

Fall 1982

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Robert P. Davidow

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Recommended Citation

Robert P. Davidow, Criminal Procedure Ombudsman Revisited, 73 J. Crim. L. & Criminology 939 (1982)

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CRIMINAL PROCEDURE OMBUDSMAN REVISITED

ROBERT P. DAVIDOW*

I. INTRODUCTION

In 1973 I proposed that the exclusionary rule be replaced by a criminal procedure ombudsman,¹ an independent government official² who, with the help of a number of assistants,³ would investigate instances of alleged police misconduct, publicize the results of such investigations, and authorize the appointment of private counsel at public expense to sue the offending official or officials when the ombudsman found probable cause to believe that an aggrieved person had been subjected to a deprivation of constitutional rights or other rights set forth in

* Professor, George Mason University School of Law. J.S.D., Columbia University, 1982; LL.M., Harvard University, 1969; J.D., University of Michigan, 1962; A.B., Dartmouth College, 1959.

I wish to acknowledge with gratitude the research assistance of Bruce Eells, a second-year student at George Mason University School of Law.

¹ Davidow, *Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal*, 4 TEX. TECH L. REV. 317 (1973). The original, 1973 proposal is set forth *infra* in the Appendix, together with the modifications suggested by the current Article.

² "The Ombudsman is an independent governmental official who receives complaints, conducts investigations, and makes recommendations relating to the actions of other governmental agencies. He succeeds mainly through persuasion, which is made more effective by the publicity which he can give to his recommendations." *Id.* at 322.

One of the best general treatments of the ombudsman is found in W. GELLHORN, OMBUDSMEN AND OTHERS (1967). The extent to which the ombudsman principle has been adopted at various levels of government in the United States is outlined in Haemmel, *The Ombudsman, Or Citizens' Defender — The North Carolina Experience*, 10 N.C. CENT. L.J. 227, 245-246 (1979). At least five states have adopted the Ombudsman at the state level. ALASKA STAT. §§ 24.55.010-.340 (1978); HAWAII REV. STAT. §§ 96-1 to -19 (1976); IOWA CODE ANN. §§ 601G.1-.23 (West 1975 and West Supp. 1981-82); NEB. REV. STAT. §§ 81-8,241 to 8,254 (1976); N.J. STAT. ANN. §§ 52:27E-3 to -41 (West Supp. 1981-82). The term "ombudsman" is used in the Alaska, Hawaii, and Iowa statutes. The Iowa statute also uses the term "citizens' aide"; in Nebraska the official is referred to as the "public counsel"; in New Jersey the ombudsman is referred to as the "Office of Citizen Complaints" of the Department of the Public Advocate.

³ The proposed bill provided for the appointment of not more than 100 assistant ombudsmen. My assumption was that the ombudsmen and assistants would enforce the Bill of Rights and other legal restrictions with respect to both state and federal official actions. Davidow, *supra* note 1, at 328, 336.

statutes or regulations.⁴ The proposal also would have made recovery against the government possible in cases in which the fact finder was satisfied that a violation had occurred but in which the offending officer could not be identified or had acted in good faith.⁵ Since the publication of this proposal, the debate over the exclusionary rule has continued unabated,⁶ but no further legislation, either state or federal, has been enacted to replace the rule. Some legislation, however, has been introduced in Congress,⁷ and hearings have been held.⁸ The United States Supreme Court has refused to expand the rule,⁹ and, in the fourth amendment area, has made federal review of state court decisions less likely by severely restricting the opportunities for federal habeas corpus relief.¹⁰

Thus, the problems associated with the exclusionary rule remain: the possible failure to deter police lawlessness, the release of some guilty persons, and the failure to provide a remedy for the innocent.¹¹ Al-

⁴ Appointment of private counsel at government expense was regarded as extremely important since, in the absence of such provisions, aggrieved persons "might not have the ability to present their claims without the assistance of counsel, whose fees might exceed the aggrieved person's financial resources." *Id.* at 320.

The ombudsman was given the power to act with respect to any law violation, defined as any departure from pertinent constitutional, statutory, or regulatory provisions. I accepted the thesis of the late Lon Fuller that it is extremely important to require adherence by the government to its own rules and regulations. *See* L. FULLER, *THE MORALITY OF LAW* 81, 209 (rev. ed. 1969); Davidow, *supra* note 1, at 338.

⁵ Davidow, *supra* note 1, at 329, 339.

⁶ Among the recent discussions of the exclusionary rule are the following: COMPTROLLER GENERAL OF THE U.S., *IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS* (1979); 1 W. LAFAVE, *SEARCH AND SEIZURE* 3-39 (1978); S. SCHLESINGER, *EXCLUSIONARY INJUSTICE* (1977); Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66 (1978); Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & C. 343 (1980).

⁷ S. 101, 97th Cong., 1st Sess. (1981); S. 751, 97th Cong., 1st Sess. (1981); Amend. No. 93 to S. 951, 97th Cong., 1st Sess. (1981); S. 1995, 97th Cong., 1st Sess. § 5 (1981). All but S. 951 are reproduced in *The Exclusionary Rule Bills: Hearings on S. 101, S. 751, and S. 1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st and 2d Sess., 531, 533, 563 (1982) [hereinafter cited as *Hearings*]. The first, third, and fourth of these bills would limit the circumstances under which evidence secured in violation of the fourth amendment would be inadmissible. The second bill would abolish the exclusionary rule. The second, third, and fourth bills would permit a tort action against the federal government for violation of fourth amendment rights (but with severe limitations on the amount of damages that could be collected). The second and third bills would authorize disciplinary action against a police officer. *See infra* notes 32 & 72.

⁸ Hearings were held on October 5 and November 12, 1981, and on March 16 and 25, 1982, before the Subcommittee on Criminal Law of the Senate Judiciary Committee. *Hearings, supra* note 7.

⁹ *See, e.g.,* *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974).

¹⁰ *See* *Engle v. Issac*, 102 S. Ct. 1558 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Stone v. Powell*, 428 U.S. 465 (1976); *Francis v. Henderson*, 425 U.S. 536 (1976).

¹¹ Other problems associated with the exclusionary rule are discussed *infra* note 32.

though the extent of these problems is disputed,¹² one may conclude not merely that each of these deficiencies of the rule continues in some measure, but also that the public probably perceives that these deficiencies exist.¹³ Apart from any other consideration, this public perception must be dealt with. It seems appropriate, therefore, to reconsider the remedy that I suggested in 1973 in light of pertinent recent developments. Is the basic approach still sound? What adjustments should be made in the light of recent decisions by the United States Supreme Court?

II. THE SOUNDNESS OF THE BASIC APPROACH

My premise was that a criminal procedure ombudsman would be an effective method by which to enforce the fourth, fifth, sixth,¹⁴ and, in the case of the states, fourteenth amendment limitations on police practices. Concerning the fifth amendment, the assumption was that the criminal procedure ombudsman would be an effective alternative to the exclusion of statements which are taken in violation of the present *Miranda* standards but nevertheless thought to be trustworthy. I assumed that untrustworthy statements, such as those which were the result of coercion or promises of leniency, would continue to be inadmissible. I contrasted the proposed ombudsman with the present exclusionary rule which, on the basis of earlier studies, I assumed to be lacking in suffi-

¹² Compare, e.g., Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681 (1974) with S. SCHLESINGER, *supra* note 6, at 50-60.

¹³ In one relatively recent poll, respondents were asked in part whether they agreed or disagreed with the following statement: "Violation of law and order has been encouraged by the courts." Sixty-nine percent expressed agreement; twenty-three percent expressed disagreement; eight percent said that they were "not sure." Erskine, *The Polls: Causes of Crime*, 38 PUB. OPINION Q. 288, 291 (1974). Although respondents could have had in mind factors other than the exclusionary rule—such as lack of sympathy for the substantive decisions in the fourth amendment area or assumptions about undue leniency in sentencing—it is certainly possible that at least some of the criticism of the courts was based on the exclusionary rule. To the extent that other factors, such as dissatisfaction with the substantive fourth amendment rules, were involved, this survey result tends to illustrate that Americans have not been very well educated in fundamental constitutional principles. This in turn suggests the importance of the Ombudsman, who can properly educate the public. See *infra* notes 83 & 84 and accompanying text.

