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ARTICLES

Are State Courts Enforcing the Fourth Amendment? A Preliminary Study

CRAIG M. BRADLEY*

INTRODUCTION

In its 1976 decision in *Stone v. Powell*,¹ the Supreme Court withdrew jurisdiction from the lower federal courts to entertain habeas corpus petitions from prisoners who alleged that they had been convicted on the basis of evidence obtained in violation of the fourth amendment.² The Court noted that "Fourth Amendment violations . . . do not impugn the integrity of the fact finding process."³ It then reasoned that the purpose of the exclusionary rule was deterrence and that there is no

reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant.⁴

That is, applying the sort of economic analysis that the Court has consist-

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1. 428 U.S. 465 (1976).

2. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

Withdrawal of federal jurisdiction is subject to one exception: "a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review." *Stone*, 428 U.S. at 495 n.37; see also *id.* at 482, 494 (holding that federal habeas corpus relief not required when state law has provided opportunity for full and fair litigation of fourth amendment claim). This exception is discussed *infra* notes 156-60 and accompanying text.

3. *Stone*, 428 U.S. at 479.

4. *Id.* at 493.

ently invoked in its criminal procedure decisions in recent years,⁵ the cost of federal habeas—interfering with the finality of state convictions—is not worth the benefit—furthering the deterrent impact of the exclusionary rule.⁶ The Court dismissed as unfounded the argument that “state courts can’t be trusted to effectuate Fourth Amendment values.”⁷

This streamlining of federal habeas jurisdiction has met with some disagreement. In his dissent, Justice Brennan countered that “the availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial where constitutional rights are at stake.”⁸ While Justice Brennan did not say so flatly, the thrust of his opinion was that after *Stone* the states—subject only to inadequate Supreme Court certiorari jurisdiction—could not in fact be trusted to enforce the fourth amendment.⁹

Academic critics were no less distressed by the *Stone* decision. As Professor Seidman stated: “By closing the only effective federal forum for raising fourth amendment claims, [*Stone*] turns the exclusionary rule into little more than a precatory suggestion to state courts”¹⁰ Similarly, Professor Michael opined that the holding in *Stone* created the danger of a return to an

5. See *id.*, at 489-91 (weighing costs and utility of exclusionary rule); see also *United States v. Leon*, 468 U.S. 897, 906-08 (1984) (court must weigh costs and benefits of exclusionary rule before excluding evidence).

6. See *Stone*, 428 U.S. at 495 n.37 (“we emphasize the minimum utility of the rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding”).

7. *Id.* at 493-94 n.35 (“Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states.”).

8. *Id.* at 519 (Brennan, J., dissenting) (quoting *Kaufman v. United States*, 394 U.S. 217, 225 (1969)). Justice Brennan continued: “[H]abeas jurisdiction is a deterrent to unconstitutional actions by trial and appellate judges, and a safeguard to ensure that rights secured under the Constitution and federal laws are not merely honored in the breach.” *Id.* at 521.

9. See *id.* at 526 (“The Court does not . . . dispute that institutional constraints totally preclude any possibility that this Court can adequately oversee whether state courts have properly applied federal law”).

10. Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 450 (1980). Other commentators have been concerned that *Stone* would be extended to apply to any constitutional violation, even those that affect guilt or innocence. See Cover & Aleinikoff, *Dialectical Federalism, Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1087 (1977) (*Stone* “may be deepened and widened until the guilt/innocence theory . . . serves as the principal doctrine for restricting existing rights and creating new ones”). However, despite the fact that this expansion would seem to follow from the *Stone* opinion, it has not occurred. See, e.g., *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) (refusing to extend *Stone* to claim of grand jury discrimination); *Kimmelman v. Morrison*, 477 U.S. 365, 382-83 (1986) (rejecting extension of *Stone* to sixth amendment ineffective assistance of counsel claims); cf. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 888-91 (1981) (*Stone* should not be extended to habeas claims of *Miranda* and sixth amendment *Massiah* violations); Halpern, *Federal Habeas Corpus and Mapp Exclusionary Rule After Stone v. Powell*, 82 COLUM. L. REV. 1, 39-41 (1982) (*Stone* should not be extended to habeas claims of *Miranda* violations).

era of "flagrant disregard of the prohibition against illegal searches."¹¹ Professor Israel, on the other hand, was more sanguine, arguing that

It seems most unlikely . . . that the *Stone* decision will encourage many state trial courts to violate the fourth amendment. The limited number of federal habeas reversals of state convictions suggests that a state trial judge with an inclination to ignore the fourth amendment is likely to be concerned primarily with reversal by a state appellate court, not a federal habeas court.¹²

Both the majority and the dissent in *Stone*, and their respective academic supporters, rest their views of *Stone*'s wisdom on untested assumptions. As Professor Halpern has observed: "There are no data on the pivotal issue: is federal collateral review necessary to ensure adequate state court enforcement of the exclusionary rule?"¹³ Despite Professor Halpern's insightful recognition of the problem, neither he nor anyone else has endeavored to collect such data. This article is a preliminary attempt to fill this gap—to discover whether the state courts are, in fact, enforcing the fourth amendment and whether the *Stone* decision has had any impact on such enforcement.

As will be discussed in detail later in this article, the results are mixed. Most states are doing a fairly good job,¹⁴ some states a poor job, and some, deciding most cases by unreported opinions, are hard to evaluate. The results also show that *Stone* appears to have had little impact on state compliance with fourth amendment rules.

While originally I had intended only to determine *Stone*'s impact and whether the state courts were enforcing the fourth amendment, the data led me to a more profound observation. As Table I shows, 26% of the 1986 cases studied were, or should have been, decided for the defendant under the Supreme Court's fourth amendment "rules." Yet, in view of the Court's often vague guidance concerning fourth amendment rules,¹⁵ most of these cases do not appear to be the result of purposeful or reckless police misbehavior, but instead arguably could be construed as understandable

11. Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings*, 64 IOWA L. REV. 233, 255 (1979).

12. Israel, *Criminal Procedure, the Burger Court and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1406-07 (1973). Israel pointed out that fewer than 5% of the cases presented to federal courts on habeas corpus resulted in reversal. *Id.* at 1407 n.370.

13. Halpern, *supra* note 10, at 13. As Justice Powell observed, the "Court should not assume that the past insensitivity of some state courts to the rights of defendants will continue." *Argersinger v. Hamlin*, 407 U.S. 25, 65 (1972).

14. By "good job," I mean conscientious application of the complicated rules that the Supreme Court has developed in the years since *Mapp v. Ohio*, 367 U.S. 643 (1961).

15. See Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) (describing confusion wrought by multitude of Supreme Court pronouncements on fourth amendment rules).

mistakes.¹⁶

The rules do not appear to capture the essence of the fourth amendment. They are either too strict, too complex, or both.¹⁷ This is true, whether one takes the position that the "essence" of the fourth amendment is embodied in the reasonableness clause or the warrant clause.¹⁸ The Supreme Court in recent years has paid lip service to the latter while, in practice, frequently utilizing the former approach, leaving a body of law that is hopelessly confused.¹⁹

The data compiled show that in 1986 the police failed to follow fourth amendment law over twenty-five percent of the time and that the appellate courts misconstrued the amendment about ten percent of the time.²⁰ This is hardly surprising considering that a four-volume treatise is required to explain what that law is.²¹ Virtually all of this law has developed in the twenty-seven years since *Mapp*. The problem is likely to get worse as a result of the Supreme Court's tendency to decide numerous search and seizure cases²² and the tendency of each decision to create more uncertainty than it

16. Justice Rehnquist has complained about the "mysteries of the Court's Fourth Amendment jurisprudence." *Florida v. Royer*, 460 U.S. 491, 520 (1983) (Rehnquist, J., dissenting). Examples of the difficulty of applying fourth amendment rules abound. *See, e.g., Davis v. State*, 500 So. 2d 472, 473-74 (Ala. Crim. App. 1986) (remanded to determine if arrest warrant was issued on purely conclusory statement that defendant "did feloniously possess" marijuana and cocaine; if so, warrant not properly obtained); *State v. Rice*, 717 P.2d 695, 696-97 (Utah 1986) (per curiam) (evidence obtained from "inventory search" of car inadmissible because impoundment had no legal basis flowing from driving without license and was therefore merely pretext for search); *State v. Carpena*, 714 P.2d 674, 675 (Utah 1986) (per curiam) (search of trunk lacked probable cause when basis for stop was that car moved slowly at 3:00 A.M. through area which had experienced rash of burglaries).

17. There is one exception: consent searches. This broad loophole in fourth amendment law can swallow up all the other rules. Georgia police in particular seemed adept at using this exception. *See infra* notes 89-90 and accompanying text (noting that in 1986 about 20% of Georgia cases studied featured consent searches).

18. Justice Rehnquist has focused upon the first clause. *See Mincey v. Arizona*, 437 U.S. 385, 406 (1985) (Rehnquist, J., concurring) ("The constitutionality of a particular search (or seizure) is a question of reasonableness and depends on 'a balance between the public interest and the individual's right to personal security.'" (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975))).

19. The Court claims that for a search to be "reasonable" the police must have a warrant, "subject only to a few specifically established and well-delineated exceptions." *United States v. Ross*, 456 U.S. 798, 825 (1982) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). At last count, however, there were over 20 such exceptions under which the majority of searches are performed and which can hardly be called "well-delineated." *See Bradley, supra* note 15, at 1473-75 (listing exceptions to warrant requirement).

20. Table I, *infra* at 258 (223 cases were studied: 58 cases exhibited improper police action and courts improperly ruled in favor of the government in 23 of these cases).

21. *See W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (2d ed. 1986).

22. From the 1979 through 1983 Terms, the Supreme Court decided 35 cases involving the fourth amendment.

resolves.²³ I discuss some proposed solutions to this problem later in this article.

II. THE STUDY

To answer the questions posed, I began by reading the 1986 "Search and Seizure" and "Arrest" headnoted cases from three states: Georgia, Idaho, and Illinois. These states were chosen as, in my view, a reasonable cross-section of the country, with one caveat. I specifically eliminated from consideration any state which, to my knowledge, has shown an inclination to go *further* than the Supreme Court in enforcing fourth amendment rights. Thus, I assumed²⁴ that Alaska, California, Connecticut, Massachusetts, New Jersey, New York, Oregon, Washington, and Wisconsin are enforcing at least the United States Supreme Court's standards because the courts of these states have surpassed the Supreme Court in protecting defendants against unreasonable searches and seizures.²⁵

This initial sample showed that Idaho was applying Supreme Court standards rigorously, Illinois was producing mixed results, and Georgia essentially was not enforcing the fourth amendment.²⁶ Since it seemed likely at this point that many states do comply with the federal standards, I decided to focus further study on other states with conservative reputations to see if any others, besides Georgia, were failing to enforce the amendment. Consequently, I studied the 1986 decisions from Alabama, Arizona, Louisiana, Oklahoma, South Carolina, and Utah. The results are summarized in Table I.

Next, to determine whether the *Stone* decision had affected enforcement or nonenforcement, I studied a "control" group of 1975 decisions (the last full

23. See generally Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1 (demonstrating that the Court's attempts to achieve certainty often lead to more uncertainty).

24. Since I do not draw conclusions about the country as a whole, it does not matter whether my assumptions about these states are correct.

25. These states have rejected, under their constitutions, the Supreme Court's narrowing of defendants' rights in cases such as *United States v. Leon*, 468 U.S. 897, 920-21 (1984) (establishing good faith exception to exclusionary rule), *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983) (establishing totality-of-the-circumstances test to determine probable cause), and *New York v. Belton*, 453 U.S. 454, 462 (1981) (allowing search of passenger compartment of automobile as search incident to lawful custodial arrest). The decisions rejecting these Supreme Court opinions are discussed in Latzer, *Limits of the New Federalism: State Court Responses*, 14 SEARCH & SEIZURE L. REP. 89 (1987). This list does not purport to include all of the states that have enacted rules more protective of the fourth amendment than the Supreme Court, but it comes close.

Of course, these states might fail to enforce some other aspect of fourth amendment law and should thus not necessarily be exempt from further study.

