

CASENOTES

Limiting Exclusion of Evidence Under the Federal Courts' Supervisory Power with a Fourth Amendment Sword: *United States v. Payner*¹ — Throughout the past two decades the Supreme Court of the United States has conducted an extensive re-evaluation of the exclusionary rule — the rule that excludes illegally obtained materials from admission into evidence in subsequent legal proceedings.² This process has narrowed the scope of the rule's application.³ At the present time, a third party whose own privacy rights are not violated by an illegally conducted search which intrudes upon the constitutional rights of another lacks standing to challenge the search under the fourth amendment.⁴ Recently, in *United States v. Payner*,⁵ the Supreme Court further narrowed the scope of the exclusionary rule by refusing to extend its benefits to such a third party under the federal court's supervisory power, a non-constitutional device of the federal judiciary designed to preserve a fair and orderly administration of justice.⁶ The Court's ruling prompted Justice Marshall to claim in dissent that the majority had improperly encumbered the supervisory power with fourth amendment standing restrictions.⁷ By so doing, he reasoned, the Court had allowed fourth amendment standing to become a sword that the Government may wield, as it did in *Payner*, to deliberately violate the constitutional rights of one person in order to gather evidence against another who will be incapable of invoking the exclusionary rule.⁸

In *Payner*, the federal government's prosecution of Jack Payner resulted from a criminal investigation conducted by the Internal Revenue Service (IRS), entitled "Operation Tradewinds."⁹ The operation, initiated in 1965, was aimed at identifying Americans who were maintaining unreported accounts in Bahamian banks.¹⁰ In 1972, suspicion focused on the Castle Bank and Trust Company of the Bahamas (Castle Bank).¹¹ The IRS agent supervising the operation approached one Norman Casper, a private investigator in Miami, Florida and occasional government informant, to solicit his cooperation in the investigation of the Castle Bank.¹² Casper, who was acquainted with Michael

¹ 100 S. Ct. 2439 (1980).

² *Weeks v. United States*, 232 U.S. 383, 393 (1914).

³ See, e.g., McMillian, *Is There Anything Left of the Fourth Amendment*, 24 ST. LOUIS L.J. 1, 2-3 (1979).

⁴ See *Rakas v. Illinois*, 439 U.S. 128, 138 (1978); *Altermann v. United States*, 394 U.S. 165, 171-72 (1969).

⁵ 100 S. Ct. 2439 (1980).

⁶ See text and notes at notes 129-81 *infra*.

⁷ *United States v. Payner*, 100 S. Ct. at 2447-48 (Marshall, J., dissenting).

⁸ *Id.*

⁹ *Id.* at 2443.

¹⁰ *Id.* A taxpayer filing Form 1040 must also indicate on Schedule B whether or not s/he had any interest in a foreign account. If so, Treasury Form 90-22.1 must also be filed. [1981] STAND. FED. TAX REP. (CCH) ¶ 5008.0177.

¹¹ *United States v. Payner*, 100 S. Ct. at 2443.

¹² *Id.*

Wolstencroft, a Castle Bank vice-president, agreed to participate.¹³ Casper's involvement included introducing Wolstencroft to Sybil Kennedy, a private investigator and former employee of Casper.¹⁴

In early 1973, Casper learned that Wolstencroft planned to visit Miami on January 15.¹⁵ Casper knew Wolstencroft would carry a briefcase containing records about the bank's depositors.¹⁶ Casper then devised a scheme for the illegal search of Wolstencroft's briefcase.¹⁷ He arranged for Wolstencroft to go to dinner with Kennedy while leaving the briefcase in her apartment.¹⁸ Using a key supplied by Kennedy, Casper entered the apartment and removed the briefcase to a nearby location where he met a locksmith referred to him by the IRS.¹⁹ The locksmith made a key to fit the briefcase.²⁰ Casper delivered the briefcase to IRS agents who employed a photography expert to copy the over four-hundred documents containing therein.²¹ Materials obtained from Wolstencroft's briefcase enabled IRS investigators to discover that Jack Payner maintained an unreported account at the Castle Bank.²²

Payner's failure to report this account on his income tax return for 1972 resulted in his indictment for falsifying that return.²³ The district court consolidated the hearing on Payner's motion to suppress with the trial on the merits,²⁴ and ordered that the evidence obtained as a result of the illegal search of Wolstencroft's briefcase be suppressed.²⁵ Accordingly, it found Payner not guilty.²⁶

In excluding this evidence, the district court applied a balancing test, used to determine when the exclusionary rule should be invoked, which weighs the deterrent impact of applying the rule against the harm society suffers by the exclusion of reliable and probative evidence.²⁷ In applying this test, the court

¹³ *Id.*

¹⁴ Casper was paid eight thousand dollars by the IRS for his participation in Operation Tradewinds. *Id.* at 2449 (Marshall, J. dissenting). He, in turn, paid one thousand dollars to Kennedy for her participation. *Id.*

¹⁵ *Id.* at 2443.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See id.* at 2449 (Marshall, J., dissenting).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 2443.

²² *See id.* at 2442-43.

²³ *Id.* at 2442. A knowing and willful false statement or misrepresentation made to the government "in any matter within the jurisdiction of the United States" is a criminal act. 18 U.S.C. § 1001 (1976).

²⁴ *United States v. Payner*, 434 F. Supp. 113, 118 (N.D. Ohio 1977).

²⁵ *Id.* at 136.

²⁶ *See United States v. Payner*, 100 S. Ct. at 2443 n.2.

²⁷ *United States v. Payner*, 434 F. Supp. at 124. The balancing test implemented by the district court was derived from *United States v. Janis*, 428 U.S. 433 (1976). *Janis* was a civil assessment action filed by the IRS for wagering excise taxes. *Id.* at 437. The evidence supporting the Government's case had been illegally seized by state law enforcement officers acting under a defective warrant and previously had been suppressed in state criminal proceedings. *Id.* at 437-38. The *Janis* Court, in its decision on whether to apply the exclusionary rule, balanced "the likeli-

examined the nature of the Government's conduct. The district court found as fact²⁸ that the Government was a full partner in the search conducted by Casper, having "knowingly and willfully participated in the unlawful seizure" of Wolstencroft's briefcase.²⁹ The search not only violated Wolstencroft's constitutional rights, it also involved outright violations of Florida criminal statutes.³⁰ Further, the district court found that the IRS had "affirmatively counsel[ed]" its agents that illegally seized evidence would be admissible against third parties because they could not challenge the search under the fourth amendment,³¹ and that in this case "the seizure was conducted in order to gain information about depositors in the Castle Bank; it was not to gain information about Wolstencroft."³² The district court characterized the Government's misconduct as "outrageous"³³ in that it demonstrated "knowing and purposeful *bad faith hostility* to [another] person's fundamental constitutional rights."³⁴ Because of this outrageous conduct the court concluded that application of the exclusionary rule was justified.³⁵

The district court did not base its application of the exclusionary rule on fourth amendment grounds.³⁶ The court realized that standing restrictions barred Payner from invoking the fourth amendment, despite the outrageous conduct of the government, because the search did not violate Payner's privacy rights.³⁷ In doing so, the court followed recent fourth amendment decisions of the Supreme Court which have determined that the requisite deterrent impact of imposing the rule to remedy a fourth amendment violation is not present where the defendant's own fourth amendment rights were not violated.³⁸ The district court instead based its exclusion ruling on both the due process clause of the fifth

hood of deterring the conduct of the state police" against "the societal costs imposed by exclusion." *Id.* at 454. Finding the "additional marginal deterrence" of excluding the evidence in the subsequent civil proceeding in another forum after its prior exclusion in the state criminal court to be insufficient, the Court refused to apply the rule. *Id.* at 453-54.

²⁸ See *United States v. Payner*, 434 F. Supp. at 118-23. The district court's findings of fact were not disturbed by the Supreme Court. See 100 S. Ct. at 2443 & n.3.

²⁹ *United States v. Payner*, 434 F. Supp. at 120-21.

³⁰ *Id.* at 130 n.66. At that time the Florida criminal larceny statute made it a misdemeanor or felony to "with intent unlawfully to deprive . . . the true owner of his property" or to take "from the possession of the true owner, or of any person . . . any property." FLA. STAT. ANN. § 812.021 (1)(a) (1976) (repealed).

³¹ *United States v. Payner*, 434 F. Supp. at 132-33.