¹⁴ In the minds of many lawyers the exclusionary rule is probably most closely associated with the holding in *Mapp v. Ohio*, 367 U.S. 643 (1961), that physical evidence seized in violation of the fourth amendment, as made applicable to the states through the fourteenth amendment, must be excluded in a state trial. . . . If, however, the essence of the exclusionary rule is the exclusion of evidence, otherwise trustworthy, because of a violation of an individual's constitutional rights, then the rule encompasses the exclusion of confessions secured in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) (protection of fifth amendment right to be free from self-incrimination through the enforcement of the sixth amendment right to counsel), and *Massiah v. United States*, 377 U.S. 201 (1964) (evidence inadmissible if secured through interference with the attorney-client relationship, as protected by the sixth amendment).

Davidow, *supra* note 1, at 317 n. 1.

cient deterrence.¹⁵ Also, of course, I noted the failure of the rule to protect the clearly innocent, who presumably, would have no occasion to invoke the exclusionary rule.

A. SATISFACTION OF THE REQUIREMENT OF JUDICIAL INTEGRITY

Although the deterrence rationale for the exclusionary rule is the one chiefly relied upon by the present majority of the United States Supreme Court,¹⁶ a competing rationale, that of judicial integrity, is championed by Justices Brennan and Marshall.¹⁷ There are at least two possible versions of this rationale. The first is that any admission of evidence seized in violation of the Constitution amounts to unacceptable condonation of the illegality, regardless of whether some other effective remedy is available to enforce the Constitution.¹⁸ The second version is premised on the assumption that no effective enforcement mechanism other than the exclusionary rule is available.¹⁹ If the latter version is the one adopted by Justices Marshall and Brennan, then my proposal will satisfy them if, in fact, the proposed remedy proves to be effective. I reject, however, the former, non-utilitarian version. Insistence upon adherence to the exclusionary rule regardless of the availability of effective

¹⁵ *E.g.*, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

¹⁶ "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim. . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra*, 414 U.S. 338, 347 (1974).

¹⁷ *E.g.*, *United States v. Calandra*, 414 U.S. 338, 355 (1974) (Brennan, J., dissenting). Justice Brennan was joined in his dissent by Justices Marshall and Douglas. Only Justices Brennan and Marshall remain on the Court, however.

¹⁸ The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.

Id. at 357. "For the first time, the Court today discounts to the point of extinction the vital function of the rule to ensure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct." *Id.* at 360.

¹⁹ "The exclusionary rule is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera." *Id.* at 361. *See also* *United States v. Peltier*, 422 U.S. 531, 555 (1975) (Brennan, J., dissenting) (citation omitted):

"It is . . . imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educating force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies." . . . While distinguished authority has suggested that an effective affirmative remedy could equally serve that function, . . . no equal alternative has yet been devised.

alternatives should be rejected because this insistence will have the effect of hindering *actual* enforcement of constitutional restraints while assuring a partial and merely formal compliance.

Doubts still remain about the extent to which the rule deters police lawlessness, especially in situations in which police are not primarily interested in successful prosecutions (e.g., where the chief goal is harassment of a disliked group).²⁰ Moreover, there is no hope, theoretical or otherwise, that the exclusionary rule can benefit the innocent victims of police lawlessness.²¹ In light of this, to insist upon the retention of the exclusionary rule is to insist upon maintenance of the status quo—an absence of an effective device by which to prevent police lawlessness—since the political reality is that no effective legislative alternative to the exclusionary rule is likely to be enacted if it is thought that the United States Supreme Court will nevertheless retain the rule. More effective restraints upon the police are difficult to enact under the best of circumstances;²² certainly, they stand little or no chance of being enacted without a quid pro quo—the abolition of the exclusionary rule.

B. PROBLEMS WITH THE ARGUMENT THAT THE EXCLUSIONARY RULE IS A REQUIREMENT OF DUE PROCESS

It has been suggested that the exclusionary rule is a requirement of due process, since due process requires states (by virtue of the due process clause of the fourteenth amendment) and the federal government (by virtue of the due process clause of the fifth amendment) to adhere to the law of the land.²³ Admission of evidence seized in violation of the law of the land is viewed as itself a violation of the law of the land. Such an approach clearly makes utilitarian considerations irrelevant. Surely a strong historical argument can be made that “due process” should be read as “the law of the land.”²⁴ It does not follow, however, that the

²⁰ See S. SCHLESINGER, *supra* note 6, at 56.

²¹ I admit, of course, that to the extent that fewer innocent persons are subjected to unlawful conduct by the police because of the existence of the exclusionary rule, innocent persons benefit generally from the exclusionary rule. I refer here, however, to innocent persons who are in fact the victims of unlawful police conduct; these people are not benefited by the exclusionary rule. My assumption is, of course, that innocent persons will not be prosecuted; unfortunately, this presumption is occasionally unwarranted.

²² Opposition on the part of the police, with some public support, to the notion of civilian review boards illustrates the difficulties that will be encountered in any effort to impose external restraints upon the police. See Davidow, *supra* note 1, at 324-25. This is not to suggest that civilian control is an impossibility everywhere. See Berger, *Law Enforcement Control: Checks and Balances For the Police System*, 4 CONN. L. REV. 467, 490 (1972).

²³ See Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & C. 343, 368-73 (1980).

²⁴ The origin of the Due Process Clause is Chapter 39 of the Magna Carta, which declares that “No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers

enforcement of the "law of the land" should take any particular form. Although it is possible to read "law of the land" as a requirement that the states adhere to the "law of the land" during each criminal prosecution, and to conclude further that the admission of evidence unlawfully seized is a denial of the personal right to be tried in accordance with due process, it is also possible to read "law of the land" as a requirement that each person, including a defendant in a criminal case, be afforded *an effective remedy* for any failure on the part of the state or federal government to adhere to the law of the land. This latter interpretation is, of course, consistent with the creation of a substitute for the exclusionary rule.²⁵

C. UNJUSTIFIABLE CONTENTION THAT A CONVICTED PERSON HAS FORFEITED THE RIGHT TO PRIVACY

It has been suggested that if the person who is the subject of an unreasonable search and seizure is thereafter convicted of a crime on the basis of evidence discovered during the unlawful search, then that individual should not be permitted to sue the policeman because the individual's right of privacy has not been invaded; that is, involvement in an illegal activity has deprived the individual of his or her right of privacy.²⁶ I reject this thesis because it is premised on a misunderstanding of the Bill of Rights. The fourth amendment does not merely create a right of privacy; rather, it is part of the larger Bill of Rights, which sets

and by the *law of the land*." (emphasis added) As early as 1354, the words "due process of law" were used in an English statute interpreting Magna Carta, and by the end of the 14th Century "due process of law" and "law of the land" were interchangeable. Thus the origin or this clause was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases. Chapter 39 of Magna Carta was a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures in applying valid pre-existing laws. . . . The due process of law standard for trial is one in accordance with the Bill of Rights and laws passed pursuant to constitutional power, guaranteeing to all alike a trial under the general law of the land.

Duncan v. Louisiana, 391 U.S. 145, 169-70 (1968) (Black, J., concurring) (footnotes omitted).

²⁵ The Supreme Court has required that the federal government adhere to its own regulations, at least in regard to the decision to fire an employee. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957). Generally, the Supreme Court has not required the states to adhere to their own statutes and regulations. But see Hicks v. Oklahoma, 447 U.S. 343 (1980). The Court, however, has required that the State introduce evidence to establish guilt beyond a reasonable doubt in a criminal case. Jackson v. Virginia, 443 U.S. 307 (1979). Also, the Court has required that the state courts not reinterpret a statute retroactively so as to deprive an individual of fair notice of the standards set forth in the criminal law. Bouie v. City of Columbia, 378 U.S. 347 (1964).

