amendment as a mere technicality, suggesting instead that it is as important to individual and collective freedom and to the American identity as provisions more widely recognized as doing so, such as First Amendment protections of speech, press, assembly, and religion. Indeed, I argue, the First and Fourth Amendments are best understood as closely linked.

Professor Smith’s critiques come down to a few major points: first, that my purported policy prescriptions in my ten “lessons” are not dictated by the history that I recount and are, in any event, vague and impractical; second, that the first part of my book, which covers what I describe as the “original Fourth Amendment,” is itself unoriginal; and third, that I have not addressed the rise of professional policing during the eighteenth century nor addressed the judiciary’s doctrinal treatment of the Fourth Amendment post-1868. I see much (though not all) of the substance of Professor Smith’s criticisms as turning on disagreements between us on the role of history in constitutional interpretation. Some aspects of Smith’s critique also respond to claims that he insists that I made that I, at least, never intended to, so I will try to clarify my position on those points further in the pages to come.

Following this Introduction, Part II of this essay examines the role of history in the constitutional law of search-and-seizure. Specifically, Part IIA begins by defining what I mean by historical “lessons” and correcting Smith’s too facile
attacks on the usefulness to legal decisionmakers of any one lesson. I explain that the right lesson or combination of lessons can be chosen effectively in commonsense fashion in a way that amplifies their usefulness well beyond what Smith’s approach of isolating one-lesson-at-a-time would suggest. Part IIA next explains why lessons are not rules (and why it’s a good thing too); do not suffer from ad hoc reasoning; speak to legislatures as well as courts; and contain a “romantic” element infusing concerns about human emotion, motivations, and aspirations that are both practically useful and more likely to inspire political action than the dry, technical images of a mechanistic constitutional law. A consistent theme of Part IIA is that constitutional interpretation must be understood in part as a conversation among the living and with the dead about how we should best constitute ourselves as a People today.

Part IIB defends the idea that history’s lessons for modern law can best be learned through the prism of history itself as a past conversation between legal elites and ordinary Americans. Listening to that conversation requires heeding the words and deeds of both groups and of relevant sub-groups and seeing how they interact. To seek less of history is to leave it interesting but of little practical value to the modern lawyer or lay citizen. To seek more of history is to give it a clarity that contradicts its complexity, exceeds human abilities, and gives to history a controlling force that it cannot and should not hold. Any legal history, my own included, ultimately serves modest goals, being but a single brick in a constitutional wall.

While Part IIA therefore focuses on modern conversations—which are partly about the past—Part IIB focuses on ancient conversations as the usable past. Part IIB next explains how such an understanding of history can improve constitutional talk today, thus returning to and elaborating upon Part IIA’s model of modern constitutional conversation. Part II in its entirety, therefore, articulates a conversational approach to constitutional interpretation generally and to Fourth Amendment interpretation specifically.

Part IIC offers brief musings on the best “tone” for engaging in academic debate, with Part III offering some concluding thoughts.

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8 See DERSHOWITZ, supra note 7, at 55 ("The object of any historical inquiry must therefore be modest: to convey a sense of how the relevant issues were understood, considered, addressed, and rationalized during the [relevant] period of time . . .").
II. THE ROLE OF HISTORY IN INTERPRETING THE CONSTITUTIONAL LAW OF SEARCH AND SEIZURE

A. What Does It Mean to Say That the Law Can Learn “Lessons” From History?

1. Defining Historical “Lessons”

I start with a preliminary observation. Counting endnotes, approximately forty-five pages of my 342-page text concern potential modem implications or “lessons” of the history that constitutes the bulk of the book. Yet a critique of several of those lessons seems to be the primary thrust of Professor Smith’s review. As I explained in the introduction to my book’s final chapter, however, “[m]y main task in this book has been to tell a story, a historical narrative that helps us to ask new questions about the Fourth Amendment’s meaning or to see old questions in a new light.” My lessons were meant “to start a new way of thinking, not to end it, to prompt future conversations rather than to halt past ones.” In short, the lessons were meant to be illustrations, subject to debate, to show why paying attention to the nineteenth century’s history of disputes over search-and-seizure issues can matter today. Yes, I have tried to defend some of these lessons in greater detail elsewhere but based primarily on grounds other than history, for I do not and did not claim that history offers the sole support for these lessons (converging evidence from many sources, including social science and philosophy, offer additional support), nor do I claim that these lessons necessarily alone dictate any specific modem policy prescriptions. But they can, I maintain, lead us to see modern issues in a way we may not before have adequately considered. Explaining and illustrating why this can be so is the task to which I now turn.

9 TASLITZ, supra note 1, at 258.
10 Id.; see also Zotti, supra note 4, at 285 (recognizing the role of my lessons as prompting “ongoing conversation,” an approach that political scientist Zotti concluded had “left [her] thinking about the book long after... comple[ting] it.”).
11 See, e.g., Andrew E. Taslitz, Respect and the Fourth Amendment, 94 J. CRIM. L. & CRIMINOLOGY 15 (2003) (explaining what I see as among the most important functions of history in constitutional reasoning); Andrew E. Taslitz, Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action, 66 LAW & CONTEMP. PROBS. 221 (2003) [hereinafter Taslitz, Racial Auditors] (illustrating the role of social science in constitutional argumentation); Andrew E. Taslitz, Stories of Fourth Amendment Disrespect: From Elian to the Internment, 70 FORDHAM L. REV. 2257, 2281 (2002) (explaining the importance of converging sources of data in Fourth Amendment analysis). Smith notes that my book “echo[es] themes advanced in a series of earlier scholarly articles...” Smith, supra note 2, at 664. He is right. I want to be clear, however, first, that I defended those themes in articles relying primarily on data sources other than history and, second, that, although I draw on the earlier pieces for small portions of the book, the vast bulk of the book’s material—especially the history I recount—is entirely new and not derivative of earlier works.
2. The Usefulness of Even "Vague" Historical Lessons

i. Even Broad Lessons Can Help to Resolve Some Difficult Problems

Professor Smith is right to describe many of my lessons as vague, at least if that term is taken to mean that they are recited at a high level of generality. I do not see doing so as either illegitimate or unhelpful. In the vast majority of modern cases, history simply does not, and it certainly should not, alone determine the meaning of the Constitution for reasons well-explored by other scholars.12 "Originalists" of some stripes, whether focusing on original "intent" or original "meaning," would sharply disagree with this last statement, but it is the starting point for my analysis.13 Some originalists, on the other hand, take an approach somewhat similar to my own, choosing to describe "intentions" or "meaning" at a higher level of generality.14 But that approach, too, makes assumptions about the controlling hand of the past that I reject.

I see studying the past as an important tool for understanding human nature and for making sense of the American experience. It is a way, as constitutional scholar Robin West puts it, of helping us to decide today how we, as a people, should "constitute" ourselves.15 History matters, therefore, in important part, in crafting a modern narrative, and all narratives proceed over time, linking the living to the dead.16 Professor Jed Rubenfeld has been among the ablest defenders of this narrative function of history in constitutional interpretation, taking seriously the idea that only crafting such a narrative can make sense of the idea of there being an American "people."17 Professor David A. Richards makes a somewhat similar point, explaining the relevance of history to the constitutional enterprise this way:

12 See, e.g., Farber & Sherry, supra note 6, at 10–28 (summarizing the critique of originalism by numerous scholars and including their own critique); David A. Sklansky, The Fourth Amendment and Common Law, 100 Colum. L. Rev. 1739, 1739 (2000) (critiquing the Court's "new" originalism as applied in the Fourth Amendment context).

13 See Farber & Sherry, supra note 6, at 10–28 (summarizing the arguments originalists raise in their own defense).

14 See Robert Benson, The Interpretation Game: How Judges and Lawyers Make the Law 46–77 (2008) (debunking reliance on framers' intent by noting the various levels of generality at which such intent can be described).

15 See Robin West, Progressive Constitutionalism: Reconstructing the Fourteenth Amendment 1–40, 192–98 (1994) (arguing that history matters to help inform us of how we shall constitute ourselves as a people today).

16 See Taslitz, Respect and the Fourth Amendment, supra note 11, at 70–72.

17 See Jed Rubenfeld, Freedom and Time: A Theory of Constitutional Self-Government 148–59 (2001). For Rubenfeld, constitutionalism in a democracy consists of a people's struggle over time to craft and live out its most fundamental, enduring commitments, even if they are contrary to the popular will at a given moment in time. See id. at 183–84.
American constitutionalism should be understood in terms of historically evolving interpretive practices that aspire to narrative integrity in telling the constitutional story of a people's self-consciously historical struggle to achieve a politically legitimate government that would guarantee persons their equal human rights. Constitutional interpretation must make use of historical argument constructively to articulate the thread of legal texts, principles, and institutions that constitute over time the struggle for a political community in the genre of American revolutionary constitutionalism. Such interpretation must use the best available political theory of human rights to make contextual sense of the ultimate rights-based normative ends of the constitutional project.\(^{18}\)

I do not claim that this is the only way to use history in constitutional reasoning, but I do claim that it is most often necessary to resolve the truly difficult modern disputes about constitutional meaning and, in any event, it is the way I meant to use history to craft the lessons recited in my book. Does this mean that these lessons, if accepted, can provide a comprehensive framework for resolving all modern Fourth Amendment doctrinal questions? Of course not, and I would be skeptical of any effort by anyone to do so.\(^{19}\)

\(^{18}\) DAVID A. J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS 17 (1993). Accuracy in the recounting of history should, of course, to the extent that is humanly possible, be an essential part of this project, however difficult a goal it may be to achieve. Certain events either happened or they did not, and their meaning to actors at the time must be based upon a careful evaluation of the evidence. See Taslitz, Respect and the Fourth Amendment, supra note 11, at 71 n.326. But the lessons that we draw from that history for modern constitutional law are unavoidably normative ones, and the most important of such lessons must proceed at a high level of generality precisely because they aim to articulate the fundamental principles that should constitute the American people as who they are. It is arguably for this reason that the constitutional text itself is so often abstract, speaking of "equal protection" or "unreasonable search and seizure" without more precise definition. For similar reasons, constitutional scholars so often speak in terms of "community," "justice," "inclusion," "tyranny," and other broad, emotionally-charged, contestable, yet essential terms. The judiciary also struggles to give meaning to such terms, turning partly to history to do so, but rarely relying solely on history, and facing the interpretative task of giving that history meaning for us today, no matter what some judges or justices may claim to be doing. See supra Part II.B.; ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION x, xii (1987) ("[T]he U.S. Constitution serves the dual function of protecting deeply embedded values ... from the political process, and of serving as a powerful symbol unifying the country."). Chemerinsky continues: "[I]t is desirable to have a constitution written in fairly abstract language enshrining ... fundamental values about the proper structure of government and the rights of individuals. It is left for each generation to impart specific meaning to these deeply embedded abstract values."

