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Commentary: Was the Bill of Rights Irrelevant to Nineteenth-Century State Criminal Procedure?

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I. INTRODUCTION

The Supreme Court's approach to incorporation left a troubled legacy for criminal procedure. Nearly a century after the Fourteenth Amendment was ratified the Court imposed most of the relevant Bill of Rights guarantees on the states in a piecemeal manner. In doing so, it failed to articulate a coherent principle for identifying the boundaries of the rights at stake, aside from an unwieldy compromise between fundamental fairness and the balancing of interests. This approach

* Associate Professor of Law, University of Colorado Law School. I would like to thank Don Dripps for inviting me to comment on his paper and the other conference participants for their stimulating research and discussion.

produced a jurisprudence of prophylaxis and exceptions—a policy-driven, Swiss cheese re-fashioning of rights that has left more holes than cheese in such critical areas as search and seizure, police interrogation, and the right to counsel. Would total incorporation have offered a clearer and more legitimate path? As a historical matter, there is little evidence that the concept of a nationalized Bill of Rights made any mark on state criminal procedure in the nineteenth century or that more than a handful of commentators expected the Fourteenth Amendment have such an effect.

The fascinating papers presented at this conference establish three things. First, scholars who approach the incorporation debate from an originalist perspective have taken important strides toward unearthing the rich, historical context of the Fourteenth Amendment, even if they if have not convinced everyone that history trumps judicial construction. Second, at least two framers of the Fourteenth Amendment, Representative Bingham and Senator Howard, believed that it imposed the Bill of Rights on the states. Third, sparse discussion of the topic in the years surrounding ratification reflected diverse levels of awareness of and support for the concept of nationalizing the Bill. There is a lot of silence and not much total incorporation talk in the historical record from the 1860s and 1870s, and both scholarly camps have to admit that a few nineteenth-century commentators said things that undermine their position. Resolving this aspect of the debate boils down to deciding *whose* understanding can serve as a proxy for the original meaning of the Fourteenth Amendment—the drafters, the ratifiers, a few eminent treatise writers, the press, or the general public who read the newspapers that George Thomas has painstakingly searched for clues.[1]

What the conference papers do *not* establish is that most nineteenth-century experts on criminal procedure believed the states would be forced to abandon their own approaches to investigating and prosecuting suspects in favor of a national model. Nor do they establish that the Fourteenth Amendment altered the actual practices of police officers, lawyers, or judges in ordinary criminal cases for decades after its adoption. Rather, as Donald Dripps argues, at the time of ratification some states were engaged in an independent process of reforming criminal procedure and at least two of their projects conflicted with Bill of Rights provisions.[2] In the final analysis, however, this Commentary contends

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1. *See generally* George C. Thomas III, *Newspapers and the Fourteenth Amendment: What did the American Public Know about Section 1?*, 18 J. CONTEMP. LEGAL ISSUES 323 (2009).

2. Donald A. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. CONTEMP. LEGAL ISSUES 469, 470 (2009) (hereinafter Dripps, *The Fourteenth Amendment*).

that neither the rationalism of Jeremy Bentham nor the Bill of Rights guarantees, as they were understood in the nineteenth century, adequately facilitated truth-finding or protected criminal suspects from abuse.[3]

II. THE "FIRST CRIMINAL PROCEDURE REVOLUTION" AND THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT

During the nineteenth century, Benthamite ideas led reformers away from the common-law system which was "presupposed by the Bill of Rights."[4] Professor Dripps calls the changes they wrought the "first revolution" in criminal procedure.[5] The centerpieces of his narrative are the replacement of grand jury procedure with prosecution by information and the abolition of defendants' incapacity to testify—reforms that conflicted with the Fifth Amendment. However, these two reforms did not constitute the entire revolution to which Professor Dripps refers. In fact, the Fourteenth Amendment was adopted during a period of momentous transition in American criminal justice. This revolution, which began before the Civil War and continued after the ratification of the Fourteenth Amendment, produced such major institutional changes as the rise of professional police forces, defense lawyers, and public prosecutors' offices, which in turn rendered certain aspects of the existing doctrine anachronistic and obstructive.[6] The grand jury requirement and the rule against defendant testimony constituted points of incompatibility between state criminal procedure reform and the Bill of Rights. Professor Dripps seems to find these two

