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Is The Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion

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I

As a uniform and constitutionally mandated policy, the exclusionary rule in cases involving search and seizure is entering a stormy adolescence following a serene childhood. This rule prohibits the admission of evidence in any criminal case[1] which is obtained by means of an illegal search, *i.e.*, one forbidden by the fourth amendment's prohibition against "unreasonable" searches and seizures and the statutes and case law which apply it. As a non-constitutional policy, the exclusionary rule's antecedents can be traced to *Weeks v. United States*,[2] where it was adopted for the federal courts in 1914. Almost half the states subscribed to it during the period from 1920 to 1960 by either legislative or appellate court action,[3] but it was not until the 1961 case of *Mapp v. Ohio*[4] that the exclusionary rule was elevated to the status of a constitutionally derived policy. Rejecting arguments that adoption should be a discretionary matter based upon

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[1] It also prohibits civil forfeiture of material illegally seized. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

[2] 232 U.S. 383 (1914).

[3] For a list of the states adopting the rule and the vehicle of adoption, *see* the appendix to Elkins v. United States, 364 U.S. 206, 224-32 (1960).

[4] 367 U.S. 643 (1961).

legislators' or judges' choice of values, the United States Supreme Court, speaking through Justice Tom Clark, held that because exclusion of evidence was the only workable sanction for violation of fourth amendment rights, failure to give the rule constitutional status would be to "grant the right, but in reality to withhold its privilege and enjoyment."[5]

Prior to *Mapp,* the exclusionary rule had been the subject of considerable public debate which focused primarily on the logic of the rule. Opponents argued that it was not consistent with the purpose of fact finding to reject valid and probative evidence which was useful to the determination of the guilt or innocence of the defendant. The application of the rule thwarted justice instead of enhancing it. The classic statement of this position was formulated by Judge (later Justice) Benjamin Cardozo in *People v. Defore*[6] and epitomized in the sentence: "[I]s the criminal to go free because the constable has blundered?"[7] Dean Wigmore was also a harsh critic of what he perceived as the rule's illogic.[8] Proponents of the exclusionary rule conceded that it would permit some guilty parties to escape punishment, but argued that it was the only effective means to enforce the prohibition against "unreasonable searches." They suggest that if we value the fourth amendment's guarantees, we are obligated to make them more than a "mere rhapsody of words."[9] Moreover, as Justice Clark wrote in *Mapp,* "Nothing can destroy a government more quickly than its failure to observe its own laws or worse, its disregard of the charter of its own existence."[10] Each side seemed to be arguing from different premises, or at least according different priorities to the values involved in the dispute, and thus no widespread integration of viewpoints or changes of mind occurred; each won some victories in the half century preceding 1961.[11]

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[5] *Id.* at 656.
[6] 150 N.E. 585 (N.Y. 1926).
[7] *Id.* at 587.
[8] 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940).
[9] City of Tacoma v. Horton, 382 P.2d 245, 254 (Wash. 1963). (Donworth, J., dissenting).
[10] Mapp v. Ohio, 367 U.S. 643, 659 (1961).
[11] The proponents of the rule won adoption in about 20 states during the 1920's, often as a device to soften the enforcement of Prohibition. There were fewer adoptions after World War II. But one of them, People v. Cahan, 282 P.2d 905 (Cal. 1955), was considered a major success because it came in a respected court in a populous state. Opponents of the exclusionary rule won their biggest state successes when the 1938 New York State Constitutional Convention rejected
(Continued on next page)

Because of the running debate over the logic of the exclusionary rule, the *Mapp* decision received a fair amount of criticism.[12] Much of it came from law enforcement officials,[13] but academic objections were raised as well.[14] However, criticism of the exclusionary rule never reached the quantitative or emotional crescendo that occurred following some Supreme Court decisions later in the decade such as *Escobedo*[15] or *Miranda*.[16] Indeed, *Mapp* evoked considerable support, including occasional praise from otherwise vehement critics of the high court.[17] In short, by the mid 1960's the exclusionary rule seemed to be in good health and destined for a long if unexciting career.

In the last few years, however, the outlook has begun to change rapidly. The rule's vitality has declined precipitously, and its chances of reaching adulthood unimpaired can be diagnosed as uncertain at best. Quite recently judges, lawyers, scholars, and politicians have evidenced considerable dissatisfaction with the rule, and consequently it is once again surrounded by controversy. But the new assault is by no means a mere revival of the pre-*Mapp* arguments. Now, to paraphrase Holmes, the life of the controversy is not logic but experience.[18]

(Footnote continued from preceding page)
the rule and when Michigan voters twice amended their constitution in 1936 and 1952 to withdraw weapons and narcotics seized outside the home from the rule's scope. Their most spectacular victory came in 1949 when the United States Supreme Court ruled that the exclusionary rule was not constitutionally mandated upon the states, Wolf v. Colorado, 338 U.S. 25 (1949). *Wolf*, of course, was overruled by *Mapp*.

[12] In addition, *Mapp* was criticized on federalism grounds, *i.e.*, regardless of the rule's logic, the states should be left to accept it or reject it themselves. *See* the discussion in Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1 (1961) and Friendly, *The Bill of Rights As A Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

[13] *See, e.g.*, BALTIMORE CITY STATE'S ATTORNEY, ANNUAL REPORT at 5 (1963-64); CINCINNATI POLICE DEPARTMENT, ANNUAL REPORT at 5 (1962); CINCINNATI POLICE DEPARTMENT, ANNUAL REPORT at 7 (1961); NEW YORK CITY POLICE DEPARTMENT, ANNUAL REPORT at 10 (1966); Specter, *Mapp v. Ohio: Pandora's Problems for the Prosecutor*, 111 U. PA. L. REV. 4 (1962); Wilson, *Police Authority in a Free Society*, 54 J. CRIM. L.C. & P.S. 175 (1963). Several quotations from law enforcement officials are noted in Kamisar, *On the Tactics of Police-Prosecutor-Oriented Critics of the Court*, 49 CORNELL L.Q. 436 (1964).

[14] *See, e.g.*, Burns, *Mapp v. Ohio, An All American Mistake*, 19 DE PAUL L. REV. 80 (1969); Inbau, *More About Public Safety v. Individual Liberties*, 53 J. CRIM. L.C. & P.S. 329 (1962); Taft, *Protecting the Public from Mapp v. Ohio Without Amending the Constitution*, 50 A.B.A.J. 815 (1964).

[15] Escobedo v. Illinois, 378 U.S. 478 (1964).

[16] Miranda v. Arizona, 384 U.S. 436 (1966).

[17] *See, e.g.*, Mann v. City of Heber Springs, 395 S.W.2d 557 (Ark. 1965) (Johnson, J., concurring); and Commonwealth v. Ametrane, 221 A.2d 296 (Pa. 1966) (Musmanno, J., dissenting).

[18] O. HOLMES, THE COMMON LAW 5 (M. Howe ed. 1968).

Opponents of the exclusionary rule no longer expound the Cardozian argument or even imply that the value of controlling crime and bringing violators to justice takes precedence over individual rights. Instead, they concede, *arguendo* at least, the premises of those who favored the rule in the pre-*Mapp* days and then proceed to strike the rule's proponents on their own high ground. The gist of their attack is quite simple: the rule does not work. Experience shows, they say, that the rule has not accomplished the desired goal: that of police observance of fourth amendment rights. Rather, it is argued, law enforcement officials continue unreasonable invasions of the sanctity of homes, offices and automobiles, almost as if the exclusionary rule had never been adopted. In other words, the exclusionary rule has not fulfilled the promise of its own premise and thus the relative value of the right to privacy should be recognized as bearing little weight in evaluating the rule. Consequently, bringing wrongdoers to justice, even if a secondary objective in an abstract ordering of values, should now become the primary premise on which to evaluate the rule. And, they argue, it is almost axiomatic that the exclusionary rule hinders the accomplishment of this goal.[19]

Professor Dallin Oaks has advanced the most salient and thorough attack on the efficacy of the exclusionary rule in a lengthy analysis which appeared in 1970 in which he concentrated on empirical data.[20] First, he collated, described, and analyzed previous empirical research pertaining to the effects of the exclusionary rule. (Some of this research will be briefly described below.) What little previous research there was tended to be sketchy and generally insufficient, so that the findings were therefore rather inconclusive. Oaks, however, thought that insofar as the results pointed in any direction, they supported an argument that the exclusionary rule was inefficacious in preventing unconstitutional searches.

Oaks also reported on some of his own empirical research.

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[19] Professor Fred Inbau implies that the exclusionary rule encourages crime. *See* Inbau, *supra* note 14, at 331. For a more explicit argument, *see* Parker, *The California Crime Rise*, 47 J. CRIM. L.C. & P.S. 721 (1957).

[20] Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

Primarily this involved comparing arrest and conviction data for three search-and-seizure-type crimes in Cincinnati for several years preceding and following *Mapp*. He concluded that "the *Mapp* decision does not seem to have any effect whatever upon the number of arrests or upon the number or percent of convictions"[21] insofar as weapons and narcotics crimes were concerned, but conceded that *Mapp* might have had some impact on gambling arrests and convictions, although he thought the figures rather inconclusive here.[22] Furthermore, Oaks collected data on the confiscation of handguns, narcotics and gambling paraphenalia in Cincinnati before and after *Mapp* and came to a similar conclusion.[23] Finally, Oaks systematically discussed some additional avenues of empirical research which could produce decisive results. In addition to obtaining more numerous and varied before-and-after statistics similar to those he collected for Cincinnati, he suggested a comparison of Canadian search and seizure experiences (where no exclusionary rule prevails) with those in comparable American situations, as well as conversation and observation with law enforcement personnel about past and present norms relating to search and seizure behavior.

It is clear throughout his article that Oaks is no friend of the exclusionary rule. Although he readily concedes (if, indeed, it is not his primary point) that evidence of the rule's inefficacy is currently insufficient, a strong expectation that additional research will reinforce his belief that the rule is not working permeates his discussion. Indeed, in a postscript to the article, he pronounces the exclusionary rule a failure and urges that it be abolished.[24]

Because of its scope and recency, Oaks' empirical challenge to the exclusionary rule has attained wide visibility in both legal and political circles. Undoubtedly it has served as one of the primary catalysts in the current movement to reexamine the rule. Chief

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[21] *Id.* at 690.

[22] *Id.* at 691.

[23] *Id.* at 693-96. Oaks also compared the frequency with which motions to suppress were granted in trials for gambling, narcotics, stolen property and a few other offenses in Chicago and Washington, D.C. at various times in the 1960's, but did not closely relate these findings with conclusions about the exclusionary rule's efficacy.

[24] *Id.* at 755. However, Oaks would not abolish the rule until a more effective tort remedy can be substituted.

Justice Burger cited it in his own attack on the rule,[25] and other critics have also featured Oaks' findings prominently.[26]

However, other research has been done in the area. With one exception, these researchers have not been overtly hostile to the exclusionary rule, but generally their findings can serve as ammunition for the rule's opponents (although the distribution of ammunition is not altogether one-sided). In order to get a better picture of just how the exclusionary rule has been empirically evaluated to date, we will briefly note four important pieces of research below.[27]

Perhaps the most systematic investigation was carried out in a study by Columbia University Law School students.[28] In it they analyzed the evidentiary situation surrounding the arrest and disposition of all misdemeanor narcotics cases in New York City for the six-month periods preceding and following *Mapp*.[29] The students found that the number of post-*Mapp* narcotics arrests were down about 50% for the Narcotics Bureau, although substantially unchanged for the Uniformed and Detective Bureaus. There was also a dramatic shift in police reports (found in all divisions but particularly pronounced in the Narcotics Bureau) as to the location of seized narcotics. Whereas before *Mapp* arrest reports had indicated that approximately 40% of the contraband

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[25] Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388, 416 (1971), (Burger, C.J., dissenting).

[26] *E.g.*, AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2, Comment (Official Draft No. 1, July 15, 1972); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. OF LEGAL STUDIES 243 (1973); Comment, *The Exclusionary Rule in Search & Seizure: Examination and Prognosis*, 20 KAN. L. REV. 110 (1972).

[27] Results of three of the four have appeared subsequent to Oaks' article (although one relies in part on Oaks' data). Four less important empirical studies reported in Oaks' collation are not noted below because they have a very narrow data base, or predict behavior rather than report, or use such indirect measures of behavior that the results are highly tenuous. *See* Murphy, J., dissenting in Wolf v. Colorado, 338 U.S. 25, 44-46 (1949); Katz, *The Supreme Court and the State: An Inquiry into Mapp v. Ohio in North Carolina*, 45 N.C.L. REV. 119 (1966); Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WISC. L. REV. 283; and Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 ROCKY MT. L. REV. 150 (1962).

