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Mapp's Exclusionary Rule: Is the Court Crying Wolf?

Michael Vitiello*
Jane C. Burger**

I. Introduction

Although economics and military preparedness dominated the 1980 presidential campaign, the possibility of the appointment of several Justices to the United States Supreme Court was an important campaign issue.[1] Justice Potter Stewart announced his resignation from the Court in June of 1981 and Sandra D. O'Connor has already been selected by President Reagan as Stewart's replacement.[2] It is rumored that Justices Brennan and Marshall will resign from the bench at some proximate point. Brennan is expected to resign because of the poor health of his wife and Marshall because of his own failing health.[3] The age and health of other Justices make it probable that President Reagan will make a number of appoint-

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1. The following report of a speech given by then President Carter during the campaign appeared in a weekly news magazine:

> After praising himself as the President who has "appointed more black judges than any in U.S. history," Carter warned that a change might occur if he were replaced by a Republican. "The U.S. Supreme Court has been the final bulwark of freedom. You just think about what will happen with another three or four appointments."

Time, July 14, 1980, at 17. *See also* Slonim, *Picking Federal Judges,* 66 A.B.A.J. 1185 (1980); Witt, *Reagan As President Could Change Face of U.S. High Court,* Commercial Appeal, July 27, 1980, § A, at 6, col. 1. Candidate Reagan responded to criticism from Carter supporters who raised the fear that Reagan would appoint anti-abortion and right wing judges to the federal bench. *See* Turner, *Reagan Says He Would Not Use Single-Issue Test To Pick Judges,* N.Y. Times, Oct. 2, 1980, § A, at 1, col. 2. *See also* Taylor, *Carter Judge Selections Praised, But Critics Discern Partisanship,* N.Y. Times, Oct. 3, 1980, § A, at 1, col. 1.

2. O'Connor testified at her confirmation hearings that the exclusionary rule "may have" contributed to an increase in the crime rate, and that she would be receptive to a modification of the rule. The Wash. Post, Sept. 11, 1981, § A, at 2, col. 2.

3. *See* B. WOODWARD & S. ARMSTRONG, THE BRETHREN, 154, 188, 358-59, 441 (1979).

ments to the Court.[4] The Republicans endorsed a platform plank promising that their candidate would appoint judges at all levels of the judiciary "who respect traditional family values and the sanctity of innocent human life."[5] Undoubtedly, President Reagan will view such a plank as an invitation to appoint conservative judges.[6]

During his 1968 presidential campaign, Richard Nixon attacked the Warren Court's decisions enlarging the rights of criminal defendants and vowed to appoint Justices who would reverse the Warren Court trend.[7] In part, Nixon's Justices have brought about the promised impact. Although the Burger Court has not overruled the major decisions from the 1960's, it has seldom expanded those holdings and has frequently eroded their principles.[8] For example, the Court granted certiorari to review *Mapp v. Ohio*[9] and *Miranda v. Arizona.*[10] Both decisions withstood review, but narrowly.[11]

The Justices appointed to the Supreme Court during the next four years by President Reagan will serve a significant role in shaping the Court's posture on the rights of criminal defendants. An analysis of the Burger Court decisions reveals an instability of majorities within the Court.[12] Those majorities will be reshaped with

4. Taylor, *Carter Judge Selections Praised, But Critics Discern Partisanship,* N.Y. Times, Oct. 3, 1980, § A, at 1, col. 2; Witt, *Reagan As President Could Change Face of U.S. High Court,* Commercial Appeal, July 27, 1980, § A, at 6, col. 1. Five Justices are over 70 years of age: Chief Justice Burger and Justices Brennan, Marshall, Powell, and Blackmun.

5. Taylor, *supra* note 1, at 20, col. 1.

6. "Mr. Reagan has expressed a preference for convervative judges who will not 'invade the prerogative of the legislature.'" *Id.*

7. *See* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873, 893 (1976).

8. *See, e.g.,* Michigan v. DeFillippo, 443 U.S. 31 (1979); Fare v. Michael C., 442 U.S. 707 (1979); North Carolina v. Butler, 441 U.S. 369 (1979); Oregon v. Mathiason, 429 U.S. 492 (1977); United States v. Mandujano, 425 U.S. 564 (1976); Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); Michigan v. Mosley, 423 U.S. 96 (1975); United States v. Harris, 403 U.S. 573 (1971); Spinelli v. United States, 393 U.S. 410 (1969). *See generally* Chase, *The Burger Court, The Individual, and the Criminal Process: Directions and Misdirections,* 52 N.Y.U. L. REV. 518 (1977).

9. 367 U.S. 643 (1961).

10. 384 U.S. 436 (1966).

11. *See* notes 86-97 and accompanying text *infra.* In 1975, the Court granted certiorari in Brewer v. Williams, 430 U.S. 387 (1977). One major question presented was whether a more flexible police interrogation standard should be adopted to replace the requirements of Miranda v. Arizona. Twenty-one states as amici curiae urged that the Court overrule *Miranda. Id.* at 438. (Blackmun, J., dissenting). The *Miranda* question was avoided and the case was decided on the basis of Massiah v. United States, 377 U.S. 201 (1964), concerning the sixth amendment right to counsel. Justice Stewart, a dissenter in *Miranda,* wrote for the *Williams* majority in a 5-4 decision.

One scholar has noted that although the *Williams* court avoided decision on the continued validity of *Miranda,* it also avoided relying on *Miranda* and maintained its record of not holding "a single item of evidence inadmissible on the authority of *Miranda*" since Chief Justice Burger assumed his post in June, 1969. Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is Interrogation? When Does it Matter?,* 67 GEO. L.J. 1, 78-80 (1978) (footnotes omitted). *But see* Edwards v. Arizona, - U.S. -, 101 S. Ct. 1880 (1981). *See generally* Kamisar, *Foreword: Brewer v. Williams — A Hard Look at a Discomfitting Record,* 66 GEO. L.J. 209 (1977).

12. *See* Newsweek, July 14, 1980, at 22.

the addition of new Justices, especially if President Reagan selects the replacements for the Court's remaining liberals. It is reasonable to assume that Reagan appointees will decide to limit the rights of criminal defendants.[13]

The particular concern of this article is the exclusionary rule of *Mapp v. Ohio*. Although it withstood the Court's review, it has been heatedly attacked by critics on the Court[14] and in the legal community.[15] *Mapp* has been eroded almost from its inception.[16] Four Justices currently on the Court have expressed strong dissatisfaction with the exclusionary rule[17] and *Mapp* appears particularly vulnerable after Justices Brennan and Marshall are no longer on the

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> Once again, the Burger court defied simplistic efforts to fit into a neat liberal or conservative mold. . . .
>
> If there was any thread running through the end-of-term decisions, it had to do with the style of the Court's rulings, not their substance. These nine Justices repeatedly speak in separate voices, not in unison. Their failing coalitions seem to try everything but consensus; in one case, they offered seven separate opinions.

Id. See also Time, July 14, 1980, at 10.

> [C]ourt watchers customarily try to ascertain where the court as a whole stands, whether it is moving toward conservatism or liberalism, toward activism or judicial restraint. The only answer is that the court is deeply divided. The four cases decided last week produced a total of no fewer than 22 concurring and dissenting opinions, which filled a total of 345 pages.

Id.

13. Speaking in Birmingham, Alabama, Reagan commented:

> "Time and again in recent years, we have seen the Supreme Court override public opinion concerning school prayer, forced busing, the treatment of criminals. . . . There must be new justices on the Court, women and men who respect and reflect the values and morals of the American majority. I pledge to make such appointments."

Slonim, *Picking Federal Judges,* 66 A.B.A.J. 1185, 1186-87 (1980).

14. *See, e.g.,* United States v. Janis, 428 U.S. 433, 446 (1976): "The debate within the Court on the exclusionary rule has always been a warm one." *See also* Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring); United States v. Peltier, 422 U.S. 531 (1975).

15. *See, e.g.,* Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN. L. REV. 1027 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970); Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is a Deterrent to Police?,* 62 JUDICATURE 404 (1979); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?,* 62 JUDICATURE 214 (1978); Wingo, *Growing Disillusionment with the Exclusionary Rule,* 25 SW. L.J. 573 (1971); Wright, *Must the Criminal Go Free If the Constable Blunders?,* 50 TEX. L. REV. 736 (1972).

16. That process began with Linkletter v. Walker, 381 U.S. 618 (1965), which denied retroactive application of *Mapp* to state convictions that had become final prior to *Mapp*.