³² *Id.* at 120 n.37. While it is true that Wolstencroft was indicted as a co-defendant, he failed to answer the indictment. *United States v. Payner*, 100 S. Ct. 2452 n.13 (Marshall, J., dissenting). In fact, the IRS agent who directed the operation admitted at trial that the Government had no interest in taking any action against Wolstencroft. *United States v. Payner*, 434 F. Supp. at 120 n.37. The Supreme Court felt no need to challenge either this finding or the equally critical finding on the Government's full participation. See *United States v. Payner*, 100 S. Ct. at 2443 n.3.

³³ *United States v. Payner*, 434 F. Supp. at 130.

³⁴ *Id.* at 129 (emphasis in original).

³⁵ *Id.* at 129, 135.

³⁶ *Id.* at 126.

³⁷ *Id.*

³⁸ *Id.* (quoting *Alderman v. United States*, 394 U.S. 165 (1969)).

amendment³⁹ and the supervisory power.⁴⁰ The court reasoned that in cases of outrageous misconduct, the balance shifts to favor exclusion regardless of whether the defendant's own fourth amendment rights were violated or not.⁴¹ Due process and the supervisory power protect against such misconduct and provide for such vicarious exclusion.⁴²

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the district court.⁴³ In a brief per curiam opinion, the appeals court based its decision solely on the supervisory power, which it found had been properly applied by the lower court.⁴⁴

In a six to three decision⁴⁵ the Supreme Court reversed the court of appeals decision, and HELD: illegally seized evidence may not be excluded under either the supervisory power or the fourth amendment where the manner of obtaining the evidence does not violate the privacy rights of the defendant.⁴⁶ Justice Powell, writing for the majority, noted that the district court had correctly ruled that Payner lacked fourth amendment standing.⁴⁷ The Court observed that each application of the exclusionary rule exacts a toll on society by depriving the trier of fact from receiving reliable and probative evidence.⁴⁸ Therefore, use of the rule must be restricted to situations where the policies underlying its existence are best effectuated.⁴⁹ These policies, as identified by the Court, are the deterrence of future illegality and the preservation of judicial integrity.⁵⁰ The majority placed greater emphasis on the former.⁵¹ The Court maintained that to

³⁹ *Id.* at 133. The relevant part of the amendment is: "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. The district court based its ruling on *Rochin v. California*, 342 U.S. 165 (1952), in which the Court suppressed evidence obtained by methods found to be "shock[ing to] the conscience." *Id.* at 172. The district court then went on to state its own standard for exclusion under due process in this case: "This Court concludes that Due Process requires exclusion of reliable evidence only in those cases in which government officials obtain the challenged materials in a grossly improper fashion, i.e., by engaging in illegal conduct which exhibits their knowing and purposeful *bad faith hostility* to any person's fundamental constitutional rights." *United States v. Payner*, 434 F. Supp. at 129 (emphasis in original) (footnote omitted).

⁴⁰ *Id.* at 134-35. The district court's standard for applying the supervisory power was substantially the same as that under due process: "[T]he federal courts' supervisory power should be invoked to exclude evidence obtained by Governmental conduct which is either purposefully illegal or motivated by an intentional bad faith hostility to a constitutional right." *Id.* (footnotes omitted).

⁴¹ *Id.* at 129, 135.

⁴² *Id.*

⁴³ *United States v. Payner*, 590 F.2d 206 (6th Cir. 1979) (per curiam).

⁴⁴ *Id.* at 207.

⁴⁵ The majority opinion was written by Justice Powell, joined by Chief Justice Burger and Justices Stewart, White, Rehnquist, and Stevens. Chief Justice Burger also filed a concurring opinion. Justice Marshall filed a dissent, joined by Justices Brennan and Blackmun.

⁴⁶ *United States v. Payner*, 100 S. Ct. at 2444, 2446.

⁴⁷ *Id.* at 2444.

⁴⁸ *Id.* at 2445.

⁴⁹ *Id.*

⁵⁰ *Id.* at 2446 n.8.

⁵¹ See *id.* at 2446 & n.8. The majority read the district court's opinion as relying primarily on the deterrence rationale. *Id.* at n.8. The Court stated however, that the societal interests favoring admissibility outweighed the benefits of exclusion under either rationale. *Id.* For a discussion of the policies underlying the exclusionary rule, see text and notes at notes 63-92 *infra*.

suppress evidence to benefit a third party such as Payner would upset the careful balance between the competing interests of deterring future illegality and providing the trier of fact with reliable evidence that has been established in its recent fourth amendment decisions.⁵² Thus, the fourth amendment could not support application of the exclusionary rule in this case.

Continuing on these lines, the Court stated that "[t]he same societal interests are at risk when a criminal defendant invokes the supervisory power to suppress evidence seized in violation of a third party's constitutional rights."⁵³ Hence, this balancing, which favors admission of the evidence in the third party context, is not altered by a defendant's invocation of the supervisory power.⁵⁴ Further, the Court found the lower courts' use of the supervisory power to be "standardless," in that it left too much to the discretion of a trial judge by permitting this balance of interests to be ignored.⁵⁵ Thus, the Court refused to invoke the exclusionary rule here under the supervisory power.

Justice Marshall, in a dissent joined by Justices Brennan and Blackmun, was less interested in focusing on the rights of the particular defendant before the Court than on placing primary emphasis on the level of government misconduct.⁵⁶ He examined the policies behind the exclusionary rule and criticized the majority for overemphasizing deterrence at the expense of judicial integrity.⁵⁷ Citing Justice Brandeis' famous dissent in *Olmstead v. United States*,⁵⁸ Justice Marshall stated that evidence obtained through the type of illegality present in *Payner* could not be admitted into a court without tainting that court's integrity.⁵⁹ He also contended that the majority's analysis "engraft[ed]" fourth amendment standing law onto the supervisory power.⁶⁰ According to Justice Marshall, the Court's reasoning deprived the supervisory power of its vitality in the search and seizure area by limiting use of the exclusionary rule to instances where a privacy right of the defendant has been violated.⁶¹

Payner presents another example of the Supreme Court narrowing the scope of the exclusionary rule. The Court's emphasis on the policy of deterring future misconduct greatly outweighed its consideration of the policy of protecting judicial integrity. This misplaced emphasis caused the *Payner* Court to refrain

⁵² 100 S. Ct. at 2445. See *Rakas v. United States*, 439 U.S. 128, 138-39, 143 (1978); *Alderman v. United States*, 394 U.S. 165, 171-72 (1969).

⁵³ 100 S. Ct. at 2446.

⁵⁴ *Id.* at 2446-47.

⁵⁵ *Id.* at 2445, 2447. Chief Justice Burger filed a brief concurrence in which he agreed that Payner could not take advantage of the violations of Wolstencroft's rights. *Id.* at 2447 (Burger, C.J., concurring). The Chief Justice also stated that separation of powers considerations precluded the supervisory power from being used, outside the judicial sphere, as a general oversight device to police the affairs of the executive branch. *Id.* For a discussion of the limits on the supervisory power in this regard, see text and notes at notes 161-63 *infra*.

⁵⁶ 100 S. Ct. at 2447-54 (Marshall, J., dissenting).

⁵⁷ *Id.* at 2451-53.

⁵⁸ 277 U.S. 438, 471-85 (1928).

⁵⁹ 100 S. Ct. at 2451-52. Justice Marshall stated that a court's reception of evidence which is "the intended product of deliberately illegal government action" places an "imprimatur upon such lawlessness and thereby taints its own authority." *Id.* at 2452.

⁶⁰ *Id.* at 2453.

⁶¹ *Id.*

from examining whether suppression of evidence obtained from egregious governmental misconduct was warranted in order to protect the integrity of the Federal Courts and the administration of criminal justice therein.⁶² This focus sanctions activities that taint that integrity by precluding exclusion to benefit third parties under the supervisory power regardless of the amount of the government's wrongdoing.

This casenote will argue that such a result is unnecessary, even within the context of a more limited exclusionary rule. It will be shown that even where the defendant's rights are not violated, courts should be permitted to rely on the supervisory power to exclude evidence seized by grossly improper means. This article will begin with an examination of the policy justifications — the deterrence of future illegality and the preservation of judicial integrity — which underlie the exclusionary rule. It then will discuss the reasons why the constitutional grounds for applying the rule — the fourth amendment and the due process clause of the fifth amendment — are inadequate bases for invoking the rule to benefit a third party whose own rights were not violated by an illegal search. Next, the supervisory power will be examined, with respect to both its nature and its adaptability as a device for vicarious exclusion. Further, a standard for third party exclusion in prosecutions in the federal courts will be proposed. Finally, the effectiveness of this standard will be scrutinized in light of the policies underlying the rule.