3. *See infra* notes 7-10, 28-37 and accompanying text.
4. Dripps, *The Fourth Amendment*, *supra* note 2, at 474.
5. *Id.* at 470.
6. *See id.* at 474-76. *See generally* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003) (analyzing factors leading to the predominance of plea bargaining over jury trials by the late nineteenth century); JOHN LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003) (describing the origins and impact of the transition from the lawyerless criminal trial to a system dominated by attorneys and adversary procedure); WILBUR R. MILLER, COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830-1870 (1973) (charting the rise of organized, public police forces); ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE (1989) (documenting the slow evolution toward a system of public prosecution); Carolyn B. Ramsey, *The Discretionary Power of Public Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309 (2002) (hereinafter Ramsey, *The Discretionary Power*) (assessing the nature of the prosecutor's public role in the early days of fully-staffed District Attorney's offices in the nineteenth century).

aspects of the old system objectionable, as did a growing number of nineteenth-century state legislators.

Michael Kent Curtis' call for a broader historical context also implicates other criminal procedure matters, including search and seizure, in the controversy over original meaning. Professor Curtis describes the trampling of rights, particularly those of free speech and assembly, in the antebellum South and suggests that the bitter experiences of the abolitionists, many of whom were prominent Republicans, produced a constitutional theory demanding that states respect the Bill of Rights.[7] This unfortunate history was not limited to the suppression of speech. Indeed, agents of the slave states unjustifiably detained both blacks and whites; seized property, including abolitionist literature; and interrogated suspects to preserve their race-based hierarchy in the face of dissent.[8] These tactics continued after the Civil War as the defeated South tried to cling to white supremacy.

The Fourteenth Amendment framers commented on such abuses. In a congressional speech in 1866, for example, Bingham alluded to South Carolina's banishment of Massachusetts activist Samuel Hoar, who was ridden out of Charleston on a rail for challenging the arrest of black sailors.[9] Yet, while Southern practices undeniably offended criminal procedure provisions in the Bill of Rights, the historical evidence does not establish that the Fourteenth Amendment was widely expected to end these oppressive practices by incorporating the Bill in toto. Bruce Smith notes that Bingham's allusion to the Hoar incident in a congressional speech "is not the same as claiming that protections against illegal 'search and seizure' constituted the 'core' of the Fourteenth Amendment."[10]

Moreover, even if Bingham espoused a total incorporationist position (and it seems clear that he did), few charged with interpreting or enforcing the criminal law, outside the context of combating Southern political terrorism, seem to have shared his views. In the 1870s, federal

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7. Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 J. CONTEMP. LEGAL ISSUES 3, 19-33 (2009) (hereinafter Curtis, *The Bill of Rights and the States*).

8. *See* ANDREW TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868 94, 106-11, 227, 246 (2006). *See generally* SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE COLONIES (2001) (describing the enforcement of slave laws and the influence of the slave system and white conceptions of honor on the formation of Southern police forces). *See also* Curtis, *The Bill of Rights and the States*, *supra* note 7, at 19-20.

9. *See* TASLITZ, *supra* note 8, at 246.

10. Bruce P. Smith, *The Fourth Amendment, 1789-1868: A Strange History*, 5 OHIO ST. J. CRIM. L. 663, 669 (2008) (reviewing TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 8).

prosecutors successfully used Reconstruction enforcement statutes to target civil rights violations by Ku Klux Klansmen.[11] However, despite their criticism of Southern atrocities, reformers in the North, the Northwest, and the West failed to see a connection between the evils of the slave system and the Klan's reign of terror, on the one hand, and the abusive detention and interrogation practices of their own police forces, on the other.[12] To the extent that they analyzed the language of the Fourteenth Amendment, especially in light of *Barron v. Baltimore*,[13] they probably did not think it threatened the autonomy of their state criminal justice systems. Of course, the perceptions of people other than framers or ratifiers may be extraneous to an "original meaning" analysis. But under the New Originalism,[14] the views of a broader spectrum of individuals comprise the general public understanding.