\(^{19}\) See FARBER & SHERRY, supra note 6, at 8, 141, 150–52, 161–62 (challenging the wisdom of any "grand theory" that purports to reduce our messy, conflicting, ambiguous constitutional history, text, politics, and policies to a fundamental maxim mechanically resolving all questions and effectively restraining judicial discretion; but, Farber and Sherry argue, case-by-case adjudication struggling to craft evolving principles to guide, but not determine, future cases, and relying upon varied methods and data sources, is both normatively superior and a better description of what American judges in fact do and will continue to do). Professors Farber and Sherry summarize their argument in one pithy paragraph worth quoting at length:
One of my lessons is about the importance of "respect," which I define as treating individuals and salient social groups "fittingly" in accordance with some shared core human attribute (whether it be labeled rationality, autonomy, the capacity to achieve moral goodness, or being made in God's image); any lesser treatment is insulting, and I craft an argument for history's role in helping us to gauge what state action is insulting or humiliating. That argument, however, cannot resolve the contours of the modern "automobile exception" to the Fourth Amendment's "warrant requirement" or even whether we should recognize such an exception.

Respect has far more relevance to other, quite specific, questions addressed by the Court and by constitutional scholars, notably including whether it is "reasonable" for a police officer to terrify, harangue, and arrest a woman committing a motor vehicle violation that is punishable only by a fine (the Court says yes, while I say no); whether race discrimination should matter to the reasonableness inquiry (the Court apparently says no, while I say yes); and whether the Terry Court was right to recognize that stops-and-frisks of minority group members have the effect of humiliating those members and provoking community resentment, while insisting that there is little the Court can do to minimize that ill effect (I think there is much it could have done).

Moreover, as I explain in my book, whether done under the rubric of respect or not, many judges and United States Supreme Court justices have found similar arguments about the importance of avoiding humiliation convincing. That reasonable people may disagree with these justices, and that a focus on "respect" does not mechanically resolve all modern interpretive Fourth Amendment issues,

The key problem is that each foundationalist is engaged in an ultimately futile search for certainty, purity, and consistency: a sort of "unified field" theory of the Constitution. They all have what one academic has wittily called "the endemic disease" of academics—"a hardening of categories that transforms a lower-case theory into an upper-case Grand Theory." But constitutional law is a complex human creation, not an elegant intellectual puzzle. Each theorist, by focusing on only a single aspect of the multi-faceted Constitution, reduces its complexity by sacrificing accuracy. The scholars are much like the blind men and the elephant. Each man feels only a part of the elephant, and thus describes very different things: the trunk feels like a snake, the tusk like a horn, the legs like a tree, and the tail like a broom. But the whole elephant is none of these things—or, rather, is all of them at once—and each man misses the mark in his description. So it is with foundationalists, who each ignore all but a favored aspect of the Constitution.

Id. at 8. See also Richard A. Posner, How Judges Think 13 (2008) ("Judicial philosophies (such as 'formalism,' 'originalism,' 'textualism,' 'representation-reinforcement,' 'civic republicanism,' or, the newest contenders, 'active liberty' and 'judicial cosmopolitanism,') are either rationalizations or decisions based on other grounds or rhetorical weapons. None is a politically neutral lodestar guiding judges' decisions.").

20 See Taslitz, supra note 1, at 262.
21 See id. at 2, 76-89, 259-60.
22 See id. at 81-83, 263-74.
does not thereby render a jurisprudence of respect "either hopelessly vague, ad hoc, or toothless."\textsuperscript{23}

ii. You Have to Choose the Right Lesson or the Right Combination of Lessons for the Right Problem

The importance of respect is only one of ten lessons that I suggest can be drawn from the history recounted in my book. While some lessons may be inapplicable to some situations, others might still be relevant. Moreover, several lessons might interact. Furthermore, because the lessons are not exhaustive, none might apply to a particular circumstance, requiring a re-examination of history to address the new problem.

Smith thus argues, for example, that "respect" is useless in deciding the constitutionality of operating biometric surveillance systems at the Super Bowl, which occur without probable cause or even reasonable suspicion that any individual being surveilled has done anything wrong. I am not sure I even agree with this point: how the searches are conducted; how the procedures for doing so were created; and whether there are adequate limits on police discretion or existing guidelines to handle disagreements over the accuracy of biometric results may affect whether an individual or group has a justifiable reason to feel insulted by the process.\textsuperscript{24} Granted, actual insult can occur only if those observed know they are being watched. But, the right question is whether they \textit{should} be insulted were they so aware.

Just as a person who is unaware that the reason that he did not get a job was his potential employer's racism has nevertheless been disrespectfully treated in

\textsuperscript{23}Smith, supra note 2, at 671 (characterizing my approach to constitutional interpretation). Concerning the unavoidability and wisdom of interpretive disagreement over the meaning of constitutional text, see H. Jefferson Powell, Constitutional Conscience: The Moral Dimension of Judicial Decision 92 (2008) [hereinafter Constitutional Conscience] ("The Constitution of the United States starts from exactly [this] . . . presupposition: disagreement on matters of great importance is ineradicable, and it is a tragic mistake to attempt to eliminate it."). Law professor Steven J. Heyman makes a similar point in the First Amendment context that could apply just as easily to the Fourth Amendment context on which I write:

I do not mean to say that this theory is capable of generating easy answers to free speech problems. As I have stressed, these problems typically involve important values on both sides. Individuals and groups will often disagree about the relative importance of these values and about how conflicts between them should be resolved. It follows that there will always be ideological disagreement over the scope of free speech. The goal of First Amendment theory should be not to eradicate such disagreement, but to develop a common language or framework within which we can engage in reasoned debate about controversial issues.

\textbf{Steven J. Heyman, Free Speech and Human Dignity} 3 (2008).

\textsuperscript{24}Cf. Martin Marcus & Christopher Slobogin, ABA Sets Standards for Electronic and Physical Surveillance, 18 CRIM. JUST. 5, 13-19 (2003) (summarizing the American Bar Association Standards on Technologically-Assisted Physical Surveillance, which include limitations of these sorts on the collection and use of, for example, video-camera surveillance information).
fact, so a person whose privacy has unjustifiably been invaded, albeit unbeknownst to him, has likewise been objectively treated with disrespect. Furthermore, if some people are ultimately singled out for further investigation based upon biometric surveillance, they at least (and perhaps the press) will then know it has occurred. Persons who are confident that police act pursuant to relatively objective guidelines, administered in a neutral fashion and subject to some oversight, have less reason to feel that they are being treated more as things than as persons. It does not take much to encourage a sense of "thing-hood," an experience I myself have had on the small number of occasions when police stopped me for no apparent reason, offering no comprehensible explanation, and treating me rudely in the process. Such concerns should, it seems to me, be relevant to the reasonableness of the police conduct even if not necessarily determinative.

Even conceding that respect is not relevant to the biometric testing question, my "lesson" that "privacy in public is not an oxymoron," that is, that the Court is wrong to have held that we "assume the risk" of full observation by the state any time we expose ourselves to a public place—a position defended in various ways by a growing number of well-respected scholars—is indeed relevant to whether the Fourth Amendment even applies in the first place to biometric Super Bowl surveillance. People do and should care about who is watching them, for what purposes, by what means, and for what length of time even when they are in "public" places. Under current doctrine, the Fourth Amendment would not even apply to such surveillance because, in a public place, there simply is no privacy to protect, while my position is quite the opposite. Likewise, my emphasis on the lesson that "individualized justice" really should matter—in more familiar language, that we should not too easily jettison the purported commitment to individualized suspicion involved in probable cause and reasonable suspicion determinations—is of obvious relevance to the Super Bowl situation in which no such suspicion is required. Again, to say that the privacy and suspicion lessons are relevant and merit weight does not mean that no other considerations matter. However, to isolate each lesson to test its relevance to a particular legal problem without exploring whether other lessons or a combination of them might do a better job in that instance—in short, to follow Smith's approach—is to caricature the meaning of the lessons I advanced.

See TASLITZ, supra note 1, at 59–60, 273.


To say that a commitment to individualized justice should not be too easily-jettisoned is not to say, however, that that commitment must never bend to competing concerns. See supra text accompanying notes 34–39.
iii. A Lesson is Not a Rule

Smith also treats my lessons as if they were "rules" rather than reminders of questions to be asked, factors to be weighed, and guidelines for what weight to give them. Thus, he ridicules my "commitment" to individualized suspicion as one that would flatly ban all "group searches," such as roadblocks, drug testing, police camera surveillance, and data mining. The problem is that I never suggested any such outcome.

A rhetorical commitment to individualized justice, as Smith notes, is of course already part of Fourth Amendment jurisprudence. My complaint, like that of several other scholars, is that the Court and other governmental entities have steadily eroded that commitment, while often not candidly admitting, much less justifying, that they are doing so. Notably, "probable cause" and "reasonable suspicion" are increasingly found on highly general and questionable evidence. Furthermore, even when the courts jettison the individualized suspicion requirement openly, they sometimes do so too easily, with too little thought given to the costs of doing so and how to compensate for them. That does not mean that individualized suspicion should be required in every case. My own contribution is merely to emphasize that history highlights the requirement's importance and that sacrificing, diluting, altering, or replacing it needs to be considered more carefully.

I do not think such reminders to take care are meaningless as recent psychological research suggests that reminders and re-emphases of various sorts can often alter, dare I say improve, decision making. Furthermore, so long as the Court relies on a balancing of law-enforcement-versus-individual-interests

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28 See Smith, supra note 2, at 672.
29 In particular, see David A. Harris, Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio, 72 ST. JOHN'S L. REV. 975 (1998).
30 See id. at 987–1012 (analyzing a number of cases supporting this proposition).
31 See id. at 1017–22 (offering a number of examples); Andrew E. Taslitz, Fortune-Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes, and Predicting the Future, 58 RUTGERS L. REV. 195 (2005) (exploring the dangers of sliding down a slippery slope toward further unwarranted loss of Fourth Amendment freedoms by continuing to embrace the logic of current individualized suspicion doctrine—doctrine that reflects a blinkered vision of the social costs of too-quickly abandoning the suspicion requirement).
32 See, e.g., DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 206–15 (2008) (describing a series of experiments in which asking participants to recall the Ten Commandments or to take an honor code oath shortly before performing a competitive task for a reward completely eliminated cheating, apparently because it reminded the participants of the importance of honesty); id. at 208–09 ("[I]t was not the Commandments themselves that encouraged honesty, but the mere contemplation of a moral benchmark . . . .").
approach to determine the reasonableness of searches. I do not see an alternative to trying to articulate guidelines to aid in evaluating the weight of those interests. Never once did I suggest that such guidelines, however, tip the scale in favor of requiring individualized suspicion in every case.

Smith thus cites Christopher Slobogin for the proposition that an undue obsession with individualized suspicion—with which Smith charges me—can sometimes be too socially costly. I agree with Slobogin, however, on this point. Indeed, I discuss with approval in my book the American Bar Association’s recent adoption of Standards on Technologically-Assisted Surveillance. Those standards seek to correct for the Supreme Court’s refusal to find the Fourth Amendment applicable to observation of public activities, thereby presumably permitting unregulated public video surveillance. The ABA accordingly proposes filling this regulatory gap by articulating potential legislative standards for the states to enact. Those standards, of which Slobogin was the primary architect, do not adopt an individualized suspicion requirement. They recognize, however, the risks of abuse thereby involved, compensating for them by permitting such surveillance “only when a fairly stringent series of conditions are met, including the opportunity of the public likely to be affected by the surveillance to express its views on the wisdom of the effort and to propose changes in its execution, that public being heard repeatedly on these matters, both before and during the surveillance.”

