

# An Account of *Mapp v. Ohio* That Misses the Larger Exclusionary Rule Story

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CAROLYN N. LONG, *MAPP V. OHIO: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES* (University Press of Kansas, Landmark Law Cases Series 2006)

The search-and-seizure exclusionary rule is a worthy subject for a book. That is especially so now that the increasingly rightward tilt of the Supreme Court's membership has again put the rule's future in doubt. Indeed, in the Court's recent decision, *Hudson v. Michigan*, four justices indicated they would abolish the rule.<sup>1</sup>

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<sup>1</sup> *Hudson v. Michigan*, 126 S. Ct. 2159 (2006). In *Hudson*, Justice Scalia's opinion for the Court opined that one should not assume that there is a need to deter police misconduct by excluding unconstitutionally seized evidence today just because of "the sins and inadequacies of a legal regime that existed almost half a century ago," and suggested that civil lawsuits for damages now provide a remedy for Fourth Amendment violations. *Id.* at 2167. Significantly, in addition to the predictable vote of Justice Thomas, both of the recent appointees, Chief Justice Roberts and Justice Alito, joined Scalia's opinion and thus indicated their readiness to abolish the exclusionary rule.

Justice Kennedy also joined Scalia's opinion in *Hudson* but wrote separately that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt." *Id.* at 2170. The significance of Kennedy's statement is unclear, however, insofar as it is unclear what the Court's recent exclusionary rule precedents now stand for, especially given that *Hudson* itself adopted a novel "attenuation" doctrine that may turn out to be quite expansive in application.

Justice Scalia's statements about a damages remedy in *Hudson* were misleading in two respects. First, although he wrote as though there was no damages remedy available to Dollree Mapp in 1961, that was incorrect: The Court had already construed 42 U.S.C. § 1983 to permit damages suits for Fourth Amendment violations in *Monroe v. Pape*, 365 U.S. 167 (1961). Second, Scalia's suggestion that a damages remedy now provides an effective alternative to the exclusionary rule must rank among the more cynical statements that appear in U.S. Reports. The Rehnquist Court effectively crippled the civil damages remedy, available under 42 U.S.C. § 1983 (which applies to state and local police) or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (which applies to federal law enforcement officers), when it adopted an expansive conception of the "qualified immunity" available to police officers in such lawsuits. In particular, *Anderson v. Creighton*, 483 U.S. 635 (1987), ruled that officers are entitled to immunity, and thus to the pretrial dismissal of such suits prior to discovery, unless case law existing at the time of the police misconduct clearly established that the police conduct at issue violated the Constitution. In other words, lawsuits against police will be dismissed unless prior case law has previously declared unconstitutional virtually the same police conduct in virtually the same factual situation. When a fact-based legal standard such as "probable cause" or "reasonable suspicion" or even "reasonableness" is involved, as is typically the case in Fourth Amendment issues, that level of

Unfortunately, political scientist Carolyn N. Long's book on *Mapp v. Ohio*<sup>2</sup> and the Fourth Amendment exclusionary rule does little to inform the reader about the road to *Hudson*.<sup>3</sup> The premise for Long's book seems to be that *Mapp* provides a useful perspective on the current exclusionary rule. But that is a very questionable premise, because *Mapp* was more about the incorporation doctrine than about the exclusionary rule itself, and because the current exclusionary rule is only a shadow of that applied in *Mapp*. Of course, the premise may have been dictated by the Kansas Press's "Landmark Law Cases" series in which Long's book was published.<sup>4</sup>

Long's detailed journalistic accounts of the search of Dollree Mapp's house and the proceedings in the Ohio courts in the opening chapter are interesting enough. However, her focus on *Mapp* conveys a heroic litigant theme that actually misdescribes what the Supreme Court generally does, and even what it probably did in *Mapp* itself. Moreover, the heroic litigant theme is about the only theme I can detect in the book. No one can accuse Long of being opinionated; so far as I can tell she has none.

Long's discussion of the events that preceded and followed *Mapp* are underdeveloped at best. Her discussion of the historical Fourth Amendment and of pre-*Mapp* developments appears to be a condensation of Jacob Landynski's now quite dated 1966 book.<sup>5</sup> Her post-*Mapp* chapters seem to have been structured more to facilitate writing the book than to illuminate the story. Most importantly, the book utterly fails to convey to the reader the degree to which the Burger Court effectively shut down the exclusionary rule during the 1970s and 1980s, and of the degree to which the Rehnquist Court subsequently eviscerated the contents of Fourth Amendment doctrine itself.

In this review, I discuss Long's obsolete treatment of Fourth Amendment

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specificity means that there will rarely be an applicable precedent, so police will virtually always have "qualified immunity," and the purported damages remedy is virtually nonexistent. Scalia knew that; he wrote the Court's opinion in *Anderson*.

<sup>2</sup> 367 U.S. 643 (1961).

<sup>3</sup> I take it from the lack of citations for quoted material that Long's book is aimed at a "general" rather than scholarly audience. Her book will be of very limited utility for serious research, or even for student research papers, because it fails to identify the source of many quotations presented, other than by phrases such as "as one observer noted." (Long, p. 108.) It would be useful to at least know whether the "observer" was in a position to know anything about the subject of the statement.

<sup>4</sup> One of the noteworthy features of the Landmark Law Case series is that several of the authors have written books on more than one topic in the series. See the page preceding the title page. Long herself previously published a book in the series titled RELIGIOUS FREEDOM AND INDIAN RIGHTS that is about the Peyote case, *Oregon v. Smith*, 494 U.S. 872 (1990). To put it bluntly, it does not appear that the editor necessarily chose the authors for their expertise in the topic on which they contracted to write, and that may explain many of the shortcomings of the book under review here.

<sup>5</sup> JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION (1966) (tracing the exclusionary rule from the framing of the Fourth Amendment through *Mapp* and its immediate aftermath).

history, her heroic litigation treatment of *Mapp* itself, her disconnected discussions of the post-*Mapp* reactions to the rule, the empirical research debates, and the Supreme Court decisions that curtailed the rule's operation, and, finally, her virtual omission of any discussion of the Rehnquist Court's dismantling of Fourth Amendment standards themselves.

### I. LONG'S REGURGITATED "HISTORY"

As Long acknowledges, she drew her obligatory chapter on the history of the Fourth Amendment and its exclusionary rule (Chapter 2) from the conventional account previously offered by Landynski.<sup>6</sup> (Long, p. 33.) Long's regurgitation of that historical treatment is unfortunate, because the conventional historical account has been shown to be wrong in fundamental respects.<sup>7</sup> The conventional account was composed to make the original Fourth Amendment appear to comport with modern investigatory procedure. In particular, the conventional account followed the modern Court in asserting that the Fourth Amendment was meant to establish an overarching "reasonableness" standard for government searches. But that was pure prochronism.<sup>8</sup>

I confess to personal irritation here. I undertook to correct the conventional history that Long regurgitates in my 1999 article on the original Fourth Amendment, in which I concluded that the "reasonableness" standard that is the centerpiece of current search-and-seizure doctrine is only a modern concoction, and that the original Fourth Amendment was simply a ban against legislative authorization of general warrants.<sup>9</sup> Additionally, I also documented in a 2002

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<sup>6</sup> *Id.* at 5. Landynski, in turn, acknowledged that he drew heavily on Nelson Lasson's 1937 historical account. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

<sup>7</sup> Because Long repeated the Lasson/Landynski historical account, her account repeats the shortcomings of the earlier works. For example, like Lasson and Landynski, she also overlooks the importance of the widespread colonial legal controversies over the reauthorization of the writ of assistance in the Townshend Duties Act of 1767. (Long, p. 36.) *See infra* note 15. Likewise, Long repeats Lasson's erroneous and rather magical account of the framing of the text of the Fourth Amendment in which a small last-minute alteration of Madison's draft that was unaccompanied by any debate transformed what was clearly only a straightforward ban against general warrants into a broad regulation, applying a "reasonableness" standard, of all government intrusions. (Long, p. 37.) *See infra* note 9.