²⁶ S. SCHLESINGER, *supra* note 6, at 48-49. See S. 751, 97th Cong., 1st Sess. § 2 (1981).

forth a proper relationship between the government and the governed.²⁷ That probable cause is found at a particular point in time and justifies subsequent temporary incarceration of an individual²⁸ does not alter the fact that prior to the discovery of probable cause the individual was entitled to certain liberties vis-à-vis the government.²⁹ Thus, I reject the notion that a right of privacy is forfeited *ab initio* if it is later discovered that the individual has engaged in unlawful conduct.³⁰ I see no reason to distinguish between situations involving an innocent person who is the subject of an unlawful search and seizure and a person who is later found guilty through evidence seized in violation of that individual's constitutional rights. Reasonable minds may differ about the appropri-

²⁷ Cf. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966):

All these policies point to one overriding thought: the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of the citizens. To maintain a “fair state-individual balance,” to require the government “to shoulder the entire load,” . . . to respect the inviolability of the human personality, an accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from its own mouth.

²⁸ See *Gerstein v. Pugh*, 420 U.S. 103 (1975).

²⁹ The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

Weeks v. United States, 232 U.S. 383, 391-92 (1914).

³⁰ Professor Schlesinger's argument in behalf of the notion that an individual who is convicted of crime should not have a cause of action for invasion of privacy is based upon the following reasoning:

If criminal activity is predominantly a public concern, then when the police, either legally or illegally, find evidence of such activity, it is not an invasion of the individual's privacy to use what the police have found against him in a criminal proceeding. Specifically, since criminal activity is not private, a location is not private if activities of great public concern—crimes—are committed or concealed there; thus, the police cannot be denied access to the location of the crime on the ground of protection of privacy.

S. SCHLESINGER, *supra* note 6, at 48.

This is sheer sophistry. The right of privacy is most assuredly not lost merely because something of public importance is occurring in what would otherwise be a private location. One of the best illustrations of this is *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which the Supreme Court held that the right of privacy attached to the use of contraceptives by married couples, despite a Connecticut statute that purported to prohibit the use of such contraceptives. If Schlesinger's argument were to prevail, then clearly the majority opinion in *Griswold* would have to be overturned, for the activity was criminal under the Connecticut statute and therefore was a matter of public interest.

In any event, Schlesinger is not totally consistent in his position, because he does acknowledge that, although an individual who is convicted of a crime does not have an action against the police, the offending official is still to be disciplined. S. SCHLESINGER, *supra* note 6, at 71. If the officer is to be disciplined, there must be a reason for it; the only reason that logically suggests itself is that the officer has been guilty of a violation of someone's constitutional rights.

ate way to enforce the Bill of Rights,³¹ but this difference of opinion does not justify differential treatment for the innocent and those later found guilty of crime. The possibility that an innocent person will sustain greater damages does not mean that a person who is later found guilty has sustained no damage by reason of his or her being subjected to an unlawful search and seizure or some other deprivation of rights.³²

³¹ Compare, e.g., Gilligan & Lederer, *Replacing the Exclusionary Rule with Administrative Rulemaking*, 28 ALA. L. REV. 533 (1977), and Boker & Corrigan, *Making the Constable Culpable: A Proposal to Improve the Exclusionary Rule*, 27 HASTINGS L.J. 1291 (1976), with Kamisar, *The Exclusionary Rule in Historic Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing"*, 62 JUDICATURE 337 (1979), and Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974).

³² This is one of the reasons for my opposition to S. 751, 97th Cong., 1st Sess. (1981), Amend. No. 93 to S. 951, 97th Cong., 1st Sess. (1981), and S. 1995, 97th Cong., 1st Sess. (1981), all of which provide in part:

Notwithstanding subsections (b) and (c), the recovery of any person who is convicted of any offense for which evidence of such offense was seized in violation of the fourth amendment to the United States Constitution is limited to actual physical personal injury and to actual property damage sustained as a result of the unconstitutional search and seizure.

Other objections to the exclusionary rule have been voiced. It has been suggested, for example, that "the necessity of excluding obviously probative evidence under the rule has placed increasing pressure on judges to sanction dubious searches and seizures based on dangerously expanded notions of probable cause." S. SCHLESINGER, *supra* note 6, at 63. It may be, however, that the judges who are tempted to do this are not particularly sympathetic to the assertion of rights under the Bill of Rights; such judges, even in a non-exclusionary context, might give a rather narrow interpretation to the guarantees provided in the Bill of Rights.

Another criticism of the rule is that

[the exclusionary rule] which is supposed to discipline and improve police conduct actually results in encouraging highly pernicious police behavior. The policeman is supposed to tell the truth, but when he knows that describing the search truthfully will taint the evidence and free the suspect, the policeman is apt to feel that he has a "higher duty" than the truth. He may perjure himself to convict the defendant.

Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215, 226 (1978). If this criticism is taken seriously, then it calls into question any alternative to the exclusionary rule, because presumably any alternative would involve at least some disciplinary procedure directed at the police. See, e.g., S. SCHLESINGER, *supra* note 6, at 72-76. Presumably at such a disciplinary proceeding, the police officer would have at least as much of an incentive to lie as such a police officer has now in the context of the administration of the exclusionary rule; indeed, it can be argued that the police officer would have an even greater motive to falsify in light of the fact that presumably direct action would be taken against the police officer. Although police fabrication may be a problem, it is thus not a problem peculiar to the exclusionary rule.

Another criticism of the rule is that it imposes the same "penalty"—that is, exclusion of evidence—regardless of the degree of culpability of the officer. See Wilkey, *supra*, at 226. Presumably this objection is encompassed within the arguments for a good faith exception to the exclusionary rule. See *infra* note 35. My proposed statute deals with that problem by permitting the plaintiff to recover against the government in those situations in which it appears that a police officer has acted in reasonable good faith.

Still another criticism of the rule is that it makes it "virtually impossible for any state, not only the federal government, to experiment with any other methods of controlling police." *Id.* at 227. As Professor Kamisar has pointed out, however, "for many decades the major-

D. EFFECTIVENESS OF THE CRIMINAL PROCEDURE OMBUDSMAN

The central question, therefore, is whether a criminal procedure ombudsman can be an effective mechanism for the enforcement of constitutional and other limitations on police practices. In my original proposal, the following means of enforcement were provided: (1) publication by the ombudsman of a report outlining violations and non-violations of pertinent rules by the police;³³ (2) appointment of private counsel at public expense to sue allegedly offending officials in appropriate courts of law, following a finding of probable cause to believe that there had been a law violation;³⁴ and (3) creation of a cause of action against an individual police officer in cases where individual responsibility could be assigned, or against the federal government in those cases where a law violation had occurred but in which no individual officer could be held responsible, either because of a lack of proof of identify or because of the exercise of good faith on the part of the officer.³⁵ The

ity of the states had no exclusionary rule but *none of them* developed any meaningful alternative. . . . This half-century of post-*Weeks* 'freedom to experiment' did not produce any meaningful alternative to the exclusionary rule anywhere." Kamisar, *supra* note 31, at 346.

³³ Davidow, *supra* note 1, at 328, 334. The importance of publicity is illustrated by the following: "To buttress their own persuasiveness external critics rely heavily on favorable public opinion. They make annual reports to their creators, usually the national legislators, and may report additionally when they wish." W. GELLHORN, *supra* note 2, at 437.

³⁴ See *supra* note 4.

³⁵ It is already clear, for example, that state law enforcement officials, when sued under 42 U.S.C. § 1983, can defend on the ground that their arrest was based on probable cause to believe that the persons arrested had violated a statute subsequently found to be unconstitutional. *Pierson v. Ray*, 386 U.S. 547 (1967). The present provision incorporates this standard. This use of the concept of "good faith" must, of course, be distinguished from the suggestions that the present exclusionary rule simply be restricted to those instances in which the police officers acted in the absence of good faith. See *United States v. Williams* 622 F. 2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981); *Hearings, supra* note 7, at 7-12 (testimony of D. Lowell Jensen). The United States Supreme Court was recently asked to accept a "good faith" exception to the exclusionary rule, but explicitly refused to do so. *Taylor v. Alabama*, 102 S. Ct. 2664, 2669 (1982).