26. See Table I, *infra* (of 13 cases studied, Idaho decided none incorrectly in favor of government and 4 in favor of defendant; Illinois decided 15.7% of cases studied incorrectly in favor of government, but 23.5% of cases in favor of defendant; Georgia decided 17.5% of cases incorrectly in favor of government and only 3.5% in favor of defendant).

year of federal habeas jurisdiction) from the same nine states.²⁷ I then determined the number of reported grants of federal habeas corpus relief on fourth amendment grounds in the nine states studied in 1975.²⁸

The perceptive reader already will have recognized that this study is not "scientific." First, as discussed, I made no effort to choose the states randomly. The thrust of this study was not to see whether the states are, in general, enforcing the fourth amendment. Rather, it was to find out if *any* state was not enforcing it and whether that nonenforcement can be attributed to *Stone*.

Second, while the compilation of data into tables gives the appearance of an objective study, and while objectivity was indeed my goal, a degree of subjectivity was unavoidable. That is, the data depend on *my* conclusions, based on *my* understanding of fourth amendment law, and influenced by *my* biases as to whether state cases are correctly decided.²⁹ To allow the reader to draw his or her own conclusions, I have provided a detailed discussion of some representative cases later in the article as well as lists of all "wrongly decided" cases in footnotes. Nevertheless, since nearly four hundred cases were studied, the tabulated results ultimately depend on my view of the law. I have, however, tried to be a dispassionate and well-informed observer.

Third, a study of appellate decisions does not tell the full story about fourth amendment compliance. For example, if police in a particular state are good at making up "probable cause" or "consents" or if prosecutors are particularly vigilant at dismissing cases with fourth amendment problems prior to trial, appellate court statistics may not accurately reflect the level of fourth amendment compliance "on the street." However, there is no reason to expect that such matters would change much within a state from 1975 to 1986 or that *Stone* would have had any impact in that respect.

Moreover, it is highly unlikely, if state appellate decisions reflect less than vigorous fourth amendment enforcement, that vigorous enforcement nevertheless will be occurring in the trial courts, prosecutors' offices, and police departments. Also, I counted separately the number of "consent" searches in each state to try to guard against the opposite possibility: that appellate decisions give the impression of enforcement although it is not occurring in practice.³⁰ I could think of no way to guard against police officers lying about the quantum of probable cause, but in that respect this study is situ-

27. See Table II, *infra* at 259.

28. See Table III, *infra* at 260.

29. However I urge United States District Courts, in acting on my proposed solution to the problem of state noncompliance, to rely not upon my view of the cases, but upon an independent evaluation. See *infra* text accompanying notes 171-72.

30. See Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RES. J. 543, 598-600 (discussing problem of police perjury in criminal cases).

ated no worse than prosecutors who handle motions to suppress before trial or studies that examine the exclusionary rule's effectiveness in deterring police misconduct. Police perjury is simply an imponderable. Still, it is probably fair to assume that police prevarication is relatively constant both from state to state and from year to year, in which case it may be factored out.³¹ The most serious problem with studying appellate decisions is the common use of unreported decisions, particularly in Arizona and South Carolina. This problem, and how I attempted to cope with it, is discussed later in this article.

Fourth, neither the fourth amendment nor the exclusionary rule is the same as it was in 1976, the year that *Stone* was decided. The automobile exception to the warrant requirement has been expanded;³² the standard for probable cause has been loosened;³³ "stop and frisk" has been expanded;³⁴ and "good faith" has become an exception in search warrant cases.³⁵ This trend could have the effect of diluting *Stone*'s apparent impact. That is, as the fourth amendment becomes "easier" to enforce (i.e., less restrictive on police), we might expect the states to enforce what is left of it more vigorously. While this point should be kept in mind, it did not in fact appear that many of the 1986 decisions revolved around these fourth amendment innovations.

Finally, I offer this data not as conclusive "proof" that a given state is, or is not, enforcing the fourth amendment, but rather only as *evidence* of such compliance or noncompliance. As I suggest, the United States District Courts in the individual states should draw their own conclusions.

III. INTERPRETING THE STUDY

Table I shows the results in fourth amendment cases for 1986 in the nine

31. *But see Note, The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1050 (1987) (by M. Orfield, Jr.) (suggesting that increased warrant use may have diminished incidence of police perjury).

32. *See United States v. Ross*, 456 U.S. 798, 825 (1982) (upholding warrantless search of automobile when police have probable cause); *New York v. Belton*, 453 U.S. 454, 462 (1981) (allowing search of passenger compartment as search incident to a lawful arrest).

33. *See Illinois v. Gates*, 462 U.S. 213, 230-31 (1983) (adopting totality-of-the-circumstances test for probable cause determinations).

34. *See United States v. Sharpe*, 470 U.S. 675, 685 (1985) (imposing no rigid time limitation on *Terry* stop); *United States v. Hensley*, 469 U.S. 221, 233 (1985) (*Terry* stop allowed when police have reasonable suspicion that individual is wanted for felony offense); *see also Wasserstrom, The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 355-75 (1984) (discussion of fourth amendment as in a state of transition, with weakened warrant and probable cause requirements and expanded *Terry* searches).

35. *See United States v. Leon*, 468 U.S. 897, 928 (1984) (good faith reliance on invalid search warrant does not violate fourth amendment); *see also Kamisar, Comparative Reprehensibility and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 39-42 (1987) (discussing "inadvertent" or honest police blunder exception to exclusionary rule).

TABLE I (1986)

STATE (CRIME RATE/100,000 POPULATION) (1986 POPULATION) ¹	TOTAL CASES ²	CASES STUDIED ³	DECISIONS FOR THE GOVERNMENT ⁴	DECISIONS FOR THE DEFENDANT	WRONG CASES FOR THE GOVERNMENT ⁵	CONSENT SEARCHES	PERCENTAGE WRONG CASES FOR THE GOVERNMENT	PERCENTAGE DECISIONS FOR THE DEFENDANT
GEORGIA (5,455) (6,104,000)	51	57	55	2	10	11	17.5	3.5
ILLINOIS (5,546) (11,553,000)	13	51	39	12	8	8	15.7	23.5
IDAHO (4,207) (1,003,000)	3	13	9	4	0	1	0	30.7
SOUTH CAROLINA (5,137) (3,378,000)	66	3	2	1	0	1	*	*
LOUISIANA (6,078) (4,501,000)	46	42	38	4	5	10	11.9	9.5
ALABAMA (4,288) (4,053,000)	19	26	20	6	0	3 ⁶	0	23.0
OKLAHOMA (6,014) (3,305,000)	4	19	16	3	0	2	0	16.0
ARIZONA (7,321) (3,312,000)	8	4	3	1	0	1	*	*
UTAH (5,478) (1,665,000)	267	8	6	2	0	0	0	25.0
TOTALS	267	223	118	35	23	37	10.3	15.7

* Sample too small to calculate percentages. Arizona and South Carolina data included in totals.

¹ 1986 FBI Uniform Crime Statistics.

² Civil cases involving search and seizure issues not counted in total. Cases headnoted under both "arrest" and "search and seizure" counted only once. Only includes reported cases. Many states have substantial numbers of unreported decisions that are not broken down as to subject matter.

³ Because of time constraints, a random selection of cases was studied for some states.

⁴ This means the decision on the fourth amendment issue, not necessarily the whole case.

⁵ See *supra* note 29 and accompanying text & note 39 ("wrong" subjectively determined by author).

⁶ Including one case decided for the defendant.

TABLE II (1975)

STATE (CRIME RATE/100,000 POPULATION) (1975 POPULATION) ¹	TOTAL CASES	CASES STUDIED	DECISIONS FOR THE GOVERNMENT	DECISIONS FOR THE DEFENDANT	WRONG CASES FOR THE GOVERNMENT	CONSENT SEARCHES	PERCENTAGE WRONG CASES FOR THE GOVERNMENT	PERCENTAGE DECISIONS FOR THE DEFENDANT
GEORGIA (4,625) (4,926,000)	78	35	19	16	0	3	0	45.7
ILLINOIS (5,382) (11,145,000)	88	31	23	8	0	3 ²	0	25.8
IDAHO (4,141) (820,000)	2	2	1	1	0	0	*	*
SOUTH CAROLINA (4,641) (3,818,000)	6	6	6	0	0	0	0	0
LOUISIANA (4,123) (3,791,000)	42	22	21	1	2	5	9.1	4.5
ALABAMA (3,472) (3,614,000)	32	26	25	1	5	3	19.2	3.9
OKLAHOMA (4,578) (2,712,000)	31	15	13	2	0	4	0	13.3
ARIZONA (8,341) (2,224,000)	49	18	14	4	0	0	0	22.2
UTAH (3,481) (471,000)	3	3	3	0	0	1	*	*
TOTALS	331	158	125	33	7	19	5.6	20.9

* Sample too small to calculate percentages. Idaho and Utah data included in totals.

¹ 1975 FBI Uniform Crime Statistics.

² Including one case decided for the defendant.

TABLE III
1975 FEDERAL HABEAS CORPUS—SEARCH AND SEIZURE
CASES REPORTED¹

STATE	HABEAS CASES DECIDED ²	ANY RELIEF GRANTED
GEORGIA	2	0
ILLINOIS	2	1
IDAHO	0	0
SOUTH CAROLINA	1	0
LOUISIANA	1	0
ALABAMA	2	1
OKLAHOMA	3	0
ARIZONA	1	1
UTAH	0	0
TOTAL	13	3 ³

¹ Westlaw search of "Search and Seizure" and "Arrest" headnoted federal habeas corpus cases, 1975.

² Includes decisions by United States District Courts and the United States Courts of Appeals.

³ In addition, three other cases headnoted "arrest" or "search and seizure" were decided on other grounds, two for and one against defendants.

states studied; Table II contains the results for 1975. The percentage figures shown in each table's last two columns are particularly significant. The percentage of decisions favoring the defendant simply shows how often the defendant won. Given the difficulty of understanding fourth amendment law³⁶ and the amendment's incompatibility with zealous law enforcement, one would expect a substantial number of cases to be decided in the defendant's favor in a state that is vigorously enforcing the Supreme Court's rules.³⁷ As the tables show, this statistic has decreased from 20.9% in 1975 to 15.7% in 1986.³⁸

The other important figure, the "percentage of wrong cases for the govern-

36. See Bradley, *supra* note 15, at 1468 ("The fourth amendment is the Supreme Court's tar baby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck.").

37. Despite the fact that a well-trained police force and good trial courts would, theoretically, leave no need for prodefendant decisions at the appellate level, my experience as a prosecutor and as a student of fourth amendment law suggests that the rules are too complicated for *any* police force to avoid making mistakes. See Bradley, *supra* note 15, at 1468-69 (describing difficulty of deciphering Supreme Court rules on search and seizure). *But see infra* text accompanying notes 107-20 (Arizona's low rate of prodefendant appellate decisions may represent good police work by police force trained to follow fourth amendment rules). In any event, a theoretically perfect state legal system, while producing no decisions for defendants on appeal, also would produce no wrong decisions for the government.

38. Of course, this trend also might be explained by either improved police procedures or more prodefendant decisions at the trial level.

ment," shows how often the state courts erred in the government's favor.³⁹ Thus, it shows what percentage of cases might be reversed if federal courts were reviewing state court fourth amendment decisions carefully. Tables I and II show that, in the states studied, the cumulative percentage of cases wrongly decided in favor of the government has increased since *Stone* from 5.7% in 1975 to 10.3% in 1986. Together, these two statistics suggest that *Stone's* withdrawal of federal habeas jurisdiction has adversely affected state fourth amendment jurisprudence. Prodefendant decisions have decreased, and wrong decisions for the government have increased.

But there are reasons to be suspicious of this conclusion. First, there were very few reversals of state convictions on federal habeas for any reason prior to *Stone*.⁴⁰ More specifically, as Table III shows, in the nine states studied in 1975, I found only thirteen cases of reported federal court scrutiny of defendants' fourth amendment claims, only three of which resulted in relief being granted on fourth amendment grounds. However, there is reason to believe that there are substantially more unpublished cases in which relief was granted.⁴¹

Second, while the last column in Tables I and II does show a drop in the percentage of prodefendant decisions, the 1986 figure of 15.7% would seem to suggest that, in general, many state courts, even in the relatively conservative states studied, are still taking fourth amendment claims seriously.⁴² Moreover, this decrease in prodefendant decisions could simply reflect the Supreme Court's loosening of fourth amendment standards. However, if this were the case, there also should have been fewer wrong decisions in favor of the government, rather than more, as actually occurred.