The few instances in which Long makes novel historical claims tend to involve errors. For example, she says that James Otis Jr., who argued the 1761 Writ of Assistance Case in Boston, "later earn[ed] prominence in the Revolutionary War." (Long, at 34.) That is incorrect; Otis is not well known today because he suffered a mental breakdown after a coffee-house brawl with a customs commissioner in 1769 and withdrew from public life in 1772, well before the outbreak the war in 1775. *See* M.H. SMITH, *THE WRITS OF ASSISTANCE CASE 474-75* (1978).

<sup>8</sup> A "prochronism" is a specific form of anachronism: namely, the error of imposing concepts or events from more recent periods on more distant periods.

<sup>9</sup> Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). I documented that the Framers did not understand the Fourth Amendment to regulate all

article that the law of arrest was actually a salient component of the Fifth Amendment guarantee of “due process of law.” Hence, the Framers never intended to create any overarching “reasonableness” standard—a much weaker standard than the common law standards for searches or arrests.<sup>10</sup>

Long says my 1999 article is “[p]erhaps the most honest assessment of intent of the Framers in writing the Fourth Amendment” (Long, p. 39.), and she “highly recommend[s]” it in her bibliography, albeit misspelling my name.<sup>11</sup> (Long, p. 210.) However, apart from quoting some innocuous passages from the introduction to that article (Long, pp. 37–39.), I do not detect any indication that she read it.

Long’s history chapter is especially deficient because she ignores the most salient historical puzzle about the exclusionary rule itself: Why did it arrive so seemingly “late”? The Fourth Amendment exclusionary rule first appeared in a

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forms of government intrusions, but rather understood it simply as a ban against future legislative authorization of general warrants, which the Framers perceived as a unique threat to the common-law right to security of person and house. Thus, the Framers specified warrant standards in that amendment, but never intended for it to address warrantless intrusions, and thus never meant to create the broad “reasonableness” standard that the modern Supreme Court later read into the text. In particular, I documented that the term “unreasonable searches and seizures” was simply a pejorative label—derived from Sir Edward Coke’s use of “against reason” as a synonym for extreme illegality—of searches or arrests made under general warrants. *Id.* at 684–93. Likewise, I also traced the legislative history of the Fourth Amendment to debunk the common misconception that the last-minute revision of Madison’s single clause text into the final two-clause text somehow altered the focus on banning general warrants. *See id.* at 697–700, 715–22.

<sup>10</sup> Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 388–98, 408–15 (2002). This article, which Long does not mention, documented that the legal requisites for lawful arrests at the time of the framing of the Bill of Rights were more stringent than probable cause. *Id.* at 369–82. It also documented that arrest standards and the use of warrants, subjects that modern doctrine now assigns to the Fourth Amendment, were actually salient features of the original meaning of the “law of the land” provisions in the state declarations of rights, and also explained why Madison shifted from that traditional phrasing to “due process of law” in the Fifth Amendment. Thus, “due process of law” was a protection that pertained only to the requisites of criminal procedure at the time of the framing of the Bill of Rights in 1789. *Id.* at 389–96, 408–15.

The original meaning of “due process of law” is now obscure, however, because the Supreme Court drastically revised the meaning of “due process” by reading the original criminal procedure content out of that term, starting with *Hurtado v. California*, 110 U.S. 516 (1884), and instead reading in a variety of contents that were more appropriately assigned to the Privileges and Immunities Clause of the Fourteenth Amendment. *See Davies, supra*, at 432 n.641.

<sup>11</sup> I became “Thomas Davis” in the bibliography, although Long spelled my name correctly at other places in the text. I fared better than Professor Dallin Oaks whose name repeatedly appears as “Oakes.” (Long, pp. 115, 130–31, 226.) Readers familiar with the debates over the exclusionary rule may recognize an irony there. Dallin Oaks was a leading critic of the rule. *See, e.g., Dallin Oaks, Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). However, Judge James L. Oakes was a supporter of the rule. *See, e.g., James L. Oakes, The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 932–33 (1979).

cryptic statement in the 1886 decision *Boyd v. United States*,<sup>12</sup> but did not fully emerge until the 1914 decision *Weeks v. United States*.<sup>13</sup> The fact that exclusion did not appear until roughly a century after the framing has seemed mysterious because the logic of exclusion as set out in *Weeks* is merely the logic of nullity—if a government search violated the Constitution, the search would be a legal nullity, so a court could have no authority to recognize the results of such a search.<sup>14</sup> How can that logic have been overlooked for a century?

Long does not acknowledge this mystery. Indeed, she obscures it by making an undocumented claim that “because illegally seized evidence was admitted in England, the Framers would have endorsed this view as well,” and then conventionally jumps an entire century from the framing of the text in 1789 to *Boyd* in 1886. (Long, p. 40.) However, I explained why the exclusionary rule did not fully arise until *Weeks* in the 1999 article that Long “highly recommend[s]”—namely, there was no concept that a law enforcement officer could violate the Constitution prior to *Weeks*. I realize this probably sounds strange, so let me explain.

The constitutional criminal procedure standards in the Bill of Rights were framed in 1789 to prevent *legislative* relaxation of basic common-law protections, such as the common-law ban against general warrants.<sup>15</sup> The Framers recognized that a statute could be “unconstitutional” but they expected that courts would refuse to enforce such a statute; hence, they did not specify “remedies” for violations of the constitutional protections set out in the Bill of Rights.<sup>16</sup> Consistent with the understanding that the Bill of Rights constrained legislative power, the logic of exclusion was first raised in cases like *Boyd* that involved allegedly unconstitutional statutes.<sup>17</sup> However, because Congress passed few

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<sup>12</sup> 116 U.S. 616, 638 (1886) (stating that the order to produce an invoice and the statute authorizing the order “were unconstitutional and void” and that the admission of the invoice into evidence was an “erroneous and unconstitutional proceeding[.]”).

<sup>13</sup> 232 U.S. 383 (1914). See Davies, *supra* note 9, at 726–31.

<sup>14</sup> The logic of nullity is the same logic evident in both James Otis’s argument against the legality of the writ of assistance in the 1761 Boston case and in the assertion of the power of judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Unfortunately, the logic of nullity is not readily apparent in Long’s thoroughly superficial treatment of *Weeks*.

<sup>15</sup> The pre-revolutionary grievances largely had been grievances against Parliamentary legislation that deprecated American rights. In particular, the grievance against general warrants arose primarily from Parliament’s authorization of general writs of assistance for colonial customs enforcement in the Townshend Duties Act of 1767. See Davies, *supra* note 9, at 657–60. Thus, when the Framers conceived of a Bill of Rights, they viewed it as a limit on the power of Congress. That is why Madison proposed inserting almost all of the provisions of the Bill, including the criminal procedure provisions that became the Fourth, Fifth, Sixth and Eighth Amendments, into the limits on the powers of Congress set out in Article I section 10. See *id.* at 700–02.

<sup>16</sup> Davies, *supra* note 9, at 663, 701–02.

