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FOURTH-AMENDMENT ENFORCEMENT MODELS: ANALYSIS AND PROPOSAL

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INTRODUCTION

President Reagan recently called for a new crackdown on crime.[1] He listed as a major component in this drive the elimination, by statute, of the exclusion of evidence unconstitutionally obtained.[2] Thus, he joins the many detractors of the Mapp[3] "exclusionary rule" and presents a new occasion for its examination.[4]

The idea of protecting against unreasonable governmental disturbances of privacy, liberty, security and property is not itself controversial. Justice Brandeis referred to "the right to be let alone" as "the most comprehensive . . . and the . . . most valued by civilized men."[5] Fourth-amendment controversy has two sources. *First*, the complex of interests protected by the fourth amendment very often competes with the constellation of interests (also including privacy, liberty, security and property) protected by policing those who violate the Penal Code. It is a fact that some people use their privacy to perpetrate or conceal crime. It is also a fact that the government cannot, without defeating the very idea of privacy, condition or monitor its use. Thus, a tension results. The fourth amendment embraces this tension by providing that "unreasonable" intrusions by police are unlawful, that reasonable intrusions are not.[6]

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1. N.Y. TIMES, Sept. 30, 1981, at A28, col. 1.

2. The exclusionary rule of Mapp v. Ohio, 367 U.S. 643 (1961) renders inadmissible in a criminal trial any evidence obtained by a violation of the defendant's fourth amendment right. The case rests on an interpretation of the fourth amendment; thus, it cannot be changed by statute, but only by the Supreme Court's renunciation of *Mapp* or by constitutional amendment. The President's call for legislation is in reality a declaration of his position and a new call to the Court, which may now have the votes, to renounce *Mapp*.

3. Mapp v. Ohio, 367 U.S. 643.

4. I would of course have written this piece anyway if the President hadn't spoken; it just would have had a different opening paragraph. Maybe a better one.

5. Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

6. 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

This is not, of course, a distinction easily made. The question "What intrusive police conduct is unreasonable?" generates complexity, perplexity, and continuous controversy.[7] You will be delighted to know that I will not address it.

What I do address is the *second* source of controversy—"Assuming a violation of the fourth amendment, what is the appropriate remedy?" The fourth amendment does not explicitly direct the manner of its enforcement, but the Supreme Court has stated that all constitutional guarantees implicitly call for some means of effective enforcement.[8] Enforcement can be supplied by legislation, common-law forms, or judicial "interpretation" of the Constitution. Any method of enforcement is theoretically possible if only it tends to enforce the guaranteed right.

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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.

7. On the one hand, the specter of central data banks, police riots, and an increasing inability to shut out the outside world reinforces the complex of privacy values. On the other, a rising crime rate, increased fear of violence, especially in urban areas, and the impact of the media, especially television, intensify "policing" values. Both the extensive highlighting of crime "news" and the incessant flow of sympathetically drawn policemen chasing invariably guilty suspects reinforce these values.

There are not two groups in society — one representing the privacy interest and one the policing interest. Each of us values both in varying degrees. The assignment of our policing concerns to organized police enables many persons to disassociate themselves from certain acts of oppression which may be necessary to permit the system to run smoothly in a large, diverse population. As Paul Chevigny puts it, "The police have become the repository of all the illiberal impulses in this liberal society; they are under heavy fire because most of us no longer admit so readily to our illiberal impulses as we once did." Chevigny, *Police Power* (1969), *reprinted in* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 144 (4th ed. 1974) [hereinafter cited as KAMISAR]. Consider also the dual effect of a criminal trial as described by Abraham S. Goldstein: "In addition to satisfying the public demand for retribution and deterrence, it permits the ready identification of the *same public*, now in another mood, with the plight of the accused." *The State and the Accused: Balance of Advantage in Criminal Procedure, in* A. GOLDSTEIN & J. GOLDSTEIN, CRIME, LAW AND SOCIETY 173, 174 (1971) (emphasis supplied) [hereinafter cited as GOLDSTEIN & GOLDSTEIN].

There is support in psychoanalytic theory for the proposition that there is, in all of us, a tendency, seen most vividly in childhood, to "identify pleasure with the self and unpleasure with the non-self." Thus, "(t)he impulse to divide the universe of 'good' and 'bad' along these lines is so strong that it is only corrected slowly and with difficulty, and throughout life the tendency to project the evil in ourselves is a constant menance to our true appreciation of reality." J. FLUGEL, MAN, MORALS AND SOCIETY 109 (1945). Thus, it is possible that a person's condemnation of police practices may be a reaction against his own unconscious impulses.

8. *See* Mapp v. Ohio, 367 U.S. 643.

Many discussions about fourth-amendment enforcement in general quickly become discussions about the exclusionary rule in particular with all the political baggage the rule carries. The rule tends to take over the fourth amendment itself. The controversy overpowers the notions about enforcement that we hold in common. As this article attempts to look at the problem of fourth-amendment enforcement through a wide lens, the exclusionary rule, while it must be viewed, is viewed solely as a remedy component and not in its other guises. For example, some oppose the rule *even if* it has a legitimate remedial effect.[9] Some favor it *even if* it does not.[10] These arguments are relevant if the exclusionary rule is the focus of debate. When, however, the question is the more general one of how to enforce the fourth amendment, they become irrelevant.[11]

The fourth amendment presents the legal system with two distinct questions: (1) What conduct constitutes a violation? and (2) Assuming a violation, what is the appropriate remedy? It is important not to confuse them.[12] The remedy utilized to vindicate any right will ultimately have an impact on what that right comes to embrace; put more cynically, the term "right" may be unintelligible unless there is some mechanism to enforce it.[13] Nevertheless, one cannot

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9. *See, e.g.*, Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215 (1979) [hereinafter cited as Wilkey], in which the author argues among other findings that the rule increases crime, hampers gun control and leads to police perjury.

10. Part of the stated justification for *Mapp* was the idea of "judicial integrity," that the courts should not, in effect, become party to the illegality by accepting the evidence. Another way of putting it is that the state has a special obligation not to profit from its own wrong.

11. There is, of course, nothing necessarily wrong with wanting the rule if it does not deter or wanting to abolish it even if it marginally deters. The point is that the arguments for those positions are extraneous to enforcing the fourth amendment.

12. A certain naivete is a condition precedent to viewing the two questions as wholly separate. Each tugs at the other. Nevertheless, I ask the reader to share this temporary naivete so that the remedy problem can be viewed in isolation. Until an understanding of what problems inhere in the remedy question itself is achieved, considering extraneous influences on it is premature and unduly confusing. The physicist who wishes to measure the gravitational pull that two apples exert on each other has to start by understanding certain characteristics of each apple.

13. There is another dynamic to these two questions. The person deciding whether or not there is a violation knows what remedy follows a finding of violation. If he believes the remedy is excessive, but has no power to reduce the remedy, he may simply "find" that there is no violation. This is especially possible in fourth-amendment cases because there is so little general agreement on what the law is. For a good discussion of the right-remedy dynamic in fourth-amendment cases, *see* Burkoff, *The Court that Devoured The Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 186-90 (1979) [hereinafter cited as Burkoff].

begin to fashion remedies until he conceives that certain conduct (however loosely described) is undesired. This article is primarily concerned with the second question: Assuming a violation, what is the appropriate remedy? Two assumptions are, therefore, made. First, there exists a process, either separate from the remedial process or amalgamated with it, for determining what police conduct constitutes a violation. Second, unless otherwise indicated, any police conduct scrutinized in this article constitutes a violation (or will be "found" to be a violation by the agency vested with such authority).[14]

This article attempts to identify the necessary criteria for an appropriate fourth-amendment remedy. Four enforcement models, which currently operate or have been proposed, are evaluated in light of these criteria and found unacceptable. Two other models which appear to meet the necessary criteria are then proposed.

Section I identifies three critical variables— compensation of victims, punishment of violators and deterrence of violations—examines their justifications, their relative importance, and their interdependence; and suggests the criteria for an appropriate fourth-amendment remedy expressed in terms of restricting each variable within upper and lower limits.

Section II examines four operating or previously proposed enforcement models and concludes that, in each, at least one variable is not sufficiently restricted. These models are:

Exclusionary Rule Model

By a rule of evidence, holds inadmissable, in a criminal proceeding, any object or statement[15] obtained by

14. *Terminology.* The remedies spoken of herein are designed for constitutional violations committed by agents of the state (usually police). Often these violations occur in the course of policing violators of the substantive criminal law. Because of this, confusing "violators," "violations," "victims," and "enforcers" is all too easy, and terminology should be carefully explained. If A robs B and policeman X arrests A, A is a violator, B a victim and X an enforcer. If A now demonstrates that the arrest violated the fourth amendment (for example, if X did not have "probable cause" for the arrest), policeman X is a violator, A is a victim, and, depending on how the remedy is constructed, A may also be the enforcer of X's violation. As this paper is not concerned with violations of the criminal law (except as they interrelate with the constitutional violation), the term "violation" is used to denote a breach of the fourth amendment, "violator" the actor in such violation (usually a policeman), "victim" its object, and "enforcer" that person authorized by the remedial model to prosecute such violation.

15. A statement is inadmissible under the fourth amendment if it is the product of an illegal arrest or search. *See* Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun

governmental agents as a product of a constitutional violation. This model currently operates in every jurisdiction.[16]

Discipline Model

Administers employment-related penalties to the violator through a tribunal created for this purpose. A well-developed scheme on this model has recently been proposed.[17]

Tort Model

Compensates the victim with a money award *paid by the violator* in a common-law tort action, a section 1983 action,[18] or an action before a tribunal created for this purpose. The common-law action has always been available in theory.

Enterprise Liability Model

Compensates the victim with a money award *paid by the state* in a common-law action, a section 1983 action, or an action before a tribunal created for this purpose. A tribunal on this model has been advocated by Chief Justice Burger.[19] A proposal by Judge Jon Newman would revise section 1983 to make the government a party defendant.[20]

In his proposal of an Enterprise Liability Model, the Chief Justice recognized that abrogation of sovereign immunity is essential.[21]

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v. United States, 371 U.S. 471 (1963). This is true even if the statement was obtained without violation of the fifth-amendment privilege against self-incrimination.

16. Mapp v. Ohio, 367 U.S. 643, of course, was a fourteenth-amendment case and thus applicable to all states.

17. S. SCHLESINGER, EXCLUSIONARY INJUSTICE (1977) [hereinafter cited as SCHLESINGER]. Other proposals are cited in an excellent bibliography. *Id.* at 109-12.

18. 42 U.S.C. § 1983 (1976) covers violations by state officials. It provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Court has held that a victim of a federal official's fourth-amendment violation also has a cause of action. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1970).