The ABA and Slobogin thus seem to embrace in this context yet another of the lessons that I have articulated—the importance of community voice—while recognizing that, where public safety requires the sacrifice of individualized suspicion, alternative but nevertheless muscular safeguards are required. If Slobogin is thus also guilty of the “populism” with which Smith rightly but derisively charges me, I am proud to be in such company. Similarly, both Slobogin and I serve on an ABA Committee on Transactional Surveillance Standards, part of whose function is to suggest rules governing state access to a wide range of electronic data held by third party institutions—rules that, at a minimum, can be workable only with at least some modification of traditional notions of individualized suspicion. I do not expect to be a dissenter from that Committee’s evolving standards on this point.

33 See Andrew E. Taslitz, Margaret L. Paris & Lenece C. Herbert, Constitutional Criminal Procedure 175–76 (3d ed. 2007) (explaining the Court’s categorical “reasonableness balancing approach”).
34 See Smith, supra note 2, at 671–72.
35 See Taslitz, supra note 1, at 59–60.
36 See Marcus & Slobogin, supra note 24, at 14–18.
37 See Taslitz, supra note 1, at 59–60.
38 See Smith, supra note 2, at 673.
39 Cf. Christopher Slobogin, Government Data Mining and the Fourth Amendment, 75 U. Chi. L. Rev. 317, 336–41 (2008) (recognizing the need for reducing, modifying, and even eliminating the


My use of history to inform doctrine in this fashion is sympathetic with a commitment to judicial minimalism of which Professor Cass Sunstein so convincingly writes.40 “Judicial minimalism” is the case-by-case accretion of doctrinal change that relies on “incompletely theorized agreements,” that is, on concepts and their justifications recited at a sufficiently high level of generality so as to permit broad agreement on their terms, without straight-jacketing future doctrine in service of some totalizing, comprehensive model that may ignore experience in the service of narrow notions of consistency and logic.41 That is not to say that my lessons, if accepted and read as I suggest, would not substantially alter current doctrine, but they would do so incrementally, open to the need for course corrections, and with acceptance that they rely on incomplete theories. These lessons are thus merely guidelines meant to assist in analyzing problems raised by specific cases. They are not a code-book of narrowly specific rules prejudging the wisest resolution of every Fourth Amendment problem.

My approach is also reminiscent of feminist theories that emphasize particularity and uniqueness, and with modes of judicial reasoning that applaud the common law method.42 Any interpretive approach partly relies on some sort of theory, but the common law method, as I understand it, accepts Sunstein’s idea that application of general concepts to particular cases can lead to strongly justifiable results even if we cannot all agree on a single, comprehensive explanation for how we got there or should have gotten there.43 Additionally, the common law method accepts that “truth” of some sort can be achieved in an individual case that is

individualized suspicion requirement for at least certain types of government data-mining). The ABA Committee is still in the early stages of its work, so I cannot now know what the final product will say. However, our internal discussions and drafts suggest that it is highly likely that we will recommend modification, alteration, or elimination of the individualized suspicion requirement for certain types of transactional surveillance, including certain types of data-mining.


41 FARBER & SHERRY, supra note 6, at 161 (arguing that grand theory in constitutional interpretation impairs judges’ ability to learn from experience).

42 See Andrew E. Taslitz, What Feminism Has to Offer Evidence Law, 28 Sw. U. L. Rev. 171, 196–209 (1999) [hereinafter Taslitz, What Feminism Offers] (summarizing such feminist theories); see also infra text accompanying notes 43–45 (discussing some virtues of the common law method).

43 See SUNSTEIN, supra note 40, at 1–40; FARBER & SHERRY, supra note 6, at 152 (“Applying large scale theories is clearly not the primary way judges make decisions. Instead, they tend to proceed incrementally, moving case by case. Rather than attempting to articulate a general theory from the start, they try to develop and elaborate principles as they go along.”).
recognized as unique. Of course, the accretion of reasoning explaining such cases leads to principles meant to guide future cases too (serving as precedent), and there is always a tension between the needs of the individual case and the precedent set for future ones. Nevertheless, precedent is ultimately guidance rather than the statement of a simple mechanically-applied rule; it is one set of weighty reasons to be considered in making future decisions but can often be distinguished from a particular new case. Case-specific reasoning is thus always part of the common law method.

Such an approach of course allows for the interplay of at least subconscious judicial biases and political preconceptions. While the law should do what it can to minimize such influences where they are pernicious, I do not think that they can ever be eliminated. Moreover, for the important questions of constitutional law, good arguments have been made that it is self-delusion to believe that these forces are not at work and that it is even desirable that they play a role, as long as the underlying political and ideological arguments are brought into the open, thereby subjecting them to efforts at defense and critique. Such arguments accept that the

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44 Richard Posner makes the point this way:
So pervasive is pragmatic thinking in the American political culture that legalists are [unconvincingly] driven to defend the blinkered results to which their methodology of strict rules and literal interpretations tends as yielding better consequences [that is, as being more pragmatically useful] than a fuller engagement with the facts of a case, a greater willingness to knead rules into standards, and a looser interpretation of rules that were created without reference to the situation presented by the new case would do.

POSNER, supra note 19, at 239-40 (emphasis added).

45 See id. at 238-39 (arguing that sensible pragmatic judges consider the social consequences of a rule crafted in a specific case and not only the consequences for the parties in the case before it).


47 See POSNER, supra note 19, at 19-56, 107-21 (surveying nine theories of judicial behavior, most of which recognize a prominent role for the subconscious in judicial reasoning, and arguing that, via intuition and good judgment, subconscious reasoning is often, though not always or entirely, a good thing).

48 Judge Posner explains:
If the Justices acknowledged to themselves the essentially personal, subjective, political, and, from a legalist standpoint, arbitrary character of most of their constitutional decisions, then—deprived of “the law made me do it” rationalization for their exercise of power—they might be less aggressive upsetters of political applecarts than they are. But that is probably too much to expect, because the “if” condition cannot be satisfied. For judges to acknowledge even just to themselves the political dimension of their role would open a psychologically unsettling gap between their official job description and their actual job. Acknowledging that they were making political choices would also undermine their confidence in the soundness of their decisions, since judges’ political choices cannot be justified by reference to their professional background or training.

Id. at 289. Cf. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, 93 CORNELL L. REV. 1, 3 (2007) (articulating empiricists’ argument emphasizing the powerful subconscious forces at work in judging, observing their benign and
Court is a political institution, though not operating in the same way as a legislature or the executive. The Court itself thus contributes to an ongoing conversation with the other branches and the people about what aspects of political morality do and should constitute the basic law of the American people. Effective conversations require give-and-take as well as constant adjustment and flexibility. Rigid, narrow rules designed to cover a vast swath of legal disputes are not conducive to such conversation. To Smith this is "ad-hoc-ery"; to me it is principled realism.

b. Clearer Rules and the Legislature

The criticism that ad hoc reasoning often gives police officers and private citizens too little guidance to assist them adequately in their daily tasks is, nevertheless, sometimes a valid one. The Court's current approach to the Fourth Amendment has widely been critiqued as being a confusing, complex, inconsistent...

\footnote{See [citation].}

pernicious effects, and recommending a variety of reforms for compensating for the ill effects, a model they call the "intuitive-override" mode of judging).

\footnote{See Posner, supra note 19, at 157, 204, 264–65, 369–77 (summarizing the institutional and internal constraints on judging that leave the judiciary a wide berth for exercising discretion in creating and applying law, but a discretion different from that exercised by legislatures and far from unlimited). Posner sees the discretionary, quasi-legislative role of the judiciary as unavoidable in our legal culture and often desirable:}

\footnote{The reasons for the legislative character of much American judging lie so deep in our political and legal systems and our culture that no feasible reforms could alter it, and furthermore that [this is] the character of our legal system is not such a terrible thing. The falsest of false dawns is the belief that our system can be placed on the path to reform by a judicial commitment to legalism—to conceiving the judicial role as exhausted in applying rules laid down by statutes and constitutions or in using analytic methods that enable judges to confine their attention to orthodox legal materials and have no truck with policy.}

\footnote{Id. at 15.}

\footnote{See Robert W. Bennett, Talking It Through: Puzzles of American Democracy 1–8, 85–105 (2003) (arguing that our governmental institutions are designed to promote widespread conversation among the branches and between them and the American people, a model in which the courts play an important role). H. Jefferson Powell, relying on his understanding of Justice Oliver Wendell Holmes's work, likewise stresses the importance of conversation:}

\footnote{Holmes's point is that the unavoidably coercive aspect of political community is, in the American system, dependent on conversation, on the ability of those subject to its coercions to participate in the community's choices. The constitutional virtues collectively inculcate a predisposition to understand American constitutionalism in this manner, as a privileging of talk over command, inclusive conversation over divisive exercises of power.}

\footnote{Powell, Constitutional Conscience, supra note 23, at 102.}

\footnote{See Smith, supra note 2, at 671 (decrying what he sees as my ad hoc constitutional reasoning); but cf. Posner, supra note 19, at 238–39 (denying that case-specific evolution of legal rules is a "synonym for ad hoc adjudication" because judges consider both the consequences to the parties in the immediate case and the wider systemic consequences of decisions).}
mess, and it seems that every theorist thinks that he or she can do better. Crafting highly specific rules, however, seems to be generally a legislative task. That is not to say that the legislature can do it alone. It must act in conversation with the judiciary, which can ensure enforcement of some minimal standards of constitutional protection. The judiciary can also offer incentives for legislatures to take the time to craft specific rules and to do so in accordance with broad constitutional guidelines—an incentives-creating technique that Erik Luna has dubbed using "constitutional roadmaps."

The judiciary is thus at its best when it draws on history, precedent, and a wide array of other sources to resolve individual disputes. Though the rules it crafts certainly impact future cases too—the latter being the major point of stare decisis. The articulation of highly specific rules meant to govern a broad run of cases, however, is generally a better job for the legislature. The legislature, like the judiciary and the executive, is bound by the Constitution, and so it should feel obliged to act as informed by the same historical, empirical, and moral concerns that worry courts wrestling with constitutional questions. But precisely because the crafting of specific, trans-case rules can be so controversial, that job is often best left to the legislature. Accordingly, I devoted some significant effort in my book to argue that the lessons I articulated should guide legislative thinking, as well as that of the executive and the judiciary. In doing so, I embrace a variant of a growing school of thought that sees a major role for legislatures in constitutional reasoning.