Although my proposal does not purport to be merely a limitation upon the exclusionary rule in favor of the policeman who has acted in good faith, some of the discussion regarding the good faith exception to the exclusionary rule is pertinent here. Most commentators assume that police action based upon subjective good faith must also be reasonable. The question arises whether an action of the police should be regarded as reasonable if the mistake is based, on the one hand, on a miscalculation of the facts necessary to constitute probable cause, or, on the other hand, on a failure to anticipate a new constitutional decision by the United States Supreme Court, a warrant subsequently found invalid, or a precedent later overruled. In *Pierson*, the mistake was the latter—a failure to anticipate a later court decision declaring a statute unconstitutional. At first glance this seems to be a clear instance of the situation in which the policeman who is being sued ought to be able to rely on what appeared to be the current law when he or she acted. Some of the difficulties encountered in knowing whether it is reasonable for a policeman to assume that the present law is valid are illustrated in *Michigan v. DeFillipo*, 443 U.S. 31 (1979). Arguably, the former type of "good faith" mistake should not exonerate the policeman from personal liability; after all, the notion of

assumption was that publicity and private law suits against individual police officers, including police supervisors in cases involving failure to promulgate or enforce appropriate regulations for the governance of subordinates,³⁶ would create pressures at all levels of the police hierarchy to adhere to constitutional and other limitations.

One arguable deficiency in this system was the provision for jury trial, which is required in private suits for damage by the seventh amendment.³⁷ A choice seemingly had to be made between the achievement of two conflicting goals: (a) to provide for personal liability on the part of the police officer (to insure compliance with pertinent limitations),³⁸ or (b) to avoid trial by jury because of the possibility—perhaps

probable cause includes the notion of reasonableness, and if the policeman acted reasonably (apart from situations in which a warrant was required), there was, by definition, no violation of the Constitution. If a court later decides that the action of the policeman was not reasonable, there seems little basis for exonerating the policeman. In regard to the warrant situation, it is so easy to get a warrant that it does not seem unreasonable to require that the policeman, when in doubt, apply for a warrant. For a general discussion of the "good faith" exception to the exclusionary rule, see, e.g., Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & C. 635 (1978).

The defense of "good faith" should also be distinguished from proposals to modify the exclusionary rule by permitting admission of evidence where the violation of the Constitution was not "substantial." See, e.g., S. 101, 97th Cong., 1st Sess., (1981); Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1 (1975). Although the "good faith" exception to the exclusionary rule may involve a measure of subjectivity, such subjectivity pales in comparison with that contained in the substantiality test. For example, S. 101 permits the court to consider the following factors in determining whether to admit the evidence:

- (1) The extent to which the violation was reckless; (2) The extent to which privacy was invaded; (3) The extent to which exclusion will tend to prevent such violations; and, (4) Whether, but for the violation, the thing seized would have been discovered; or whether the relation between the things discovered and the violation is attenuated.

³⁶ It is important to set forth explicitly the liability of the superior police officer or official; particularly it is important to establish affirmatively a requirement that the official set forth regulations for the governance of the actions of his subordinates. Although the Ombudsman might in some instances be concerned with the substance of the regulations (as for example, where they appeared to be unlawful or unconstitutional), the more important aspect of the problem seems to be the requirement that some kind of rules be established. After all, as Professor Lon Fuller has struggled mightily to maintain, a legal system presupposes a set of rules which the lawgiver, as well as the citizen, will obey. The exercise of unlimited discretion by public officials is the antithesis of a legal system. I here accept Lon Fuller's assumption that if public officials are required to publicize their standards and policies, a better system of administration will result. Davidow, *supra* note 1, at 338 (footnotes omitted).

³⁷ "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

³⁸ The importance of personal liability on the part of the individual police officer is illustrated by Chief Justice Burger's criticism of the exclusionary rule:

The [exclusionary] rule does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial. With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer responsible for a particular judicial application of the Suppression Doctrine.

probability—that jurors would tend to sympathize unduly with the police and not with the victims of police lawlessness.³⁹ My choice was to retain private law suits, as opposed to general suits against the government, because personal liability is essential to the practical enforcement of constitutional and other limitations.

In the light of some recent seventh amendment cases,⁴⁰ I have come to the conclusion that the choice outlined above is not a theoretically necessary one. A choice must be made, however, between a relatively simple procedural device relying almost exclusively on the ombudsman, and a considerably more complicated enforcement device involving the creation of one or more administrative agencies. For the reasons set forth below I prefer the simpler procedure.

1. Administrative Agencies to Deal With the Problem of Jury Trial

Since it is now clear, if it was not before, that the seventh amendment applies only to suits at common law in the ordinary courts and not to the enforcement of civil penalties by the government before administrative agencies,⁴¹ it would be possible to modify the ombudsman propo-

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971)(Burger, C.J., dissenting).

³⁹ See, e.g., Newman, *Suing the Lawbreakers: Proposals to Strengthen the § 1983 Damage Remedy for Law Enforcers Misconduct*, 87 YALE L.J. 447 (1978).

⁴⁰ See *infra* note 41.

⁴¹ In *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), the Court upheld the action of an administrative agency in seeking abatement of violations of the Occupational Safety and Health Act of 1970 and civil penalties from employers without a jury trial. The Court said in part:

At least in cases in which "public rights" are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.

Id. at 450 (footnote omitted).

In sum, the cases discussed above stand clearly for the proposition that when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law." Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency.

Id. at 455 (footnote omitted).

There seems little doubt that actions by the federal government to enforce constitutional restraints upon law enforcement officials would constitute the litigation of "public rights," as that phrase is used in *Atlas Roofing*. It may be argued that this approach by the Supreme Court exalts form over substance in that the forum seems to be the determinative factor, rather than the nature of the action itself. If so, this is hardly the only instance in which the court has exalted form over substance. See, e.g., *Patterson v. New York*, 432 U.S. 197

sal. In addition to creating the office of ombudsman, one could create two administrative agencies: (a) a procedural enforcement commission—an independent agency that would seek civil penalties against offending policemen (under the standards set forth under the original proposal), with adjudication before administrative law judges appointed in the usual manner⁴²—and (b) a victims' compensation commission—an independent agency to which *both* victims of crime and victims of police lawlessness could go for compensation from the government.⁴³

2. *Advantages and Disadvantages of the New and Old Proposals*

The main advantage of the more recent proposal to provide for the creation of two administrative agencies is the avoidance of trial by jury in the case of suits against individual police officers. There are at least two disadvantages. First, and perhaps more obviously, a procedure of considerable complexity would be created. One can certainly argue that today we have enough complexity as it is without adding to it. Moreover, there would be additional costs involving two new agencies. Additionally, the present political climate does not favor the creation of new bureaucracies.⁴⁴

The second disadvantage of the more recent proposal relates to the method of appointment of the heads of the agencies. Under *Buckley v. Valeo*,⁴⁵ the heads of agencies would unquestionably be officers whose appointments would be governed by the appointments clause.⁴⁶ Possi-

(1977)(defendant could be required to prove absence of mitigating circumstance in homicide prosecution because absence of mitigating circumstance was not explicitly made an element of the offense, even though a contrary result had previously been reached in regard to the common law offense of murder because it was assumed that at common law the definition of murder included the notion of an absence of provocation).

⁴² Hearings before such administrative law judges would be preferable to the administrative remedies suggested by Schlesinger, who proposed the creation of an independent review board to discipline offending police officers. Professor Schlesinger suggested that the board consist of "citizens, judges, law officers and any other groups whose representation may be desirable." S. SCHLESINGER, *supra* note 6 at 73. I see no reason to have police officers sit on a board to review the action of other police officers. If we analogize this situation to a jury trial, one can be reasonably certain that counsel opposing the police officer would exercise preemptory challenges so as to insure the absence from the jury of any member of a law enforcement agency. A police officer should be no better off before an independent review board than before a jury in regard to the make-up of the fact-finding body.

⁴³ Giving the same commission power to compensate victims of crime as well as victims of police lawlessness might increase the political acceptability of such a scheme, in light of present proposals to create agencies to compensate victims of crime. For a discussion of victim compensation schemes, see, e.g., McGee, *Crime Victim Compensation*, 5 J. CONTEMP. L. 67 (1978).

⁴⁴ See Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 357 (1981).