The most telling of the above factors is the low level of reported federal court scrutiny of state fourth amendment decisions in 1975.⁴³ Even if the

39. I did not tabulate how often courts erred in the defendant's favor. However, my impression was that such errors were rare.

40. Israel, *supra* note 12, at 1407 n.370 (studies conducted in the early 1970s indicated that less than 5% of habeas petitions presented to federal courts were granted).

41. In an effort to determine how many more *unpublished* habeas decisions there were, I compared information from the Federal Judicial Center on all habeas petitions with Westlaw's information on reported habeas decisions for the period of July 1, 1978, to June 30, 1979 (the only period for which the Federal Judicial Center had this data). I found that there were 8,246 state prisoner habeas petitions in that period of which only 73 (0.9%) resulted in published opinions. Prisoners were granted some relief in 327 of all cases (4.0%). Only 17 of the 327 cases in which relief was granted were reported (5.2%). How this figure applies to fourth amendment cases decided in 1975 in the nine states studied is anybody's guess, but it is safe to assume that relief was granted in more than the three reported cases.

42. *But see infra* notes 54-105 and accompanying text (discussing evidence that Georgia is not complying with fourth amendment requirements and that South Carolina and Arizona are hiding fourth amendment problems by using unpublished opinions).

43. *See supra* note 41 (only 0.9% of all habeas petitions in 1978-79 resulted in published opinions).

total number of reversals was five times the reported number of three, apparently *Stone* has not relieved the states of a major infringement on their sovereignty, as the Court claimed,⁴⁴ nor has it saved society from the release of numerous criminals on fourth amendment "technicalities." If this is true, *Stone* could only have produced two effects. First, *Stone* may have relieved state courts of the *potential* threat of reversal in federal court, which might have caused them to "toe the line" in enforcing the fourth amendment. It seems unlikely, however, that state courts would have been affected by this potential threat of federal intervention when surely they were aware of the actuality of nonintervention. This threat may have checked any tendency toward blatant violations, but blatant violations did not occur in 1986 after federal habeas corpus jurisdiction was abandoned.⁴⁵

Second, *Stone* may have relieved the federal courts of the burden of dealing with a great many habeas corpus petitions by prisoners alleging fourth amendment violations. In fact, while there are no statistics as to the number of such petitions, the total number of habeas petitions filed in federal courts on all issues remained roughly constant from 1975 to 1976 and had increased by about twenty-seven percent as of 1986.⁴⁶ Of course, nothing in *Stone* prevents a prisoner from filing a petition raising fourth amendment issues; it simply makes such petitions easy to deny. Thus *Stone*, if not reducing the number of habeas petitions, undoubtedly made it easier for the federal courts to dispose of them. This benefit, however, seems insignificant if one expects the federal courts to provide a bulwark against wholesale violations of fourth amendment rights by the states.

An examination of the data for individual states also suggests that *Stone* has not had as great an impact as its detractors once feared. In this nine-state survey, most of the increase in decisions that wrongly favored the government and decrease in decisions favoring the defendant can be attributed to one state: Georgia. In 1975, of the nine states studied, Georgia was the most responsive to defendants' fourth amendment claims, deciding 45.7% of stud-

44. The Court found:

Resort to habeas corpus . . . results in serious intrusions on values important to our system of government [including] . . . "(ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance on which the doctrine of federalism is founded."

Stone, 428 U.S. at 491 n.31 (quoting *Schneekloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring)).

45. See *infra* notes 185-86 and accompanying text (few of the 223 cases studied from 1986 involved police behavior that was clearly wrong).

46. There were 7,843 habeas petitions filed by state petitioners in 1975, 7,833 in 1976, and 10,724 in 1986. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 189 (1976); ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 176 (1986).

ied cases for defendants and deciding no cases wrongly for the government.⁴⁷ By stark contrast, in 1986 Georgia had become the *least* responsive of the sampled states to such claims, deciding only 3.5% of all fourth amendment cases in favor of defendants and 17.5% wrongly in favor of the government.⁴⁸ Eliminating Georgia from the study shifts the results dramatically. In that case, only 13.8% of the cases studied in 1975 would have been decided in favor of defendants, with that figure increasing to 19.8% in 1986. Similarly, the number of cases wrongly decided in favor of the government would increase only slightly, from 7.3% in 1975 to 7.9% in 1986. These statistics suggest that *Stone* had little impact on the eight remaining states.

It seems unlikely that *Stone* had such a tremendous impact on Georgia but little effect on the other eight states. A much more likely explanation would focus on political/social factors peculiar to Georgia. Without attempting a detailed social analysis of that state, two possible explanations come to mind. In 1975, the liberal Democrat Jimmy Carter had recently completed his term as Governor of Georgia. Presumably, he made judicial appointments commensurate with his philosophy, which are reflected in the 1975 decisions. The 1986 bench, on the other hand, may reflect more conservative appointments.⁴⁹ A second explanation may be that most of the 1986 cases involved narcotics. Georgia borders Florida, the site of substantial drug traffic in recent years. As a result of federal law enforcement efforts aimed at Florida, Georgia has itself experienced substantial drug activity.⁵⁰ It may be that Georgia courts were particularly unresponsive to fourth amendment claims in 1986 because so many of them were raised by drug traffickers.⁵¹

Alabama presents additional evidence of politics playing as large, if not a larger, role than *Stone* in changing a state's attitude about the fourth amendment. In 1975 during George Wallace's governorship, Alabama had a questionable record, deciding only 3.9% of studied cases in favor of defendants

47. Table II, *supra*. While Idaho actually had a greater percentage of cases decided in favor of defendants than Georgia, this statistic is misleading because Idaho reported only two cases. *Id.*

48. *Id.* These figures disclose a shocking fact: while 21.0% of the total cases should have been decided in favor of the defendant, only 3.5% actually were, meaning that 83.3% of the cases that defendants should have won were wrongly decided.

49. Carter appointed five justices to the seven-member Georgia Supreme Court, only one of whom was still on the Court in 1986. Compare 228 Ga. iii (1971) and 234 Ga. iii (1975) (addition of five Georgia Supreme Court Justices in period 1971-75) with 255 Ga. iii (1986) (only Hon. Harold N. Hill, Jr. remaining from 1975 court).

50. See Shenon, *The Enemy Within: Drug Money is Corrupting the Enforcers*, N.Y. Times, Apr. 11, 1988, at A1, col. 6, A12, col. 2 (reporting that, beginning in 1981, southern Georgia had become popular among drug smugglers as a result of federal crackdowns on drug shipments to Florida).

51. As Professor Saltzburg has observed, courts have been "turning their backs" on fourth amendment principles "in order to aid the war against illicit drugs." Saltzburg, *Another View of Illegal Narcotics: The Fourth Amendment (As illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 4 (1986).

and 19.2% wrongly in favor of the government.⁵² By 1986, however, despite *Stone*, Alabama had changed dramatically, deciding 23.0% of all cases studied in favor of the defendant and no cases wrongly for the government. Like Georgia, it would appear that Alabama's courts were influenced not by the United States Supreme Court but by internal political and social considerations that affected societal attitudes, police training, judicial appointments, and other relevant matters.⁵³

To argue, as I have, that *Stone* has not generally diminished state compliance with the fourth amendment does not answer the question posed in this article's title: Are the state courts enforcing the fourth amendment? While readers may disagree as to whether the overall rate—10.3% of cases decided wrongly in favor of the government and 15.7% of cases decided in favor of the defendant—represents substantial compliance, the study indicates that at least one and possibly three states of the nine studied simply are not enforcing the amendment: Georgia, South Carolina, and Arizona.

Georgia presents an easy case for noncompliance. It is virtually impossible for a defendant to win a fourth amendment claim in the appellate courts of that state.⁵⁴ Of fifty-seven cases in which defendants raised fourth amendment issues, only two cases were decided in favor of the defendant.⁵⁵ These two cases involved a first-offense possession of marijuana⁵⁶ and a murder in which the state conceded that there was no probable cause for arrest and the trial court already had suppressed the resulting statements by the defendant.⁵⁷

The difficulty that defendants apparently have in Georgia can be illustrated by examining several of the "wrongly decided" cases. In *Isbell v. State*,⁵⁸ for example, the defendant shot and killed a juvenile who was burglarizing his apartment. He had his neighbor call the police; he disassembled the gun; and when the police arrived he explained what had happened.⁵⁹ The police obtained a search warrant for the apartment, searched it four

52. Table II, *supra*.

53. As Judge J. Harvie Wilkinson once observed, "Criminal rights . . . may . . . be the part of the [Supreme] Court's work most susceptible to swings of the pendulum after a change in personnel." J. WILKINSON, *SERVING JUSTICE* 146 (1974). The same is presumably true of state supreme court attitudes toward criminal rights.

54. This statement is true of reported opinions. Georgia also has a substantial number of unreported opinions pursuant to GA. SUP. CT. R. 59.

55. Table I, *supra*.

56. *Vincent v. State*, 178 Ga. App. 199, 201, 342 S.E.2d 382, 385 (1986) (conviction reversed because based on evidence seized by police officer with neither probable cause nor arrest warrant).

57. *State v. Harris*, 256 Ga. 24, 26, 343 S.E.2d 483, 485 (1986) (affirming suppression of incriminating statement made during an interrogation that was conducted following an arrest lacking probable cause).

58. 179 Ga. App. 363, 346 S.E.2d 857, *cert. denied*, 479 U.S. 1098 (1986).

59. *Id.* at 364-65, 346 S.E.2d at 858-59.

hours after the shooting, and found marijuana and cocaine in plain view. The appellate court found no probable cause for a search warrant beyond the fact of the shooting but, citing *Mincey v. Arizona*,⁶⁰ noted that the police "were authorized" in making a warrantless search of the apartment "in order to secure the crime scene."⁶¹ It followed that the search warrant, obtained by the officers in "an abundance of caution"⁶² was justified; the appellate court affirmed the trial court's denial of the defendant's motion to suppress. The facts of this case square almost exactly with those of *Mincey* in which the United States Supreme Court specifically *rejected* any such crime scene exception to the warrant and (by implication) probable cause requirements.⁶³ In *Isbell* the police already had discovered the gun and "observed evidence of an apparent burglary" when they responded to the defendant's call.⁶⁴ Moreover, the defendant had already given a full statement admitting the shooting.⁶⁵ There was no probable cause for a search warrant because there was no evidence to find, and no "crime scene exception" has been recognized by the Supreme Court as dispensing with the probable cause and warrant requirements.⁶⁶

In another wrongly decided case, *Minor v. State*,⁶⁷ a police officer stopped the defendant's van for an illegal left turn at 2:30 A.M. in a warehouse area of Savannah. The defendant produced citation papers showing that his driver's license had been revoked.⁶⁸ When asked what he was doing there, the defendant stated that he had been cleaning one of the warehouses, but the officer could see no cleaning equipment in the van.⁶⁹ In addition, the defendant and the passenger told conflicting stories about who owned the

60. 437 U.S. 385, 392-93 (1978) (dictum) (warrantless search permissible when conducted with reasonable belief that person is in need of immediate aid).

61. *Isbel*, 179 Ga. App. at 365, 346 S.E.2d at 859.

62. *Id.* at 366, 346 S.E.2d at 859.

63. *Mincey*, 437 U.S. at 395 (warrantless search of apartment pursuant to "murder scene exception" created by Arizona Supreme Court violates fourth amendment); *see also* *Thompson v. Louisiana*, 469 U.S. 17, 21-23 (1984) (warrantless search of murder scene violates the fourth amendment); *cf.* *Michigan v. Clifford*, 464 U.S. 287, 293 (1984) (requiring search warrant based on probable cause for reentry into arson scene after fire has been extinguished).

64. 179 Ga. App. at 365, 346 S.E.2d at 859.

65. *Id.* at 364-65, 346 S.E.2d at 858-59.

66. Had the court held that, though the search warrant in this case was defective, the evidence nevertheless was admissible under the good faith exception to the exclusionary rule, *United States v. Leon*, 468 U.S. 897 (1984), *Isbell* would have been a closer case. However, I doubt that a warrant affidavit, which apparently was completely lacking in probable cause, would qualify under *Leon*. While this situation did not present itself in any other case, I would not have counted a case as "wrong," even if the reasoning was incorrect, if I could think of a satisfactory rationale to support the result.