Any legislative code will suffer from inconsistencies, and it will still require the courts to apply that code to specific cases, but an enhanced legislative role in consultation with the courts helps to address concerns about ad-hoc thinking. That principles, passions, and history have, do, and should guide Congress in playing

52 See, e.g., AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 1 (1997) ("The Fourth Amendment today is an embarrassment. . . . All searches and seizures must be grounded in probable cause—but not on Tuesdays. . . . The result is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse."); CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION (1993) (critiquing the Court's messy doctrine).

53 Cf. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (crafting an extended defense of the argument that legislatures, rather than courts, should play the primary role in constitutional interpretation).

54 See Erik Luna, Constitutional Road Maps, 90 J. CRIM. L. & CRIMINOLOGY 1125 (2000).

55 See supra text accompanying notes 41-45.

56 See POWELL, CONSTITUTIONAL CONSCIENCE, supra note 23, at 12 ("[T]he distinction between adjudication and constitutional decision by political actors is less dramatic than is often assumed . . . ."); id. at 74-75 (arguing, however, that it is also not entirely meaningless); ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 148-51 (1999) (discussing the "legislative constitution").

57 See TASLITZ, supra note 1, at 58-60.

58 See TUSHNET, supra note 53.
this role I take as a given. I thus reject the hyper-skepticism that declares legislatures unable to serve or craft any "common good" as an overstatement, and one that fails, and fails badly, to consider adequately the institutional alternatives. All decisionmaking processes are flawed and all require means of accountability and self-correction; therefore, all we can hope to accomplish is to choose the least bad option for the tasks that we set.

Constitutional scholar Jefferson Powell concedes the unavoidable imperfections that characterize our, or any, constitutional system, and the indeterminacy of finding answers to our difficult constitutional questions. Yet Powell finds solace in the obligations of all constitutional interpreters—regardless of the branch and thus pointedly including the legislative and executive branches—to act with a "constitutional conscience," guided by constitutional "virtues." These virtues include: faith, in the sense of a belief that the Constitution is

59 Jefferson Powell put the point this way:
The problem with this dichotomy—judges good, politicians and their legal eagles bad—is that it combines an extreme cynicism about the political branches of government (and often all branches of state government) with an extreme credulity, in practice if not always in theory, about the federal judiciary. Both sides of this coin are gross exaggerations of whatever truth they may contain. The history of the Republic is replete with examples of government lawyers working in the political branches who took positions which were not mere translations of their superiors' wishes into legalese, and to say [even] this is to [wrongly] risk ignoring the possibility and the historical reality of principled obedience to the law on the part of those superiors.

POWELL, CONSTITUTIONAL CONSCIENCE, supra note 23, at 67. Powell is obviously here addressing both the role of the legislature and the executive branch, though the quoted comment is in a chapter devoted to illustrating how one executive branch figure fused principles, passions, and history to demonstrate a "conscience" about how wisely to interpret the constitution. See id. at 74–79 (developing that illustration); id. at 110–11 (noting the "priority of the political," in which legislative and electoral politics are assumed in the Constitution to play critical roles).

60 See Andrew E. Taslitz, Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics, 32 HARV. J. ON LEGIS. 329, 353–94 (1995) (analyzing and responding to public choice and other theorists' critique of legislation as not having any discernible purpose or serving any coherent notion of the public good); Andrew E. Taslitz, The Jury and the Common Good: Synthesizing the Insights of Modern and Postmodern Legal Theories, in FOR THE COMMON GOOD: A CRITICAL EXAMINATION OF LAW AND SOCIAL CONTROL 312 (R. Robin Miller & Sandra Lee Browning eds., 2004) [hereinafter Taslitz, The Common Good] (crafting an extended argument that the "common good" is no fiction and comes into being as a result of deliberative dialogue and heated political conversation).

61 Cf. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1994) ("Institutional choice is difficult as well as essential. The choice is always a choice among highly imperfect alternatives.").

62 See POWELL, CONSTITUTIONAL CONSCIENCE, supra note 23, at 87 ("Founding-era constitutionalists understood, correctly I think, that no legal instrument complex in its provisions or in its goals can eliminate ambiguity. This must be true a fortiori for an instrument that . . . is the constituent act of a nation. The founders therefore accepted quite consciously the corollary that interpreting the Constitution is an intellectually creative activity, not a mechanical process of unveiling outcomes already fixed in the text.").

63 Id. at 11.
intelligible, and in a commitment to using its language fairly;\textsuperscript{64} candor about its ambiguity;\textsuperscript{65} and integrity in "seeking in any given situation that interpretation of the Constitution that honestly seems to the interpreter the most plausible resolution of the issues in the light of the text and constitutional tradition."\textsuperscript{66} The virtues also include: "humility," the recognition that "the Constitution is primarily a framework for political argument and decision and not a tool for the elimination of debate,"\textsuperscript{67} and "acquiescence,"\textsuperscript{68} when one's efforts to persuade others have failed. Powell further argues that three substantive constitutional commitments are necessary for these virtues to thrive: first, that political struggle is generally a good; second, that orthodox understandings must be resisted and dissenters given free reign to do so; and third, that all Americans are to be included in the ensuing debate.\textsuperscript{69}

Powell understands that appeals to virtue may sound to some readers like hopeless naiveté, but he goes on to illustrate how, over the course of American history, all the branches have often lived up to these ideals, while also often falling short of them.\textsuperscript{70} Moreover, he insists that logic and experience show that the exercise of these virtues are thoroughly consistent with the clash of self-interested

\textsuperscript{64} Id. at 11, 85.
\textsuperscript{65} Id. at 87–89.
\textsuperscript{66} Id. at 90.
\textsuperscript{67} Id. at 94, 99–101; see also HEYMAN, supra note 23, at 3 (making similar point).
\textsuperscript{68} The virtue of "acquiescence," Powell notes, is not an invariant rule of decision—exceptions may be necessary in individual cases—but is nevertheless an obligation of political morality: In habitually beginning from a presumption of respect for past decisions, the conscientious interpreter acknowledges the possibility not only of error on his or her part, but even more fundamentally the existence of principled disagreement within the American community over the Constitution's purposes. The virtue of acquiescence locates the constitutional decision maker within the broader American community, which encompasses the past, with its controversies, conclusions, and errors, as well as his or her contemporaries, who share that past, as well as the obligation to treat constitutional decision as the search to implement not a partisan or parochial perspective but what Madison called "the national judgment and intention."

POWELL, CONSTITUTIONAL CONSCIENCE, supra note 23, at 99–100. "Acquiescence" is, therefore, a mark of belongingness to the American political community but not an entreaty to silence. The discussion can continue in the loser's hope of one day persuading the winners of their error, and the loser can do so in the expectation that, when that day arrives, those still dissenting from his position will nevertheless acquiesce in it until such time, if ever, when they shall again win the debate.

\textsuperscript{69} See id. at 110–13.
\textsuperscript{70} Powell discussed only one major historical example in this work. See id. at 56–79. But, in light of his current theory of constitutional virtues, many of his other historical works can be understood as extended examples of these virtues at work or analyses of their reasons for failing. See, e.g., H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS (2002); H. JEFFERSON POWELL, THE CONSTITUTION AND THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION (2002); H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL (1999); H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION (1993).
groups and with "passionate commitment to one's views on contested matters of constitutional interpretation."  

If history proves that the constitutional virtues can mean something real, then every constitutional actor must strive to develop them because, in a world of unavoidable legal indeterminacy, acting in good faith is all we have. Powell pulls no punches about the consequences if the exercise of such virtues proves, contrary to his view, unattainable:

I have identified what I believe are certain constitutional virtues, dispositions of mind and will that are necessary if men and women are to interpret and apply the Constitution as that instrument and the history of our dealings with it demand. Without those virtues as ideals, and as realities, to the extent that [it] is possible for fallible human beings [to make these ideals real], American constitutionalism is a fraud.  

But, Powell further adds, these virtues not only set the rules of the game but have moral significance beyond those rules, for "they draw the outline of a particular attitude toward political community."  In short, "they describe the characteristics of men and women who recognize the incorrigible otherness of those with whom they must live and yet who decline the old, sour, ultimately violent solution of denying the equal humanity of the other."  

My point in reviewing Powell's articulation of the constitutional virtues is that legislatures, simply because they are political creatures, are not by that reason alone rendered incapable of protecting fundamental rights, including those embodied in the Fourth Amendment. Correspondingly, just because hard constitutional questions are indeterminate does not mean that legislatures, the executive, or the judiciary are incapable of addressing such questions in a fair, reasoned manner. But their choices are limited by moral, institutional, and cultural constraints on the options available to them. History provides fodder for the

71 Powell, Constitutional Conscience, supra note 23, at 94. Indeed, one of the essential premises of Powell's argument is that "constitutional law's central function is to provide a means of resolving political conflict that accepts the inevitability and persistence of such conflict rather than the possibility of consensus or even broad agreement on many issues." Id. at 7; see generally Stuart Hampshire, Justice is Conflict (2000).  
72 Powell, Constitutional Conscience, supra note 23, at 100.  
73 Id. at 101.  
74 Id.  
75 See Taslitz, supra note 1, at 58–59 (summarizing instances in which legislatures did a better job than the courts in enhancing protections against unreasonable searches and seizures).  
76 Erwin Chemerinsky summarizes a number of the constraints operating, for example, on the courts, including the need to elaborate reasons for decision, the regard of the relevant interpretive communities, the likelihood that judges themselves embrace values broadly reflective of large segments of the broader political community, the community's commitment to the separation of powers, judicial norms governing decisionmaking methods and outcomes, the appointments process,
exercise of the constitutional virtues by all the branches of government but does not alone dictate outcomes.

If the courts act with these virtues while focusing on case-by-case decisionmaking (yet with an eye toward their future implications), and if they prod legislatures to craft more specific rules within broad guidelines, and if all institutions act within a political culture of broad-ranging, inclusive conversation, then the "lessons" drawn from constitutional history and other sources will be worthy of respect and will be the best that fallible humans are likely to achieve. That Powell and I both believe that this happens, at least sometimes, makes us constitutional optimists in an otherwise often cynical legal and political culture.

c. The Romanticism of Constitutional Lessons

Finally, I plead guilty not only to the charge of being an optimist but also to being a romantic.77 History in the context of law can, among other functions, serve to caution us against human foibles and yet still call us to noble aspirations. To articulate a motivating vision of such aspirations and to seek to live them are themselves, I believe, inherently worthwhile tasks.

These aspirations are not merely "academic." They also inspire reform movements, spark individual creativity, and encourage coalition-building. They

the at-least conscience-pulling tug of stare decisis, and, in rare cases, the fear of the Article V amendment process. See CHEMERINSKY, supra note 18, at 119–28.