Professor Dripps makes a credible case against total incorporation under both brands of originalism, though he leans heavily on reformist moves in criminal procedure in just a handful of states. Citing the work of such reformers as Alexander Buel, who spearheaded the repudiation of the grand jury in Michigan in 1859,[15] as well as legal treatises and judicial opinions, Professor Dripps demonstrates the existence of support both before and after the Civil War for state innovations that did not comport with the federal Bill of Rights. In 1868, several states had already ceased to require traditional grand jury proceedings, and over the next decade four more followed suit. Modern incorporationists offer little convincing evidence that reformers who favored the abolition of the grand jury requirement thought ratifying the Fourteenth Amendment would frustrate their project. Indeed, Bryan Wildenthal concedes that, with the exception of John Pomeroy,[16] all of the jurists whom Professor Dripps mentions either explicitly asserted state power to depart from the Fifth Amendment or assumed the Fourteenth "would have

11. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 920-22 (1986).

12. *See infra* text accompanying notes 33-36 (discussing interrogation and witness detention practices in New York, Illinois and California).

13. 32 U.S. 243, 247-50 (1833).

14. *See* Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 364-65 (2009) (explaining the New Originalism).

15. Dripps, *The Fourteenth Amendment*, *supra* note 2, at 479-80.

16. Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourth Amendment in 1867-73*, 18 J. CONTEMP. LEGAL ISSUES 153, 191-229 (2009).

little or no effect on criminal procedure."[17] Many of these jurists held Republican loyalties, which makes their assumption that ratification was compatible with Benthamite reforms damaging to the total incorporation thesis.

Even Senator Howard omitted explicit reference to the grand jury guarantee of the Fifth Amendment in his May 1866 speech about the privileges and immunities clause of the Fourteenth. According to Professor Dripps, this shows that Howard was a "selective," rather than a "total" incorporationist.[18] The counter-argument that Howard simply provided a non-exhaustive set of examples[19] seems more probable, but it does not definitively answer the question of how contemporaries perceived Howard's words. This May 1866 speech constituted one of the most particularized discussions of the rights that would be protected, yet it gave Republican grand jury opponents hazy notice of tension between their criminal procedure agenda and ratification.

The view that Republicans simply chose ratification over their more trivial objective of abolishing the grand jury[20] makes sense. However, I have not seen much evidence that anyone except Representative Bingham and legal scholars George Paschal, Timothy Farrar, and possibly Pomeroy would have envisioned a conflict between the two. Moreover, because grand jury opponents commanded a political majority in Kansas at the time of ratification,[21] we can presume that some ratifiers were also reformers. Thus, Professor Dripps' argument remains plausible, even if the views of those who framed and ratified the Fourteenth Amendment are the only ones that count toward the Amendment's original meaning.

Professor Wildenthal's evidence that the majority of states retained a grand jury right in 1868[22] only indicates a lack of conflict between their practice and the Bill of Rights; it does not prove that most ratifiers believed the Fourteenth Amendment would require states with differing procedures to abandon them. Moreover, if events after ratification can

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17. Wildenthal, *supra* note 16, at 189. Professor Dripps does not discuss the writings of either George W. Paschal or *Barron*-contrarian Timothy Farrar, both of whom asserted that the Fourteenth Amendment imposed the Bill of Rights on the states. *See id.* at 229-39. *See also infra* notes 19-24 and accompanying text.

18. Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again"*, 74 N.C. L. REV. 1559, 1583 (1996).

19. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 111 (1986).

20. *See* Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. CONTEMP. LEGAL ISSUES 77, 134-38 (2009).

21. *See* Dripps, *The Fourteenth Amendment*, *supra* note 2, at 484. Kansas ratified the Fourteenth Amendment in 1867 and eliminated the grand jury requirement in 1868.

22. Wildenthal, *supra* note 16, at 213.

be taken into account,[23] the authorization of prosecution by information in four more states—Illinois, Wisconsin, Colorado, and California—in the 1870s further undercuts the argument that the Fourteenth Amendment was thought to accomplish total incorporation.[24]

The privilege against self-incrimination constituted another piece of territory staked out by Benthamite reformers. Both proponents and detractors of removing defendants' testimonial disqualification linked this move to the abrogation of the privilege. Yet those who objected to allowing defense testimony apparently eschewed the argument that the Fifth Amendment, applied through the Fourteenth, would bar sworn defendant testimony or more importantly, adverse comment on failure to testify, in state trials.[25] This offers some additional evidence that they did not think Section 1 accomplished total incorporation.