I. THE POLICIES BEHIND THE EXISTENCE OF THE EXCLUSIONARY RULE

In deciding to deny application of the exclusionary rule to benefit a third party under the supervisory power, the Supreme Court in *Payner* purported to implement the policies that underlie the rule.⁶³ Before examining the nature of the supervisory power and its application to illegal searches and seizures, it is first necessary to understand these basic supporting rationales. The exclusionary rule frequently has been termed a "judicially created" device, indicating that it exists as an engraftment upon fourth amendment search and seizure law to effectuate its policies.⁶⁴ Hence, because its continued existence is not constitutionally mandated, it is continually open to judicial re-evaluation. As will be shown, the policies that the Court emphasizes will greatly influence a decision to expand or contract the rule.⁶⁵ During the Court's re-evaluation of the

⁶² See text and notes at notes 71-80 *infra*.

⁶³ See text and notes at notes 49-52 *supra*.

⁶⁴ See, e.g., *Stone v. Powell*, 428 U.S. 465, 482 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974).

⁶⁵ The Supreme Court's opinion in *Payner* illustrates this process. By emphasizing the deterrence rationale and the balancing test conducted under it instead of judicial integrity, the Court focused on the reliability of the evidence and the harm to society suffered when such evidence is excluded rather than upon how it was obtained. Thus, the Court did not inquire whether the admission of such evidence tainted the integrity of the courts. This focus on the harm suffered by exclusion facilitates the admission of such evidence. See 100 S. Ct. at 2445-46 & text and notes at notes 49-54 *supra*. See also *Rakas v. Illinois*, 439 U.S. 127, 137-38 (1978); *Alderman v. United States*, 394 U.S. 165, 174-75 (1969).

rule in the past two decades, the Court's emphasis in this area has shifted. This shift has contributed to the current inability of third parties to invoke the exclusionary rule.

The district court in *Payner* perceived a two-fold rationale behind the exclusionary rule: (1) the deterrence of future governmental misconduct, and (2) the preservation of judicial integrity.⁶⁶ The first rationale, as applied, focuses on the truth-seeking function of the court by asking whether the deterrence gained by exclusion outweighs the harm suffered by depriving the trier of fact of reliable evidence.⁶⁷ The second rationale involves the notion that the administration of justice must remain untainted. In this light, the need for evidence must be subordinated to the requirement that the government abide by its own laws while imposing them on its citizens.⁶⁸ Prior to the Court's re-evaluation of the rule, this latter policy was recognized as a separate and distinct justification for the exclusion of evidence. Indeed, in *Weeks v. United States*,⁶⁹ the case which introduced the exclusionary rule as a device for suppressing evidence seized in violation of the fourth amendment, the Court stressed the importance of preserving judicial integrity as a basis for the rule's creation and use.⁷⁰

The most articulate expressions of this underlying justification for the exclusionary rule are contained in the famous dissents in *Olmstead v. United States*.⁷¹ In that decision, the majority held that the rule would not be applied to exclude evidence obtained through illegal wiretaps where there had been no violation of the defendant's proprietary interests.⁷² In his sharp criticism of this result, Justice Brandeis wrote that evidence obtained illegally must be excluded "in order to preserve the judicial process from contamination."⁷³ He reasoned that because the government acts as "the omni-present teacher," its use of

⁶⁶ *United States v. Payner*, 434 F. Supp. at 123-24.

⁶⁷ This is the *Janis* balancing test which the district court applied in its analysis of when the exclusionary rule is to be invoked. See note 27 *supra*.

⁶⁸ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 659 (1961); *Olmstead v. United States*, 277 U.S. 438, 470, 485 (1928) (Holmes, J., & Brandeis, J., dissenting); J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 85 (1976); cf. Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1078 (1975) (lawyer's duty as advocate for the client versus duty to the truth seeking function of the courts). The *Olmstead* dissents are discussed at text and notes at notes 71-75 *infra*.

⁶⁹ See 232 U.S. 383 (1914). The defendant in *Weeks* was convicted of illegal gambling operations. *Id.* at 386. The evidence against the defendant, personal papers taken from his quarters, was seized without a warrant. *Id.* Reasoning that an exclusionary rule was necessary in order to implement the guarantees of the fourth amendment, the Court stated:

If letters and private documents can thus be seized and held against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Id. at 393.

⁷⁰ *Id.* at 392, 394.

⁷¹ 277 U.S. 438 (1928).

⁷² *Id.* at 464-65. *Olmstead* was overruled by the Supreme Court in *Katz v. United States*, 389 U.S. 347, 352-53 (1967).

⁷³ 277 U.S. at 484 (Brandeis, J., dissenting).

illegal practices to gather evidence can have disastrous effects on a nation pledged to the rule of law.⁷⁴ He continued:

Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution.⁷⁵

Thus, in Justice Brandeis' opinion, the government calls its own validity into question when it indulges in lawbreaking to convict its lawbreakers. To protect their own integrity, courts must not aid in this process.

This rationale was adopted by the Supreme Court in several subsequent decisions in which illegally seized evidence *was* excluded.⁷⁶ For example, in *Mapp v. Ohio*,⁷⁷ the Court extended the exclusionary rule to the States through the operation of the fourteenth amendment.⁷⁸ Responding to Justice Cardozo's famous lament that "[t]he criminal is to go free because the constable has blundered,"⁷⁹ the *Mapp* Court observed that "[t]he criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."⁸⁰

While the most recent decisions, including *Payner*, have continued to pay at least lip service to the independent validity of the judicial integrity rationale,⁸¹ the bulk of the decisions of the past decade have looked primarily, if not exclusively, toward the deterrence rationale as the only legitimate justification for invoking the exclusionary rule.⁸² This trend led at least one commentator to conclude that the Supreme Court had extinguished the judicial integrity

⁷⁴ *Id.* at 485.

⁷⁵ *Id.* Although less frequently quoted, similar sentiments were expressed by Justice Holmes, who stated in part:

[W]e must consider the two objects of desire, both of which we can not have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which evidence is to be obtained. . . . We have to choose, and for my part I think it is a less evil that some criminals should escape than that the Government should play an ignoble part.

Id. at 470. (Holmes, J., dissenting).

⁷⁶ *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 659-60 (1961); *Elkins v. United States*, 364 U.S. 206, 222-23 (1960); *McNabb v. United States*, 318 U.S. 332, 340-41, 343 (1943).

⁷⁷ 367 U.S. 643 (1961).

⁷⁸ *Id.* at 655. The defendant in *Mapp* was convicted of possession of pornographic materials. *Id.* at 643. The evidence was obtained through an illegal search aimed at finding a suspect in a bombing and at discovering gambling paraphernalia. *Id.* at 644-45. The pornographic materials were uncovered in the course of this search. *Id.* at 645. The Court ruled that this evidence must be excluded. *Id.* at 655.

⁷⁹ *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

⁸⁰ *Mapp v. Ohio*, 367 U.S. at 659.

⁸¹ *See United States v. Payner*, 100 S. Ct. at 2446 n.8. *See also Dunaway v. New York*, 442 U.S. 200, 217-18 (1979) (referring to the "two policies behind the use of the exclusionary rule").

⁸² *See, e.g.*, *United States v. Janis*, 428 U.S. 433, 458 n.35 (1976); *Stone v. Powell*, 428 U.S. 465, 484-85 (1976); *See generally Rakas v. Illinois*, 439 U.S. 128 (1978).

rationale as an independent ground for applying the rule.⁸³ In this same period, attacks upon the rule cited empirical research which challenged the deterrent impact of the rule's use.⁸⁴ Although no conclusive data on the subject have ever been compiled, this early research indicated that the exclusionary rule's impact on the deterrence of future illegality was minimal or non-existent,⁸⁵ thus increasing the pressure to limit the rule. More recent research has revealed that such conclusions were premature at best and has produced more positive indications of the rule's deterrent impact.⁸⁶ Yet the pressures to limit the rule have not abated.

By focusing on deterrence rather than judicial integrity, the courts are much more likely to deny application of the rule. The balancing test utilized under the deterrence rationale weighs the benefits to society in deterring future illegalities against the harm incurred by allowing a guilty person to go free.⁸⁷ Such a test inherently favors the admission of illegally obtained evidence

⁸³ See Comment, *Judicial Integrity for the Exclusionary Rule Rejected*: United States v. Janis, 1977 WASH. U. L.Q. 129, 138 [hereinafter cited as Comment, United States v. Janis]. The commentator based his opinion on United States v. Janis, 428 U.S. 433 (1976). The Janis case is discussed at note 27 *supra*. The Janis Court stated: "The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose." 428 U.S. 433, 459 n.35. Similar sentiments were expressed in Stone v. Powell, 428 U.S. 465 (1976): "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *Id.* at 486 (1976). See also Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415 (1971) (Burger, C. J., dissenting).