19. Bivens v. Six Unknown Named Agents, 403 U.S. at 422 (dissenting opinion).

20. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978) [hereinafter cited as Newman].

21. Bivens v. Six Unknown Named Agents, 403 U.S. at 422-23.

His conception of this model and the relinquishment of immunity seems, however, inextricably linked with his well-known desire to abolish the exclusionary rule.[22] As he has stated:

> Any such legislation should emphasize the interdependence between the waiver of sovereign immunity and the elimination of the judicially created exclusionary rule so that if the legislative determination to repudiate the exclusionary rule falls, the entire statutory scheme would fall.[23]

It is difficult to perceive the source of this notion of interdependence. At best, it is animated by an assumption that the two remedies existing together would be duplicative, mutually frustrating, or incoherent, but no demonstration that these difficulties would result is attempted.[24]

The two models put forth in section III result from an inquiry into the sense and feasibility of combining two or more of the existing models as components in an enforcement network—the path of inquiry so swiftly foreclosed by the Chief Justice. It will be argued that these two models conform to the criteria postulated in section I. These models are:

Combination Model

Compensates the victim with money *paid by the state* in a tort action at common law, a section 1983 action, or an action before a tribunal which shall be created for that purpose, *and* administers employment-related penalties to the violator by the tribunal. This model combines the Enterprise Liability Model and the Discipline Model and rejects the Tort Model and the Exclusionary Rule Model.

Exclusion Combination Model

Retains the exclusionary rule for all but serious felony prosecutions, implements the Combination Model and provides for linkage between the criminal courts and those agencies involved in administering the Combination

22. The Burger Court has greatly limited the effect of the rule. *See* Burkoff, *supra* note 13, at 4.

23. Bivens v. Six Unknown Named Agents, 403 U.S. at 423 n.7 (dissenting opinion).

24. Burger's amazing statement invites Congress to attempt to improve fourth-amendment enforcement, but only if the inviter's own Court will trade off the exclusionary rule. He seems to assume that too much enforcement of the fourth amendment is a bad thing.

Model. This model combines the Enterprise Liability Model, the Discipline Model and the Exclusionary Rule Model, but rejects the Tort Model.

Section IV briefly examines other dimensions of the problem.

I. THE CRITERIA FOR AN APPROPRIATE REMEDY

A. *Identification of Variables*

The definition herein suggested of an appropriate fourth amendment remedy depends on the identification and interrelationship of three variables. These variables—compensation, punishment, and deterrence—are the ones most often invoked in discussion of fourth-amendment remedies.[25]

By compensation, I mean those benefits (including reduction or elimination of deprivations otherwise forthcoming) extended to a victim to approximate losses suffered and, if the remedial scheme relies on the victim to invoke a process and prove the violation, to pay for those enforcement services.

By punishment, I mean those deprivations (or withholdings of benefits otherwise forthcoming) visited on a violator to satisfy a retributive impulse, to express moral condemnation of the behavior,[26] and to reinforce a commitment to the violated norm. Punishment may have a deterrent effect but that is not the only reason it is imposed. If we were convinced, for example, that the arson statute did not deter arson and that repealing it would not increase arson, we would not automatically conclude that repeal is appropriate.[27] People are punished not only so that they will not act illegally again, but because they have so acted already.

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25. "Rehabilitation" of violators is, in this setting, relatively unimportant. Certainly policemen must be educated about the law and remedies for misconduct, but any extensive therapeutic effort seems unnecessary. If a policeman cannot be "rehabilitated" by less ambitious efforts, dismissal from the force will, in most cases, be more expedient.

26. Henry Hart states: "What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition." *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958), *reprinted in* GOLDSTEIN & GOLDSTEIN, *supra* note 7, at 64-65. Constitutional violations are morally condemnable as well. "Moral condemnation" carries, perhaps, too much emotional baggage to have utility in describing what happens when a judge fines someone $5.00 for "wilfull and malicious jay-walking." Such, however, should be taken as evidence of $5.00 worth of moral condemnation.

27. This may not be as far-fetched as it sounds. The presence or absence of internal controls against arson are probably more determinative than the law's control.

By deterrence, I mean the influence that a legally authorized threat to punish specified behavior has on anyone desiring to engage in that behavior. In some theoretical constructs, different terms are used to describe the effect punishment has on the future behavior of the one punished (*e.g.*, "special deterrence") and its influence on others (*e.g.*, "general deterrence" or "prevention").[28] I shall use "deterrence" to include both the narrower and broader influences.

B. *Justification for Variables*

That compensation, punishment, and deterrence are all imperatives of the fourth amendment is, for the most part, self-evident. The very idea of a "right" implies that some legal adjustment must follow its denial.[29] And surely a society which holds civil liberties dear must register concern, if not outrage, when these rights are abridged. Compensation and punishment are natural responses.

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28. Andenaes, *The General Preventive Effects of Punishment*, 144 U. PA. L. REV. 949 (1966), *reprinted in* GOLDSTEIN & GOLDSTEIN, *supra* note 7, at 321.

29. It may be asked why victims of fourth-amendment violations ought to be paid if the personal "victim" of a crime is not generally paid. The answer requires teasing some notions apart. Although a person can be the personal victim of conduct which is a crime, he cannot be the personal victim of crime in a formal sense, for "crime" involves a notion of an affront to society generally and to each of its members equally. That all of us have the same stake in seeing a convict punished, and, so, being "compensated," is what moral condemnation of the community is all about. But conduct can amount both to a crime and a tort—indeed most crimes involve tortious activity. The "personal victim of a crime" thus should be seen as the person with tort-plaintiff standing arising from conduct which happens also to be a crime. The estate of a murder "victim" has a tort action for wrongful death. The victim of a criminal assault often, but not always, has a tort claim for civil assault. The law of torts, then, does require compensation to personal victims of crime, to be paid by the individual tortfeasor.

Thus, a "victimless" crime (sometimes one involving a "willing victim") is really a crime with society the victim, as always, but with no tort plaintiff, either because no one suffered special harm ("victimless") or because such harm was consented to in some way ("willing victim"). Even as not all torts are crimes, not all crimes are torts.

There is no denying that these "personal victims" of crime, however styled, are often left with no compensation. This is because the violator usually cannot pay. Society (or the state) it is argued, ought to insure these risks. To some extent it does. The legislature may vote compensation in individual cases or endow a fund for such purpose. Low-level adjustment of crime often involves compensation given by the violator to the victim. But the state also frustrates compensation to the victim by locking up the violator or making it otherwise difficult or impossible for him to earn the money to pay the victim. Clearly not enough is being done to compensate victims of crime, yet it does not follow that victims of fourth-amendment violations should not be compensated either. This is particularly true since fourth-amendment victims receive harm at the hands of the state, through its employees.

Moreover, the fourth amendment guaranty is not to be "paid for" unreasonable searches and seizures, but to be "secure from" them. Government is thus commanded both to redress violations which occur and to take steps to minimize their occurrence. If we visualize a society in which police routinely break into citizens' homes and pay handsomely for the physical and psychological damage caused, all would be "rich" but none "secure." Deterrence is not merely an incident of compensation and punishment, but one justification for them.

C. *Interdependence of Variables*

There cannot, by definition, be any deterrence unless there is punishment.[30] But the converse—there *must* be deterrence if there is punishment—is not valid, because deterrence is measured not by the quantity of the threat but by the quantity of the threat's influence. If the violator knows that the agency authorized to impose punishment will not do so, his conduct is not influenced. The "gravity of the evil is discounted by its improbability."[31] Deterrence, therefore, depends both on authorization of punishment and a perceived likelihood that it will be employed. Punishment must be credible if it is to deter.

But before punishment can be imposed, conduct which may constitute a violation must come to the attention of the punisher. Because of the limited audience for most fourth-amendment violations, many involving only the violator and victim, any serious effort to learn of violations must place heavy reliance on victim complaints. This is especially true if there are strong disincentives for victims coming forward. The typical victim of police abuse may fear retaliation and have little sense of "civic duty" if such implies confidence in those institutions which investigate, decide and remedy violations. He may fear that coming forward will prompt prosecution for past or future conduct. What is to bring him forward if he does not entertain some hope of receiving a benefit, especially if he is required not only to claim but to *prove* a violation in some adversary process? A policeman is paid a salary for turning criminal violators

30. A policeman, of course, may be influenced to act or not by many things. I do not mean to suggest that only the threat of punishment motivates police; rather, I mean that the only deterrent the *law* can supply (other than by tapping some internal desire to abide by it) is punishment in some form.

31. Dennis v. United States, 341 U.S. 494, 510 (1951). The violator may be deterred by a desire to abide by the law's authority or by other internal controls. The point is that he is not deterred by *punishment* when he knows it will not occur.

over to the legal system and a tort victim is promised compensation upon proof of the tortfeasor's liability. A victim of fourth amendment violations combines these roles; he has suffered a private loss, like the tort victim and, like the policeman, he discharges a public function—calling attention to the disregard of constitutional guarantees. If repayment for loss and payment for this enforcement service are not provided, the service will not be forthcoming. Thus, if credible compensation is not authorized, punishment cannot be imposed. Since no deterrence will result if punishment cannot be imposed, it follows that no deterrence will result if no credible compensation is authorized.

Once again, however, the converse—if compensation is offered, punishment will be imposed and some deterrence will result—does not follow. Take, for example, the case of an illegal, but successful, search for gambling apparatus. The evidence is excluded in the criminal prosecution of the victim for possession—surely a form of compensation to him which he seeks without hesitation by moving to suppress. The policeman is not punished by that exclusion *if* confiscation, not successful prosecution, was his sole purpose for searching.[32] And even if successful prosecution was his goal, how is he punished any more than all of us, who have an interest in that prosecution being successful?[33] Nor is he generally disciplined in such case by the police department or superiors in the law-enforcement apparatus, though they surely have authority to do so. Even though a violation has been determined and the victim has been compensated, the violator has not not been punished.

To summarize the dynamic of the variables: Adequate compensation is necessary but not always sufficient to produce adequate punishment; adequate punishment is necessary but not always sufficient to produce deterrence.

Adequate deterrence, thus, depends on adequate compensation *and* adequate punishment. Since deterrence is zero if *either* compensation or punishment is zero, we may infer, in mathematical terms, a product relationship—deterrence equals compensation times punishment, or D = C x P.

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32. Statistics showing nearly 100% success of suppression motions in a given area over a long period of time for narcotics or gambling apparatus seizures bear the inference that confiscation is the primary objective. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 684-85, (1970) [hereinafter cited as Oaks].

33. *See* text accompanying note 53 *infra*.

D. *The Criteria*

In light of the legitimacy of the variables and their interdependence, an appropriate fourth-amendment remedy is defined as one meeting the following three criteria:

Compensation Criterion

The remedy compensates the victim for losses suffered *and* the actual cost of proving the violation plus or minus a permissible tolerance.