[28] Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COL. J.L. & SOC. PROBS. 87 (1968).

[29] The six-month periods were September through March, 1960-61 and 1961-62. Additionally, data were collected for a sample of 100 cases in 1964 and 1966. However, because the samples are so small (each of the six-month periods produced over 2,000 cases) and because some changes in laws and police division duties occurred in the interim, the latter data are not readily comparable with the former.

was hidden either on the person or in the premises, this figure dropped to around 10% in the post-*Mapp* period. Conversely, reports that the arrestee dropped or otherwise visibly disposed of the narcotics occurred only about 10% of the time prior to *Mapp*, but appeared in the reports about 35% of the time after that decision. The authors argue that the dramatic decline in Narcotics Bureau arrests indicates that it is engaging in many fewer illegal searches, but that they are often disguising those they do make with false testimony.[30] In another article, Sarah Barlow, one of the data gatherers, details this conclusion by noting that the police report fewer instances of contraband being located in plain view in private premises, thus indicating that there were fewer searches of such premises after *Mapp*.[31] In other words, *Mapp* apparently had the effect of reducing the number of illegal searches of premises (where perjury about how the illegal substance is obtained is more difficult), but did not so markedly reduce the number of illegal street searches (where perjury is not so great an obstacle).[32] The Columbia study authors further noted that disposition patterns in the misdemeanor narcotics cases did not change dramatically after *Mapp*. While dismissals of the charge and successful motions to suppress the evidence occurred more often, the increases were hardly dramatic; the majority of cases were still disposed of through guilty pleas. The authors concluded that "[p]olice practices in New York City narcotics enforcement . . . have not changed substantially as a result of *Mapp*."[33] Nevertheless, they indicated that "the situation is better after *Mapp* than it was before. Even if there is an indeterminate amount of lying today, police search-and-seizure practices are now more strictly controlled."[34]

Two sociologists, Donald Black and Albert J. Reiss, have also reported observational data on police search and seizure be-

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[30] Oaks argues that this conclusion is not necessarily sound. *See* Oaks, *supra* note 20, at 697-99, 714.

[31] Barlow, *Patterns of Arrest for Misdemeanor Narcotics Possession: Manhatten Police Practices, 1960-62*, 4 CRIM. L. BULL. 549 (1968).

[32] Barlow also noted a dramatic decline in the number of women involved in on-street arrests and suggested that narcotics officers abided by *Mapp* in these instances in order to avoid the sexual overtones that court disputes about an illegal personal search would induce. *Id.* at 560.

[33] Comment, *supra* note 28, at 103.

[34] *Id.* at 96.

havior.[35] The authors are interested in all phases of police-citizen interaction and during the mid-1960's conducted extensive observation of such encounters in Boston, Chicago and Washington, D.C. The search and seizure aspects of such interactions constitute a relatively minor part of their project, and the authors offer no speculation or conclusions about the efficacy of the exclusionary rule. They define a search as a physical inspection of a person or his property which is more than a routine frisk following an arrest, and report that such searches occur in about 20% of all police-citizen encounters. Blacks are somewhat more frequently the targets of searches in "on-view" situations, but there were little racial differences in "dispatched" situations. While Black and Reiss offer no evidence or judgments about the legality of such searches, they do note that even though the police seldom sought explicit consent to conduct a search, contemporaneous or subsequent objections occurred only one time out of five. The authors argue that failure to object, at least orally, is a tacit recognition of the legitimacy, if not the legality, of the search. Moreover, the observers in the project categorized nearly two-thirds of the searches as "necessary" for the officers' protection or to the solution of the immediate problem. Proponents of the exclusionary rule might find some comfort in these observations, but the 20% objection rate and the "unnecessary" one-third of the searches should render the comfort marginal.

Michael Ban, a political scientist, conducted an in-depth survey of *Mapp's* impact in two cities, Boston and Cincinnati, both of which were non-exclusionary rule locales prior to the decision. He exhaustively searched police and court records and in addition interviewed police, prosecutorial and judicial personnel. Although his research was largely conducted in the mid-1960's, Ban has only recently circulated some of his findings.[36] In terms of hard data, he noted that the issuance of search warrants in Boston increased from about 100 annually before *Mapp* to nearly 1,000

[35] Black and Reiss, *Patterns of Police Behavior in Citizen Transactions*, in 2 STUDIES IN CRIME AND LAW ENFORCEMENT IN MAJOR METROPOLITAN AREAS 84-90 (1967).

[36] Ban's findings are reported in two mimeographed papers, *The Impact of Mapp v. Ohio on Police Behavior* (delivered at the annual meeting of the Midwest Political Science Association, Chicago, May, 1973) and *Local Courts v. The Supreme Court: The Impact of Mapp v. Ohio* (delivered at the annual meeting of the American Political Science Association, New Orleans, September, 1973). The latter builds upon the former and the data cited in this paragraph are taken from it.

by 1963, while in Cincinnati the increase was from virtually zero to about 100. Further, he found that motions to suppress rose from zero in both cities before 1961 to somewhat over 100 in Boston by 1965 and to around 35 in Cincinnati during the same time period. Approximately 25% of such motions were granted in Boston; about 40% in Cincinnati. Ban assumed that these records are reasonable indicators of compliance with *Mapp* and concluded that the exclusionary rule's efficacy was spotty in Boston and next to non-existent in Cincinnati. He also argued that the low incidence of motions to suppress made or granted is not indicative of high compliance with *Mapp,* but of lawyers' ignorance of or judicial defiance of the exclusionary rule. Moreover, in his interviews Ban found an almost universal hostility to the exclusionary rule, equally intense in both cities. He concluded that the Cincinnati political milieu—a tight-knit political machine which integrated the criminal justice mechanisms into its patronage and policy operations—permitted widespread disregard if not definance of the Supreme Court's ruling. This was contrasted with Boston's "every-man-for-himself" style of politics which rendered participants in the criminal justice system more cautious and compromising. In summary Ban found that the efficacy of the exclusionary rule varies somewhat with the local political culture. While indicating that *Mapp* will have some of its hypothesized impact in some localities, Ban's conclusion offers little succor to those who hope that the exclusionary rule will largely curtail unconstitutional searches.

The last research work to be noted was written by James Spiotto, who worked with Professor Oaks as a law student. An unabashed critic of the exclusionary rule, Spiotto focused on the incidence of motions to suppress filed and granted in Chicago at various times during the 1960's.[37] His major finding is that the number of motions filed has increased considerably in recent years in narcotics and weapons prosecutions and that motions granted have increased somewhat in the former type of case.[38] While recognizing that frivolous motions might explain some

[37] Spiotto, *supra* note 26. Some of his data were gathered by Oaks and used in his article, *supra* note 20, but Spiotto has added more recent data. The bulk of Spiotto's article is devoted to correlating characteristics of the defendant or the arrest situation with the frequency of motions to suppress and has no direct bearing on conclusions about the exclusionary rule's impact on police.

[38] Spiotto, *supra* note 26.

of the increase, he argued that "had the exclusionary rule deterred police from making illegal search and seizures, one might expect the number of motions to suppress to have declined . . . ."[39]

In addition to the systematic empirical research noted here, there is a considerable amount of what may broadly be termed anecdotal material about the operation of the exclusionary rule. Some of it, of course, is available to the average reader of daily newspapers. In the spring of 1973, newspapers reported the arrogant and highhanded raids by federal narcotics agents on sleeping and innocent householders in Collinsville, Illinois.[40] Subsequently the *New York Times* released a feature article recounting a dozen or so similar raids conducted by both federal and local authorities.[41] Occasionally accounts of similar dramatic or outrageous events find their way into publication.[42]

Those who wish to pursue it further can find descriptive material on violations of the fourth amendment in other places. Most notable, perhaps, is a book by Paul Chevigny entitled *Police Power*.[43] Chevigny, a New York City lawyer, devoted a section of the book to recounting numerous instances of illegal searches by New York police, especially those involving political dissidents and narcotics users.[44] Some of the violations are outrageous even to those quite unsympathetic with the exclusionary rule. As an example, Chevigny reported that at times the police enter premises illegally not to search for evidence but to "plant" it for use against their enemies. Other incidents of serious police misconduct are found in the recurring material written about police perjury routines in New York City. One such comment appears in a judicial opinion where New York Supreme Court Justice Irving Younger almost openly asserts that perjured police testimony in so-called "dropsy" cases is routine in his court.[45]

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[39] *Id.* at 248.

[40] N.Y. Times, Apr. 30, 1973, at 30, col. 1.

[41] N.Y. Times, June 25, 1973, at 1, col. 1.

[42] *See, e.g.*, F. WAY, LIBERTY IN THE BALANCE: CURRENT ISSUES IN CIVIL LIBERTIES at 124 (2d ed. 1967); Kuh, *The Mapp Case One Year After: An Appraisal of Its Impact in New York* in CRIMINAL JUSTICE ADMINISTRATION 261-62 (F. Remington ed. 1969).

[43] P. CHEVIGNY, POLICE POWER, POLICE ABUSES IN NEW YORK CITY (1969).

[44] *Id.* at 180-218.

[45] People v. McMurty, 314 N.Y.S.2d 194 (N.Y.C. Crim. Ct. 1970). *See also* Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596. "Dropsy" cases refer to those where the police testify that the defendant dropped or threw away

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Martin Garbus, another New York City attorney, makes a similar charge, indicating that while the police respected the exclusionary rule for a while after *Mapp*, they then "made a great discovery—lying."[46] Garbus further charged that the police have developed a "plain view" perjury routine, and quoted one judge as saying that to accept police testimony, "you have to . . . believe that nearly every person who lives in a ghetto apartment always keeps his doors open all the time."[47] Ghetto residents, of course, are thought to be both qualitatively and quantitatively the greatest victims of illegal searches and seizures. According to the Kerner Commission report, such behavior was a primary cause of resentment in general and lack of respect for the police in particular.[48] Indeed, in times of tension, the police have sometimes searched whole ghetto neighborhoods without the slightest guise of legality.[49]

Law enforcement officials themselves often make little pretense of complete adherence to the exclusionary rule. Sociologist Jerome Skolnick, after spending two years with the police in Oakland, narratively recounts police procedures of completely ignoring an arrestee's constitutional rights when the success of a subsequent prosecution was not a major concern. Inconveniences to the victim, such as making him spend money for bail, or a night in jail, were the main object of the police. Even where a successful prosecution was desired, the police viewed the exclusionary rule as an obstacle to be evaded in any manner possible rather than a reinforcement of citizens' constitutional liberties.[50] Occasionally high ranking police officials are candid in substance if not in detail about such behavior vis-a-vis the fourth amendment.[51]

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the contraband thus enabling the officer to obtain the evidence without a search. Critics charge that the police actually search the defendant and then lie about how the evidence was acquired. For statistical evidence about the increase in testimony about evidence obtained without a search *see* Barlow, *supra* note 31 and Comment, supra note 28. For further discussion, *see* Comment, *Police Perjury in Narcotics 'Dropsy' Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971).

[46] Garbus, *Police Perjury*, 8 CRIM. L. BULL. 363, 368 (1972).

[47] *Id.* at 372-73.

[48] REPORT OF NAT'L ADVISORY COMM. ON CIVIL DISORDERS 159-61 (1968).

[49] *See* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

[50] J. SKOLNICK, JUSTICE WITHOUT TRIAL 215-25 (1967).

[51] *See, e.g.*, Kamisar, *supra* note 13, at 442-43; LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 MO. L. REV. 391, 444 (1965); and Wilson, *supra* note 13, at 177.

In the wake of these studies and reports, there have been a number of demands for modification or abandonment of the exclusionary rule on the grounds that it is not working. Oaks, as noted above, has proposed its abolition.[52] Spiotto echoed this call and proposed that a tort remedy for violations of fourth amendment rights similar to that now prevailing in Canadian law and practice be substituted for the rule.[53] But the agitation for change has come from beyond the ranks of academicians who have researched the problem. Norval Morris and Gordon Hawkins, in their highly sensible and influential book *The Honest Politician's Guide to Crime Control,* argue that the rule should be abandoned.[54] And more recently, an increasing number of articles criticizing the rule have begun to appear in law reviews—some urge abolition outright while others would merely modify its rigidity; most offer an alternative for protecting fourth amendment rights, but some merely criticize.[55]

But the most spectacular attack on the exclusionary rule was mounted by Chief Justice Warren E. Burger. Dissenting at length in *Bivens v. Six Unknown Named Federal Narcotics Agents,*[56] the Chief Justice charged that the rule was "both conceptually sterile

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[52] Oaks, *supra* note 20, at 754-57.