17. Chief Justice Burger has been most critical of the rule. He initially hesitated to overrule *Mapp* in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting), but subsequently advocated overruling the decision in Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring). More recently, the Chief Justice, joined by Justices Blackmun and Rehnquist, characterized a holding of the Court as "another manifestation of the practical poverty of the judge-made exclusionary rule." Ybarra v. Illinois, 444 U.S. 85, 97 (1979) (Burger, C.J., dissenting). Justice Rehnquist authored the Court's opinion in United States v. Peltier, 422 U.S. 531 (1975). One scholar noted,

> The principle [in *Peltier*] is so broadly stated, and the majority's dislike of the suppression doctrine is so apparent, that Justice Brennan, who has emerged as the Court's most vocal defender of the doctrine, feared the principle would spill over into ordinary search and seizure cases that do not involve questions of retroactivity.

Geller, *Enforcing The Fourth Amendment: The Exclusionary Rule and Its Alternatives,* 1975 WASH. U. L.Q. 621, 636. Justice White announced his readiness to modify Mapp in his dissenting opinion in Stone v. Powell, 428 U.S. 465, 536 (1976) (White, J., dissenting). Justice Powell expressed a willingness to develop a sliding scale of fourth amendment violations in Brown v. Illinois, 422 U.S. 590, 606 (1975) (Powell, J., concurring in part).

Court.[18] Chief Justice Burger challenged the exclusionary rule more than five years before his appointment to the Court.[19] Shortly after appointment he began his attack in earnest. Burger has characterized the rule as "conceptually sterile and practically ineffective" in deterring illegal police conduct.[20] Thus, he has attempted to shift the burden to supporters of the rule to show that the rule accomplishes its stated objective.[21]

Supreme Court decisions eroding the exclusionary rule have focused on the rule's cost to society and its limited proven deterrent value.[22] The Court has balanced the marginal deterrent value of the rule when applied to civil proceedings with the cost to society of applying the rule and concluded that extension of the rule was not justified.[23]

The erosion of the exclusionary rule that has already occurred may become partial justification for overruling *Mapp* in the near future. Historically, the Supreme Court has seldom directly overruled precedents.[24] Its reluctance to do so may be explained by the need to preserve its image as an impartial decision-maker adhering to fundamental constitutional values.[25] One commentator persuasively suggests that there is an "art" to overruling a prior case that preserves the image of transcendent principle.[26] A component of that art is the erosion of the earlier case by subsequent cases. The Court may rely on erosion to show that the new rule is not a product of the new Justices, but the work of many Justices over time.[27] Section II of this

18. Justices Brennan and Marshall have been the most consistent supporters of Mapp. *See* Michigan v. DeFillippo, 443 U.S. 31, 41 (1979) (Brennan, J., with whom Marshall and Stevens, JJ., joined, dissenting); Stone v. Powell, 428 U.S. 465, 502 (1976) (Brennan, J., with whom Marshall, J., joined, dissenting); United States v. Janis, 428 U.S. 433, 460 (1976) (Brennan, J., with whom Marshall, J., joined, dissenting); United States v. Peltier, 422 U.S. 531, 544 (1975) (Brennan, J., with whom Marshall, J., joined, dissenting); United States v. Calandra, 414 U.S. 338, 355 (1974) (Brennan, J., with whom Douglas and Marshall, JJ., joined, dissenting).

19. Burger, *Who Will Watch The Watchman?,* 14 AM. U. L. REV. 1 (1964).

20. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting). Justice Burger has also referred to the rule as a "Draconian, discredited device in its present absolutist form." Stone v. Powell, 428 U.S. 465, 500 (1976) (Burger, C.J., concurring).

21. 403 U.S. at 416.

22. *See, e.g.,* United States v. Salvucci, - U.S. -, 100 S. Ct. 2547 (1980); Michigan v. DeFillippo, 443 U.S. 31 (1979); Stone v. Powell, 428 U.S. 465 (1976); United States v. Peltier, 422 U.S. 531 (1975); United States v. Calandra, 414 U.S. 338 (1974).

23. United States v. Janis, 428 U.S. 433 (1976).

24. [D]espite its widespread reputation as a Court most ready to "disregard precedent and overrule its own earlier decisions," the Supreme Court in fact has directly overruled prior decisions on no more than a hundred occasions in over a century and a half of judicial review. And only about half of these instances involved cases . . . in which the Court was dealing with a constitutional question.

Israel, *Gideon v. Wainwright: The "Art" of Overruling,* [1963] S. CT. REV. 211, 213-14 (footnotes omitted).

25. *Id.* at 216-17.

26. *Id.*

27. Other grounds for overruling cases are changing conditions and the lessons of experi-

article demonstrates the erosion of *Mapp* that may be used to overrule it.

The arguments surrounding the exclusionary rule focus on several issues: (1) its effectiveness as a deterrent,[28] (2) the adequacy of alternatives,[29] and (3) the constitutional status of the rule itself.[30] A major premise of the argument against the exclusionary rule is that the cost to society of "the release of countless criminals" is too great.[31] A recent study of the federal system indicates that the cost to society may be overstated. The study found that in a sample of almost 3000 defendants charged with a crime, evidence was suppressed on fourth amendment grounds in only 1.3 percent of the cases examined.[32] Another study indicates a low rate of suppression in state felony cases.[33] Section III of this article reports the research of the authors on the application of the rule in state appellate courts. The authors' findings also suggest that the exclusionary rule's cost to society has been exaggerated. Any modification or abandonment of the rule, therefore, should be preceded by a review of the research and a reappraisal of the rule's actual costs.

II. The Exclusionary Rule: Its Erosion

A. Background

The fourth amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreason-

ence. "There are very few such cases in which the Court has not employed one or the other [rationale]." *Id.* at 226.

28. *See, e.g.,* Canon, *A Postscript on Empirical Studies and the Exclusionary Rule,* 62 JUDICATURE 455 (1979); Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?,* 62 JUDICATURE 398 (1979); Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels,* 5 AM. POLITICS Q. 57 (1977); Canon, *Is the Exclusionary Rule in Failing Health?,* 62 KY. L.J. 681 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970); Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is a Deterrent to Police?,* 62 JUDICATURE 404 (1979); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives,* 2 J. LEGAL STUDIES 243 (1973); Critique, 69 NW. U. L. REV. 740 (1974).

29. *See, e.g.,* ALI Model Code of Pre-Arraignment Procedures §§ 8.02C2) (Tent. Draft No. 4, 1971); Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349 (1974); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives* [1975] WASH. U. L.Q. 621; Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?,* 62 JUDICATURE 67 (1978); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?,* 62 JUDICATURE 215 (1978); Wright, *Must the Criminal Go Free If the Constable Blunders?,* 50 TEX. L. REV. 736 (1972).

30. *See* Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?,* 62 JUDICATURE 67 (1978); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?,* 62 JUDICATURE 215 (1978).

31. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. at 416.

32. REPORT OF THE COMPTROLLER GENERAL ON THE IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (1979). The Report appears to diminish one hidden cost of the exclusionary rule. Prosecutors often decline to prosecute because of known fourth amendment violations, but the Report cites search and seizure problems as the primary reason in only 0.4% of the cases in which prosecution was declined.

33. Brasi, *A Cross-City Comparison of Felony Case Processing* (1979).

able searches and seizures."[34] Unlike the fifth amendment's direct command against the use of compelled testimony,[35] the fourth amendment contains no express remedy. It was not until 1914 that the Court created a remedy for effectuation of the rights protected by the fourth amendment.[36] Thirty-five years later, the Court held in *Wolf v. Colorado*[37] that the core of the protection found in the fourth amendment was "implicit in the concept of ordered liberty" and therefore applicable to the states.[38] *Wolf* rejected, however, the *Weeks v. United States*[39] exclusionary rule, which applied only in federal courts.[40]

B. Mapp v. Ohio

Wolf survived less than twelve years, when the Court reversed itself in *Mapp v. Ohio*.[41] In the interim, according to Justice Clark's opinion in *Mapp,* decisions by the Supreme Court eroded the foundation of *Wolf.*[42] Specifically, Justice Clark cited the rejection of the "silver platter" doctrine in *Elkins v. United States,*[43] the expansion of standing in *Jones v. United States,*[44] and the use of injunction to prevent federal officials from handing over illegally seized evidence to state officials in *Rea v. United States.*[45] The opinion focused on the lessons of experience,[46] which proved that *Wolf's* factual assumptions were erroneous.[47]

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34. U.S. CONST. amend. IV.