Punishment Criterion

The remedy punishes the violator to the extent of the retributive impulse plus or minus a permissible tolerance.

Deterrence Criterion

The remedy's compensation and punishment yield, as a product, a level of deterrence within acceptable upper and lower limits.

Before elaborating on each criterion, several general comments are necessary. It is conceivable that no remedy meeting these requirements can be devised. If punishment and compensation are held within defined limits, they may be incapable of yielding deterrence within its defined limits. If such is true, at least one criterion must be relaxed. For example, if deterrence is too low even when compensation and punishment are pushed to their upper limits, we will either have to tolerate more compensation or punishment than is reasonable for their own sakes or resign ourselves to insufficient deterrence. There are three reasons for avoiding this problem now. First, the permissible tolerances described for punishment and compensation are specifically designed to offer a high probability of achieving acceptable deterrence. Second, no model which has at any time yet operated even meets the first two criteria[34] and, thus, impossibility is not clearly inevitable. Third, while compliance with the compensation and punishment criteria can be verified by examining a proposed model, compliance with the deterrence criteria is verifiable only empirically after the model's implementation. For these reasons, *two* models are later proposed, one making no use of the tolerances and one pushing compensation toward its upper limit.[35]

34. The Court's opinion in Mapp v. Ohio, 367 U.S. 643, demonstrates the failures of all remedies in use prior to exclusion. The exclusion remedy, wholly apart from the question of deterrent effect, punishes the policeman in no important sense. *See* text accompanying note 53 *infra*.

35. *See* text accompanying notes 88-99.

1. The Compensation Criterion

Any model which authorizes and delivers to a victim benefits commensurate with all losses flowing from the violation *and* his actual expense of proving the violation, complies with the compensation criterion. If it delivers no more and no less, it is in strict compliance. We shall examine several models which strictly compensate.[36]

A permissible tolerance is suggested since it may be desirable to increase or decrease compensation to achieve deterrence ends. Compensation may, for example, be increased to induce more complaints when it is discerned that many violations go unreported because of barriers (including cost barriers) to invocation. Compensation exceeds the upper limit if it is disproportionately greater than loss plus expense. When, for example, the exclusionary rule requires suppression of critical evidence in a murder prosecution, the avoidance of the conviction is an extremely high benefit to the defendant and may bear no proportional relationship to the gravity of the police illegality.

Compensation is too low if it does not pay the actual expense of successful invocation of the process (or all invocations would be economically irrational) plus *some* compensation for the loss of right. We shall examine one model which does not even do this.[37]

2. The Punishment Criterion

Any model which authorizes and delivers to a violator deprivations commensurate with society's retributive impulse meets this criterion. Admittedly, it is difficult to translate a complex social-psychological phenomenon into a program for action, but such difficulty afflicts the legal system generally and the criminal process in particular. The attempt must be made lest interests denominated priceless too soon become worthless.

It should be noted that the definition of punishment herein adopted makes no reference to the future impact of its imposition on the violator's behavior or on that of others. Rather, it is limited to acting on the violator before us solely to adjust our present feelings about him and his past behavior.[38]

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36. *See* text accompanying notes 77-99.

37. *See* text accompanying notes 60-68.

38. This limited definition of punishment to embrace only retribution and not deterrence is utilized merely to stress that punishment for constitutional violations

As with compensation, adequate punishment may permissibly fluctuate within a given range. On the upper end shall be placed two limitations, one practical and one normative. The punishment is too high if it renders impossible the recruitment and retention of the desired number of qualified policemen. Since this can be evaluated only by experience, the punishing agency must be invested with enough flexibility to reduce punishment if this occurs. On the normative side, punishment is too high if it is disproportionately greater than that imposed in a manner strictly commensurate with the retributive impulse. Of course this limit is quite vague but it evokes the general contours of the problem. In addition, since the punishment may need to be regulated to raise or lower deterrence, a range larger than that necessary strictly to punish should be stated.

The lower limit is breached if the punishment is disproportionately less than that imposed in strict accord with the retributive impulse. Although this, too, produces a huge grey area, it permits at least this standard: if a model does not punish a violator of the Constitution *at all*, it does not meet the punishment criterion.

3. The Deterrence Criterion

Measuring how much deterrence exists, let alone deciding whether it is "enough," is a complex operation since so many fluctuating forces and counterforces co-exist with the legal sanction. This article, however, will assume that accurate empirical evidence of a model's deterrent effect is obtainable. Indeed, persuasive empirical studies on the effect of the exclusionary rule already exist.[39]

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should be prompted by retributive impulse alone. Some writing in this area suggests that the *only* purpose for enforcing the fourth-amendment is to deter violations. Consider this language of Professor Anthony Amsterdam:

> The common focus on the concept of 'deterrence' in the debate over the exclusionary rule can be quite misleading. It suggests that the police have a God-given inclination to commit unconstitutional searches and seizures unless they are 'deterred' from that behavior. Once this assumption is indulged, it is easy enough to criticize the rule excluding unconstitutionally obtained evidence on the ground that it 'does not apply any direct sanction to the individual officer whose illegal conduct results in the exclusion,' and so cannot 'deter' him. But no one, to my knowledge, has ever urged that the exclusionary rule is supportable on this prinicple of 'deterrence.'

Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 431 (1974) [hereinafter cited as Amsterdam].

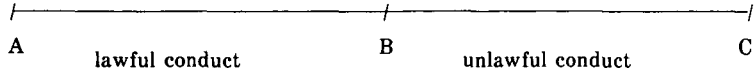
39. The classic piece is Oaks, note 32 *supra*. *See also* Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?* 62 JUDICATURE 398

In criminal law, there are many instances in which punishment, held within above-stated limits, produces insufficient deterrence. For example, even when the death penalty (which many argue breaches an ethical upper limit, but which is, in any event, the ultimate punishment in our power) is authorized and imposed, the murder rate often does not decrease. Deterrence of fourth-amendment violations clearly can be too low.

It is, perhaps, not so clear how deterrence can be *too high* if punishment limits are respected. One might say that too much deterrence of bank robbery is unimaginable. And he would be right. But that is not our case. It is difficult to picture human behavior that looks like bank robbery but is not bank robbery. And even if we could contrive an example of such bizarre behavior, there would be no compelling reason to encourage that behavior. In contrast, much police conduct that violates the fourth amendment is quite similar to conduct that does not violate the fourth amendment. Moreover, there are powerful reasons to encourage police to engage in this "similar" conduct—arresting, searching and seizing.

If we label all the interests embraced by the fourth amendment a "privacy complex" and all those interests comprising the need to monitor and regulate individuals a "policing complex," these complexes are polar opposites and because they are both so widely accepted as legitimate, they generate high tension. How to resolve that tension is a central problem, but is not the focus of this article. That problem is resolved when answering the question, "What conduct constitutes a violation?" and is anterior to the remedy inquiry. We have assumed earlier that this question has been answered so that, at any given time, it is known what police conduct is a violation and what conduct is not. If we could arrange all possible police behavior on a unidimensional continuum, starting at the left with the case in which the "policing complex" most clearly outweighs the "privacy complex" and running to the converse case on the right, the process defining violations should, ideally, produce this picture:

Fig. 1



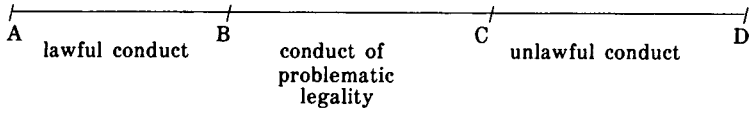
(1979); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974); Hyman, *In Pursuit of a More Workable Exclusionary Rule: A Police Officer's Perspective*, 10 PAC. L.J. 33 (1974); Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is a Deterrent To Police?* 62 JUDICATURE 404 (1979).

If Figure 1 were an accurate depiction of reality, the deterrence criterion would require that the remedy deter all conduct between B and C and none between A and B.

But the picture does not look like this. One article surveying fourth amendment doctrine is entitled, *Search and Seizure: The Course of True Law . . . Has Not . . . Run Smooth*,[40] and the Supreme Court has called it "nonsense" to assume that fourth amendment law possesses "complete order and harmony."[41] Apart from the problem of a policeman's knowledge of the law, Figure 1 is inaccurate for three reasons: (1) the law cannot anticipate every situation in which a policeman must decide whether or not to intrude; (2) the law does not provide an unproblematic solution to every situation it can anticipate;[42] and (3) the law's unproblematic solutions may change in any given case and the new solution applied to such case.

For these reasons, a more accurate picture is:

Fig. 2



If both cases in which the law is problematic and those in which the policeman cannot reasonably be expected to know the law are included in the problematic category, the upper and lower limits of the deterrence criterion are suggested. Deterrence is too low if unlawful conduct (C to D) is consistently engaged in. Deterrence is too high if lawful conduct (A to B) is consistently eschewed. It is noted that the Figure 2 conception builds in tolerance automatically, *for what the policeman does in the problematic category (B to C) is immaterial to compliance with the deterrence criterion.* It may, of course, be advisable to manipulate punishment and compensation within their limits if substantially all problematic cases are decided

40. LAFAVE, *Search and Seizure: The Course of True Law . . . Has Not . . . Run Smooth*, 1966 U. ILL. L.F. 255 [hereinafter cited as LaFave].

41. Coolidge v. New Hampshire, 403 U.S. 443, 483 (1971).

42. One clear trend from recent Supreme Court fourth-amendment decisions is to favor the outcome giving unambiguous directions to police in recurrent fact situations at the expense of some loss in purely intellectual rigor. *See* the discussion in New York v. Belton, ___ U.S. ___, 101 S. Ct. 2860, 2863-65 (1981). Many writers advocate rule-making procedures to give clearer directions to police. *See, e.g.*, Amsterdam, note 38 *supra*.

by the police in one way or the other, but the limits suggested are minimum requirements. Several models later proposed offer a special solution to police conduct of problematic legality.

To summarize:

A fourth-amendment remedy is in strict compliance if, and only if:

(1) it compensates the victim by paying him the amount of loss flowing from the violation plus his actual expenses of proving the violation, no more, no less, and
(2) it punishes the violator in accord with the retributive impulse, no more, no less, and
(3) it does not consistently produce unlawful intrusions nor does it consistently chill lawful ones.

A fourth amendment remedy is in compliance if, and only if:

(1) it compensates within the limits described above (which always require at least *all* actual expenses plus *some* benefit for the invasion of a right), and
(2) it punishes within the limits described above (which always require at least *some* punishment of the violator), and
(3) it does not consistently produce unlawful intrusions nor does it consistently chill lawful ones.

