
REGARDING RE'S REVISIONISM: NOTES ON *THE DUE
PROCESS EXCLUSIONARY RULE*

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INTRODUCTION

At least initially, Richard Re's argument for grounding the exclusion of unlawfully obtained evidence on the Due Process Clauses of the Fifth and Fourteenth Amendments looks fresh and powerful.¹ As originally understood, these clauses "require[d] that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law."² Because the police do not act in accordance with established law when they violate the Fourth Amendment, deprivations of liberty may not rest on their unconstitutional actions.

Re says that his argument should appeal to "new" originalists, and his view that the Due Process Clauses originally required adherence to positive law seems correct. His efforts to address the difficulties posed by this argument, however, lead him away from originalism. In addition, he proposes unfortunate restrictions of both constitutional requirements and the exclusionary remedy.

Part I of this Response sketches the history of the term *due process*. After describing this term's precursor in the Magna Carta, it explains why the appearance of the term in the Fifth Amendment initially meant next to nothing while its appearance in the Fourteenth Amendment transformed the constitutional landscape. This Part also describes how the Framers reconciled the admission of unlawfully obtained evidence with their view that government must obey its own law.

Part II addresses Re's argument that the two Due Process Clauses now require something they did not require initially — the exclusion of unlawfully obtained evidence. Re observes that the government searches of the Framers' era were infrequent and usually led to civil forfeitures. Police searches did not become a regular part of the criminal investigative process until late in the nineteenth century.

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¹ See Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885 (2014).

² *Id.* at 1907 (quoting John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997)) (internal quotation mark omitted).

Re does not explain, however, why these developments justify a due process exclusionary rule. Because the Due Process Clauses do not distinguish civil from criminal cases, the fact that police searches have moved from the civil to the criminal column does not seem to matter. Moreover, the changes Re describes neither undercut the Framers' doctrinal reasons for rejecting the exclusionary remedy nor strengthen his own doctrinal reasons for endorsing it.

Re's argument encounters two further snags. It is difficult to see how an exclusionary rule grounded on the original meaning of the Due Process Clauses could be limited to criminal cases, and it is equally difficult to see how such a rule could exclude only the fruits of constitutional violations. Both applying the rule in civil cases and applying it to the products of nonconstitutional violations would expand the rule in ways that currently seem unthinkable. Re's efforts to resolve these difficulties lead him away from originalism.

Part III examines the contours of the exclusionary rule Re proposes. He maintains that a focus on due process leads to two major doctrinal shifts, and these shifts in turn require reconsideration of a number of subordinate doctrines. First, he says, a focus on due process obviates the need to consider whether a violation of law has caused the discovery of challenged evidence; the question instead becomes whether officials have exceeded their lawful authority. Second, he says, due process requires exclusion only when the police have violated "scope rules" (rules limiting the scope of their investigative authority), not when they have violated "manner rules" (rules limiting the manner in which they exercise this authority).

Re's reasons for concluding that the Due Process Clauses yield these doctrinal changes are obscure, but his assertions set the stage for a display of Langdellian legal science. He employs the concepts of "authority" and "scope" to validate virtually all of the Burger, Rehnquist, and Roberts Courts' limitations of the exclusionary rule. Indeed, Re would admit much unlawfully obtained evidence the current Supreme Court would exclude. Part III examines Re's proposed revisions of Supreme Court rulings concerning inevitable discovery, attenuation, good faith, the admission of evidence seized following knock-and-announce violations, and the power of courts to try unlawfully arrested defendants.

Although I have explained elsewhere why I consider the current Fourth Amendment exclusionary rule "well within the bounds of legitimate constitutional interpretation,"³ this Response concludes by en-

³ See Albert W. Alschuler, *Fourth Amendment Remedies: The Current Understanding*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 197, 206 (Eugene W. Hickok, Jr., ed., 1991).

dorsing Re's claim that the rule can plausibly rest on the Due Process Clauses as well. I briefly sketch a less conceptual due process argument than his.⁴

I. THE ORIGINAL MEANING OF DUE PROCESS

This Part discusses what the phrases *by the law of the land* and *due process of law* are likely to have meant to the people who used them in the Magna Carta, the Fifth Amendment, and the Fourteenth Amendment.

A. *The Magna Carta*

In 1215, in chapter 39 of the Magna Carta, King John promised his barons that he would condemn no freeman “but by the lawful judgment of his Peers, or by the Law of the Land.”⁵ The King thus agreed to abide by law, or at least to secure the approval of someone's peers when he did not. At the time, neither a right to jury trial nor a separate legislative branch of government existed. “Peers” meant, not jurors, but equals — for a baron, other peers of the realm. “Law” meant customary law.⁶ Re echoes Lord Chief Justice Coke, the U.S. Supreme Court, and everyone else when he says that the phrase *due process of law* in a subsequent English statute and the U.S. Constitution expressed the same idea: a government of laws.

B. *The Fifth Amendment*

By the time the Due Process Clause of the Fifth Amendment promised adherence to law, the promise seemed redundant. Even without this clause, the federal government would have been required to obey federal law. Initially, there appeared to be no reason to mention this clause in litigation, and almost no one did.⁷

⁴ Re seeks to bolster his due process argument by dismissing efforts to ground the exclusionary rule on the Fourth Amendment. Many of his arguments on this point are unconvincing, and his claim that supporters of the rule have ignored issues of constitutional legitimacy is unfair. The *Harvard Law Review Forum's* word limits do not permit me to discuss all of Re's article, however, and I will bypass this part.

⁵ MAGNA CARTA, ch. 39 (1215).

⁶ This year marks the centenary of Professor Charles McIlwain's impressive analysis of the original meaning of chapter 39. See C. H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27 (1914). Some historians have concluded that the King promised only to invoke legal process before sending an army against a baron, but McIlwain's article shows that chapter 39 meant more.