35. U.S. CONST. amend. V. *See also* Boyd v. United States, 116 U.S. 616 (1886). *Boyd* involved a forfeiture proceeding in which Boyd was compelled to produce private books and papers. The Supreme Court held that compulsory production was barred by both the fourth and fifth amendments. While the fifth amendment is now limited to testimonial evidence, United States v. Wade, 388 U.S. 218 (1967), Schmerber v. California, 384 U.S. 757 (1966), *Boyd* provided the first indication that the exclusionary remedy may be based on the fourth amendment. *See* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives,* [1975] WASH. U. L.Q. 621. *See also* United States v. Janis, 428 U.S. 433, 443 (1976).

36. Weeks v. United States, 232 U.S. 383 (1914) (defendant may petition before trial for the return of evidence seized illegally by federal authorities); Gouled v. United States, 255 U.S. 298 (1921) (illegally seized evidence cannot be used at trial). *See also* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (prohibited the use of copies of illegally seized evidence at trial). Prior to *Weeks,* the Court adhered to the common-law rule prohibiting a court from asking how the evidence was obtained. *See* Adams v. New York, 192 U.S. 585 (1904).

37. 338 U.S. 25 (1949).

38. *Id.* at 27-28.

39. 232 U.S. 383 (1914).

40. 338 U.S. at 31.

41. 367 U.S. 643 (1961).

42. *Id.* at 653.

43. 364 U.S. 206 (1960). The silver platter doctrine allowed the use of evidence in federal court if it had been seized by *state* agents.

44. 362 U.S. 257 (1960). *Jones* allowed anyone legitimately on searched premises to object to the search.

45. 350 U.S. 214 (1956).

46. *See generally* Israel, *Gideon v. Wainwright: The "Art" of Overruling,* [1963] S. CT. REV. 211.

47. "The [*Wolf*] Court's reasons for not considering essential to the right to privacy, as a curb imposed upon the States by the Due Process clause, that which decades before had been posited as part and parcel of the Fourth Amendment's limitation upon federal encroachment

Mapp was decided by a divided court, which is consistent with most of the Court's decisions concerning the exclusionary rule.[48] Misgivings about the rule are numerous. Critics claim that because the rule is unique to American jurisprudence, it is not fundamental to an Anglo-American scheme of justice.[49] Many critics espouse Justice Cardozo's position that the rule produces an anomalous result since the "criminal [goes] free because the constable has blundered."[50]

Furthermore, the rule does nothing to punish the offending officer, but leaves society without a remedy against the criminal defendant. Both wrongdoers may go unpunished.[51] Nor does the rule protect the innocent person who is unlawfully searched.[52] The rule also distorts the fact-finding process because it withholds highly probative evidence from the trier of fact,[53] which often results in a remedy that is disproportionate to the minor wrong done to the defendant.[54] Additionally, substantial concern exists that the rule does not deter police misconduct.[55]

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of individual privacy, were bottomed on factual considerations." 367 U.S. at 650-51. Justice Clark pointed out the acceptance of the exclusionary rule by a majority of states that considered the question after *Wolf* and the California Supreme Court's conclusion that alternative remedies were worthless. *Id.* at 652.

48. *See* note 14 *supra.* Except for a unanimous decision in *Weeks,* "the evolution of the exclusionary rule has been marked by sharp divisions in the Court." United States v. Janis, 428 U.S. 443, 446 (1976). Indeed, *Wolf,* Lustig v. United States, 338 U.S. 74 (1949), Rochin v. California, 342 U.S. 165 (1952), Irvine v. California, 347 U.S. 128 (1954), Elkins v. United States, 364 U.S. 206 (1960), *Mapp* and United States v. Calandra, 414 U.S. 338 (1974), produced a total of 27 separate signed opinions or statements.

49. *See, e.g.,* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 415 (Burger, C.J., dissenting). *See also* Martin, *The Exclusionary Rule Under Foreign Law—Canada,* 52 J. CRIM. L.C. & P.S. 271 (1961); Williams, *The Exclusionary Rule Under Foreign Law—England,* 52 J. CRIM. L.C. & P.S. 272 (1961).

50. *See* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting).

51. Payton v. New York, 445 U.S. 573 (1980), held that a warrantless arrest made in accordance with New York's Code of Criminal Procedure was unlawful. The arrest took place on January 14, 1970, over 10 years before the issue was finally resolved. The police conduct was affirmed by two state courts before it was successfully challenged in the United States Supreme Court. It is doubtful that a police officer feels he has been punished by the suppression of evidence he obtained unlawfully 10 years prior to the determination. *See* People v. Payton, 55 App. Div. 2d 859, 390 N.Y.S.2d 769 (1976); People v. Payton, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978).

52. *See* Irvine v. California, 347 U.S. 128 (1954). *See also* Taft, *Protecting the Public from Mapp v. Ohio Without Amending the Constitution,* 50 A.B.A.J. 815 (1964).

53. *See* Levin, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations,* 58 JUDICATURE 74 (1974).

54. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 CALIF. L. REV. 929 (1965).

55. As currently administered, the exclusionary rule imposes no personal penalty on the officer involved in the illegal activity, or on the police department for which he works. The greatest sanction imposed is at best the disappointment felt by the officer for allowing a criminal to return to the street. Even that disappointment, however, may not be felt by the officer because exclusion often occurs several years after the illegal conduct. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970).

C. The Erosion of Mapp v. Ohio

1. Cost-Benefit Analysis.—When the division of the Court in *Mapp* and the extensive misgivings about the rule are considered, it is not startling that the erosion of *Mapp* commenced almost from its inception. *Mapp* relied explicitly on two separate justifications. First, "the purpose of the exclusionary rule 'is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.' "[56] Second, Justice Clark, writing for the majority in *Mapp,* premised the exclusionary rule on its contribution to concepts of judicial integrity: "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[57] By denying retroactive application to *Mapp,* however, Justice Clark construed the primary purpose of the exclusionary rule as its deterrent effect on police illegality.[58] He reasoned that deterrence would not be served by retroactive application because the lawless conduct had already taken place.[59]

In *United States v. Calandra,*[60] the Court held that a grand jury witness could not refuse to answer questions even if the source of the questions was evidence seized in violation of the fourth amendment. Justice Powell referred to deterrence as the "prime purpose" of the rule and did not mention the judicial integrity rationale.[61] Obviously, grand jury proceedings can be tainted as easily as a trial through the use of evidence procured by government-sanctioned lawlessness. By limiting the justification of the rule to the purpose of deterrence, however, Justice Powell provided the basis for a series of decisions that substantially narrowed *Mapp's* application.

Calandra follows a cost-benefit analysis: Does the limited incremental deterrent value of an application of the rule in a given context outweigh the cost to society and the criminal justice system? Justice Powell explained that "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. . . . [W]e must weigh the potential injury

56. 367 U.S. at 656.

57. *Id.* at 659. *See also* Lee v. Florida, 392 U.S. 378, 385-86 (1968) (evidence seized by state officials in violation of the Federal Communications Act of 1934 is inadmissible).

58. *See also* Linkletter v. Walker, 381 U.S. 618, 636 (1965); Desist v. United States, 394 U.S. 244, 249 (1969).

59. *Mapp* was not entirely prospective. It did apply to cases still pending on direct review when *Mapp* was decided. 367 U.S. at 622. *See also* Stone v. California, 376 U.S. 483 (1964); Fahy v. Connecticut, 375 U.S. 85, 86 (1963).

60. 414 U.S. 338 (1974).

61. *Id.* at 347. In United States v. Janis, Justice Blackmun cited *Calandra* for the proposition that "[t]he Court . . . has established that the 'prime purpose' of the rule, *if not the sole one,* 'is to deter future unlawful police conduct'." 428 U.S. 433, 446 (1976) (emphasis added).

to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context."[62] Predictably, once the Court introduced a new analysis, the balance tipped against application of the rule because of uncertainty whether any increased deterrent effect could be achieved by extension of the rule.[63]

Calandra's balancing approach has limited *Mapp's* application. In *United States v. Janis,*[64] the Court found that *Mapp* did not apply in civil tax assessment proceedings. The application of the exclusionary rule would hamper "the enforcement of admittedly valid laws"[65] by making unavailable concededly probative evidence. This cost outweighed the marginal and empirically unverifiable deterrent value that could possibly be derived from the exclusion of the evidence. Thus, the Court found that extension of the exclusionary rule was unjustified.[66]

The *Calandra* cost-benefit analysis was also applied in *Stone v. Powell,*[67] in which the Court held that state prisoners who had a full and fair hearing on their fourth amendment claims in state court could not relitigate those claims in a federal habeas corpus proceeding. Justice Powell listed the costs of the rule as the diversion of the focus of trial from guilt and innocence of the defendant to a collateral issue, the exclusion of what may be the most probative evidence, the possible disparity between a minor violation of the law and the windfall release of the guilty, and the disrespect for the law created by indiscriminate use of the rule.[68] Balanced against the costs was the assumed deterrent effect of the rule. The Court concluded that the costs outweighed "the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review. . . ."[69]

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62. 414 U.S. at 348-49.