⁴⁵ 424 U.S. 1 (1976).

⁴⁶ [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court

bly these officers could be appointed only by the President.⁴⁷ The President, however, might appoint someone who was not particularly sympathetic to the enforcement of constitutional rights against the police.⁴⁸ If this were done, it seems unlikely that the creation of such agencies, even with the additional creation of an ombudsman, could be an adequate substitute for the exclusionary rule. On the other hand, if enforcement were almost exclusively within the hands of the ombudsman, this individual might be appointed in a manner different from that specified in the appointments clause. In my original proposal, I suggested that the ombudsman "be selected by the President of the United States from a list of three nominees submitted by a committee composed of the Speaker of the House of Representatives, the President *Pro Tempore* of the Senate, the House Minority Leader, and the Senate Minority Leader."⁴⁹ My assumption was that such a bi-partisan committee would have to reach some sort of compromise agreement in order to make any recommendation to the President, and that at least two members of the committee would insist upon the appointment of someone who was at least not hostile to the enforcement of the Bill of Rights.⁵⁰

and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that members of the Federal Election Commission were officers of the United States whose appointment was controlled by the appointments clause. The Court said in part:

Unless their selection is elsewhere provided for, *all* Officers of the United States are to be appointed in accordance with the Clause. Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the Heads of Departments, or by the Judiciary. No class or type of officer is excluded because of its special functions.

Id. at 132.

⁴⁷ See *Hobson v. Hansen*, 265 F. Supp. 902, 920 (D.D.C. 1967) (Wright, Cir. J., dissenting).

⁴⁸ If the appointments to the federal bench can be taken as an indication of the likely approach to the appointment of an ombudsman by the President, then one has reason to fear that the President would appoint someone with views fairly similar to his or her own. If the President happened to be unsympathetic to the enforcement of the Bill of Rights, then, of course, the difficulty mentioned in the text would be realized. For documentation of the principle that Presidents have tended to appoint those from their own party (and hence those who presumably have similar views) see, e.g., L. BERKSON & S. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* 134 (1980).

⁴⁹ Davidow, *supra* note 1, at 327.

⁵⁰ Compromise is required because each party has, in effect, a veto power over the choices of the other party. Cf. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. L. REV. 409, 440-41 (1981) (application of the principle of enforced compromise through the exercise of the veto power in the context of the work of a judicial nominating commission).

Because the ombudsman could not be an effective substitute for the exclusionary rule if the President were totally free to select the ombudsman, I would prefer to adhere to my original proposal for appointment.

The question remains, however, whether such a method of selection is consistent with the constitutional requirement—more specifically, whether selection of the ombudsman would be covered by the appointments clause. (The originally proposed method of selection, binding the President to select from among a list of three persons submitted to him or her, seems clearly inconsistent with the appointments clause.) The question certainly is not free from doubt. A strong argument can be made, however, that the ombudsman would not be subject to the appointments clause, and that *Buckley* can be distinguished on its facts. One could argue that the powers of the election commission in *Buckley* were considerably broader than, and very different from, the powers entrusted to the ombudsman.⁵¹ In fact, the only power of the ombudsman beyond that of merely investigating and reporting⁵² would be the power to appoint counsel at government expense when the ombudsman found probable cause to believe that an aggrieved person had been the victim of a law violation.⁵³ Alternatively, the court might be persuaded that the ombudsman as an institution was so different from the traditional three branches of government that the appointments clause ought not to apply.⁵⁴ The ombudsman arguably would be like a fourth branch of government, totally different from anything contemplated by the framers at the time of the ratification of the Constitution.

⁵¹ The federal election commission was given "extensive rulemaking and adjudicative powers." *Buckley v. Valeo*, 424 U.S. 1, 110 (1976).

⁵² "Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them." *Id.* at 137.

⁵³ Davidow, *supra* note 1, at 328.

⁵⁴ The founding fathers undoubtedly assumed that all powers could be categorized as either legislative, executive, or judicial:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim upon which it relies has been totally misconceived and misapplied.

THE FEDERALIST NO. 47, 313 (J. Madison)(Bicentennial ed. 1976). Since the ombudsman, under my original proposal, would have no real power at all, except the power to speak and to provide for the payment of private counsel at government expense under certain circumstances, it can be argued plausibly that the appointments clause, which supposes a tri-partite form of government, ought not to apply to the appointment of such an ombudsman.

III. PROPOSED MODIFICATIONS OF THE ORIGINAL PROPOSAL

The prior discussion indicates that I would adhere to most of the original proposal.⁵⁵ In several areas, however, departures from the original plan seem necessary or desirable. For example, a desire to keep the appointment power out of the hands of the President, along with continued doubts about the constitutionality of my original proposal, has led me to propose a totally different method of selection, as set forth below.

A. METHOD OF SELECTION

I have already alluded both to the constitutional problems associated with the original plan for selection of the ombudsman, and to the undesirability of permitting the President to select the ombudsman.⁵⁶ My solution to this dilemma is to provide for appointment of the ombudsman by the United States Supreme Court, acting unanimously.⁵⁷ For example, a requirement of unanimity would prevent the appointment of someone totally unsympathetic to the enforcement of the Bill of Rights; presumably, at least some members of the Court would be relatively sympathetic to the enforcement of such provisions and could hold out for the appointment of someone with similar attitudes.⁵⁸ Given the limited power of the ombudsman, it seems likely that the ombudsman could be regarded as "an inferior officer," and as such the ombudsman probably could be appointed by "the courts of law."⁵⁹

⁵⁵ See *supra* notes 33-54, and accompanying text.

⁵⁶ See *supra* notes 45-54, and accompanying text.

⁵⁷ See *supra* note 46.

⁵⁸ See *supra* note 50 and accompanying text.

⁵⁹ See *supra* note 46.

Finally, it is objected that the Act of Congress imposes upon the circuit court duties not judicial, in requiring them to appoint the supervisors of election, whose duties, it is alleged, are entirely executive in their character. It is contended that no power can be conferred upon the Courts of the United States to appoint officers whose duties are not connected with the judicial department of the government.

The Constitution declares that "The Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." It is, no doubt, usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officer appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of Marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts. The Marshal is pre-eminently the officer of the courts; and, in case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the Marshal upon the justice of the circuit in which the district in which the vacancy occurs is situated.

But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light, it is, perhaps, better that it should rest there, than that the

The appointment of someone not hostile to the enforcement of the Bill of Rights is so crucial to the effectuation of this proposed alternative to the exclusionary rule that I would expressly provide that if the appointment section of the proposal were held invalid by the court, the whole statute would be inoperative and the exclusionary rule would be restored.

B. LIMITATION OF JURISDICTION

My original proposal called for the creation of a national ombudsman who would enforce lawful behavior on the part of all law enforcement personnel, state and federal.⁶⁰ I argued that Congress could do this in regard to state officials through its power to enforce the due process clause of the fourteenth amendment.⁶¹ Arguably, this approach remains sound. If Congress is serious about doing something about the problems of crime and the problems associated with the exclusionary rule, it will do little good to restrict itself to federal law enforcement, since federal law enforcement is only a small part of the total law enforcement picture today.⁶² It is also true that Congress, despite some public protestations to the contrary, has continued to intrude into state affairs, as demonstrated by congressional efforts to promote family values and to spend federal monies to accomplish this goal.⁶³

Upon reflection, however, I believe that today's political climate

country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise.

Ex parte Siebold, 100 U.S. 371, 397-98 (1880).

⁶⁰ Davidow, *supra* note 1, at 327, 328, 329, 333.

⁶¹ *Id.* at 333.