77 One way—a way that I reject—to define a romantic is someone who is "[i]dealistic, characterized by or arising from idealistic or impractical attitudes and expectations." MICROSOFT ENCARTA COLLEGE DICTIONARY 1258 (2001). I chose the word carefully because I know that some readers might suffer from a cynicism that would equate idealism with impracticality, the pejorative notion embodied in the above definition. But the same dictionary from which I drew that definition also notes that one definition of an idealist is "somebody with high ideals[,] somebody who aspires to or abides by high standards or principles." Id. at 715. Likewise, that dictionary offers an alternative definition of being romantic as "involving adventure[,] relating to or characterized by adventure, excitement, the potential for heroic achievement, or the exotic." Id. at 1258. I use the term "romantic" here, therefore, to fuse aspects of these definitions, to mean someone who aspires to high ideals, sees them as a means for motivating others to heroic achievement, and understands the practical obstacles to changing visions or actions yet goes forward anyway, knowing that some observers will see foolishness where the romantic sees opportunity. But see POWELL, CONSTITUTIONAL CONSCIENCE, supra note 23, at 110 (rejecting a description of himself as "romantic" if that means ignoring the virtues and hard realities of practical politics). Explains Powell:

In the American Republic the political process is not some means of channeling the choices (which [means] if they existed would be authoritarian and frightening) of a mythical people: it is instead the form of political struggle by which individuals and groups seek to pursue their own goals within a shared political framework. . . . At our best, as individuals and groups we take into account the existence of fellow Americans with (sometimes) very different visions of the world, but the Constitution does not assume that we are always at our best, nor does it demand that we be so.

Id. at 110–11.
are part of the stuff of politics and of law’s role in any political system. Greed, irrationality, foolishness, confusion, chaos, randomness, and downright evil are also part of the stuff of politics and law. I prefer to be open-eyed about the latter without rejecting the relevance of the former. Part of my worry about the law of search-and-seizure is that it has come to be seen as a hyper-technical set of questions to be resolved mechanically by legal elites, of relatively little importance in the hierarchy of liberties and of little relevance to the common man or to the future of the republic. Examining history, particularly the too-oft ignored aspects of that history, belies those claims, and that alone is a very worthwhile effort.

A little romanticism of this sort in thinking about constitutional law, politics, and passions is thus as hard-headed as it is idealistic, an answer to the passivity and despair that cynicism or pessimism can breed.

B. History as a Conversation Between Elites and the Hoi-Poloi

Having argued in Part IIA that current constitutional interpretation is best understood as a conversation among modern political actors, including their understanding of the past, I turn now to defending the idea that legal history is best envisioned as a past conversation about the kind of people we then thought we should be. I discuss how that past conversation can further enrich the current one, and I elaborate on some of the points made more glancingly in Part IIA about history’s role in constitutional interpretation. Part IIB thereby closes the circle of a conversational theory of constitutional interpretation.

1. Legal History as Conversation

Several decades ago, historian Howard Zinn published his now-famous A People’s History of the United States. Zinn’s goal was to tell the nation’s story from the bottom-up, focusing on the experiences of racial and ethnic minorities, workingmen, recent immigrants, the poor, and the despised. Other book authors have followed Zinn’s example, examining narrower slices of the American experience than did Zinn in his sweeping chronicle. My approach has an affinity for Zinn’s, and particularly for the “narrower slice” variant followed by his intellectual descendants. One of the major goals of my book was to examine one such narrow slice: how search-and-seizure practices during slavery and Reconstruction affected African-Americans and the White defenders of the anti-

78 See LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996); Taslitz, Racial Auditors, supra note 11, at 264–65 (arguing that the “political emotions” can be used to motivate social change that at first blush seems unattainable).


slavery cause. But a legal history cannot entirely jettison concern with elites, for it is the elites who ultimately enact and interpret the laws.\textsuperscript{81}

The elites do not always act as gods imposing their sacred law on their worshippers, however much the contrary may seem to be the case. Elites respond to events on the ground, sometimes having sympathy for, or a political need for the support of, those who daily struggle for and against the law as it is practiced, other times acting against the dissenters and protestors whom some elites find repellent. Moreover, the meaning of the law, especially of constitutional law, is daily disputed by the American public, if not necessarily directly so.\textsuperscript{82} Modernly,

\textsuperscript{81} In this respect, my approach differs from Zinn’s. Zinn and his progeny look at history from the bottom-up. More traditional histories look at history from the top-down. I look at both perspectives (for example, I have chapters on the masters’ viewpoint and others on the slaves’ viewpoint) and try to explore the interconnections among them—the ways that the actions and, sometimes the perspectives, of each group influenced the actions and understandings of the other. There are, however, also differences, for example among elites, so I have chapters on Northern versus Southern perspectives. Obviously, not all, or even many, perspectives can be offered in a book of workable length when trying to tell an understandable story, and there is choice involved in what groups to select and what perspectives to seek. This observation is true of all histories. I have tried to select those groups and perspectives that I thought most relevant to my task. The key point here, however, is that history can be seen as an interaction among many contending viewpoints, all of which are changing, multiple, and complex. Furthermore, most human action has some communicative element, conveying some message to someone, whether intended or not, and evoking some responsive meaning-filled action by recipients. In this sense, therefore, history is itself a conversation among participants, albeit one on which any historian can eavesdrop only selectively without each portion being drowned out by the cacophony. See Joyce Appleby, Lynn Hunt & Margaret Jacob, Telling the Truth About History 256, 262–67 (1994) (noting that there are always multiple simultaneously true perspectives among the various actors involved in historical events; that there are many messages packed into each past event, not all of which were consciously intended; and that every history involves telling a story by some degree of selection, arrangement of events, and interpretation).

\textsuperscript{82} Constitutional historian Jack Rakove thus cautions us to distinguish between “intention” and “understanding.” See Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 8 (1996). “Intention” refers to an actor’s purpose, while “understanding” refers to the impressions of the actor’s words or actions that are formed in the minds of his audience. See id. When speaking of the “original meaning” given words or actions by historical participants, therefore, we must distinguish between the intentions of the framers and the understandings of the ratifiers. See id. at 8–10. But, emphasizes Rakove, there is always a range of intentions and understandings in any collective enterprise. See id. at 6–10. Furthermore, because historical participants never act in isolation, the “ratifiers” of the constitution must at least include not only the elected representatives to the state constitutional conventions, but also the electorate whom they represent. See id. at 6. (I would go further and consider as well even the influence of those Americans excluded from the vote.) Additionally, says Rakove, intentions and understandings are dynamic and creative, making them uncertain and problematic. See id. at 10. As Rakove and other historians note, however, this does not mean that history can be no more than a collection of acts, for history is comprehensible only as a narrative. See id. at xiv, 6. See also Michael Stanford, An Introduction to the Philosophy of History 17, 216–17 (1998). While different narratives may be told, some are more plausible, some not, and some are better reasoned and more carefully supported by evidence than others. See Appleby et al., supra note 81, at 259, 261–63. (“The fact that there can be a multiplicity of accurate histories does not turn accuracy into a fugitive from a more confident age . . . .”). Id. at 262 But any sound legal conclusions to be drawn from past
internet chat room debates, television news stories, high-profile lawsuits, family dinner conversations, and church sermons concerning everything from abortion to police use of force to affirmative action, demonstrate this reality.

The creation, meaning, and application of constitutional law thus, I believe, turn partly on, and arise partly from, a conversation between historical elites and everyday people. This is a conversation that can be had both in words and in deeds, and it is an often unpleasant conversation that is part of a struggle over status, power, material resources, and deeply-held moral, religious, and political values. This historical conversation is not the sole source of constitutional law, but it is an important one, and it is the one that I sought to emphasize.

Historians who argue, for example, that slaves themselves (by thousands of small acts of defiance during the antebellum period and by fleeing in huge numbers from their masters during the Civil War) played an important role in their own freedom, held views of that freedom’s meaning, and contributed to its embodiment in the Thirteenth Amendment, are recognizing that history (including legal history) cannot be understood solely via the words or actions of the elites. Correspondingly, anyone reading widely in the history leading up to the three Reconstruction Amendments sees the critical role of elites—whether via congressional debates, political speeches, or judicial opinions. All that is said by elites, however, cannot be taken simply at face value, because their words and actions reflect their awareness of players in the historical drama whom they do not mention, agendas that they sometimes seek to camouflage, and forces that influence them but which they do not wholly understand.

intentions and understandings must not rely upon univocal stories of the past that exclude voices that have something to teach us today. Cf. RAKOVE at 10 n.10 (“What historians do best is to make connections with the past to illuminate problems of the present.”).

83 Cf. RAKOVE, supra note 82, at 11 (noting history always involves power and exclusion).

84 Rakove thus distinguishes between using historical intentions, understandings, and interpretations as “an informed point of departure,” which makes sense to both him and me, or letting past meanings control present law, which, even if possible, makes no sense to either of us. See id. at 9.

85 See, e.g., TASLITZ, supra note 1, at 236–39 (summarizing much of the historical work on the slaves’ role in attaining their freedom); ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 4 (2004) (“[A] key to understanding the Abolition Amendment is first to comprehend the workings of the institution that it ended.”).


87 This last observation is one of many reasons why history necessitates interpretation. As Joyce Appleby and her colleagues have noted: “Historians . . . seek to understand the internal dispositions of historical actors: what motivated them, how they responded to events, which ideas shaped their social world.” APPLEBY ET AL., supra note 81, at 259. Such understandings must be divined from evidence—evidence that can support or help to falsify a particular account. See id. at 261–62. Different interpretations from the same evidence can result by assigning different weights to the various kinds of evidence, and as a result of the author’s perception of the participants’ relative influence on events, as well as from different sets of assumptions about human nature or other factors. See id. at 256. Furthermore, the meaning of events is not inherent in them but lies in their
A conversational approach to law—and thus to legal history—recognizes as well that law and culture continually interact, shaping one another. In particular, law serves an expressive function, sending messages about the kind of people we are and the things we value. Such messages affect the status, power, and self-conception of individuals and groups, matters having both instrumental and inherent value. Those messages will, therefore, always be contested. The law thus helps to constitute our nature as individuals, members of salient social groups, and as Americans. Political scientist John Brigham explained the matter thus:

We call practices operating on ways of thinking and acting . . . constitutive. Legal practices in this sense are a part of the culture, part of our nature: our basic outlook on life is stamped by the compacts drawn up by the colonists; by the decision that all laborers, black or white, should be free; by the agreements concerning due process for the accused and the convicted and the proper roles of the police and the judiciary. The constitutive is a level in the analysis of legal practices; it comes from constitute, meaning to form or establish. When we say of a former slave after the Civil War that laws constitute his identity we do not mean to say that being free is his whole being, but rather that laws operate at the level where his being is determined, and that they operated, along with social position and physical characteristics (such as being black), to make him what was called at the time a “freedman.”

inter-connection, so a historian’s narrative is necessarily a partial explanation of what ties certain events into a story. See STANFORD, supra note 82, at 217. This observation does not mean, however, that a historian can explore only the evidence supporting the story he tells and not contradictory evidence, for that would be a sin akin to that of “law office history”—history that is unduly selective or merely justificatory rhetoric to achieve an advocate’s goal. See RAKOVE, supra note 82, at 11. (Trying to avoid this sin is one of the reasons for some of the lengthy footnotes in my text, which seek to account for and weigh or explain away evidence arguably contrary to my thesis). Yet complete balance on all details is unworkable given the “drama, significance, irony, pathos” of a good narrative. See STANFORD, supra note 82, at 217. Thus historian Michael Stanford asks this rhetorical question about scrupulous balance: “Is not this the death of a good story?” Id.

