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Debate

***1193** DO CRIMINAL DEFENDANTS HAVE TOO MANY RIGHTS?

Akhil Reed Amar
Johnnie L. Cochran, Jr.

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Johnnie L. Cochran, Jr.

GREG BOLLER: My friends, we are in for a special treat. Good evening and welcome. My name is Greg Boller, the Debate Editor for the American Criminal Law Review. It is a great pleasure to present to you our Editor-In-Chief, Michael Carroll; our Managing Editor, Stephanie Pickels; our Executive Editor, Clem Turner; and our special guests, Professor Akhil Amar, Mr. Johnnie L. Cochran, Jr., and Ms. Nina Totenberg.

MICHAEL CARROLL: Good evening. Welcome to the Georgetown University Law Center. I'm Michael Carroll, the Editor-In-Chief of the American Criminal Law Review.

STEPHANIE PICKELS: I'm Stephanie Pickels, Managing Editor.

CLEM TURNER: I'm Clem Turner, the Executive Editor.

MICHAEL CARROLL: On behalf of the American Criminal Law Review, we want to welcome you all here tonight for this debate. The Review is a studentedited, scholarly journal that has been published here at Georgetown for the past twenty-five years. Our mission is to be a forum for the meaningful exchange of ideas on issues arising out of the criminal law.

In this election year, one of the pressing issues is how to respond to public frustration with the criminal justice system. Some suggest that the way to do it is to reduce the amount of protection given to criminal

defendants. To debate whether criminal defendants have too many rights, we are pleased to have with us Professor Akhil Amar and Mr. Johnnie L. Cochran, Jr. We are equally pleased to welcome Ms. Nina Totenberg to be our moderator. My colleagues will now introduce the speakers. Stephanie.

STEPHANIE PICKELS: I am pleased to introduce tonight Professor Akhil Reed Amar, the Southmayd Professor of Law at Yale Law School. Professor Amar is a leading scholar and prolific writer in the fields of constitutional law, criminal procedure, American legal history, and federal jurisdiction. He is the author of more than forty articles in leading law reviews, including over a dozen lead articles on topics covering everything from voting rights and affirmative action to the Vice Presidency and Presidential succession.

Professor Amar is what we would affectionately call a hot-shot. After graduating summa cum laude from Yale College in 1980, Professor Amar received his law ***1194** degree from Yale Law School in 1984. Following a clerkship with then Judge Steven Breyer, Professor Amar went on to become the second youngest scholar in history to receive an endowed Chair at Yale. In addition to delivering endowed lectures at fifteen universities in the last five years, Professor Amar was awarded the 1993 Paul M. Bator Award of the Federalist Society and was named one of the National Law Journal's forty rising stars in the law in 1995. Given such impressive credentials, it would be easy to cast Professor Amar as locked away in an intellectual ivory tower.

However, it is important to note that Professor Amar's influence extends beyond the academic world and into real life. At the request of Senator Hatch, he recently testified before the Senate Judiciary Committee on the Crime Bill and the exclusionary rule. The popular media has sought his opinions and comments on a variety of issues, including recent Supreme Court rulings, challenges by the gun lobby and the Tennessee Militia to interpretations of the Second Amendment, and even the O.J. Simpson case. He has appeared on PBS, NPR, C-SPAN, and MTV, and has contributed to many magazines and newspapers, including The Washington Post, The New Republic, Washington Monthly, and the Policy Review.

The New Yorker has recognized him as a leader of the "truth school" in criminal procedure--a position which, among other things, asserts that constitutional protection of the guilty should come only as an incidental by- product of protection of the innocent. To put it another way, although the guilty will often have the same rights as the innocent, they should never have more, and never because they are guilty. Professor Amar is the author of the forthcoming book from Yale University Press entitled The Constitution and Criminal Procedure--First Principles, and we are honored to have him with us tonight. Clem.

CLEM TURNER: You may think that the next man to speak at this podium needs no introduction. Referred to succinctly as "The Man" by commentators on the O.J. Simpson trial, Johnnie Cochran's name is practically a household word. You've read about him in many publications, such as Ebony, The New Yorker, Time, and Newsweek. You have seen him on 20/20, The Evening News with Dan Rather, Nightline, and Good Morning America, to name a few. His list of honors includes being cited in the Fifth Edition of the Best Lawyers of America. He was voted Attorney of the Year by the Los Angeles Trial Lawyers' Association, and Civil Rights Lawyer of the Year by the Los Angeles Chapter of the

NAACP. His client list reads like Who's Who in Los Angeles and includes Michael Jackson, Eddie Murphy Productions, and Jim Brown.

However, there is a lesser-known side of Johnnie Cochran--a firm believer that injustice anywhere is a threat to justice everywhere. Mr. Cochran has always fought for fameless people who don't sing, dance, or score touchdowns. In one of his landmark cases, Mr. Cochran won a large jury award for a little girl who was the victim of grievous sexual misconduct by a police officer. In another case, police insisted that a student athlete arrested for a traffic violation had committed suicide ***1195** in his cell. Mr. Cochran forced another inquest, which revealed that the boy's death was at the hands of another-probably a police chokehold. Cases like these, as well as his own experience as a victim of an illegal traffic search in 1979, have shown Mr. Cochran that it is always necessary to question the official version of events, and have caused him to champion the rights of defendants who have no one else to speak for them.

His current clients include the families of the 300 Oklahoma City bombing victims and 2,000 to 3,000 Black residents of Bogalusa, Louisiana, whose land and health has been affected by a toxic spill. Furthermore, his commitment to those less fortunate extends beyond his legal practice. Acts, such as establishing a low-income housing complex in South Central Los Angeles and creating a scholarship for African-Americans at UCLA, his alma mater, earned him the prestigious Golden Bell Award for community service in 1994. Johnnie Cochran is motivated by the premise that one man can make a difference in this world, and you need only look at his life to see that this is true. Mike.

MICHAEL CARROLL: It's my pleasure to introduce our moderator for tonight, Nina Totenberg. Ms. Totenberg is the award-winning journalist for National Public Radio. She is the Legal Affairs Correspondent and also a correspondent for ABC's program, Nightline. As one of the most respected journalists in Washington, Ms. Totenberg is well known for her coverage of the Supreme Court and the Supreme Court nomination process. It was Ms. Totenberg who first reported on Anita Hill's allegations of sexual harassment during the confirmation hearings of Clarence Thomas. It was Ms. Totenberg who first reported on Judge Douglas Ginsberg's marijuana use during his youth.

Nina Totenberg is both a reporter and a media personality in her own right. One of her colleagues at NPR described her as "a character with a lot of character," and the editors of Esquire twice named her as one of the "Women We Love." Ms. Totenberg brings with her tonight the perspective developed from covering the Supreme Court for more than twenty years. During that time, she has reported on the Court as it has struggled with many of the issues that will be debated here tonight, and we are very pleased that Ms. Totenberg could be here with us tonight. At this point I'd like to ask her to take over and tell us about tonight's topic. Please welcome Nina Totenberg.

NINA TOTENBERG: Thank you, folks. I also bring you the perspective of somebody who never went to law school and doesn't have a college degree. So with that caveat, we are blessed this evening by having two great debaters and a subject that increasingly has become the focus of debate from the living room to the law schools all over the country. The debate, of course, is not entirely new. Judges, lawyers, and politicians have for the last half century been debating whether criminals or accused criminals have too many rights. Justice Benjamin Cardozo, before he was a Justice, as all law students know, is the

author of the famous phrase "the criminal is to go free because the constable blundered"--a ***1196** principle that Chief Justice Warren Burger and others would later call "handcuffing the police."