II. FOUR EXISTING MODELS

We will test four models, two in operation, and two which have been recently proposed, against the compensation, punishment and deterrence criteria.[43] To aid in this endeavor, we will consider three

43. One other criterion could be stated – the extent to which the remedial process educates police about fourth-amendment issues. One drawback of the exclusionary rule is that the policeman involved often does not learn of the decision to exclude or, if he does, is not told its basis. Thus, the same errors can reoccur. A model which includes the policeman as a named party in interest promises to improve on this situation. This is a further argument in support of the models proposed herein which do include the policeman directly in the disciplining tribunal. While this factor's importance is not meant to be discounted, it is not elevated to the positions of compensation, punishment and deterrence for two reasons. First, it begins to complicate the remedy question with the substantive question of violation. Second, the question of educating policeman is not strictly bound up in how violations are remedied. Although feedback does not always occur under the exclusionary rule, it surely could. There is nothing in the rule itself which bans careful explanation to the policeman of the decision and its bases.

hypothetical cases and attempt to project how each model would treat (or not treat) each case.

> *Lucky's Case.* Officer Lucky entertains a suspicion (not amounting to probable cause though he believes it does) that A possesses controlled substances in his apartment. He enters A's apartment, conducts a warrantless search in A's presence (but without his consent), finds and seizes one gram of marijuana, arrests A and charges him with possession. After booking, A is able to post bond and is immediately released.
>
> *Unlucky's Case.* Officer Unlucky entertains a suspicion (not amounting to probable cause though he believes it does) that B possesses controlled substances in his apartment. He enters B's apartment, conducts a warrantless search in B's presence (but without his consent), but finds no evidence of any crime. B is not arrested or charged.
>
> *Cautious' Case.* Officer Cautious entertains a suspicion (not amounting to probable cause, though he believes it does) that C possesses controlled substances in his apartment. Mindful of the warrant requirement, he applies for and receives a warrant from a magistrate who mistakenly "finds" probable cause based on Cautious' affidavit, which states only those facts Cautious knows to be true. Armed with the warrant, he enters the apartment, conducts a search within the particularity bounds lawfully set forth in the warrant, in C's presence (but without his consent), finds and seizes 2 kilos of heroin, arrests C and charges him with possession. C is unable to post bond for two days and remains in jail during that time.

It is assumed—and cases surely demonstrate[44]—that a violation exists in each case (though in Cautious' Case there is room for debate on who the violator is).[45]

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44. Probable cause does not exist and no probable-cause exception is apparent. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971). In the first two cases, failure to obtain a warrant is an independent ground for finding a violation. Payton v. New York, 445 U.S. 573 (1980).

45. It could be argued that Cautious is the violator because he searched without probable cause. In view of the necessity for supplying incentives to police to use the warrant procedure, it can be argued that Cautious is insulated by the magistrate's determination. The fourth amendment, of course, also protects against unreasonable decisions by magistrates. United States v. Ventresca, 380 U.S. 102 (1965).

A. *Exclusionary Rule Model*

1. Description

The rule, operating in the federal courts since 1914[46] and in all state courts since 1961,[47] provides that no evidence, tangible or intangible, obtained as a result of an unconstitutional search or arrest is admissible in a criminal prosecution of the victim. Its most often stated rationale is that removal of the incentive for illegal arrests and searches (successful prosecution for crime) will decrease violations. An ethical justification is sometimes stated as well.[48] The rule typically is invoked by the defense via pretrial motion to suppress or at trial upon the prosecution's proffer of the tainted evidence.[49]

2. Application to Hypotheticals

Lucky's Case. Lucky's luck has changed, for the marijuana is suppressed upon A's motion in the criminal case. Whether the case continues depends on whether the prosecutor has enough other evidence to secure conviction. (In some cases he does, but generally not in possessory offenses.)

Unlucky's Case. As B is not prosecuted for crime, *nothing* happens in Unlucky's case. Unlucky's luck has changed, too.

Cautious' Case. As in Lucky's case, the heroin is suppressed upon C's motion in the criminal case. (Cautious may wonder now why he, too, should not trust to luck since neither Lucky nor Unlucky has suffered a fate worse than his.)

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46. Weeks v. United States, 232 U.S. 383 (1914). The possibility of exclusion had been mentioned earlier, as dictum, in Boyd v. United States, 116 U.S. 616 (1886).

47. Mapp v. Ohio, 367 U.S. 643.

48. *See* text accompanying notes 100-03 *infra*.

49. If the trial judge suppresses the evidence before trial, the prosecution in some jurisdictions, may obtain interlocutory review. *See, e.g.*, 18 U.S.C. § 3731 (1976). In most states, however, this is not true. KAMISAR, *supra* note 7, at 147. If the trial court suppresses evidence, the double jeopardy clause of the fifth amendment precludes review, assuming acquittal. *See* Benton v. Maryland 395 U.S. 784 (1969), which extends this protection to state criminal defendants. If the suppression motion is denied and the issue properly saved, the defense may obtain review on appeal following conviction, and state convicts may obtain direct discretionary review by the Supreme Court of the United States on *certiorari*. Such decisions are usually subject to collateral attack in the jurisdiction which rendered them. KAMISAR, *supra* note 7, at 156-72. Until 1976, state convicts could collaterally attack their convictions in federal courts via habeas corpus. This was virtually foreclosed by the decision in Stone v. Powell, 428 U.S. 465 (1976).

3. Application to Definition

Compensation. The victim's compensation is exclusion. This leads to two serious problems. First, if no criminal action is brought against the victim (as in B's case), compensation is zero, breaching the lower limit of the compensation criterion.[50] In some cases when a prosecution is commenced, the constitutional violation may be egregious and the objects excluded of small significance relevant to the prosecution for a minor offense. The lower limit would be breached in such cases too. Second, there are instances in which the compensation is so high as to violate the compensation criterion's *upper* limit. For example, despite Cautious' attempt to respect C's rights, the rule makes it impossible to convict C of a serious possessory crime, a high compensation to C. "The criminal goes free because the constable has blundered" is the slogan of abolition.[51]

Compensation under the rule is wildly erratic, dropping below the lower limit in many cases and rising above the upper limit in others. The rule compensates victims appropriately only by sheer accident (arguably, A's compensation is appropriate).[52]

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50. This feature of the rule leads to the widespread criticism that the exclusionary rule protects only the "guilty" since the "innocent" have nothing to hide and, therefore, nothing to suppress. *See* Wilkey, *supra* note 9, at 228. This criticism assumes that there are only two classes of persons — "guilty" persons who are searched and "innocent" persons who are searched. Of course, there is also a third class of persons — those who are not searched (which I think we can safely assume includes both "guilty" and "innocent" people). To the extent the rule deters, it deters searches against the innocent as well as searches against the guilty. It is precisely by insisting on probable cause for a search that the number of "innocent" persons searched is kept down without unduly lowering the number of "guilty" persons who are searched. Most innocent people who have "nothing to hide" seem, nevertheless, to want their privacy.

51. The phrase was coined by Judge Cardozo (then Judge of the New York Court of Appeals) in People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). For perhaps the most devastating brief tirade against the exclusionary rule, *See* 4 WIGMORE, ON EVIDENCE, § 2184 (2d ed. 1923) [hereinafter cited as WIGMORE].

52. One of the leading criticisms of the rule is that "compensation" ought never take the form of relief from criminal prosecution. In Wigmore's words, the rule does not "strike at the policeman who breaks [the Constitution], but lets off somebody else who broke something else." *See* WIGMORE, note 51 *supra*. There is an interesting irony to the rule pointed out by Professor Yale Kamisar, a leading fourth-amendment scholar. Against the criticism that, without the rule, we could not punish the criminal, he states:

> If we replace the exclusionary rule with 'disciplinary punishment and civil penalties directly against the erring officer involved,' as Judge Wilkey proposes . . . and if these alternatives 'would certainly provide a

Punishment. In most situations, the rule simply does not punish the violator at all. As Chief Justice Burger has stated:

> The doctrine deprives the police in no real sense; except that apprehending wrongdoers is their business, police have no more stake in successful prosecutions than prosecutors or the public.[53]

Of course the rule cannot punish if no criminal case is commenced. Unlucky, therefore, receives no punishment. When a suspect is "held for investigation" and released when his lawyer appears with a writ, or when police troll for narcotics or gambling apparatus solely to confiscate, no punishment results since successful prosecution is not a police goal.

The only punishment to the policeman involved is psychological, and that only in cases of serious crime. Psychological punishment can be effective, even devastating, but its impact is erratic and may be neutralized by psychological support from colleagues or from the public, who are entreated to recognize that the rule "ties our hands."[54] Furthermore, those policemen who feel this punishment most intensely may deserve it the least. Cautious, who has evidenced some appreciation for the fourth-amendment imperative may feel worse about exclusion than Lucky, who may view exclusion as simply a cost of doing police business. Thus, the exclusionary rule breaches the lower limit of the punishment criterion for in all cases no punishment is imposed.

Deterrence. The bulk of opinion grounded in empirical studies (including field observation) is that the rule is an insufficient deterrent.[55] These studies show a consistently high incidence of

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> far more effective deterrent than . . . the exclusionary rule,' as the judge assures us . . . , the weapon still would not be brought in as evidence in the case he poses because the officer would not *make* the search or frisk if he lacked the requisite cause to do so.

The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing," 62 JUDICATURE 337, 344 (1979) [hereinafter cited as Kamisar]. If the police honored the fourth amendment, the rule would never be invoked and we would not constantly see the criminals who get off. Thus, by violating the Constitution, the police build a case to *destroy* the rule designed to deter violations.

53. Bivens v. Six Unknown Named Agents, 403 U.S. at 416.

54. Interestingly, one leading argument against the rule is that it does not work. Another is that it works too well. The exclusionary rule must be a bit like a Corvair I once owned. It was a dangerous little car to drive around; fortunately, it usually wouldn't start.

55. *See* note 39 *supra.*

unlawful police conduct, suggesting that the lower limit of the deterrence criterion is being breached. If there is any validity to D = C x P, this is not surprising, because P is close to zero.

Summary. None of the criteria is met. Nevertheless, two positive features of the rule should be noted, especially if an inquiry into combining models is to be made and defects in one model may be neutralized by strengths in another. First, the rule embraces an important idea about government's special responsibility to obey the law.[56] Second, the rule generates a continuously high volume of occasions for the legal process to identify violations.[57] This is because: (1) the victim is a criminal defendant and is compelled by self-interest to associate with a lawyer, who will acquaint him with his rights and with how to redress their violation by suppression; (2) there are no disincentives to invoking the rule;[58] and (3) invocation involves little or no marginal cost.[59]

B. *Discipline Model*

1. Description

A recent proposal on this model envisions creation of a special tribunal to deal out fines and employment-related penalties to violators.[60] Because there is little or no award to the victim to serve as incentive for bringing such an action, its prosecution is handled by state-paid counsel and referrals to the tribunal made by participants in the criminal process. Methods of discipline could include: (1) dismissal; (2) suspensions; (3) demotion; (4) delaying, or otherwise affecting eligibility for promotion; (5) assignment, for a specified period, to unattractive work detail (*e.g.*, parking meters) or shifts; (6) prohibition against involvement in certain work activities; (7) cen-

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56. *See* text accompanying notes 102-03 *infra*.