88 See Taslitz, What Feminism Offers, supra note 42, at 180.

89 See id. at 180–81. Stanford notes that interpretation in one sense turns on actors’ intentions, in another sense on their significance, and in a third sense on their meaning. See STANFORD, supra note 8, at 16. But, determining significance always requires asking: “Significant to whom and in what ways?” See id. Similarly, giving meaning means “making sense,” which also requires us to ask: “Making sense of what, why, and how?” See id. The questions we ask, therefore, affect what particular struggles over the meaning of their answers best aid our understanding of the earlier period. My interest in my book concerned questions arising from messages reflecting and affecting the distribution of power that were embodied in nineteenth century struggles over governmental search-and-seizure activities relating to the position of African-American slaves, then newly-freed men, in the American polity. My answers, therefore, focused on the significance and meaning of those events to those constitutional actors, matters necessarily affecting the distribution of social power then and, more indirectly, now.

Law can impose degrading meanings as well as uplifting ones, and law does so by the daily practices of legal actors and ordinary civilians acting in the shadow of the law. Thus, the segregated beaches, buses, and water fountains of the Jim Crow era are described by one leading constitutional scholar as subjecting African-Americans to thousands of daily "degradation ceremon[ies]" shaping the "life of every black person within the system's reach." Critical legal scholars make a similar point when they seek to challenge the reigning legal "narratives," drawing on the experiences of the subordinated to challenge, modify, or reject the stories that both the law on the books and the law as it is practiced tell about the nature of our social world.

Here is where an important distinction must be made. In Part IIA of this article, I explained how modernly crafting "lessons" from history presupposes a conversational politics today. Up until now, in Part IIB, however, I have written about a conversational approach to history, particularly legal history. This latter approach explores the meanings of past events, including degrading meanings, to the participants. But when we return to the task of determining what the past has to say about how the law should help to constitute ourselves in the present, we are leaving the historians' realm. This latter task changes the conversation to one among the living and between the living and the dead. That conversation and its legal consequences will also send messages about the kind of people we are today and whom we respect or degrade.

A conversational approach to legal history has several consequences for my dialogue with Professor Smith: first, it explains what I saw as evidence for my claims; second, it helps in understanding the scope of my project.

2. What Counts as Evidence for Legal Claims

Here, too, a background point is necessary. As already noted above, I see my book's most important contribution as shedding light on search-and-seizure
practices during slavery and Reconstruction. Indeed, 199 pages of my text are devoted to this subject. Smith himself finds the book at its "most compelling in describing the extent to which southern slave owners used their extensive powers of search and seizure to regulate slaves, free persons of color, and abolitionists." Nonetheless, he devotes but a handful of paragraphs in his review to this subject. Smith likewise spends only two paragraphs of his review analyzing my discussion of Reconstruction, centering those two paragraphs on his claim that I do little more than quote John Bingham for an argument that the "framers and ratifiers" of the Fourteenth Amendment meant to apply a re-invigorated version of the Fourth Amendment to the states. Apart from challenging my "lessons" learned from history, Smith thus focuses his critique on Part I of my book, which briefly explored the "original Fourth Amendment" of 1791 as background for understanding the "Reconstructed" Fourth Amendment of Part II.

Professor Smith's critique of Part I challenges my originality, not my history, and his critique of Part II challenges the strength of the evidence supporting my argument that the Fourteenth Amendment rendered regulation of the states' search-and-seizure practices (as opposed to just the federal government's similar practices) a matter of federal constitutional law. Smith does not otherwise critique my history in Part II.

I want to begin with Smith's accusation that John Bingham's words are the sole evidence I offer for applying the Fourth Amendment to the states, then turn to his critique of the book's Part I.

i. Implicit "Conversations" as Evidence of "Incorporation"

Smith's focus on Bingham's words assumes that by "framers and ratifiers" I meant the traditional notion of the members of Congress and of the state ratifying conventions. Here I must accept some blame for lack of clarity of expression. I used the term "framers and ratifiers" only rarely, but in the context of the entire thrust of my book I thought it would be clear that by this term I meant the framers and ratifiers in conversation with the American people, for it is ultimately the

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95 Smith, supra note 2, at 667. Smith also describes my history as a "pioneering effort to situate the law of search-and-seizure within the context of antebellum slavery," while, however, deriding the lessons I draw therefrom as "ignor[ing] the workings of day-to-day criminal justice administration." Id. at 664. Smith's latter criticism is correct, if my "lessons" were rigid and isolated rules rather than, as I have said, meant to be illustrations of some ways in which history might be one factor in helping us to re-envision what Fourth Amendment law should be like today. Therefore, I did not in this book spend much time addressing other factors, such as the practicalities of modern criminal justice administration. That is a task that I have undertaken elsewhere in much of the body of my writing on criminal procedure, along with countless other academics whose insights I draw upon, a task that I hope to continue in the years ahead.

96 See id. at 669. Smith does concede that my evidence on this point is "suggestive of the importance of search-and-seizure law" to the Fourteenth Amendment's drafters, though he considers it "hardly compelling," a conclusion that, I will shortly argue, ignores what should count as evidence for the claim and misunderstands what I was claiming in the first place.
People's authority that vests the Reconstruction Amendments, like the rest of the Constitution, with its status as our basic law.

This vision of the American people is reflected in the conversation of word and deed between the elites (including members of Congress and the like) and the everyday people who make history, including the newly-freed slaves, the Union soldiers, the seemingly triumphant abolitionists, and others.

There are indeed relatively few statements in congressional or ratifying convention debates that unequivocally and, to modern ears, clearly support the idea of incorporation of any amendments at all.97 Yet incorporation of most of the Bill of Rights has become the status quo understanding of the law on the Court and among most, though not all, leading constitutional scholars.98 Part of the reason

97 Professor George Thomas makes this point most thoroughly and eloquently in his article challenging the "incorporation" of the Bill of Rights against the states via the Fourteenth Amendment. See George C. Thomas III, When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure, 100 MICH. L. REV. 145 (2001). But even Thomas reads the Fourteenth Amendment as constitutionalizing regulation of state search and seizure practices as a stand-alone amendment, though he argues that it operates in a different way from how the Fourth Amendment regulates the federal government. See id. at 222–26. Whether Thomas would agree with my lessons I do not know, but I explain in my book why I could reach the same conclusions that I do under his anti-incorporationist mantle. See TASLITZ, supra note 1, at 284 n.40. Given that both paths would lead me to the same place, emphasizing the more familiar language of incorporation seemed the clearest way to convey my arguments to most of my audience, who are familiar with the idea of incorporation.

I note briefly as well that Smith criticizes my use of certain of John Bingham's words during the debates because Bingham could have had other things in mind than search and seizure. But those other things are not inconsistent with an embrace of search and seizure's importance to Bingham, especially read in context. See, e.g., TASLITZ, supra note 1, at 128, 242–57 (summarizing references by other Republicans to search and seizure concepts and to the Fourth Amendment in public debate as well as in congressional debates leading up to, and immediately following, ratification of the Fourteenth Amendment, including over the Civil Rights Act of 1866, an important Fourteenth Amendment precursor, and in light of developing Republican theories of the nature of the American polity).

More importantly, Bingham's intentions were never my primary concern, nor were his words the primary evidence on which I meant to rely for my claim that Fourth Amendment concerns should best be understood as among the "core" concerns embodied in the Fourteenth Amendment. Social context and the "conversation" of which I write over time are what make this history useful for present-day lawyers. See supra text accompanying notes 82–86. Moreover, even taking the past on its own terms requires far more inquiry than into the words appearing in isolated debates or into the intentions of their speakers to understand just what was afoot. Explains leading historian Gordon Wood:

The past in the hands of expert historians becomes a different world, a complicated world that requires considerable historical imagination to recover with any degree of accuracy. The complexity that we find in that different world comes with the realization that the participants were limited by forces that they did not understand or were even aware of—forces such as demographic movements, economic developments, or large-scale cultural patterns. The drama, indeed the tragedy, of history comes from our understanding of the tension that existed between the conscious wills and intentions of the participants in the past and the underlying conditions that constrained their actions and shaped their future.

WOOD, supra note 93, at 10–11.

98 See TASLITZ, supra note 1, at 284 n.40.
for this is that some leading historians have made convincing arguments that those statements that were made in Congress, when put in the context of events and in light of the political background of the speakers, are best understood as representative of a broader congressional intention that the Fourteenth Amendment apply the Bill of Rights to the states (or at least recognize that that application already existed). 99

Still, I can understand why some thinkers would find the incorporation argument as to the entire Bill of Rights hard to swallow based upon congressional debates alone. Furthermore, express reference to the Fourth Amendment specifically in those debates, though not non-existent, is relatively sparse. 100 My goal, as I expressly stated in my book, however, was not to re-create the wheel by recounting and critiquing yet again the debate over incorporation. 101 Instead, on the one hand, I assumed the correctness of the incorporationist position, focusing more on its consequences for the incorporated Fourth Amendment’s meaning than on whether it was incorporated at all. On the other hand, I recounted those aspects of history that I thought best supported the incorporationist position as to the Fourth Amendment given my conversationalist approach to legal history, gauging its relevance for modern law. However, I did not limit my examination of the relevant history to the congressional debates. Were that so, Smith’s critique of my position would have more force. Instead, I relied on far more wide-ranging evidence.

I have always thought that the most viable arguments for incorporation instead arise from the conversational perspective. Search-and-seizure issues were at the heart of the American Revolution and of the great contest over slavery and Reconstruction. Reading that history reveals stories of the colonists being seized from the streets to be impressed into the royal Navy, the slaves required to produce passes or face whippings when leaving plantations, and the abolitionists being banished from Southern states while their letters and publications to Southern brethren were seized by postal authorities and burned. That revelation makes evident the centrality of search-and-seizure to the American story, and to the path to the Fourteenth Amendment.

Judicial decisions, political speeches, newspapers, public protests, sermons, and street violence similarly reflected these concerns. If much of the Bill of Rights, and particularly the Fourth Amendment, was made applicable to the states by the Fourteenth Amendment, it is because that is the best way to make sense of this relevant portion of the American story. It is not because legislative debates come close to conclusively resolving this matter. Although it was not my goal, one way to read the bulk of my book, therefore is as, in part, an extended argument in support of incorporation, at least as to the Fourth Amendment.