Of late, critics of the criminal justice system have come to focus not just on the exclusionary rule, but also on the way juries are selected, and even on the hallowed Fifth Amendment and how far it should go. This evening we are going to divide our debate into these three controversies, starting with jury selection.

They have given me three minutes for my overview, but you don't want to hear me anyway. So, I will tell you I will not give you a big broad overview like that. I will tell you that last night I had occasion to be talking to Judge Abner Mikva, the former Chief Judge of the U.S. Court of Appeals here in Washington, who resigned to become White House Counsel, and I told him that I was moderating this debate and that the debaters were Akhil Amar and Johnnie Cochran. Judge Mikva remarked with a grin, "Sounds pretty boring to me. What do they have to disagree about?"

"Everything," I said, "starting with Amar's opposition to the exclusionary rule."

And Mikva looked at me and said, "Is that the Akhil Amar that I know, the young guy at Yale, the one who used to be a law clerk?"

"Yeah," I said, and I noted that Amar recently testified before the Senate Judiciary Committee in support of Senator Hatch's bill doing away with the exclusionary rule.

"Hmmm," said Judge Mikva, "times really have changed."

So, with that, let me introduce Akhil Amar for a two-minute overview of the subject for tonight, "Do accused criminals have too many rights?" The debaters don't have a lot of rights, because I've got the stopwatch. Two minutes, Professor Amar.

AKHIL AMAR: Thank you, Nina. So, the short answer is yes, sometimes they do. The longer, more precise answer is: and often they don't. Most precisely still, they have the wrong kind of rights. We have rights right now that often benefit the guilty without helping the innocent and that indeed sometimes make the innocent worse off. Judge Mikva notwithstanding, I still count myself a liberal and I think liberals should really care about protecting innocent people from erroneous conviction, but the current rules that we have often make their plight worse in order to help guilty people escape conviction.

So, let's just take the Fourth, Fifth, and Sixth Amendments in sort of constitutional order. Fourth Amendment. The exclusionary rule basically says (and Judge Cardozo was actually an opponent of it, interestingly, that phrase was meant to deride the rule a bit) if the cops find extremely reliable evidence, the exclusionary rule says sometimes we toss that out even though it can help us get at the truth. That's a great rule if you happen to be guilty because the more evidence the cops find, the more they exclude, the more you benefit. It doesn't help you at all, of course, if they don't find any reliable evidence against you, if you are innocent--if ***1197** they know you are innocent, if they just want to hassle you because of your race or your sex or your politics.

The exclusionary rule is upside down. It protects the guilty and it doesn't protect the innocent at all, and worse, it actually often leads judges to constrict the scope of the Fourth Amendment right. If we have to exclude, we'll deny the Fourth Amendment was violated--see Judge Baer--and what that means is innocent people are worse off because we have a narrow Fourth Amendment. Okay, Fourth.

Fifth Amendment self-incrimination. Right now, when Ollie North is forced to testify, if he confesses that he embezzled $50,000 and the gold bars are in his garage with his fingerprints on them, we can't introduce it at trial; if he was obliged to tell the truth before a hearing outside of the jury's earshot, we can't introduce the confession. That might make some sense-- maybe he was innocent but he had a slip of the tongue, as one of us might have tonight. But we also exclude the reliable, physical evidence--the gold bars with fingerprints on them--and that's a mistake that doesn't help innocent people at all and in fact makes them worse off because of the current Fifth Amendment rules in place. Under these rules, if you are innocent and you know who did it, right now you're not able to force that guilty person to take the stand because of that person's overly broad Fifth Amendment immunity. I'll explain how that works a little bit later.

Finally, for the Sixth Amendment, how we pick juries. Right now, we let the parties pick, and we let the parties often sort of stack the jury using race and all sorts of other things, even though they try to deny that that's what they are doing, but they are trying to manipulate jury composition. This may help some guilty defendants go free, with a designer jury, but it also means the defendants are doing this with jury consultants, but so are the prosecutors. Having the prosecutors manipulate the system with peremptory challenges ends up hurting innocent defendants too. So, in all these cases, it's upside down. We have too many rights for guilty defendants and not enough for innocent defendants. How did I do on time?

NINA TOTENBERG: Well, I gave you a minute and a quarter of my time, which I will now give also to Mr. Cochran. Ah, before the O.J. Simpson trial I, quite frankly, only knew about Johnnie Cochran sort of vaguely by reputation. But I remember early, before the trial really had begun, I was chatting with a lawyer friend who handles only first degree murder cases, and we were speculating about who would take the lead role in the trial. And I remember very clearly her saying that it would be Cochran, if O.J. wants to win, she said. I raised an eyebrow. "Just wait and see," she said. I waited, I saw, and so did the rest of the country. So, to rebut Akhil Amar, two minutes, but I'll now give you three and a quarter, Mr. Cochran.

JOHNNIE COCHRAN: Thank you and good evening to everyone. I've been a criminal defense attorney for almost thirty-three years. During this time I've fought and spent time in the trenches trying to give a life to the principles of justice outlined in the Constitution. It is one thing to sit in an ivory tower and, pipe in ***1198** mouth, textbook in hand, to think about some of the drastic changes that have come about in our system of justice. It is quite another to truly appreciate and understand that judges are human, police officers sometimes lie, innocent people are sometimes charged with crimes.

That many of these people are often poor, black, brown adds yet another dimension to the complexity of ensuring that justice is truly for all in this great country. When the question is posed--"Do criminal defendants have too many rights?"--what really is being asked is, "Do guilty people have too many

rights?" Implicit in the original question is the latent belief that this generic criminal defendant is really a guilty heathen hiding behind our Constitution. It was written really to protect innocent people, not guilty ones. But the Constitution bestows its protections upon all American citizens, and the only way that you and I can be assured of a fair trial is if every citizen in this land is assured of his or her right to a fair trial.

Our system of justice demands that all persons charged with a crime be presumed innocent. Since that is so, and surely no one here would argue against that, do innocent people charged with crimes have too many rights? This is the real question, because while you may guarantee that you will not commit a crime, you cannot guarantee that you will not someday be charged with a crime. If you were charged with a crime in this country, or if your mother or your father or your sister or your brother were charged with a crime, wouldn't you want every protection afforded you by the Constitution, or would you feel then that you have too many rights?

The short answer is that criminal defendants do not have too many rights. This is a system that has worked well. As we talk about this tonight, I hope that will become abundantly clear to you. During the Simpson trial we talked a lot about a rush to judgment. H.L. Menken once said that for every problem, there is an obvious solution that is quick, easy, and wrong. Just as in the Simpson case, I caution again tonight against this rush to judgment in seeking solutions after the verdict to perceive problems by solutions that many times will only compound those problems. Thank you.

NINA TOTENBERG: He did better than you, Akhil. I'm sorry. He's gone seventeen seconds over.

AKHIL AMAR: It's going to be a long night.

NINA TOTENBERG: I'm only talking about time. Alright, now, we have picked three basic topics, and I'm allowed to interrupt anytime I feel like it. We are going to divide it into thirteen-minute segments. The first one is about the jury. Should lawyers, through peremptory challenges, essentially pick jurors? Why don't you start, Professor Amar.

AKHIL AMAR: Thanks. I believe in the Constitution. I've studied it for the last ten years. I admit it's been in an ivory tower. On the other hand, I don't make any money off the system one way or the other, and so I try to call it as I see it.

***1199** NINA TOTENBERG: He's just a poor country lawyer.

JOHNNIE COCHRAN: Very good!