57. A by-product of this high volume is the opportunity to establish and continuously refine answers to important fourth-amendment questions.

58. There are a few situations in which the motion to suppress conflicts with some more important trial strategy. *See, e.g.*, Henry v. Mississippi, 379 U.S. 443 (1965). There are not many.

59. Many criminal defendants are represented by state-paid counsel. Of those paying their own counsel, the cost is not likely to be greater because of such motions unless they involve especially sophisticated points. If the motion is granted, moreover, the overall expense is apt to be much less than if the case had proceeded without the motion.

60. SCHLESINGER, note 17 *supra*. As to questions of judicial review of tribunal action and procedural due process, see Bishop v. Wood, 426 U.S. 341 (1976).

sure or reprimand; (8) monetary fine; and (9) any combination thereof.[61]

2. Application to Hypotheticals

Lucky's Case. The marijuana is admitted at A's possession trial. If A brings action in the tribunal or if there is a referral, the tribunal will find a violation and impose some punishment on Lucky from the above list.

Unlucky's Case. If B brings action, the tribunal will find a violation and impose punishment on Unlucky.

Cautious' Case. The heroin is admitted at C's trial. If C brings action in the tribunal or if there is a referral, the tribunal will find a violation and *may* impose punishment on Cautious. It is conceivable that "acting pursuant to a warrant" would be accepted as an affirmative defense.[62]

3. Application to Definition

Compensation. This model offers *nothing* to a victim but revenge or vindication of a legal right. The proposal's author recommends "minimal, but automatic compensation to the successful claimant,"[63] but such compensation seems only payment for the enforcement service, not for the loss of right. Clearly, this model does not meet the compensation criterion.

Punishment. The Discipline Model introduces punishment which is effective and appropriate. Whatever other preferences the typical policeman has, he prefers to remain a policeman, to advance within the hierarchy, and to maintain the friendship and respect of his colleagues.[64] When police abuse becomes egregious, community sentiment should be aroused and, in some cases, criminal prosecution instituted. Much police misconduct is, however, not of this ilk but is the product of the inadequate recruitment, training and knowledge

61. *Id.*

62. *See* text accompanying note 93 *infra.*

63. SCHLESINGER, *supra* note 17, at 73.

64. Police observers often comment on the close-knittedness of policemen. Their alienation from the community often results in the formation of a police subculture, so that the dominant values of the policeman are not those of the community, but of the police force. *See, e.g.*, Lipset, *Why Cops Hate Liberals — and Vice Versa*, THE ATLANTIC, March 1969, *reprinted in* KAMISAR, *supra* note 7, at 35, 36-37. Thus, the punishment most meaningful to many policemen is one which affects his position or function within the police force itself.

of persons to whom we assign sometimes delicate or conflicting tasks and who simply do not do their jobs properly. It is helpful to view a violator as someone, above all, not functioning adequately at his chosen occupation. Confusing incompetence with evil often masks the fact that an employment problem is involved.

The punishment inflicted by the Discipline Model is flexible and relates to the gravity of the violator's conduct, not the gravity of the victim's conduct as under the exclusionary rule. Lucky and Unlucky are now treated alike based, not on the results of their intrusions, but, on their decisions to intrude. Whether Cautious is given a lessor punishment or is allowed a complete defense, an important difference between him and the other policemen is pressed into view. Unlike the effect under the Exclusionary Rule Model, under the Discipline Model Cautious' reliance on the warrant process is reinforced.[65]

Punishment can be fashioned to fit idiosyncracies of the violator. For example, a policeman may demonstrate an inability to cope rationally with certain crime-enforcement situations but not with other situations. Discipline may take the form of barring him from such work detail. Finally, the model has the capability to administer punishment quickly, with all that that implies.

Deterrence. One would expect Lucky, Unlucky, and Cautious, and all others who learn of their punishments, to be influenced greatly. The problem, of course, is that the resolution of the hypotheticals, in

65. The warrant process aids in achievement of four goals. *First*, and most important, it interposes a neutral and detached person into the decision-making process. As the Court, quoting Justice Jackson, has observed:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971). *Second*, it memorializes, through the affidavit process, the information known to the policeman at the time of issuance so that facts learned later (perhaps even as a result of the intrusion) cannot be used to justify the intrusion. *Third*, because of the particularity requirement of the warrant clause, any intrusion under a warrant is carefully circumscribed as to the scope of place and object. *Fourth*, the warrant process makes the actions of individual policemen more visible to the police department. No one may ever become aware of a warrantless search which produces no seizure.

each case, was conditioned by the assumption that the victim instituted an action in the tribunal or that there was a referral. But why would the victim institute an action? He receives no benefit from it. And if he does not bring such an action, what reason is there to assume that more self-regulation will occur than does now?

Recognizing this problem, the proposal's author calls for an informal system of referrals from participants in the criminal process.[66] The useful possibility of linkage between the criminal process and the tribunal is doomed *in this context.* The prosecutor cannot be expected to be of much help—a healthy police-prosecution rapport is endangered by such referrals. It is easier to anticipate that defense counsel would refer cases, but this assumption rests on shaky ground, for our association of the defense counsel with the fourth amendment *springs from the exclusionary rule*, which is abolished under this model. This referral proposal places the most faith in the trial judge.

> If a trial judge believed that there were evidence of illegal official behavior (regardless of the outcome of the trial), he could order such a [tribunal] hearing to be held. Under such a system, the judge must be particularly alert during testimony to the possibility of illegal behavior by officials, since defense counsel would not have the incentive of a suppression motion to bring forward illegal behavior. [Nor would certain lines of discovery now open to him be available.] The judge must be given discretion to ask questions concerning how evidence was obtained in order to make sure that he has enough information to recommend, where necessary, a hearing on police misconduct.[67]

This all seems otherworldly. One of the avowed purposes for abolishing the exclusionary rule is to unclutter criminal cases of issues which *should not be there*. This proposal now clutters them with issues which *are not there.* What does everyone else in the room do while the judge launches this investigation? How has he acquired jurisdiction over such an issue? Will his investigation disturb some legitimate tactic of one of the parties? Moreover, if Fuller is right when characterizing many trial judges as "guardians of local police morale,"[68] the expectation of referrals is a dream. But the pro-

66. SCHLESINGER, note 17 *supra.*
67. *Id.* at 72.
68. L. FULLER, THE MORALITY OF LAW 82 (1969).

posal points out something critical to our inquiry. Existing legal rules and institutions depend on the aggrieved party pressing his claim to conclusion. If he does not, either because of disinterest or the system's failure to offer enough incentive, doctrines of adversariness, confrontation, jurisdiction, and the pervasive reactive style of adjudication make it extremely difficult to overcome the complainant's absence as an active participant.

There is, of course, no empirical data on this model, but if one accepts the equation D = C x P, he would project deterrence as low since compensation is nearly zero.

Summary. This model does not meet the compensation criterion and, almost certainly would not comply with the deterrence criterion, but it does strictly comply with the punishment criterion. The punishment, when imposed, is appropriate and effective; because of the absence of compensation, however, it will hardly ever be imposed. If the compensation weakness can be eliminated through the addition of another model, the Discipline Model would form an important component in a remedial scheme.

C. *Tort Model*

We have now looked at one model which does not punish (Exclusionary Rule Model) and one which does not compensate (Discipline Model). Although these defects are sufficient to render them inappropriate, it was suggested also that the first has not, and the second will not, produce adequate deterrence. A look at the traditional possibility of a damage action by victim against violator now has a particular allure, since a money judgment *punishes the violator one dollar for every one dollar of compensation to the victim and vice versa.*

1. Description

The Supreme Court's enunciation of the exclusionary rule sprang largely from the abject failure of remedies of this sort.[69] The Tort Model deserves serious attention only if its earlier defects are eliminated. These defects defects were: (1) availability of immunity defenses;[70] (2) jury-bias against "criminals" or "suspects" and in

69. *See* Mapp v. Ohio, 367 U.S. 643. A recent piece advocating a return to tort actions for fourth-amendment violations is Gottlieb, *Feedback from the Fourth Amendment: Is the Exclusionary Rule an Albatross Around the Judicial Neck*, 67 KY. L.J. 1007 (1979).

70. For a recent treatment of the immunity problem, *see* Levinson, *Suing*

favor of policemen; (3) inability to collect entered judgments; and (4) largely because of the first three, inability to obtain counsel.[71] Curing the problem of immunity defenses can be accomplished by legislative abolition of immunity. Jury-bias is a deeper problem, but two recent proposals offer some promise. The Chief Justice suggests a "panel of lawyers" to decide the facts (a suggestion which has drawn noteworthy skepticism).[72] Judge Newman, noting historically low damages for losses of fundamental rights, suggests a legislatively created minimum award ($1,000)[73] for a violation. The collection problem might be solved, short of holding the state liable, by mandatory insurance coverage.

As to the problem of availability of counsel, consider these observations of Professor Anthony Amsterdam:

> Where are the lawyers going to come from to handle these cases for the plaintiffs? *Gideon v. Wainwright* and its progeny conscript them to file suppression motions; but what on earth would possess a lawyer to file a claim for damages before the special tribunal in an ordinary search and seizure case? The prospect of a share in substantial damages to be expected? The chance to earn a reputation as a police-hating lawyer, so that he can no longer count on straight testimony concerning the length of skid marks in his personal injury cases? The gratitude of his client when his filing of the claim causes the prosecutor to refuse a lesser-included-offense plea or to charge

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Political Subdivisions in Federal Court: From Edelman to Owen, 11 U. TOL. L. REV. 829 (1980).

71. *See* Mapp v. Ohio, 367 U.S. 643.

72. Consider these remarks of Professor Amsterdam, responding to Chief Justice Burger's suggestion:

> Chief Justice Burger seems to agree with me that the traditional alternatives, such as criminal prosecutions and tort actions against policemen, do not work. His faith in a special tribunal for government claims is apparently based on his belief that 'lawyers serving on such a tribunal would [not] be swayed either by undue sympathy for officers or by the prejudice against 'criminals' that has sometimes moved lay jurors to deny claims.' I would welcome the opportunity to put that prognostication and my own contrary prognostication before any randomly selected group of contingent-fee lawyers in the land by offering them a retainer as plaintiff's counsel in the special tribunal and letting them vote with their feet.