[53] Spiotto, *The Search and Seizure Problem—The Canadian Tort Remedy and the U.S. Exclusionary Rule,* 1 J. POLICE SCI. & AD. 36 (1973). For the most part, such a remedy already exists in the United States. The failure of this remedy to deter illegal searches is what led to the adoption of the exclusionary rule. *See* Mapp v. Ohio, 367 U.S. 643, 651-53 (1961). Moreover, it is not at all clear that such a remedy is a practical deterrent in Canada. The author interviewed law enforcement officials and defense lawyers in Vancouver in the spring of 1973. While all parties conceded that the police violated common law rights to privacy in varying degrees, no one could remember a successful damage suit stemming from such a violation as having occurred in recent years.

[54] N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 100-01 (1969).

[55] *See, e.g.,* Cox, *The Decline of the Exclusionary Rule: An Alternative to Injustice,* 4 SW. L.J. 68 (1972); Davidow, *Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule,* 4 TEX. TECH. U.L. REV. 317 (1973); Roche, *A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeals Board,* 30 WASH. & LEE L. REV. 223 (1973); Satlin, *Constitutional Law: Search and Seizure: An Alternative to the Exclusionary Rule. Bivens v. Agents of Federal Bureau of Narcotics,* 24 JAG J. 255 (1972); Wingo, *Growing Disillusionment with the Exclusionary Rule,* 25 SW. L.J. 573 (1971); Wright, *Must the Criminal Go Free If the Constable Blunders?,* 50 TEX. L. REV. 736 (1972); and Comment, *supra* note 26. So far as the author can determine only one article appeared in a law review in 1972-73 defending the rule. *See* Bennett, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule,* 20 U.C.L.A.L. REV. 1129 (1973).

[56] 403 U.S. 388 (1971).

and practically ineffective in accomplishing its stated objective."[57] He added:

> Some clear demonstration of the benefits and effectiveness of the Exclusionary Rule is required to justify it in view of the high price it exacts from society—the release of countless guilty criminals. But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officers.[58]

Burger went on to discuss several reasons why he believed the exclusionary rule was ineffective, but these reasons can be reduced to two basic arguments: (1) "policemen do not have the time, inclination or training" to understand the exclusionary rule and more particularly, appellate court interpretations of it[59] and (2) the rule applies no direct sanction to the officer who engaged in the illegal search, and consequently has no educational value where it is most needed.[60] The Chief Justice further criticized the exclusionary rule as a "single, monolithic and drastic judicial response" applied to all violations of the fourth amendment whether flagrant or merely technical.[61] The rule, he argued, is designed to deter deliberate rather than inadvertant violations and it is irrational to sanction the two acts in the same way. Burger concluded that the rule should be abandoned in favor of an alternate scheme which protects fourth amendment rights and yet will permit the admission of trustworthy evidence obtained through illegal means, such as his suggestion of an administrative or quasi-administrative remedy against the government itself based on the doctrine of *respondeat superior*. Tri-

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[57] *Id.* at 415. *Bivens* did not turn on the exclusionary rule, but involved a suit for federal trespass damages. The majority held that the fourth amendment created a right to such damages even in the absence of statutory authorization. Ironically, Burger, who advocates the establishment of alternative means of deterring illegal searches, dissented from the Court's recognition (or creation) of one such alternative here.

[58] *Id.* at 416.

[59] *Id.* at 416-18.

[60] The policeman is too remote from the actual prosecution and trial to appreciate the ultimate result of his conduct, Burger argues. He adds that the exclusionary rule is premised on an assumption "that law enforcement is a monolothic governmental enterprise," whereas in fact prosecutors who may lose a case because of police misconduct have little control or direction over police procedures. *Id.* at 416.

[61] *Id.* at 418.

bunals staffed by lawyers, he argued, would be more likely to award damages for constiutional violations than would ordinary jurors and the problem of collection of a judgment against the government would be nonexistent.

The Chief Justice was not alone among his brethren in his disillusionment with the exclusionary rule. He was joined in general, if not in particular, by Justices Harlan and Blackmun.[62] The fact that Justice Harlan left the Supreme Court should not appreciably weaken this minority. Justice Hugo L. Black left the court along with Justice Harlan in 1971, and they were replaced by President Nixon's appointments of Justices Lewis F. Powell and William Rehnquist, who were described in the announcement of their selection as men who favored a restoration of the balance between "peace forces" and "criminal forces." It would not be unexpected if their attitude toward the exclusionary rule paralleled that of the first two Nixon appointees.[63]

Besides drawing fire from the Chief Justice, the exclusionary rule has come under attack from other influential quarters. In 1972, the American Law Institute [hereinafter referred to as ALI] proposed in its newly adopted *Model Code for Pre-Arraignment Procedure* that the rule be sharply modified.[64] Under the ALI proposal, motions to suppress evidence allegedly obtained in violation of the fourth amendment would be granted "only if the court finds that the violation (of the fourth amendment) upon which it is based was substantial."[65] In determining the question of substantiality, the *Model Code* calls for consideration of the following circumstances: (1) the importance of the particular

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[62] Justice Harlan did not dissent in *Bevins*, which did not involve the exclusionary rule directly. *See supra* note 56. In the companion case of Coolidge v. New Hampshire, 403 U.S. 443 (1971), decided the same day, however, Harlan in a concurring opinion said that "it is apparent that the law of search and seizure is due for an overhauling," *Id.* at 490, and specifically called upon the Court to overrule *Mapp v. Ohio*. Justice Blackmun, dissenting in *Coolidge*, made it clear that in his view "the Fourth Amendment supports no exclusionary rule." *Id.* at 510 (Blackmun, J., dissenting). He also dissented in *Bivens*.

[63] *See, e.g.*, Justice Rehnquist's opinion for the Court in United States v. Robinson, 94 S. Ct. 467 (1973) and Gustafson v. Florida, 94 S. Ct. 488 (1973), and Justice Powell's opinion for the Court in United States v. Calandra, 94 S. Ct. 613 (1974). *Calandra* constitutes the most serious denigration of the exclusionary rule since *Mapp* and may well be a portent of things to come. (The Court held by a 6-3 vote that the rule did not prohibit grand juries from making use of illegally seized material.)

[64] AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2, Comment (Official Draft No. 1, July 15, 1972).

[65] *Id.*

interest violated, (2) the extent of deviation from lawful conduct, (3) the extent to which the violation was willful, (4) the extent to which privacy was invaded, (5) the extent to which exclusion will tend to prevent future violations, (6) whether, but for the violation, the things seized would have been discovered, and (7) the extent to which the violation prejudices the defendant's ability to defend himself in the proceeding if the things seized are offered in evidence against him. In their commentary the drafters pointedly added, "substantial doubts have been expressed that the exclusionary rule is the sole or best means of enforcing the Fourth Amendment."[66]

Strong support for a similar stance developed in the American Bar Association [hereinafter ABA]. The ABA's Section on Judicial Administration adopted such a proposal charging that the "[R]ule [has] failed to achieve its stated purpose, but it has imposed substantial costs on society in the process."[67] In February, 1973, the issue was squarely faced at the meeting of the ABA's House of Delegates. Led by Professor Livingston Hall of Harvard, many prestigious personages in the legal profession, including then U.S. Solicitor General Erwin N. Griswold, argued that the rule should be modified so that only evidence obtained in substantial violation of the Constitution would be subject to suppression. After considerable debate, the House by a narrow 118-130 vote refused to adopt the resolution proposing modification.[68] Because the vote was so close and the controversy surrounding the rule is likely to grow more salient, another effort to put the ABA on record as favoring modification of the exclusionary rule is quite likely.

Senator Lloyd Bentsen introduced a bill in October, 1971, which would amend the federal criminal code to provide that motions to suppress evidence allegedly seized in violation of the fourth amendment not be granted "unless the court finds, as a matter of law, that the violation was substantial."[69] The criteria

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[66] *Id.*

[67] As quoted by Senator Bentsen in 119 CONG. REC. 2553 (daily ed. Feb. 15, 1973). The Judicial Conference of the 9th Circuit adopted a similar resolution.

[68] 41 U.S.L.W. 2438-39 (February 20, 1973). The resolution would have supported the Bentsen bill S. 881, 93 Cong., 1st Sess. (1971), (discussed below), which would virtually incorporate the *ALI Model Code* into federal law. The opposition was led by Samuel Dash and Barnabus Sears.

[69] S. 2657, 92d Cong., 1st Sess. §3505(a) (1971).

for determining substantiality were adopted almost verbatim from the ALI MODEL CODE. The measure was referred to the Judiciary Committee which did not report the bill out during the 92nd Congress. Senator Bentsen reintroduced his measure early in the first session of the 93rd Congress. In addition to the substantial violation provision, the new bill provided that the United States shall be liable for actual and punitive civil damages up to $25,000 "for an illegal search and seizure conducted in violation of the Constitution" by government employees.[70]

With the impetus of the ALI Code and the Bentsen bill, several other groups have come out in favor of abandoning or modifying the exclusionary rule. Perhaps the most formidable advocate of reform is the Department of Justice, which in the summer of 1972 announced that it was joining what it called "the strong movement to change the Supreme Court's doctrine that rules out the use of illegally seized evidence."[71] Other groups opposing the rule include the National Association of Attorneys-General, the National Association of District Attorneys, and the Judicial Conference for the Ninth Circuit.[72] Furthermore, some state supreme courts have openly criticized the rule or indicated thinly veiled hostility toward it.[73]

In short, it appears that the exclusionary rule is about to be overwhelmed in a rising crescendo of criticism and will suffer considerable modification at best, and complete abolition at worst. Everything seems to be running against it: empirical findings, the weight of commentary in legal journals, the positions of many prestigious national legal organizations—to say nothing of the attitudes of the Department of Justice and the Chief Justice of the United States. Currently the rule seems to have few vocal defenders who are not defensive and apologetic.[74] For a doctrine which was rather calmly accepted if not universally applauded

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[70] S. 881, 93d Cong., 1st Sess. § 2692(a) (1973). Senator Bentsen's remedy is in the same vein although administratively different than that proposed by Chief Justice Burger in his *Bivens* dissent. *See* Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

[71] N.Y. Times, Aug. 14, 1972, at 19, col. 1. The announcement was made by Assistant Attorney General Henry Peterson who is in charge of the Criminal Justice Division.

[72] 119 CONG. REC. 2553 (daily ed. Feb. 15, 1973).

[73] *See, e.g.*, Commonwealth v. Haefeli, 279 N.E.2d 915 (Mass. 1972); State v. Bisacci, 279 A.2d 675 (N.J. 1971).

[74] Even such groups as the American Civil Liberties Union have not laid stress on defending the rule or explaining its value to the public.

only a scant half a dozen years ago, the change has been drastic and the future of the rule is now looking rather bleak.

II

The premise of this article is that such a hasty abandonment of the exclusionary rule is unwise. The hue and cry that the rule is inefficacious is based on woefully insufficient and, perhaps more importantly, inappropriate data. It must be remembered that the imposition of the exclusionary rule upon the nation's criminal justice system constituted a fundamental policy change on the part of the Supreme Court. No one will deny that important policies should be subject to continuing reevaluation by considering feedback about their impact upon society. But the information upon which this reevaluation is based must be sufficient. It would be folly to base decisions to continue or abandon momentous policies on a story from city X or a single data tabulation from city Y. To do so would subordinate a broad and dispassionate consideration of justice to reactive attitudes to what could be dramatic but relatively rare phenomena; moreover, such excessive fluidity will give the law an undesirable "good for this day and this train only" quality.[75] Legal scholars in particular have an obligation to avoid poorly considered judgments. Obviously, it its difficult for us to make a complete and thorough appraisal of the impact of even the most important policies, but some extended investigation is invariably possible and should be pursued as far as our resources permit. Certainly, at any rate, given the importance of the policies underlying the exclusionary rule, the investigation should be carried out to the extent of feasibility.