⁸⁴ United States v. Ceccolini, 435 U.S. 268, 281 n.1 (1978) (Burger, C. J., concurring); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415 (1971) (Burger, C. J., dissenting).

⁸⁵ See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 678-709 (1970). Even if it could be established, however, that the exclusionary rule does not have the desired deterrent effect in the more mainstream areas of police activities, the deterrent impact on bad faith police misconduct would remain most effective. See text and notes at notes 230-32 *infra*. Hence, even if the exclusionary rule were to be restricted or eliminated in situations involving routine police activity, its deterrent effect against the type of misconduct present in *Payner* would justify its retention to exclude evidence so obtained. Cf. United States v. Peltier, 422 U.S. 531, 537-39, 542 (1975) (majority's reliance, in part, on a good faith versus bad faith test in its decision not to exclude evidence seized by border patrol officers who believed their actions were proper). See also Justice Powell's concurring opinion in *Brown v. Illinois*, 422 U.S. 590 (1975), in which he argued that the government's burden to show that evidence obtained subsequent to the occurrence of an illegal search was not a product of that illegality should be much greater in cases of bad faith misconduct than it should in cases of "technical" violations. *Id.* at 610-12 (Powell, J., concurring in part).

⁸⁶ Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974). Professor Canon writes:

[These more recent findings] cast considerable doubt on earlier conclusions that the rule is ineffective in deterring illegal police searches. To be sure, such an assertion may have been appropriate at one time, and as some of our evidence suggests, there are still circumstances in which the rule has minimal impact on police behavior. But these circumstances are comparatively few. Most of our data do not permit such an inference. Indeed, a good many of the findings support a positive inference — that the rule goes far toward fulfilling its purpose.

Id. at 725-26.

⁸⁷ See Comment, United States v. Janis, *supra* note 83 at 137.

because the deterrence effect is immeasurable.⁸⁸ For example, the choice presented by a motion to exclude an illegally seized murder weapon presents a balance between the abstract benefits of preventing such seizures in the future and the immediate and tangible costs of setting the murderer free. The tendency to sacrifice future benefits of an unknown quantity to prevent a present and visible loss can make the test outcome determinative.⁸⁹ Thus, principal reliance on the policy of deterrence instead of judicial integrity makes it easier to reach results such as the *Payner* decision.⁹⁰

The choice to de-emphasize the judicial integrity rationale, much like the choice to further limit or eliminate the exclusionary rule itself, fundamentally rests on a judgment regarding the effect that tainted evidence will have upon being admitted into courts of law. The present Court seems unconcerned with the effect that tainted evidence will have on the integrity of the courts.⁹¹ Those who are more concerned, however, with the harm which may be inflicted by the admission of such evidence will be more desirous of retaining the rationale and the exclusionary rule itself.⁹²

In summary, there are still two separate policies — the deterrence of future illegality and the preservation of judicial integrity — which support the existence of the exclusionary rule. In the past two decades, however, the Supreme Court has restricted the application and questioned the validity of the second rationale. This emphasis on deterrence at the expense of judicial integrity has facilitated the narrowing of the rule which has occurred in this period.

II. THE INADEQUACY OF CONSTITUTIONAL REMEDIES TO AID THIRD PARTIES

A. *Rejection of Target Standing under the Fourth Amendment*

By focusing on the deterrence rationale as the justification for the exclusionary rule, the Supreme Court has in recent years cut back on the rule's application. A major product of this narrowing process has been restricted

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ It is perhaps worth noting that if the rule is to have its desired deterrent effect, law enforcement officers must have workable standards to guide their conduct in the field. See Simons, *California's Rule of Vicarious Exclusion: Who May Challenge the Constable's Error?*, 19 SANTA CLARA L. REV. 319, 324, 327-28 (1979). In this light, the dilution of the rule in recent years may produce a climate of uncertainty in the minds of the police who may begin to feel that the Supreme Court will be unwilling to order the suppression of evidence obtained illegally. This process may make ineffective deterrence a self-fulfilling prophecy. *Id.* at 324-28. The commentator writes:

[T]here seems to be good reason to question the extent to which fourth amendment rights exist independent of the exclusionary rule. . . . [J]udicial failure to punish misconduct by exclusion is viewed by the police as a sanction of their behavior. Therefore, a standing limitation seems likely to increase police disregard of the rights of those who are searched in order to find evidence that can also be used against a third person.

Id. at 325-26. (footnote omitted).

⁹¹ See *Stone v. Powell*, 428 U.S. 465, 486 (1976).

⁹² The de-emphasis of judicial integrity also restrains the ability of the Court to limit the exclusionary rule to cases of bad faith misconduct. Comment, *Janis v. United States*, *supra* note 83, at 139. The Court has indicated that such a restriction of the exclusionary rule may be proper. See note 85 *supra*.

standing principles under the fourth amendment. Although it is now clear that these restrictions preclude vicarious application of the rule under the fourth amendment, such a limitation was less certain two decades ago. It was then that the Supreme Court moved beyond the proprietary interest test of *Olmstead v. United States*,⁹³ under which one was required to demonstrate a violation of such an interest in order to invoke the rule.⁹⁴ The Court, in *Jones v. United States*,⁹⁵ laid a foundation for a potentially broad reading of fourth amendment standing through dictum defining the victim possessing standing to challenge an illegal search as "one against whom the search was directed."⁹⁶ Subsequent cases refined this notion to include persons having a privacy expectation in the area that was searched.⁹⁷ In the past decade, the Court has combined this notion of standing based on privacy expectations with the emphasis on deterrence as the primary justification for the exclusionary rule. The net result has been to deny fourth amendment standing to third persons — persons whose expectations of privacy were not violated by the illegal acts.⁹⁸ Under this approach, the Court has concluded that the incremental increase in deterrence which would result

⁹³ 277 U.S. 438 (1928).

⁹⁴ See text at note 61 *supra*.

⁹⁵ *Jones v. United States*, 362 U.S. 257 (1960).

⁹⁶ *Id.* at 261. This broadening occurred in order to note a person who lacked a genuine proprietary interest in the place which was searched. The petitioner in *Jones* was convicted on narcotics charges. *Id.* at 258. He had been arrested pursuant to a search of the apartment where he had been staying. *Id.* at 258-59. The district court denied his motion to suppress on standing grounds because he failed to allege a proprietary interest in either the apartment or the narcotics that were seized. *Id.* at 259. In reversing this decision, the Supreme Court enunciated the "legitimately on the premises" standard: "[A]nyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress. . . ." *Id.* at 267. The Court inquired into whether a person's presence was such that he or she might "invoke the privacy of the premises searched." *Id.*

Jones also enunciated a second principle, known as "automatic standing" which granted standing to persons in situations where possession of the contraband was, as in *Jones*, an essential element of the charge. See *id.* at 263-64. This portion of *Jones* was superceded in *Simmons v. United States*, 390 U.S. 377 (1968), which held that testimony necessary at a suppression hearing to demonstrate a possessory interest in the contraband would be inadmissible at trial regardless of the ruling made on the motion to suppress. *Id.* at 394. See also *Brown v. United States*, 411 U.S. 223, 227-28 (1973).

⁹⁷ In *Katz v. United States*, 389 U.S. 347 (1967) the Court ruled in favor of suppressing phone conversations obtained by illegal wiretaps of a public phone. Stating that the fourth amendment "protects people, not places," the Court held that what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52.

In *Mancusi v. DeForte*, 392 U.S. 364 (1968), the Court held that a union official had privacy rights protected by the fourth amendment in open office space shared with other union officials. *Id.* at 368-69. The Court stated:

In . . . a "private" office, DeForte would have been entitled to expect that he would not be disturbed except by personal or business invitees. . . . It seems to us that the situation was not fundamentally changed because DeForte shared an office with other union officers. . . . This expectation was inevitably defeated by the entrance of state officials.

Id. at 369.

⁹⁸ See *Alderman v. United States*, 394 U.S. 165 (1969). In *Alderman*, convictions were obtained in part because of evidence obtained through illegal electronic surveillance. The Court rejected any ability on the part of those petitioners whose privacy interests were not violated to assert "an independent constitutional right of their own to exclude relevant and probative evidence because it was seized from another in violation of the Fourth Amendment." *Id.* at 174.

from extending the rule to benefit third parties would be insufficient to offset the harm inflicted upon society by such an extension.⁹⁹ This marginal deterrence analysis seeks to restrict the exclusionary rule to "those areas where its remedial objectives are most efficaciously served."¹⁰⁰

The clearest statement of the fourth amendment's standing restrictions in recent cases is found in *Rakas v. Illinois*.¹⁰¹ *Rakas* is the culmination of two decades of fourth amendment standing law. The *Rakas* Court characterized the issue of who may invoke the exclusionary rule as one of substantive fourth amendment law centering on privacy rights rather than a matter of "standing."¹⁰² The petitioners in *Rakas* advanced a "target standing" theory, arguing that the fourth amendment should protect any person at whom an illegal search is directed.¹⁰³ The Court rejected this argument.¹⁰⁴ The Court's

⁹⁹ The *Alderman* Court reasoned that the deterrence policy of the rule would be served by exclusion in favor of those defendants whose privacy rights had been violated. *Id.* The Court continued:

[W]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

Id. at 174-75.