67. 180 Ga. App. 869, 350 S.E.2d 783 (1986).

68. *Id.* at 869, 350 S.E.2d at 784.

69. *Id.* at 869-70, 350 S.E.2d at 784.

van.⁷⁰ The officer advised the defendant of his *Miranda* rights and took him to the warehouse where the defendant opened the combination lock to the gate, "thus convincing the officer that [he] had worked there or at least knew how to get in."⁷¹ The officer also received word that the defendant's brother owned the van as defendant had claimed. The officer had no knowledge of a specific burglary, but he " 'knew within [himself]' that some place had been burglarized."⁷² Accordingly, he formally arrested the defendant and searched the van incident to the arrest, finding property later determined to have been stolen from the warehouse in question.⁷³ While the officer cannot be faulted too severely for this alert police work, it seems inescapable that neither the original detention nor the formal arrest were justified by probable cause. Consequently, the evidence should have been suppressed.

In *Gravley v. State*⁷⁴ police received a "tip" that the defendant was growing marijuana at his farm. They went to the farm "to talk to him."⁷⁵ Looking for the defendant, the police walked through a barn to a vegetable garden where they saw marijuana plants. Although the court conceded that the barn and the garden were within the curtilage of the house,⁷⁶ it held that "no rational person can have a reasonable expectation of privacy in an open area such as a yard or a garden even in the curtilage."⁷⁷ As the dissent correctly pointed out, the Supreme Court in *Oliver v. United States*⁷⁸ did not extend the "open fields" doctrine to the curtilage.⁷⁹ Assuming that individuals have a reasonable expectation of privacy in a yard or garden within the curtilage of the house, it was improper for the police to search that area to find someone for questioning.⁸⁰

In *Kennard v. State*,⁸¹ another wrongly decided Georgia case, a search warrant was issued for a knife suspected to have been used in an armed rape. The affidavit stated that within the preceding two days a rape had been investigated, that appellant had been arrested at his home, and that the police therefore believed that the knife would be at his home.⁸² The appeals court

70. *Id.* at 870, 350 S.E.2d at 784.

71. *Id.*

72. *Id.*

73. *Id.* at 872, 350 S.E.2d at 785-86.

74. 181 Ga. App. 400, 352 S.E.2d 589 (1986).

75. *Id.* at 401, 352 S.E.2d at 591.

76. *Id.*

77. *Id.* at 403, 352 S.E.2d at 593.

78. 466 U.S. 170, 180 (1984).

79. *Gravley*, 181 Ga. App. at 408, 352 S.E.2d at 596 (Sognier, J., with Banke, C.J. & Benham, J., dissenting).

80. *Cf.* *United States v. Dunn*, 480 U.S. 294, 303 (1987) (Court assumed *arguendo* that barn could not be entered without warrant).

81. 180 Ga. App. 522, 349 S.E.2d 470 (1986).

82. *Id.* at 523, 349 S.E.2d at 472.

does not explicitly state what evidence was actually found. Assuming there was probable cause to believe that appellant had committed the rape two days before, that fact alone does not, in my view, render it in any way probable that the appellant would have taken the knife home and kept it there for that period. Accordingly, I judged this case wrongly decided.

When in doubt, I classified cases in the state's favor. For example, I counted the following decision as correct, though many would probably consider it wrongly decided. In *Cline v. State*⁸³ the police obtained a search warrant for a house at which the defendant was staying. The warrant was based on an affidavit describing a narcotics buy that had occurred more than two months earlier.⁸⁴ However, the issuing magistrate testified that the police officer had informed him orally of subsequent surveillance indicating that "drug traffic was still going on."⁸⁵ Without this oral information, the probable cause was stale. Therefore, the issue was whether oral statements may be given to supplement written affidavits. Professor LaFave supports the view that a defective affidavit should not be saved by oral testimony.⁸⁶ However, he points out that the Supreme Court has "never explicitly passed on this issue" and that the prevailing view is to allow such testimony.⁸⁷ Accordingly, giving the benefit of the doubt to the state courts, as was my practice, I did not count this as a "wrong" decision.

None of the Georgia cases involves approval of blatant police misconduct.⁸⁸ What is striking is that defendants virtually never win, despite the 21% of cases in which the police failed to comply with the fourth amendment. Another feature of the Georgia cases, which suggests that fourth amendment violations may be even more widespread than reflected by the appellate statistics, is the number of consents. Eleven of the fifty-seven 1986

83. 178 Ga. App. 470, 343 S.E.2d 506 (1986).

84. *Id.* at 471, 343 S.E.2d at 508.

85. *Id.* at 472, 343 S.E.2d at 508.

86. 2 W. LAFAVE, *supra* note 21, § 4.3(b), at 172-74 (describing insufficiency of oral testimony when no contemporaneous written record of testimony exists).

87. *Id.* at 171-72.

88. The other 1986 Georgia cases wrongly decided in favor of the government were: *Davis v. State*, 255 Ga. 588, 590-91, 340 S.E.2d 862, 865 (declining to review on appeal alleged deficiencies in probable cause for defendant's arrest because defense counsel did not properly raise them at trial), *cert. denied*, 479 U.S. 871 (1986); *Blount v. State*, 181 Ga. App. 330, 335-36, 352 S.E.2d 220, 225 (1986) (search of visitor's pocketbook and automobile, pursuant to search warrant for host's house, held valid); *State v. Rosof*, 180 Ga. App. 637, 639-40, 350 S.E.2d 36, 39 (1986) (upholding airport security officer's warrantless search of tobacco pouch that felt soft); *Mosley v. State*, 180 Ga. App. 30, 30, 348 S.E.2d 555, 556 (1986) (holding that tip from informant that defendant was growing marijuana, and overflight by officer revealing greenhouse but no marijuana, provided sufficient probable cause for search warrant); *State v. Wilson*, 179 Ga. App. 334, 337, 346 S.E.2d 111, 114 (1986) (holding that defendant's unkempt appearance, proximity to burglary site, and absence of anyone else fitting description of burglar provided sufficient probable cause for warrantless arrest); *Luke v. State*, 178 Ga. App. 614, 616, 344 S.E.2d 452, 454 (1986) (upholding warrantless search conducted as part of bargain for defendant's wife's probation).

cases involved consent searches, more than in any other state. Several of the "consents" seemed suspicious,⁸⁹ and I could not help wondering why people being investigated by Georgia (and Louisiana) police were so much more cooperative than people in other states.⁹⁰ However, there is no way to evaluate police credibility by reading an appellate opinion, so I rated these consent cases as correctly decided, but added a separate column in the tables to keep track of how often consents were occurring.

Evaluating South Carolina's track record was more difficult. With a population of about 3.5 million and a crime rate of 5,137 per 100,000,⁹¹ South Carolina decided only *three* fourth amendment cases by opinion in 1986. Moreover, the one case decided for the defendant⁹² was, according to South Carolina sources, actually based on the trial court's refusal to appoint counsel for an indigent capital defendant, rather than on the relatively minor fourth amendment violation cited in the opinion.⁹³ It seems unlikely that South Carolina police officers are more competent at following the rather complicated fourth amendment strictures than officers in other states or that South Carolina trial courts are more sensitive to defendants' fourth amend-

89. For example, in *Mitchell v. State*, 178 Ga. App. 244, 342 S.E.2d 738 (1986), the defendant was brought to the police station at the request of an officer investigating a robbery. The defendant allegedly was told that he was not under arrest and "agreed to come with [the police]." *Id.* at 245, 342 S.E.2d at 740. At the station, the victim identified the defendant, and he was placed under arrest. The defendant then executed a consent form for the search of his house and allegedly orally consented to the search of his car. *Id.* at 245-46, 342 S.E.2d at 740-41. I was troubled by the defendant's alleged "cooperation" at every stage of this case. However, if the facts are as stated in the opinion, there appears to be no violation of either *Dunaway v. New York*, 442 U.S. 200, 217 (1979) (information obtained from defendant after illegal arrest excludable if obtained by exploitation of illegality of arrest), or *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973) (voluntariness of consent determined by totality of surrounding circumstances and not only by whether subject of search knew of right to refuse consent). For other examples of suspicious consents, see *Jothier v. State*, 177 Ga. App. 655, 655, 340 S.E.2d 624, 624-25 (1986) (defendant claimed that he opened trunk of automobile at officer's command and not consensually); *Wilson v. State*, 179 Ga. App. 780, 781, 347 S.E.2d 709, 710 (1986) (defendant denied at trial that he had consented to search of automobile trunk and briefcase); and *Conley v. State*, 180 Ga. App. 662, 663, 350 S.E.2d 45, 46 (1986) (defendant denied at trial that he had consented to search of his boots after arriving at airport).

90. A Georgia criminal defense attorney informed me that Georgia police receive training in "euchring" or tricking consents out of suspects, particularly motorists stopped along Interstate 75 (the main route to and from Florida). Telephone interview with defense attorney (Aug. 1987). The author conducted several interviews in August 1987 on the condition that identities be kept confidential. Copies of these interview notes are on file at *The Georgetown Law Journal*.

Professor Yale Kamisar noted one reason for the abundance of consent searches: "'Consent' is the 'trump card' in the law of search and seizure. For it is [t]he easiest, most propitious way for the police to avoid the myriad problems presented by the Fourth Amendment.'" Kamisar, *supra* note 35, at 41 (quoting Zion, *A Decade of Constitutional Revision*, N.Y. Times, Nov. 11, 1979, § 6 (Magazine), at 26, 106).

91. See Table I, *supra* (based on 1986 FBI Uniform Crime Statistics).

92. *State v. Brown*, 289 S.C. 581, 347 S.E.2d 882 (1986).

93. Telephone interview with confidential source (Aug. 1987).

ment rights. A much more likely explanation is that South Carolina is simply sweeping these violations under the rug, affirming convictions by unpublished opinion (so that the issue raised on appeal cannot be identified).⁹⁴

To better determine what was happening in South Carolina, I obtained the briefs from some of the 1986 cases that were decided by unpublished opinion and also read the reported cases from 1985 and 1987. The latter study produced six cases (three in each year): four were decided in favor of the government on the fourth amendment issue⁹⁵ and two in favor of the defendant.⁹⁶ The four cases decided in favor of the government seemed correctly decided. One of the cases decided for the defendant, *State v. McKnight*,⁹⁷ was based on a South Carolina requirement that search warrant affidavits must be in writing—a requirement that, as previously discussed,⁹⁸ has never been imposed by the United States Supreme Court. The other case, *State v. Cox*,⁹⁹ involved a search, with probable cause but no warrant, of an automobile parked in the defendant's yard.¹⁰⁰ In my view, the court was correct to strike down this search on the ground that an automobile parked in the curtilage of a house may be searched only with a warrant.¹⁰¹ However, this issue is not entirely free from doubt in light of the Supreme Court's decision in *California v. Carney*.¹⁰² Certainly, a court consistently

94. S.C. SUP. CT. R. 23 (1986) provides for unreported opinions when, *inter alia*, "no error of law appears."

95. *State v. McSwain*, 292 S.C. 206, 207, 355 S.E.2d 540, 541 (1987) (fourth amendment not applicable to action of private party); *State v. Adams*, 291 S.C. 132, 134, 352 S.E.2d 483, 485 (1987) (probable cause for search warrant existed when undercover operation revealed contemporaneous drug deal at defendant's residence); *Knight v. State*, 284 S.C. 138, 141, 325 S.E.2d 535, 537 (1985) (police officer authorized to stop vehicle when he had reasonable suspicion that occupants involved in criminal activity); *State v. Gaskins*, 284 S.C. 105, 116, 326 S.E.2d 132, 139 (warrantless search of prisoner's cell reasonable when inmate of adjoining cell killed in explosion), *cert. denied*, 471 U.S. 1120 (1985).

96. *State v. McKnight*, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987) (holding inadmissible items seized pursuant to search warrant unsupported by written affidavit); *State v. Cox*, 287 S.C. 260, 264, 335 S.E.2d 809, 811 (Ct. App. 1985) (holding that automobile parked in curtilage of house protected from warrantless search), *aff'd*, 290 S.C. 489, 351 S.E.2d 570 (1986).