100 See Taslitz, supra note 1, at 242–57.
101 See id. at 284 n.40.
Yet that reading would itself be slightly misleading because of the awkward nature of the word “incorporation.” The word “incorporation” conjures up images of Congresspersons’ and ratifying convention members’ intent. My point instead is that the Fourteenth Amendment is best understood as imposing on the states restrictions on their search-and-seizure practices informed by the nation’s experiences with such practices during slavery and Reconstruction. I think that the best and most convenient way to understand and express this idea is to see the Fourth Amendment as being applied to the states by the Fourteenth Amendment, the latter mutating the meaning of the former to embody the people’s lived conversational experience with political elites. But, as I explain in a lengthy footnote, the same result could be reached on a theory that the freestanding Fourteenth Amendment imposes, in its own right, independently of the Fourth Amendment, restrictions on modern search-and-seizure practices. I thus saw the everyday Americans’ struggles—their implicit and explicit conversations with their ruling elites—as making incorporation a sensible idea, while acknowledging that, even jettisoning the assumption of incorporation’s wisdom, similar results can be achieved through alternative constitutional paths.

ii. Post-1868 Case Law as Irrelevant to My Project

Similar reasons explain why I did not address case law development or indeed any other search-and-seizure history post-1868. Whether based upon the theory of incorporation, free-standing due process, or the privileges and immunities of American citizens, it is the ratification of the Fourteenth Amendment in 1868 that is best understood as imposing, for the first time, serious constitutional limitations on the search-and-seizure practices of the states. That the courts did not figure this out until the mid-twentieth century is quite irrelevant to a people-focused, conversational narrative approach to constitutional interpretation. Bruce Ackerman, in his We the People series of books makes a similar point when he argues that judges often have a certain myopia that blinds them from fully comprehending the implications of the People’s verdict in making major changes in our constitutional order.

Ackerman’s pathbreaking work has faced other criticisms, but I think that his argument that judges can at least temporarily be blinded to constitutional change embodied in the ongoing struggles of the American People—and that judges therefore often give outdated or cramped interpretations to constitutional text—is consistent with the teachings of an array of modern sociological, political science, and psychological studies of “how judges think” and with a clear-eyed

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102 See id.


104 See FARBER & SHERRY, supra note 6, at 97–121 (summarizing such critiques).
understanding of the political functions of the courts. In any event, whether Ackerman is right or not, because a conversational approach to legal history is a theory about how to interpret that history, I simply note here that I think that the interpretive premises that led courts for too long to abdicate their responsibility to craft a jurisprudence of constitutional regulation of state search-and-seizure practices were wrong.

iii. The Relevance of Great Political Events as Evidence to Resolve Concrete Modern Controversies

A similar line of reasoning explains why I do not accept Smith’s assertion that great political events have little relevance for crafting law governing the common fare of ordinary criminal cases. Again, if by this he means, for example, that understanding how Southern slave masters used the equivalent of general warrants to limit slaves’ free movement and ability to invade their white masters’ property does not dictate what the rule should be when modern police engage in inventory searches, he is right. In one sense, a narrower use of history, perhaps searching for nineteenth century practices akin to inventory searches, would arguably provide more specific guidance. But, as Thomas Davies, in his powerful studies of the original Fourth Amendment’s history concludes, there are strong normative reasons for not giving such narrow, specific histories a decisive or even especially important role in resolving modern day Fourth Amendment controversies.

105 See, e.g., Posner, supra note 19, at 97, 103-05. Posner declares it “implausible that people are libertarians, or socialists, or originalists because libertarianism, or socialism, or originalism is ‘correct.’” Id. at 97. Rather, he considers these “isms” “hypothesis-driven rather than fact-driven,” because “[n]othing is more common than for different people of equal competence in reasoning to form different beliefs from the same information,” “seeing the same thing but interpreting it in opposite ways.” Id. This observation, argues Posner, applies to how originalists use history, id. at 103, because interpreting history, tradition, and what counts as settled precedent are “tasks so fraught with uncertainty that the judge’s preferences as to outcome will not only shape his theory but also determine its application to specific cases.” Id. at 105. A judge blinded by the ideology with which he has been raised, I therefore argue, is often blind to seeing that events may have rendered that ideology obsolete.

106 See Smith, supra note 2, at 676 (asserting that the history of criminal procedure in prosecuting political offenses and slavery has nothing to offer in understanding procedure in ordinary criminal cases).

107 See Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 740-50 (1999) (arguing for applying history’s lessons to modern Fourth Amendment law only when stated at a high level of generality); Thomas Y. Davies, The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista, 37 Wake Forest L. Rev. 239, 437-38 (2002) (“An accurate understanding of how constitutional criminal procedure came to take the shape that it has provides valuable and liberating perspectives on current issues. However, in the end, it teaches that . . . [d]ecision making regarding criminal procedure will be more likely to produce sound policy—and less likely to succumb to undiluted statism—if it proceeds without the distorting influence of fictional law-and-order originalism.”). Another way to use history in Fourth Amendment analysis is to ask what the common law permitted or prohibited at the time of the original Fourth Amendment’s ratification. I
Furthermore, even if such more specific histories are given such a role, that does not render the history of broader political struggles any less important. Indeed, the centrality of the colonists’ search-and-seizure disputes with the British to the American Revolution is now widely recognized by most thinkers who pay attention to such things; and the colonists’ complaints about general warrants and an array of other British practices, and the meaning that those complaints hold for us today, have repeatedly informed the Court’s crafting of more specific Fourth Amendment rules.

If, as I have sought to suggest, a general framework is needed for debating constitutional questions in any particular area (such as search-and-seizure); if certain values or lessons should guide how much weight the Court gives to various

will not dwell on this approach here but note that it has been soundly debunked by others and, in any event, misunderstands the common law as a fixed set of doctrines when it is really an approach to careful, flexible, and reasoned evolution of the law to meet changing circumstances. See generally Sklansky, supra note 12; see also infra note 109 (expanding upon the flaws in an overly-specific common law originalism).

See Samuel Dash, The Intruders: Unreasonable Searches and Seizures from King John to John Ashcroft 2–31, 37, 41 (2004) (noting that the “writs of assistance . . . were the yoke the colonists would not bear” and that “unreasonable searches and seizures were partly responsible for igniting the Revolution . . .”).

See Sklansky, supra note 12, at 1739 (praising an “older tradition” on the Court of “using the background of the Fourth Amendment to illuminate not its precise demands but its general aims”); id. at 1739–43 nn.2–22 (summarizing some leading illustrative cases and scholarship in this vein). Sklansky notes that this older tradition was largely, though not entirely, displaced by an “ahistoric” approach, followed more recently by a new originalism that Sklansky properly derides. See id. at 1742–44. Sklansky begins by summarizing the older tradition that he reveres:

Justices Bradley, Brandeis, and Frankfurter all focused on particular forms of search and seizure condemned in the years preceding the American Revolution: the general warrants struck down by English Courts in the 1760s, and the writs of assistance that provoked widespread opposition in the colonies. They sought to generalize from those controversies to the underlying evils against which the Fourth Amendment took aim. Both the Court and its commentators have favorably contrasted this strategy with approaches that would limit a constitutional prohibition to the “mischief which gave it birth.” So it would be odd if the Court now read the Fourth Amendment to prohibit only general warrants and writs of assistance.

Id. at 1743. Sklansky contrasts this approach with the Court’s new originalism that does seem to use history in the blinkered way that he and others have condemned. While the Court has not gone so far as to limit the Fourth Amendment to prohibiting general warrants and writs of assistance only, its approach, argues Sklansky, moves it in that direction, asking what government action was considered unlawful under the common law at the time the amendment was framed. See id. “Novelty aside” says Sklansky:

[T]his is a curious reading in at least two respects. First, the Fourth Amendment on its face says nothing about common law, but bans all unreasonable searches and seizures, whether or not they were legal before the Amendment was adopted. Second, the chief proponent of the Court’s new understanding of the Fourth Amendment has been Justice Scalia, who is also its most vocal advocate of giving constitutional and statutory provisions their “plain meaning.”

Id. at 1743.
interests in crafting constitutional rules; and if a constitutional provision is not to be viewed as a mere technicality but rather as an expression of a broad, symbolic vision of who we are as a people and how we should live our lives, then the political struggles that define and redefine the social compact that we call the "Constitution" must play a role in crafting a constitutional search-and-seizure jurisprudence. That role can and should inform holdings in specific cases, and aid in crafting rules to guide future cases, even those governing routine police conduct. The Court and other scholars do this routinely, and I think wisely so.110

In my view, those who embrace a narrower view of history condemn the Bill of Rights to slow, subtle erosion—to becoming a withering constitutional flower. If my specific efforts to show how the lessons of our second American Revolution can translate into modern doctrine do not persuade Professor Smith, that is fine, but I do not see the wisdom of the argument that the task should not be attempted.

Additionally, the task I set for myself was to emphasize too-long ignored aspects of search-and-seizure history, specifically those involved in slavery and Reconstruction, that shed light on the importance of expressive violence, race, dissent, and protection of society's weakest. Smith is therefore right when he says that I wrote "a" but not "the" definitive history of the Fourth Amendment. I did not try to do the latter and do not believe that it can effectively be achieved in a single volume of manageable length. William Cuddihy's magisterial dissertation on the original Fourth Amendment is three thick volumes long,111 and his newly-published book—an updated and streamlined version of his dissertation is just under one thousand pages.112 Thus, I did not address the rise of police forces in the nineteenth century because that history was beyond the scope of my project. I leave that history for another day.113

110 See DASH, supra note 108, at 2–10 (arguing that remembering history, particularly the history of the American Revolution, is essential to preventing the many seemingly minor, routine intrusions on Fourth Amendment rights that are too often sanctioned by the courts from cumulating to blow a hole in that Amendment); id. at 120–31 (offering the Court’s approach to standing and its creation of a good faith exception to the exclusionary rule as examples of what the author saw as misguided Fourth Amendment doctrines because they ignored the broad teachings of history).