⁷ The two earliest reported decisions on the meaning of state constitutional provisions promising adherence to the law of the land both held that these provisions required compliance with current law but imposed no restraint on the power of the legislature to change law. See *Mayo v. Wilson*, 1 N.H. 53, 57 (1817) (declaring that New Hampshire's provision “was not intended to abridge the power of the legislature, but to assert the right of every citizen to be secure from all

In 1856, however, the Supreme Court concluded that the Due Process Clause demanded more than adherence to current law. The issue in *Murray's Lessee v. Hoboken Land & Improvement Co.*⁸ was the validity of a federal statute authorizing certain procedures for recovering a debt. A debtor challenging these procedures argued that the Due Process Clause required not only the observance of the legal restrictions then in effect but also of restrictions in effect at the time the Bill of Rights was ratified.⁹

Re might call this debtor an “old” originalist (though other “old” originalists might not welcome his company). He argued for “construing” the clause to do just what it would have done at the moment it was ratified rather than for “interpreting” the broader principle of legality enacted by the Framers.

In *Murray's Lessee*, the Court embraced this brand of originalism. To determine whether the challenged statute violated the Due Process Clause, it asked first whether this statute violated any other provision of the Constitution (the positive law applicable to Congress) and then whether it was inconsistent with “those settled usages and modes of proceeding existing in the common and statute [sic] law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.”¹⁰

“Constitutionalizing” all the common law and English statutory law that Americans observed in 1791 probably was not what the Framers had in mind, and placing this law beyond legislative revision was a dreadful idea.¹¹

C. The Fourteenth Amendment

After the Civil War, the Fourteenth Amendment extended the due process requirement to the states. At least on one view, the amend-

arrests not warranted by law”); *State*, 2 N.C. (1 Hayw.) 28, 30 (1794) (accepting the attorney general’s argument that the North Carolina provision “could not be intended as a restraint upon the Legislature”). The reporter apparently styled the North Carolina decision “State” because it consisted of a ruling on an ex parte motion by the attorney general.

⁸ 59 U.S. (18 How.) 272 (1856).

⁹ *Id.* at 273.

¹⁰ *Id.* at 277.

¹¹ One year after *Murray's Lessee*, Chief Justice Taney, writing for himself and two other Justices, propounded an even more dreadful interpretation of the Fifth Amendment’s Due Process Clause. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857) (declaring that Dred Scott remained a slave because “an act of Congress which deprives a citizen of the United States of his . . . property, merely because he . . . brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law”). Justice Curtis offered a powerful rebuttal. See *id.* at 626–28 (Curtis, J., dissenting).

ment required the states to adhere to their own procedural law.¹² A federal constitutional guarantee of state adherence to law was not at all redundant, and it sparked lots of litigation.

Constitutionalizing state law, however, was just as bad an idea as constitutionalizing the common law. In *Hurtado v. California*¹³ in 1884, the Supreme Court confronted a clash of two unfortunate interpretations of the Fourteenth Amendment, both of them assertedly originalist.

Several states, departing from the common law, had authorized the commencement of felony prosecutions by information rather than indictment. Some courts held this departure consistent with due process because “a prosecution by information takes from [the accused] no immunity or protection to which he is entitled under the law.”¹⁴ To these courts, due process meant “law in its regular course of administration according to the prescribed forms and in accordance with the general rules for the protection of individual rights.”¹⁵ They observed that “[a]dministration and remedial proceedings must change from time to time with the advancement of legal science and the progress of society.”¹⁶ The position of these courts looked good when a state had modified the common law in a sensible way, but it threatened to make a federal constitutional case of every alleged violation of state law.

The Supreme Judicial Court of Massachusetts took a different view. Interpreting the Massachusetts Constitution before the Civil War, it said that due process could not refer to “the law of the land at the time of the trial,” for such a construction would allow a legislature a free hand in shaping and altering law. Safeguarding “ancient rights and liberties” required incorporating those portions of the common law that had been accepted by the American colonists.¹⁷

In *Hurtado*, the Supreme Court rejected both of these competing views and criticized old-style originalism:

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. . . . There is nothing in Magna Charta, rightly construed as a

¹² See *Walker v. Sauvinet*, 92 U.S. 90, 93 (1876) (upholding Louisiana’s denial of a jury trial to a defendant in a civil action and observing that “[t]his process in the States is regulated by the law of the State”). The principal goal of the Fourteenth Amendment was to afford the benefit of law to former slaves and other likely targets of discrimination.

¹³ 110 U.S. 516 (1884).

¹⁴ *Kalloch v. Superior Court*, 56 Cal. 229, 241 (1880).

¹⁵ *Rowan v. State*, 30 Wis. 129, 149 (1872).

¹⁶ *Id.*

¹⁷ *Jones v. Robbins*, 74 Mass. 329, 342 (1857) (Shaw, C.J.); see *id.* at 342–43.

broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age¹⁸

The Court concluded that the Fourteenth Amendment Due Process Clause “refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”¹⁹

With this decision, the Court began the task of separating fundamental from nonfundamental rights. Assuming this power was unavoidable if the clause was not to constitutionalize either all state law or all the received common law of England. Nevertheless, the Court’s move marked the start of a roller coaster ride. Later decisions would speak of shocked consciences, ordered liberty, selective incorporation, interest balancing, emanations of penumbras, tiers, trimesters, the exclusion of unlawfully obtained evidence, and other things of which the Framers never dreamed.

D. Due Process and Exclusion

If the Due Process Clauses require the government to adhere to law when it deprives people of liberty, doesn’t it follow that illegally seized evidence may not be used to generate convictions and prison sentences? The Framers themselves did not draw this conclusion. The question of exclusion almost never arose before the last part of the nineteenth century, but in two, and apparently only two, reported cases prior to the Civil War, courts declared that they would not pause to consider the methods by which evidence was obtained.²⁰

The courts’ view of illegally seized evidence resembled the view they took (and still take) of unlawful arrests — a view Re endorses. An officer who arrests someone unlawfully and locks him in a cell deprives him of liberty without due process. At the time of the framing, this arrestee would have had both a common law damage action against the officer and a specific remedy in equity for his unlawful detention. Illegal detention by an executive officer was the paradigmatic case for affording habeas corpus relief.

Once a magistrate had held the arrestee for trial, however, his detention would no longer be seen as unlawful. Courts would regard it as resting on the magistrate’s determination rather than the officer’s unlawful arrest. In the same way, after a jury had convicted the arrestee, his conviction and prison term would be seen as resting on the

¹⁸ *Hurtado*, 110 U.S. at 530–31.

¹⁹ *Id.* at 535.