97. 291 S.C. 110, 352 S.E.2d 471 (1987).

98. *See supra* text accompanying note 87 (although Supreme Court has never explicitly passed on issue, prevailing view allows oral testimony to supplement written affidavit).

99. 287 S.C. 260, 335 S.E.2d 809 (Ct. App. 1985), *aff'd*, 290 S.C. 489, 351 S.E.2d 570 (1986).

100. *Id.* at 262, 335 S.E.2d at 810.

101. *Cf. Coolidge v. New Hampshire*, 403 U.S. 443, 455-57 (1971) (plurality opinion) (automobile parked in driveway cannot be searched incident to arrest because it is not in control of arrestee).

102. 471 U.S. 386 (1985). In *Carney* the Court held that the vehicle exception to the warrant requirement applies if a vehicle is "found stationary in a place not regularly used for residential purposes." *Id.* at 392. Thus, it upheld a search of a recreational vehicle parked in a downtown lot. *Id.* at 395. It is not clear if the Court meant to include a driveway as a "place regularly used for residential purposes" or if it meant to restrict this limitation to trailers or recreational vehicles parked in trailer parks and hooked up to utilities.

ill-disposed to fourth amendment claims might have decided *Cox* differently. I also read four briefs filed in fourth amendment cases that had been affirmed without opinion in 1986. In my view, all four cases were correctly decided.¹⁰³

Thus, all available evidence suggests that the South Carolina courts are at least somewhat responsive to fourth amendment claims. Of the thirteen total cases considered, three were decided in favor of defendants, and none were decided incorrectly in favor of the government. Still, the dearth of reported cases suggests that further study of that state may be in order. In any event, the failure of the South Carolina courts to report these cases creates the impression that fourth amendment issues are not taken seriously in that state.

In Arizona the statistics are striking. In 1975 Arizona decided forty-nine fourth amendment cases by opinion and, in the cases studied, decided 22.2% for the defendant.¹⁰⁴ In 1986, Arizona's population having increased by over one million people since 1975, the state appellate courts decided only four cases by opinion.¹⁰⁵ By contrast, Idaho, with one-third the population of Arizona, decided thirteen fourth amendment cases by opinion in 1986.¹⁰⁶

Of course, the fact that opinions are unpublished does not necessarily mean that they have been decided against the defendant. It seems likely, however, that most unpublished opinions would be progovernment because a prodefendant decision is likely to result in reversal of a conviction and is therefore a more significant event than a routine affirmance. Moreover, the deterrent purpose of the exclusionary rule is largely lost if an opinion in favor of the defendant is not published.

It also is possible that the lack of prodefendant appellate decisions simply reflects good police work. This possibility was suggested to me by both an

103. The cases were *State v. Smith*; *State v. Gridine*; *State v. Johnson*; and *State v. Gove* (briefs did not bear case numbers). Two of these cases, *Gridine* and *Smith*, presented the issue of whether an affidavit could be supplemented by the testimony of the officers.

104. See Table II, *supra* (of 18 cases studied, 4 decided for defendant).

105. Arizona Supreme Court Rule 111(b) provides that disposition is to be by published opinion when it:

1. Establishes, alters, modifies or clarifies a rule of law, or
 2. Calls attention to a rule of law that has been generally overlooked, or
 3. Criticizes existing law, or
 4. Involves a legal or factual issue of unique interest or substantial public importance
-

ARIZ. S. CT. R. 111(b). An Arizona appellate judge estimated that "80-90%" of appellate court opinions are unpublished but that most Arizona Supreme Court opinions are published because they grant certiorari for the purpose of issuing opinions in important cases. Telephone interview with Arizona judge (Aug. 1987).

106. Table I, *supra*.

Arizona judge and a defense attorney.¹⁰⁷ While I was dubious about this proposition, it is not inconceivable that Arizona, a state in which most of the law enforcement occurs in two counties (Pima and Maricopa), could possess police officers who are actually trained to follow the fourth amendment rules. This seems especially likely if the police obtain warrants frequently, taking advantage of the recently established "good faith exception" to the exclusionary rule in warrant cases.¹⁰⁸

To test this hypothesis I analyzed the briefs in five unpublished 1986 Arizona cases that raised fourth amendment issues and that had been affirmed without opinion.¹⁰⁹ In my view, four of these cases clearly were correctly decided.¹¹⁰ The fifth, *Arizona v. Barfield*,¹¹¹ is close. In *Barfield* the police saw the defendant, "who looked as dirty and unkempt as the other transients . . . in that area," carrying a duffel bag through a public park in Tucson one morning.¹¹² Outlined in the bag was a square object that the police officers thought resembled a video cassette recorder. They stopped Barfield, asked for identification, and asked to look in the bag. He identified himself but refused to consent to the search.¹¹³ When they asked "if he was afraid that there was anything in the bag that may be stolen," he said no.¹¹⁴ The police officers asked again for permission to look in the bag, and Barfield again refused. They continued to talk to him, and "eventually he agreed to let [the police officers] look in the bag."¹¹⁵ The officers found a cassette tape player and other property that later proved to be stolen.¹¹⁶

The defendant's attorney argued that there was no reasonable suspicion for the stop under *Terry v. Ohio*¹¹⁷ and that the consent to search was invalid

107. By "good" the attorney meant in conformity with recent Supreme Court decisions. Telephone interview with defense attorney (Aug. 1987).

108. See *United States v. Leon*, 468 U.S. 897, 926 (1984) (establishing good faith exception); see also Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287, 292 (1985) (predicting that good faith exception is likely to increase warrant use); Note, *supra* note 31, at 1050-51 (finding that in Chicago, "the vast majority of searches occurs pursuant to warrants").

109. The briefs were chosen at random by a University of Arizona law student (i.e., they were the first five search and seizure cases he found in the library files).

110. *Arizona v. Earles*, No. 2CA-CR4292 (Ariz. Ct. App. Sept. 10, 1987); *Arizona v. McGuire*, No. 2CA-CR4493 (Ariz. Ct. App. Feb. 5, 1987); *Arizona v. Sandon*, No. 2CA-CR3076 (Ariz. Ct. App. Jan. 15, 1986); *Arizona v. Wickman*, No. 1CA-CR8495 (Ariz. Ct. App. Mar. 15, 1986). Copies of the briefs in *Earles* and *McGuire* are on file at *The Georgetown Law Journal*.

111. No. 2CA-CR4387 (Ariz. Ct. App. July 23, 1986) (copy on file at *Georgetown Law Journal*).

112. Appellee's Answering Brief at 1, *Arizona v. Barfield*, No. 2CA-CR4387 (Ariz. Ct. App. July 23, 1986).

113. *Id.* at 1-2.

114. *Id.* at 2.

115. *Id.*

116. *Id.* at 4.

117. 392 U.S. 1 (1968).

because of the defendant's two prior refusals to consent.¹¹⁸ Even conceding the validity of the stop, a consent obtained only after two prior refusals by the defendant does not seem to be one as to which the state has satisfied its burden of proving that the consent was freely and voluntarily given.¹¹⁹

Notwithstanding *Barfield*, this preliminary survey suggests that Arizona police may well be following fourth amendment strictures in most cases, despite the lack of appellate decisions.¹²⁰ In fact, the police obtained search warrants in six of the twelve Arizona cases studied (including the four reported cases), including two cases (an auto search and a search incident to arrest) in which a warrant was not even required by United States Supreme Court cases. Still, a more complete survey of the Arizona cases is in order.

Utah, with half the population and twice the reported opinions of Arizona,¹²¹ appears to be doing a good job. However, the relative paucity of reported opinions still raises questions about what is going on behind the scenes.

As for the other states, Idaho stands out both in its enthusiastic regard for defendants' fourth amendment rights and in the overall quality of the opinions. The Idaho opinions reflect thoughtfulness and a command of Supreme Court precedent. The following passage is indicative of the Idaho Supreme Court's attitude: "We must never forget that a violation of one person's Fourth Amendment . . . rights is a violation of every person's rights. Only by suppressing the illegally obtained evidence, and deterring future illegal con-

118. Appellant's Reply Brief at 6, *Barfield* (No. 2CA-CR4387).

119. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 248 (1973) (state has burden of proving that "consent was in fact voluntarily given, and not the result of duress or coercion, express or implied"). Professor LaFave points out that, unlike a request for counsel during custodial interrogation, a refusal of consent to search is not final and absolute. 2 W. LAFAVE, *supra* note 21, § 8.2(f), at 200-01. However, the cases that have approved a second request by the police have done so because the request was not overly coercive. See *United States v. Morrow*, 731 F.2d 233, 235 (4th Cir.) (approved girlfriend's consent to search jointly occupied apartment when withdrawal of first consent resulted from "menacing" presence of defendant), *cert. denied*, 467 U.S. 1230 (1984); *United States v. Richards*, 500 F.2d 1025, 1029-30 (9th Cir. 1974) (approved consent given to search personal belongings in airplane after consent refused to search whole airplane), *cert. denied*, 420 U.S. 924 (1975).

120. On the surface, Arizona's record appears equivocal. Two justices of the Arizona Supreme Court have advocated abolishing the exclusionary rule in serious felony cases. *State v. Bolt*, 142 Ariz. 260, 270, 689 P.2d 519, 529 (1984) (en banc) (Cameron, J., with Hayes, J., concurring) (advocating adoption of balancing test in which exclusionary rule would not be applied "whenever the societal costs of applying the rule exceed societal benefits"). On the other hand, two notable recent Arizona criminal procedure cases have decided close issues in favor of the defendants. *Arizona v. Mauro*, 149 Ariz. 24, 29-32, 716 P.2d 393, 399-400 (1986) (en banc) (taping conversation between defendant and wife after defendant refused to talk to police violated *Miranda*), *rev'd*, 107 S. Ct. 1931 (1987); *Arizona v. Hicks*, 146 Ariz. 533, 534, 707 P.2d 331, 332 (Ct. App. 1985) (holding that police exceeded scope of warrantless search allowed by exigent circumstances and plain view doctrine), *aff'd*, 480 U.S. 321 (1987).

121. Table I, *supra*.

duct, can a court effectively protect innocent people from impermissible invasions of their constitutional rights."¹²²

Illinois has a decidedly mixed record: on the one hand, it is relatively likely to decide a fourth amendment issue in favor of the defendant (23.5% of the time); on the other hand, it is second only to Georgia in deciding cases wrongly in favor of the government (15.7% of the time).¹²³

Illinois is a good example of a second problem that my data disclosed: in many cases, neither the police nor the courts could follow the rules. Nearly 40% of the Illinois cases either were, or should have been, reversed according to the United States Supreme Court's rules,¹²⁴ yet no case involved clear-cut police misconduct. In 19.6% of the cases considered (ten of fifty-one), the trial court had granted the defendant's motion to suppress. In 80.0% of *those* cases (eight of ten), the appellate courts reversed the trial court but, in my view, 37.5% (three of eight) of those reversals were incorrect.¹²⁵ In another 19.6% of the cases studied (ten of fifty-one), the appellate court reversed the trial court for not granting the motion to suppress. If the courts, after briefing, argument, and calm reflection, cannot agree on the law, how are the police expected to do so?

For example, in *People v. Ocasio*,¹²⁶ the police arrested the defendant at his home for murder. They had probable cause but no warrant.¹²⁷ The defendant made incriminating statements after receipt of *Miranda* warnings.¹²⁸ The court concluded that exigent circumstances justified the warrantless

122. *State v. Johnson*, 110 Idaho 516, 529, 716 P.2d 1288, 1301 (1986). On the other hand, Idaho is not "soft." I noted no Idaho cases incorrectly decided for the defendant.

123. Table I, *supra*.

124. *Id.* (51 cases studied: 12 decided for defendant and 8 wrongly decided for government).