⁶² The common assumption that the states prosecute the vast majority of criminal cases in the United States is illustrated by the fact that "[t]he Uniform Crime Reports give a nationwide view of crime based on police statistics contributed by state and local law enforcement agencies." U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS v (1980). When the Uniform Crime Reports were begun approximately fifty years ago, only state and local authorities were used as a source of information, apparently because of this assumption about the low number of federal criminal prosecutions in relation to the number of state prosecutions. This assumption apparently still continues to operate. Phone conversation between Robert P. Davidow and John McBreen, Federal Bureau of Investigation, Washington, D.C., January 22, 1982. Although another document does report that in 1978, 972,000 criminal cases were prosecuted in the federal court, U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 415 (1980), there is no comparable figure for state courts; therefore, it is impossible to compare accurately the number of state and federal prosecutions. Phone conversation between Robert P. Davidow and Anthony Cain, Court Specialist, National Criminal Justice Reference Service, January 22, 1982. The editors of a popular casebook on criminal procedure recently reported that yearly federal felony prosecutions represent "less than 5% of all felony prosecutions initiated annually within the United States." Y. KAMISAR, W. LAFAYE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 2 (5th ed. 1980). They cited no authority to support this proposition, however.

⁶³ See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 955(a), 95 Stat. 357, 578 (1981).

makes it pointless to propose that Congress act to enforce the Bill of Rights against state authority. Thus, my proposal here is to restrict the ombudsman to the enforcement of constitutional and other legal rights against the federal government. Possibly the federal example will encourage states to adopt similar, effective procedures for the enforcement of the Bill of Rights and other appropriate limitations upon police activity.⁶⁴

C. MITIGATION OF LACK OF JURY SYMPATHY TOWARD PLAINTIFF

The original proposal provided for a jury trial pursuant to the seventh amendment when an aggrieved person sued an allegedly offending public official or officials. Borrowing from a recent proposal to amend 42 U.S.C. § 1983,⁶⁵ I now propose that the federal government, presumably through the Justice Department, be given authority to join as a party plaintiff. Such joinder would lessen the disparity in the degree to which each side might elicit sympathy. Without such a joinder, the jury would be likely to sympathize more with the law enforcement official than with the plaintiff, since the latter might have a prior criminal record and be guilty of an offense that was the subject of the defendant's unlawful investigation.⁶⁶

D. METHOD OF COMPENSATION

Inflationary trends require a change in regard to compensation. The original proposal was that actual damages, but not less than fifty dollars, be recoverable for every instance of law violation.⁶⁷ There was also a provision for exemplary damages. The provision for a minimum recovery of fifty dollars is obviously inadequate today.⁶⁸ To obviate the need for Congress to amend the statute on a yearly basis, it seems to make more sense to tie the minimum amount recoverable to some more general standard. For example, minimum amounts that are recovered under the statute might be one and one-half percent of the annual gross income of someone earning the minimum wage for adults.⁶⁹

⁶⁴ Cf. Davidow, *One Justice For All: A Proposal to Establish, by Federal Constitutional Amendment, a National System of Criminal Justice*, 51 N.C.L. Rev. 259, 275 (1972) (use of law in the District of Columbia as a basis for experimentation to determine whether the law ought to be made applicable across the country).

⁶⁵ Newman, *supra* note 39, at 453-54.

⁶⁶ *Id.*

⁶⁷ Davidow, *supra* note 1, at 329, 338.

⁶⁸ The following minimum damages have recently been proposed: "Any deprivation of a constitutional right should be valued at not less than one thousand dollars; any time wrongfully spent in jail, no matter how brief, should be valued at not less than two thousand five hundred dollars." Newman, *supra* note 39, at 465.

⁶⁹ If we assume that a person works 50 weeks and 40 hours per week at the present mini-

My original assumption was that there ought to be some minimum amount that should be recoverable in every instance of "law violation" as defined in the original proposal. I continue to adhere to this proposition. Although an aggrieved person may not be able to show much in the way of actual damages, it is important that the victim, and society as a whole, be able to perceive that *something* is being done to remedy the situation.⁷⁰ This "something" must take the form of more than nominal damages.

IV. CONCLUSION

The exclusionary rule has been rather like the weather: many people continue to talk about it, but the state and federal legislatures have persisted in doing nothing about it. The bills that have occasionally been introduced in Congress have attempted either to modify the rule⁷¹ or to abolish it altogether while providing an "alternative" that is totally inadequate.⁷² The challenge is to adopt a remedy that will be *effective* in ensuring that law enforcement officials obey the Constitution and other

minimum wage of \$3.35 an hour, *see* 29 U.S.C.A. § 206 (1978), we find that the minimum amount recoverable would be \$100.50. Although this may seem like a small amount, it must be remembered that this is the minimum amount that may be recovered. One must also consider that under the proposal the attorney would be provided at government expense; the \$100.50 is not subject to any deduction for attorney fees. It would obviously be possible to increase the percentage of the minimum wage if it were thought desirable to do so.

⁷⁰ "Basic to libertarian jurisprudence is acceptance of the reality that public sentiment is a factor to be considered." Gottlieb, *Feedback From the Fourth Amendment: Is the Exclusionary Rule an Albatross Around the Judicial Neck?*, 67 KY. L.J. 1008, 1017 (1978-79). Consider also the importance in the mind of the late Lon Fuller of the reciprocal relationship between the government and the governed. *See* L. FULLER, *supra* note 4.

⁷¹ *See, e.g.*, S. 101, 97th Cong., 1st Sess. (1981); S. 951 97th Cong., 1st Sess. (1981); S. 995, 97th Cong., 1st Sess. (1981). S. 101 provides no substitute for the exclusionary rule; the other two bills provide substitutes, the deficiencies of which are discussed *infra*, note 72.

⁷² *See, e.g.*, S. 751, 97th Cong., 1st Sess. (1981). Among the deficiencies of the bill, which would create a tort remedy against the United States, are the following: (1) It relates only to the fourth amendment. (2) It provides no liability on the part of the individual law enforcement official. (3) One convicted of an offense relating to the evidence unlawfully seized may not recover unless that person suffers actual physical personal injury or actual property damage. (4) There is an absolute limitation on liability; the maximum recoverable is twenty-five thousand dollars. (5) Although there is a provision for disciplining the law enforcement officer, the agency that employs the officer is responsible for such discipline. (6) Private counsel is not appointed in the first instance; there is a provision for the recovery of actual costs on the part of a successful claimant, but this apparently is discretionary.

Similar deficiencies exist in Amend. No. 93 to S. 951, 97th Cong., 1st Sess. (1981). The main difference between S. 751 and this amendment to S. 951 appears to be that the latter provides for the creation of a "Search and Seizure Review Board," which is to determine whether a violation of the fourth amendment was conducted in good faith. (As is true of S. 751, the language is "good faith," rather than "reasonable good faith.") If the Board finds an absence of good faith, the Board is to recommend "appropriate disciplinary procedures to the agency which *shall* discipline the officer" (emphasis added).

S. 995, 97th Cong., 1st Sess. (1981) provides a tort remedy that suffers from the first four

appropriate limitations upon their authority. Thus, given a choice between adhering to the present exclusionary rule and abandoning the rule with no effective alternative, I would unhesitatingly choose to retain the exclusionary rule.

As others have pointed out, a reason for some of the opposition to the exclusionary rule and to an effective substitute for the exclusionary rule may really be an opposition to the substantive rules enunciated by the Supreme Court in interpreting the fourth amendment.⁷³ Thus, the underlying problem may be a broad one: a fundamental disagreement about the way in which the government should relate to the governed.⁷⁴ Some of the opposition to the enforcement of the Bill of Rights may come from a perception that society is divided into two groups—the law-abiding persons and the criminals—and that the object of law enforcement is to wage war upon the latter.⁷⁵ Procedural niceties are seen as irrelevant to the prosecution of such a war. The morale of the citizenry is said to suffer if the goal is not total victory. Obviously there is another view of society. For example, the late Lon Fuller emphasized the reciprocal relationship between law-giver and law-receiver, maintaining that law is “the enterprise of subjecting human conduct to the governance of rules.”⁷⁶ In this enterprise, the law-receivers must be convinced that the system is a good one so that they will have an incentive to obey the laws. If they are to feel that the system is a good one, they must be assured that the law-givers will adhere to the law that has been devised to govern the relationship between the government and the people. One can argue that from this perspective the long-range goal of the criminal law ought to be to bring those who have been criminally convicted back into the enterprise.⁷⁷ Total warfare, without adherence to

deficiencies mentioned *supra* in connection with S. 751. Unlike S. 751 and S. 951, however, S. 1995 contains no provision for disciplining law enforcement officers.