In the 1972-73 academic year the author conducted research on a modest scale into the impact of the exclusionary rule on search and seizure behavior. Crime statistics were gathered on a widespread basis as opposed to Oaks' statistics for one city; questionnaires pertaining to search and seizure practices were sent to police departments, prosecutors and public defenders in over 130 cities, and interviews were conducted with such officials in ten cities. Much of this data is presented and discussed in Section III. The findings are not presumed to be conclusive; no

[75] Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

one can argue from them that it is manifestly obvious that the exclusionary rule is highly efficacious or that it is a total failure. Nevertheless in the author's judgment they do indicate that to a considerable extent the rule is producing the impact that was intended. Moreover, it is further submitted that there is good reason to believe that this impact is becoming more profound with time.

Meanwhile, the remainder of this section will explain why the evidence heretofore collected which bears on the exclusionary rule's efficacy is insufficient and largely inappropriate. Principally, there are three reasons why this existing evidence is largely inconclusive.

First, the evidence is insufficient because it is drawn from an insufficient sample. This applies almost by definition to anecdotal or participant observer experiences such as those of Chevigny or Skolnick. Less obviously this deficiency is also present in the more systematic empirical findings described in Section I—especially when they are considered independently. Oaks' study of arrest rates before and after *Mapp* focused on the single city of Cincinnati, which may or may not be typical. Indeed, there may be no "typical" reaction. It is worth recalling in this context that Ban's comparison of official reaction to *Mapp* in Cincinnati and Boston on other dimensions found a discernably lesser propensity for compliance in Cincinnati than in Boston. Likewise, Spiotto's finding of the high frequency with which motions to suppress are made and granted came only from the city of Chicago. Similar data which Oaks collected in Washington, D.C. showed drastically reduced frequencies.[76] Clearly Chicago's motion to suppress statistics cannot be adjudged typical without further comparative data. The Columbia Law School study, which supported a conclusion that the exclusionary rule was ignored by patrolmen and sometimes evaded through perjury by the Narcotics Bureau, occurred in New York City, which is not noted for its typicality in much of anything. Moreover, the authors of the Columbia study concluded that the rule was not completely inefficacious. While the Black and Reiss study of police-citizen interactions was based on observations from three

[76] Oaks, *supra* note 20, at 693-96.

cities, the focus on search and seizure was a minor one and their data are not given to very clear conclusions.

Because each of these findings has relied upon a different measure for determining the effectiveness of the exclusionary rule, we have analyzed each research finding separately to demonstrate the insufficiency of the data on any given measure. Of course when all the results are considered together (as must eventually be done), it might be fair to treat them as an indictment of the exclusionary rule's adequacy. But it is not sufficient for conviction. Because of the difficulty of collecting large amounts of data in this area, even this insufficiency might be overlooked if there were no other problems in arriving at a conclusion. We are not, however, without other difficulties.

A second and more serious problem is the fact that much of the evidence damning the exclusionary rule, as well as the perspective dictating its collection, is quite dated. Most of the research projects used *Mapp* as a demarcation line for a before and after approach. The Columbia Law School study largely relied upon data taken within a year before or after the decision, while Oaks' and Ban's data encompassed approximately four years prior to or following it. Obviously there are compelling reasons for collecting data immediately before and after a particular event for purposes of assessing its impact. To delay too long is risky; the particular type of data sought may disappear, become incomparable to that collected before the event, or become incapable of reconstruction. Worse yet, as time goes on other events will contaminate the influence of the subject event and weaken or fatally destroy the viability of conclusions about its impact. Nonetheless, in evaluating the effect of the exclusionary rule on the behavior of law enforcement personnel with an eye toward making the public policy decision of whether to retain, modify or abandon the rule, we must be interested in its present, rather than past, significance. Unless we can be reasonably sure that the impact of the exclusionary rule in the fall of 1961 or 1964 or at any other date in the past has persisted without great change until the present time, the value of such before and after studies focusing on a relatively short time period surrounding *Mapp* is limited indeed. In light of the author's research discussed in the next section, it is not at all clear that the behavior of law

enforcement officials in searching for and seizing evidence and contraband has remained unchanged since the early 1960's.

Beyond this, there is an even more important reason for treating such data gingerly. This is that before-after type studies are based on the theoretical expectation that if behavior is going to change in response to a given stimuli, it will change immediately after the event. But experience often belies this theory, particularly in the case when the sudden imposition of a new policy requires fundamental readjustments in patterns of thinking and habits of behavior. Consequently, changes—if they occur at all—will occur slowly rather than instantaneously. This is especially true of Supreme Court decisions where the communications and control mechanisms between the Court and the recipients of the policy are quite tenuous. Information about high court decisions is often poorly disseminated, easily misunderstood, or ignored in deference to habit and convenience.[77] Eventually, however, many Supreme Court policies have succeeded in altering the behavior of those to whom they were addressed.[78] This is not to say that this is necessarily the case with the exclusionary rule, but it is to say that we cannot willy-nilly extrapolate findings from the early 1960's to the early 1970's.

There is a third reason for caution in regard to the applicability of these older data. This is the problem that before-after studies rest on the assumption that the stimulus expected to cause change is a singular concrete event. In one way, of course, the *Mapp* decision conforms to this assumption. Yet in another way appearances of a singular event are deceiving. While *Mapp* forbade the introduction of illegally seized evidence in criminal cases, the decision did not say what constituted an illegal seizure of evidence. This was determined in piecemeal pronouncements later in the decade—sometimes much later.[79] Consequently, in

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[77] *See* N. MILNER, THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF MIRANDA (1971), and Wasby, *The Communication of the Supreme Court's Criminal Procedure Decisions: A Preliminary Mapping*, 18 VILL. L. REV. 1086 (1973).

[78] Brown v. Board of Educ., 347 U.S. 483 (1954) is the most salient example. This is discussed further in Section IV, *infra*.

[79] Gustafson v. Florida, 94 S. Ct. 488 (1973); United States v. Robinson, 94 S. Ct. 467 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Whitley v. Warden, 401 U.S. 560 (1971); Chambers v. Moroney, 399 U.S. 42 (1970); Vale v. Louisiana, 399 U.S. 30 (1970); Chimel v. California, 395 U.S. 752 (1969); Spinelli v. United States, 393 U.S. 410 (1969); Bumper v. North Carolina, 391 U.S.

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the first few years following *Mapp*, the states had varied and often quite loose definitions about what constituted an illegal search (especially in non-exclusionary rule states). Quite often it was not very difficult for state and local officials to find many ongoing practices congruent with these definitions. By the early 1970's, of course, the states had lost much of their flexibility in defining an illegal search so that search and seizure behavior thought acceptable in the early 1960's was often unacceptable a decade later.[80] Given the differences in standards between the two periods, there is much danger in considering findings from the former relevant to the latter period.

A third weakness in the existing evidence relates not as much to the findings in the previously discussed material *per se* as to the *perspective* in which the research was undertaken and the findings featured. Most of the researchers have either sought out evidence of the exclusionary rule's failure or upon finding it they have spotlighted it in their discussions. In varying degrees this is certainly the case with Oaks, Spiotto, Ban and the Columbia Law School study. And clearly the whole point of the illustrations of Chevigny, Garbus and Skolnick was to dramatize the illegal searches and evasive tactics practiced by the police. Of course, such a perspective is not unnatural. Normally compliance with a law or court decision is considered routine while non-compliance is dramatic and unexpected. The point is, however, that in cases like the exclusionary rule, we might well adopt an opposite perspective—or at least some researchers should do so. For, as noted earlier, in situations such as this immediate compliance is not the norm; old habits and local policies are quite likely to continue relatively unchanged for some time. Despite this, nobody has searched for evidence or illustrations of compliance with the fourth

(Footnote continued from preceding page)
543 (1968); Sibron v. New York, 392 U.S. 40 (1968); Terry v. Ohio, 392 U.S. 1 (1967); McCray v. Illinois, 386 U.S. 300 (1967); Cooper v. California, 386 U.S. 58 (1967); United States v. Ventresca, 380 U.S. 102 (1965); Aguilar v. Texas, 378 U.S. 102 (1965); Stoner v. California, 376 U.S. 483 (1964); and Ker v. California, 374 U.S. 23 (1963).

[80] Cases such as Gustafson v. Florida, 94 S.Ct, 488 (1973); Robinson v. United States, 94 S.Ct. 467 (1973); Chambers v. Moroney, 399 U.S. 42 (1970); Terry v. Ohio, 387 U.S. 929 (1967); McCray v. Illinois, 386 U.S. 300 (1967); and Cooper v. California, 386 U.S. 48 (1967) held that search procedures which many state and local officials had refused to apply (officially at least) in the belief that they were illegal were constitutional. Some state supreme courts had held them illegal. *See, e.g.*, State v. Elkins, 422 P.2d 250 (Ore. 1966); Ellis v. State, 364 S.W.2d 925 (Tenn. 1963); and Barnes v. State, 130 N.W.2d 264 (Wisc. 1964).

amendment as a result of the exclusionary rule. Moreover, when compliance is found, it is not given prominence but rather is treated with all the excitement of finding an old shoe. In short, at least some researchers should have turned the perspective upside down; non-compliance should have been expected as routine while significant changes in police search and seizure behavior should have been considered unusual and noteworthy.

Hypothetically, it can be argued that police compliance with the goals enunciated in *Mapp* increased significantly relative to the 1950's after the decision was handed down in 1961, but, of course, did not attain anything like full compliance with the fourth amendment. Because existing research had been premised upon the conventional perspective that compliance was the norm, therefore it could not gainsay this argument. Furthermore, it can be argued hypothetically that by the early 1970's, police behavior was even more consistent with the goals of *Mapp*. Perhaps something approaching full compliance with the fourth amendment is a likely possibility in the not too distant future. It is with this reversed perspective and hypothetical argument in mind that the author conducted his research.

III

This section describes some significant findings of the author's research into the impact and efficacy of the exclusionary rule. The scope of the study was broad and this is not a comprehensive report of the results.[81] The emphasis here is quantitative; limitations of time and space preclude an extensive analysis of the more qualitative aspects of the research, such as interviews with

[81] The data came from the following sources: (1) compilation of arrest statistics from the annual police reports or FBI figures for about 40 cities, (2) collation of pertinent material from police operating manuals, bulletins or training manuals in about 40 cities, (3) interviews with police officials, prosecutors and public defenders in ten large cities, and (4) questionnaires sent to and returned by police departments, prosecutors' offices and public defenders' offices in all American cities over 100,000 population (except five used for pre-test purposes). Return rates on the questionnaire were: Police departments, 62 out of 131 or 47.4%; prosecutors, 44 out of 125 or 35.2%; defenders, 33 out of 82 or 40.2%. (The smaller number of public defender recipients is due to the fact that not all cities have such organizations.)

Not all of the data gathered bears directly on the question of the exclusionary rule's efficacy. Some of it focuses upon such matters as communications of court decisions within the criminal justice system, relationships between police, prosecutors, and defense attorneys, and officials' attitudes toward the exclusionary rule and criminal procedure generally.

police officials and substantial changes in police training. The author believes, however, that the thrust of the quantitative findings herein reported will not be belied or radically modified by such material. Four types of data are reported. The first is an expansion of the type of data Oaks collected for Cincinnati. The second involves either hard figures or officials' estimates of the number of search warrants issued at certain periods of time in large American cities. The third focuses on recent changes in police search and seizure policies in such cities, while the fourth involves participants' estimates of the frequency of pretrial disposition by dropping charges by police or prosecutor and of motions granted to suppress evidence in search and seizure types of crimes in such cities.

A. *Arrest in Search-and-Seizure Types of Crimes*

Oaks, it will be recalled, compiled arrest statistics from Cincinnati for the 1956-67 period and concluded that the imposition of the exclusionary rule in 1961 had virtually no effect on the propensity of the police to make arrests for narcotics and weapons offenses, although he conceded some likelihood that the decision reduced the number of gambling arrests. It was argued in Section II, however, that data from one city was an insufficient base upon which to build a generalization about the efficacy of the exclusionary rule. Consequently, we have gathered similar data for 14 cities which did not have the rule prior to *Mapp*.[82] In addition to the

[82] The data were collected from annual police department reports on file at the Wisconsin Criminal Justice Library in Madison. This library has one of the most extensive collections of such reports in the nation. Reports from about 20 large cities in non-exclusionary rule states prior to 1961 are located there. However, several missing reports or drastic changes in the report formats rendered the data from some of them too incomplete for use here. (Some missing data were obtained by directly contacting the relevant police department, but such requests were not always answered.) In five of the 14 cities used here, there are one or two missing reports, but they occur at times not likely to impair seriously an analysis of trends.