125. The three incorrect reversals are: *People v. Parent*, 148 Ill. App. 3d 957, 958-59, 500 N.E.2d 80, 81 (1986) (holding valid a warrantless "walk through" search of defendant's house after defendant had been removed and taken to police station); *People v. Kessler*, 147 Ill. App. 3d 237, 240-42, 497 N.E.2d 1323, 1325-26 (1986) (holding that defendant consented to search through "nonverbal conduct" of backing away from door); *People v. Wilson*, 141 Ill. App. 3d 156, 159-60, 490 N.E.2d 701, 703-04 (1986) (holding that search of duffle bag justified as search incident to arrest or as limited *Terry* search). The other five Illinois cases I counted as "wrongly decided for the government" are: *People v. Martin*, 148 Ill. App. 3d 1061, 1067-68, 500 N.E.2d 528, 533 (1986) (upholding trial court's refusal to hear defendant's offer of proof that warrants had been issued for two separate premises and both warrants contained similar information); *People v. Ocasio*, 148 Ill. App. 3d 418, 423-26, 499 N.E.2d 528, 531-32 (1986) (upholding warrantless arrest at home despite questionable exigent circumstances); *People v. Stachelek*, 145 Ill. App. 3d 391, 398-400, 495 N.E.2d 984, 989-90 (1986) (holding that probable cause for arrest existed when defendant found in apartment with individual identified as participant in crime and police spotted blood on defendant's clothing); *People v. Turner*, 143 Ill. App. 3d 417, 423-24, 493 N.E.2d 38, 42 (1986) (holding that consent was given for police to enter home despite testimony by defendant and his mother that they did not consent); *People v. Dyer*, 141 Ill. App. 3d 326, 330-32, 490 N.E.2d 237, 240-41 (1986) (upholding stop of automobile despite no evidence that automobile used in crime).

126. 148 Ill. App. 3d 418, 499 N.E.2d 528 (1986).

127. *Id.* at 422-23, 499 N.E.2d at 530-31.

128. *Id.* at 420, 499 N.E.2d at 529.

arrest, in part because of the seriousness of the crime and the fact that the perpetrator of a stabbing murder was obviously armed.¹²⁹ However, the arrest occurred twelve hours after the crime and nearly two hours after the police had probable cause. The court averred that "it was not unreasonable for the officers to believe that the defendant might have escaped if not swiftly apprehended."¹³⁰ No basis for this belief is stated beyond the defendant's involvement in this crime. This decision is clearly wrong under current law.¹³¹

Still, given that it would have been proper to arrest the defendant without a warrant had the police officers found him on the street,¹³² it was not obviously unreasonable for them to look for him both on and off the street and to arrest him where they found him, at least when the arrest in the home was solely for the purpose of obtaining custody rather than as an excuse to search the home incident to the arrest. The pressures on the defendant to confess are not significantly different than they would have been had he been subjected to a warrantless arrest on the street, yet, in that case, the confession clearly would have been admissible.

Another example of understandable police confusion about fourth amendment rules is *People v. Parent*.¹³³ In that case the defendant was charged with possession of an explosive device. Neighbors had called police to report gunshots from the defendant's yard. When the police arrived, the defendant ran into his home. The police were informed that he had automatic weapons. They entered the house to arrest him (apparently for shooting at his neighbors) and saw a gun which they (properly) seized. When his girlfriend went into the kitchen a policeman followed her and saw another gun which was (properly) seized. After the defendant was arrested and transported to the police station, remaining officers conducted a "walk through" of the apartment and found additional weapons and an explosive device.¹³⁴ The appellate court approved this as a "protective sweep" incident to arrest.¹³⁵ While such a protective sweep may have been justified during the arrest, it hardly is justified after the defendant has been taken away. However, the police cannot be faulted too severely, as they might have found this case similar to others in which the Supreme Court has used a "vested rights"

129. *Id.* at 424, 427, 499 N.E.2d at 532, 533.

130. *Id.* at 424, 499 N.E.2d at 532.

131. See *Payton v. New York*, 445 U.S. 573, 590 (1980) (holding that warrant required to arrest individual in home, unless exigent circumstances present); *Brown v. Illinois*, 422 U.S. 590, 602-03 (1975) (*Miranda* warning does not remove taint of fourth amendment violation unless intervening events sufficiently attenuate violation).

132. See *United States v. Watson*, 423 U.S. 411, 423-24 (1976) (upholding warrantless public arrests).

133. 148 Ill. App. 3d 957, 500 N.E.2d 80 (1986).

134. *Id.* at 958, 500 N.E.2d at 80-81.

135. *Id.* at 959, 500 N.E.2d at 81.

approach to justify, as incident to arrest, the search of an automobile after the defendant has been removed.¹³⁶

"Consents" occurred almost as often in Illinois (15.7% of the time) as in Georgia (19.3% of the time).¹³⁷ However, it did not appear that Illinois regularly employed consent as a device to avoid grappling with fourth amendment issues. The facts in two of the consent cases were presented in sufficient detail for me to conclude that the appellate court findings of valid consent were wrong.¹³⁸ In a third case, the defendant agreed that he had consented.¹³⁹ Still, it is disturbing that the United States Supreme Court, with one hand, creates an overly elaborate scheme of fourth amendment protections and, with the other, provides the police with an easy means of circumventing it, which the police used 16.6% of the time (37 of 223 cases) in the states studied in 1986.¹⁴⁰

Oklahoma seemed to be doing a good job, deciding three cases for the defendant and none wrongly for the government.¹⁴¹ However, the relative scarcity of reported opinions again makes it difficult to be completely confident that the fourth amendment is being strictly enforced.¹⁴²

Louisiana, while not generally ill-disposed to fourth amendment claims (9.5% of the cases decided in favor of defendants),¹⁴³ nevertheless approved the most flagrant example of police misconduct that I discovered. In *State v. Williams*,¹⁴⁴ a stabbing murder by a burglar had occurred at a house two-fifths of a mile from where the defendant was staying. The victim was heard

136. See *New York v. Belton*, 453 U.S. 454, 462-63 (1981) (allowing warrantless search of automobile passenger compartment incident to lawful arrest after defendants had been removed); *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) (allowing warrantless automobile search after police had driven vehicle to police station).

137. Table I, *supra* (consents occurred in 8 of 51 cases studied in Illinois and in 11 of 57 cases studied in Georgia).

138. See *supra* note 125 (discussing *People v. Kessler*, 147 Ill. App. 3d 237, 497 N.E.2d 1323 (1986), and *People v. Turner* 143 Ill. App. 3d 417, 493 N.E.2d 38 (1986)).

139. *People v. Whitfield*, 140 Ill. App. 3d 433, 439, 488 N.E.2d 1087, 1091 (1986) (defendant signed consent to search form as part of his employment).

140. Table I, *supra*.

141. *Id.*

142. Only 19 fourth amendment cases were decided by opinion in Oklahoma in 1986. *Id.*

143. *Id.*

144. 490 So. 2d 255 (La. 1986), *cert. denied*, 107 S. Ct. 3277 (1987). The other four Louisiana cases that I counted as "wrong" were: *State v. Payne*, 489 So. 2d 1289, 1292-93 (La. Ct. App.) (holding that search of bag attached to defendant's bicycle was proper during *Terry* stop), *writ denied*, 493 So. 2d 1217 (La. 1986); *State v. Jones*, 483 So. 2d 1207, 1208-09 (La. Ct. App.) (holding that police had reasonable suspicion to make *Terry* stop and to remove "pill formation" from defendant's pocket), *writ denied*, 488 So. 2d 197 (La. 1986); *State v. Washington*, 482 So. 2d 171, 173-74 (La. Ct. App. 1986) (holding search warrant valid based on hearsay of informant and two-hour surveillance of apartment during which time two suspicious visits took place); *State v. Brown*, 482 So. 2d 115, 116-17 (La. Ct. App.) (upholding police pat-down of individual who, with "suspicious bulge" in jacket, walked through area linked to narcotics traffic), *writ denied*, 487 So. 2d 436 (La. 1986).

to shout, "This black man is killing me," and "darkly pigmented skin" was discovered on the window ledge through which the murderer had escaped. The police had no other evidence but knew that the defendant, who earlier had been convicted for burglary, was in the area on furlough from a prison camp. Police officers went to his grandfather's house "to pick [him] up for questioning."¹⁴⁵ According to the court, he "voluntarily accompanied the detectives to the sheriff's office."¹⁴⁶

At the office the defendant was advised of his *Miranda* rights and signed a waiver form. Police officers then ordered him to strip so that they could look for scratches and told him he would not be released unless he complied. Scratches were noted, and "[a]fter further interrogation the defendant finally admitted that he had murdered [the victim]."¹⁴⁷

The court made no effort to argue that the defendant was not under arrest, which he plainly was at least by the time he was ordered to strip,¹⁴⁸ or that this arrest was based on probable cause. Rather, it denied defendant's motion to suppress the confession on the grounds that his status as a furloughed prisoner meant that he had no expectation of privacy.¹⁴⁹

The court thus relied upon the patently unsound "constructive custody" theory,¹⁵⁰ which has been advanced, and rejected, in other cases to justify warrantless searches of parolees.¹⁵¹ As the Supreme Court pointed out in a related context in *Morrissey v. Brewer*:¹⁵² "Although the parolee is often formally described as being 'in custody,' the argument cannot . . . be made here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody."¹⁵³

145. *Williams*, 490 So. 2d at 257.

146. *Id.*

147. *Id.* at 258.

148. The Supreme Court has clearly indicated that this scenario constitutes an arrest. *See Dunaway v. New York*, 442 U.S. 200, 212 (1979) (picking someone up for questioning and transporting him to police station for interrogation constitutes "arrest"). In *Dunaway* the defendant also had "voluntarily" accompanied the police in the sense that he had acceded to a police request to come down to the station. *Id.* at 222-24 (Rehnquist, J., dissenting).

149. *Williams*, 490 So. 2d at 260.

150. *Id.*

151. For a general discussion of the "constructive custody" theory, see 4 W. LAFAYE, *supra* note 21, § 10.10(a).

152. 408 U.S. 471 (1972).

153. *Id.* at 483; *cf. Hudson v. Palmer*, 468 U.S. 517, 526-28 (1984) (citing "institutional security" as basis for holding that no expectation of privacy exists in prison cell).

The recent case of *Griffin v. Wisconsin*, 107 S. Ct. 3164 (1987), in which the Court upheld a warrantless search of a probationer's home by probation officers on "reasonable grounds" as authorized by the state probation statute, is distinguishable. The Louisiana court in *Williams* gave no indication that furloughed inmates were subject to the kind of statutory regulation that was present in *Griffin*. Moreover, the Louisiana search was not part of a "special" regulatory scheme "beyond normal law enforcement," as was the Wisconsin search. *Griffin*, 107 S. Ct. at 3168. Rather, this

Professor LaFave indicates that recent opinions also have rejected this "constructive custody" argument as a "mere fiction."¹⁵⁴ If the arrest of the defendant in *Williams* was unconstitutional, so too were the strip search and subsequent confession.¹⁵⁵

IV. WHAT IS TO BE DONE?

Assuming that the existence of "wrongly" decided opinions in the state courts poses a problem one wants to correct, what should be done? One solution would be to restore federal habeas jurisdiction, as *Stone's* critics have urged. I do not urge this, for two reasons. First, such a wholesale restoration of habeas jurisdiction would create a substantial burden on the federal courts since they would no longer be able to summarily dismiss fourth amendment issues. This burden should be placed on the federal courts only if there is reason to believe it is necessary to do so. Second, and more importantly, it is highly unlikely that such a solution would work since, as discussed, *Stone's* elimination of federal habeas jurisdiction does not seem to have made much difference in fourth amendment enforcement by the states surveyed. In any event, a solution is available that is compatible with *Stone*.

A. THE "OPPORTUNITY FOR FULL AND FAIR LITIGATION" EXCEPTION

The Supreme Court's ban on federal habeas jurisdiction over fourth amendment claims was not absolute. The *Stone* Court recognized that federal habeas corpus jurisdiction would still lie if a state had not "provided an opportunity for full and fair litigation of [the] Fourth Amendment claim."¹⁵⁶ The Court provided scant elaboration of this exception.¹⁵⁷ Just what this language means has been the subject of considerable debate in the lower fed-

was simply an ordinary criminal investigation by ordinary police. They were not in any sense engaged in the sort of "supervisory" function that the Court approved in *Griffin*. *Id.*

154. 4 W. LAFAVE, *supra* note 21, at 131.

155. See *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975) (confession obtained after unlawful arrest is inadmissible despite *Miranda* warning, unless an intervening event breaks causal connection between illegal arrest and incriminating statement).