For discussion of other bills that have been recently introduced in the Congress, see Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621, 704-09 (1975).

⁷³ See, e.g., Kamisar, *supra* note 31, at 343.

⁷⁴ Thus the chief difficulty involved in an attempt to apply the ombudsman principle to the problem of police lawlessness in the United States today becomes clear: Some police administrators apparently do not share some of the values expressed in the Bill of Rights of the Federal Constitution. In this they seem to have the support of a substantial portion of the population.

Davidow, *supra* note 1, at 324 (footnote omitted).

⁷⁵ Cf. Younger, *The Perjury Routine*, 204 THE NATION 596 (1967) (“Policeman see themselves as fighting a two-front war—against criminals in the street and against ‘liberal’ rules of law in court. All’s fair in this war, including the use of perjury to subvert ‘liberal’ rules of law that might free those who ‘ought’ to be jailed.”)

⁷⁶ L. FULLER, *supra* note 4, at 96.

⁷⁷ As to the stigmatization associated with criminal conviction, the real problem may not be the initial stigma but rather the continuing effects of that conviction. In this regard, a partial solution would seem to be the repeal of those laws that deprive con-

fundamental rules, is hardly calculated to inspire such individuals to participate in the enterprise. I am not suggesting that we "coddle" criminals or that the notion of deterrence has no validity.⁷⁸ What I am alluding to is the obvious fact that eventually most of the persons who enter prison will return to society. The question, therefore, is whether upon their return they are going to feel a sufficient commitment to the system to obey its rules.⁷⁹

It is possible, of course, to take the position that these different perspectives are simply two competing views⁸⁰—two different definitions of the situation⁸¹—and that there is no empirical way to demonstrate that one rather than the other perception is "correct." Under these circumstances, we may be forced to resort to history, for at least the history of the ratification of the Constitution and, more specifically, the Bill of

victed felons of many of their constitutional rights even after they have "paid their debt to society." Perpetual disenfranchisement of ex-felons is an example of such a law. Again, the analogy of the treatment of children may be appropriate. A young child may be "punished" for having disobeyed his parents. Punishment may take the form of a lecture and perhaps even a spanking. The child, however, is not perpetually ostracized, but is made to see that although a wrong has been committed, he is still loved by, and a part of, the family. Similarly society could emphasize individual responsibility through stigmatization associated with criminal conviction while at the same time providing minimum deprivation of physical liberty and constitutional rights. Of course, to be fully effective such a scheme would also require a generally more forgiving societal attitude.

Davidow, Book Review, 52 TEX. L. REV. 1245, 1252 (1974) (footnotes omitted).

⁷⁸ Unquestionably, given the right circumstances, people can be deterred. For example, while serving in Korea in the United States Army in the 1960s, I was told of how a Turkish unit in Korea solved the problem of thefts by members of the local population. Members of the Turkish unit caught a person attempting to steal items from their compound and the following day suspended the thief, by a spike driven through the thief's head, from the fence in front of the main gate of the compound. Thereafter, the Turkish unit was no longer bothered with the problem of theft, although other United Nations units in the area continued to be the objects of thievery. Obviously, the situation becomes considerably more complex when notions of due process come into play. For discussion of the concept of deterrence in the context of capital punishment, see, e.g., Baldos & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975).

⁷⁹ Clearly other factors may influence the decision of an ex-convict to adhere to the law, on the one hand, or to return to a life of crime, on the other hand. The availability of employment upon release from prison is an example. In a recent speech, Chief Justice Burger, for instance, acknowledged the importance of this factor. See Washington Post, Dec. 17, 1981, at A12, col. 1.

⁸⁰ That there are differing views is hardly surprising in light of the well recognized phenomenon of selective perception. See Hastorf & Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCH. 129, 133 (1954); Vidmar & Rokeach, *Archie Bunker's Bigotry: A Study in Selective Perception and Exposure*, 24 J. COM. 36 (1974).

⁸¹ The concept of the "definition of the situation" was apparently developed by W.I. Thomas, and is discussed in R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 475-77 (enlarged ed. 1968). The significance of this phrase for sociology is not only that it is a description of an individual's perception, but also that it often describes a false perception that constitutes a self-fulfilling prophecy. Merton refers to the example of a solvent bank in 1932 that became insolvent as a result of a perception on the part of depositors that it was not solvent. (This perception caused them to withdraw their funds from the bank, and this withdrawal resulted in insolvency.) *Id.* at 476.

Rights tells us something about the attitudes of the framers of the Constitution. We do know that they were opposed to the exercise of unfettered power of the sort that characterized the actions of police before the adoption of the exclusionary rule.⁸² Part of the difficulty may be that in this country we have not done a very good job of educating the general public in regard to the principles that underlie our system of government.⁸³ One of the more attractive features of the criminal procedure ombudsman is that the ombudsman, through the power to investigate and report, can probably educate the public more effectively than can any other body.⁸⁴ One should recall that an ombudsman is not an advocate for one side or the other, but is an independent government official whose duties include pointing out the successes as well as failures of government officials.⁸⁵ Given this position of impartiality, the ombudsman is in a better position than is a defense counsel or a member

⁸² The Writ of Assistance was used by the British during the colonial period; such usage formed part of the background surrounding the ratification of the fourth amendment provision against unreasonable searches and seizures, which was first proposed in 1789. *See* 1 W. LAFAYETTE, *supra* note 6, at 4-5. More specifically, the Virginia Declaration of Rights, which was adopted by Virginia in 1776 and apparently served as a model for parts of the Bill of Rights, provided in Clause 10:

That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of the fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

Virginia Declaration of Rights § 10, *reprinted in* GEORGE MASON LECTURES 20 (1976).

⁸³ Most people do not understand freedom of speech as a generalizable principle; in failing to apply it in concrete situations, in tolerating restrictions on civil liberties, most people are revealing a failure of understanding rather than an attitude of hostility to civil liberties in general or to free speech in particular.

Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 L. & SOC'Y REV. 427, 445 (1977). Another study showing antipathy toward, and hence a possible misunderstanding of, some of the provisions of the Bill of Rights, is J. CASPER, *THE POLITICS OF CIVIL LIBERTIES* 1-2, 223-24 (1972).

⁸⁴ *See supra* note 33.

⁸⁵ Maybe those of us who like Ombudsmanship have been a bit careless in presenting it as though we thought that the citizen—the customer, so to speak—is always right. Perhaps we have implied that the Ombudsman is always going to side with the citizen against officials. Of course, that isn't the way things have worked out in any degree. Wherever an Ombudsman has functioned, he has been purely and plainly an advocate of sound administration, not an advocate of the position of the complainant. In this respect, he has differed from many legislators who tend, when a constituent complains, to become an advocate of the complainant's case without much consideration of its merit; they pushed the matter because of the source from which it comes, not because of its worth. The Ombudsman, on the other hand, is not a built-in critic of officials, whether elected or not. He is simply stationed at the margin, as it were, between the citizen and the official, and he must be concerned with seeing that justice is done to public servants as well as to the public whom they serve. Believe me, he does protect both groups. I have not the slightest doubt that if a free vote were taken among the police and other officials in any country in which the Ombudsman has functioned, a truly overwhelming majority of the participants in the election would favor the continuation of Ombudsmanship.

Gellhorn, *The Ombudsman Concept in the United States*, in *OUR KIND OF OMBUDSMAN* 13-14 (L. Levison ed. 1970).

of the American Civil Liberties Union, for example, to explain to the public the rationale for the various limitations on governmental authority in the field of criminal procedure. As a "doer," the ombudsman is also more likely than is the academic critic to have success in educating the public, since many Americans seem to be suspicious of academicians. This greater ability to inform and educate is an important reason for preferring the ombudsman to other proposed substitutes for the exclusionary rule.⁸⁶

The exclusionary rule is not an end in itself. It will lose its *raison d'être* if an effective alternative can be found. The criminal procedure ombudsman is such an alternative.

APPENDIX

THE PROPOSED ACT OF CONGRESS*

A BILL

To create a criminal procedure ombudsman and to abrogate the exclusionary rule, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled. That this Act may be cited as the "Criminal Procedure Ombudsman Act of 198__."