Statistics were collected from 1956-66 inclusively. (The 1967 figures were excluded largely because narcotics arrests began rising rapidly in the wake of their large scale use by middle class youths.) The particular nature of the charges in any given arrest category may vary slightly from city to city, but it should be emphasized that we are looking at changes across time in a particular city. We are *not* making comparisons between cities or aggregating findings.

In reporting his Cincinnati data, Oaks also recorded convictions. These figures do not often appear in police reports and are much more difficult to obtain. Although such data were found for five of the cities, they are not reported here. In Oaks' study, the conviction figures did not significantly add to or detract from his arguments, just as those which we have obtained do not do so here.

three crimes Oaks used, we have recorded arrests for possessing or receiving stolen property, an offense for which evidence is often obtained by search and seizure.

The data show that the Cincinnati experience relied upon by Oaks is not necessarily typical. Contrast the arrests there (shown in Figure 1) with those in Baltimore (shown in Figure 2) or those in Buffalo (shown in Figure 3). In Baltimore, the decreases in arrests following *Mapp* were both dramatically sudden and truly spectacular; one would be hard pressed to attribute them in large measure to anything but the imposition of the exclusionary rule. Even in 1965 the arrest rates for all crimes except gambling were significantly less than they were in 1960 (and for gambling they were significantly lower in 1962-64). In Buffalo the decreases in arrests were not so spectacular but were quite noticeable. More importantly, it is apparent that a monotonic increase in arrests for all crimes except weapons offenses was halted in 1962 (except for gambling where the decline began in 1963). By 1965, arrest figures for two crimes were considerably lower than those for 1960, and the arrests in the other two were only slightly above those in 1960.[83] The conclusion that police behavior in Buffalo was affected by the imposition of the exclusionary rule is certainly tenable.

Figure 1
Arrests in Cincinnati, 1956-67

	Stolen Property	*Weapons*	*Narcotics*	*Gambling*
1956	180	382	97	894
1957	169	380	84	879
1958	231	337	77	891
1959	198	216	59	699
1960	235	237	70	858
1961	328	220	52	586
1962	313	189	72	369
1963	340	202	53	500
1964	381	194	54	385
1965	326	185	45	296
1966	251	219	45	408
1967	390	270	82	204

Source: Cincinnati Police Department, *Annual Reports.*

[83] Except for the large increase in narcotics arrests, the same would be true for the 1966 arrests.

Figure 2
Arrests in Baltimore, 1956-65

	Stolen Property	*Weapons*	*Narcotics*	*Gambling*
1956	166	1341	324	434
1957	144	1324	239	512
1958	241	1343	435	849
1959	350	1452	239	577
1960	488	1559	502	623
1961	294	936	221	345
1962	274	1031	275	467
1963	163	1120	314	328
1964	171	1326	368	192
1965	168	1030	378	996

Source: Baltimore Police Department, *Annual Reports*. Data for 1966 are unavailable.

Figure 3
Arrests in Buffalo, 1956-66

	Stolen Property	*Weapons*	*Narcotics*	*Gambling*
1956	41	148	76	91
1957	46	137	62	90
1958	68	152	68	93
1959	67	108	87	126
1960	72	125	112	171
.....	....	.....	.....	.....
1962	57	97	69	222
1963	44	94	110	137
1964	65	113	80	154
1965	81	127	83	102
1966	81	147	173	92

Source: Buffalo Police Department, *Annual Reports*. Data for 1961 are unavailable.

It should be understood that Baltimore and Buffalo are not being paraded as "typical." Baltimore is probably an extreme case and is illustrated to counter Oaks' generalizations about the efficacy of the exclusionary rule from the presentation of Cincinnati's arrest figures. Buffalo is less extreme, but not necessarily typical. Indeed, it is not at all clear that there is a typical response to the exclusionary rule. Rather, if the arrest figures we have gathered are indicative, response patterns vary considerably from city to city. Moreover, there is variation from crime to crime: arrests for gambling and weapons offenses seem to have

been frequently affected, but stolen property and narcotics arrest rates were impaired in fewer locales. Space precludes setting forth the arrest figures for each of the 14 cities here, but Figure 4 gives a summary account of their relationship to the imposition of the exclusionary rule. A look at it shows that only four other cities, Boston, Dayton, New Orleans and New York have the rather minimal response pattern that Cincinnati has. At the other end of the spectrum, *Mapp* apparently had a significant impact in Baltimore and Buffalo (as we have seen), as well as Philadelphia and perhaps Akron. The remaining five cities show differentiated results; figures for some crimes lend support to arguments for the rule's efficacy while others support the opposite contention.

Figure 4

Relationship Between Arrest Rates and Imposition of the Exclusionary Rule in 14 Cities

	Stolen Property	*Weapons*	*Narcotics*	*Gambling*
Akron	*	A	*	A
Atlanta	X	C	X	A
Baltimore	A	A	A	C
Boston	X	X	X	A
Buffalo	B	C	B	A
Cincinnati	X	X	X	A
Cleveland	B	X	X	C
Columbus (Ohio)	X	A	X	A
Dayton	X	X	*	X
Denver	C	X	X	C
Newark	X	A	C	A
New Orleans	X	A	X	X
New York	X	C	X	X
Philadelphia	A	A	X	A

Key

X = No clear effect. Includes declines in arrest rates where trend began prior to 1961.

A = Permanent decrease. Arrest rates following *Mapp* average at least 10% less than those before *Mapp*.

B = Levelling off. Arrest rates increase in years preceding 1961 and remain steady (perhaps increasing slightly by 1965 or 1966) thereafter.

C = Impermanent decrease. A decline of 20% or more in arrest rates in 1962 or 1963 and lasting at least two years, but with an increase substantially above the pre-*Mapp* rates thereafter.

* = Indeterminate. Too few arrests for analysis or change in reporting format makes comparison impossible.

This discussion should not be read as an argument that a leveling-off or decline in arrest rates was necessarily caused by imposition of the exclusionary rule. Obviously, arrest rates are affected by changes in local crime situations or law enforcement priorities. Gambling in particular is subject to such factors. (Gambling arrests declined, usually rather substantially in 11 of the 14 cities, however, and it is unlikely that such a widespread phenomenon was the chance product of entirely local factors.) As indicated in Section II, we could not fairly expect police behavior to change radically in the years immediately following *Mapp*, and a before and after type of comparison using arrest rates is not particularly adequate for our purposes. Consequently, our argument is negative rather than positive; we are maintaining that the evidence from the 14 cities certainly does not support a conclusion that the exclusionary rule had no impact upon arrests in search-and-seizure type crimes in the years following its imposition.

B. *Numbers of Search Warrants Issued*

Another way to measure the exclusionary rule's effectiveness is to look at the changes, if any, which occurred in police use of search warrants following *Mapp*. If their employment of search warrants does not increase or increases only slightly, it seems likely that either (1) the police have never been engaging in illegal searches or (2) they are continuing to engage in illegal searches at about the same rate as before the imposition of the rule. Conversely, if the use of search warrants increases considerably, it is likely that either (1) the police formerly never engaged in any significant number of searches and are now doing so or (2) that the police are now engaging in a greater proportion of constitutional searches at the expense of what had heretofore been illegal ones.[84]

[84] A third alternative is logically possible to explain an increase in search warrants: namely, a drastic increase in all types of searches (legal and illegal) following *Mapp*. However, there is no reason to expect such a sudden change in policy and no evidence to suggest that it occurred.

The issuance of a search warrant to the police is indicative of their effort to follow constitutionally prescribed patterns. But it does not necessarily mean that the warrant is constitutionally valid. Thus a fourth alternative is also possible: namely, that large numbers of warrants are issued but are later voided. While this may have been a real possibility in a few localities, the questionnaire data and interviews make it clear that this was not a general occurrence.

Of course, the above alternatives do not constitute an absolute either-or choice. It is possible and in some cases likely that both possibilities contribute to the situation. But it seems clear that the police were engaged in relatively frequent illegal searches when there was no exclusionary rule. Everyone writing on the question assumes this; certainly no one has argued to the contrary on any kind of aggregate basis.[85] It is likely then that both alternatives labeled (1) postulating low levels of illegal search activity prior to *Mapp*, are not very viable. This leaves us with the alternatives labeled (2). One of them supports a conclusion that the exclusionary rule is efficacious while the other suggests that it is not. In order to draw a conclusion, we need to obtain data on the issuance of search warrants.

Data such as this, however, are not easily obtained. This is particularly the case when we are seeking data for a decade or more in the past. Police and judicial clerks simply did not compile such statistics. One is left to making his own compilations from the scattered case files, relying on the few printed estimates published at that time or on current estimates of officials who served at that time.

The evidence, such as it is, indicates that search warrants were a rare phenomenon indeed prior to 1961 in cities where no exclusionary rule prevailed. In Minneapolis, no search warrants at all were issued over several years time in the 1950's,[86] while in other sizeable cities the number issued was amazingly low.[87] The most comprehensive figures are those laboriously compiled by Ban in his study of the exclusionary rule in Cincinnati and Boston.[88] His data (reprinted in Figure 5) make it obvious that search warrants were almost non-existent in the former city and used only modestly in the latter. It is also obvious that their use increased dramatically in both cities immediately following *Mapp*.

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[85] Acknowledgement of widespread illegal searches by the police prior to *Mapp* can be found in statements of various law enforcement officials collated in Kamisar, *supra* note 13. *See also* Murphy, *The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966).

[86] Kamisar, *supra* note 13, at 441. *See also* Linse, Due Process in Practice: A Study of Police Procedures in Minneapolis, 1966 (unpublished Ph.D. dissertation in University of Minnesota library).

[87] Weinstein, *supra* note 27, at 177, indicates that less than 25 search warrants a year were issued in Denver before *Mapp*. Murphy, *supra* note 85, at 941, indicates that New York City police "rarely used" search warrants prior to *Mapp*. A few of the author's interviewees recalled similarly low figures for their own cities.

[88] Ban, *supra* note 36.

Figure 5
Search Warrants Obtained by Police in Cincinnati and Boston
1958-65

	Cincinnati	*Boston*
1958	3	176
1959	0	186
1960	7	267
1961 (Jan.-May)	3	150
1961 (June-Dec.)	25	538
1962	38	834
1963	100	940
1964	113	574
1965	89	560

Source: Ban, *The Impact of Mapp v. Ohio on Police Behavior*, *supra* note 36, at 10.

An even more dramatic upswing in police use of search warrants was recorded in New York City,[89] and estimates of sizeable increases have come from other cities.[90] Nonetheless, it must be pointed out that in some populous cities police reliance on search warrants remained disproportionately small. With only about 100 warrants issued annually in Cincinnati in the mid-1960's, their use cannot be accounted as common there. It seems that a similarly low figure prevailed in Los Angeles.[91] To pose a conclusion on rather sparse data then, it would appear that following *Mapp* the police generally engaged in a greater proportion of constitutional searches at the expense of what had heretofore been illegal ones, but the increase in the proportion varied considerably.[92]

As discussed in Section II, we are more interested in the exclusionary rule's impact today than ten years ago. This per-

[89] Murphy, *supra* note 85, at 941.
[90] Kamisar, *supra* note 13; Weinstein, *supra* note 27; Linse, *supra* note 86.
[91] Los Angeles began keeping exact search warrant statistics in 1968, when 207 were issued. Although data are not available from earlier years, it does not seem likely that a significantly larger number of search warrants would have been issued then. (Ostensibly, California was not affected by the *Mapp* decision, but the state had adopted the exclusionary rule only a few years prior to *Mapp*, in People v. Cahan, 282 P.2d 905 (Cal. 1955).
[92] The key word here is proportion. We cannot necessarily conclude that the police are engaged in any fewer illegal searches.

spective makes it worthwhile to obtain recent data on police use of search warrants. Here we are aided by the fact that a few cities have recently begun compiling exact figures; the author has obtained half a dozen such compilations. However, to obtain a broader base of information, police and prosecutorial respondents to the author's questionnaire were asked to estimate the number of search warrants sought or issued annually.[93] These ranged from a low of 30 in Lincoln, Nebraska, to 3,500 in Chicago.[94] The average for 80 cities responding was 440.[95] The average population for these same cities is 391,000. Thus as a rough rule of thumb the average police department in a metropolitan area seeks 1.1 search warrants a year for every 1,000 persons. Clearly, this is a significant increase from the pre-*Mapp* days.[96] Of course averages hide disparities and our data make it clear that some police departments were much more frequent in their use of search warrants than others. In Mobile, Alabama, a

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[93] The exact wording was "Approximately how many search warrants per year does your department request these days?" for police respondents, and "Approximately how many search warrants per year are issued in this jurisdiction these days?" for prosecutorial respondents.