AKHIL AMAR: And I might be wrong, but the ideas should just stand or fall, I think, on their own merit, rather than on where the ideas come from, whether they come from the ivory tower or someone else. I always thought that these ideas came from the Constitution itself. They come from England. So, I want to persuade you that there's nothing wrong with our Constitution, it doesn't need amending at all. I do think that some of our interpretations have been erroneous.

Now, the Supreme Court is clear that there is no Constitutional right to peremptory challenges. The lawyers don't have to have a right to design or pick the jury. And some of our greatest civil libertarians have been really concerned about peremptory challenges because they allow lawyers to use race and sex and religion and other factors to try to manipulate jury composition. The great Thurgood Marshall opposed peremptory challenges precisely because he thought it enabled lawyers and jury consultants and all the rest to rig the system.

Here's the fundamental constitutional idea--and England does this today--and it's the idea, I think, at the heart of the Bill of Rights. The jury should represent the people, not the parties. Juries should represent public justice. So, the way they do it in England is they pick their petit juries very similar to the way they pick their grand jurors. You know, the defendant doesn't get to hand-pick the grand jury, he doesn't get to hand-pick the judge who tries the case, or the legislature that passes the law, or the appellate court that rules finally. And neither does the prosecutor. Basically, those institutions are picked by the people. So, inEngland, basically, voters names are put into a drum, they pull out twelve. If you are a friend of one of the parties, if you're the brother-in-law, you're excluded in the same way that you would have to recuse yourself as a judge, but otherwise you sit in judgment, and the jury looks like America, not like the plaintiff, not like the defendant.

NINA TOTENBERG: Mr. Cochran.

JOHNNIE COCHRAN: Well, I think--and I'm glad the Professor mentioned England, because I recently was in England, and many of the lawyers there are chaffing at the bit at the unfairness of this system of randomly picking individuals--to suggest that juries should be selected randomly is to ignore the complexities of a multiracial society. We live in America, a melting pot. I don't think that Professor Amar would quarrel with the fact that if there were twelve members of the KKK and a black defendant--you want those first twelve people? That's why we have voir dire. That's why we probe their minds.

Now certainly there have been abuses throughout, but the peremptory challenges allow you to exclude those people where the judge denies a challenge for cause. I believe, quite frankly, that the challenges for cause should be expanded. Again, leaving the ivory tower and going into the practicalities, you have people from all walks of life, and they bring biases into that courtroom, civil or criminal. ***1200** And so when they bring their biases in there, what you want, Professor Amar, is a fair trial.

For a litigant who's been waiting two or three years for his day in court, or whose life hangs in the balance, who could quarrel about that? One of the fairest things that Judge Ito did in the Simpson case was allow the lawyers an opportunity in this important case to query these jurors where there's so much publicity in the case. Everybody has an opinion. You need to ferret out that. Just take the first twelve? Let me tell you, that's part and parcel of a thought that you have this guilty heathen defendant. It doesn't make any difference ...

NINA TOTENBERG: Professor Amar, do you envision questioning of jurors, after they are randomly selected, to see if there are biases?

AKHIL AMAR: Well, of course you have to have challenges for cause, just like you have ...

NINA TOTENBERG: But I asked you, do you envision questioning jurors? Lawyers questioning jurors?

AKHIL AMAR: Well, that's a different question. For example, lawyers don't always have to do the questioning, judges can do the questioning. And so, you have to make sure that they don't know the brother and they're not friends with the brother-in-law ...

NINA TOTENBERG: Or that they're a member of the KKK?

AKHIL AMAR: Well, I wouldn't want members of the NAACP excluded from some white racist defendant's trial. I basically think, ordinarily, we don't exclude grand jurors or judges because they happen to have a race. Everyone does. Or a sex, or a political affiliation. We trust the jury basically, and the Simpson case, of course, is unusual in the amount of publicity. Here's a grand jury. It sits and it issues multiple indictments over a whole range of cases ...

NINA TOTENBERG: But nobody goes to jail because of what happens in a grand jury.

AKHIL AMAR: Well, when a grand jury indicts you, you are subject to great anxiety. It's a huge event in your life. You're ...

NINA TOTENBERG: But you're not going to lose your liberty yet.

JOHNNIE COCHRAN: That'll be later.

AKHIL AMAR: Well, the ...

NINA TOTENBERG: Mr. Cochran, would you trust a judge to do the questioning for you?

JOHNNIE COCHRAN: Absolutely not. Again, in practicality, the problem is the judge is basically out of practice. Let me tell you what the real world is like. The judge is sitting there and he's worried about his next case. This is your litigant's one day in court. You know the facts. The judge will ask a generic question, he's ***1201** sitting in an elevated or she's sitting in an elevated position, jurors will say what the judge wants to hear, he moves on. He doesn't follow up. He doesn't find out anything that way. The lawyer has an interest in his case and you've got to be about that.

Let me just tell you a question that I ask always in these cases to determine the mindset of a juror: Would you be comfortable being tried by a person in your present frame of mind? And that's what you're looking at. We're not trying to carve out any boutique jury. You're trying to get some people who say they can be fair. And even with that, they don't always tell you the truth. But certainly the judge, his interest is, "Let's move this case along, I've got this heavy calendar, I've got things to do"--and you move along.

So you look at this from a practical standpoint. This is a system that has worked, and worked very, very well. If there are abuses, what the judge will do is to sit down with the lawyers and say, "Look, I want you to submit those questions, I want to see no running afield, don't ask the same questions over and over again, don't do such and such ..."

That's alright. But to take away the right and say that you're going to accept questioning by the judge is to bury your head in the sand. The last thing I'd like to say if I could, is that I don't think you can very well equate the KKK with the NAACP.

NINA TOTENBERG: Would you be so anxious to be asking a lot of questions of jurors, and would you be so excited by the notion of random selection of jurors if there was a universal ban on jury consultants and you couldn't use them at all?

JOHNNIE COCHRAN: No, I'd still want to do that. The Simpson case is the first time in thirty-three years that I used a jury consultant. Normally you use your own visceral reaction or gut reaction, how you feel about this person when they look you in the eye, and that's really the question. You want to find out, "Can my client receive a fair trial?" That's all you're really asking. And how bad is that? But people bring biases, and this is a realization. You see, what I believe, and rooted in what the Professor has told us, is that we start off believing these defendants are guilty, so why do we need a trial? Pretty soon we could put it in the computer and have it spew out ...

AKHIL AMAR: Hang on.

JOHNNIE COCHRAN: It's truth that we're talking about, and I don't want to do that, you know.

AKHIL AMAR: I don't remotely believe that. That's such a straw-man argument. Now here's the point. Okay, first of all, if this is so bad, then Thurgood Marshall was crazy and England is crazy and the Supreme Court has been crazy when it says there's no Constitutional right to this at all. Now, I understand that the lawyers want to manipulate the system. They like to pick, because that gives them a lot more power. I'm not sure, though, that the American people are well served by that kind of manipulation.

***1202** The point is if it's peremptory, peremptory means never having to say you're sorry, never having to explain it. So if you can exclude someone peremptorily, the problem is so can the prosecutor, and the prosecutor can exclude someone because she's a member of the NAACP. With peremptories, both sides use them to manipulate and create unrepresentative juries that don't look like the people. We want our juries to be representative of the society.

JOHNNIE COCHRAN: No, I don't think you could peremptorily excuse someone because they belong to the NAACP. I don't think you go with that. In fact, if you excuse a juror ...

AKHIL AMAR: You don't have to explain!

JOHNNIE COCHRAN: Oh yes, you do.

NINA TOTENBERG: You do. Yeah, you do.

JOHNNIE COCHRAN: In California, you do have to explain. This is the reality.