The testimonial-incapacity issue provides a less compelling argument against the historical basis of incorporation than prosecution by information does, however, because testimonial incapacity implicated the *scope* of the privilege against self-incrimination, rather than the question of whether states could jettison it completely.[26] Nevertheless, taken together, the state criminal procedure reforms constitute a puzzle that incorporationists have neither solved nor persuasively dismissed. Proponents of either brand of originalism should admit that Professor Dripps makes a reasonable case against total incorporation. And if subsequent judicial rulings can inform the analysis, the fact that Fourteenth Amendment challenges to prosecution by information and issues related to defendant testimony failed miserably in the courts before the nineteenth century's end[27] further strengthens his argument.

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23. *But see id.* at 158-60 (arguing that post-ratification evidence and especially any views expressed after 1877, the year that signaled the end of the Reconstruction, should be given less weight in establishing the original understanding); *see also* Aynes, *supra* note 20, at 100 (emphasizing the need for caution in assessing post-ratification events due to the reactionary movement that followed the Fourteenth Amendment's adoption).

24. *See* Dripps, *The Fourteenth Amendment*, *supra* note 2, at 484.

25. *See id.* at 492-93.

26. Most state constitutions contained the privilege, *see* Twining v. New Jersey, 211 U.S. 78, 83, 114 (1908), though it was not generally thought to apply to the police station or to implicate the prophylactic requirements that we associate with it today.

27. *See* Dripps, *The Fourteenth Amendment*, *supra* note 2, at 490-91, 494-95.

III. LEGAL HISTORY, SUSPECTS' RIGHTS, AND THE REFORM OF MODERN CRIMINAL PROCEDURE

A normative critique is unnecessary to undercut the historical basis of total incorporation; indeed, it may be inappropriate in an originalist analysis. But since our panel bears the title "Frontiers of Incorporation," perhaps we can legitimately indulge in a little normativity. For Professor Dripps, getting beyond incorporation seems to be just a starting point for remedying the ills of modern criminal procedure. In Bentham's view (and apparently in Professor Dripps' opinion, as well), a rational legal system must evolve by discarding anachronisms and impediments to truth-finding. Professor Dripps subscribes to the nineteenth-century reformers' allegations that secret grand jury proceedings lead not only to expense and inefficiency, but also to abuse.[28] During the Reconstruction, grand juries often refused to indict Ku Klux Klan members for lynching;[29] conversely, they are criticized today for rubber-stamping the charging decisions of overzealous prosecutors.[30]

The critique of the privilege against self-incrimination proves more difficult to embrace. I believe that this position can only be sustained by creating an interrogation environment free from abusive police techniques that risk generating false confessions. Eschewing total incorporation permits state innovation, which does not yield positive results unless the innovation is sound. Professor Dripps has elsewhere described a model of instrumental procedural due process that allows recording, the presence of counsel, time limits, and even the defendant's silence with the caveat that adverse inferences may be drawn from it.[31] This proposal has some validity in the twenty-first century. However, in the second half of the nineteenth century, the conditions necessary to permit just experimentation with Bentham's theory of confessions were sorely lacking.[32] A retreat from total incorporation in favor of due process looks undesirable if we get stuck with nineteenth-century notions of due process.

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28. *Id.* at 498-99.

29. *See* 1 GRAND JURY LAW AND PRACTICE §1.5, at 1-23 (Sara Sun Beale et al. eds., 2d ed. 1997) (1986); Ric Simmons, *Re-Examining the Grand Jury: Is there Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 14 (2002).

30. *See* Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2335-36 & n.4 (2008) (collecting citations to scholars who have alleged that "the average grand jury would indict 'a ham sandwich'").

31. DONALD DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 147-48 (2003).

32. *See infra* text accompanying notes 33-37 (discussing the brutality and corruption of nineteenth-century police and the lax scrutiny of their conduct by the judiciary).