¹⁰⁰ *United States v. Calandra*, 414 U.S. 338, 348 (1974). The Court in *Calandra* concluded that illegally seized evidence could be presented to a grand jury. *Id.* at 35. The decision rested in part on the traditional powers accorded to that institution. *Id.* at 349. The Court, however, also decided that the incremental deterrence from excluding such evidence from a grand jury proceeding was not sufficient and did not justify its exclusion. *Id.* at 35-52.

As *Calandra* demonstrates, this marginal deterrence has allowed the Court to narrow the application of the exclusionary rule in cases involving issues other than standing. In *United States v. Ceccolini*, 435 U.S. 268 (1978), the Court held that oral evidence procured following an unconstitutional search can be admitted when the witness demonstrates a willingness to testify independent of the illegality of the search. *Id.* at 276-77. Suppression of such evidence where the witness voluntarily testifies carries little deterrence value, because that witness was likely to come forward on his or her own. *Id.*

The marginal deterrence test was also applied by the Court in *Stone v. Powell*, 428 U.S. 465 (1978), to deny a collateral challenge to a search conducted by state law enforcement agencies on a habeas corpus proceeding in federal court. *Id.* at 493. The deterrent impact of allowing such collateral challenges was insufficient when the petitioner had had the opportunity to raise the claim in state court. *Id.* In *United States v. Janis*, 428 U.S. 433 (1976), the Court refused to suppress illegally seized evidence in a civil assessment action filed by the IRS where the evidence had previously been suppressed in a state criminal proceeding. *Id.* at 437-38. This prior suppression had already achieved the desired deterrent effect, and any incremental increase that would result from suppression in the civil assessment action could not justify the social costs of exclusion. *Id.* at 453-54. The Court distinguished *Elkins v. United States*, 364 U.S. 206 (1960), see text and notes at notes 153-54 *infra*, on the ground that *Elkins* involved a subsequent criminal proceeding. *United States v. Janis*, 428 U.S. at 458.

¹⁰¹ 439 U.S. 128 (1978).

¹⁰² See *id.* at 138-39. The *Rakas* opinion was written by Justice Rehnquist. *Id.* at 129. Justice Powell's opinion in *Payner* continued to use the rubric of standing. *United States v. Payner*, 100 S. Ct. at 2444.

¹⁰³ The petitioners in *Rakas* based their target standing theory on the broad dictum of *Jones v. United States*, 362 U.S. 257 (1960). See *Rakas v. Illinois*, 439 U.S. at 132-33. That dictum in *Jones* defined the victim of a search as "one against whom the search was directed." 363 U.S. at 261. The *Jones* case is discussed at note 95 *supra*.

¹⁰⁴ *Rakas v. Illinois*, 439 U.S. at 133.

analysis of this area of fourth amendment law, grounded on personal rights¹⁰⁵ and marginal deterrence¹⁰⁶ requires a criminal defendant to show an intrusion into his or her own privacy rights.¹⁰⁷ Thus the petitioners, who were convicted on the basis of evidence seized from an automobile in which they had been passengers but in which they claimed no privacy interest,¹⁰⁸ were unable to invoke the exclusionary rule.¹⁰⁹

Despite this rejection of target standing in *Rakas*, Payner did advance the argument that his fourth amendment rights had been violated by the search of Wolstencroft's briefcase because he and persons similarly situated, rather than Wolstencroft, were the genuine targets of the IRS search.¹¹⁰ It is difficult to imagine, however, that Payner had an expectation of privacy in the briefcase.¹¹¹ Because of this lack of a privacy expectation, the rationale of *Rakas* clearly barred him from invoking the fourth amendment or fashioning a successful "target standing" theory under it. After *Rakas* a target theory for applying the exclusionary rule cannot be developed on fourth amendment grounds. Consequently, any hope for vicarious exclusion of illegally seized evidence in cases of outrageous governmental misconduct must come from another source.

B. Due Process and Outrageous Conduct

Although the fourth amendment is barred as a device for the suppression of evidence to benefit third parties, the due process clause of the fifth amendment, with its more general notions of fair play, presents another potential constitutional ground upon which to base the same result. The due process clause was in fact relied on by the district court in *Payner* in its decision to exclude the evidence seized as a result of the search of Wolstencroft's briefcase.¹¹² Payner also raised this argument before the Supreme Court.¹¹³ As applied by the district court, due

¹⁰⁵ See *id.* at 133-134.

¹⁰⁶ See *id.* at 137.

¹⁰⁷ *Id.* at 138.

¹⁰⁸ *Id.* at 130-31.

¹⁰⁹ *Id.* at 148. After rejecting the petitioners' target standing argument, the Court considered whether the *Jones* concept of "legitimacy on the premises," see note 95 *supra*, extended to this situation. In rejecting this argument as well, the Court stated that the "legitimacy on the premises" notion would no longer be controlling. *Id.* at 148. The petitioners' legitimate presence in the automobile could not alter the result where they lacked a privacy interest in that place. *Id.* Justice White dissented, stating that the majority was returning to the proprietary interest requirement of *Olmstead v. United States*, 277 U.S. 438 (1928), that had been rejected in *Katz v. United States*, 389 U.S. 347 (1967). *Rakas*, 439 U.S. at 162-63 (White, J., dissenting). Justice Powell attempted to reassure the dissenters that such was not the case. In his concurrence, he wrote that the majority had merely focused on requiring a demonstration of a "legitimate expectation of privacy." 439 U.S. at 150 (Powell, J., concurring) (emphasis in original).

¹¹⁰ Brief for the Respondent at 36-37, *United States v. Payner*, 100 S. Ct. 2439 (1980).

¹¹¹ A depositor does not possess any privacy interest in the records of that deposit maintained by a bank or savings institution. *United States v. Miller*, 425 U.S. 435, 442-43 (1976). Payner argued that this general rule should not have applied to him because of the secrecy provisions of the Bahamian banking laws. Brief for the Respondent at 37-38, *United States v. Payner*, 100 S. Ct. 2439 (1980). This argument was rejected by the Court. 100 S. Ct. at 2444 n.4. No mention of this point appears in the dissent.

¹¹² 434 F. Supp. at 133.

¹¹³ Brief for the Respondent at 27-34.

process would require the exclusion of evidence obtained in a manner demonstrating "bad faith hostility" toward the constitutional rights of any person.¹¹⁴ The district court found that the misconduct present in *Payner* amounted to that type of shocking conduct which the Supreme Court in *Rochin v. California*¹¹⁵ held incompatible with basic notions of due process.¹¹⁶ In *Rochin*, the key evidence against the defendant consisted of two morphine capsules, which were forcibly extracted from him by the police's use of a stomach pump.¹¹⁷ The *Rochin* Court overturned the conviction of the defendant, ruling that the evidence should have been excluded on due process grounds.¹¹⁸ Similarly, the district court in *Payner* concluded that the grossly improper fashion by which the Government obtained the evidence against Payner justified its exclusion under the same provision.¹¹⁹

In the decade preceding *Payner*, the Supreme Court had hinted that illegal government activities could indeed become so outrageous as to allow suppression of evidence thereby obtained regardless of whether that conduct violated a right of the defendant.¹²⁰ The district court in *Payner* decided that the government had passed beyond that level of outrageousness in this case and that suppression was justified under due process despite Payner's lack of standing under the fourth amendment.¹²¹ Payner argued that the Government's open admission that its agents had violated the constitutional rights of Wolstencroft

¹¹⁴ *United States v. Payner*, 434 F. Supp. at 129.

¹¹⁵ 342 U.S. 165 (1952).

¹¹⁶ See *United States v. Payner*, 434 F. Supp. at 127-29.

¹¹⁷ 342 U.S. at 166.

¹¹⁸ *Id.* at 172.

¹¹⁹ 434 F. Supp. at 129.