113 Important work on nineteenth-century search-and-seizure history and its link to the rise of modern police forces has recently been done by Wesley Oliver. See Wesley MacNeil Oliver, The Rise and Fall of Material Witness Detention in Nineteenth Century New York, 1 N.Y.U. J. L. & Liberty 727 (2005).
3. On Originality

This discussion of the conversational approach to legal history leads me back to Smith's claim that chapter two of my book, covering the "Original Fourth Amendment," says little that is new. Part of his complaint is that others have written about the Fourth Amendment's role in taming political violence, and he is right. But Smith cites scholars who have largely relied on arguments other than history to do so.\textsuperscript{114} The one work of history he does cite for this point is William Cuddihy,\textsuperscript{115} and here he is absolutely right, and I am pleased to be placed in such company, but, as Smith concedes, "no scholar has stressed the ubiquity of 'political violence' to the same degree as [Taslitz] . . . ."\textsuperscript{116} Smith also says that others have made the point that constitutional law is forged not only in the courts but by people on the street, and here too he is right, but he cites a superb book by Larry Kramer that is not focused on how this happens in the area of search-and-seizure.\textsuperscript{117} Smith also notes that Akhil Amar has stressed the public, political functions of the Fourth Amendment,\textsuperscript{118} and here too Smith is correct, but Amar did not explore much of the history that I do, did not portray that eighteenth-century history as laying the groundwork for the nineteenth-century history (which Amar does not examine), and reaches very different conclusions from mine.\textsuperscript{119}

More importantly, Smith ignores my use of "political violence" as a shorthand term for "expressive political violence"—the idea that violence by and against the state always carries with it messages about status, power, equality, and the inherent worth of persons as fundamentally political beings.\textsuperscript{120} Without addressing this aspect of my definition, and without explaining how he reaches his conclusion, Smith says my definition is "so vague and so expansive that those eschewing [t]his path have seemingly taken the more defensible approach."\textsuperscript{121}

My definition is indeed expansive, but that was exactly its point: to demonstrate that expressive violence is ubiquitous when the state engages in searches and seizures and that even the daily, little occurrences of stopping individuals on the street can, properly understood, have political consequences. These consequences underscore the Fourth Amendment's importance. Seeing much human behavior as expressive, and seeing most state action as political (in the sense that it affects power and cultural understandings relevant to power), are

\textsuperscript{114} See Smith, supra note 2, at 665–66.
\textsuperscript{115} See id. at 666 n.14.
\textsuperscript{116} See id. at 666.
\textsuperscript{117} See id. at 666 n.17 (citing LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)).
\textsuperscript{118} See id., at 666 n.16.
\textsuperscript{119} See AMAR, supra note 52, at 1–45 (offering a concise and updated presentation of Amar's work on the Fourth Amendment).
\textsuperscript{120} See TASLITZ, supra note 1, at 2–5, 14, 17, 71, 261, 279 n.4.
\textsuperscript{121} Smith, supra note 2, at 666.
insights consistent with the work of critical, feminist, and critical race scholars, of “bottom-up” historians like Zinn, and of a wide array of less left-leaning legal, linguistic, political, and legal scholars who emphasize the expressive function of the law. Those whose works lean more to the hard-right or who simply reject the expressive vision of the law will find my definition of expressive political violence unhelpful, but it is within a stream of thought that many scholars have found enlightening, and I do not think that it necessarily only supports conclusions consistent with progressive political policies.

Part I of my book indeed tries to argue that the idea of expressive political violence is implicit in the Lockean social contract theory that was so important in the framers’ era—a theory that also stresses the oft-legitimate role of such violence in maintaining the public peace—and tells the story of the original Fourth Amendment in a way that emphasizes struggles over expression, voice, and meaning. My tale of the original Fourth Amendment thus emphasizes such matters as: seditious libel disputes; the colonists’ righteous anger at having an unrepresentative Parliament dictating search-and-seizure policy; their correspondingly seeing a close connection between British policies in this area and the tyranny that justified revolution; the insult experienced by colonial leaders and businessmen facing searches pursuant to general warrants; the sense of degradation experienced by ordinary colonists forcefully impressed into the British navy; the anger generated by the unjustified seizures of sloops involved in smuggling that was seen as a protest against British policies; the symbolic importance of the home and the diminishment experienced by its denizens upon its violation; and the perception that British search-and-seizure practices lowered colonists to the dishonorable status of the slave.

The messages sent by British searches and seizures and received by the colonists fed fuel to the fire of revolution and sent us on a path to the Fourth Amendment. These were pieces of a great political struggle, but the pieces and their meaning happened one-at-a-time, often to individuals. The citizen impressed

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122 See Taslitz, What Feminism Offers, supra note 42, at 179–87 (summarizing the work of feminist legal scholars writing about the expressive function); supra notes 63–65 (discussing the relevance of Zinn’s work and that of his successors).

123 For example, my reading of the literature on the Second Amendment right to bear arms has led me to believe that it embraces both collective and individual rights components, but that if the Fourteenth Amendment incorporated the Second Amendment against the states, it revised the latter amendment to far more heavily stress the individual rights component—a conclusion generally associated with the political Right. (I have not written about this specific matter and thus merely state my conclusion to make the noted point). See also District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (interpreting the Second Amendment to create an individual right to bear arms but without deciding the incorporation question); cf. TASLITZ, supra note 1 at 147, 248–52 (discussing the historical connections among thinking about the Second, Fourth, and Fourteenth Amendments during the period of Reconstruction).

124 See TASLITZ, supra note 1, at 3–4.

125 See id. at 17–44.

126 See id.
on the street, the warehouseman whose goods were seized, and the mother who faced armed men of the king rifling through intimate items in her home were perhaps then concerned with their own fate, but their plight helped shape the fate of the nation.

I take no credit for originality in the approach to constitutional interpretation that I assumed and briefly recounted but did not fully defend in my book—and that I elaborate on a bit more here—but I do claim originality in using that approach as a lens for understanding the original Fourth Amendment and its 1868-reconstructed child, and I do claim originality for telling in particular the tale of search-and-seizure practices under slavery and during Reconstruction. I do not claim that my perspective is the only legitimate one, nor is it the only one that guides my own work, but I do claim that it is one legitimate perspective worth debating.

III. A COMMENT ON TONE

Professor Smith also faults me for what he sees as my oddly combative tone. I must say that this is a criticism I have never heard about my work from anyone, and I am not sure what he means by it or what evidence he cites for it. It particularly troubled me because I tried, I thought, to go out of my way to demonstrate that, in most respects, my work was consistent with that of other scholars of search-and-seizure history, though I sought to build on their work and to cast some of their evidence in a different light. The critique also troubled me because I so object to the common academic style of not simply disagreeing with someone but of trashing their work, as if someone who disagrees with you has thereby produced trash. I expressed disagreement with other scholars (what Smith calls "quibbles") only where I thought it unavoidable, in order to defend my own perspective.

For example, I accepted and relied upon much of the excellent work of Tom Davies, but I disagreed with Davies's writing off the Fourth Amendment's reference to a right "of the people" as a mere rhetorical flourish; I instead see it as central to understanding the Amendment's meaning, and I see nothing combative about trying to explain why this is so. I did not insult or diminish Davies's work but indeed complimented him along the way.

Smith strangely tries to argue that I am too combative and not combative enough simultaneously. Thus, he faults me for devoting an extended footnote to arguing that Davies was wrong to conclude that ships and commercial premises were excluded from the scope of the original Fourth Amendment. Then, however, he suggests I have wasted my time "belabor[ing]" the point because I end my note

127 See Smith, supra note 2, at 678.

128 See ROBERT J. SPITZER, SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS DISTORT CONSTITUTIONAL MEANING 5, 23 (2008) (bemoaning the stridency, one-sidedness, and harsh tone of much legal scholarship as aimed more at advocacy than truth).
by “admit[ting]” that the difference between Davies and me is that “Davies relies more heavily . . . on official and elite statements about the law” than do I.129 But I saw no flaw in acknowledging that reasonable people might differ on a point and explaining candidly why and how I reached a different conclusion than Davies. Smith seems to suggest that my candor undermines the strength of my argument, while I find the hyperbole and lack of candor in so much legal writing both unfair and unconvincing.130 Simultaneously, Smith seems to think that I meant my statement about Davies’s and others’ reliance on elite sources as a criticism, thus presenting himself as their defender by noting that “it is to their credit, not their detriment” that they do so.131 But, I agree. My position is simply that elite sources are not the only ones that matter in understanding history on its own terms or the lessons that it teaches the law; a greater emphasis on non-elite sources is crucial to the conversational approach to legal history. If the “people” in conversation with their rulers—most often via expressive action—are considered to be important constitutional actors, maybe the most important ones, then greater weight should be given to their actions, and I argued only that doing so led me to a different view than Davies on a fairly specific question. I meant no slight to others writing about the Fourth Amendment’s history, and several of them—William Cuddihy and Tracey Maclin, joined also by leading constitutional scholar H. Jefferson Powell—graciously offered effusive praise for my book that adorns the hard cover version of the book’s jacket.132

I do not claim to be holier than thou. Too many qualified statements and too much tentativeness in expression can be boring, sometimes meandering, and even create the impression of lack of confidence in one’s work. The line between a strongly-held position fairly defended and a combative stance can sometimes be a thin one, and I am sure I must have crossed it at times. Indeed, I worry that this

129 Smith, supra note 2, at 666–67.
130 Cf. Spitzer, supra note 128 (analyzing in extended fashion some major examples).
131 See Smith, supra note 2, at 667.
132 Tracey Maclin praised the book’s “unique vision,” particularly its emphasis on “tam[ing] political violence” and on “respect for the individual,” finding the “research on search and seizure practices of Southern states during Reconstruction” “illuminating.” Taslitz, supra note 1 (reviews on back cover of dust jacket), available at http://www.nyupress.org/product_info.php?products_id=4825&reviews=1. William Cuddihy lauded the book for removing a “critical gap” in the historical literature and “break[ing] new ground by exploring the Fourth Amendment’s connections with political violence and slavery.” Id. Finally, H. Jefferson Powell described the book thus:

Reconstructing the Fourth Amendment is a remarkable scholarly accomplishment. It presents one of the most radical challenges to standard constitutional thinking—not just about searches and seizures but also about the interpretation of the Fourteenth Amendment as a protection of individual rights—in recent literature. Taslitz stakes out a radical and compelling position on a pressing contemporary issue—the protection of individual privacy against government invasion—and does so on impeccably researched and intellectually conservative grounds. It is a must read.
My displeasure with Smith’s review arose primarily from what I saw as its lack of balance and its harsh tone. But Smith’s underlying objections raise fair points about the role of history in constitutional interpretation. I thank him for presenting the opportunity for me to at least try to clarify the assumptions about the interpretation that, as I briefly explained in my book, underlay both the history presented there and the illustrative, admittedly debatable lessons that I drew from it. I also said in that book that I wrote it to prompt debate, not to end it, and this too Smith has done, for which I again express my appreciation. I find no contradiction in saying that I can find disagreement with another scholar’s work, even find fault in it, and even take away hurt feelings from it, yet still find it to have merit as well and to serve the laudable goal of continuing the conversation.

133 Smith also describes my book as “irritating,” dropping a footnote bemoaning what he describes as “stock[ing]” my footnotes with citations to popular culture, like The Sopranos and The Rolling Stones. Smith, supra note 2, at 678 n.66. I cannot recall references to popular culture elsewhere in the book, except for my discussion of The Matrix; this is hardly a “stocking” of the text with such references which were used where I thought they expressed or illustrated a theoretical point nicely, never as a substitute for historical analysis. See id. (agreeing that I cite “extensively from both primary documents and respected secondary sources”). He further bemoans my voice as “unpredictable” for including some normative theory (my “lessons”) and, again, for briefly (in an introduction and scattered in a few footnotes) discussing popular culture, and for drawing on my “personal experiences with race relations” (the latter being something I did only in my book’s Preface, to explain what prompted my interest in the book’s subject area). Id. He also argues that my coverage is “extremely selective,” which I take as meaning that he objects to the fact that I did not address the nineteenth-century rise of police forces—a task that, as I have explained, was outside my focus on the culture of the Slave Power and that would, in itself, deserve a separate text in order to be treated fairly. Id. This collection of vituperative comments ends his review, leaving a harsh impression and, as is true of his entire review, rejecting any serious attention to the history that occupies the bulk of the text. Spirited, even passionate, pull-no-punches debate and criticism are essential to scholarly progress. But I have always failed to understand how lack of balance, selective isolation of pieces from the puzzle as a whole, and language dripping with contempt help to achieve that goal.