63. *Id.* at 351.

64. 428 U.S. 433 (1976).

65. *Id.* at 447.

66. *Id.* at 454. In light of *Janis,* the continued vitality of One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), which applied *Mapp* to forfeiture proceedings, is questionable.

67. 428 U.S. 465 (1976).

68. *Id.* at 490-91.

69. *Id.* at 493. *See also* Rawlings v. Kentucky, - U.S. -, 100 S. Ct. 2556 (1980); United States v. Salvucci, - U.S. -, 100 S. Ct. 2547 (1980). In Rakas v. Illinois, 439 U.S. 129 (1978), the Court restricted standing to those who claimed a legitimate expectation of privacy: "Respondents . . . seek to retain the [automatic standing rule of Jones v. United States] on the grounds that it is said to maximize the deterrence of illegal police conduct by permitting an expanded class of potential challengers. The same argument has been rejected by this Court. . . ." - U.S. at -, 100 S. Ct. at 2554. In Stone v. Powell, unlike Calandra, Justice Powell addressed judicial integrity as a justification for the exclusionary rule and underscored its limited vitality:

> Logically extended this justification would require that courts exclude unconstitutionally seized evidence despite lack of objection by the defendant, or even over his assent. It also would require abandonment of the standing limitations on who may object to the introduction of unconstitutionally seized evidence and retreat from the

2. *The Good Faith Exception.*—Critics of *Mapp* agree that there must be an effective remedy for fourth amendment violations.[70] The exclusion of evidence, if it has any deterrent effect at all,[71] only deters those who are aware that their conduct is unlawful. An officer's good faith belief that he is acting lawfully overcomes his concern that the evidence may subsequently be suppressed.[72] Thus, it is argued that the exclusionary rule should apply only if the court finds that the officer did not act in good faith.[73] In some contexts, the Court has suggested that conduct must also be reasonable,[74] although it is arguable that an unreasonable but honest officer will not be deterred by the additional requirement that his conduct be reasonable.[75]

The Supreme Court relied on the good faith test in its decisions denying retroactive application of the exclusionary rule. In *Fuller v. Alaska,*[76] the Court disallowed retroactive application of *Lee v. Florida*[77] because a contrary ruling would require every state conviction obtained in reliance on *Schwartz v. Texas*[78] to be overturned.[79] The Burger Court adhered to the *Fuller* line of cases in *United States v. Peltier,*[80] which implied support for a broader application of the

> proposition that judicial proceedings need not abate when the defendant's person is unconstitutionally seized. Similarly, the interest in promoting judicial integrity does not prevent the use of illegally seized evidence in grand jury proceedings. Nor does it require that the trial court exclude such evidence from use for impeachment of a defendant, even though its introduction is certain to result in conviction in some cases. . . . While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence.

428 U.S. at 485-86 (footnotes and citations omitted).

70. *See, e.g.,* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting). "I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials." *Id.*

71. *See, e.g.,* United States v. Janis, 428 U.S. 433, 449-50 (1976). "[A]lthough scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way, appears to be flawed." *Id.* (footnote omitted).

72. To the extent that this argument is reasonable, it is because the Court has focused on specific deterrence of the particular officer, not on general deterrence. *See* United States v. Peltier, 422 U.S. 531, 556-60 (1975) (Brennan, J., dissenting).

73. Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting).

74. *See, e.g.,* United States v. Peltier, 422 U.S. 531 (1975).

> If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

Id. at 542. *See also* Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Janis, 428 U.S. 433 (1976); Stone v. Powell, 428 U.S. 465, 536 (1976) (White, J., dissenting).

75. *See* United States v. Williams, 622 F.2d 830, 850 n.4 (5th Cir.), *cert. denied,* - U.S. -, 101 S. Ct. 946 (1980). Proponents of the reasonableness requirement argue that the good faith rule, without more, creates a disincentive to educate police officers.

76. 393 U.S. 80 (1968).

77. 392 U.S. 378 (1968).

78. 344 U.S. 199 (1952).

79. *See also* Desist v. United States, 394 U.S. 244 (1969); Linkletter v. Walker, 381 U.S. 618 (1965).

80. 422 U.S. 531 (1975).

good faith test.

Peltier raised the question of the retroactivity of *Almeida Sanchez v. United States.*[81] *Almeida Sanchez* required that roving border patrols have probable cause to believe that a vehicle contained illegal aliens before the patrol could search the vehicle. In *Peltier,* Justice Rehnquist stated that judicial integrity is not offended when the police "reasonably believed in good faith that their *conduct* was in accordance with the law. . . ."[82] Without limiting his analysis to the retroactivity question, he argued that the exclusionary rule is applied only in " 'those areas where its remedial objectives are thought most efficaciously served.' "[83] Justice Rehnquist concluded that "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the fourth amendment."[84] The significance of this approach was noted by Justice Brennan in his dissent:

> I have no confidence that the new formulation is to be confined to putative retroactivity cases. Rather, I suspect that when a suitable opportunity arises, today's revision of the exclusionary rule will be pronounced applicable to all search-and-seizure cases. . . . The new formulation obviously removes the very foundation of the exclusionary rule as it has been expressed in countless decisions. . . .[85]

Contrary to Justice Brennan's prediction, the exclusionary rule narrowly survived total revision in search and seizure cases. In *Wolff v. Rice,*[86] the court avoided a modification of the rule "to admit evidence obtained by good faith conduct of police where exclusion would have no deterrent effect,"[87] and decided the case on the ground that the exclusionary rule is inapplicable in habeas corpus proceedings.[88]

Mapp was eroded in *Michigan v. DeFillippo,*[89] in which the court considered an ordinance that made it a substantive offense for a person lawfully stopped by the police to refuse to identify himself. The respondent in *DeFillippo* refused to identify himself and was

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81. 413 U.S. 266 (1973).

82. 422 U.S. at 538.

83. *Id.* at 539 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

84. *Id.* at 542.

85. *Id.* at 552 (Brennan, J., dissenting). For an interesting account of what was apparently perceived by the liberal wing of the Court as a subterfuge by Justice Rehnquist, *see* S. Woodward & B. Armstrong, The Brethren 383-84 (1979).

86. 422 U.S. 1055 (1975). *See* note 11 *supra.*

87. 43 U.S.L.W. 3861 (1975).

88. Stone v. Powell, 428 U.S. 465 (1976). In a dissent, Justice White stated that he would not limit the application of the rule in habeas corpus proceedings. *Id.* at 537-38 (White, J., dissenting).

89. 443 U.S. 31 (1979).

arrested and searched. The search netted controlled substances. The Michigan Court of Appeals held that the arrest and search were invalid and that the statute was unconstitutional.[90] The United States Supreme Court reversed because the officer had probable cause to believe that a crime was being committed: "At that time . . . there was no controlling precedent that this ordinance was or was not constitutional. . . . A prudent officer should not have been required to anticipate that a court would later hold the ordinance unconstitutional."[91] Chief Justice Burger distinguished *DeFillippo* from cases striking down a statute authorizing an illegal search.[92] The ordinance created a substantive offense and did not authorize a search prohibited by the fourth amendment.[93]

Disregarding Chief Justice Burger's efforts to distinguish the ordinance in *DeFillippo* from statutes authorizing illegal searches, one can argue that the Court's reasoning should apply to situations now controlled by *Mapp*. For example, in his dissent in *Stone v. Powell*,[94] Justice White hypothesized that in particular situations an officer could make a good faith judgment that probable cause exists to search or arrest and a later judicial review could determine that no probable cause actually existed.[95] Furthermore, Chief Justice Burger cited the good faith rule as applied in civil suits against police as additional support for application of a good faith rule in *DeFillippo*.[96] Since the rationale for the exclusionary rule is deterrence of police misconduct,[97] the arguments in *DeFillippo* should apply equally to all fourth amendment claims.