AKHIL AMAR: You have to explain that you're not doing it because of someone's race, but if you say it's because of their attitude, it's because they looked at me the right way, they didn't look at me in the eye, they looked the other way.

JOHNNIE COCHRAN: Let me give you an example, Professor, again. Let me return to the reality of the courtroom. When the prosecutors in the Simpson case excused--ten of the eleven first challenges were black people. I started at the second challenging them. And that's why they finally stopped because, you're right, they have to make up reasons. The prosecutors can't say they excused someone because they're black because they can't do that under Batson and in California under Wheeler.

But you stop them every time--they become offended--but you stop and so they say, "Well, I didn't like the way she looked at me." And you are absolutely right. Where there are abuses, the judge can stop it.

I had a case where there were two blacks on a panel, and the prosecutors excused both blacks, and the judge stopped it under a Wheeler motion in California. He brought a new panel from downtown to Torrence. And that's what you have to have ...

AKHIL AMAR: And lots of judges don't. With peremptory challenges, it's just a loaded gun. Again, lots of prosecutors in lots of other courtrooms with different judges get away with that all the time.

JOHNNIE COCHRAN: But the idea is that you've got to have a fair shot at this. You've got to understand and look at it from a standpoint that racism is endemic in the system. If we lived in a perfect society where people didn't bring these biases, then so be it. We could just have this underway. But people bring their biases in. Just as this is ...

AKHIL AMAR: Then let's have them cancel out in a conversation around the jury ***1203** room where we have black and white and brown and yellow and red and male and female and all religions and all classes together. That's America.

JOHNNIE COCHRAN: That would be nice, Professor, except the jury panel doesn't look like that. The jury panels are chosen from voters, and you take an area, even in Los Angeles, you have a jury panel that looks like it's 70% or 80% white; very, very few Hispanics, very few blacks. It doesn't work that way. And with a few peremptory challenges, unless you can really force their hand, you're not going to get that jury you're talking about.

AKHIL AMAR: Well, if the panel is mainly white, here's the real problem. If each side has an equal number of peremptory challenges, and the prosecutor is looking to exclude the minorities, and there are fewer of them in the pool, this is a pro-prosecution device in a lot of situations, and that's why Thurgood Marshall opposed peremptory challenges.

NINA TOTENBERG: There's nothing in the law that says jurors have to be from the voting rolls, and in some places, many places, they're not.

JOHNNIE COCHRAN: In California they are, and they don't have to be, but generally that's a good way of certainly picking them in California. I think that Professor Amar and I might agree with what we'd like to see in the end result. I just ... My practice tells me you're never going to get that. Let me just talk about this area.

A trial really isn't so much the search for truth. The great Clarence Darrow, hero of many, once said that a courtroom is not a place where truth and innocence inevitably triumph. It is only an arena where contending lawyers fight not for justice, but to win. Now he said that long before Professor Amar and I came on the scene. This was years and years ago that he said that. These lawyers are there trying to win. Now, it's nice to have this truth, but in the courtroom you're not going to have the same level of truth that you have in a scientific lab. We're going to have to talk about that somewhere along the way. We may not disagree about the end result, it's how we get there. The judge is not going to help you get there. You know your case best, you know which jurors are going to best help you do that. That's what gives confidence to the system. If you bring ...

AKHIL AMAR: Even if it's not true.

JOHNNIE COCHRAN: I think that's what gives confidence. If you bring citizens in who are set up to lose--who never think they can get justice--believe me, your way is going to make the system a lot worse. And we have seen that in Los Angeles.

NINA TOTENBERG: Mr. Cochran, most of the jury studies that have been done do not bear out trial lawyers' contentions that their tummy instincts are right. Their tummy instincts are frequently wrong.

JOHNNIE COCHRAN: Sometimes they are, but you know, after thirty-three years ***1204** you get a pretty good feeling about people. I'll still put my tummy instincts up against these consultants and others, because, you know, in the final analysis, you look back over your career and certainly sometimes you've been wrong, but by in large, what you feel about a person will generally carry the day.

AKHIL AMAR: But let's talk about these prosecutors' tummy instincts that blacks think a certain way and Jews think a certain way and women think a certain way. The problem isn't just one person's tummy instincts, it's that there are two sides here, both trying to manipulate the system, and the people get cut out of the process. And I understand why lawyers do this--it's lucrative, it gives them a lot more control over the whole proceeding. But I'm not sure that it's conducive to truth or democracy or a sense of public confidence that public justice is done in public courtrooms.

JOHNNIE COCHRAN: May I ask you this: In any court in this country, you can take the same facts and go into one courtroom and get one result. You can go right next door with the same facts and get a directly opposite outcome, and that's the way the system has always worked. You know, being an advocate means you're doing the best you can for your client. That's all we're talking about. This isn't like some lottery, we just go in there and say, "Let's just take the first twelve that are randomly picked."

These people bring their biases, some don't want to be there. You know, that's unspeakable or unthinkable that you would go along and do that and rely upon the judge who wants to finish this case and get to the next case.

AKHIL AMAR: England has thought it and done it.

JOHNNIE COCHRAN: England is changing. I want you to know, Professor, they are now asking for diversity in jurors because they said it is unfair for the people who formerly served as colonists, the people who were the colonizing ones, to have all the power and sit on juries. I just came back from there, and I've seen it. And the whole world is going to change. The view you're talking about would be a nice view in another time and place, but this is a new world now, and people now want some fundamental fairness. If they don't get that, it causes a lot of unrest. And that's not what we want in our law. We want a system where there's not unrest and chaos. We want law and order, not anarchy.

NINA TOTENBERG: Well, my unrest is to move on to the next subject. And the subject is the exclusionary rule. As far as I know, I don't think evidence was ever excluded, certainly in this country, until about 1886. But the notion, the concept of the exclusionary rule, at least in the federal system, goes back to 1914 in the Weeks case. That's a very long time ago. Almost a century ago.

No judge has ever liked the rule particularly. Not even Chief Justice Earl Warren or Justice William J. Brennan, but they finally came to the conclusion that it was the only effective tool to sort of knock upside the head the police and get their attention so that they wouldn't engage in police misconduct, that there was no reward for police misconduct, and that the only way to get there was to throw out ***1205** the evidence. Now, Professor Amar thinks that's an unfortunate conclusion for the courts to have reached, and I would like you, Professor Amar, to tell us why you think that damage suits, in place of the exclusionary rule, are a real-life option.

AKHIL AMAR: Two things that I agree with: no court in America for the first hundred years ever excluded evidence. The Framers--none of them believed in exclusion. England has never had exclusion in two hundred years; Canada didn't until 1985, and they have amuch more modest version. The Supreme Court has recently, I think, made it clear that exclusion is not constitutionally required. If you have a real substitute that protects the Fourth Amendment, and England has been based on that and so was the Fourth Amendment, then exclusion isn't required.

Now exclusion can never be your sole mechanism, because too many times the cops are going to do things that don't lead to evidence, but they're abusive. They punch people in the nose. They do chokeholds in Los Angeles--and I'm sure Johnnie Cochran will agree with me--and there's nothing to exclude. You've got to have damage remedies; when they whup Rodney King upside the head, there's nothing to exclude in that case. So, for better or worse, you're going to have to have a damage system with punitive damages for outrageous conduct and the like to protect all the innocent people in the world.

The cops actually, even with the exclusionary rule, benefit tremendously. They've always, for two hundred years, been able to introduce the evidence in a civil case against the target or in a criminal case

against someone other than the party searched. They get to keep the drugs (which is a lot of money); they can sell them for medicinal uses, they can return ... This is big bucks, people! They can return stolen goods to their rightful owners, even without exclusion. So, we have all of that right now. Exclusion could never be the only or the sole mechanism.