²⁰ See *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 843–44 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.); *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329, 337 (1841). A few English cases had said the same thing.

jury's verdict. The unlawful arrest might remain a but-for cause of the arrestee's imprisonment, but courts would not see it as a proximate cause (meaning a cause they wanted to treat as a cause).

Similarly, detention following a jury verdict would be regarded as resting on this verdict rather than on the seizure of even outcome-determinative evidence. The government was bound to obey its own law, but the law it was bound to obey included the law of remedies. The common law or a legislature might have determined that some remedies for unlawful seizures were appropriate and others inappropriate. As long as the government applied its law of remedies uniformly, it afforded litigants the process they were due.

Re maintains that the constitutional requirement of adherence to law now requires something it did not require in 1791 or 1868 — the suppression of evidence seized in violation of the Fourth Amendment. In his view, however, changed circumstances do not require revision of the government's power to imprison a *person* seized in violation of the amendment. This Response turns to his argument.

II. RE'S ARGUMENT FOR DUE PROCESS EXCLUSION

This Part examines Re's view of the relationship between the Due Process Clauses and the Fourth Amendment, his reasons for concluding that this relationship has changed over time, and his response to the objection that grounding the exclusionary rule on due process and the government's obligation to obey its own law would extend the rule to civil cases and to the fruits of statutory as well as constitutional violations.

A. *The Relationship Between the Due Process Clauses and Other Parts of the Constitution*

Re says that "a Fourth Amendment violation is 'complete' before the commencement of trial" but "that the introduction of illegally obtained evidence threatens a second violation — namely, the violation of a defendant's right not to be deprived of liberty without due process."²¹ The Due Process Clauses thus mandate a remedy for the unlawful seizure of evidence that the Fourth Amendment alone would not require. Excluding this evidence is necessary to prevent an unconstitutional deprivation of liberty.

Re adds that the Due Process Clauses require a specific remedy for other constitutional violations in the same way. Although the Self-Incrimination and Confrontation clauses, unlike the Fourth Amendment, specify trial rights, they "are silent when it comes to the appro-

²¹ Re, *supra* note 1, at 1917.

priate remedy in the event that a violation has *already* transpired.”²² Moreover, the First Amendment, which begins with the words “*Congress shall make no law,*”²³ limits the power of the legislature but not the judiciary. Although Congress’s enactment of the Sedition Act violated the First Amendment, the courts’ conviction and imprisonment of people who violated this statute did not. Their “convictions instead transgressed the procedural requirement that every deprivation of liberty must be authorized by a valid substantive law. Thus, the Fifth Amendment’s Due Process Clause *in conjunction with* the First Amendment, not the First Amendment alone, explains why convictions under the Sedition Act should have been reversed.”²⁴

Re appears to suggest that, if the Framers had left the Due Process Clauses out of the Constitution, convictions for violating invalid statutes would be permissible, and convictions on the basis of compelled self-incrimination and the testimony of unopposed accusers would be permissible as well. Surely, however, the courts did not need the Due Process Clauses to imply the existence of specific remedies (remedies other than compensatory damages) for the violation of at least some constitutional rights.

B. *Changed Circumstances*

Re notes that government searches in the Framers’ era were infrequent and, when they occurred, were not part of the criminal process. Seizures typically led to civil forfeitures, and professional police forces did not exist. He observes, “Over time, pre-trial Fourth Amendment rights came to function as a critical source of pre-trial procedure for the lawful deprivation of liberty and became functionally analogous to in-trial confrontation and self-incrimination rights.”²⁵ Today “the Fourth Amendment . . . serves as a source of process for the acquisition of criminal verdicts.”²⁶

One wonders, however, why these historical developments matter. Neither the Fourth, the Fifth, nor the Fourteenth Amendment draws any distinction between criminal and civil proceedings, and none of these amendments distinguishes deprivations of liberty from deprivations of property. If the two Due Process Clauses require adherence to positive law in criminal cases, they seem to require it for deprivations of liberty and property in civil cases as well. Re fails to explain why

²² *Id.* at 1915.

²³ U.S. CONST. amend. I (emphasis added).

²⁴ Re, *supra* note 1, at 1914 (footnote omitted).

²⁵ *Id.* at 1927.

²⁶ *Id.* at 1928.

the movement of government searches from the civil to the criminal column makes a difference when the same principles apply in both.²⁷

Moreover, the changed historical circumstances Re recites neither undermine the Framers' understanding of due process nor bolster Re's different understanding. The Framers' view was apparently that, as long as a jurisdiction adhered to its own law including its law of remedies, it provided due process. The greater frequency of criminal investigation by the police did not call this conceptual analysis into question.²⁸

Re's view is that the Due Process Clauses forbid courts from depriving people of liberty on the basis of prior unconstitutional actions such as Congress's approval of the Sedition Act in violation of the First Amendment. The suppression of speech, however, was not a routine part of the criminal process at the time of the Sedition Act, and it is not a routine part of this process today. The First Amendment has never moved from the civil to the criminal column. If the Due Process Clauses do not allow convictions based on violations of constitutional provisions that do not "serve as a source of process for the acquisition of criminal verdicts," the exclusion of unlawfully obtained evidence apparently should have been required from the outset.

If it mattered, the enactment of a single criminal statute like the Sedition Act could be characterized as a part of the criminal process, and so could any search that uncovered evidence a defendant sought to suppress. The search must have been a part of the criminal process in this defendant's case. Re does not explain why his inquiry is statistical (how *often* did police searches produce evidence for use in criminal cases at various stages of history) or why a court should consider

²⁷ Other Bill of Rights provisions apply only in criminal cases, and in determining the scope of these provisions, it may be necessary to determine whether police investigation is "functionally" a part of the criminal process. See *Miranda v. Arizona*, 384 U.S. 436, 460-61 (1966) (holding that the constitutional requirement that no person "shall be compelled in any criminal case to be a witness against himself" is "fully applicable during a period of custodial interrogation").