3. United States v. Williams.—Recently, in *United States v. Williams*,[98] the Fifth Circuit Court of Appeals, sitting en banc, effectively overruled *Mapp*. Defendant Williams pleaded guilty to possession of heroin. While an appeal of a denial of her pretrial motion to suppress was pending before the Sixth Circuit Court of Appeals, Williams was released on bond subject to the condition that she remain in Ohio.[99] Subsequently, in Atlanta, an agent of the Drug Enforcement Administration saw her depart from a nonstop flight from Los Angeles. With knowledge of the conditions of her release in

90. *Id.* at 34.
91. *Id.* at 37-38.
92. *See, e.g.*, Torres v. Puerto Rico, 442 U.S. 465 (1979).
93. 443 U.S. at 39.
94. 428 U.S. 465 (1976).
95. *Id.* at 540. Justice White maintained that "when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably in making the arrest." *Id.*
96. 443 U.S. at 38.
97. *Id.* at 38 n.3.
98. 622 F.2d 830 (5th Cir.), *cert. denied*, 101 S. Ct. 946 (1980).
99. *Id.* at 833.

Ohio, the agent confronted her and, after she gave unsatisfactory answers to his questions, arrested her for violating the release order.[100] A search incident to arrest produced a packet of heroin from her coat pocket. Williams was in custody when the agent procured a search warrant for her luggage, and the search revealed a large quantity of heroin.[101]

After she was indicted for possession of heroin with intent to distribute,[102] Williams moved to suppress the evidence on the ground that her arrest was unlawful. A magistrate recommended that the motion be denied, but the district court suppressed the evidence and a panel of the Fifth Circuit affirmed.[103] The court directed a rehearing on its own motion and reversed the panel's earlier decision.[104]

The court agreed that the arrest was legal, that the search of Williams' person was lawful, and that there was probable cause for the search warrant.[105] Presumably, any further discussion of the exclusionary rule was moot. In the opinion, however, thirteen judges discussed the status of the exclusionary rule.[106] They found remiss the panel's refusal to consider the agent's reasonable and honest belief that he was authorized to make the arrest,[107] citing authorities advocating the good-faith rule[108] and the argument that "[i]t makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was *legal* by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all."[109] The opinion of the thirteen judges discussed the Supreme Court cases in which deterrence was balanced against the cost of application of the rule and concluded that the good-faith exception espoused in *Williams* was similar.[110] They argued that the Supreme Court had essentially adopted the good-faith exception in technical violation cases since at least four Supreme Court Justices would adopt the good-faith rule.[111] Although much of *Williams* is dicta, it reflects the extent of *Mapp's* erosion.

100. *Id.* at 834.

101. *Id.* at 834-35.

102. Williams was indicted under 18 U.S.C. § 3731 (1976).

103. 594 F.2d 86 (5th Cir. 1979).

104. *Id.* at 98. The decision en banc is truly unique. Judge Rubin noted in his special concurrence that "[t]he twenty-four of us are rarely unanimous." 622 F.2d at 848 (Rubin, J., concurring opinion in which nine judges joined).

105. 622 F.2d at 833.

106. *Id.* at 840.

107. "In the panel's view, [the agent's] reasonable belief, held in unquestioned good faith, that he was authorized to arrest Williams cut no figure in the analysis." *Id.*

108. *Id.* at 841.

109. *Id.* at 842.

110. *Id.* at 842-43.

111. *Id.* at 841. Judge Rubin, however, pointed out in a special concurrence that "five members of the Court up to now have not suggested [the rule's] qualification, and they constitute a majority." *Id.* at 849.

The Supreme Court denied certiorari in *Williams.*[112] It is difficult to imagine a less likely case in which certiorari would be granted. The possibility that Justices Brennan and Marshall would vote to grant certiorari is doubtful because they believe it would be rash to give the Court the opportunity to dismantle *Mapp.*[113] Members of the Court willing to overrule or modify *Mapp* would prefer to do so in a case in which they will not be subject to the criticism leveled at the *Mapp* majority for unnecessarily overruling *Wolf.*[114]

The Fifth Circuit judges who see *Mapp* tottering may well sense the direction of the Supreme Court despite the denial of certiorari. Although only four Supreme Court Justices have expressed a willingness to overrule or modify *Mapp,* a fifth can be considered an unenthusiastic supporter of the rule.[115] President Reagan's first appointment to the Court may provide the fifth vote.[116] *Williams* clearly illustrates the continual erosion of *Mapp,* and foreshadows the bleak future of the exclusionary rule.

III. Is the Cost Too Great?

Before *Mapp* is overruled, the Supreme Court should question whether the assumed costs of the rule are as great as represented by *Mapp's* critics.[117] A report by the Comptroller General's Office ana-

112. 49 U.S.L.W. 3531 (1981).

113. *See* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977).

114. Mapp v. Ohio, 367 U.S. at 674 (Harlan, J., dissenting).

115. Justice Blackmun joined Justice Black's concurring and dissenting opinion in Collidge v. New Hampshire, 403 U.S. 443, 493 (1971). *See also* Ybarra v. Illinois, 444 U.S. 85 (1979) (dissenting opinion of Chief Justice Burger in which Justice Blackmun joined).

116. *See* note 2 *supra.*

117. It is the authors' view that the arguments against the exclusionary rule are generally suspect. *Mapp* however, has been defended elsewhere. *See, e.g.,* Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349 (1974); Kamisar, *Is The Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?,* 62 JUDICATURE 67 (1978).

An observation concerning the good faith test is in order. The efforts of the courts to discipline police are at best difficult. *See generally* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases,* 45 N.Y.U. L. REV. 785 (1970). A defendant has difficulty overcoming police testimony concerning his conduct during a search or arrest. *Id.* at 789-90. *But see* Israel, *Criminal Procedure, the Burger Court and the Legacy of the Warren Court,* 75 MICH. L. REV. 1319 (1977). The police view fourth amendment limitations with hostility, and at least some police justify perjuring themselves "to subvert 'liberal' rules of law that might free those who 'ought' to be jailed." Younger, *The Perjury Routine,* The Nation, May 8, 1967, at 596-97. At the most, the defendant's testimony creates a credibility battle, which is usually lost by the defendant. Unless he persuades the police to admit ill-will or bad-faith, the defendant may have little evidence available to counter police representations of their good faith.

Products liability in tort law provides an analogy. A plaintiff is often powerless to prove a negligent act committed by a large corporate defendant that places many products on the market; however, because deterrence is an important goal of tort law, courts have adopted strict liability in many products liability cases. Even though a defendant may not be at fault in some cases, the increased possibility of plaintiff's recovery causes manufacturers to be more careful in producing their products. *See* SPIESER, LAWSUIT, ch. 5 (1980). Criminal justice, therefore, may be better served by increasing the rule's penalty, not by diminishing it. Even if critics lament the unverifiable deterrent value of the rule, a good faith rule diminishes whatever deterrence the rule may provide.

lyzed 2,804 cases in 1978.[118] Approximately 30 percent of the sample involved a search and seizure, but only 11 percent of the defendants filed a fourth amendment motion to suppress. The report concluded that "the overwhelming majority of [those] motions were denied."[119] Evidence was suppressed on fourth amendment grounds in only 1.3 percent of 2,804 cases and despite suppression of some evidence, a conviction was nonetheless obtained in over half of those cases.[120] The report also considered that a possible hidden cost of the exclusionary rule is that the United States attorneys decline to prosecute cases if they believe that evidence has been illegally obtained. Although prosecution was declined in about 46 percent of all cases screened, search and seizure problems were cited as the primary reason in only about 0.4 percent of the total cases declined.[121] A Law Enforcement Assistance Agency (LEAA) study of felony cases yielded similarly low results.[122]

A. State Appellate Court Study

A research project was conducted by the authors to examine the exclusionary rule as applied at the state appellate court level. The study was intended to determine whether state courts applied the rule consistently. Several variables were considered. The results of the study are further evidence that the cost of the exclusionary rule has been overstated.

1. Method of Research.—Four reporters within the West Reporter System were used to obtain a cross section of the state courts and their respective treatment of the fourth amendment exclusionary rule.[123] Only United States Constitution fourth amendment criminal search and seizure cases were examined. The time periods surveyed were the years 1964, 1969, 1974 and 1979, which were chosen as representative of the changing attitude toward *Mapp.* By 1964, *Mapp* began to have an effect on the nature of criminal appeals in the state courts. In the later years, the gradual erosion of the exclusionary rule by the United States Supreme Court in such cases as *Calandra, Peltier, Janis,* and *Powell* was evident.[124]

The factors considered in each case were the crime committed, the personality of the individual defendant, the police conduct in-

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118. REPORT OF THE COMPTROLLER GENERAL ON THE IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (1979).