[94] The New York City police did not answer this question, but it appears that they use in excess of 3,000 search warrants annually. Murphy, *supra* note 85, says that almost 18,000 were used by the police in the five year period of 1961-66.

[95] For 17 of the 80 cities, answers to this query were received from both the police and prosecutor's office. Prosecutors are usually elected on a county-wide basis and thus often serve a population considerably larger than a central city. Thus it is not surprising that in 11 of the cities, the prosecutors' estimates were higher than those of the police; the reverse was true in four cases and in two the estimates coincided exactly. In most localities, however, it seems that most search warrant requests come from the central city. Consequently, we can use these 17 cities as something of a check on the accuracy of the respondents' estimates. In 12 of them the two were reasonably comparable, *i.e.*, the prosecutors' estimates, if greater, did not exceed that of the police by more than 50% and, if smaller, were at least 75% of the police estimate. In three cities where the prosecutors' estimates exceeded those of the police by more than 50%, telephone interviews revealed that this was most likely the result of frequent use of search warrants by other law enforcement agencies (*e.g.*, state police or alcoholic beverage units). In two cities where the prosecutors' estimates were both around 30% of that of the police, no explanations of the disparity were available. On the whole, it seems that the respondents' estimates are rough reflections of reality. Like all approximations, none can be considered perfectly accurate, and a few are perhaps quite far off base. Because it is the police use of search warrants that primarily interests us, their estimates are used for these 17 cities here and in subsequent discussions.

[96] A check was made against the possibility that these figures reflect differences between those cities which had the exclusionary rule prior to 1961 and those which did not. This is not the case: the average number of warrants for pre-Mapp exclusionary rule cities is 455; for non-exclusionary rule cities is 428. Both groups have an approximate ratio of 1.1 search warrants per 1,000 persons. It might be noted that no evidence is available on the frequency with which search warrants were used in cities having the exclusionary rule before 1961. An inference that it was not very frequent can be drawn from Katz, *supra* note 27.

town of less than 200,000, the police sought 1,308 search warrants in 1972, or well over six for every 1,000 persons. By contrast, in Kansas City, Missouri, with nearly 500,000 people, the police used only 120 search warrants, or about 0.25 for every 1,000 persons. A few other cities approached these extremes but most were bunched around the average. To some extent differences in the use of search warrants might reflect such local factors as the incidence of crime, the peculiarities of state laws and the propensity of judges to issue warrants in marginal requests.[97] But most likely the disparity also reflects the degree to which the police and other law enforcement agencies have altered their behavior in response to the imposition of the exclusionary rule and subsequent decisions governing the admissibility of evidence.

To determine how the current use of search warrants relates to the use of warrants in prior years, the respondents were also asked: "How does this (figure) compare with the number sought five or six years ago?" It was a closed-answer question with five alternatives: (1) It is a decrease, (2) No great change, (3) It is 50% to 100% greater, (4) It is 100% to 200% greater, and (5) It is more than 200% greater. This comparison will give us some perspective on any recent trends in police use of search warrants without resorting to estimates that predate the great upsurge in the use of narcotics. It will also give us some indication of the impact of the Supreme Court's 1969 decision in *Chimel v. California*.[98] In some ways, *Chimel* is appropriate for a before-and-after type analysis. There the Court held that searches made contemporaneous with an arrest were constitutionally restricted to areas immediately under the arrestee's control (*i.e.*, clothing or areas within arm reach). Prior to *Chimel*, wide-ranging searches contemporaneous with an arrest were frequently carried out in some localities and often arrests were timed so as to enable officers to search a suspect's premises or automobile. *Chimel* had the effect of closing an important gap in the search and seizure law which enabled the police to conduct legally broad searches for evidence or contraband without fear of the consequences of the

[97] There was some regional variation in the use of search warrants. Southern police departments relied on them to a much greater extent than those in the Midwest. Interview answers and questionnaire comments indicated that some of this was attributable to the more restrictive alcoholic beverage control laws in the South.

[98] 395 U.S. 752 (1969).

exclusionary rule. Many law enforcement officials denounced *Chimel,* asserting that it would cause the police grievous inconvenience and allow more criminals to escape conviction.[99] Several legal writers predicted significant changes in police search practices (including a greater use of search warrants) if they were to abide by the decision.[100]

The comparison of present estimates with those of 1967-68 is shown in Figure 6.[101] Quite clearly the use of search warrants has increased greatly over this short period of time. Virtually four-fifths of the cities reported a rise of 50% to 100% or more,

Figure 6

Changes in Use of Search Warrants Between 1967-68 and 1973

1973 Figure is:	*No. of Cities*	
A Decrease	2	(3%)
No Great Change	13	(18%)
50% to 100% Greater	33	(45%)
100% to 200% Greater	12	(16%)
200% or Greater	14	(19%)
	74	(101%)*

and for nearly one-fifth of them the increase was a dramatic 200% or more. Nor are such estimates the products of respondents' failing memories; exact records show an increase in Detroit from 45 in 1968 to 1,657 in 1972; in Los Angeles from 207 in 1968 to 999 in 1972; and in St. Paul from 55 in 1967 to 118 in 1972.[102] Needless to say, the crime rate has not increased during the reported years at a rate that would even approach this increase. Of course, while we have deliberately chosen a period

[99] For such comments, *see* Carrington, *Chimel v. California—A Police Response,* 45 NOTRE DAME LAW 559 (1970).

[100] *Id. See also, e.g.,* Burnett, *Search Warrants: Impact and Application of Chimel and Spinelli and Related Problems,* 29 FED. BAR. J. 170 (1970); Note, *Police Practices and Threatened Destruction of Tangible Evidence,* 84 HARV. L. REV. 1465 (1971); Note, *Searches and Seizures: The Chimel Decision and Police Procedures,* 6 CALIF. WESTERN L. REV. 164 (1969).

[101] There were responses from only 74 of the 80 cities in which the 1973 search warrant figures were estimated.

* Total greater than 100% due to rounding.

[102] Sources for these figures are: Detroit, letter from Richard J. Padzieski, Deputy Chief Prosecuting Attorney for Wayne County, June 11, 1973; Los Angeles, letter from Joseph L. Carr, Director, Los Angeles County District Attorney's Office, June 8, 1973; St. Paul, conversation with "Bud" Hudson, Clerk of the Municipal Court, May 23, 1973. The Detroit figures reflect only those search warrants sought

(Continued on next page)

which predated *Chimel* and post-dated the beginning of the "narcotics explosion" among middle class youths, narcotics offenses have risen considerably since that time.[103] Consequently, we cannot confidently attribute the increased use of search warrants entirely or even primarily to police reaction to the exclusionary rule.

While an objective determination of causality is impossible, we did ask the respondents what percentage of the increase could be attributed to: (1) increases in narcotics offenses, (2) the effect of one or more judicial rulings, (3) more and better trained police officers, and (4) other causes. The answers[104] gave the narcotics upsurge the lion's share of the credit; the mean percentage of attribution was 55%. Judicial rulings had a mean attribution of 24%; more police and better training, 22%; and other, 4%. These means, however, hide a wide range of responses. The spectrum of attribution to judicial rulings is shown in Figure 7, which shows a clear tendency for the impact of such rulings to vary drastically from city to city. In about one-third of the

Figure 7

Percentage of Responsibility for Increased Search Warrants Attributed to Judicial Rulings

Percentage	*Number of Cities Responding*	
Less than 10%	17	(35%)
10% - 24%	7	(14%)
25% - 49%	14	(29%)
50% - 74%	6	(12%)
75% - 100%	5	(10%)
	49	(100%)

(Footnote continued from preceding page)
with the cooperation of the Wayne County prosecutor's office. In conversation Mr. Padzieski estimated that this covered about 90% of the warrants issued in Wayne County in 1972 but only about 50% to 60% in 1968. Even with this adjustment, however, Detroit's increase remains startling. In fairness, it should be noted that Mobile, which has also kept search warrant records for some years, recorded no great change, going from 1,208 in 1967 to 1,308 in 1972 (letter from Lt. William H. Mingus, Mobile Police Dept., May 24, 1973). As noted in the text, however, Mobile has one of the highest search warrant to population ratios in the nation. Subsequent to 1968 several other cities have begun compiling search warrant statistics.

[103] In 1968, there were 2,234.8 major crimes per 100,000 people in the United States; in 1972 the rate was 2,829.5/100,000, an increase of 26.6%. Narcotics arrests went from 111.6/100,000 to 269.1/100,000, an increase of 135.8%. (Figures are taken from the *Uniform Crime Reports for the United States*).

[104] In 15 of the 74 cities, there was no increase (see Figure 6). There were 49 valid responses from the 59 cities where an increase was reported.

cities court decisions are seen as having little if any relationship to the recent increase in search warrants whereas in about one-quarter of them major if not total responsibility is attributed to judicial action. This variation seems to reflect the differential impact of the *Chimel* decision. In cities attributing upwards of 50% of the increase to judicial rulings, *Chimel* was almost universally given the credit (or blame), even though the respondents were not requested to name any particular decision. Explanations on the questionnaire or from subsequent interviews revealed that at least some of these police departments had frequently used arrests as an excuse, or at least an opportunity, to conduct broad ranging searches and that *Chimel* had caused them to resort to search warrants in much greater numbers. A disproportionate number of these estimated an increase of over 200% in the use of warrants since 1967-68. On the other hand, a greater number of police departments apparently did not often rely on this device as a vehicle for conducting searches and thus attributed their often more modest warrant increases to rising narcotics offenses or other causes.

As an explanatory factor, the narcotics phenomenon is not mutually exclusive to the exclusionary rule. While increased use of narcotics is undoubtedly the immediate cause behind the increase in the use of search warrants in a great many cities, it can be asked: why do the police seek search warrants in narcotics cases rather than operating without them? In good part at least the answer lies with judicial decisions governing the legality of searches and the rule excluding illegally seized material from evidence. In other words, the narcotics phenomenon explains to a large extent the tremendous increase in police use of search warrants during the past half dozen years, but it does not explain police decisions to seek search warrants rather than operate without them. The exclusionary rule explains this.

In summary, there clearly has been a significant increase in the use of search warrants by police in comparison to the period prior to *Mapp*. It is commonly conceded that (at least in non-exclusionary rule areas) search warrants were a rarity and that the police conducted numerous illegal searches before the exclusionary rule was applied to the states in *Mapp*. In contrast to this, metropolitan police now use roughly 1.1 search warrants

Figure 8

Changes in Police Department Policies Regarding Searches of Premises Contemporaneous with Arrest

Year	*Policy*					
	Only Area Under Suspect's Control	*Entire Premises Upon Suspicion*	*Routinely Search Entire Premises*	*Other*	*No Clear Policy*	*Total*
1967-68	15 (28%)	26 (48%)	7 (13%)	1 (2%)	5 (9%)	54 (100%)
1973	49 (85%)	7 (12%)	0	1 (2%)	1 (2%)	58 (101%)

a year for every 1,000 persons. In some places the increase seems to have come in the years following *Mapp* while in others it has come more recently as a result of *Chimel* and the upsurge in narcotics use. Nevertheless, in all but a few cities, the increase is now of such magnitude that we can believe that a greater proportion of current police searches follow constitutional guidelines than was the case before the imposition of the exclusionary rule.

C. *Changes in Police Search and Seizure Policies*

The impact of the exclusionary rule as tightened by the constraints of *Chimel* can be measured in another way, namely by noting the extent police department policies regarding search and seizure incident to arrest have changed since 1967-68. It is recognized that due to the fact that statements of policy often do not represent actual behavior, this could be a weaker measure of the effectiveness of the rule. No doubt such statements were sometimes unduly generalized to conform with the sparsely worded questionnaire alternatives. In addition, some policies could be misreported so that they will appear to be in conformity with the law. Even when accurately reported, it does not follow that a policy reflects behavior in the field. Nonetheless, such information is useful. Some departments *did* admit to policies apparently or arguably in opposition to United States Supreme Court decisions. Moreover, while field behavior may not always conform to headquarters policy, it can be argued that police officers as members of a paramilitary organization do not lightly disregard directives from their superiors. Most importantly, a focus on policy rather than on a quantitative measure of behavior may enable us to separate *Chimel's* impact from that of the narcotics phenomenon. The latter is clearly not going to produce more restrictive search and seizure policies.