SEC. 2. It is the sense of Congress, that since the exclusionary rule of criminal procedure (whereby **trustworthy** evidence seized in violation of the fourth, fifth, **and** sixth [and fourteenth] amendments to the United States Constitution has been inadmissible in [both state and] federal criminal trials) has failed to protect the innocent, has sometimes permitted guilty persons to escape punishment, and generally has failed to deter some police lawlessness, these evils ought to be reduced as far as practicable (and within constitutional limitations) primarily through the creation of a criminal procedure ombudsman, and secondarily through the abrogation of the exclusionary rule.

SEC. 3. As used in this statute, the following words or phrases have the following meanings:

(a) *Law violation* means any violation of the federal Constitution, [state constitutions,] federal laws, [state laws, local ordinances,] and regulations of any **federal** administrative body [(local, state, or federal, and including the police)], **including federal law enforcement agencies**.

(b) *Ombudsman* means *the* Ombudsman if spelled with a capital

⁸⁶ See, e.g., S. SCHLESINGER, *supra* note 6, at 71-82.

* The original, 1983 proposal appears in regular roman type. The deletions and additions proposed in the present Article appear in brackets and bold face type, respectively.

"O"; if spelled with a lower case "o," it refers to both the Ombudsman and assistant ombudsmen.

(c) *Public official* means any official or employee of the federal government, [the states, or any political subdivision of the states,] but does not include state and federal judges **or federal magistrates**.

SEC. 4. The Congress of the United States hereby establishes a Criminal Procedure Ombudsman (hereafter referred to as the Ombudsman).

SEC. 5. The Ombudsman shall be selected by the [President of the United States from a list of three nominees submitted by a committee composed of the Speaker of the House of Representatives, the President Pro Tempore of the Senate, the House Minority Leader, and the Senate Minority Leader] **unanimous vote of the justices of the United States Supreme Court**.

Sec. 6. The Ombudsman shall serve a term of fifteen years unless: (a) on the fifth or tenth anniversary of his **or her** selection, the [Congress, by majority vote of the total membership of each House thereof] **United States Supreme Court by unanimous vote**, shall remove him **or her**, or (b) at any time the [Congress, by a two-thirds vote of the total membership of each House] **Supreme Court, by a two-thirds vote**, shall remove him **or her** because of disability or conviction of a felony or other crime involving moral turpitude.

SEC. 7. No person shall serve as Ombudsman unless he **or she** has reached his or her thirty-fifth birthday, has been admitted to the practice of law in at least one state or the District of Columbia, and has not been involved in partisan affairs for five years immediately preceding his selection.

SEC. 8. The salary of the Ombudsman shall equal that of the Chief Justice of the United States Supreme Court.

SEC. 9. The Ombudsman shall have the power:

(a) to receive complaints, oral or written, from anyone regarding the actions of public officials relating to any type of detention (regardless of duration and regardless of whether it occurs in connection with criminal or civil commitment proceedings), interrogation, interference with the attorney-client relationship, searches, or other invasions of privacy;

(b) to investigate the complaints referred to in (a) or, on his **or her** own initiative, to investigate the matters described in (a);

(c) in the course of investigations referred to in (b), to have access to the internal files of any public official, to take the depositions of pertinent witnesses, whose presence may be compelled by subpoena issued by

the ombudsman (and enforceable in an appropriate federal district court), and to inspect the premises of public officials whose activities he may investigate;

(d) with respect to the matters described in (a), to make and publicize recommendations concerning that which the Ombudsman deems either (1) necessary to the avoidance of law violations, or (2) desirable, from a policy standpoint; however, publication shall occur only after any public officials whose actions are to be criticized are given an opportunity to respond to the criticisms, and the publication shall include the criticized officials' responses;

(e) to authorize payment of private counsel from appropriated funds for litigation, when the Ombudsman determines that there is probable cause to believe that an aggrieved person has a cause of action as described in section 12 of this statute;

(f) to appoint private counsel at government expense to sue in an appropriate federal district court for a declaratory judgment in those instances in which the Ombudsman decides that there is a need to determine whether there has been a law violation with respect to the matters described in subsection (a) and in which such determination has not been and is not likely to be made through litigation referred to in subsection (e);

(g) to appoint not more than [100] **twelve** assistant ombudsmen who shall:

(1) have all of the qualifications of the Ombudsman.

(2) be paid the same salary as that received by judges of the United States District Courts;

(3) exercise any of the powers of the Ombudsman which the Ombudsman, in his **or her** discretion, delegates to them (except that of delegation), and

(4) serve for a term of fifteen years unless removed by [Congress] **the United States Supreme Court** in accordance with the provisions of section 6; and

(h) to appoint such other staff members as may be necessary to effectuate this act.

SEC. 10. The Ombudsman may refuse to investigate a complaint if, on its face, it is obviously unmeritorious, or may require that a claimant of an apparently meritorious claim exhaust available administrative remedies, unless there is a danger of unreasonable delay or undue hardship. Following investigation of a facially meritorious claim, the Ombudsman may proceed no further if the facts found by him demonstrate that the claim is unmeritorious. The Ombudsman shall advise the claimant and the public official who is the object of the complaint of

any action taken; the Ombudsman shall also advise the complainant of a decision to proceed no further and the reasons therefor.

SEC. 11. Subject to the limitations of section 9(d), the Ombudsman shall report annually to Congress regarding the work of his **or her** office.

SEC. 12. (a) Any person who is aggrieved because of a law violation by a public official may sue the offending official or officials (including a supervisory official where the supervisory official has materially contributed to the violation through willful misconduct or through negligence, including the failure to make or enforce reasonable regulations for the governance of the conduct of those working under him **or her**) in an appropriate United States District Court. Compensatory damages (not less than [\$50 for each violation] **1.5% of the annual gross income of someone working fifty weeks and earning the minimum wage, for each offense**), exemplary damages (in cases of willful misconduct, and costs may be recovered by the aggrieved person.

(b) In suits authorized under (a), if the fact-finder (judge or jury) rules in favor of the defendant, the fact-finder shall render a special verdict in which it shall indicate whether the basis of the verdict was (1) the absence of a law violation, (2) the inability of the fact finder to attribute blame to a specific defendant (despite a law violation), or (3) a reasonable, good faith effort on the part of the defendant to avoid a law violation.

(c) When the fact-finder renders judgment for the defendant for reasons (2) or (3) set forth in subsection (b), the trial court shall render judgment against the United States for an amount determined according to the principles set forth in subsection (a).

(d) In suits under this section, the United States may [intervene] **join** as a party [defendant] **plaintiff**.

(e) No judgment against an individual official under this section shall be satisfied, directly or indirectly, with public funds (local, state, or federal), **nor shall such judgment be satisfied, directly or indirectly, through a system of individual or group insurance.**

SEC. 13. No letter addressed to the ombudsman from any person whose mail might otherwise be subject to censorship shall be opened prior to delivery to the ombudsman.

SEC. 14. The Ombudsman shall have authority to seek injunctive relief in an appropriate federal district court against efforts by individuals to obstruct the activities of the ombudsman or his **or her** staff.

SEC. 15. No activities of the ombudsman and staff with respect to the functions of the ombudsman shall be reviewed in any court.

SEC. 16. The ombudsman shall enjoy the same immunities from civil and criminal liability as are enjoyed by federal judges.

SEC. 17. No evidence obtained through a law violation shall be inadmissible in any federal court if that evidence is **trustworthy and is** obtained subsequent to three years after the effective date of this statute; **however, this section shall be inoperative if section 5 is declared invalid by the courts.**

SEC. 18. It shall be the duty of every attorney involved in [the trial (state or federal)] **a federal trial** of any case dealing with alleged criminal acts, civil commitment, or prison administration to report to the ombudsman every instance of apparent law violation by public officials.

SEC. 19. [If section 17 is declared unconstitutional] **If that portion of section 17 that abrogates the exclusionary rule is declared unconstitutional**, the remainder of this act shall remain in effect, it being the sense of Congress that, even without formal abolition of the exclusionary rule, the ombudsman may reduce the need for the employment of the exclusionary rule.