119. *Id.* at 1.

120. *Id.* at 11.

121. *Id.* at 13-14.

122. *See* note 32 and accompanying text *supra.*

123. The Reporters used were as follows: (1) Atlantic Reporter, (2) California Reporter, (3) Southwestern Reporter, and (4) Northwestern Reporter.

124. *See* notes 56-97 and accompanying text *supra.*

volved, and the sentence received. A total of 613 cases were included in the study and although not all of the cases revealed the same type of information, the data yielded significant correlations.

2. *Results*

(a) *All reporters — all years*

(1) Seriousness of the crime.—The statistics compiled for all the regions over all four years indicate that 54 percent of the cases in which the appellate courts excluded evidence because of fourth amendment violations involved narcotics.[125] A negative correlation exists between the seriousness of the narcotics offense and the rate of application of fourth amendment principles. Courts suppressed evidence least often in cases of sale of dangerous drugs[126] and suppressed evidence most frequently in cases of possession of marijuana.[127] In sale of marijuana and possession of dangerous drugs cases, the exclusionary rule was applied at 33 percent and 47 percent levels, respectively.

Throughout the sample, the prevailing rule was that the more serious the crime, the fewer the applications of the exclusionary rule.[128] Among the most serious crimes, evidence was suppressed in 23 percent of armed robbery cases, 21 percent of rape cases, and 13 percent of homicide cases.[129] The frequency of application of the rule in possession of marijuana cases, the least serious offense, is four times the rate of application in homicide cases. Similarly, compilations for victim versus victimless crimes over the four years reveal a 20 percent application rate of the fourth amendment exclusionary rule for all victim crimes, but a 36 percent application rate for victimless crimes.[130]

Initially, the 13 percent application rate in homicide cases may

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125. The exclusionary rule was applied in 175 cases; 94 of those cases involved narcotics. *See* Appendix I.

126. Evidence was suppressed in only 27% of such cases, or 9 of 33 cases examined.

127. Evidence was suppressed in 52% of possession of marijuana cases, or 33 of 64 cases examined.

128. For purposes of this article, "seriousness" rises as the danger resulting from the use of the drug rises, and also refers to the culpability of the transaction. Sale is more culpable than possession. For a similar scale of seriousness, *see* N.J. STAT. ANN. §§ 24:21-4 to 24:21-8.1 and §§ 24:21-19 to 24:21-20 (West Supp. 1980).

129. Evidence was suppressed in 7 of 31 armed robbery cases, 3 of 14 rape cases, and 11 of 83 homicide cases.

130. For purposes of this article, the following crimes are considered "victim crimes": homicide, rape, armed robbery, kidnapping, burglary, theft, assault and battery, arson, and receiving stolen goods. "Victimless crimes" includes all narcotics offenses, gambling, possession of a weapon, and possession of burglary tools. For a general discussion of the problems surrounding classification of victim and nonvictim crimes, *see* WRIGHT & LEWIS, MODERN CRIMINAL JUSTICE 33-52 (1978).

appear to be high. Indeed, if one of every seven or eight murderers were released because the constable blundered, the argument that the cost to society is great would be supported. The sample deals, however, only with crimes in which evidence was seized and the defendant appealed. Perhaps the most significant consideration is the frequency with which some of the surveyed courts affirm without an opinion.[131] The absence of an opinion made it impractical to determine whether the case involved a fourth amendment claim. Adding those figures would substantially lower the frequency in all cases in which the exclusionary rule was applied.[132]

(2) Mitigating factors.—The State Appellate Court Survey also examined homicide and possession of marijuana cases to determine whether the rule was applied evenhandedly despite what may appear to be mitigating facts. Although difficult to quantify, the details of specific cases often indicate that justice is not seriously impaired when the exclusionary rule is applied in homicide cases. Many of the homicide cases in which the exclusionary rule was applied can be partially explained either as responses to the fundamental unfairness of the conviction because the defendant's guilt was seriously in doubt, or as tokens because sufficient evidence remained to convict the defendant on retrial.[133] At the other end of the spectrum, possession of marijuana cases in which the court did not apply the exclusionary rule tended to involve a very small penalty[134] or a defendant with either prior convictions or a criminal reputation with the po-

131. The following courts' per curiam decisions without written opinions were examined: the Supreme Court and Superior Courts of Connecticut; the Court of Appeals for the District of Columbia; the Supreme Judicial Court of Maine; the Court of Appeals of Maryland; the Supreme Court of New Hampshire; the Supreme and Superior Courts of New Jersey; the Supreme and Superior Courts of Pennsylvania; the Supreme Court of Rhode Island; the Supreme Court of Vermont; the Supreme Court of Michigan; the Supreme Courts of Arkansas and Tennessee; the Supreme Court and Court of Appeals of Kentucky and Missouri; the Court of Criminal Appeals and the Supreme Court of Texas. Both the California Supreme Court and the Courts of Appeals for the First and Fourth Districts render decisions without opinion on occasion.

132. Most per curiam decisions without written opinions are rendered in appeals by defendants, not the prosecution. Thus, numerous fourth amendment claims by defendants are unreported.

133. *See, e.g.,* Bowden v. State, 256 Ark. 320, 510 S.W.2d 879 (1974); People v. Blair, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979); People v. Farley, 90 Cal. App. 3d 851, 153 Cal. Rptr. 695 (1979); State v. Peterson, - Iowa -, 219 N.W.2d 665 (1974); Trevathan v. Commonwealth, - Ky. -, 384 S.W.2d 500 (1964); People v. White, 692 Mich. 404, 221 N.W.2d 357 (1974); Commonwealth v. Strickland, 457 Pa. 631, 326 A.2d 379 (1974); Commonwealth v. Wright, 415 Pa. 55, 202 A.2d 79 (1964).

134. Cases involving a small penalty are as follows: People v. Soberanes, 97 Cal. App. 3d 811, 159 Cal. Rptr. 155 (1979); People v. Figueroa, 268 Cal. App. 2d 721, 74 Cal. Rptr. 74 (1969); People v. Weitzer, 269 Cal. App. 2d 274, 75 Cal. Rptr. 318 (1969); *In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969); People v. Mermuys, 2 Cal. App. 2d 1083, 82 Cal. Rptr. 902 (1969); State v. Barclay, 398 A.2d 794 (Me. 1979); Smith v. State, 577 S.W.22 782 (Ct. Civ. App. Tex. 1979); Christian v. State, 504 S.W.2d 865 (Ct. Crim. App. Tex. 1974); In Interest of L.L., 90 Wis. 585, 280 N.W.2d 343 (1979).

lice.[135] These explanations account for 73 percent of the successful homicide appeals and 61 percent of the unsuccessful marijuana appeals. The assertion that the application of the exclusionary rule is a function of the seriousness of the offense is therefore supported.

Finally, the study examined cases in which the defendant had some prior contact with either the police or the criminal justice system. The overall application rate of the rule during the four years surveyed was 29 percent of a total of 613 cases. When the defendant had prior contacts with police or the criminal justice system, the rule was applied in only 18 percent of the cases.

In summary, the results of the State Appellate Court Study, considered in conjunction with the Comptroller General's Report[136] and the LEAA Study,[137] indicate that the cost to society exacted by the exclusionary rule has been greatly exaggerated.[138] The evidence supports the assertion that if the application of the rule would result in the release of a criminal charged with a serious offense, or a defendant previously involved in criminal activity, the courts are reluctant to exclude evidence under the fourth amendment.[139]

8. *All reporters — trends 1964-1979.*—The State Appellate Court Study also compared data from all reporters for each year to determine whether any trends existed. Generalization about indi-

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135. Cases involving defendants with prior convictions or a criminal reputation are as follows: People v. Rafter, 41 Cal. App. 3d 557, 116 Cal. Rptr. 281 (1974); People v. Randal, 226 Cal. App. 2d 105, 37 Cal. Rptr. 809 (1964); People v. Jefferson, 230 Cal. App. 2d 151, 40 Cal. Rptr. 715 (1964); State v. Reader, 328 A.2d 146 (Super. Ct. Del. 1974); People v. Herrera, 19 Mich. App. 216, 172 N.W.2d 529 (1969); State v. Rohrer, 589 S.W.2d 121 (Ct. App. Mo. 1979); State v. Bollinger, 405 A.2d 433 (Super. Ct. N.J. 1979); Mull v. State, 510 S.W.2d 358 (Ct. Crim. App. Tex. 1974).