Amsterdam, *supra* note 38, at 429-30 (citations omitted).

73. Newman, *supra* note 20, at 465.

> priors or to pile on "cover" charges? The opportunity to represent his client without fee in these resulting criminal matters?[74]

Some of this skepticism, of course, relates to the defects mentioned above. Some cuts deeper. But even if most lawyers are as jaded by the real world as Professor Amsterdam suggests, the coming of no-fault insurance at once makes skid-mark testimony less important and leaves many plaintiff's counsel looking around for new arenas in which to ply their trade. If the tribunal acts fairly and the awards are high enough, contingent-fee arrangements are possible, without which many victims are barred at the threshold. Moreover, the Tort Model can be constructed with state-paid "special prosecutors" to represent claimants before the tribunal.[75]

Let us assume, perhaps naively, that these defects can be overcome and test the model under our criteria, selecting a special tribunal as forum, though the discussion applies equally to common-law or § 1983 actions.

2. Application to Hypotheticals

Lucky's Case. The marijuana is admissible in A's possession trial. A brings action against Lucky in the tribunal and collects an award.

Unlucky's Case. B sues Unlucky in the tribunal and collects an award.

Cautious' Case. The heroin is admissible in C's possession trial. C sues Cautious. Cautious defends on the ground that he was "acting pursuant to warrant," The tribunal either accepts the defense and enters no award, rejects it and enters an award, or compromises the point by entry of a lesser award.

3. Application to Definition

Compensation, Punishment and Deterrence. If this model is to be appropriate, the awards made by the tribunal must not transgress the stated limits for compensation and punishment. The problem is that the amounts of compensation appropriate for A, B, and C, and the amounts of punishment appropriate for Lucky, Unlucky, and Cautious do not necessarily have anything to do with each other. The very case which produces C, the victim whose two days in jail

74. Amsterdam, *supra* note 38, at 430.
75. *See* SCHLESINGER, note 17 *supra.*

following an illegal search and arrest involve the *greatest compensable loss*, also produces Cautious, the violator (if one at all) least deserving of punishment. Also, A, who was illegally arrested, suffered a loss greater than B's (B was not arrested), but Lucky's violation was, absent his better luck, precisely the same as Unlucky's. It is irrelevant to compensation that A and C are criminal suspects and B is not, for that difference is *fully reflected* in their criminal prosecutions which now proceed without the exclusion possibility.

Thus, the initially alluring fact that under the Tort Model each dollar of compensation is a dollar of punishment and vice versa has an incurable downside—*compensation and punishment are mutually limiting.* The idea, for example, of a $1,000 minimum award for a violation plus stated minimums for each day spent in jail pursuant to illegal arrest makes sense as compensation but would often be disproportionate punishment of the policeman and may dangerously jeopardize the law-enforcement effort, driving deterrence above its upper limit. On the other hand, if awards were limited by the punishment standard, they would often be so low as to provide insufficient incentive for bringing an action. That would violate the compensation criterion *and* would drive deterrence below its lower limit.

Nor does insurance solve this dilemma. On one hand, either the state must pay the premium (or accept the risk to state funds) or each policeman must. On the other, the goal is either to generate awards measured by a punishment standard or a compensation standard. This presents four possibilities.

Fig. 3

	Punishment Standard	Compensation Standard
Policeman pays premium	Option 1	Option 3
State pays premium (or accepts risk)	Option 2	Option 4

Option 1 insures that the victim will collect some award, but will produce: (a) awards over the upper compensation limit when the violation is egregious but the loss *relatively* slight (*e.g.*, a policeman, for no legitimate reason, stops every long-haired male pedestrian and demands to see "some identification"); and (b) many more awards *under* the lower compensation limit (*e.g.*, Cautious' Case).

Option 2, in addition to these problems, is incoherent. If the goal is to punish violators (or to spread punishment through the class of potential violators), the violators must pay the premiums.

Option 3 is intriguing. The victim collects an amount appropriate under the compensation criterion. The traditional difficulty of

the uncollectability of money judgments against police is overcome. Moreover, one can imagine that an insurance company paying claims would have, *and employ*, more techniques for reducing valid claims (and therefore reducing violations) than the state does currently. The problems with this option are, however, considerable. Since payment of awards is based on a *compensation* standard, the *whole class of potential violators* is punished (through premium payments) incommensurate with the amount of appropriate punishment. The disparity between appropriate compensation and appropriate punishment has not evaporated, but is only being spread among all insureds. Of course, this problem appears in the area of automobile insurance, too—but in that area there simply is no choice but to punish (monetarily) either the negligent driver of the car or the class of all drivers. In our case there is a choice, and a more logical one. The violator is an employee, and the violation is committed in the course of employment.

This leads us to option 4—the state bears the risk and pays the victim according to the compensation standard. But this is not a Tort Model anymore. Why is the policeman a party-defendant? The only possible effect of denominating him a defendant is to drive down the award, but that is exactly what the compensation standard tries to avoid. We now turn to option 4 under the name it was earlier assigned.

D. *Enterprise Liability Model*

1. Description

This model, recognizing that law enforcement is an enterprise which produces great risk to individual rights, visits the obligation to pay on the entity which creates the risk—the state.[76] Numerous proposals have been made along this line,[77] and an attempt is made herein to assimilate their leading features into a scheme demonstrating the model in its most favorable light. The following facts are assumed: (1) sovereign immunity is abolished; (2) a special tribunal, composed of persons least likely to be infected with any impermissible bias, is created to decide the violation question and

76. The word "state" is used here, and throughout, in its broadest sense to include political subdivisions and agencies of all sorts. The eleventh amendment may, indeed, require that the defendants in these cases be denominated as subdivisions and not the state itself or that the state explicitly waive its eleventh-amendment right. *See* Levinson, *supra* note 70, at 829.

77. The most significant is Chief Justice Burger's in his *Bivens* dissent, 403 U.S. at 411.

grant awards payable by the state; (3) there is a minimum $1,000 award for a violation plus set minimums for common effects of violations (*e.g.*, days in jail);[78] (4) the victim is given the option in the tribunal of a state-paid special prosecutor (with discretion to decline frivolous claims) or private retained counsel (who assuredly screens frivolous claims too); (5) the victim has the option of bypassing the tribunal and filing, instead, a common-law or § 1983 action against the state (with his own counsel); (6) an action of the tribunal is appealable only at the discretion of the appellate court, and only as to the violation question, and a tribunal action shall be a bar to subsequent filing of a common-law or § 1983 action; (7) the state is the named party-defendant in the tribunal or in the common-law or § 1983 action.

2. Application to Hypotheticals

Lucky's Case. The marijuana is admissible in A's possession prosecution. A sues the state and receives compensation for his losses (at least $1,000) plus expenses (there would be none in a tribunal action with special prosecutor).

Unlucky's Case. B sues the state and receives at least $1,000 plus expenses.

Cautious' Case. The heroin is admissible in the criminal case. C sues the state and receives $1,000 plus the set minimum for two days in jail plus expenses.

3. Application to Definition

Compensation. Under this model, the victim is paid in accordance with the severity of his loss from the violation and for his expense in proving it. If the model did not utilize state-paid prosecutors, the cost of an attorney could, in successful action, be paid under the Civil Rights Attorney's Fees Act of 1976[79] or some instituted equivalent. Every victim, whether or not he is a criminal defendant,

78. There is, of course, the problem of equating money with unliquidated losses. This is not a new problem. The idea of denominating rights as "priceless" and then refusing damages as "speculative" often renders the right worthless. Although Carey v. Piphus, 435 U.S. 247 (1978), held that only nominal damages could be awarded for due process violations, a series of recent lower-court decisions has granted substantial compensatory damages for violations of fundamental constitutional rights. *See* Herrera v. Valentine, 653 F.2d 1220, 1228 (8th Cir. 1981) and cases collected therein. *Herrera* involved a fourth-amendment violation, among others.

79. Now codified as a part of 42 U.S.C. § 1988 (1976).

is eligible for this compensation. Thus, some especially obnoxious low-visibility police misconduct may be pressed into the view of the legal process.

Moreover, by making the state the defendant, the process is liberated from a conception that the right to compensation depends on identifying a particular violator deserving of punishment. For example, the need to compensate C for the illegal search, arrest and resulting two days in jail is evident, but punishing Cautious (or the magistrate)[80] is not so clearly justifiable. But all C need show is that some person in the law-enforcement enterprise, *or the enterprise*

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80. One could accept the "rubber stamp" nature of the magistrate's review and open him to sanction, or one could attempt to upgrade that decision process by forcing, through selection and training, the development of a more independent, proactive posture by magistrates, in short by inculcating in them a self-image more like that of judges. My tentative choice of the latter alternative, which includes the same kinds of "sanction" (such as reversal) that judges are subject to, stems from a distinction between agencies charged with advocating or protecting one set of opposed values and those charged with mediating those sets of values. The latter are more intensely associated with the system as a whole and some collective sanction, like exclusion or state payment of award, seems more appropriate. In addition, the policeman can, in most circumstances, avoid exposure to sanction by applying for a warrant, thereby shifting the decision-making responsibility, or by simply refusing to arrest or search. We are not concerned about his doing the latter too often because his primary function and motivation is to advance the "policing" complex. With the magistrate, however, if we assume he is exposed to sanction for issuing a warrant, do we also assume he is exposed when not issuing one which was properly applied for? If so, we visit him with a vicious proposition—one wonders how judges would react if told they face personal employment-related sanction for any wrong decision. If the magistrate is not exposed to sanction for not issuing a warrant, we build in to a two-sided question a strong self-protective bias to one side. On the other hand, this bias may be useful to compensate for the proven bias toward issuing warrants based on a low perception of independence and a conscious or unconscious association with the whole of the law enforcement effort.

Any proposal for governmental liability based on *respondeat superior* notions runs headlong into the Supreme Court's rejection of pure *respondeat* liability for governments in cases such as Monell v. Department of Social Services, 436 U.S. 658 (1978). Questions of what pure *respondeat* liability means and whether failure properly to supervise or educate may form the basis for liability remain open. *See* Levinson, *supra* note 70, at 841. The *Monell* decision is troubling in the sense that it creates an incentive for the state to remain ignorant about the actions of employees, since the state *is* liable if it does not correct obvious patterns of abuse. The proposal made herein cuts deeper into the *Monell* decision. I am, in fact, arguing for pure *respondeat* liability in cases where there is *no fault* on anyone's part. Liability is viewed as strict given the ultrahazardousness of the policing business to fourth-amendment interests. It has been generally recognized that for almost any alternative to the exclusionary rule to work, sovereign immunity would have to be loosened to some extent. For the proposals herein to work fully, the private sector *respondeat superior* doctrine must be applicable against the government.

itself, has made him a victim. Just as in private-sector *respondeat superior* actions, the defendant employer first pays, and then decides whether to visit retributive or deterrent responses on a particular agent or instead to accept the loss as a cost of doing business.