<sup>17</sup> *Boyd* involved the constitutionality of a statute. See *supra* note 12. The issue of exclusion actually arose earlier than *Boyd* in an 1841 Massachusetts case Long does not mention. In

statutes that dealt with search authority regarding houses or papers during the nineteenth century, there really was no opportunity for the federal courts to construe the Fourth Amendment prior to *Boyd*.

Of course, search cases today usually involve allegations that law enforcement officers committed illegal searches, rather than that statutes are unconstitutional. Although officers surely made unlawful arrests or searches prior to *Weeks*, wrongful conduct by an officer did not raise any constitutional issue during the eighteenth or nineteenth centuries because there still was no concept that an unlawful act by an officer constituted *governmental* illegality. Rather, the historical concept was that an officer's act that was outside of the lawful authority of his office ceased to have any official character, and thus was merely a personal wrong. That is why the framing-era remedy for an unlawful arrest or search was a trespass suit for damages against the person who held the office. There was no historical concept that an unlawful arrest or search by an officer involved the government, and thus there was no concept that a wrongful arrest or search by an officer could violate a constitutional standard.<sup>18</sup>

The understanding of officer misconduct underwent change, however, during the nineteenth century. For one thing, the mid-nineteenth-century introduction of the "probable cause" standard for warrantless arrests conferred a degree of discretionary authority on ordinary law enforcement officers that was unheard of (and would almost certainly have been disapproved of) when the Bill of Rights was framed.<sup>19</sup> Additionally, toward the end of the nineteenth century the Supreme

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*Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841), the defendant-victim of a search asserted that the statute that authorized the search was unconstitutional, and that the seized items should be inadmissible as evidence. The Massachusetts Supreme Court first upheld the constitutionality of the statute but nevertheless announced that it was contrary to common law to permit an inquiry into how evidence was obtained during the course of a trial, a rule that became known as the "collateral issue" doctrine. Contrary to the claim of the Massachusetts judges, this was not a settled rule at common law, but was actually a novel creation. See Davies, *supra* note 9, at 664 n.318.

<sup>18</sup> Blackstone described unlawful conduct by a government officer as a form of wrongdoing that "deceived" the king. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 255 (1768); *id.* at \*255 (9th ed. 1782). Likewise, the historical conception was still evident in the now strange sounding rationale of *Ex Parte Young*, 209 U.S. 123 (1908). See also Davies, *supra* note 9, at 660–66.

<sup>19</sup> In the accusatory criminal procedure of the framing-era, warrantless arrests, arrest warrants, and search warrants for stolen property all required a sworn allegation, by a named and potentially accountable complainant who asserted personal knowledge of the facts, that a crime had been committed "in fact." See Davies, *supra* note 9, at 627–34, 650–54. Note, for example, that that standard is explicitly stated in the 1776 Virginia ban against general warrants ("evidence of a fact committed"). *Id.* at 674–75, n.348. The Fourth Amendment differed from the state declarations in using "probable cause"—a customs search warrant standard—rather than the common law criminal standards. *Id.* at 703–06; Davies, *supra* note 10, at 369–71.

In 1827, English judges departed from the earlier warrantless arrest standard by permitting peace officers to arrest for felony on probable cause alone, and American courts imported that standard during the nineteenth century. That change reduced the significance of the warrant, permitted the officer to use hearsay information to justify an arrest, led to increased use of searches

Court began to expand the concept of “state action” in the course of applying the Fourteenth Amendment Due Process Clause to state business regulation cases. Eventually the justices expanded “state action” to include situations in which state regulators allegedly violated state statutes in connection with the exercise of their office.<sup>20</sup> The justices then transferred that expanded concept of government illegality to the new law enforcement officer by ruling in 1914 in *Weeks* that a federal marshal’s unlawful warrantless search of a residence violated the Fourth Amendment and, thus, was subject to the constitutional logic of nullity.<sup>21</sup>

Thus, the reason that the exclusionary rule dates from *Weeks* is that the modern understanding that a police officer’s unlawful search can violate the Constitution began with that case. Indeed, that is why the development of Fourth Amendment doctrine itself virtually starts with *Weeks*.<sup>22</sup> *Weeks* both extended the Fourth Amendment to the conduct of officers and gave violations of the Fourth Amendment a legal consequence in the form of exclusion.

Hence, the exclusionary rule was not really “late” at all. Rather, it arose contemporaneously with the modern conception of the modern law enforcement officer. Unfortunately, by omitting my or any other explanation as to why exclusion appeared when it did, Long may leave readers with the sense that exclusion is somehow illegitimate, especially because she also recites claims by critics of the rule to that effect. (Long, p. 111.)

Although Long catalogues the cases between *Weeks* and *Mapp* at the end of her history chapter, her treatment of the cases is so superficial that she often misses the most important features. For example, a reader is unlikely to detect how pivotal *Weeks* itself was. Long also is sometimes careless in the descriptions she does offer.<sup>23</sup> In particular, Long repeats conventional errors regarding the 1949

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incident to arrest, and also led to the emergence of police interrogation of suspects. See Davies, *supra* note 9, at 634–42; Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right” in Chavez v. Martinez*, 70 TENN. L. REV. 987, 1030–34 (2003) (discussing the origin of police interrogation). In short, the post-framing creation of the probable cause arrest standard undermined accusatory procedure and introduced modern investigatory criminal procedure. See Davies, *supra* note 10, at 419–35.

<sup>20</sup> See Davies, *supra* note 9, at 666–67.

<sup>21</sup> *Id.* at 729–31 (noting the connection between *Weeks* and the expansion of state action a year earlier in the 1913 ruling in *Home Telegraph & Telephone Co. v. Los Angeles*, 227 U.S. 278 (1913)).

<sup>22</sup> Of course, others have also recognized that the development of Fourth Amendment law effectively began with *Weeks*. See e.g., *United States v. Robinson*, 414 U.S. 218, 224 (1973) (opinion of the Court by Rehnquist, J.) (“Because the rule requiring exclusion of evidence obtained in violation of the Fourth Amendment was first enunciated in *Weeks v. United States* . . . it is understandable that virtually all of this Court’s search-and-seizure law has been developed since that time.”).

<sup>23</sup> Long sometimes states the application of the “collateral issue” doctrine backwards in discussing the early exclusionary rule cases. (Long, pp. 41–43.) In *Adams v. New York*, 192 U.S. 585 (1904), a case in which there was not a hint of federal jurisdiction, the Supreme Court blocked the

ruling in *Wolf v. Colorado*,<sup>24</sup> with the result that she misdescribes the road to

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adoption of the exclusionary rule in lower federal courts by endorsing the “collateral issue” doctrine invented in *Dana* (see *supra* note 17). Although Long initially describes *Adams* correctly, she later states that the situation in *Weeks* “should be differentiated because in *Adams* the request for the return of the seized items was made prior to trial . . .” (Long, p. 43.) Actually, it was the other way around: The request for exclusion was made during the trial in *Adams*, and thus constituted a “collateral issue,” but was made prior to trial in *Weeks*. Hence, *Weeks* indicated that the “collateral issue” bar could be avoided simply by moving for suppression prior to trial. The “collateral issue” doctrine was later dispensed with entirely in *Gouled v. United States*, 255 U.S. 298 (1921), but unfortunately Long’s statement regarding *Gouled* is confusing at best. (Long, p. 45.)

<sup>24</sup> 338 U.S. 25 (1949). Long makes several conventional errors about *Wolf* when she writes that the justices “unanimously” ruled that the search in *Wolf* was “unconstitutional,” and that the Court ruled that “the Fourth Amendment prohibition against unreasonable searches and seizures was applicable to the states through the due process clause of the Fourteenth Amendment.” (Long, p. 48.) Although Long is hardly the first to make these two claims, neither is correct.