136. *See* note 32 and accompanying text *supra*.

137. *See* note 33 and accompanying text *supra*.

138. *See* notes 148-158 and accompanying text *infra*.

139. Some specific cases indicate that in close decisions the facts may sway the appellate court. *See, e.g.,* State v. Pinegar, 583 S.W.2d 217 (Mo. Ct. App. 1969); State v. Smith, 43 N.J. 65, 202 A.2d 669 (1964). At times, the analysis seems incorrect. For example, in State v. Chapman, 250 A.2d 203 (Me. 1969), the police made a warrantless search of the defendant's home ten hours after he had been arrested for the murder of his wife. The crime scene had been further secured with a police guard. In upholding the search, the court relied heavily on the balancing test of Terry v. Ohio, 392 U.S. 1 (1968), and its standard of reasonableness. The Maine court quoted at length from *Terry* stating,

> We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, . . . or that in most instances failure to comply with the requirement can only be excused by exigent circumstances. . . . But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription *against unreasonable searches and seizures.*

250 A.2d at 209 (emphasis added). *Chapman* did *not* involve "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat"; rather, it involved an instance in which prior judicial approval was practicable. Nevertheless, the *Chapman* search was upheld as being reasonable. The result seems a bit strained, especially considering the apparent irrelevance of *Terry*.

vidual offenses is difficult, but a trend is discernible if percentage-application figures for victim and victimless crimes are compared. This analysis reveals a decline in application rate in victim crimes and a rise in victimless crimes.[140]

Individual crimes do not consistently conform to the general trend. For example, application of the rule in narcotics cases was highest in 1964, when courts suppressed evidence in 49 percent of all reported cases. The rate declined to 41 percent in 1969 and 23 percent in 1974, before rising to 45 percent in 1979.[141] Homicide fluctuated from an application rate of 22 percent in 1964, to 0 percent in 1969, to 22 percent in 1974, and finally to 10 percent in 1979.[142] Similarly, fluctuation was observed in rape[143] and in armed robbery cases.[144]

Despite the fluctuations within a class of cases, the data suggest trends within the victim and victimless crime categories. The decline in applications of the rule in victim cases is dramatic, from 34 percent in 1964 to 17 percent in 1979.[145] After an initial decline from 37 percent in 1964 to 26 percent in 1969, application of the rule in victimless crimes rose steadily, climbing to 31 percent in 1974 and 44 percent in 1979.[146] The trend illustrates that the social cost of the exclusionary rule has been exaggerated. Dangerous criminals are apparently less likely to benefit from the rule today than they were fifteen years ago.[147]

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140. *See* Appendix II.

141. The statistics are as follows: 18 applications in 37 cases in 1964; 18 in 44 cases in 1969; 16 in 59 cases in 1974; and 42 in 94 cases in 1979.

142. The statistics are as follows: 2 applications in 9 cases in 1964; 9 in 9 cases in 1969; 5 in 23 cases in 1974; and 4 in 42 cases in 1979.

143. The statistics are as follows: 0 applications in only one case in 1964, and 1 in 1969; 1 in 2 cases in 1974; and 2 in 10 cases in 1979.

144. The statistics are as follows: 2 applications in 6 cases in 1964; 0 in 7 cases in 1969; 2 in 8 cases in 1974; and 3 in 10 cases in 1979.

145. The statistics are as follows: 10 applications in 29 cases in 1964; 11 in 55 cases in 1969; 14 in 68 cases in 1974; and 22 in 129 cases in 1979.

146. The statistics are as follows: 18 applications in 49 cases in 1964; 19 in 74 cases in 1969; 28 in 89 cases in 1974; and 53 in 120 cases in 1979.

147. A comparison of the four regions of the country shows relatively little deviation from the national trend. California showed a small increase in applications of the rule in victim crimes between 1964 (18%) and 1969 (29%), but has remained at that level (27% in 1974 and in 1979). California showed a curious decline in application in nonvictim crimes, from 41% in 1964 and 37% in 1969, to only 12.5% in 1974.

The statistics compiled from the Northwestern Reporter suggest that the states in that region have either law abiding police or courts that take a narrow view of the fourth amendment. After no application of the rule in 1964, the courts applied the exclusionary rule in 14% of victim crime cases in 1969, 15% in 1974, and 3% in 1979. Although application was more frequent in victimless crimes - 50% in 1964, 23% in 1969, 27% in 1974, and 19% in 1979 - the statistics showed a decline in application, contrary to the composite of the four regions.

The Southwestern Reporter was similar to the composite for all four regions. Application of the rule in nonvictim crimes increased from 0% in 1964 and in 1969, to 25% in 1974, and 53% in 1979. The sample for victim crimes was small. It declined from 100% application in 1964 to 9% in 1969, but rose to 16% in 1974 and 22% in 1979.

3. Analysis of Results.—The study was not intended to prove the frequency with which appellate courts upheld defendants' fourth amendment claims. The data reveals only the percentage of reported cases in which the exclusionary rule was applied. In jurisdictions such as Pennsylvania, in which affirmance may be announced without opinion, the state supreme and superior courts certainly rejected numerous fourth amendment claims.[148] The data of the State Appellate Court Study does not include such cases because the appellants' contentions are also unreported. Thus, the data likely inflate the frequency of application of the exclusionary rule.

The results of the study suggest the following correlations: (1) a negative correlation between severity of the crime and suppression of evidence and (2) a negative correlation between the number of defendant's with prior criminal records and their successes on appeal. Furthermore, the data indicates the following trends: a decline in application of the rule in victim crimes and an increase in victimless crimes. The research does not prove causation, but at least four explanations for the results are plausible.

First, the police may be more cautious when they gather evidence in serious cases than they are when they perform the same task in nonserious cases. Serious offenses are more likely to draw the attention of superiors, the press, and the public[149] and prosecutors are certainly more interested in pursuing serious cases.[150] The different suppression rates may indicate that the police are able to comply with the law when motivated to do so. Thus, the exclusionary rule may deter illegal police conduct when the release of a serious offender is at stake. This conclusion is plausible, but not readily subject to statistical proof. The possibility that the rule has more deterrent effect as the seriousness of the offense increases militates in favor of retention, especially in the investigation of heinous crimes.[151] The decline in application in victim offenses is consistent with the notion that the rule deters police misconduct. The trend may be explained by increased sensitivity to fourth amendment values as the police become more familiar with its requirements.

A second explanation is that police officers who investigate serious crimes are often more experienced than those who investigate

148. For example, a review of Volume 413 of the Atlantic Reporter indicates that in an overwhelming majority of cases, the appellant is the defendant, and seldom the Commonwealth, e.g., 61 of 63 appeals to the Superior and Supreme Courts of Pennsylvania. It is not known how many of the appellants raised fourth amendment claims.

149. *See* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice,* 69 YALE L.J. 543, 554-73 (1960).

150. *See generally* LaFave, *The Prosecutor's Discretion in the United States,* 18 AM. J. COMP. L. 532, 533-39 (1970).

151. This suggestion is directly contrary to proposals made by one scholar. *See* Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN. L. REV. 1027 (1974).

petty offenses. The exclusionary rule may therefore have an educational effect. This is consistent with the view that the rule deters.[152] The experienced officer promoted to a major felony unit or to detective may have sufficient career aspirations and professional pride to conform to fourth amendment requirements and avoid adverse publicity for his police department.

A third possibility is that the police are more willing to perjure themselves to preserve a conviction in a serious case than in a nonserious case.[153] Further research in this area is extremely difficult because of the inherent bias of the subject of the research.[154] The police are unlikely to confess their lawlessness to a researcher. It is anomalous, however, that police perjury is cited as a reason to abandon the exclusionary rule. Even if an effective alternative to the rule is propounded,[155] the incentive to perjure oneself is a continuing one. If a good-faith test were adopted, an officer could misrepresent his motives or knowledge at the time of the contested search or seizure. The motive to falsify the facts in a civil damage suit against the officer is greater than when the available remedy does not involve personal loss. The possibility of a recovery from the municipality or the police department may motivate the officer to perjure himself and avoid the opprobrium that may result if substantial damages are awarded. An officer may perjure himself in a criminal case to save society from a person who he knows is guilty; a similar rationale may produce perjured testimony in a civil case to prevent the unjust enrichment of the same criminal.

Finally, the data may be explained by the desire of appellate

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152. If this explanation is correct, it would contradict one of Chief Justice Burger's criticisms of *Mapp*:

> Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not 'reasonable" amply demonstrate. Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity.
>
> The presumed educational effect of judicial opinions is also reduced by the long time lapse—often several years—between the original police action and its final judicial evaluation. Given a policeman's pressing responsibilities, it would be surprising if he ever becomes aware of the final result after such a delay.