¹²⁰ In *United States v. Russell*, 411 U.S. 423 (1973), the respondent was convicted of manufacturing narcotics. *Id.* at 424. A primary ingredient had been supplied to Russell by a government agent. *Id.* After holding that Russell's predisposition precluded the defense of entrapment, *id.* at 430-31, the Court went on to consider whether the government's action violated the standard set forth in *Rochin*, stating: "While we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . the instant case is distinctly not of that breed." *Id.* at 431-32 (emphasis supplied). The Court went on to state that the judiciary may not exercise a "chancellor's foot" veto over convictions of which it does not approve. *Id.* at 435. The issue arose again in the factually similar case of *Hampton v. United States*, 425 U.S. 484 (1976). In *Hampton*, the defense of entrapment was again precluded by the defendant's predisposition. *Id.* at 490. In a plurality opinion joined by Chief Justice Berger and Justice White, Justice Rehnquist stated that the due process clause could not be invoked by a defendant whose rights had not been violated. *Id.* (plurality opinion). Justice Powell, joined by Justice Blackmun, concurred in the judgment, but did not accept the plurality's *per se* rule on the due process issue, stating: "I do not understand *Russell* . . . to have gone so far. . . . [*Russell*] did not require the Court to consider whether overinvolvement of Government agents . . . could ever reach such proportions as to bar conviction of a predisposed defendant as a matter of due process." *Id.* at 492 (Powell, J., concurring) (footnotes omitted). See also *United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973). There Judge Friendly wrote: "Governmental 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction." *Id.* at 677.

¹²¹ 434 F. Supp. at 133; Note, *The Briefcase Caper Standing and Due Process Exclusion: United States v. Payner*, 434 F. Supp. 113 (N.D. Ohio 1977), 10 CONN. L. REV. 210, 220-21 (1977) [hereinafter cited as Note, *Due Process Exclusion*].

flaunted that illegality and demonstrated the sort of attitude condemned in *Rochin*.¹²² To the district court, Wolstencroft's absence as a party made vicarious exclusion essential to deter such outrageous activities in the future.¹²³ Without vicarious exclusion, the district court reasoned, the situation would present a classic scenario "capable of repetition yet evading review."¹²⁴ The district court believed that its standard of intentional bad faith created a much higher threshold than that present under fourth amendment law, where a violation may be founded upon a technical defect, such as an inadequately executed warrant.¹²⁵ Because due process exclusion, under the district court's standard, could only occur in cases of intentional bad faith, the court reasoned that this exclusion need not be limited by any standing restrictions.¹²⁶

The Supreme Court's prior hints that outrageous conduct might permit suppression of evidence without regard to standing restrictions ostensibly laid a foundation for the conclusion of the district court that due process would support exclusion in this case. This due process issue was not properly before the Supreme Court, since the court of appeals did not pass on the question.¹²⁷ In *Payner*, however, the Court retreated from its prior hints, emphasizing that it considers the argument that due process may require vicarious suppression in instances of outrageous conduct to be unpersuasive.¹²⁸ Thus, suppression of evidence obtained through activities of the sort present in *Payner* must come under a non-constitutional device. That device is the supervisory power.

¹²² Brief for Respondent at 33.

¹²³ See 434 F. Supp. at 129 n.65.

¹²⁴ *Id.*

¹²⁵ See *id.* The district court considered the due process threshold in light of the *Janis* balancing test. Deterrent effect is low where the government agents act in good faith. *Id.* Bad faith activities, however, change the balance in favor of exclusion. *Id.* This analysis has been characterized as a trade-off between standing and a "subjective" test of the government's misconduct. Note, *Due Process Exclusion*, *supra* note 121, at 219. Instead of focusing on whether the Government's search violated a privacy right of the defendant, the court focused on the subjective bad faith intent of the Government agents. *Id.*

¹²⁶ 434 F. Supp. at 129 n.65. While *Payner* was before the Sixth Circuit, the Government contended that *Rochin* applies only to those situations where the shocking conduct of the government involves physical violence. Brief for the United States at 28, *United States v. Payner*, 590 F.2d 206 (1979). In response, *Payner* pointed to cases involving exclusion under due process where there had been no physical violence. See, e.g., *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957); *Pyle v. Kansas*, 317 U.S. 213, 216 (1942) (perjured testimony); *Jackson v. Denno*, 378 U.S. 363, 376-77 (1964); *Spano v. New York*, 360 U.S. 315, 323-24 (1959) (improperly obtained confessions); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (government's withholding of favorable evidence). The issues in those classes of cases, however, involve the reliability of evidence presented or obtained in questionable circumstances. In *Payner*, as in most cases involving illegally conducted searches, there was no suggestion that the evidence was unreliable. See 100 S. Ct. at 2442-43.

¹²⁷ The court of appeals expressly declined to decide the due process issue. 590 F.2d at 207.

¹²⁸ See *United States v. Payner*, 100 S. Ct. at 2447 n.9. It is worth noting that Justice Powell's footnote cites *Hampton v. United States*, 425 U.S. 484 (1976). In *Hampton*, Justice Powell had taken issue with a *per se* rule on due process. *Id.* at 492-93. See note 120 *supra*.

III. THIRD PARTY EXCLUSION UNDER THE SUPERVISORY POWER

A. *The Nature and Application of the Supervisory Power*

The supervisory power of the federal courts¹²⁹ is traceable in theory back to pre-eighteenth century England.¹³⁰ Its present form, however, appears to be a relatively recent judicial formulation.¹³¹ The supervisory power exists as a non-constitutional power of the federal judiciary to insure that the administration of justice in federal cases,¹³² especially criminal prosecutions, is conducted in a fair and orderly fashion.¹³³ Because it is non-constitutional in nature, it may be used to require adherence to standards exceeding minimum constitutional guarantees.¹³⁴ Common applications of the power have been to protect the trial proceeding itself from contamination that would damage the court's integrity. Such applications have included relaxing procedural requirements,¹³⁵ controlling the discretion¹³⁶ or excess partisan conduct¹³⁷ of the trial judge, protecting the integrity of the jury system,¹³⁸ and maintaining controls over potentially unreliable evidence.¹³⁹ Certain exercises of the supervisory power have provoked congressional response,¹⁴⁰ and it appears that Congress possesses the authority to define the limits of its application.¹⁴¹

¹²⁹ See generally Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963) [hereinafter cited as Note, *The Supervisory Power*]; Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L. J. 1050 (1965) [hereinafter cited as Note, *The Judge-Made Power*].

¹³⁰ Note, *The Judge-Made Power*, *supra* note 129, at 1052-53. A general rule-making power over procedural matters was exercised by the King's Court in Westminster long before the establishment of the American colonies. *Id.* The commentator writes that the first recognition of this sort of power by the United States Supreme Court appears in 1792. *Id.* at 1054 n.27. At that time, the Court indicated that it would make alterations in its practices and procedures "as circumstances may render necessary." 2 U.S. (2 Dall.) 414 (1792).

¹³¹ See Note, *The Judge-Made Power*, *supra* note 129, at 1056.

¹³² The supervisory power is limited to cases in the federal judiciary. See note 216 *infra*.

¹³³ Note, *The Judge-Made Power*, *supra* note 129, at 1050.

¹³⁴ *Id.*

¹³⁵ *Mortensen v. United States*, 322 U.S. 369, 371-72 (1944) (supplementing the record with a transcript not technically part of it in order to treat the merits fully); *Cf. Helwig v. United States*, 162 F.2d 837, 840 (6th Cir. 1947) (granting of new trial in order to allow the presentment of evidence that had not been produced at the first proceeding).

¹³⁶ *Marshall v. United States*, 360 U.S. 310, 312-13 (1959) (new trial granted where trial judge questioned jurors rather than declaring a mistrial after certain inflammatory newspaper articles had been shown to the jury).

¹³⁷ *Offutt v. United States*, 348 U.S. 11, 17-18 (1954) (new trial granted in response to biased conduct of trial judge who had displayed personal animosity and lack of proper judicial restraint in protracted dispute with counsel).

¹³⁸ *Ballard v. United States*, 329 U.S. 187 (1946); *Thiel v. United States*, 328 U.S. 217 (1946). The significance of these cases is discussed in text and notes at notes 186-92 *infra*.

¹³⁹ *Mesarosh v. United States*, 352 U.S. 1, 14 (1956) (new trial granted after government came forward with discovery that its key witness might have committed perjury).

¹⁴⁰ See *Jencks v. United States*, 353 U.S. 657 (1957), holding that the defendant was entitled to inspect certain reports given to the F.B.I. by paid informants in order to impeach the credibility of the witnesses. *Id.* at 668-69. Congress responded by codifying the result in the Jencks Act, 18 U.S.C. § 3500 (1976 & Supp. III 1979).