Now, what has happened in the last century, as courts built up exclusion, is they whittled away damage schemes, punitive damages, administrative sanctions, and the like, that would have protected all these innocent folks. And, we need to bring those back and, in fact, the Hatch Bill does do that, and I applaud it for that. I'm a liberal Democrat, but this is great for civil libertarians to give us something that we haven't had before, which is the ability to be free of governmental immunity. There are all sorts of technical immunities of government and of individuals that are preventing recovery for people who have been abused.

NINA TOTENBERG: Mr. Cochran?

JOHNNIE COCHRAN: I think that our courts for some time have recognized that the exclusionary rule is an important tool to prevent rampant police overreaching and police misconduct. Without the threat of some serious sanctions for the violation of basic Fourth Amendment rights, no citizen would be safe from unbridled police actions; we would move toward a police state. However distasteful the thought--and let's not dance around it tonight--there's some law enforcement officers who would be willing to corrupt the process to convict defendants ***1206** whom they feel are guilty anyway, including by manufacturing evidence. The exclusionary rule provides protection against that potential abuse.

So, the one thing that the Professor forgets is that there are times police officers plant evidence. So, when that happens, an illegal search and seizure, it's not going to help. This man's in prison for thirty years under the federal sentencing guidelines; that doesn't help. So again, you've got to look at the realities of what happens out there in the streets when the ends justify the means. You've got to look at that--and all of us then are less safe. And so it's easy to say, well, it's just, you know, only innocent people should be worried about this. Well, I think it protects equally the guilty and the innocent.

We don't start again on the premise that most people are guilty. The Constitution was set up in a way that protected all of us, and so I feel real strongly that in our justice system, the exclusionary rule plays a very, very important role. The Fourth Amendment has been very, very effective and good. Sure, it's been chipped away, and clearly it will continue to be chipped away. But we need this. We don't want a police state under the guise that we live, and we have these heathen defendants out there who should've all been taken away, and we need to take whatever is illegally seized. Some of the things seized have been planted by the police. That does in fact happen.

In the real world we have to be mindful of that and stop tiptoeing around. And the other thing--and I agree with the Professor about this--is that there is too much looking away that corrupts the process. Judges will sit there and see police officers lie to establish probable cause, and you know what? They look the other way. The best example of this is the embarrassing situation of Judge Baer recently in New York City. That is an embarrassment for all of us; and none of us want to see that, neither Professor Amar nor myself, but this happens. You have this lying and this corrupting.

In the Simpson case, some people said that only two people in America thought that the police went there to save lives and look for O.J. Simpson and notify him regarding his ex-wife's death--and that was Judge Kathleen Kennedy Powell and Judge Lance Ito. They were the only two--the rest of us knew that was an illegal search and seizure.

NINA TOTENBERG: Mr. Cochran, you concede that judges look the other way.

JOHNNIE COCHRAN: Yes.

NINA TOTENBERG: Anybody who's spent any time in criminal courts knows that there are terms of art even for the way police deal with evidence. Things like "dropsy"; you say they dropped the drugs if that's what you need to do; you say they picked up the drugs if that's what you need to do. If you're really not protected by the exclusionary rule because the police have come up with all kinds of artifices to get around it when they need to, and judges have come up with all kinds of artifices to get around it when they need to, doesn't that mean that the rule has failed?

***1207** JOHNNIE COCHRAN: No, I don't think so. I think we need better judges. Judges who have some integrity, who'll stand up. And you're absolutely right. When the Supreme Court came down and said that if you could stop a defendant where you saw him making a furtive move or the so-called "dropsy" cases, the numbers in New York City went from like 14% before to 50%. In California, when the Supreme Court said that if you smelled ether from a PCP lab, with every case, the police officer driving down the street would smell ether from the middle of the street--that's what happens. Yet the judges look the other way.

It's all because of this mentality in this country. You are presumed to be innocent, and we've got to get ahold of that. What we ought to be debating tonight is what's happened to this country--in the interest of putting everybody in jail, we've gone far too far. It seems to me we ought to be talking about that and a better caliber of judge who's going to be honest and upright in what they're doing, rather than passing a litmus test to see who can be the toughest on anybody charged with a crime.

NINA TOTENBERG: Professor Amar, how would your idea really concretely work? And let me just follow that up by saying, most times--if I walk out of here tonight and I'm strip searched by a policeman on the street, and I sue him, the likelihood is he doesn't have a lot of money for me to get, and that's not really a huge deterrent. When was the Bivens case?

AKHIL AMAR: 1973.

NINA TOTENBERG: I wrote a story as a young journalist saying--I hate to admit I was around then, but I was--this would open the door, provide a new remedy. Warren Burger proclaimed it as a new era in the criminal law. It ain't happened.

AKHIL AMAR: Great. Two thoughts: First, here's why the exclusionary rule is affirmatively bad, and second, here's why damages are so much better--and it's not really my scheme; it's the Framers'. Let's get that clear; just because I have spent a little bit of time studying what they did and it's England so, it's not

just some ivory tower theory. Okay.

JOHNNIE COCHRAN: Don't be sensitive.

NINA TOTENBERG: I didn't say ...

AKHIL AMAR: You know ...

NINA TOTENBERG: Who said ivory tower?

AKHIL AMAR: Law professors can be very arrogant, and I want to claim very little credit for any originality here. This is not my idea. Here's why it's affirmatively bad. One--Johnnie Cochran just told you--because we see the problem of throwing out reliable evidence. It tempts judges to lie, to say that the Fourth Amendment wasn't violated, and that is a bad thing. It's a corrupting thing, and it hurts innocent defendants and these subsequent Bivens suits because it generates a very bad precedent.

***1208** It encourages the police to lie, because ordinarily honest cops--some are not ordinarily honest, but the ones that are--often will tell a small lie to get the larger truth, because it really wasn't planted evidence and they want to get that in. And so there becomes a police culture of lying, of winking in order to get actual honest evidence in, and that creates a very bad culture. Evidence is planted but that almost never has anything to do with whether you had a warrant. You can plant evidence with a warrant or without, so it has nothing to do with whether the search or seizure was constitutionally reasonable. It's a red herring. Planting evidence is different from the exclusionary rule.

The exclusionary rule says even if there's no planted evidence, no remote possibility of planted evidence, it's utterly reliable--we exclude it, and that's a mistake. The exclusionary rule creates this culture of corruption and dishonesty in courts and by the police, and society then becomes very disheartened. Now, precisely because right now they say, "Well, you can sue the officer but the officer has no money," and you might not even know which officer did it to you--the exclusionary rule helps you not at all in your situation because they didn't find anything. Maybe they just wanted to hassle you because they were offended by your last NPR piece. That officer works for someone--that's the government. Follow the money. You sue the government directly, and--if you think there's not enough deterrence--just start adding zeros to the punitive damages until the lawyers start to take interest, you know. If you build it, they will come.

And that's what the Framers recognized in the O.J. Simpson case of its era-- Wilkes v. Wood. It's the most famous case in the Anglo-American world: Wilkes- Barre, Pennsylvania; Wilkes County, North Carolina; Wilkes County, Georgia. The judge is Camden, as in Camden Yards where the Orioles play; Camden, New Jersey; Camden, South Carolina.

This was a case where it was an outrageous government search and seizure, almost a strip search, in someone's home. He sued, got massive punitive damages from the government itself. He socked it to 'em. And that was the principle that gave us, and the case, that gave us the Fourth Amendment.