²⁸ The history Re recites provided *empirical* evidence that influenced some courts to reconsider their disapproval of the exclusionary remedy. See, e.g., *People v. Cahan*, 282 P.2d 905 (Cal. 1955). This history revealed both the unfairness and the ineffectiveness of the remedial regime known to the Framers, and it appeared to influence two non-originalist moves by the Warren Court: (1) extension of the Fourth Amendment exclusionary rule to the states, see *Mapp v. Ohio*, 367 U.S. 643 (1961); and (2) the invention of "qualified immunity" for police officers sued for damages, see *Pierson v. Ray*, 386 U.S. 547 (1967). One can plausibly question the legitimacy of both moves, but together they better protected the police from unfair liability, better safeguarded Fourth Amendment rights, and made criminal law enforcement more effective. See Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 501-10 (2009). Unlike the exclusionary rule, the Warren Court's non-originalist approval of qualified immunity for police officers has met with the whole-hearted approval of the Burger, Rehnquist, and Roberts Courts.

whether police investigation has aided the prosecution in cases other than the one before it.

Re's statistical inquiry in fact grows odder. He ultimately looks not only to how often police searches have aided criminal prosecution but also to the *relative* frequency of police investigative searches and civil remedies. If Congress were to establish "a damages regime to deter . . . unreasonable searches and seizures," he writes, "the Fourth Amendment might no longer function *primarily* as a source of pre-trial procedure for the acquisition of evidence, but instead as a vehicle for tort remedies."²⁹ In that event, he says, the Due Process Clauses might not require exclusion. Affording civil remedies more often, however, would not reduce the frequency with which police investigations contribute to criminal prosecution. It would not make police investigation less a part of the criminal process.

Re's conceptual argument for due process exclusion and his historical argument do not fit together. Moreover, grounding the exclusionary rule on due process and the government's obligation to obey its own law appears to require a notable expansion of the rule. The following sections of this Response consider whether the rule could still be limited to criminal cases and to evidence seized in violation of the Constitution.

C. *Exclusion in Civil Cases*

Because the Due Process Clauses draw no distinction between civil and criminal cases, Re acknowledges that the limitation of the current exclusionary rule to criminal cases is "in tension" with his proposal.³⁰ Without taking a firm position, however, he maintains that a due process exclusionary rule might not prevent courts from continuing to receive unlawfully seized evidence in civil cases.

He writes, "[I]t is axiomatic that criminal process needn't always be followed in civil proceedings . . ."³¹ That conclusion in fact comes easily when courts assume the power to determine for themselves what process is due. When due process consists of adherence to positive law including the Fourth Amendment, however, is difficult to see why the same respect for the Fourth Amendment isn't required in both sorts of cases. When "new originalism" leads to unattractive results, Re appears to revert to a more familiar kind of due process analysis.

Moreover, Re's agnosticism seems incompatible with his argument that changed circumstances justify a due process exclusionary rule. He could not plausibly maintain that (1) because the Due Process

²⁹ Re, *supra* note 1, at 1929 (emphasis added).

³⁰ *Id.* at 1938.

³¹ *Id.* at 1939.

Clauses are concerned mostly with deprivations of liberty in criminal cases, the movement of searches from the civil to the criminal column mandated an exclusionary rule, and (2) because the texts of the two Due Process Clauses do not distinguish between civil and criminal cases, exclusion is necessary in civil cases too. Exclusion in civil cases would complete a circle and make the incompatibility of Re's position with that of the Framers clear.

D. Nonconstitutional and State Law Violations

The current limitation of the exclusionary rule to the fruits of constitutional violations poses a similar dilemma. When King John agreed in the Magna Carta to deprive freemen of liberty only *per legem terrae*, he did not distinguish statutory from constitutional law or local from federal law, for those distinctions did not exist. Re observes that "substantial historical evidence indicates that the Due Process Clauses were originally understood to command adherence to all positive-law procedures for depriving persons of life, liberty, or property."³² He adds, "Given that history, there is a powerful historical argument that suppression should be mandatory for all harmful violations of positive-law process, including state law and federal statutory law."³³ Although accepting this argument would radically transform current doctrine, Re says, "it is fair to ask whether current doctrine is correct."³⁴

Reading the U.S. Constitution to require the suppression of all evidence obtained in violation of state statutes, municipal ordinances, and police department regulations would constitutionalize local law and plunge the federal courts into one of the vats of soup *Hurtado* avoided. It would effectively transform all violations of local ordinances regarding, say, the search of impounded automobiles into federal constitutional wrongs. Avoiding this soup, however, would require a move like *Hurtado*'s — distinguishing some rights from others. This move would again abandon originalism, authorize judicial selectivity, and empower judges in a way that would cause originalists to shudder.

Re hedges a little. He writes, "There is some evidence suggesting that, at least by the Fourteenth Amendment's ratification, 'due process' referred primarily to constitutional procedures,"³⁵ but the only evidence he cites is *Murray's Lessee*.³⁶ That's the pre-Civil War case in which the Supreme Court read the Due Process Clause to incorporate not only the Constitution but also all the common law and statutory law of England that Americans had followed prior to ratification

³² *Id.* at 1941.

³³ *Id.*

³⁴ *Id.* at 1940.

³⁵ *Id.*

³⁶ *See id.* at 1941 n.302.

of the Bill of Rights. *Murray's Lessee* stands for the opposite of the proposition for which Re cites it.

Re also maintains that the Due Process clause might not require exclusion when a state has prescribed non-exclusionary remedies for state law violations. These remedies could make government searches part of the “civil” process again and thereby obviate the basis for exclusion. The previous section of this Response considered that peculiar suggestion.

III. BENDING DOCTRINE

This Part considers how the exclusionary rule Re proposes would operate and the reasons he gives for admitting a great deal of unlawfully obtained evidence.

A. Causation or Authority?

Re’s description of what the two Due Process Clauses require appears to be a moving target. Initially he says that these clauses “demand adherence to law”³⁷ and forbid convictions “based on unconstitutionally obtained evidence.”³⁸ A reasonable reader of these statements might assume that “law” means all law (or at least all procedural law) and that “unconstitutionally obtained evidence” means all unconstitutionally obtained evidence. This reader also might assume that an exclusionary rule grounded on the Due Process Clause would require a causal inquiry of the sort the current exclusionary rule requires: Did a violation of law cause or produce evidence that a prosecutor proposes to introduce?