¹⁴¹ See *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959); See also *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941); Brief for the United States at 18-19, *United States v. Payner*, 100 S. Ct. 2439 (1980).

It has been argued that the power must be confined to cases of in-house judicial self-policing.¹⁴² Nevertheless, from its modern inception in *McNabb v. United States*,¹⁴³ it has been used to counteract improprieties of the executive branch that do not amount to constitutional violations. In *McNabb*, the defendants were arrested for the murder of an IRS agent.¹⁴⁴ In violation of a federal statute requiring prompt arraignment,¹⁴⁵ the defendants were held for a protracted period of time after which confessions were obtained.¹⁴⁶ The Court excluded these confessions, which were the crux of the Government's case,¹⁴⁷ on the basis of the supervisory power.¹⁴⁸ This decision was not based on fears surrounding the reliability of the evidence raised by the spectre of involuntary confessions.¹⁴⁹ Rather, the *McNabb* Court focused on the Government's misconduct and reasoned that it could not allow itself to be made an accomplice to such willful disregard of the law.¹⁵⁰ Thus, by reaching beyond the judicial sphere to counter improper activity of the executive branch, the *McNabb* Court presented a use of the supervisory power different in kind from that defined by those who would restrict it to judicial self-policing.¹⁵¹

After *McNabb*, the supervisory power was applied to suppress tainted evidence in several other decisions of the Court,¹⁵² including *Elkins v. United States*.¹⁵³ The power was used in *Elkins* to eliminate the so-called "silver-platter doctrine." Under this doctrine federal agents could receive from state authorities evidence seized by state agents in violation of the fourth amendment. The evidence would be admissible in federal prosecutions.¹⁵⁴ *Elkins* and other

¹⁴² Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 182 (1969); See *United States v. Payner*, 100 S. Ct. at 2447 (Burger, C.J., concurring).

¹⁴³ 318 U.S. 332 (1943).

¹⁴⁴ *Id.* at 333.

¹⁴⁵ 28 Stat. 416 (1896). This requirement is currently contained in FED. R. CRIM. P. 5(a).

¹⁴⁶ *McNabb v. United States*, 318 U.S. at 334-38.

¹⁴⁷ *Id.* at 338.

¹⁴⁸ *Id.* at 340-41.

¹⁴⁹ See Note, *The Supervisory Power*, *supra* note 129, at 1660 ("[N]o finding or allegation of coercion was required, or even relevant." (footnote omitted)); Note, *The Judge-Made Power*, *supra* note 129, at 1062. But see *Upshaw v. United States*, 335 U.S. 410, 429 (1948) (Reed, J., dissenting).

¹⁵⁰ *McNabb v. United States*, 318 U.S. at 345. The *McNabb* Court stated: "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." *Id.* It is critical to note, however, that the Court did not find application of the exclusionary rule to be mandated by the statute. *Id.* Although it did see itself as following congressional policy, the choice to exclude was the Court's own. *Id.* See Note, *The Judge-Made Power*, *supra* note 129, at 1063.

¹⁵¹ See Note, *The Supervisory Power*, *supra* note 129, at 1661.

¹⁵² *Mallory v. United States*, 354 U.S. 449, 452-53, 455 (1957); *Mesorosh v. United States*, 352 U.S. 1, 14 (1956); *Communist Party v. Subversive Activities Control Bd.*, 351 U.S. 115, 124-25 (1956); *Rea v. United States*, 350 U.S. 214, 216-17 (1956); *Upshaw v. United States*, 335 U.S. 410, 414 & n.21 (1948); *United States v. Valencia*, 541 F.2d 618, 621-22 (6th Cir. 1976).

¹⁵³ 364 U.S. 206, 216 (1960).

¹⁵⁴ Prior to *Elkins*, such evidence would not have been excluded, since the exclusionary remedy would not have applied where the federal agents had not participated in the illegal search. Before *Elkins* federal agents also could turn over to state authorities material they had seized in violation of the fourth amendment. Such materials, which would have been inadmissible in federal court under *Weeks*, would not have been excluded in state courts. See *Wolf v. Colorado*, 338 U.S. 25 (1949).

cases suppressing tainted evidence applied the same two policies underlying the use of the exclusionary rule in other contexts — namely, the deterrence of future illegality and the preservation of judicial integrity.¹⁵⁵ It appears, however, that cases decided under the supervisory power place greater emphasis on judicial integrity.¹⁵⁶ Nevertheless, the supervisory power is not a judicial wildcard. In addition to the recognized power of Congress to prescribe the limits of its application,¹⁵⁷ the Court has for some time realized that the power must be used sparingly, especially in regard to suppressing reliable evidence.¹⁵⁸ In spite of the current emphasis on deterrence as the basic justification for invoking the exclusionary rule,¹⁵⁹ judicial integrity has not been altogether absent from the most recent cases.¹⁶⁰ Thus the Court has been unwilling to abandon it as a relevant factor in search and seizure law.

Nevertheless, the desire of the courts to preserve their integrity does not automatically justify an independent non-constitutional basis for invoking the exclusionary rule. Although this use of the supervisory power is historical fact, two specific objections to it, raised by the Government in *Payner*, warrant consideration. These objections were not relied on by the Court, but are substantial enough to deserve attention here. The first is that the doctrine of separation of powers between the branches of the federal government will not permit the supervisory power to be used to regulate the activities of the executive branch.¹⁶¹ This problem is diminished in part by the Court's own recognition that the power must be used with discretion.¹⁶² Moreover, the nature of the supervisory power, as exercised in *McNabb*, is not that of affirmatively intruding into the affairs of the executive. Rather, the Court was concerned with executive practices only insofar as they threatened the integrity of a criminal proceeding.¹⁶³

¹⁵⁵ See, e.g., *Elkins v. United States*, 364 U.S. at 217, 222-23; *McNabb v. United States*, 318 U.S. 343, 347.

¹⁵⁶ The Court stated in *Communist Party v. Subversive Activities Control Bd.*, 351 U.S. 115 (1956):

The untainted administration of justice is one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See [*McNabb*]. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

Id. at 124. This approach was evident in *McNabb* as well: "The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." *McNabb v. United States*, 318 U.S. at 347.

¹⁵⁷ See text and note at note 141 *supra*.

¹⁵⁸ *Lopez v. United States*, 373 U.S. 427, 440 (1963).

¹⁵⁹ See text and notes at notes 82-83 *supra*.

¹⁶⁰ See text and note at note 81 *supra*. See also *United States v. Russell*, 411 U.S. 423, 431-32 (1973).

¹⁶¹ See Brief for the United States at 46, *Payner*, 100 S. Ct. at 2439 (1980).

¹⁶² *Lopez v. United States*, 373 U.S. 427, 440 (1963). In *Lopez* the Court suggested that the use of the supervisory power should be limited to examples of "manifestly improper" government conduct, such as a statutory violation. *Id.* No such misconduct was present in *Lopez*. *Id.* *Payner*, however, involved conduct which was both unconstitutional and criminal 100 S. Ct. at 2450 (Marshall, J., dissenting).

¹⁶³ See Note, *The Judge-Made Power*, *supra* note 129, at 1064. The commentator writes:

Thus the exercise of the supervisory power is a refusal of the courts to participate in the illegalities of the executive branch in an effort to preserve their own integrity. It is not an attempt by the courts to dictate policy to the executive branch.

In *Payner*, the Government's second objection to the use of the supervisory power as a basis for excluding evidence was that Congress had precluded this use of the power with the Federal Rules of Evidence.¹⁶⁴ The Supreme Court has recognized that Congress does have the authority to proscribe the limits of the supervisory power.¹⁶⁵ The Government thus contended that Rule 402 of the Federal Rules, promulgated in 1975, is such a limitation prohibiting the suppression of evidence unless the action at issue is supported by a constitutional or specific statutory provision.¹⁶⁶ The Rule states, in part: "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution . . . by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."¹⁶⁷ The Government in *Payner* argued that because the supervisory power does not fall within any of the exceptions, it could not be used by the district court to exclude evidence.¹⁶⁸ This argument was not adopted by the *Payner* Court, and no mention of it even appears in the majority opinion.¹⁶⁹

Payner, however, was not the first case in which the Government raised this argument based on Rule 402. It previously had been asserted and rejected in *United States v. Jacobs*.¹⁷⁰ In *Jacobs*, the defendant was indicted for perjury on the basis of testimony given before a grand jury.¹⁷¹ Contrary to local practice in the Second Circuit, the defendant was not advised before her appearance that she was a target of the investigation.¹⁷² The United States Court of Appeals for the Second Circuit affirmed the suppression of the defendant's testimony and the

"[T]he *McNabb* Court specifically disclaimed any right to supervise the executive, stating that it was 'not concerned with law enforcement practices except insofar as courts themselves become instruments of law enforcement.' " *Id.* (quoting *McNabb*, 318 U.S. at 347).