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 417 (1971).

153. One criticism of the exclusionary rule is that it encourages police perjury. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215, 226 (1978). *See also* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, [1975] WASH. U. L.Q. 621, 673-74.

154. Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is a Deterrent to Police?*, 62 JUDICATURE 404 (1979).

155. Critics of the rule agree that some effective alternative must be developed. *See, e.g.*, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) (Burger, C.J., dissenting); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 45 (1978); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

judges to protect society from dangerous criminals. Result-orientation is not foreign to our judicial system. The same judges may be sympathetic to defendants, especially nonrecidivists, who are charged with victimless crimes. For example, an appellate judge who doubts the wisdom of drug laws can reduce their harshness by invoking the exclusionary rule when the defendant is charged only with possession.

If society is dissatisfied with the substantive criminal law, it is arguable that the suppression of evidence is an inappropriate remedy and that the offensive laws should be repealed.[156] Pending a legislative remedy, however, judges must attempt to do justice to the litigants before them. A softening of societal attitudes may come too late for the criminal defendant forced to serve time on a petty offense.[157] Thus, despite the merits of the view that the legislature is the correct source of legal reform, judges may be tempted to use an available remedy to mitigate harsh results.

Although judges may be criticized for result-orientation, it is unrealistic to believe that they can ever be entirely free of it.[158] A more serious problem is that result-orientation defeats the purposes of the exclusionary rule. Diminished application of the rule as seriousness of the offense increases does not necessarily undercut the deterrent rationale. Courts still release some serious offenders. Sporadic application of the rule in serious cases may deter police misconduct as much as frequent applications in less serious cases. Thus, even if result-orientation is a partial explanation of the data, this judicial attitude may not seriously undermine the purpose of the rule.

IV. Conclusion

Critics of the exclusionary rule argue that the cost to society is "great and real."[159] The results of the State Appellate Court Study

156. Wright, *supra* note 15, at 740.

157. *See, e.g.,* Commonwealth v. Riggins, 232 Pa. Super. Ct. 32, 332 A.2d 521 (1974), *rev'd,* 474 Pa. 115, 377 A.2d 140 (1977). The defendant was convicted of possession of marijuana with intent to deliver. Riggins, a married man, age twenty-one, with several small children, had no prior criminal record. He possessed 53.9 grams of marijuana (about 2 ounces). He was sentenced to 2 to 5 years and received a $100 fine. The Pennsylvania Supreme Court subsequently remanded and held for the first time that trial courts had to explain on the record the reasons for sentencing. *Id.* One of the dissenters in the superior court noted that elsewhere in Pennsylvania the defendant would have been given a short probationary period with the possibility of expungement of the record if the probation were completed successfully. 232 Pa. Super. Ct. at 39 n.6, 332 A.2d at 525 n.6 (Hoffman, J., dissenting). Professor Wright's argument would make little sense to one sentenced under laws that have lost public support.

158. *See* B. Woodward & S. Armstrong, The Brethren (1979), which provides insight into the Justices' efforts to reach principled decisions that conform to their political concerns.

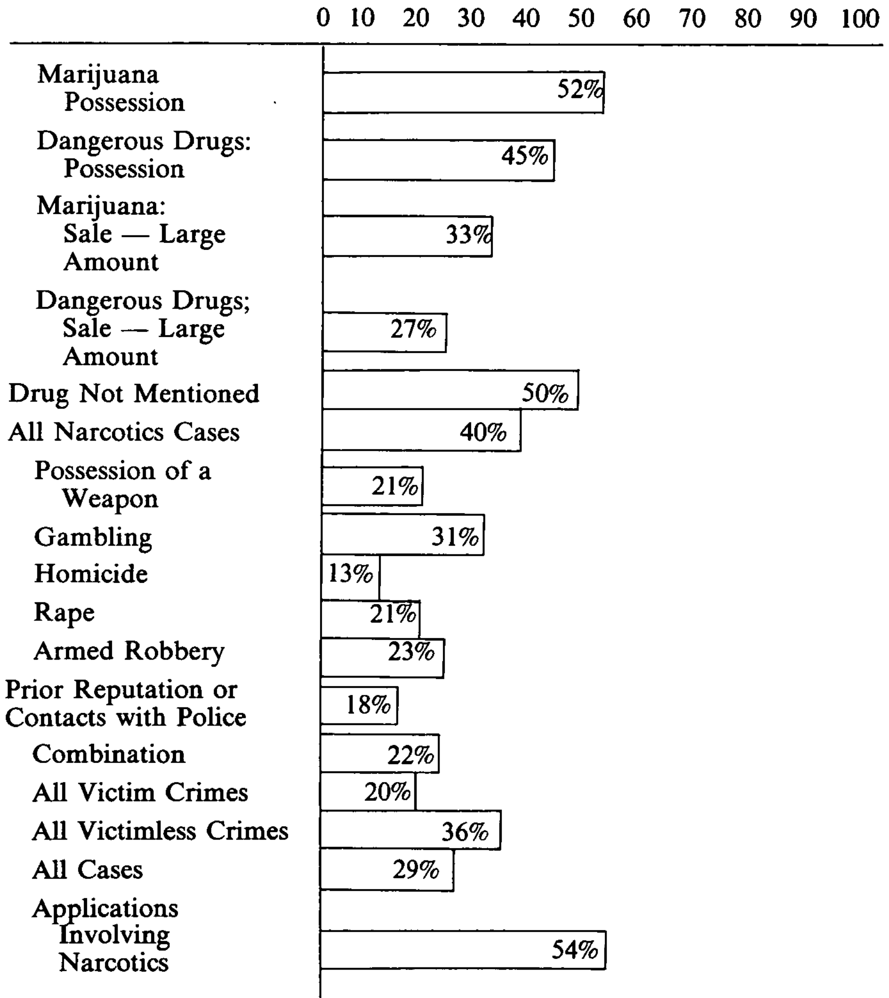
159. Wright, *Must the Criminal Go Free If the Constable Blunders?,* 50 Tex. L. Rev. 736, 741 (1976). *See also* Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

indicate, however, that the cost has been overstated. The exclusion of trial evidence is infrequent and prison doors are not being opened to release masses of dangerous criminals. As long as the fourth amendment requires an effective remedy, unreasonable police practices will extract a toll from society.[160] Nevertheless, before the foundation of *Mapp v. Ohio* is totally eroded and the Supreme Court abandons *Mapp's* holding, the available data suggest that the Court reexamine whether the cost of the exclusionary rule has been accurately reported.

160. Even if Congress, state legislatures, or courts substitute a good faith test, criminals will be released, despite the existence of otherwise highly probative but illegally seized evidence. Appellate courts currently apply a result-oriented approach, finding against serious offenders unless police conduct is egregious. It is likely that similar practices would evolve under a good faith test and render that approach ineffective because of inconsistent application.

APPENDIX I

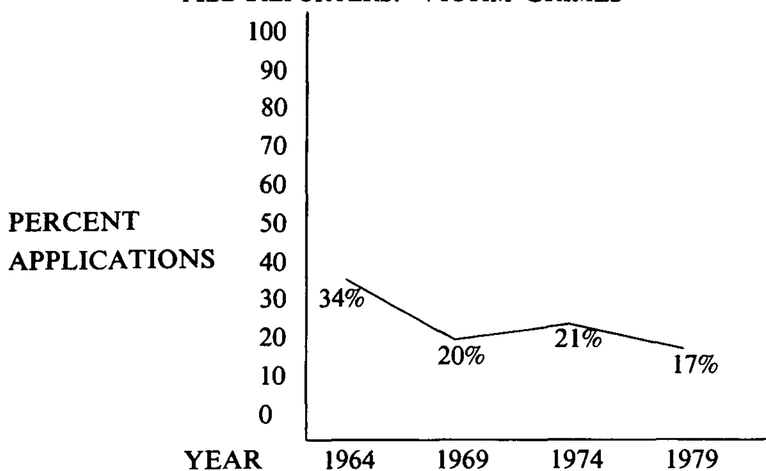
STATE APPELLATE COURTS' APPLICATION RATE OF EXCLUSIONARY RULE BY CRIME
ALL REPORTERS
YEARS — 1964, 1969, 1974, AND 1979



Appendix II

Graph A

All Reporters: Victim Crimes



Graph B

All Reporters: Victimless Crimes