Later, however, Re writes, “The due process exclusionary rule . . . focuses . . . on the scope of the government’s lawful investigative authority.”³⁹ If one were to assume that the government has no authority to violate the law, this formulation might not differ from the formulations that preceded it, but Re in fact proposes to admit much outcome-determinative evidence the police have obtained unlawfully. The issue, he says, is “authority, not causality.”⁴⁰

Re objects, for example, to the Supreme Court’s statement in *Murray v. United States*⁴¹ that it would suppress evidence seized pursuant to a warrant if an earlier unlawful search had prompted the police to

³⁷ *Id.* at 1906.

³⁸ *Id.* at 1890.

³⁹ *Id.* at 1953.

⁴⁰ *Id.* at 1952.

⁴¹ 487 U.S. 533 (1988).

seek this warrant.⁴² He writes, “[A]ll that should have mattered was whether the police possessed a lawful basis for obtaining the evidence in question. Again, the answer to that question was yes: the government’s evidence was collected in full compliance with the Fourth Amendment, including the warrant requirement.”⁴³ Similarly, Re approves the ruling in *Segura v. United States*,⁴⁴ which he interprets as declining to suppress evidence despite an “obvious causal link between [an] illegal entry and the later discovery of evidence.”⁴⁵ (In fact, *Segura* held that the entry was not a but-for cause of the discovery of any of the evidence the government presented at trial.⁴⁶)

Authority is a plastic concept, however, and Re bends it. He posits a case in which an officer unlawfully stops a vehicle, learns of an outstanding warrant for the driver’s arrest, arrests the driver, and then discovers incriminating evidence in a search incident to the arrest. In this case, Re says that the evidence must be suppressed:

[T]he officer learned that the car was being driven by the target of an arrest warrant only by undertaking an unlawful investigative step — namely, the stop. Because the officer stepped outside the scope of her investigative authority, due process prohibited her from relying on the fruits of that transgression when taking new investigative steps.⁴⁷

Re’s position thus seems to be that when a violation of the Fourth Amendment leads the police to seek a warrant, they may act on the basis of the warrant they obtain. A warrant issued on probable cause obliterates their earlier violation and gives them authority to search. When a violation of the Fourth Amendment leads the police to learn of an already existing warrant, however, they may not act on the basis of this warrant. I do not see how these conclusions can be reconciled.⁴⁸

Re does not explain why authority rather than causality is the appropriate inquiry. He offers no evidence that the Framers favored this inquiry or that anyone else did either. Moreover, Re offers no explanation of what authority means or why this concept isn’t question begging.

⁴² See *id.* at 542. The Court envisioned a situation in which the police could have obtained a warrant on the basis of evidence they possessed prior to an illegal search but in which they decided to search without a warrant to confirm that obtaining the warrant would be worth their effort.

⁴³ Re, *supra* note 1, at 1958–59.

⁴⁴ 468 U.S. 796 (1984).

⁴⁵ Re, *supra* note 1, at 1957–58.

⁴⁶ *Segura*, 468 U.S. at 813–14.

⁴⁷ Re, *supra* note 1, at 1962.

⁴⁸ Indeed, the “existing warrant” case is the stronger case for bending or abandoning the customary causal inquiry. If an officer were to discover that a driver he had stopped unlawfully was on the FBI’s most wanted list and that a valid warrant existed for his arrest, one hopes that the officer would not allow the suspect to drive off. Indeed, one would be tempted to fire the officer if he did. And if the officer could appropriately arrest the suspect, he should be allowed to make a self-protective search incident to arrest before transporting the suspect to a lockup.

Re would in fact admit nearly all of the unlawfully obtained evidence the Supreme Court has ruled admissible after more than four decades of chopping away at the exclusionary rule. In some situations, he would admit more.⁴⁹ Where the Court has cut back on the rule by approving a number of exceptions to it and by speaking of inevitable discovery, attenuation, and other causal concepts, Re would cut back primarily by speaking of “authority.” He claims that unrecognized due process principles underlie nearly all of the Supreme Court’s exclusionary rule decisions, and he maintains that “many basic features of current jurisprudence suddenly make sense” when one focuses on due process.⁵⁰

Re concludes that the Supreme Court nearly always has reached the correct results in Fourth Amendment cases and nearly always has given the wrong reasons for them. He is truly a legal scientist, and Dean Langdell would be proud. The following sections of this Response examine some of his reconceptualizations.

B. Inevitable Discovery

In *Nix v. Williams*,⁵¹ “the seminal ‘inevitable discovery’ case,”⁵² a police officer’s interrogation of a suspect in violation of his right to counsel led the suspect to reveal the location of his victim’s body. The Supreme Court held the unlawfully recovered body admissible because a lawful search already underway would have led to its discovery in any event. The constitutional violation was not a but-for cause of the body’s discovery; the discovery was inevitable.

Re comments:

[I]t should not matter whether the police were, in fact, likely to discover the evidence in question, so long as they had authority to find it. . . . [D]ue process is satisfied so long as the government obtained the evidence in question in compliance with its investigative authority. . . . Because police could have looked into the ditch [where the body was found] for any reason or no reason at all, the Court should have declined to suppress simply by noting that the discovery of the body invaded no privacy interest whatever.⁵³

Re’s analysis may sound plausible on the facts of *Nix v. Williams*, but consider a case in which a murder suspect has responded to a threat of violence by confessing that he threw the murder weapon in a

⁴⁹ At the same time, Re might greatly expand the reach of the exclusionary rule by extending it to civil cases and by suppressing evidence obtained in violation of federal and state statutes. *See id.* at 1938–42.

⁵⁰ *Id.* at 1929.

⁵¹ 467 U.S. 431 (1984).

⁵² Re, *supra* note 1, at 1956.

⁵³ *Id.* at 1957.

river. Assume that no search for this weapon was underway; our best guess is that even Sherlock Holmes, Hercule Poirot, and Nancy Drew never would have found it in the absence of the confession.

Current law would suppress the weapon. The suspect was compelled to incriminate himself, and discovery of the weapon was not inevitable. The privilege against self-incrimination does not “mean only that two steps are required instead of one.”⁵⁴ Re, however, apparently would admit the weapon because the police could have searched the river for any reason and because their search invaded no privacy interest.

Re does not explain why the “authority” of the police to search a river should trump, excuse, or launder their use of unconstitutional methods to “cause” the discovery of evidence. He also does not explain why a focus on the Due Process Clauses should lead to this revision of doctrine. The police threat of violence was a part of the pretrial criminal process. This threat did not accord with existing law or even with “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”⁵⁵ Even if the police did not exceed their investigative authority by searching the river, they exceeded it by making the threat.