Figure 8 reveals that a great change in police department policies regarding search of premises contemporaneous with arrest has occurred over the last six years. Since 1969 the first alternative, "searches are limited to area immediately under the suspect's control," is the only specific policy which is constitutionally permissible.[105] The rapidity in adoption of this policy

[105] The question read: "Which of the following best describes department policy regarding searches of premises contemporaneous with an arrest?" The
(Continued on next page)

has been dramatic—from 28% in 1967-68 to 85% currently. Indeed, in answering a follow-up question, 14 departments specifically cited *Chimel* as the reason behind their policy change and another 24 cited court decisions generally without mentioning a specific case. No non-judicial explanation for the change in policy was given by any department.

The degree to which *Chimel* has affected automobile search policies is less clear. The law of search and seizure has often recognized the need for different procedures regarding automobiles.[106] *Chimel* dealt with a search of residential premises and it can be argued that its holding does not extend to automobiles. Figure 9 shows a noticeable shift in police department policies relating to automobile searches contemporaneous with an arrest, but the shift is not as dramatic as that which occurred in relation to searches of residential premises.[107] Twice as many departments now restrict automobile searches according to the constraints of *Chimel* and far fewer now allow officers to search on a routine basis. *Chimel* was given as the reason for the policy change by two departments and eight others attributed it to unspecified judicial decisions. In the only response that gave a non-judicial reason, the policy change was attributed to the installation of a new police chief.

In sum, if policy is taken as any measure of behavior, the exclusionary rule operating through the contraints of the *Chimel* decision has had a decided impact upon the nation's police.

D. *Successful Motions to Suppress Evidence or Dismissal of Charges*

Another indicator, albeit an imperfect one, of the efficacy of

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(Footnote continued from preceding page)
alternatives were: "(1) search is limited to area immediately under suspect's control, (2) search can cover part or all of premises if officers suspect evidence or contraband is located therein, (3) officers can search premises on a routine basis, (4) other (explain), and (5) no clear policy is in effect." The next question read: "Was the above policy different five or six years ago? (Yes or no.) If yes, what was the policy at that time?"

[106] Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925).

[107] The question read: "Which of the following best describes department policy regarding searches of automobiles contemporaneous with an arrest?" The alternatives were: "(1) search is limited to area immediately under suspect's control, (2) search can extend to trunk, glove compartment, etc., if officers have reason to believe evidence or contraband are located there, (3) officers can search entire automobile on a routine basis, (4) other (explain), and (5) no clear policy is in effect." The next question read: "Was the above policy different five or six years ago? (Yes or no.) If yes, what was the policy at that time?"

the exclusionary rule is the degree to which motions to suppress allegedly illegally seized evidence are granted. Presumably if no such motions are granted, it is testimony to the rule's effectiveness indicating that the police are not invading citizens' fourth amendment rights. Of course in any jurisdiction some such motions will be granted because good faith disagreements or uncertainties about what the law requires will be resolved in the defendant's favor. However, when motions to suppress are granted with considerable frequency, it can be taken as an indication that the police are not making a good faith effort to abide by constitutional limitations.

Nevertheless, counting successful motions is an imperfect indicator for several reasons. One is that sometimes the police or prosecutor, in anticipation of a successful motion, will drop charges against a defendant early in the proceedings. Another is that worthy motions may never be made because of defendants' ignorance or out of strategy considerations. A third is that judges, because of their ignorance of the law or lack of sympathy for the exclusionary rule, will deny motions that should be granted. Any of these phenomena will have the effect of reducing the number of motions to suppress which are granted. The extent to which they occur cannot be accurately measured, but they clearly do take place in some degree.[108] Thus focusing on successful mo-

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[108] Oaks, *supra* note 20, at 688, notes considerable variety between cities in prosecutorial screening of charges against the probability of a successful motion to suppress. Ban, *supra* note 36, found great hostility to the exclusionary rule among Cincinnati and Boston judges. At least a few judges, however, are sympathetic. *See* Younger, *supra* note 45. The author's questionnaire to public defenders posed the following question: "How would you describe the attitude of the principal judge(s) before whom you appear in regard to motions to suppress illegally seized evidence?" Defenders in 24 cities responded; the answers were:

Very reluctant to grant such motions; will deny them unless an overwhelming case can be made	10 (42%)
Sometimes willing to grant such motions if a plausible case can be made	7 (29%)
Often willing to grant such motions if a plausible case can be made	4 (17%)
Willingness to grant such motions depends upon the offense involved or the seriousness of the charge	3 (12%)

The reluctance to make worthy motions is more speculative. However, it is probably declining as public defender and other programs give more defendants better quality legal aid and appellate courts have become more concerned with the substance as well as the form of due process in criminal trials. Interviews with both prosecutors and defenders indicated that the number of motions to suppress had increased considerably from the mid-1960's. Indeed, many of them indicated that such motions were made almost automatically regardless of their merit.

Figure 9

Changes in Police Department Policies Regarding Searches of Automobiles Contemporaneous with Arrest

Year	*Policy*					
	Only Area Under Suspect's Control	*Entire Automobile Upon Suspicion*	*Routinely Search Entire Automobile*	*Other*	*No Clear Policy*	*Total*
1967-68	10 (20%)	20 (41%)	14 (29%)	4 (8%)	1 (2%)	49 (100%)
1973	20 (39%)	21 (40%)	2 (4%)	7 (14%)	2 (4%)	52 (101%)

tions to suppress will to some extent make the exclusionary rule appear more efficacious than it actually is.

Despite these difficulties and the fact that they tend to weaken their arguments, some opponents of the exclusionary rule have focused on the granting of motions to suppress in making their case that the exclusionary rule is ineffective. There is a hint of this in Oaks' article and it seems to constitute the thrust of Spiotto's argument.[109] Spiotto recorded the frequency with which such motions were made and granted in narcotics, gambling and concealed weapons cases in Chicago's circuit courts for sample periods in 1969 and 1971. While there is some variation by offense, he found that 87% of the motions were granted in 1969 and 77% two years later. Even if one considers the fact that only about 40% of those charged with these offenses made motions to suppress, the number of defendants set free because of illegal police searches amounted to about 35% in 1969 and 30% in 1971. These are high percentages indeed and Spiotto strongly implies that this is damning evidence that the exclusionary rule does not deter police misconduct.[110] The implication, moreover, has received some well placed publicity at the hands of the rule's opponents.[111]

In Section II we argued that it was fallacious to draw general conclusions from just one city. This is particularly true in this situation. Judges in Chicago have long been noted for their willingness to grant motions to suppress evidence. (Illinois adopted the exclusionary rule many years prior to *Mapp.*)[112] Indeed, it is sometimes alleged that Chicago police habitually conduct vice raids in a manner that ensures that a motion to suppress will be successful.[113] Beyond that, there is no prior screening of cases by the states attorney's office in Chicago; every charge, good, bad and indifferent, goes on the docket.[114] It might be surmised that this combination of factors would not

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[109] Oaks, *supra* note 20, at 681-89; Spiotto, *supra* note 26.
[110] Spiotto, *supra* note 26, at 245-48. *See also* Spiotto, *supra* note 53, at 37.
[111] 119 CONG. REC. S-2553 (daily ed. February 15, 1973).
[112] People v. Castree, 143 N.E. 112 (Ill. 1924).
[113] Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. L. REV. 493 (1952). *See also* LaFave, *supra* note 51, at 423.
[114] Oaks, *supra* note 20, at 688.

occur too often and that successful motions to suppress were atypically high in Chicago.

In fact this is very much the case. In the questionnaires sent to prosecutors and public defenders, the respondents were asked to indicate (from fixed alternatives) the proportion of motions to suppress which are granted in their jurisdiction.[115] Admittedly this is impressionistic data, but in the absence of exact observation no one's impressions should be more reliable than those who deal in such motions regularly. And there is no good reason to think these impressions will be occupationally biased. Indeed, we have asked the question of both prosecutors and public defenders, and their answers in the aggregate average at 10% and 12% respectively.[116] This is not to say that these impressions constitute the hallmark of precision or reliability,[117] but in the aggregate they can be taken as reasonably valid. Certainly they do not radically misrepresent reality.

Figure 10 shows the results for 65 cities. They stand in rather stark contrast to those Spiotto reports for Chicago. In three-fifths of the cities, motions to suppress evidence as illegally seized are granted 10% of the time or less. Indeed, in some of these cities the granting of such motions is a relatively rare event. At the other extreme, in only 10% of the cities are such motions granted as often as one-fourth of the time and only one city even approached Chicago's record. These responses certainly offer strong evidence that Chicago is an exception—a gross exception—to the national norm of granting suppression motions. Presumably motions to suppress are granted somewhat more often nationally

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115 For the prosecutor, the questions were: "In cases involving tangible evidence, how common is it for the defendant to move for the suppression of evidence?" (The alternatives were: "virtually never done, occurs rather infrequently, occurs somewhat frequently, occurs quite frequently.") It was followed by this question: "How frequently are such motions granted?" (The alternatives are shown in Figure 10.) Similar questions were asked of the public defender respondents.

116 There is, however, a greater spread in the public defenders' estimates. Over 90% of the prosecutors' answers fell between 2% and 25% while only about 65% of the defenders' impressions were within this range.

117 In 10 cities, answers were received from both prosecutors and public defenders. In four both chose the same alternative (listed in Figure 10) and in five others they chose adjacent alternatives. In only one city was there a sharp difference in the estimates of the proportion of suppression motions granted. Using this as a check on the accuracy of the respondents' impressions, we can see that while they are crudely estimated, they are not "out of the ballpark."

than they would be if the exclusionary rule approached perfection as a deterrent to illegal police conduct, but our data offer no support to an argument that the rule is largely or totally worthless as a device for controlling police conduct.[118]

Figure 10

Proportion of Motions to Suppress Granted in 65 Cities*

Proportion	*Number of Cities*	%
1% or Less	7	11%
2-10%	32	49%
11-25%	20	31%
26-50%	5	8%
Over 50%	1	2%
	65	101%

* When differences in responses from the same city occurred, the larger estimate was used.

Motions to suppress are made at a somewhat advanced stage in the process of evaluating the legality of the manner in which evidence was seized. At least two prior stages exist, although they lack the formality of a motion to suppress and they may occur as much by indecision as by decision. Initially, of course, the police themselves (once an arrest occurs) may drop the charge or otherwise fail to prosecute it because, in their belief, the manner in which the evidence was obtained precludes its admission and thus no conviction is possible. If the police do not do this, the prosecutor may take the same steps where in his judgment there

[118] The time differential between Spiotto's observations and our questionnaire appears inconsequential. We also asked our respondents for an estimate of the proportion of suppression motions granted in 1967-68. Only three reported 50% or more, and only seven answered in the 25% to 50% category. In the main, the distribution was rather similar to that in Figure 10. Of 63 cities responding, 43 reported no change while 13 said that a higher proportion of motions were granted in 1967-68 than are granted now and eight said the opposite. These data have some bearing on our supposition that compliance with the exclusionary rule is likely to be a developmental rather than a sudden phenomenon. If this is so, then a greater proportion of suppression motions should have been granted in the 1967-68 period. This is the case, of course, but the difference is minimal. This may be, in part, because more frivolous motions are made nowadays. *See* the discussion in note 102 *supra*. The minimal difference appears also to reflect a greater willingness on the part of prosecutors who are perhaps opposed by more competent or dedicated defense counsel these days to negotiate pleas in weak cases or ask that charges be dismissed prior to the filing of such a motion.

is little or no chance of conviction. In other words, just as we looked at the third stage, so to speak, we can also use the first and second stages as measures of the efficacy of the exclusionary rule.

The police questionnaire asked the following: "In cases involving tangible evidence, does your department sometimes drop charges against suspects because of the ruling excluding illegally seized evidence at trials?" A very similar question was asked of prosecutorial respondents. Unlike the granting of motions to suppress, decisions or non-decisions at these early stages are not very well given to numerical or percentage estimates; in the former situation the respondent can grasp the total number of motions and estimate the percentage of those successful while for the latter situation the total number of cases where charges could possibly be dropped is not so discrete or easily imaginable. Consequently for the police and prosecutor's options of dropping charges, closed answer adjectival estimates working their way up from a base answer of "Never" were used rather than percentages based on the total number of cases possible.