A striking example of a violation calling for compensation but without any obvious defendant to pay that compensation is *Michigan v. DeFillippo*.[81] A policeman, drawn to investigate DeFillippo by suspicious behavior, asked for identification. DeFillippo refused and was arrested under a Detroit ordinance making it a crime to so refuse. The search incident to that arrest produced controlled substances and DeFillippo was prosecuted for their possession. Even though the Detroit ordinance was recognized as unconstitutional[82] (a holding which would normally invalidate all incident searches)[83] the United States Supreme Court refused to suppress the evidence owing to the policeman's "good faith"—after all, he should be expected to enforce the laws until they are repealed or invalidated by a court.[84] In this case, the state, through its legislative branch, caused flagrant impairment of DeFillippo's right to be secure from governmental intrusion. DeFillippo should be compensated, yet clearly the policeman ought not be punished. There can be no wish to deter future police conduct on the ground that some court may *later* declare it illegal. If the policeman is not the violator, who is? The legislature? The courts? As the dissenters point out:

> [T]he Court errs, in my view, in focusing on the good faith of the arresting officers and on whether they were entitled to rely upon the validity of the Detroit ordinance. For the dispute in this case is not between the arresting officers and respondent. The dispute is between respondent and the State of Michigan. The ultimate issue is whether the State gathered evidence against respondent through unconstitutional means. Since the State is responsible for the action of its legislative bodies as well as for the ac-

81. 443 U.S. 31 (1979).

82. The Michigan courts held the ordinance unconstitutionally vague. 443 U.S. at 34. The ordinance is also obviously and deeply in conflict with the fifth-amendment privilege against self-incrimination.

83. If the arrest is unlawful, anything found as a result is "fruit of the poisonous tree," Wong Sun v. United States, 371 U.S. 471 (1963).

84. Michigan v. DeFillipo, 443 U.S. at 38-40. For a recent article on the "good-faith" problem, *see* Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIM. 635 (1978).

> tions of its police, the State can hardly defend against this charge of unconstitutional conduct by arguing that the constitutional defect was the product of legislative action and that the police were merely executing the laws in good faith.[85]

The law-enforcement enterprise is ultrahazardous to constitutional rights. This cannot be helped. If law enforcement works at all, it will inevitably bring injury. As with any other such enterprise, it must bear the costs. Thus, under the Enterprise Liability Model, DeFillippo would be compensated, the police officer would not be punished, and the state would pay.

The objection can be anticipated, "But if the state pays sizeable amounts of money to victims, it will pass those losses on and 'we' end up paying, as usual." First, techniques for punishing and deterring violators should be devised to drive down those costs, and such techniques are discussed below. This cannot be the whole answer, for *DeFillippo* demonstrates that certain violations are beyond punishment and deterrence. In just such cases, in which "we" end up paying again, we *should* pay. The Constitution "guarantees" rights only in the sense that they cannot be taken away. It cannot pay for them. This model compensates appropriately; it is submitted that its compensation is strictly appropriate as it is geared specifically to pay losses and the expenses of their proof.

Punishment. The Enterprise Liability Model makes no provision for the imposition of punishment of violators. This does not, by itself, however, prove that the model breaches the lower punishment limit for, following the private sector analogy, the state, once it is made to pay, may deliver punishment to maximize the success of its enterprise. The model need not *require* punishment if it is demonstrated that the employer (the state) will *naturally* respond in its own interest by policing its ranks.

The problem, of course, is that this particular employer is organized in an unusual way — into three segments. Only the executive authority (including police departments) can "naturally" punish these employees, but the executive authority has been made the special guardian of the "policing complex" of values and ought not be expected to mediate that complex's conflict with the "privacy complex" as much as to protect its special charge. This can be seen under current practice. The state is constantly "paying" when the

85. Michigan v. DeFillipo, 443 U.S. at 42-43.

exclusionary rule frustrates enforcement of its criminal law; nevertheless there is very little evidence of its subsequent direct punishment of violators to channel this frustration. The exclusionary rule does not punish, but neither does the executive authority, even though it could. The reason is that the "policing complex" is best served by training policemen to adopt generally aggressive behavioral patterns, and to resolve all doubts in favor of intrusion, for such produces the highest volume of prosecutable cases, though at a cost to the "privacy complex." Exclusion, moreover, does not always produce a loss to legitimate law-enforcement interests, for often a legal arrest or search was not possible to conduct under any procedure. In this sense, it is not unlawful police work, but only stupid police work, which damages the "policing complex" and may result in departmental punishment.[86] And if the exclusionary rule is abolished, these behavioral patterns are even more useful to the "policing complex" for then even violations do not prevent successful prosecutions. None of this is to suggest that continued state payment of awards will not jar the executive authority into reexamining certain law-enforcement policies or into punishing violators occasionally. It is suggested only that that authority will do so on its own terms and wholly from the "policing complex" perspective. Certainly there will be many cases in which it will not punish at all, even though a violator is identified.

If, then, punishment will not naturally result from executive authority after state payment of a claim, an appropriate model must embrace legislation or judicial action *requiring* punishment. This model does not.

Deterrence. Projection of deterrent effect is difficult at best; however, unless one thinks that loss of state funds will spur the executive authority to take action against many violators any more than the exclusionary rule now does, there is no reason to believe deterrence would be higher.[87]

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86. To illustrate, if a policeman has a hunch, not amounting to probable cause (or reasonable suspicion), that the people in the car traveling in front of him are smoking marijuana, it is illegal to stop them to look for it. From the "policing complex," however, it is not stupid since there will probably not be a later opportunity to make a lawful search. The Supreme Court sometimes offers relief to the police for work both illegal *and* stupid by holding evidence admissible if it would have been "inevitably discovered" by lawful means. *See, e.g.*, Brewer v. Williams, 430 U.S. 387 (1977).

87. In one sense, it would be a sad commentary if the state were more concerned about losing money than about enforcing its criminal law.

III. TWO PROPOSED MODELS

The previous section demonstrated that only one existing model — the Tort Model — both compensates and punishes. But that model ties compensation and punishment together in one operation which leads to inappropriate lowering of one or elevation of the other. What is needed is a model which compensates and punishes in separate operations under separate standards. The first proposal in this section combines the Enterprise Liability Model (which strictly compensates) with the Discipline Model (which strictly punishes).

A. *Combination Model*

1. Description

The exclusionary rule and sovereign immunity are abolished and a tribunal is created (1) to decide whether or not there is a violation upon complaint of an alleged victim and, if so, (2) to enter a monetary award against the state-defendant as outlined in the Enterprise Liability Model, and (3) to decide if there are any identifiable individual violators, and (4) to punish violators as outlined in the Discipline Model. Victims may, at their option, by-pass the tribunal and bring a common-law, or § 1983 action against the state. If the state suffers a judgment in such case, however, the matter shall be automatically referred to the tribunal for purposes of (3) and (4). The tribunal must accept as *res judicata* any judgment that a violation has occurred, but such a judgment does not automatically imply punishment, for it may be that no individual violator can be identified (as in *DeFillippo*) or that the policeman identified has a defense to discipline. Representation of the victim before the tribunal could be provided by private retained counsel or by state-paid special prosecutor.[88] For purposes of discussion, the latter is assumed.[89]

2. Application to Hypotheticals

Lucky's Case. The marijuana is admissible in A's criminal prosecution. A institutes action in the tribunal which enters a $1,000

88. *See* SCHLESINGER, note 17 *supra.*

89. One other possible feature, given that common-law and § 1983 actions are not foreclosed, is the setting of a maximum recovery in the tribunal of say, $5,000. Such a limit may help foster a more informal process. You may be tempted to say my figure is too high or too low; any really careful thought will, however, show you I am right.

award in A's favor and against the state and, (by assumption) since this is Lucky's first violation, reprimands Lucky and enters a notation in his permanent file.[90]

Unlucky's Case. B chooses (by assumption) to sue the state via § 1983. A judgment is entered in his favor. The matter is automatically referred to the tribunal. It decides that Unlucky is the violator of B's rights and, since (by assumption) this is Unlucky's third violation, suspends him without pay for two weeks.

Cautious' Case. The heroin is admissible in C's prosecution. He brings action against the state in the tribunal and receives $1,000 plus the set minimum for two days in jail. Cautious interposes the defense of "acting pursuant to warrant."[91] The tribunal either accepts such defense or enters the minimum punishment.

3. Application to Definition

Compensation, Punishment and Deterrence. This model assimilates the compensation characteristic of the Enterprise Liability Model and the punishment characteristic of the Discipline Model. The compensation acts not only to make victims whole but to create occasions to identify violations and administer appropriate discipline to violators. Unlike the Tort Model, however, while every violation brings compensation, it does not necessarily bring punishment, for some injury is the result of an enterprise ultra-hazardous to constitutional rights. The compensation can be high and the punishment low or vice versa for they are not tied together as in other models.

A number of possible affirmative defenses to discipline are suggested to demonstrate the sorts of situations which might generate compensation but not punishment. (1) *The policeman acted pursuant to a warrant, did not include in the underlying affidavit any known false or "recklessly believed" facts,*[92] *and remained within its scope.*[93]

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90. I certainly do not mean to suggest this punishment is necessarily the correct amount. Here, as in other examples, I have included an actual punishment simply to add concreteness to the hypothetical.

91. *See* text accompanying note 93 *infra.*

92. *See* Franks v. Delaware, 438 U.S. 154 (1978). *See also* Schlicter, *The Outwardly Sufficient Search Warrant Affidavit: What If It's False?*, 19 U.C.L.A. L. REV. 96 (1971).

93. The warrant must be "particular" with reference both to the place to be searched and the person or thing to be seized. LaFave, *supra* note 40 at 267 n.79 and 268 n.91. It must be executed within a specified period of time. *See, e.g.*, Fed. R. Crim. P. 41(d). Nighttime searches may depend on certain prerequisites. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § 220.1 (Proposed Official Draft No. 1, 1972). Knock-and-

The appropriateness of such defense is debatable, and seems to turn on whether one views the obtaining of a warrant as a ratification of the affiant's decision or as a complete shift of that decision. Permitting the defense yields encouragement for a wider use of warrants.[94] (This defense is applicable to Cautious' case.) (2) *The policeman acted under specific superior orders.* If this defense is accepted in a given case, the special prosecutor should be charged with instituting action in the tribunal against such superiors.[95] (3) *The policeman's conduct was, at the time engaged in, not reasonably know to be unlawful.* This defense includes both conduct thought lawful at the time (*DeFillippo*) and conduct of problematic legality. The defense would permit the widest scope to law-enforcement within current legal boundaries, generate occasions to clarify the law and compensate victims in such cases without punishing the individual policeman. This is the paradigmatic case in which the monetary loss should be spread among all of us who entertain these inherently conflicting value complexes.