C. Attenuation

Re’s discussion of attenuation is similarly unconvincing. In *Wong Sun v. United States*,⁵⁶ the Supreme Court excluded a confession a suspect had made immediately after his unlawful arrest, but the Court admitted a confession made by another suspect three days after this suspect’s unlawful arrest. Before confessing, the second suspect had been released on his own recognizance and had returned voluntarily to submit a statement. The Court held that “the connection between the arrest and the statement had ‘become so attenuated as to dissipate the taint.’”⁵⁷

Re maintains that the Court’s talk of taint, attenuation, and causation was unnecessary: “[T]he voluntary confession in *Wong Sun* disclosed information the police were authorized to hear. By contrast, the police had no . . . authority to learn the contents of the involuntary confession.”⁵⁸ The Court, however, excluded the first suspect’s confession, not because it was involuntary, but because it was evidence derived from an unlawful arrest. If the confession had been involuntary,

⁵⁴ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

⁵⁵ *Hurtado v. California*, 110 U.S. 516, 535 (1884).

⁵⁶ 371 U.S. 471 (1963).

⁵⁷ *Id.* at 491 (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

⁵⁸ Re, *supra* note 1, at 1956.

the case would have been easy. In *Brown v. Illinois*,⁵⁹ the Court held that even a confession obtained following *Miranda* warnings — a confession that plainly would have been admissible if the suspect's arrest had been lawful — could not be received if it was the fruit of an improper arrest. Only a more-than-voluntary confession like that of the second suspect in *Wong Sun* qualified as an independent, intervening cause sufficient to purge the “taint” of the unlawful arrest.

D. *The Good Faith Exception*

The Supreme Court has held the exclusionary rule inapplicable when the police have searched in reasonable reliance on an invalid warrant, an invalid statute, or an invalid judicial decision that appeared to authorize their actions.⁶⁰ Re declares that “there is no ‘good faith’ exception to the Due Process Clauses,” but he maintains that the decisions approving a “good faith” exception reached the correct results. He writes, “[T]he results obtained in [these] cases are best understood, not as the exclusionary-rule decisions they purport to be, but rather as displaced Fourth Amendment holdings.”⁶¹

Re observes that the police do not violate the Fourth Amendment when they rely reasonably on an inaccurate tip from an informant, and he maintains that the police similarly do not violate the amendment when an invalid statute, warrant, or judicial decision leads them to a mistaken but reasonable legal conclusion. “How . . . can a search be *unreasonable* if an officer *reasonably* believed it was appropriate?”⁶²

Reliance on a magistrate's official action differs, however, from reliance on an informant's tip. A nongovernmental informant cannot violate the Fourth Amendment, which limits only governmental action. A magistrate who issues an invalid warrant, however, does violate the amendment. The Framers of the Fourth Amendment spoke to judges, not police officers, when they provided, “[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or

⁵⁹ 422 U.S. 590 (1975).

⁶⁰ See *United States v. Leon*, 468 U.S. 897 (1984) (invalid warrant); *Illinois v. Krull*, 480 U.S. 340 (1987) (unconstitutional statute); *Davis v. United States*, 131 S. Ct. 2419 (2011) (subsequently overruled or narrowed judicial decision).

⁶¹ Re, *supra* note 1, at 1942.

⁶² *Id.* at 1944. The Fourth Amendment's concept of probable cause provides a built-in mistake-of-fact “defense” to an officer who has relied reasonably on inaccurate information in making a search. As long as an informant's tip or other evidence supplied probable cause for the search, the search was lawful, and whether the tip was correct does not matter. Until the Supreme Court recognized a “good faith” exception to the exclusionary rule, however, it treated mistakes of law differently. The Court applied the same rule to the police that it applied to the rest of us: ignorance of the law is no excuse.

things to be seized.”⁶³ In the “good faith” cases, the Supreme Court held that even when officials other than police officers have violated the amendment deliberately, the exclusionary rule does not apply. This rule is only for cops.

As Re suggests, the police officers involved in the “good faith” cases acted reasonably, but the officials who authorized their searches did not. Re appropriately disparages the sort of “deterrence” analysis that led the Supreme Court to declare the exclusionary rule inapplicable to the fruits of these officials’ unlawful conduct. If Re would apply the due process exclusionary rule to these improperly obtained fruits, however, he could not approve the results of the Supreme Court’s “good faith” decisions. Perhaps, in this rare instance, he would suppress evidence the Supreme Court would admit.

One cannot be confident of this conclusion, however, for Re seems to limit his focus to the reasonableness and authority of the officer who personally conducted a search. In *Herring v. United States*,⁶⁴ an officer relied on a judicially withdrawn warrant that another officer should have removed from a computerized file. The Supreme Court held the exclusionary rule inapplicable because “the error was the result of isolated negligence attenuated from the arrest.”⁶⁵

Re maintains that the Court should have found no Fourth Amendment violation instead: “By its terms, the Fourth Amendment prohibits unreasonable ‘searches’ and ‘seizures’; it does not prohibit faulty data-entry procedures. So the critical question . . . should have been whether the second action — the officer’s reliance on the computer system — was ‘reasonable’”⁶⁶

If the Fourth Amendment is unconcerned with data entry and focuses only on the reasonableness of an officer who conducts a search, a malicious officer who places a forged warrant in a file for the purpose of prompting an innocent officer to make an arrest neither violates the Fourth Amendment himself nor produces a violation of the amendment by the innocent officer. Once more, Re apparently would admit evidence the Supreme Court would exclude, for the Supreme Court limited its “good faith” ruling to cases of negligent error.

Re seems to reiterate his myopic view of the Fourth Amendment when he acknowledges that what he calls his “revisionist reading” of *Herring* would “narrow” the Supreme Court’s decision in *Whiteley v. Warden*.⁶⁷ In *Whiteley*, a police officer arrested a suspect on the basis of a radio bulletin, but the bulletin had been issued without probable

⁶³ U.S. CONST. amend. IV.

⁶⁴ 129 S. Ct. 695 (2009).

⁶⁵ *Id.* at 698.