Professor Dripps treats the nineteenth-century transformation of criminal justice as a narrative of progress; yet describing the doctrinal revolution in criminal procedure only tells part of the story. The nineteenth-century police were notoriously brutal, and other personnel in the system often acted on corrupt, self-interested motives.[33] Police and judges who had power over the fate of individual defendants seem to have become less respectful of defendants' silence as the nineteenth century progressed. Evidence rules aimed at insuring reliability governed the admissibility of confessions. Hence, historically, courts had excluded confessions considered to be the product of threats or inducements. However, Wesley Oliver's study of criminal procedure in New York demonstrates that elected state judges treated deceitful, coercive police tactics more permissively in the second half of the nineteenth century after the confession rule was relaxed, and that, for this reason, officers abandoned an earlier practice of giving suspects warnings, including a warning about their right to silence.[34]

My own research further illuminates how actual practice negated the privilege against self-incrimination. In Illinois, California, and New York (and probably in many other states as well) in the late nineteenth and early twentieth centuries, officers worked up cases against so-called "witnesses" held without probable cause or a formal charge.[35] Efforts to bring state witness detention policies into line with federal statutory law did little to curb the common police tactic of "sweating" witnesses to force them to incriminate themselves or others—a tactic that sometimes led to false confessions and erroneous charges.[36] Incommunicado questioning and the decline of warnings were only indirectly relevant to the nineteenth-century privilege, which did not clearly extend to the pre-trial setting even in federal cases prior to *Bram v. United States*.[37] But they add another dimension to Professor Dripps' argument about

33. *See, e.g*, Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880-1920*, 77 U. COLO. L. REV 101, 168-71 (2006) (basing discussion of this situation in nineteenth-century New York City on archival history research).

34. Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations and Miranda-like Warnings in Nineteenth Century New York*, 81 TUL. L. REV. 777, 780-81, 810-21 (2007).

35. Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses*, 6 OHIO ST. J. CRIM. L.681, 686-89, 695-700 (2009).

36. *See id.* at 691-92 (discussing an 1874 Illinois statute) and 686-89, 699-700 (describing pressures leading detained witnesses to give false or inaccurate statements).

37. 168 U.S. 532 (1897).

reformers' increased impatience with defendants' silence, and they illustrate my point about the dangers of Bentham's views in a society in which police interrogation was virtually lawless. Rejection of the incorporationist position leaves a choice between nineteenth-century due process and modern innovation. Even a cursory glance at the history of criminal procedure suggests the superiority of the latter.

Should the incorporation debate matter to criminal procedure scholars? Yale Kamisar posits a system in which judges decide cases according to their own values and invent doctrine retrospectively to justify their decisions.[38] I accept this as a description of the current state of the law, but I cannot embrace it normatively as an appropriate path for even the most well-meaning judge. Supreme Court decision-making without a guiding principle to anchor doctrine has created the mess that now afflicts constitutional criminal procedure. That said, I do not share the incorporationists' confidence that simply announcing a unitary set of national rights would have solved the problem.

Total incorporation might have established more definite parameters than the selective approach the Court took, but the Court ultimately could not escape vexing interpretation questions surrounding each guarantee. Even if the states had clearly adverted to being bound by the entire Bill of Rights at the time of the Fourteenth Amendment's ratification (which I do not think they did), meaningful protection of criminal suspects awaited clarification of the scope and content of those rights. Given popular demands for vigorous crime control,[39] the unchecked spread of abusive police practices,[40] and the appeal to nineteenth-century legal elites of Benthamite attacks on the privilege against self-incrimination,[41] a narrow version of criminal procedure rights would have been adopted if nineteenth-century leaders had agreed that these clauses of the federal Bill bound the states. Hence, while I remain skeptical of the ability of Benthamite rationalism to yield reliable outcomes punishing the guilty and protecting the innocent in individual cases, I also cannot see Bingham's nationalization project as a panacea. Whether one chooses the incorporationist or anti-incorporationist position, strict reliance on

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38. Yale Kamisar, *How Much Does It Really Matter Whether the Court Works within the "Clearly Marked" Provisions of the Bill of Rights or with the Generalities of the Fourteenth Amendment?*, 18 J. CONTEMP. LEGAL ISSUES 513, 521-22 (using the *Miranda v. Arizona* opinion as an example).

39. *See* Ramsey, *The Discretionary Power*, *supra* note 6, at 1310-17, 1336-38, 1342-52 (showing that the late nineteenth-century public urged prosecutors to pursue the most severe charges possible, rather than to play a neutral, quasi-judicial role).

40. *See supra* text accompanying notes 33-37.

41. *See* Dripps, *The Fourteenth Amendment*, *supra* note 2, at 491-94.

historical evidence in defining rights results in an approach to criminal procedure that guarantees neither truth nor fairness.