There is no statement in Justice Frankfurter’s majority opinion that the search was unconstitutional. His opinion clearly did not treat the search by state officers as a violation of the Fourteenth Amendment Due Process Clause; indeed, if the Court had concluded that the search violated the Due Process Clause, it would have ordered the prosecution to be dismissed. See, e.g., *Rochin v. California*, 342 U.S. 165 (1952).

Rather, in order to reach the exclusionary rule issue, Frankfurter’s opinion assumed *hypothetically* that the search would have violated the Fourth Amendment if the Fourth Amendment applied. However, Frankfurter did *not* say that the “Fourth Amendment” applied to the search by state officers. Rather, Frankfurter’s opinion said only that the Fourteenth Amendment Due Process Clause included some “core” protection of privacy that overlapped with some of the broader protection afforded by the Fourth Amendment. However, he never said or implied that the Due Process Clause required the states to afford as strong a protection of privacy as the Fourth Amendment required of the federal government. Indeed, Frankfurter was careful to say only that Fourteenth Amendment due process prohibited “arbitrary” searches; he never used the by-then settled Fourth Amendment terminology of “unreasonable” searches.

Thus, all that the majority actually held in *Wolf* was that evidence seized in a state search, which hypothetically would have violated the Fourth Amendment if it had been conducted by federal officers, need not result in exclusion of the seized evidence. *Wolf* was decidedly a peculiar and artfully structured opinion, but it plainly did not say what Long and numerous others have claimed it said.

Rather, the conventional misreading of *Wolf* derives from Justice Stewart’s incorrect claim, in *Elkins v. United States*, 364 U.S. 206 (1960), that *Wolf* had incorporated the Fourth Amendment and made it applicable to the states. I think that was a misstatement of *Wolf*, and frankly I think Stewart and the other members of the *Elkins* majority must have known it was a misstatement. Certainly Justice Frankfurter’s dissenting opinion in *Elkins* pointed that out. However, Stewart’s misstatement of *Wolf* allowed the *Elkins* majority to dodge the need to explain *why* the Fourth Amendment was incorporated in the Fourteenth Amendment Due Process Clause. Of course, that also meant that the Court did not have to explain the basis for incorporation in *Mapp* a year later—the result being that there is no explanation of the incorporation of the Fourth Amendment into the Fourteenth in the Supreme Court opinions.

Long also makes an uncommon error about *Wolf* when she states that “several justices” recharacterized exclusion as a deterrent of police misconduct “rather than” a constitutional requirement in *Wolf*. (Long, p. 47.) Actually, Justice Murphy *added* the deterrence claim to the other rationales for exclusion in *Wolf*. The “rather than” claim—that is, the false dichotomy claim—



*Mapp*.

## II. *MAPP* AS HEROIC LITIGATION

The strongest part of Long's book, by far, is her detailed journalistic account of the search of Dollree Mapp's house and the state court proceedings through the Ohio Supreme Court (Chapter 1), as well as her discussions of the arguments in the United States Supreme Court and the transformation of the issue in the case from the obscenity of the materials found in Mapp's house to the search itself. (Chapters 3–4) Readers who think they already know *Mapp* will likely learn new details in these chapters.

For example, Long explains the gambling turf war background of the bombing that led to the police search of Mapp's house, and describes the materials on which Mapp's obscenity conviction was based. Long also brings the search of Mapp's house to life by presenting Dollree Mapp's own account of the search as well as the accounts of some of the police officers involved.

Likewise, Long presents a detailed account of the unsuccessful motion to suppress in the Ohio trial and appellate courts. I was surprised at how much the illegal search aspect had been developed in the state courts, despite the fact that the Ohio Supreme Court had previously rejected a state exclusionary rule. The details of the prosecutorial misconduct in the case are also noteworthy: The state prosecutors pretended that the police had had a warrant for the search all the way through the certiorari filings in the United States Supreme Court itself until finally admitting, in their brief on the merits, that there had been no warrant!<sup>25</sup> (Long, p. 60.)

Long also presents a detailed account of the briefs, oral arguments, and the justices' deliberations and maneuvering in *Mapp* itself, as revealed in the draft opinions and interchambers memoranda. I'm unaware of any other account of *Mapp* that presents a richer description of the case and its setting (although there is another noteworthy and somewhat different account of the maneuvering among the justices in *Mapp* that Long does not mention<sup>26</sup>).

The concern I have with Long's account of *Mapp* is that it may leave a reader with a false notion of what actually drives Supreme Court decisions. The only theme I find in Long's book is what I would call a "heroic litigant" theme. The

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is more appropriately assigned to the Burger Court's post-*Mapp* decision in *United States v. Calandra*, 414 U.S. 338 (1974), as I discuss below.

<sup>25</sup> One of the more bizarre aspects of the *Mapp* search is the claim of Carl Delau, head of the police unit that searched Mapp's house, that the police had an affidavit (not a warrant) with a judge's signature on it. (Long, p. 107.) If true, that suggests that the Cleveland judge was either indifferent to what he was signing or incompetent.

<sup>26</sup> A rich but largely overlooked account of the decision-making in *Mapp* appears in Dennis D. Dorin, *Seize the Time: Justice Tom Clark's Role in Mapp v. Ohio*, in *LAW AND THE LEGAL PROCESS* 21–72 (Victoria L. Swigert ed. 1982).

focus on Dollree Mapp, complete with a brief “Epilogue” that traces Mapp’s personal history after the 1961 decision, does add a human element to the story. Dollree Mapp comes across as a stubborn litigant who resists police oppression, refuses to plead out, and thereby wins rights for all of us—notwithstanding her being a petty criminal. Of course, this heroic litigant theme is emotionally appealing, much along the lines of Anthony Lewis’s portrait of Clarence Gideon in his classic, *Gideon’s Trumpet*<sup>27</sup> (and Henry Fonda’s portrayal of Gideon in the movie of the same name). But is it realistic?

There actually were two story lines in Lewis’s account: (1) Gideon, the heroic litigant, standing up for his (our) rights; and (2) Supreme Court justices who were *looking for* a case in which they could extend the right to appointed counsel to state criminal prosecutions. Given the second story line about the justices’ agenda, it really didn’t matter if Gideon personally held fast or not. The Warren Court would have found another vehicle to announce the same rule anyway.

There is a second story line about *Mapp*, too. A majority of the justices had already crossed the incorporation Rubicon in the 1960 decision, *Elkins v. United States*.<sup>28</sup> As Justice Stewart, who authored *Elkins*, later commented, *Elkins* effectively applied the Fourth Amendment to the states, and that meant that the Court would extend the Fourth Amendment exclusionary rule to the states.<sup>29</sup> Indeed, in the years since *Wolf* it had become even clearer that there was no alternative means other than exclusion to regulate police intrusions.<sup>30</sup> Hence, even if *Mapp* had never reached the Court, it is highly likely that the majority justices would have found another vehicle for extending the rule to the states.<sup>31</sup> Oddly,

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<sup>27</sup> ANTHONY LEWIS, *GIDEON’S TRUMPET* (1964) (describing the background and decision-making in *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

<sup>28</sup> 364 U.S. 206 (1960). Professor Dorin cited a memorandum written by Justice Frankfurter, for the dissenters in *Elkins*, delivered to the justices in the majority shortly after the conference vote in that case. See Dorin, *supra* note 26, at 67 n.11. He provided me with a copy of that memorandum, which proposed submitting the “silver platter” doctrine at issue in *Elkins* to a rule-making committee. The unusual nature of that post-vote memorandum leaves little doubt that Frankfurter and the other dissenters perceived that the forthcoming ruling in *Elkins* portended the extension of the Fourth Amendment and its exclusionary rule to the states.