JOHNNIE COCHRAN: Let me respond just briefly ...

NINA TOTENBERG: Let me just ask one question. When you were testifying before Senator Hatch, were you also testifying against caps on punitive damages at that time?

AKHIL AMAR: Indeed, yes--and they got rid of them to their credit. Again, I'm of the other party, and they got rid of them when I said, "If you mean to take seriously the Fourth Amendment, you have to provide some real effective deterrents." And they said, "By gosh, you're right."

JOHNNIE COCHRAN: Let me ... Certainly, this is one area where I find the Professor and I are closer than the other areas. But let me just combine two things. Certainly, you should have the right to bring these damage suits. For fifteen years I've done an awful lot of that in Southern California. And let me tell you ...

***1209** AKHIL AMAR: You came.

JOHNNIE COCHRAN: These are the toughest lawsuits you can ever bring as young lawyers. You need to bring them. But it's fighting City Hall.

NINA TOTENBERG: Literally.

JOHNNIE COCHRAN: It's very, very tough. And believe you me, if you have a random selection of jurors, you'll never win. First of all, let's start with that--I want to combine two things. But more important than that, the other problem is I think the Professor underestimates how the police really stand together. Let me just read something very quickly in that regard.

Let me just refer to this fellow, Detective Fuhrman, who is someone you've heard about. You know, we talk about these internal investigations and suing and everything. Here's what he had to say--I want to give you just two quick quotes, which I think the Professor will find instructive. He was describing the arrest of a black man in Westwood, California, where UCLA is, and he said, "So, you're allowed to just pick somebody up that you think doesn't belong in an area and arrest him?" That's what Kenny asked him.

The answer: "I don't know. I don't know what the Supreme Court or the Superior Court says. And I don't really give a so-and-so. If I was pushing this thing, why I did it, I'd say suspicion of burglary. I'd be able to correlate exactly what I said into a reasonable, probable cause for an arrest." That's the mentality of these police officers. But even more than that, on the issue of "let's just sue 'em," here's what happens.

Here's what he says to his partner one day in the car: "Don't tell me because you've got a wife and a kid--you're either my partner all the way or you get the blank out of this car. We die for each other. We live for each other. And that's how it is in this car. You lie for me, up to six months' suspension."

So, believe you me, it's not like you just run off into court and have this judge ask these questions, get a random selection of jurors, have the police officer still lie, and you collect anything. It's not practical. It

doesn't work under those circumstances. We know there aren't easy answers, but you've got to look at the practicality of how it is. And I applaud the fact there are no limits on the damages, but that's not going to work and really solve the problem either, I think. And that's what I'm concerned about.

AKHIL AMAR: There are other mechanisms in addition to civil jury options. Remember, we're talking about civil suits brought by aggrieved citizens who may not have been even charged with any wrongdoing. They may have been utterly innocent, and even the cops knew they were innocent ...

NINA TOTENBERG: They may have just have had an NPR broadcast.

AKHIL AMAR: You know, and the cops want to hassle them. So, these are civil suits. In civil suits we can easily structure the thing to give citizen plaintiffs, when they're suing the government, a choice. Do you want a jury, or would you prefer ***1210** this to be a judge trial? No problem whatsoever on the Seventh Amendment. And you give the citizen the choice. Her option.

There are administrative schemes, sanctioning schemes, and the like. For example, if you're hurt in the workplace, we have OSHA and worker's compensation and the like. There are many civil models for enforcing the Fourth Amendment in addition to juries. But, here's the fundamental other disagreement. I basically have more confidence in a random selection of my fellow citizens and their ability, with proper instructions from the judge, who will sometimes say this is unreasonable as a matter of law, this is not unreasonable as a matter of law.

Within the confines of that judicial grid of what is and isn't reasonable, I have more confidence in my fellow citizens trying to decide what police conduct they consider reasonable, what police conduct they consider unreasonable, what they consider outrageous.

JOHNNIE COCHRAN: Could I respond?

NINA TOTENBERG: I just want to ask one question on this idea of internal discipline. Why would we have any reason to think that that would work when, for example, take the case of Mark Fuhrman. I've never been able to figure out why the Los Angeles Police Department fought him when he was trying to get early retirement essentially, disability on the basis that he was an unredeemed bigot, then put him on the Homicide Squad in one of the creme-de-la-creme positions with enormous power over people's lives. Why would we think that police departments who behave that way for, not necessarily even evil reasons, often bureaucratic reasons, because they're going to get sued by the officer, or they'll be up before the State Employment Board, or whatever; what makes you think that your value will trump other values?

AKHIL AMAR: The problem is bureaucracy, which creates a certain kind of density and solidarity and a culture of "us" against "them." And one way you break it is by trying to bring sunshine in, oversight. So you could have--and this is a jury-like idea, but not technically the jury--citizen oversight panels. You have either community leaders, respected community leaders, that's like a blue-ribbon jury; or random cross-sections of citizens or grand juries who monitor and are involved in that oversight process when citizens come and bring complaints against police officers. They're not handled just by the police

department bureaucracy, but by the citizenry monitoring its government officials.

JOHNNIE COCHRAN: Ms. Totenberg, what I was going to say--and a good example is again, Detective Fuhrman, who was charged with some sixty-six counts, resulting in the beatings that he talks about on the tape, of the Hispanics in East Los Angeles. He took great pride in the fact that he was the last one they talked to, which meant that he was the real heavy. And he said that he was acquitted, absolved of every last one of the them. Because he knew he would. The officers said, "We knew how to lie for each other. We stood up for each other together." That's why these tapes are so chilling.

***1211** That's why all of America needed to hear these tapes because there are Mark Fuhrmans in every department in America--not the majority of officers, make no mistake about it, it's not about being anti-police. But they are there, and they do exist, and it doesn't help us to engage in this national epidemic of denial. What the Professor again talks about would be nice in a perfect world, but it's not going to work. It's not a remedy that's going to work until we overcome and come to grips with the issue of race in America that nobody ever wants to talk about. Racism is endemic.

NINA TOTENBERG: That's the last word on this subject. Moving on to the next, which is confessions and self-incrimination. Should defendants be forced to speak? And when? And to what degree? So, we'll start with you again, Professor Amar, since you want to curtail this to some degree.

AKHIL AMAR: Yeah, I want to construe the Fifth Amendment correctly is another way of saying that. Start by reading the words of the Amendment. But the basic idea here is that in any criminal case, no person shall be compelled to be a witness against himself, okay? I've moved the words around, but that's the key concept. Now, here's one thing, for example, that we can compel people to do. We can compel people to give their blood, their hair, voice exemplars, and the like--and the Supreme Court said that's not forcing them to be witnesses against themselves; that's reliable, physical evidence, and it can come in. Now, under that theory--that's the famous Schmerber case--my suggestion is that so long as someone outside the courtroom--in a grand jury proceeding, in a civilized deposition, the same way we have civil discovery on the civil side, with their lawyer present, with Brendan Sullivan whispering in your ear (he's not a potted plant)--you're asked questions and you have to answer them.

Those answers aren't introduced in a criminal case because then you would in effect be a witness against yourself by affidavit. But if your answers lead to other physical evidence--you know, where is that bloody knife, where is that smoking gun, where are those gold bars with your fingerprints on them? Just like, where is your blood? And give it to us--those bits of reliable, physical evidence can come in the courtroom because that's not witnessing, that's fruit.