⁶⁶ Re, *supra* note 1, at 1944 (footnote omitted).

⁶⁷ 401 U.S. 560 (1971); see Re, *supra* note 1, at 1944.

cause.⁶⁸ The Court held that “an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.”⁶⁹ Narrowing *Whiteley* as Re proposes apparently would allow an officer without grounds for a search to make this search lawful by telling another officer that grounds exist. It also would allow an officer who violated the Fourth Amendment to launder his violation by passing the task of searching to another officer who would conduct the search in blissful ignorance.

In the first of its “good faith” rulings, the Supreme Court said: “It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination.”⁷⁰ In determining whether a search violated the Fourth Amendment, it also is necessary to consider the reasonableness of all of the officials whose combined actions produced the search. Re’s view of the Fourth Amendment, however, would give the police a laundry tub.

E. Scope Rules and Manner Rules

Even violations of the Fourth Amendment by the officer who himself conducted a search often would not lead to suppression under the version of the exclusionary rule Re proposes. He draws what he calls a “fundamental distinction” between “scope rules” (limiting “the scope of the government’s investigative authority”) and “manner rules” (limiting the “manner in which that authority is exercised”). Re would not exclude evidence the police have obtained by violating manner rules.⁷¹

As Re acknowledges, the distinction between scope rules and manner rules is not always clear.⁷² He characterizes the requirement of probable cause for a search as a scope rule but says that one could reasonably regard the requirement that the police obtain a warrant before searching as either sort of rule.⁷³ On balance, Re approves of Supreme

⁶⁸ *Whiteley*, 401 U.S. at 564–66.

⁶⁹ *Id.* at 568.

⁷⁰ *United States v. Leon*, 468 U.S. 897, 923 n.24 (1984).

⁷¹ Re, *supra* note 1, at 1945–46. Re cites an article of mine, commenting that I have “recently drawn a similar distinction between . . . ‘rules about *when* the police may search,’ and ‘rules about how a search must be conducted.’” He repeats my observation that *Hudson v. Michigan*, 547 U.S. 586 (2006), “‘appears largely to withdraw the exclusionary remedy when the police have violated’ the second of these categories.” Re, *supra* note 1, at 1945 n.330 (quoting Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 IOWA L. REV. 1741, 1756–57 (2008)). Then Re declares, “Alschuler would flip the rules for these categories.” *Id.* But that’s wrong. No one who had read the article Re cites could doubt that I would exclude the fruits of violations of both “scope” and “manner” rules.

⁷² Re, *supra* note 1, at 1949.

⁷³ *Id.* at 1949–50.

Court decisions treating the warrant requirement as “defin[ing] the scope of the government’s investigative authority.”⁷⁴ According to Re, rules limiting the duration of a suspect’s detention “implicate[] both scope and manner issues.”⁷⁵ All other Fourth Amendment requirements appear to be manner rules. Indeed, even the probable cause and warrant requirements seem to be manner rules when they limit seizures rather than searches.

Re explains: “The police act within the scope of their investigative authority when their searches disclose only information that the government has authority to learn.”⁷⁶ He continues:

By contrast, police act in a constitutional manner when their searches are not unreasonably harmful or degrading. So whereas scope rules limit the evidence that the government may lawfully obtain for later use at trial, manner rules impose additional constraints on the police by securing interests such as physical well-being, dignity, and property. The Constitution itself reflects this dichotomy, as it separately proscribes unreasonable “searches,” which disclose information and evidence for trial, and “seizures,” which impinge on private control over persons and property. Because only scope rules constitute procedures for the acquisition of evidence, only scope rules trigger the due process exclusionary rule.⁷⁷

According to Re, the scope/manner distinction explains why courts permit the prosecution of unlawfully arrested defendants:

The bar on unreasonable seizures, including arrests, is a manner rule that secures control over one’s person [A]n illegal arrest — when viewed apart from search principles like the doctrine of search incident to arrest — does not limit the scope of information available for use in evidence at trial.⁷⁸

In addition, Re says that the scope/manner distinction justifies the Supreme Court’s ruling that violations of the Fourth Amendment’s knock-and-announce requirement do not lead to suppression.⁷⁹ Although the knock-and-announce requirement “diminishes the risk of unnecessary injury to suspects’ persons, property, and dignity,” it is

⁷⁴ *Id.* at 1950.

⁷⁵ *Id.* at 1949.

⁷⁶ Re, *supra* note 1, at 1945–46. One might have thought that there is no information the police lack the authority to learn if they do things right and no information they have the authority to learn if they do things wrong. But Re would not endorse those propositions.

⁷⁷ *Id.* at 1946 (footnotes omitted).

⁷⁸ *Id.* at 1951. The Supreme Court not only has held that a court may place an improperly arrested defendant on trial; it also has admitted evidence the government would not have obtained in the absence of the arrest — testimony by alleged eyewitnesses identifying the defendant as the criminal. *See* *United States v. Crews*, 445 U.S. 463 (1980). Re appears to approve the result in *Crews*, although this decision seems inconsistent with his contention that an arrest is not a means of acquiring evidence.

⁷⁹ Re, *supra* note 1, at 1948 (discussing *Hudson v. Michigan*, 547 U.S. 586 (2006)).

“collateral to whether the government has legal authority to learn private information for use as evidence at trial.”⁸⁰

Re does not explain where the scope/manner distinction comes from or why he draws it. The Fourth Amendment does not indicate that a person’s interests in physical well-being, dignity, and property are less protected than his interest in informational privacy or that any of these interests are protected in different ways. The amendment treats unlawful searches and unlawful seizures alike and does not suggest that violations of the warrant and knock-and-announce requirements should yield different consequences.

The Due Process Clauses similarly offer no hint of the distinction between scope rules and manner rules. The paradigmatic due process violation is one committed by an executive officer who imprisons someone without ever taking him to court. This officer diminishes the prisoner’s physical well-being and dignity but does not gather evidence.

When the Supreme Court held the exclusionary remedy unavailable for knock-and-announce violations, it maintained that the failure to knock did not cause the discovery of evidence; the police would have obtained the challenged evidence even if they had knocked. Re, however, disclaims this sort of argument, and a lack of but-for causation could not explain why the prosecution of unlawfully arrested defendants is permitted. For Re, the issue is authority, not causation. An officer who exceeds his “investigative” authority violates a scope rule; an officer who exceeds any other kind of authority violates a manner rule.