<sup>29</sup> Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

<sup>30</sup> Although *Wolf* had encouraged the states to develop alternative means of preventing “arbitrary” searches, the only developments had been that several states, including California, had concluded that exclusion was the only available means for doing so. See *People v. Cahan*, 282 P.2d 905 (Cal. 1955).

<sup>31</sup> Indeed, another case might have provided a better vehicle for extending the exclusionary rule to the states. In *Mapp*, Justice Stewart declined to join the opinion of the Court because the exclusionary rule issue had not been briefed, even though his opinion in *Elkins* indicates he otherwise would have endorsed that ruling. As a result, Justice Clark had to rely on Justice Black for the crucial fifth vote, but Black characteristically endorsed an idiosyncratic notion (harkening back to *Boyd*) that exclusion for a Fourth Amendment violation was required by the protection against compelled self-incrimination in the Fifth Amendment. That unnecessary confusion might have been avoided if Clark, who had been assigned to write an opinion striking down Mapp’s conviction on First

Long relegates what she has to say about this second story line to a chapter that comes well after the description of *Mapp* itself (Long, pp. 145–48.), but that structure does not do justice to the story. Moreover, she apparently did not detect Justice Stewart’s finesse of the incorporation issue in *Elkins*.<sup>32</sup> (Long, pp. 90, 147.)

As a political scientist/lawyer myself, I find it puzzling that Long, as a political scientist, devotes so much space and attention to the legal arguments in *Mapp*, but virtually none to the ideological orientations and agendas of the justices who decided the case. Lawyers and law professors may be forgiven for professional hubris when they write as though lawyers’ arguments win or lose cases in the Supreme Court. Political scientists should know better. Indeed, precisely because the electronic media now present Supreme Court oral arguments as though they constitute serious news events (a classic example of lazy journalism—what could be easier to report than an oral argument?), there is a need for a more realistic perspective on the Supreme Court’s processes.

With few exceptions, the individual justices who sat on the Court during the last half century had well developed ideological commitments regarding criminal justice matters. For example, the voting alignment in *Mapp* reflected a fairly consistent pattern in the early Warren Court.<sup>33</sup> Because justices have ideological commitments, there is every reason to think that they usually vote for or against certiorari to advance or protect their ideological agenda, especially in an area as ideologically charged as criminal procedure. Moreover, there is a strong likelihood that at least the direction of the justices’ votes—that is, the outcome of a case—is pretty much set by the vote on certiorari. How else would one explain the fact that the Court reverses or modifies the outcome in such a large proportion of the cases it hears?<sup>34</sup> Given those facts, there is little likelihood that briefs or oral arguments alter the direction of the outcome in a case.<sup>35</sup> Likewise, there is little

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Amendment grounds, had been content to simply include a footnote to telegraph to the legal community that the Court would be willing to entertain a reconsideration of *Wolf*, and had waited for another case.

<sup>32</sup> See *supra* note 24.

<sup>33</sup> By the early 1960s, Chief Justice Warren and Justices Douglas and Brennan formed a fairly predictable liberal voting bloc in criminal cases, sometimes joined by Justice Black, while Justices Frankfurter, Harlan, and Whittaker formed a conservative bloc.

<sup>34</sup> See, e.g., LAWRENCE BAUM, *THE SUPREME COURT* 94–95 (2007). Unfortunately, many lawyers do not appreciate that the briefs seeking or opposing certiorari itself are the ones that are most likely to matter.

<sup>35</sup> For example, the late Chief Justice William Rehnquist had this to say about the significance of oral argument:

I think that in a significant minority of the cases in which I have heard oral argument, I have left the bench feeling different about the case than I did when I came on the bench. The change is seldom a full one-hundred-and-eighty degree swing, and I find that it is most likely to occur in cases involving areas of law with which I am least familiar.

WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 276 (1987).

reason to think that the rationale expressed in the opinion in a case necessarily reflects the considerations that actually led a justice to vote as he or she did.<sup>36</sup>

Yet Long directs the reader's attention to the oral arguments rather than to the ideological orientations of the justices who decided *Mapp*. Indeed, she says very little about the individual justices and their ideological commitments until she reaches the post-*Mapp* Nixon Appointments. (Long, p. 148.) That is a strangely unpolitical-science account of the Supreme Court at work.

### III. THE LARGER BUT MISSING STORY

My larger complaint about Long's discussion of *Mapp* is that the attention she pays to the legal details comes at the expense of the larger and more important dimensions of the story. The extension of the exclusionary rule in *Mapp* was not an isolated event. Rather, it was part of a much broader judicial strategy to advance the cause of civil rights by subjecting state criminal prosecutions to federal court oversight. A majority of the Warren Court justices undertook to use what levers they had available to civilize the more backward and racist state criminal justice systems that were prevalent in the 1960s, especially in the South.

Because those justices correctly understood that "due process" doctrine itself was grossly inadequate to that task, they instead extended the specific federal procedural standards the federal courts had already developed by selectively incorporating the federal constitutional criminal procedure protections into the Fourteenth Amendment.<sup>37</sup> The same justices then augmented the incorporation of

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<sup>36</sup> Opinions are public justifications, not statements of the justices' motivations. The justifications are important because the justifications constitute the substance of constitutional law. However, the justifications that appear in opinions are usually composed by the assigned justice largely *after* the vote in the justices' conference that decides the case. Moreover, available information suggests that the conference discussions are brief and often consist of little more than the casting of votes on the outcome. *See id.* at 289–93 (noting "how little interplay there was between the various justices during the process of conferring on a case" during the post-argument conference).

<sup>37</sup> Recent commentaries have suggested that the Warren Court took a wrong turn when it adopted an incorporation approach rather than develop "due process" doctrine in criminal procedure. *See, e.g.,* Donald Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125 (2005); George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169 (2005). I disagree, because I do not think that position adequately considers the resistance of the more backward state courts to procedural considerations.

The problem with "due process" is that it has no particular content, but rather must be applied according to the facts of individual cases and the values of individual judges. As a result, what it means depends entirely on who is applying it. Hence, it was not a useful doctrinal tool for reforming recalcitrant state criminal justice systems. Indeed, the Warren Court had direct evidence of that: A "due process" approach to the right to counsel had been articulated in *Betts v. Brady*, 316 U.S. 455 (1942), yet one study indicated that in 139 state appeals involving appointment of counsel issues, the state courts had found that the *Betts* due process standard required counsel to be appointed in only eleven. *See* LEWIS, *supra* note 27, at 151–52. The problem with telling state judges to apply "due process" in 1960 was that too many state judges had no use for "due process." My point is *not* that

federal constitutional standards with several related moves. For example, shortly before deciding *Mapp*, the justices also opened the way for civil suits for damages for police violations of the Fourth Amendment.<sup>38</sup> Likewise, two years later, the justices also expanded the potential for federal court enforcement of constitutional criminal procedure standards by substantially expanding federal *habeas corpus* review of state criminal convictions.<sup>39</sup> Of course, the justices also furthered that agenda by providing state defendants with appointed counsel.

Long mentions some aspects of the Warren Court's larger agenda,<sup>40</sup> but she devotes too little space to that topic and does so too late in the book. As a result, her focus on *Mapp* may create a false impression that *Mapp* was a singular event. It was not. All in all, Long's focus on the details of *Mapp* detracts from the more important stories of the Warren Court's agenda and of how the Supreme Court actually operates.