156. *Stone*, 428 U.S. at 494. This exception, and the majority opinion in *Stone* as a whole, was obviously influenced by Professor Bator's article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963), which is cited several times in *Stone*, 428 U.S. at 475 n.7, 494 n.35, as well as in Justice Powell's concurrence in *Schneekloth v. Bustamonte*, 412 U.S. 218, 253 nn. 3 & 5, 255 n.7 & 259 n.13 (1973) (Powell, J., concurring). However, as Professor Halpern has demonstrated, Bator's views do not aid in interpreting the exception in *Stone*. Halpern, *supra* note 10, at 16-17 (while Bator's views are based on interpretation of federal habeas corpus statute, *Stone* and its exception are based "on a constitutional judgment about the source of the exclusionary rule").

157. Only a cryptic reference to *Townsend v. Sain* is provided. *Stone*, 428 U.S. at 494 n.36 (citing *Townsend*, 372 U.S. 293 (1963)). Professor Halpern has demonstrated that *Townsend* provides little help in interpreting this exception. Halpern, *supra* note 10, at 14-16 & n.94 (*Townsend* assumes that

eral courts.¹⁵⁸ As Professor Halpern has concluded, however, “[m]ost lower federal courts interpret *Stone*’s use of the term ‘opportunity’ to mean that habeas corpus review of a fourth amendment claim may be available only where state process was defective” and not when the state courts have simply decided the fourth amendment issue wrongly.¹⁵⁹ Since the states generally provide forums in which to litigate these claims, the practical effect of this view is that “wherever state courts reject fourth amendment claims on their merits [however erroneously], habeas applicants are generally unsuccessful in obtaining federal review on the basis of alleged procedural defects at trial or on appeal.”¹⁶⁰

Given the rationale for *Stone* in the first place—that fourth amendment violations have nothing to do with guilt or innocence and that the cost of enforcing the exclusionary rule at the federal habeas level is not worth the limited benefit of additional deterrence, if any, of police misconduct—the process-based view seems correct. However, one wonders why the Court declared the exception. In advancing the deterrent interest served by the exclusionary rule, what is the difference between allowing federal habeas relief for the limited class of defendants unable to raise fourth amendment issues at trial but denying it to the larger class of defendants whose claims were wrongly decided? As Justice Brennan pointed out, dissenting in *Stone*, if a general grant of federal habeas review would not increase deterrence of police misbehavior significantly, as the majority assumed, then surely granting such review in those cases in which the defendant was not accorded an “opportunity for full and fair litigation of his claim” will not do so either.¹⁶¹

Therefore this exception is totally inconsistent with *Stone*’s main policy choice, that resort to habeas corpus “other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government.”¹⁶² Since the prisoner who claims solely that he was convicted on the basis of illegally seized evi-

defendant has received evidentiary hearing and is thus irrelevant to deciding whether defendant had sufficient opportunity to obtain such hearing).

158. Compare *Gamble v. Oklahoma*, 583 F.2d 1161, 1165 (10th Cir. 1978) (“Opportunity for full and fair consideration’ includes, but is not limited to, the procedural opportunity to raise or otherwise present a Fourth Amendment claim. It also includes [a] full and fair evidentiary hearing . . . [and] recognition and at least colorable application of the correct Fourth Amendment constitutional standards.” (footnote omitted)) with *Swicegood v. Alabama*, 577 F.2d 1322, 1324 (5th Cir. 1978) (using *Stone* to reject defendant’s claims that he did not receive *full* consideration because state courts dealt with illegal arrest only “in passing” and that he did not receive *fair* hearing because state courts misapplied federal constitutional law).

159. Halpern, *supra* note 10, at 18.

160. *Id.* at 20. Moreover, “actual litigation on the merits in the state courts is not necessary” as long as “the defendant had the opportunity to litigate.” *Id.* at 21.

161. *Stone*, 428 U.S. at 514 (Brennan, J., with Marshall, J., dissenting).

162. *Id.* at 491 n.31 (majority opinion).

dence is making no claim that he is "innocent," he seemingly is not entitled to relief under this strict policy reading of *Stone*.

By creating this exception, the *Stone* Court must have been endeavoring to advance some goal of habeas corpus other than protection of the innocent. What is that goal?

Stone represents the victory of the "narrow" over the "broad" view of federal habeas corpus. The broad view adopted by the Court in 1963 in *Fay v. Noia*¹⁶³ noted that the Habeas Corpus Act of 1867,¹⁶⁴ which first extended federal habeas corpus to state prisoners, was "designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees."¹⁶⁵

The Act was adopted because Congress "distrusted the courts of the southern states and expected that they would be totally unreceptive to the Reconstruction legislation."¹⁶⁶ Interpreting the same 1867 Act, a majority of the *Stone* Court was influenced by Justice Powell's concurrence in *Schneckloth v. Bustamonte*,¹⁶⁷ which rejected the broad view as a "revisionist view" of history.¹⁶⁸ *Stone* held that habeas corpus should be limited to the narrow concern of assuring that no innocent person suffers an unconstitutional loss of liberty.

Thus, while the narrow view won out in *Stone*, the full and fair litigation exception represents the lingering inclination to distrust the states, which animated the 1867 Act and, more importantly, the Supreme Court's 1961 decision in *Mapp v. Ohio*,¹⁶⁹ which applied the exclusionary rule to the states. Justice Powell, speaking for the *Stone* majority, simply was not willing to assume that the states always would provide a fair opportunity to litigate fourth amendment claims. If the states did not do so, the exclusionary rule's deterrent effect would be lost, and state and local police could feel free to ignore the fourth amendment's strictures. This result would be unacceptable to a Court that continues to insist that *Mapp* is the law of the land, as it

163. 372 U.S. 391 (1963).

164. Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2254 (1982)). The act provided that: "the several courts of the United States . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." *Id.*

165. *Fay*, 372 U.S. at 416; see also 3 W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE § 27.2, at 294 (1984) (purpose of 1867 Act was to give "federal courts superintending control so as to ensure that there would be full recognition of the federal rights already established in the 1866 Civil Rights Act and about to be established in the Fourteenth Amendment" (footnote omitted)).

166. 3 W. LAFAYE & J. ISRAEL, *supra* note 165, at 294.

167. 412 U.S. 218 (1973) (Powell, J., concurring).

168. *Id.* at 252. But see Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte*, 1975 WIS. L. REV. 484, 487-92 (arguing that legislative history of 1867 Act supports broad view).

169. 367 U.S. 643 (1961).

reiterated in *Stone*.¹⁷⁰

However, there is another way to deny defendants a full and fair opportunity to litigate fourth amendment claims beyond refusing to hear them—that is to hear such claims and then consistently decide them against defendants, regardless of the merits. This is precisely what is occurring on the record in Georgia and, possibly, off the record in South Carolina and Arizona. Just as if a state were not allowing defendants to litigate fourth amendment claims, the consistent refusal to grant relief on those claims will cause a state's police officers, prosecutors, and even defense attorneys to stop taking the fourth amendment seriously—the very result that the *Stone* exception appears to have been designed to avoid.

B. USING THE EXCEPTION TO PREVENT NONENFORCEMENT

If a defense attorney can demonstrate such a pattern in the courts of a particular state, it is reasonable for the federal courts sitting in that state to resume federal habeas jurisdiction on the basis of the *Stone* exception. That is, federal courts can reasonably conclude at some point that defendants are *not* provided a “full and fair opportunity” to litigate fourth amendment claims because of a consistent nonenforcement bias in the state courts. Such jurisdiction, which could be temporary, is entirely consistent with the *Stone* Court's unwillingness “to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the [state courts].”¹⁷¹ It is reasonable to believe that, faced with direct evidence of such “insensitivity,” as is provided by the cases collected in this article, the *Stone* majority's attitude toward habeas corpus review *in those states* might well have been different.

Such a solution does not open the floodgates of litigation, for as my study indicates, attorneys in most states will be unable to demonstrate the pattern of noncompliance necessary to convince the federal court even to consider the merits of their claim. Moreover, I do not claim that this study, by itself, provides the basis for such a federal court's decision to intervene. Rather, I would urge federal judges in Georgia to read the ten cases I characterized as “wrongly decided in favor of the government.” If the judges agree that Georgia has decided these, or most of these, cases wrongly, then that, combined with the unarguable fact that Georgia decided only two of fifty-seven

170. *Stone*, 428 U.S. at 484-86. Only Chief Justice Burger, concurring in *Stone*, urged that *Mapp* be overruled. *Id.* at 496 (Burger, C.J., concurring). While Justice Rehnquist did not join this concurrence, he has on other occasions expressed a similar view. See *California v. Minjares*, 443 U.S. 916, 927-28 (1977) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay) (arguing that parties and Solicitor General should have opportunity to brief question of whether exclusionary rule should be retained).

171. *Stone*, 428 U.S. at 494 n.35.

reported cases for defendants in 1986, should lead to the reestablishment of federal habeas jurisdiction in Georgia for some reasonable period of time. Similarly, attorneys in South Carolina, Arizona, and perhaps some of the other states in which opinions are rarely reported should study the briefs of unreported cases. Such analysis will enable them to convince federal judges that there exists, in states not enforcing the fourth amendment, such a persistent pattern of defendants not winning and of cases being wrongly decided in favor of the government that defendants are not in fact being granted a full and fair opportunity to litigate fourth amendment claims.

It must be emphasized that this solution does *not* permit a federal court to assume habeas jurisdiction to correct a single ruling by the state courts, no matter how egregiously wrong. Thus, in Louisiana, just because the *Williams* case was a bad decision,¹⁷² it is probably not fair to conclude on the basis of the data collected in this study that defendants do not receive a full and fair opportunity to raise these claims. After all, defendants in Louisiana won 9.5% of the time while 11.9% of the cases were wrongly decided for the government.¹⁷³ Similarly, in Illinois, even though a substantial percentage of cases (15.7%) were wrongly decided in favor of the government, an even more substantial percentage of cases (23.5%) were decided in favor of defendants.¹⁷⁴ While Illinois police (and courts) apparently could benefit from better training and from more comprehensible fourth amendment law, there is no reason to conclude that they have received a tacit message from the appellate courts to ignore the fourth amendment. The evidence in this survey indicates that Illinois defendants receive a full and fair opportunity to litigate these issues, even if the overall quality of the decisions is not high.¹⁷⁵

In not approving federal habeas jurisdiction on the basis of a showing of serious error in a single case, I differ from Professor Halpern, who urges that "habeas corpus relief should be available under *Stone*'s exception to correct judicial errors which, if otherwise uncorrected, could lead to diminished police adherence to fourth amendment values" such as "where a state's highest

172. See *supra* notes 144-55 and accompanying text (discussing *State v. Williams*, 490 So. 2d 255 (La. 1986), *cert. denied*, 107 S. Ct. 3277 (1987)).

173. Table I, *supra*. However, a court conceivably could conclude that this rate of bad decisions for the government (11.9%) combined with the high rate of consent searches (nearly a quarter of the cases studied) demonstrates a denial of a full and fair opportunity for Louisiana defendants to be heard. Certainly Louisiana bears further study.

174. *Id.*

175. The idea that Illinois courts are by no means hostile to fourth amendment claims is partially supported by a recent study showing that Chicago courts granted motions to suppress in 63.8% of all cases in which motions to suppress physical evidence were filed. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 231 [hereinafter *Costs Revisited*]. This compares to an earlier study by the same author that found a success rate of about 17.2% (27 of 157) on the same type of motions in three mid-sized Illinois counties. Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 598.

court has announced an erroneous and fertile fourth amendment rule of decision."¹⁷⁶

Professor Halpern elaborates with this example:

[S]uppose a state supreme court interprets a state statute as authorizing random stops of motorists to check drivers' licenses and vehicle registration. The court further holds that the statute is consistent with the fourth amendment, and affirms a conviction for possession of illegal drugs discovered incident to a random stop under the statute. If the fourth amendment decision is erroneous, every motorist and passenger in the state is threatened with an "unreasonable seizure." Consequently, habeas review is appropriate given the significant impact of the decision on the privacy interest of so many persons.¹⁷⁷

While Professor Halpern's interpretation of the *Stone* exception is consistent with advancing the deterrent purposes of the exclusionary rule, it is inconsistent with the *Stone* Court's express language and with the lower federal courts' nearly universal interpretation of that language. The defendant in the auto search hypothetical patently *has* had an opportunity for full and fair litigation of his fourth amendment claim. His only complaint is that the claim was wrongly decided and that the decision will have broad consequences. But as Professor Halpern observes, the lower federal courts do not recognize a wrong decision on the merits as providing grounds for federal habeas relief, for to do so would vitiate *Stone*.¹⁷⁸ That the decision may have broad consequences is a matter to be raised in the petition for certiorari on direct appeal, not on collateral attack in federal court.¹⁷⁹ Moreover, as soon as "wrong and consequential" is recognized as a ground for federal habeas jurisdiction, the federal courts once again will be forced to deal with large numbers of habeas corpus petitions because many fourth amendment claims, if wrong, could be deemed consequential.¹⁸⁰ The Court's goal in *Stone* of "effective utilization of limited judicial resources" thus would be lost.¹⁸¹

The above analysis assumes that the Court essentially is satisfied with the current state of fourth amendment law and simply would like to ensure its

176. Halpern, *supra* note 10, at 31.

177. *Id.* at 32 (footnotes omitted).