Perhaps the scope/manner distinction proceeds from one of Re’s earlier unexplained moves. Although the Due Process Clauses do not distinguish civil from criminal proceedings, Re does. At the time of the Framing, the Fourth Amendment did not “serve[] as a source of process for the acquisition of criminal verdicts,”⁸¹ but today it does. Re argues that this historic development justifies excluding unlawfully obtained evidence the Framers would have admitted.

But perhaps not all of the Fourth Amendment “serves as a source of process for the acquisition of criminal verdicts”; perhaps only its scope rules do. Re says of the Supreme Court decision withdrawing the exclusionary remedy for knock-and-announce violations, “*Hudson* effectively held that the knock-and-announce requirement is a substantive tort principle. It . . . diminishes the risk of unnecessary injury to suspects’ persons, property, and dignity.”⁸² When the police obtain a search warrant, they are part of the criminal process, but when they

⁸⁰ *Id.*

⁸¹ *Id.* at 1928.

⁸² *Id.* at 1948.

fail to knock before executing this warrant, they are, as of yore, part of the civil process.

As noted, a police officer can violate the Due Process Clause without gathering evidence; he can simply lock someone up. But Re must agree with the conventional view that, when imprisonment follows a jury verdict, the defendant's imprisonment rests on this verdict rather than any unlawful detention that preceded it. Re may see the jury's verdict as resting in turn on the evidence it has heard. That is why only an officer who has exceeded his "investigative authority" by gathering evidence improperly contributes to a post-verdict deprivation of liberty without due process of law.

A jury, however, requires more than evidence to render a valid verdict. For one thing, a federal jury cannot convict in the absence of a grand jury indictment. Re, however, approves of a Supreme Court decision allowing a grand jury to use unlawfully obtained evidence to produce an indictment.⁸³ The jury requires jurisdiction over the defendant too, but Re says it doesn't matter that the defendant's presence in the courtroom was obtained by arresting him in violation of the Constitution.

Re's view brings to mind the conceptualizations that formerly led courts not only to place unlawfully arrested defendants on trial but also to receive unlawfully seized evidence. Re, however, apparently regards a jury verdict as resting on the evidence presented in court and not on the fact that the defendant was there too. His metaphysics elude me.

CONCLUSION

No one can be sure what the words *due process of law* meant to the people who put those words in the Constitution twice. The hypothesis that the Framers meant to require government to adhere to its own law, however, is at least as plausible as any other. As applied to the federal government by the Fifth Amendment, this principle initially seemed redundant and harmless — simply a constitutional reminder of the importance of even-handed administration of law.

Following the Civil War, however, people feared with good reason that the states of the former Confederacy would seek to deny the benefits of law to a large part of their populations. The Framers of the Constitution's second Due Process Clause might have meant to require the states as well as the federal government to adhere to their own laws.

⁸³ See *id.* at 1936–37 (discussing *United States v. Calandra*, 414 U.S. 338 (1974)).

If that was the goal of the Framers of the Fourteenth Amendment, however, they might not have been thinking clearly. Making a federal constitutional violation of every misapplication of state law that yields a deprivation of life, liberty, or property would obliterate the distinction between constitutional and other law and decimate American federalism. In *Hurtado v. California*,⁸⁴ the Supreme Court avoided the federalization of state law by distinguishing fundamental from non-fundamental rights.⁸⁵ This move might not have been originalist, but a court sometimes must presume that lawgivers were “reasonable people pursuing reasonable purposes reasonably”⁸⁶ even when this presumption might be a fiction.

The implications of a principle may become clearer with the passage of time, new experience, and greater familiarity with the principle itself. The barons who forced King John to promulgate the Magna Carta probably had no idea that commoners would someday invoke its principles. Fortunately, later generations did not insist on an “old originalist” interpretation of the Great Charter.

Experience since the framing of the Fifth and Fourteenth Amendments suggests a plausible basis for grounding the exclusion of unlawfully obtained evidence on these amendments. The remedial regime known to the Framers held even officers who searched in what today’s Supreme Court would call “objectively reasonable good faith” personally liable in damages for their trespasses. Common law juries assessed damages with few standards, and judges sometimes encouraged them to return enormous awards. On paper, this regime seemed likely both to treat officers unfairly and to over-deter. Why would a rational officer make any search that an outlier jury conceivably might hold unlawful?

Experience following the emergence of professional police forces in the United States revealed, however, that in practice this regime did not deter much at all. An expansion of substantive criminal law including new liquor offenses and other prohibitions of private consensual conduct accompanied the growth of police forces. For many reasons, the victims of police illegality rarely sued, and they were likely to recover little or nothing when they did. The targets of twentieth century police searches did not closely resemble the pamphleteers, ship owners, and merchants whom government officials had targeted in the eighteenth century.

⁸⁴ 110 U.S. 516 (1884).

⁸⁵ *Id.* at 535–36.

⁸⁶ See HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip Frickey eds., 1994).

By the early twentieth century, the remedies for unlawful searches known to the Framers appeared to be largely a dead letter. They did not secure the government adherence to law that the Fifth and Fourteenth Amendments were designed to secure. In this situation, Americans' rejection of the exclusionary principle prior to the Civil War should not have blocked the exercise of judgment.⁸⁷

The argument for due process exclusion sketched above differs from the one offered by Richard Re. It rests on an assessment of the ability of older remedies to do the job in changed circumstances, not on a perceived shift in legal categories. It would yield a less crabbed and contorted exclusionary rule than the one Re proposes. A focus on the Due Process Clauses might serve as a reminder of the importance the Framers attached to the government's adherence to law, and if this revised focus led the Supreme Court to a less hostile view of the exclusionary rule, I would cheer.

⁸⁷ I agree with Re that the exclusionary rule is not a sensible instrument for "detering" police misconduct if to deter means to influence through fear of punishment. Deterrence, however, is not the only way to alter behavior, and the exclusionary rule has demonstrably changed police conduct for the better. It is one of the law's success stories. See generally Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365 (2008). In the absence of the rule, the Supreme Court and other courts would have had no opportunity even to articulate many of the Fourth Amendment requirements the police now observe routinely.