#### IV. *MAPP'S* AFTERMATH AND THE EFFECTS OF EXCLUSION

Long provides four post-*Mapp* chapters. The first (Chapter 5) describes public reaction to *Mapp* and early assessments of police compliance with the decision, especially in states that had not previously adopted their own state exclusionary rule. The second (Chapter 6) describes the three stages of empirical research on the effects of the exclusionary rule. The next (Chapter 7) discusses other Warren Court criminal procedure rulings. And, finally, Chapter 8 discusses the Burger Court cases that limited exclusion as well as various abortive legislative proposals to limit or abolish exclusion. This structure divvies up the material nicely enough if the goal is to simplify the writing, but it obscures the degree to which these aspects were interrelated. Let me suggest some of those connections.

##### A. *The Political Reaction*

Long mentions adverse public and political reaction to *Mapp*, but her portrait of the political counterattack is fairly lifeless. The larger story is that the Warren Court rulings in *Mapp* and the other "due process revolution" decisions

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the incorporation approach was a cure-all—it decidedly was not. However, it was the only lever the Warren Court really had available. The current notion that criminal procedure protections would be more robust today if the Warren Court had taken the "due process" route strikes me as a form of hypothetical wishful thinking.

<sup>38</sup> See *supra* note 1 (discussing *Monroe v. Pape*).

<sup>39</sup> See, e.g., *Fay v. Noia*, 372 U.S. 391 (1963).

<sup>40</sup> In the material leading up to *Mapp*, Long mentions *Elkins* and touches briefly on the ferment regarding the incorporation doctrine when she mentions that "several members on the Court were intent on applying multiple criminal procedure guarantees from the Bill of Rights to the states." (Long, pp. 94–95.) Long made this comment to explain a handwritten statement that Justice Harlan made in a memo to Justice Clark to the effect that Harlan feared that Clark's draft opinion in *Mapp* would "encourage the 'incorporation' enthusiasts."

fundamentally changed the politics of criminal justice. Previously, federal constitutional standards had been limited largely to the sorts of white collar criminal cases that did not overly scare or incite the public. However, the incorporation doctrine in *Elkins* and *Mapp*, and later in *Miranda*, meant that street criminals also could claim constitutional protections. And that did scare and incite the public.

Moreover, the Court's incorporation of federal constitutional standards for criminal justice occurred in a decade in which there was what was then perceived as an unprecedented crime wave, in which the drug culture emerged, in which race riots occurred, and in which there was intense political strife over the Vietnam War. Few decades in American history would have offered a less propitious time for extending federal criminal procedure protections to state prosecutions.

Additionally, because street crime was widely perceived in terms of race, the incorporation of federal protections meant that constitutional criminal procedure also came to be perceived in terms of race, and the backlash against *Mapp* and *Miranda v. Arizona* merged with the continuing backlash against *Brown v. Board of Education*.<sup>41</sup> In hindsight, the Warren Court's "revolution" now appears to be a bittersweet story of the limits of judicial reform. The Court sought to end racial discrimination, or at least ameliorate its effects, but its criminal procedure rulings fed a segregationist backlash under the cover of "soft on crime" rhetoric.

In retrospect, it seems fairly obvious that the Warren Court was far more concerned with the treatment of the criminally accused than American society was. Richard Nixon exploited that distance when he folded public anger over the criminal procedure cases into his "Southern Strategy." Although it goes beyond conventional political science "impact" research, it seems likely that the Warren Court's "due process revolution" contributed to the election of Richard Nixon to some degree, and probably Ronald Reagan's, as well.

#### *B. The Attack on the Rule's Efficacy as a Deterrent*

Nixon's election was a tipping point in the exclusionary rule story because Nixon's four appointments remade the Supreme Court, and hostility to the Warren Court's criminal procedure rulings was one of the two litmus tests Nixon used (the other being opposition to busing as a remedy for school segregation).<sup>42</sup> Nixon also specifically put abolition of the exclusionary rule on the front burner when he appointed Warren Burger, a critic of exclusion, to be chief justice. Burger had asserted that the rule allowed "countless guilty criminals" to escape conviction but that it failed to deter police misconduct<sup>43</sup>—the ingredients of what later became

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<sup>41</sup> 347 U.S. 483 (1954).

<sup>42</sup> JOHN W. DEAN, *THE REHNQUIST CHOICE* 57 (2001).

<sup>43</sup> See, e.g., Warren E. Burger, *Who Will Watch the Watchman?* 14 AM. U.L. REV. 1 (1964); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Burger, J., dissenting).

known as the “deterrence rationale” for the exclusionary rule.

Burger’s appointment prompted academic critics such as Dallin Oaks and James Spiotto to produce articles that claimed to empirically prove that the exclusionary rule failed to deter illegal police searches.<sup>44</sup> Those studies took on added significance when the three other Nixon appointees—Justices Blackmun, Powell, and Rehnquist—took their seats. Thus, when the new majority announced in 1974, in *United States v. Calandra*,<sup>45</sup> that the exclusionary rule henceforth would be viewed as a mere deterrent policy rather than an aspect of the Fourth Amendment itself, and that the rule’s future application would depend on whether its deterrent “benefits” outweighed its “social costs,” there was a widespread expectation that the new Court had set the rule up for extinction. Indeed, I recall that Professor Fred (“Freddy the Cop”) Inbau was so sure that the rule was about to disappear that he deleted the exclusionary rule material from his course when I took criminal procedure at Northwestern in the fall of 1974.

However, claims that the exclusionary rule could not reduce police illegality were deflated by additional research. Bradley Canon identified a variety of evidence that exclusion did affect police conduct,<sup>46</sup> and fresh from courses in social science research design, I wrote a “Critique” that identified the methodological flaws in Oaks’s and Spiotto’s studies and argued that that it was methodologically impossible to measure the deterrent effects of exclusion.<sup>47</sup>

Although Long does not mention it, and her readers will be unaware of it, the Court almost did abolish the rule in the 1976 decisions in *United States v. Janis*<sup>48</sup> and *Stone v. Powell*.<sup>49</sup> It appears there were four votes to do so, but that Justice Powell balked at going that far.<sup>50</sup> In the *Janis* and *Stone* opinions, Justices Blackmun and Powell, respectively, conceded that it was unlikely there would be any persuasive data on deterrence. Instead, they adopted a split-the-difference assumption: The Court would continue to assume that the rule had some deterrent effect when it was applied to exclude evidence from the prosecutor’s case-in-chief at trial, but would also assume that the rule would not produce any “additional” deterrent benefits outside that procedural setting. That decidedly non-data-based treatment effectively ended attempts to empirically measure the rule’s deterrent

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<sup>44</sup> Oaks, *supra* note 11; James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL. STUD. 243 (1973).

<sup>45</sup> 414 U.S. 338 (1974).

<sup>46</sup> Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1973–74).

<sup>47</sup> Thomas Y. Davies, *Critique, On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U. L. REV. 740 (1974).

<sup>48</sup> 428 U.S. 433 (1976).

<sup>49</sup> 428 U.S. 465 (1976).

<sup>50</sup> See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 429–30 (1979).

effect. It also portended the withdrawal of the rule from all procedural settings except the prosecutor's case-in-chief at a criminal trial itself.

C. *The "Good-Faith Exception" Proposal and the Rule's Alleged "Costs"*

After the Court declined to abolish the rule outright, the critics of exclusion shifted their efforts to the proposal for a broad "good-faith mistake" exception. That proposal rested on two claims: first, that most unconstitutional searches occurred only because of police "mistakes" that resulted from the confusing content of search doctrine (a dubious claim, at best); and, second, that exclusion resulted in high "social costs" in the form of "lost" arrests.