178. *Id.* at 17-18.

179. The purpose of certiorari jurisdiction is to "pass upon questions of wide import under the Constitution, laws and treaties of the United States." R. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* 190 (6th ed. 1986) (quoting address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949).

180. *See United States ex rel. Carbone v. Manson*, 447 F. Supp. 611, 616 (D. Conn. 1978) ("If this Court were to rule that *Stone* does not preclude habeas corpus review because the Connecticut Supreme Court did not apply an appropriate standard of review . . . it would be the rare state prisoner indeed who would not allege this.").

181. *Stone*, 428 U.S. at 491 n.31 (quoting *Schneekloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring)).

more consistent enforcement. As previously suggested, however, there is much reason to be *dissatisfied* with that law and to desire to change it substantially.

C. THE NEED FOR SIMPLICITY IN FOURTH AMENDMENT LAW

The totals in Table I tell much about the costs of enforcing the current body of search and seizure law. Of 223 cases studied in 1986, over a quarter either were or should have been decided for the defendant¹⁸² according to the various "rules" announced by the Supreme Court. Most of these cases did result, or could have resulted, in the reversal of a conviction¹⁸³ and the release of a (convicted) criminal. Many other cases either were dismissed before trial or were plea bargained because of police search and seizure mistakes, not to mention fifth and sixth amendment errors.¹⁸⁴

Yet, in only a very few of these 223 cases did I consider the police behavior clearly "wrong" in any obvious way. In all of the others, at least as the facts were disclosed in the opinions,¹⁸⁵ the police seem to have acted in a way most people would have considered reasonable had they not known of the excruciatingly complex rules the police are expected to follow.¹⁸⁶ Indeed, readers inclined to be critical of this study may well note that in the cases discussed the police behavior seemed reasonable. My response is: "I didn't write the rules."

I have suggested in a previous article that, as a matter of theoretical consistency, there are two and only two ways, of structuring fourth amendment law.¹⁸⁷ The first is that the police must be instructed to obtain a warrant whenever possible (by telephone if necessary), subject to a single, narrowly

182. See Table I, *supra* (35 cases decided for defendant (15.7%) and 23 wrongly decided for government (10.3%), or a total of 26.0%).

183. Such is my impression. I did not collect data on the criticality of the evidence that was or should have been suppressed. Professor Nardulli found that only 2.1% of cases in Chicago in which a motion to suppress physical evidence was granted resulted in a conviction. Nardulli, *Costs Revisited*, *supra* note 175, at 233. This suggests that a failure to suppress illegally seized evidence is not often likely to be deemed "harmless" in the sense that the improperly admitted evidence did not add much to the prosecution's case.

184. Professor Nardulli found that, in Chicago, motions to suppress an identification were successful 47.9% of the time, and motions to suppress a confession were successful 6.1% of the time. *Id.* at 231.

185. I am not oblivious to the possibility that the appellate court might slant the facts in order to make the opinion come out "right." There is no way to control for this factor other than to note that, because more than a quarter of the cases studied either were or should have been decided for the defendant on the reported facts, the courts are not consistently slanting the facts to favor the police.

186. For a discussion of this complexity, see Bradley, *supra* note 15, at 1501 (current fourth amendment law "is so full of fictitious rules and multifaceted exceptions (and exceptions to these exceptions) that the most that could be said of anyone's grasp of the doctrine is that 'he sees where most of the problems are'").

187. See *id.* (providing a complete description of the two models that I propose).

drawn, exigent circumstance exception.¹⁸⁸ The second is that the police simply be instructed to act "reasonably"—the only general limitation on searches and seizures imposed by the language of the fourth amendment.¹⁸⁹

This study, combined with Professor Nardulli's startling finding of a 63.8% success rate for motions to suppress physical evidence in Chicago,¹⁹⁰ provides the factual underpinning for the conclusion that something must be done about fourth amendment rules. It is just plain wrong to claim that the exclusionary rule comes at too high a cost. My experience as a prosecutor convinced me that *Mapp v. Ohio* was right: without the exclusionary rule, the police will not enforce the fourth amendment.¹⁹¹ Therefore, the cost of the exclusionary rule is the cost of having a meaningful fourth amendment. The problem is not the exclusionary rule, but that the underlying fourth amendment law is too complex. Things have gone too far when in twenty-six percent of the cases at the appellate level alone the police and trial courts have "erred" while apparently trying their best to follow the fourth amendment rules.¹⁹² The police must be given a very few simple rules that they can follow, search after search, year after year, if the ideal of effective law enforcement combined with respect for human rights is ever to be approached.

Fourth amendment law is unusual in a way that makes a radical restructuring of it especially necessary. Unlike most areas of law, it is not law for lawyers so much as it is law for police officers (a characteristic it shares with

188. *Id.* at 1491-98 (describing possibility of strict warrant requirement); see also Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 650 (1982) (arguing that only exigent circumstances should justify warrantless search). This strict warrant requirement rule would apply only to cases in which the search is based on probable cause. Thus, *Terry*-frisks could still be conducted without a warrant. Searches incident to valid arrests should be broken down into the frisk for weapons (no warrant required) and the search for evidence (warrant required) components. See Bradley, *supra* note 15, at 1494.

189. See Bradley, *supra* note 15, at 1481-91 (describing "reasonableness" model). The Supreme Court's current view that the fourth amendment requires a search warrant in every case subject to a few well-delineated exceptions gains little support from either the language or the history of the amendment. *Id.* at 1486 (arguing that language of fourth amendment does not emphasize primacy of warrant requirement over reasonableness requirement).

190. Nardulli, *Costs Revisited*, *supra* note 175, at 231. Note that this is a success rate in cases in which such motions were filed. Such suppression motions were filed in 8.8% of all cases. There is some reason to discount this success rate, which does not square with previous findings as to the impact of the exclusionary rule. As Professor Nardulli points out, for example, the overall conviction rate in all cases was very low in Chicago (39.8%) compared to the jurisdictions he had previously studied (88%). *Id.* at 233. The granting of a motion to suppress thus simply may have been a convenient way for the courts to dispose of a weak case.

191. As stated by Commander John Ryle of the Chicago Police Department: "[The exclusionary rule] makes the police department more professional. It enforces appropriate standards of behavior. Throughout this police department, the majority of cases are not hurt by the exclusionary rule." Note, *supra* note 31, at 1016. But see Nardulli, *Costs Revisited*, *supra* note 175, at 231 (finding motions to suppress physical evidence succeeding in 63.8% of all cases in Chicago).

192. See Table I, *supra* (15.7% of all cases decided for defendant and 10.3% of all cases decided incorrectly for government).

the *Miranda* branch of fifth amendment law). A group of people, the police, untrained in the niceties of legal interpretation, are expected to apply this law while at the same time pursuing the overriding goals of catching criminals and protecting themselves and others from harm. While the Supreme Court often has recognized the need for clear rules for the police to follow in isolated cases, no Justice would claim seriously that the entire body of fourth amendment law constitutes any kind of comprehensible mandate to the average police officer. Unlike the *Miranda* rules, which by their clarity and inflexibility generally inform the police what to do, current fourth amendment law must be contemplated in advance by lawyers to be understood. Either of my models would be more consistent with the goal of enforcing the fourth amendment than is the current arrangement.

Admittedly, the two proposals suggested here are not faultless. The "reasonableness" approach, by giving no guidelines, invites trial judges to put themselves in the shoes of the police. It threatens to erode privacy interests in some jurisdictions and effective law enforcement in others. Certainly, a system providing clear, nationally uniform rules would be preferable. As this study shows, however, the current system does not do this.

The "strict warrant" approach provides rules as well as any approach could, while still leaving room for the police to act without a warrant in case of an emergency. The problem with this approach is that it threatens effective law enforcement in close cases in which the police, erring on the side of caution, attempt to secure a warrant and let the suspect slip away. Nevertheless, it is clear to me that far fewer criminals would be lost in this scenario than currently are lost in the court system as a consequence of the inability of police officers to follow the Supreme Court's fourth amendment rules.

In an effort to balance the interests of effective law enforcement and protection of human rights, the Court has disserved both. Unless a wholesale restructuring of fourth amendment law occurs, the system will continue to produce an unacceptably high volume of cases lost at every stage of the criminal process, because of the inability of the police, the lawyers, and the courts to follow the hopelessly complex body of fourth amendment law.

V. CONCLUSION

One cannot conclude definitively from a study of reported appellate decisions whether the states in general, or a given state in particular, are enforcing the fourth amendment. A state with a high quality police force and conscientious trial courts, for example, would produce neither many appellate decisions favoring defendants nor many cases wrongly decided in favor of the government. The prevalence of unreported decisions in some states compounds the difficulties.

Despite the limitations of this study, it provides useful data for comparing

a state to itself over time and states to each other at a given time. It answers in the negative the question of whether *Stone v. Powell* has had an impact and reveals that, in general, many states appear to be enforcing the fourth amendment as conscientiously as possible, given the complexity of the law. Some states have surpassed the Supreme Court by interpreting the search and seizure provisions of their constitutions more broadly than the fourth amendment has been interpreted in recent years.¹⁹³ Nevertheless, in my view, Georgia plainly, and possibly South Carolina and Arizona, are not enforcing the fourth amendment. Accordingly, the United States District Courts in Georgia, if they agree with my view of the cases, should reassume federal habeas corpus jurisdiction under the "full and fair" opportunity exception in *Stone*. Federal courts in those states with a preponderance of unreported opinions should conduct a full review of these unreported cases.

What of the states not studied? No doubt that there may be a few other states—with the combination of a low percentage of cases decided in favor of defendants and a high percentage of cases wrongly decided in favor of the government (or a general refusal to issue reported opinions in fourth amendment cases plus other evidence of noncompliance)—that they too can be said not to be following fourth amendment standards. While a broad study such as this one is difficult, a similar study of a single state in one year is not. It is not too much to expect that ambitious law student authors or public defenders in Florida, Texas, or Pennsylvania, let alone Wyoming or Montana, might undertake to examine the decisions in their state for one or two years, thereby possibly providing grounds for a defense attorney to raise this issue in the federal district courts of that state.

If the Supreme Court insists on having intricate fourth amendment rules, it must take appropriate steps to ensure that the states are enforcing them. To declare such rules and then wink at a consistent flouting of them by a state's courts is not a sensible way to govern.¹⁹⁴

193. See *supra* note 25 and accompanying text (identifying states whose search and seizure protections exceed those currently required by fourth amendment).

194. The irrationality of the Supreme Court's approach is apparent as far away as Australia:

An accused person cannot invoke the [exclusionary] rule if the evidence was obtained in breach of another's rights. The rule does not apply to breaches by a private individual rather than a state official. It does not apply so as to prevent the presentation of illegally obtained evidence to a federal grand jury. And the rule does not apply where the evidence is admitted not on the issue of the accused's guilt but on some collateral issue such as his credibility as a witness. This kind of narrow distinction between evidence proving guilt and evidence proving that an accused who says he is not guilty is not worthy of belief as a witness tends to bring the law and lawyers into contempt.

AUSTRALIAN LAW REFORM COMMISSION, CRIMINAL INVESTIGATION REPORT NO. 2, at 39 (Interim 1975).