Deterrence is, again, difficult to predict. However, this model does threaten a mode of punishment which is credible to policemen and the compensation incentive offers hope of numerous occasions to consider its imposition.

This model strictly punishes, strictly compensates and offers credible promise of complying with the deterrence criterion as well.

B. *Exclusion-Combination Model*

It might seem superfluous, having once identified a model in strict compliance with the criteria, to propose yet another model which is not in strict compliance. However, binding tolerances into each component of the definition, in addition to responding to certain realities about their internal dynamic, was prompted by a notion that if one first excluded all those models which did not meet basic functional goals, he would then be free to apply other criteria to those which remained. Even so, a remedy not in strict compliance ought to bear some burden to overcome a model which is in strict compliance. It is not claimed that this next model meets that burden but

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announce requirements must be complied with. Sabbath v. United States, 391 U.S. 585 (1968); Ker v. California 374 U.S. 23 (1963); Miller v. United States, 357 U.S. 301 (1958).

94. *See* note 65 *supra.*

95. Obviously, this defense must be constructed delicately; giving a complete defense to clearly illegal conduct based on superior orders involves serious ethical difficulties.

only that it complies with the criteria and offers certain advantages over the Combination Model.

1. Description

This model adds the Exclusionary Rule Model to the Combination Model. Because the rule often produces compensation in excess of the upper limit when applied in prosecutions for serious crime, such application is denied under this model — the exlusionary rule is made unavailable in prosecutions for serious offenses.[96] Surely difficult problems are raised by so gross a distinction; nevertheless, for present purposes, the designation "serious crime" is used.[97]

The tribunal would receive cases in one of three ways: (1) by direct complaint of the victim; (2) by automatic referral from a common-law or § 1983 court after a finding of violation and entry of monetary award against the state; and (3) by automatic referral from the criminal court after exclusion of evidence (or quashing of arrest) on fourth-amendment grounds. In situations (2) and (3), the tribunal must accept as *res judicata* the prior decision that a violation has occurred.

The victim in a case referred by a common law or § 1983 court would be denied further compensation in the tribunal (which would, therefore, consider only the punishment question), since he has already received compensation in a forum with the authority to decide what his actual loss was and the flexibility to award an amount commensurate with that loss. It is not clear in the case of a referral from a criminal court, however, that the victim has, as yet, received compensation commensurate with his loss. Exclusion may represent more or less than compensation so measured. If it is more, the model does not correct that deficiency; instead, while compensation is more than loss, the model will seldom, if ever, (because of the "serious crime" exception) be over the upper limit, and such deviance is the price for the model's other gains. If exclusion represents too little compensation, the tribunal could cure that by awarding the

96. Some thought might be given to excluding all possessory offenses from the "serious crime" definition since such cases often involve police misconduct and a strong deterrent may be necessary. Some method must be devised, also, to deal with the fact that the crime charged may be within the definition of serious crime while certain includable offenses are not within that definition.

97. Actually, the "serious-crime" exception would not change many results. Although the rule's detractors paint the rule as loosing murderers and robbers, this is very seldom true. Vice and narcotics are the common contexts. *See* Kamisar, *supra* note 52, at 341.

victim the difference. Such a theory, however, betrays heroic confidence in the tribunal's ability to make fine distinctions about values difficult to liquidate in the first place. Therefore, it is proposed that exclusion be deemed equal to the specified *minimum* award ($1,000, using an earlier assumption). The victim would be entitled to further compensation only for "special" losses, such as days in jail, physical or psychological injury or property damage.[98]

If the criminal court decided, by denying a motion to suppress or quash, that no violation occurred, this decision too would be *res judicata*. There would be no referral and any direct action in the tribunal would be precluded. Moreover, failure to move for suppression at the last permissible point under pertinent procedural rules would act as a bar to direct complaint in the tribunal. If, however, the criminal case is terminated by dismissal or guilty plea before such time without any decision on the violation question, the victim may file a direct complaint.[99]

2. Application to Hypotheticals

Lucky's Case. The marijuana is suppressed upon A's motion in the criminal case. The matter is automatically referred to the tribunal. Victim A (thinking he has no provable "special" damage and not being entitled to the automatic $1,000 since he has received the benefit of supression) may not actively participate, but the special prosecutor is, of course, charged with seeking discipline. The tribunal must accept the decision that a violation occurred. Therefore, the discipline aspect is in the nature of a show-cause hearing in which Lucky is invited to urge his affirmative defenses or mitigating proof. The tribunal decides A has no "special" damage and thus enters no award. Since (by assumption) this is Lucky's first violation he is reprimanded and notation of the violation is made in his permanent file.

Unlucky's Case. B brings a direct complaint in the tribunal. (Notice that since there is no prosecution of B, *he* must trigger the tribunal process). The tribunal finds a violation and no affirmative defense to

98. *See* note 78 *supra*.

99. If a motion to suppress is decided and then the case is terminated by guilty plea or dismissal, the question arises whether to accept such finding as *res judicata* notwithstanding the inability to challenge it by appeal. Since, however, appeal of such issue is not available after dismissal or plea, it would seem that such decision should be accorded the weight of a "final" judgment. As to current law on the *res judicata* implications of a suppression decision on a § 1983 action and other similar issues, *see* Allen v. McCurry, 449 U.S. 90 (1980) and cases cited therein.

discipline and awards B $1,000 and since (by assumption) this is Unlucky's third violation, suspends him for two weeks.

Cautious' Case. The progress of this case depends on whether possession of two kilos of heroin comes within the "serious crime" definition adopted in the jurisdiction.

a. Serious Crime.

The heroin is admissible. C files action in the tribunal, which finds a violation and awards C $1,000 plus the set minimum for two days in jail. If the tribunal accepts Cautious' "acting pursuant to a warrant" defense, he is not punished. If the defense is not accepted, he is given a minor punishment.

b. Not a Serious Crime

The heroin is excluded upon C's motion and the matter referred to the tribunal. The tribunal accepts (as it must) the finding of violation and awards C the set minimum for two days in jail (the $1,000 minimum being deemed satisfied by the exclusion). The punishment aspect is handled as in the first alternative.

3. Application of Definition

Compensation. Compensation cannot be too low under this model. Whether it may be too high in some cases is debatable. I would argue that it cannot be too high since there is a violation of constitutional right and the highest compensation for such is either suppression in a prosecution for a non-serious crime or an award of $1,000.

More violations will be addressed under this model than under the Combination Model. The Combination Model depends entirely on victim initiation of the process *as a plaintiff.* This model permits some (perhaps most) victims to initiate the process *as a defendant* in the criminal process. There is less inertia against raising matters by way of defense than by way of claim. Although the victim who is prosecuted for crime comes into contact with an attorney who will apprise him of his remedies under either model, such advice is not strictly relevant under the Combination Model and, because it is not an issue in the criminal case, discovery lines are not open to investigate violations.

Punishment. The mode and amount of punishment, when imposed, remains the same as under the Combination Model. Because of the automatic referral provision however, punishment will be imposed in more cases.

Deterrence. As compensation and punishment are both increased over the last model, deterrence can be expected to increase too. Because of the availability of affirmative defenses to discipline, and especially the defense of problematic legality, it does not appear that the model will deter in excess of the upper limit, for lawful or problematic intrusions need not be eschewed.

IV. OTHER DIMENSIONS

Both proposed models meet the stated criteria; others, perhaps with entirely different features, could be constructed within the criteria too. Choosing from among such models may depend in part on their relative approximation to "strict" compliance, but depend even more on other factors having nothing to do with punishment, compensation, and deterrence.[100]

One possible explanation for the seeming intractability of the fourth-amendment enforcement problem is a tacit assumption that one type of remedy, whatever it is, should be sufficient. One goal of this article is to suggest that there are too many variables to the problem to admit of solution by one rule, one type of lawsuit, or one statute. To focus either on compensation alone or punishment alone blurs the other factor. When either is blurred, deterrent effect is disturbed. A system which focuses on each of these variables in turn, free from the influence of the other, is needed. The two proposed models are attempts along those lines.

Implementing either of the proposed models requires a political process. This, by itself, argues for setting broad limits to each variable so as to give tolerance for the hard realities of that process. Each model requires legislation for implementation and each, to some degree, depends on judicial renunciation of the exclusionary rule. But the Exclusion-Combination Model *could* coexist with the rule in full force. If the "serious crime" exception were struck down, the model should be permitted to operate nevertheless. It will then, of course, produce cases in excess of the upper compensation limit, but it will represent gains in compensation, punishment, and deterrence over the rule operating alone. We will have no better model than the political process provides, but there is no compelling reason to construct barriers to accepting the best that process can offer.

There is an ethical, or philosophical, dimension to the fourth-amendment remedy question, and especially to the place of the ex-

100. These would include ethical and philosophical points as well as political realities.

clusionary rule in any enforcement scheme. Opponents of the rule have never argued against compensation, punishment, or deterrence; rather they claim that the state's authority to punish criminal offenders ought never be affected by its employee's violations. They have only claimed that the "criminal should not go free," not that the constable *should* go free, nor that the "criminal" should not be viewed as a victim too and compensated in some way other than exclusion.[101] And the rule's proponents, too, invoke ethical considerations. One, so grandly stated by Justice Bandeis, places a special obligation on government to obey the law, to be "the potent, the omnipresent teacher."[102] Another proponent speaks of "judicial integrity," claiming that no court should, even by indirection, become party to governmental lawlessness.[103]

This article does not enter that political or philosophical debate but attempts to give it a limiting context. Until a remedy is constructed which, within generous limits, compensates victims, punishes violators and aspires to minimize violations, speeches about "criminals going free," "omnipresent teachers" and "judicial integrity" are without a common referent, are ships passing in the night. They may be good debates on the exclusionary rule, but they have forgotten that there is a fourth amendment to be enforced.

If government does not compensate, punish, and attempt to deter, one may understandably wonder what this rehetoric can possibly be all about. Why *should* a government that does not do even this have integrity? And why *should* it have the power to brand others criminal? If government is indeed "the potent, the omnipresent teacher," it ought now take another hard look at the fourth-amendment curriculum.

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101. I am aware of no published argument that the exclusionary rule be abolished and nothing put in its place.

102. Olmstead v. United States, 277 U.S. 438, 485 (1928) (dissenting opinion). Professor Charles Black recently characterized "law" as "the Government's omnipresent teaching assistant." DECISION ACCORDING TO LAW 51 (1981).

103. Mapp v. Ohio, 367 U.S. at 659.