The Court initially took up the good-faith issue by ordering reargument *sua sponte* in *Illinois v. Gates*,<sup>51</sup> a case Long never mentions, during the fall of 1982. That order apparently prompted the National Institute of Justice (NIJ), a branch of the Reagan Justice Department, to rush out a study that claimed the rule resulted in high percentages of "lost" arrests in California.<sup>52</sup> However, because *Gates* was a grossly defective vehicle for adopting the good-faith exception, the Court did not rule on that issue,<sup>53</sup> but instead eviscerated (Justice White's term) the probable cause standard itself. Of course, the Court almost immediately granted certiorari to take up the good-faith issue the next term in *United States v. Leon*.<sup>54</sup>

Unlike deterrence, the effects of exclusion on arrest dispositions were measurable. During the months between *Gates* and *Leon*, I published a criticism of the NIJ study coupled with a summary of all of the existing studies of the rule's effects on arrest dispositions.<sup>55</sup> I also encouraged Peter Nardulli to write up the

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<sup>51</sup> 462 U.S. 213 (1983).

<sup>52</sup> NATIONAL INSTITUTE OF JUSTICE, CRIMINAL JUSTICE RESEARCH REPORT—THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982).

<sup>53</sup> Because I had previously researched California criminal justice data on arrest dispositions, I immediately recognized that the NIJ Study's claims regarding "lost arrests" were grossly exaggerated and distorted, so I contacted the defense attorney in *Gates* and offered to write a few paragraphs for the brief criticizing the invalidity of the empirical claims in that study. I also knew, from my previous criticism of the Spiotto study, that Illinois had adopted a state exclusionary rule prior to *Mapp*. Hence, it occurred to me that there might be an independent-and-adequate-state-ground argument to be made. Research quickly revealed that there was an Illinois statute that stated that evidence seized under a warrant issued without probable cause "shall" be excluded, so that was included in the defendants' brief on reargument. Although there is no mention of that statute in the *Gates* opinion, it was mentioned in oral argument, and I think it is likely that it played the decisive role in causing the Court to pass on the good-faith issue in *Gates*. The upshot, of course, was that the Court instead adopted the so-called good-faith exception in *Leon* the next term in that most Orwellian of years, 1984.

Additionally, the Court's embarrassment in *Gates* may have been a factor in the Court's drastic curtailment of the independent-and-adequate-state ground doctrine in *Michigan v. Long*, 463 U.S. 1032 (1983), which was announced shortly after *Gates*.

<sup>54</sup> 468 U.S. 897 (1984).

<sup>55</sup> Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the*



data he had on motions to suppress in a large database on criminal court dispositions in several states.<sup>56</sup> Nardulli's data and that which I hunted up consistently showed only a marginal rate of lost cases, roughly at the level of one percent of arrests, and largely in less serious drug arrests, but rarely in violent crimes. Thus, by the time *Leon* was argued, it was apparent that the rule had some immeasurable level of deterrent benefits and resulted in only a marginal rate of lost convictions.

Both the majority and dissenting opinions in *Leon* accepted the conclusion that only a small percentage of arrests were "lost" because of suppression. However, because ideological commitments are immune to data, the rule's marginal effect on prosecutions does not seem to have affected any of the justices' votes. Rather, the conservative bloc simply redefined the rhetorical presentation of the rule's "social costs." In the 1987 decision in *Illinois v. Krull*,<sup>57</sup> Justice Blackmun asserted that the rule caused high social costs because it resulted in less evidence. That tautological approach—suppression of evidence reduces the amount of evidence—was so wholly immune to empirical assessment that it pretty much ended efforts to empirically assess the rule.<sup>58</sup>

In the end, the Burger Court's exclusionary rule decisions demonstrated that the Court's purported "costs-and-benefits" analysis was merely result-driven window dressing. What mattered was not what empirical data revealed, but who sat on the Court. The most important current feature of Fourth Amendment law is that a right-of-center majority has been in control for three plus decades. During that time, the majority has almost shut down exclusion and has also drastically diluted Fourth Amendment standards themselves.

#### V. THE ILLUSORY CHARACTER OF CURRENT FOURTH AMENDMENT "RIGHTS"

The heroic tone of the subtitle of Long's book—"Guarding Against Unreasonable Searches and Seizures"—lends the impression that Fourth Amendment protections are substantial. A similar message is obliquely implied in

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"Costs" of the Exclusionary Rule: *The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611. This article was an expansion of the criticisms that I had written for the defendants' brief on reargument in *Gates*. Subsequent to the decision in *Leon*, I was able to confirm through a variety of contacts that the results announced in the NIJ Study had in fact been heavily distorted by the Reagan administration.

<sup>56</sup> Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585. Nardulli and I had both been graduate students in political science at Northwestern University, and I was aware that he had a large data set on arrest dispositions.

<sup>57</sup> 480 U.S. 340, 347 (1987) (invoking "the costs of withholding reliable information from the truth-seeking process").

<sup>58</sup> There were two notable later studies: Myron W. Orfield Jr., *Comment, The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987); Myron W. Orfield Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992).

the last line of her text, which suggests that, because the federal Supreme Court imposed some limits on the operation of the exclusionary rule after *Mapp*, Americans may need to look to state courts to be “fully protected against unreasonable searches and seizures.” (Long, p. 195, my emphasis.) These phrasings, coupled with the heroic litigant portrait of *Mapp*, convey an overall impression that Fourth Amendment protections are substantial. But that is no longer the case.

Instead, the seemingly permanent conservative majority on the Court has maintained the illusion of Fourth Amendment rights by not overruling the leading Warren Court cases, but it has created such an array of limitations and exceptions that both the exclusionary rule and the Fourth Amendment rights it was meant to enforce have been largely drained of practical significance.<sup>59</sup> The greatest failing in Long’s book is that she fails to apprise her reader of how little practical significance either the exclusionary rule or the Fourth Amendment now hold.

#### A. *Shutting Down Exclusion*

In Chapter 8, Long discusses what she terms the “effort” to undermine *Mapp* and the exclusionary rule during the Burger and Rehnquist Court eras, as well as the so-far abortive legislative efforts to end exclusion. “Effort” may be an appropriate description of the failed legislative attempts, and Long does a useful service in compiling the various legislative attempts to abolish or limit exclusion. (Long, pp. 156–58, 164–65, 178–82, 191–93.) However, “effort” understates what the conservative majority on the Court has accomplished.

Although Long recognizes that the conservative majority curtailed the exclusionary rule in various ways, she uncritically repeats the phony “decline to extend” rhetoric that the Court employed when it cut back on the rule’s operation.<sup>60</sup> (Long, p. 172, 187.) The more serious shortcoming, however, is that she does not convey the cumulative magnitude of that curtailment. The reality is that exclusion now applies only to the prosecutor’s case-in-chief at trial. In other words, the government can often derive considerable advantage from the fruits of unconstitutional searches in grand jury proceedings,<sup>61</sup> pretrial proceedings, impeachment of defendants who testify (with the result that many are prevented from testifying), sentencing enhancements, parole or probation revocation

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<sup>59</sup> Here, too, I would have expected a political scientist to distinguish between the symbolic portrayal of “rights” and the distributive realities of the criminal justice system. The still classic treatment of this distinction is MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1974).

<sup>60</sup> The earlier understanding, derived from Justice Holmes’s opinion in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), was that items seized in violation of the Fourth Amendment could “not be used at all.”