Their responses are given in Figure 11. Some insights are available from these data, although the data themselves, as well as problems inherent in their collection, make definitive conclusions impossible. From the fact that only 12% of the police departments drop charges more than occasionally and that nearly two-thirds of them never or only rarely drop charges, we could infer a high degree of police sensitivity to the exclusionary rule. Undoubtedly there is a good deal of truth in such an inference. But some respondents probably desire their department to appear more law-abiding than it is and chose what was perhaps a marginal alternative to describe the situation. Beyond that, some departments may have a policy of never or seldom dropping charges regardless of the likelihood of conviction. In other words, while the police responses are comforting to proponents of the exclusionary rule, their validity[119] is open to some question.

The prosecutors' responses are likely to be more valid. The likelihood of conviction is more apt to be the controlling factor in allowing a dismissal, because the prosecutor's reputation for

[119] The term "validity" is used here in the scientific sense, *i.e.*, the degree to which the data you have actually measured the behavior you are interested in.

Figure 11

Frequency With Which Charges Are Dropped Because Evidence Has Been Illegally Seized

Frequency	*Police Departments*	*Prosecutors*
Never	18 (31%)	0
Rarely	19 (32%)	13 (30%)
Occasionally	15 (25%)	21 (49%)
Somewhat frequently	5 (9%)	7 (16%)
Very frequently	2 (3%)	2 (5%)
	59 (100%)	43 (100%)

compliance with the requirements of the law is not at stake.[120] However, the implication of their responses for arguments about the exclusionary rule's effectiveness is ambiguous. Only 30% are such that a real police sensitivity to the rule can be inferred, while about 20% are indicative of frequent police violation of citizens' fourth amendment rights. The remainder in the "occasionally" category are ambiguous in and of themselves.

In sum, the data in Figure 11 do not support an argument that there is widespread police violation of the exclusionary rule's mandate, but they do not furnish much ammunition for the opposite contention either.

It is possible that Figures 10 and 11 hide widespread police violations of the fourth amendment because they focus on the behavior of each actor in the criminal justice process in isolation. All you need to do to show that the exclusionary rule is not deterring illegal police searches is to demonstrate that at *one* point in the process large numbers of arrestees are being set free. Presumably, if the police frequently dropped charges, prosecutors would not have to dismiss them very often and judges would not have much cause to grant motions to suppress. Or if the prosecutors had a high rate of dismissal, it would not matter that the police seldom dropped charges or that judges seldom granted suppression motions. And, of course, if judges frequently granted

[120] Because prosecutors are elected officials and often run for reelection on their percentage of convictions, there is some incentive to dismiss charges where conviction is dubious. The police lack this political incentive. Moreover, to the extent they are statistically judged, it is by cases closed rather than actual convictions.

such motions, we might well expect it was because neither the police nor the prosecutor were willing to drop charges.

Using the criteria of "somewhat frequently" or greater for police and prosecutorial decisions to drop charges and an excess of 25% of suppression motions granted, 12%, 21% and 10% of the respondents respectively give answers indicative of widespread police non-compliance with the fourth amendment. If these categories of responses considered separately are hiding the more frequent occurrence of such behavior, we might expect it to take place in over 40% of the nation's cities.

We can check on this to some degree by analyzing the responses from 18 cities which reported impressions on decisions at all three stages in which the legality of a search is evaluated. By the above criteria, only four (22%) of the cities reported impressions at any stage indicative of police behavior largely unaffected by the exclusionary rule. In two of the four cities, impressions exceeding the above criteria were reported at two stages. This suggests that in cities where the exclusionary rule has not affected police behavior very much, this is manifested at various points in the process by which the legality of a search is evaluated. In the other 14 cities the responses from all participants give no cause to believe that the police engage in frequent or wholesale illegal searches. Perhaps these 18 cities are not representative enough to settle the matter conclusively, but insofar as we can tell, Figures 10 and 11 do not camouflage widespread police violations of the fourth amendment.

IV

For those seeking conclusive evidence about the efficacy of the exclusionary rule, the findings reported above are probably disappointing. Different measures point in varied and sometimes slightly contradictory directions and some of the results are subject to ambiguous interpretation. Taken as a whole, the main emphasis to be put on the findings is a negative one: they cast considerable doubt on earlier conclusions that the rule is ineffective in deterring illegal police searches. To be sure, such an assertion may have been appropriate at one time, and as some of our evidence suggests, there are still circumstances in which the rule has a minimal impact on police behavior. But these circumstances are comparatively few. Most of our data do not

permit such an inference. Indeed, a good many of the findings support a positive inference—that the rule goes far toward fulfilling its purpose. Beyond this, the incomplete nature of the data and the ambiguity of its interpretation serve to aid arguments on behalf of the rule's effectiveness because in this situation at least it is easier to demonstrate the existence of widespread non-compliance with the fourth amendment than it is to demonstrate compliance. It is usually necessary to support assertions of compliance by inference rather than direct evidence; and such inferences are always subject to a counter-argument that one is not using the right measure or looking in the right places. Nonetheless, the inconclusiveness of our findings is real enough; they do not nail down an argument that the exclusionary rule has accomplished its task.

At this stage it is not that important that the results point unreservedly in one direction or another. Rather, it is more important that we have some data on the matter. As was noted at the beginning of this article, the exclusionary rule is undergoing a crisis. On the basis of some cursory and perhaps symptomatic diagnosis, it has nearly been pronounced dead. In the not too distant future our courts and legislative bodies will have to decide whether they want to accept this diagnosis and issue the death certificate. Hopefully in this situation, as should be the case in all important questions of public policy, such a decision will be based on as large a quantity of reliable and valid information as can reasonably be obtained. This is particularly the case where constitutional policies are involved. By definition as well as by tradition, such policies should be stable. Stability should not be equated with inflexibility. But stability does mean that constitutional policies should be more than mere reflections of prevailing ideological winds, and it suggests that the consideration which goes into the promulgation of these policies extends beyond casual or emotional reaction to particular events or short-term political pressures.

Inevitably the evidence must be weighed in the balance; but evaluation will involve more than seeing which side of the scale is lower. The evidence must be put in perspective. As was pointed out in Section II, the impact of major changes in public policy on day-to-day behavior is usually not very far-reaching

immediately after adoption of any new rule. Only after a substantial amount of time has passed do trends of changing behavior (if any) become apparent. Then and only then do the scale readings have real meaning.

The most obvious example of the necessity of such a perspective is the 1954 desegregation decision.[121] Anyone who looked at desegregation data for 1955 or 1956 or even for a good many subsequent years would have concluded that the policy was a failure, a virtual dead letter, openly defied by those to whom it was directed. And so it was at that time. Would it then have been appropriate to argue that even though laudable in intention, the decision should be overruled because it was not having the desired impact and was attended by many severe disadvantages such as increased racial tension, civil disorders, and repeal of compulsory education laws to name but a few. The answer of course is no. An opposite answer would have been indicative of an utter absence of any understanding of the importance of time in the changing of public policy. From the comparatively distant perspective of two decades later, desegregation has worked reasonably well. There is widespread integration in southern schools (to say nothing of other institutions) and the disadvantageous costs have diminished significantly. Desegregation, while a dramatic illustration, is hardly the only example. Despite initial disinterest or resistance, fundamental changes in constitutional policies such as those defining obscenity, providing counsel for indigent defendants and reforming juvenile court procedures have been successfully implemented.

Indeed, it can be argued that the exclusionary rule has a particularly strong claim on a perspective encompassing a tolerant time frame. After all, the substantive law of search and seizure has been in a state of high confusion in the United States in recent years. The Supreme Court does not seem to know its own mind in charting the principles governing the legality of searches;[122] a scholarly justice calls for an "overhauling" of the

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[121] Brown v. Board of Educ., 347 U.S. 483 (1954).

[122] *Compare* Preston v. United States, 376 U.S. 364 (1964), *with* Cooper v. California, 386 U.S. 58 (1967); *compare* Brinegar v. United States, 338 U.S. 160 (1949), *with* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); and *compare* United States v. Rabinowitz, 339 U.S. 56 (1950), *with* Chimel v. California 395 U.S. 752 (1969).

law here;[123] leading commentators describe it by the term "quagmire" or other uncomplimentary adjectives;[124] state appellate courts divide sharply over the meaning and thrust of United States Supreme Court decisions.[125] It is little wonder that even now patrolmen, detectives, prosecutors and trial judges exhibit varied behavior in similar search-and-seizure situations. We can hope that "the course of true law" may soon be found, but we must show some tolerance of the behavior of those for whom it "has not run smooth."[126]

But a broad perspective encompasses more than a willingness to evaluate the rule's impact over time. It seems quite appropriate to consider the exclusionary rule as an integral part of a larger concept of the makeup of due process of law in criminal cases. *Mapp,* it should be rememebered, was but one of many decisions of the Warren Court during the 1960's which virtually revolutionized procedural requirements in this area. Cases such as *Gideon v. Wainwright,*[127] *Escobedo v. Illinois,*[128] *Miranda v. Arizona,*[129] *In re Gault*[130] and a host of less well known decisions now require behavior in law enforcement agencies heretofore alien to the system's participants. This means that the pressure on these agencies to accommodate their operations to new policies exists not only in the area of search and seizure but in virtually every phase of their operations. Of course an evaluation of the exclusionary rule must rest primarily on its own peculiar impact on police behavior, but the meaning of this impact must be considered in the broader context of the Warren Court's vast restructuring of criminal justice procedures. If this restructuring succeeds generally, it is likely to enhance the exclusionary rule's probabilities of success.

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123 Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (Harlan, J., concurring).

124 LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire,"* 8 CRIM. L. BULL. 9 (1972); Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law,* 49 CALIF. L. REV. 474 (1961).

125 Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision,* 8 LAW & SOC. REV. 109 (1973).

126 LaFave, *Search and Seizure: "The Course of True Law . . . Has not . . . Run Smooth,"* 1966 ILL. L.F. 255. The quotation is from Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

127 372 U.S. 335 (1963).

128 378 U.S. 478 (1964).

129 384 U.S. 436 (1966).

130 387 U.S. 1 (1967).

Despite the "law and order" backlash, it appears that the Warren Court has promulgated an idea—a concept of due process of law—whose time has come. It is more than a matter of command, although command is important. It is also a matter of preaching and inspiration, of calling to our attention in a new context the best ideas of our legal and cultural heritage. The Warren Court's actions here have embodied the twin ideas of the irreduceable dignity of the individual and the rule of law. The law protects the least of us as much as the greatest, and the guardians of the law are as much bound by its precepts as are those who are guarded. In Herbert Packer's terms,[131] the Supreme Court has advanced the Due Process Model as a viable alternative to the Crime Control Model which had heretofore prevailed in the lower echelons of the criminal process. Much of the public, and what is more important, many participants in the law enforcement system, have come to accept the principles underlying the Court's new policies not only because they are legally authoritative but because they seem appropriate and just. Acceptance is slow and anything but smooth, with "old school" personnel continuing to adhere to the Crime Control philosophy. But it is nevertheless occurring. The recent emphasis on education and professionalism in police departments, prosecutors' offices and magistrates' courts bring new attitudes to the fore; the "old school" is a diminishing breed. This does not mean that every aspect of the Due Process Model will be accepted uncritically or that all of the Warren Court's policies will stand undisturbed. But fundamentally it seems too late to turn back the clock.

These perspectives are not offered to suggest that the successful implementation of the exclusionary rule should be taken as inevitable. Some policies embody ideas whose time never does come and they fail—and this can be true even of those encompassed in a generally successful wave of reform. Rather the perspectives are offered to suggest that the exclusionary rule is in considerably better health than some of its "attendant physicians" would have us believe.[132] While not without some serious prob-

131 Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

132 While the author does not believe the empirical evidence warrants a conclusion that the exclusionary rule is inefficacious, he certainly would not foreclose consideration on their own merits of suggested alternatives to or modifications of the rule.

lems, so far as our data and perspectives suffice, the rule is maintaining its vital signs. Obviously further tests should be made. But in the meantime, perhaps the most acute problem facing the exclusionary rule is how to prevent the earlier diagnosis of a terminal illness from becoming a self-fulfilling prophecy.