Now, why do we exclude words and allow fruit? Again, it's all about truth- seeking and reliability. Under pressure, you're just an ordinary person, and you're confronted with a very clever lawyer who's trying to make a monkey out of you and make you look guilty when you're not. You might not be particularly educated; you might slip up and actually say something that looks quite incriminating and hang yourself. And we're really worried about protecting innocent people from that, so we don't force people to take the stand because even though they're innocent, they might look bad; they might look guilty; they might slip up. So we exclude their testimony. They have a right to not have those words

come in. But reliable, physical evidence is altogether different: blood, hair samples, bloody knives, smoking guns, gold bars.

***1212** NINA TOTENBERG: So, wait a minute, before you answer, I need you to spin this out one step further.

AKHIL AMAR: Okay.

NINA TOTENBERG: Blood and hair we all know about. I mean, you don't have any right to not give that to the police. But what are you saying more than that?

AKHIL AMAR: Okay. Outside your criminal case, there's a deposition, and you're there, and you're Ollie North, and you're given in Congress even a certain immunity. Here's the immunity that you get: your words will never be introduced against you in the criminal case. You will never have been made a witness against yourself in the criminal case. But fruit leads that are generated by that testimony--the identity of other witnesses, all of that comes in. That's the English rule. It always has been. That's the Canadian rule.

Here's why this is affirmatively good for innocent defendants. Right now, here's what happens. I'm on trial for my life, and I know who did it. I have an explicit Sixth Amendment right to compel the production of witnesses in my favor, but right now, when I try to put that person on the stand, that person invokes the Fifth Amendment. We saw a variant of this in a case that Mr. Cochran is aware of, and the problem right now is that person's Fifth Amendment rights are trumping my Sixth Amendment right to compel the production of witnesses.

The reason that person's Fifth Amendment right trumps is because I can't immunize that person and say, "Okay, I confer immunity on you, and so then tell them you did it so I can go free." And the reason I can't is right now, once immunity is given, it basically means we can never prosecute that person at all. That's why Oliver North is free today, rather than the convicted criminal that he would be if the other evidence were allowed to come in. So, innocent defendants right now are worse off because we've overbroadly construed Fifth Amendment immunity in a way that helps the guilty and hurts the innocent.

JOHNNIE COCHRAN: Well, I disagree.

NINA TOTENBERG: Surprise!

JOHNNIE COCHRAN: Surprise! Surprise! And even though one might think that certainly Oliver North's political views are worlds apart from mine, I respect his right to not have a statement made before Congress used against him because he was advised that it would not be used against him, and I understand that. And I think that's part of our system that he was told that--it would be unfair, and the appellate court so ruled. The problem is, I think the press has it all wrong. Let's go back to practicalities again. In a criminal case, the burden is upon the prosecution. The defendant doesn't have to do anything to help his conviction.

AKHIL AMAR: Except give his blood.

JOHNNIE COCHRAN: He doesn't have to do it; there's been chipping away-- certainly blood and hair and that sort of thing--from the old Rochin case in ***1213** California, but Professor Amar wants to go further than that. You see, implicit in what we've been hearing tonight is the fact that somebody can make a judgment of who's innocent and who's guilty. I started off by saying that's what this is about. We have now come so far to the right that we now believe that everybody is basically a guilty, heathen defendant hiding behind the Constitution, so, let's just wipe them out and let's only try to protect the innocent. But the truth, it doesn't work that way.

Truth in the courtroom doesn't work that way. Who's to say what the truth is? I dare say, in any given case, unless you or I were there, especially in the circumstantial evidence case, nobody knows for sure. And that's the issue. When the jury goes back and votes, they're not voting on whether they feel most likely this person is guilty, or it's probable that they were guilty. It's whether or not they're guilty beyond a reasonable doubt and to a moral certainty. That's what we're talking about. You know, somebody else said it really, really well when they said what is really a trial--a trial is simply a struggle for an acceptable level of human certainty.

In criminal cases, we call that beyond a reasonable doubt and to a moral certainty. So let's not turn this Fifth Amendment on its head in the interest of trying to get at only the innocent people--who's going to make that determination? Now to the Professor's credit, he's been talking about this and expostulating these ideas long before Simpson. But for the majority of people-- and the reason why I am so disturbed by it--it's only after Simpson that they decided to have all these ideas because they didn't like the result. They didn't have these same issues and weren't worrying about it with William Kennedy Smith or Claus von Bulow or John DeLorean. But in regard to the Professor, he has long thought this.

His arguments are well thought out. The only problem that I find is that I don't think they're necessarily going to work, and I think that in many instances it changes the whole burden, making it easier for the prosecution. That's what I see as the agenda; it makes it easier for the prosecution. And, you know, let me just say this, that's what makes it so beautiful in this country. The thing about the Simpson case--unless we took a vote here it's not important what you thought about that verdict--what's important is that if the jurors thought they were doing their job, and even if it's unpopular, isn't that what makes our system great in America?

That's what we're talking about--you don't talk about one case. And please, the other thing, if I can leave one thought with you, don't use Simpson for changes to the system--Simpson is an aberration in many particulars. When did you ever see any defendant who could fight on an equal field with the prosecution? What we ought to be thinking about, and let me not get too far afield, is how do we give more resources to other poor defendants out there? That's what we ought to be thinking about.

NINA TOTENBERG: Let me ask you a hypothetical, a so-called hypothetical. You ***1214** have a rape defendant, and there are seventeen other young women who are willing to testify that he has date-raped them. I really almost don't know a court in this country where that would be permissible evidence under current rules. The notion being that the other evidence would be so inflammatory to the jury that the jury

would be unable to rule on this case and this case alone, where the evidence is being introduced about this case. Under your theory, as I understand it, all seventeen of those women would come in and testify that way. Right?

AKHIL AMAR: Hmm, I don't think that actually my theory had much to say about that. But let me tell you how it would play out here. First of all, I do not challenge the presumption of innocence or the Winship idea that the prosecutor has to prove things beyond a reasonable doubt. Precisely because that is such a heavy burden and rightly so, the question is whether we're going to allow reliable evidence in the courtroom that can help establish that. That's why we force the defendant to give his own blood, even if he doesn't want to, because that can actually help us decide who did it. And in a rape case, not a date- rape case, but another case where the question might not be consent, but identity. The ...

NINA TOTENBERG: There's no consent in a date-rape.

AKHIL AMAR: Right, that's ... the issue is consent rather than identity in date-rape, but the end of the so-called stranger-rape situation, the question is who did it. And that's where, again, reliable physical evidence can be absolutely critical, like sperm. We force people to give over their bodily fluids, even though it may convict them, because it's reliable evidence--DNA, for example. It can also help clear the innocent. There are people who were on death row who now are free because the blood, because the DNA has proved it was someone else.

I don't want to say anything at all about whether the person you've heard about in the media actually committed the so-called Unabomber crimes, but I can tell you that in any trial about the Unabomber, what ultimately will be perhaps among the most decisive pieces of evidence will be saliva. Because there's saliva on the back of a stamp, and they will be able, if they ever do catch the person who did it, they will be able to prove that person's guilt literally from that person's own mouth. From saliva. But not in order to compel that person's words, because words are less reliable than saliva. So, the whole point is words can be unreliable in a way that physical evidence is much more trustworthy and can acquit the innocent.

NINA TOTENBERG: I'd like to remind the witness that he's not answered my question. I don't care whether you want it to be stranger-rape and there's seventeen women who say, "That guy is the guy who raped me" or you want it to be date-rape. It doesn't really matter. Eyewitness testimony is not DNA, and, as far as I know, usually, I don't know a court in the country where, unless the defendant is charged with that crime ...

AKHIL AMAR: Uh huh. But that has nothing to do with coerced confessions or ***1215** compelled self-incrimination. It is an interesting issue, and I'll talk about it, but it really isn't ...