<sup>61</sup> I recently became aware that in white-collar federal investigations, lower courts declare that the government is entitled to use unconstitutional evidence to obtain indictments and also even seal the affidavits for any search warrants on the ground that no motion to suppress can be made until after an indictment is issued.

proceedings, deportation proceedings, and related civil proceedings (for example suits to collect taxes). Thus, in a criminal justice system that operates largely through guilty plea processes, unconstitutionally obtained evidence can now be used in the procedural settings in which most of the important decisions are actually made. So much for the justices' professed concern with deterring illegal searches.

Moreover, in addition to restricting the exclusionary rule's operation to the trial itself, the Court also invented several important exceptions that even permit the unrestricted use of unconstitutionally seized evidence in the prosecutor's case-in-chief. The narrow conception of "standing" adopted by the Burger Court frequently permits the government to use evidence that was obtained through deliberate violations of the Fourth Amendment rights of a person other than the defendant. Although Long mentions the cases in which the Burger Court restricted "standing" to seek suppression (Long, pp. 171–72.), she does not alert her reader to how profound a hole in Fourth Amendment enforcement that "standing" has become.

Likewise, the so called "good-faith exception" announced in *Leon*—which would be more aptly named the "blame-someone-other-than-the-police" exception—means that evidence will not be suppressed if the illegality can be traced to an unconstitutional warrant, an unconstitutional statute, or faulty court records.<sup>62</sup> Although Long correctly noted that the *Leon* exception does not apply to warrantless police searches (Long, p.174.), she never mentions the fundamental point that *Leon* effectively means that the warrant standards that are explicitly stated in the Fourth Amendment are no longer enforced. For all practical purposes, it no longer matters whether the police get a valid warrant; rather, any warrant will allow the admission of whatever is found.<sup>63</sup>

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<sup>62</sup> Law students should study the *Leon* rationale as a classic example of a syllogism resting on a false dichotomy: 1) the exclusionary rule is aimed at deterring police; 2) an unconstitutional warrant is the fault of the magistrate *rather than* the police [the false dichotomy]; therefore, 3) the exclusionary rule does not apply to unconstitutional warrants. Notably, the screening prosecutor, who was involved in seeking the *Leon* warrant itself—the actor who often plays the crucial role in the decision to obtain a warrant—is entirely omitted from the syllogism. Of course, the blame-someone-else rationale can also apply to legislators and unconstitutional statutes, court clerks and defective court records of outstanding warrants, etc.

<sup>63</sup> *Leon* advised judges hearing motions to suppress not to base the suppression ruling on the probable cause or particularity standards themselves, but rather to simply decide whether the warrant search fell within the *Leon* exception itself. Operationally, the exception is defined only by four limits which are rarely of any practical significance. For example, instead of assessing probable cause, *Leon* advised reviewing courts to admit evidence seized pursuant to a warrant so long as the warrant was not "so lacking in indicia of probable as to render official belief in its existence entirely unreasonable"—a standard that appears to be met by anything more than a totally barebones warrant affidavit. See *Leon*, 468 U.S. at 923.

In addition, Long's account of *Leon* was unduly superficial. For example, although she discusses the warrant in that case (Long, p. 172–73.), she omits to mention (as many commentaries have) that *Leon* was trumped up, because the warrant in *Leon* almost certainly met the reduced standard for "probable cause" that the Court had adopted a year earlier in *Gates*. Thus, the Court

### B. Eviscerating the Fourth Amendment

Long also virtually omits the assault the Burger and Rehnquist Courts mounted on Fourth Amendment standards themselves. That assault had important implications for exclusion because it reduced the likelihood that police conduct would be found to be unconstitutional. Yet, Long devotes only a little more than a page to the topic. (Long, pp. 190–91.) Oddly, she devotes more attention to Fifth Amendment self-incrimination cases from *Miranda v. Arizona*<sup>64</sup> to *Dickerson v. United States*<sup>65</sup> than to substantive Fourth Amendment cases. Indeed, she manages to mention *Illinois v. Perkins*<sup>66</sup> (a self-incrimination case involving statements to a planted jail informer) while completely omitting the more pertinent ruling in *Schneekloth v. Bustamonte*<sup>67</sup> (the case that declined to require *Miranda*-like warnings and waiver for consent to a search).

Though readers will not learn it from Long, the Burger and Rehnquist Courts drastically narrowed the scope of Fourth Amendment protections under the “reasonable expectation of privacy” formula, adopted fictitious notions of “voluntary” consent searches, trivialized the “probable cause” and “reasonable suspicion” standards that police are expected to comply with, endorsed pretextual police conduct, and even approved of suspicionless government searches under the so called “special needs” doctrine—all in the name of “reasonableness” and “balancing.” I will not run through the full listing here, because it is readily available elsewhere.<sup>68</sup> The problem, however, is that Long’s readers will not be alerted that there is more to this aspect of the story than she told them.

There is an even larger story that Long does not mention, and that I am not yet prepared to tell either. It appears that there has been a massive cultural shift in attitudes regarding criminal justice since *Mapp*. The exclusionary rule, the Fourth Amendment itself, the right against self-incrimination, the right to bail, the rule of lenity in the construction of criminal statutes, and a variety of related features that were once regarded as central to criminal justice doctrine now increasingly appear to be only the residue of an earlier time when liberty was understood in terms of constraints upon state power. Those earlier notions clash with the current culture

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needlessly adopted an exception to exclusion, which is strong evidence that the justices had a pre-existing agenda. However, Long never mentioned the evisceration of the probable cause standard in *Gates*. In fact, as noted above, she never mentioned *Gates* at all.

<sup>64</sup> 384 U.S. 486 (1966).

<sup>65</sup> 530 U.S. 428 (2000).

<sup>66</sup> 496 U.S. 292 (1990).

<sup>67</sup> 412 U.S. 218 (1973).

<sup>68</sup> The content of the Rehnquist Court’s constriction of Fourth Amendment doctrine is not controversial. Compare Craig M. Bradley, *The Fourth Amendment: Be Reasonable*, in THE REHNQUIST LEGACY 81–105 (Craig M. Bradley, ed., 2006), with Thomas Y. Davies, *Fourth Amendment*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 360–64 (2d ed. Kermit L. Hall ed. 2005). Although the reader may detect a difference in tone, the descriptions of the changes in Fourth Amendment doctrine in these two treatments are quite similar.

of the corporate/welfare state and its assumption of ubiquitous government intervention. We now have a culture that values safety (that is, protection from each other or, in the case of drugs, from ourselves) more than liberty (protection from the government). Perhaps because of that cultural shift, what now passes for constitutional criminal procedure seems to increasingly exhibit the acceptance of discretionary governmental authority that had earlier been associated primarily with administrative law.<sup>69</sup>

## VI. CONCLUSION

The renewal of the attack on the exclusionary rule in *Michigan v. Hudson* makes this a time when an accessible book that would offer readers a broad perspective on the exclusionary rule would certainly be welcome. Regrettably, Long has not written that book. Although she offers a fairly complete catalogue of exclusionary rule cases, her book provides an inventory rather than a perspective. Readers seeking a detailed picture of *Mapp* will find several chapters that are worthwhile. Those seeking an overview of the exclusionary rule and its place in criminal procedure, constitutional law, and American history would be well advised to look elsewhere.<sup>70</sup>

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<sup>69</sup> For a discussion of the concept of legality, see FRANCIS W. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* (1996).

<sup>70</sup> General readers, or teachers seeking an accessible book on the Fourth Amendment and its exclusionary rule for their students, might consider SAMUEL DASH, *THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT* (2004). Those seeking an introduction to both the exclusionary rule and Fourth Amendment law itself might consider OTIS H. STEPHENS & RICHARD A. GLENN, *UNREASONABLE SEARCHES AND SEIZURES: RIGHTS AND LIBERTIES UNDER THE LAW* (2006).