NINA TOTENBERG: Well, ...

AKHIL AMAR: Now here's what's interesting about my ...

NINA TOTENBERG: You've written about it in connection with it, you're just trying to avoid it.

AKHIL AMAR: In ... And I thought you were a moderator.

NINA TOTENBERG: A moderator is supposed to hold both your feet to the fire. I hope I can do that.

AKHIL AMAR: Okay. And they're both being held. Now, the point is in a lot of cases what will make us very confident about guilt or innocence, and also clearing other suspects, is reliable physical evidence--blood, hair, fingerprints, and the like. Date-rape is unusual in one respect because the question isn't, "Who were the relevant parties?" The question there is, "Who do you believe?--he said/she said. And that's something as to which reliable physical evidence doesn't tell us much.

It's possible it could tell us something if we were able through some examination of the relevant parties to try to deduce whether force had occurred or not. Typically, that's going to be an examination of the woman complainant victim, rather than the defendant. So again, self-incrimination doesn't come in. But if it all turns on who you believe--he said/she said--then it is quite possible to ask the following, and it's a symmetric question: "Has she ever cried rape before?" and "Has he ever been accused of date-rape before?" That might help us, actually, on a jury, try to figure out who we believe. When the physical evidence doesn't adjudicate, it's he said/she said. And there is actually interesting legislation--I think Senator Kyle has introduced it--on this question of prior bad acts.

JOHNNIE COCHRAN: Let me just respond briefly to prior bad acts. No, that should not come in, I don't believe. I think that, again, very often the courts will engage in a balancing process, and where you have these prior bad acts, certainly under that circumstance, you can't have seventeen other little trials. And the probative value of that is far outweighed by the prejudicial factor of that evidence. So I think it stays out. Much in the same way we argued that, in the Simpson case, that acts of previous alleged domestic discord, as we call it, shouldn't come in. Now, of course the Judge let it all come in. The prosecutors themselves decided not to do that, but Judge Ito said they could use many of these acts, and we thought that was an outrageous ruling, we thought, at the time. So, the short answer is no, I don't think that should come in.

But, I want to enlarge upon the topic of confessions. If, again, you think with me for a minute, this idea of letting the defendant, or making the defendant speak or use his statement, will lead to coerced confessions--that's been a real problem in this country. Where the defendant is then, you're going to see it, the courts say that comes along, believe me, every defendant is going to confess in every case. ***1216** Whether it takes a rubber hose or whatever, you're going to see more and more and more of that. And I can see these, I can just conjure up in my mind, the things that are going to happen again out in the street.

So again, I don't think you can shift the burden and I think it really is a shifting of burden. What my learned adversary talks about from a standpoint of chipping away, the courts always do that. They will carve out these little exceptions, and we've come to live with the fact that hair and blood are things that are going to ...

NINA TOTENBERG: But Mr. Cochran, the Supreme Court was one vote, one vote away, from not permitting blood and hair, and as we now know, DNA, and all kinds of really probative evidence that,

once you get it, is really only subject to debate over how it's tested, etc. But it is not like an eyewitness. It is not completely deceptive evidence. We were one vote away from that not being acceptable, and just as Professor Amar's theories conceivably, as you spin them out, could go to putting all kinds of innocent people in prison, I suppose your theories could go to putting an enormous number of guilty people back on the street to victimize other people.

JOHNNIE COCHRAN: Now, let me just say this, and the Framers have said this for years: better to let ten guilty people go than one innocent person be convicted. And that's another reason why we can argue another time about the death penalty. Some people may think that's just the cost of business. But when you're in criminal law, when you're in the court, when you have somebody's life in your hands, these principles become very real. For it's no longer a theory at that point--when some innocent person is put to death, all of us are less safe. And the Framers were concerned about that, and that's really what we're talking about here. So, sure there probably are some guilty people who go free.

NINA TOTENBERG: But not every case is a capital case.

JOHNNIE COCHRAN: Not every case is a capital case, but that obviously is the ultimate, and if it applies for the smaller case, it certainly applies for the larger case. And that's really the problem, because really, if you think about everything we've talked about here tonight, what we're talking about is making it easier for the police. Doesn't it have to do with the tenor of the times? Isn't this really a political discussion? We talk about these bills before Congress. We talk about testifying. How many of these Congresspeople try cases every day? Or are actually out there dealing with jurors?

They need to talk with people who've actually been out there doing it and understand what this means to everyday Americans and their belief in their society. They need to understand that, it seems to me, before we talk about these changes. You know, you talked about the Unabomber--one of the things I'm concerned about the Unabomber is the fact that, again, in this country, you know, I don't know all the facts, and he's still alleged to be guilty or he's allegedly innocent at this point--but how's he going to get a fair trial when every night, Nina, your colleagues come up with all this ...

***1217** NINA TOTENBERG: And me. And me.

JOHNNIE COCHRAN: Let's get her now, okay? So, every night your colleagues, however, come on television and give us some more evidence. I'm pretty particularly sensitive of that because, having lived through that, where you're tried in the media--the media does a great job and at the end, when the media was wrong, and the jurors didn't listen to that evidence that themedia was speculating about, and you get an acquittal--then you have trouble in the country having people understand what took place. So, I think we need to look at that also, another subject perhaps.

NINA TOTENBERG: Well, we're out of time and I'm supposed to wrap this up. And so I will wrap it up this way, since I'm neither brilliant practitioner nor brilliant scholar. My area of knowledge is really journalism and the press, and what I can tell you is, even understanding that this will be shown in classrooms around the country, that the British system sucks vis-a-vis the press. Once somebody is arrested in Great Britain, you can't write anything about the crime, what police are doing, what

prosecutors are doing.

That is allegedly meant to protect the innocent defendant, but it also protects the vicious prosecutor. Similarly, when there is a trial, you may only report exactly the words that go on in the trial. You may not even report what the prosecutor looked like, or the body language of somebody. You may not use what small amount of creative language we in journalism might have. The result is that in Great Britain there have been, in large numbers of cases, really many more than in this country proportionately, railroad jobs that succeed for many years, often decades, and are not exposed by the press because there are mechanisms to keep it a secret.

I cover the courts, and I have my own notions about what's good and what's bad--I obviously, like everybody else who's a resident in this country, think that crime is a serious problem and that defendants are not the only victims. But I would say in conclusion that, at least for me, the British system is not a model to be emulated, and whatever changes we make, and we probably should make some, I wouldn't look to them for any example. After all, we got rid of them over two hundred years ago. Thank you very much.

GREG BOLLER: Thank you, Ms. Totenberg. Thank you, Mr. Cochran. Thank you, Professor Amar. In closing, the American Criminal Law Review would like to thank Dean Areen, Dean Tushnet, Professor Seidman, and Professor Dash for their continuing support. We are also thankful that so many distinguished guests are in attendance tonight, and we would like to recognize the special support of the law firm of Jack H. Ollender & Associates. And I particularly want to thank the Debate Committee, especially Debate Coordinators Deirdre Corkery, Kathy Flavin, Florence Kao, Joe Mrazek, Ngozi Okaro, Chris Porter, Rishi Varma, and Gerard Werner. The amazing work of these students over the past several months really made this evening something special. Thank you, my friends.

From the students here at the Georgetown University Law Center, let me say, ***1218** Ms. Totenberg, Professor Amar, Mr. Cochran, you inspire us. You may come from different worlds, but you're all superstars. There are a few moments in law school when the words on the page and the words in the air, what we call "The Law" really comes to life. Well, it's alive tonight. You've made one thing certain--there will be more debates at this law school by this law review. Thank you so much. Thank you all for coming. Goodnight.

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