¹⁶⁴ Brief for the United States at 11-12, *Payner*, 100 S. Ct. 2439 (1980).

¹⁶⁵ See *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959). *Palermo* involved an interpretation of the Jencks Act, which is discussed at note 140 *supra*. The Court held that a memorandum summarizing a three and one-half hour interrogation of the defendant was not a "statement" within the meaning of the Act and therefore did not have to be given to the defendant. *Id.* at 352-53.

¹⁶⁶ Brief for the United States at 22-23.

¹⁶⁷ FED. R. EVID. 402.

¹⁶⁸ See Brief for the United States at 24, where the Government argued that the point of rule 402 "was to wipe the slate clean of judicially-created limitations on the admissibility of relevant evidence and to insist that in the future all relevant evidence should be admitted, subject only to those exceptions" which the rule enumerates. *Id.*

¹⁶⁹ This failure to address the issue may indicate that while the Court does not want to expand the applications of the exclusionary rule, it also does not want to surrender an inherent catch-all power, so as not to limit its potential in other contexts. Justice Marshall addressed the issue in his dissent, where he rejected the Government's argument. *United States v. Payner*, 100 S. Ct. at 2454 n.17 (Marshall, J., dissenting).

¹⁷⁰ 547 F.2d 772, 777 (2d Cir. 1976). *cert. dismissed as improvidently granted*, 436 U.S. 31 (1978).

¹⁷¹ *Id.* at 773.

¹⁷² *Id.* at 773-74.

dismissal of the indictment for that charge on the basis of the supervisory power.¹⁷³ The appeals court stated that the Government "offers no history to support the view that Congress [in enacting Rule 402] was concerning itself with the supervisory powers of the federal courts. The obvious purpose of the catchall clause was to bar common law rules of evidence or state rules of evidence, if inconsistent."¹⁷⁴ Furthermore, while such an effort to eliminate the supervisory power as a basis for excluding evidence on the part of Congress would appear to be constitutional,¹⁷⁵ it would be unwise because the Court must bear the ultimate responsibility for the administration of justice in this country.¹⁷⁶ Therefore the courts should be permitted to retain this inherent tool in order to protect their integrity in cases where constitutional remedies are inadequate.

The majority in *Payner* did not rely on these two arguments presented by the Government, being content instead to rule that the power may not be applied to exclude evidence vicariously. *Elkins*, *McNabb*, and other cases have utilized the supervisory power to exclude improperly obtained evidence¹⁷⁷ have, as the *Payner* Court indicated, involved violations of legal rights belonging to defendants who were before the court.¹⁷⁸ For example, in *McNabb* the failure of the arresting officers to promptly arraign the defendants violated the statutory rights of those defendants.¹⁷⁹ While the Court in *Elkins* did indicate that standing requirements must be met in applying the exclusionary rule,¹⁸⁰ it was primarily concerned with abolishing the "silver-platter doctrine."¹⁸¹ Thus, *Elkins* cannot be interpreted as passing judgement on the ultimate limits of the supervisory power. Nevertheless, although neither *Elkins* nor *McNabb* supports vicarious application of the supervisory power, an examination of other instances in which the power has been exercised reveals that in the proper circumstances it can be used to exclude illegally obtained evidence to benefit one whose rights were not violated by the illegal conduct.

B. *The Adaptability of the Supervisory Power To Benefit Third Parties*

The supervisory power, which has a well-founded history as a device for excluding improperly obtained evidence, need not be confined to situations where the defendant's own rights were violated. Because the supervisory power is non-constitutional in nature, federal courts may utilize it to create standards that exceed minimum constitutional levels.¹⁸² Hence, the power need not be doctrinally confined to the vindication of personal rights. Cases involving gov-

¹⁷³ *Id.* at 778.

¹⁷⁴ *Id.* at 777.

¹⁷⁵ See *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1940).

¹⁷⁶ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁷⁷ See cases cited at note 152.

¹⁷⁸ *United States v. Payner*, 100 S. Ct. at 2446 n.7.

¹⁷⁹ *McNabb v. United States*, 318 U.S. at 345.

¹⁸⁰ *Elkins v. United States*, 364 U.S. at 223 n.16.

¹⁸¹ *Id.* at 208. For a discussion of the "silver-platter doctrine," see text and note at note 154 *supra*.

¹⁸² See Note, *The Judge-Made Power*, *supra* note 129, at 1050.

ernmental improprieties decided under the supervisory power have used it to benefit third parties, without requiring them to demonstrate that they were prejudiced by those improprieties.¹⁸³ Such decisions seek to maintain the integrity of the administration of justice in the federal courts.¹⁸⁴ Thus, the supervisory power enables federal courts, in proper circumstances, to shift the focus from the rights of particular litigants and place it upon governmental conduct or institutions threatening the courts' integrity.¹⁸⁵

For example, in *Thiel v. Southern Pacific Co.*,¹⁸⁶ the Court reversed a civil jury verdict on the ground that wage earners had been excluded from the jury pool, contrary to the applicable federal law.¹⁸⁷ Similarly, in *Ballard v. United States*,¹⁸⁸ criminal convictions were overturned where women had been excluded from jury service.¹⁸⁹ In neither case were the parties required to demonstrate that they had been prejudiced by these improprieties in the jury selection procedures.¹⁹⁰ Instead, the Court looked to the integrity of the jury system, stating in *Thiel*:

[W]e cannot sanction the method by which the jury panel was formed in this case. . . . That conclusion requires us to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the federal courts. See [*McNabb*]. On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion. . . .¹⁹¹

The Court expressed similar sentiments in *Ballard*: "The injury is not limited to the defendant — there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."¹⁹²

A more recent example of this vicarious use of the supervisory power is presented in the Sixth Circuit decision of *United States v. Valencia*.¹⁹³ In *Valencia*, a person who was a paid government informant and a secretary for the attorney of one of the defendants passed confidential information and memoranda to gov-

¹⁸³ See Note, *The Supervisory Power*, *supra* note 129, at 1657:

"[S]upervision" [under the power] has been effectuated in a manner representing a distinct departure from traditional appellate review of lower federal court process. As exercised, the supervisory power attenuates the distinction between "prejudicial" and "harmless" error. So long as the "error" violates the Court's standard for conducting judicial proceedings, reversal will usually follow even though the effect on the particular litigant may have been inconsequential or non-existent.

Id. (footnotes omitted).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* The commentator writes: "[T]he reviewing court may, under the supervisory power, shift its focus from the adjudication of the parties' rights to a more general investigation of judicial procedures, effecting a more comprehensive kind of supervision than had seemed possible under earlier doctrines." *Id.*

¹⁸⁶ 328 U.S. 217 (1946).

¹⁸⁷ *Id.* at 225.

¹⁸⁸ 329 U.S. 187 (1946).

¹⁸⁹ *Id.* at 192-93.

¹⁹⁰ *Thiel v. Southern Pacific Co.*, 328 U.S. at 225; *Ballard v. United States*, 329 U.S. at 195.

¹⁹¹ 328 U.S. at 225.

¹⁹² 329 U.S. at 195.

¹⁹³ 541 F.2d 618 (6th Cir. 1976).

ernment investigators.¹⁹⁴ She also offered testimony regarding the criminal conspiracy for which the defendants were indicted.¹⁹⁵ These activities involved violations of the attorney-client privilege, and the Sixth Circuit held that any evidence which was the product of such grossly improper conduct must be excluded under the supervisory power from being used against any of the defendants.¹⁹⁶ This ruling was extended to benefit two of the defendants who were not parties to the privilege. The court ruled that "under our supervisory authority over the conduct of federal prosecutions . . . they are entitled to the same relief."¹⁹⁷ Although the *Valencia* court was outraged by the conspiracy, it refused to permit the law to be "equally slimy" by obtaining convictions through outrageous conduct on its own behalf.¹⁹⁸ Thus *Valencia* demonstrates a use of the supervisory power to maintain the integrity of the judicial process, rather than merely determining the rights and duties of the particular parties to the litigation.

It should be noted that the conduct of the Government in *Payner* was even more outrageous than that resulting in vicarious exclusion in *Valencia*. *Valencia*, as opposed to *Payner*, did not involve outright violations of criminal statutes and constitutional rights. Yet the Court's opinion in *Payner* did not address the Sixth Circuit's application of the supervisory power in *Valencia*. Based upon the decision in *Valencia*, as well as *Thiel* and *Ballard*, it is submitted that evidence may be properly suppressed to benefit a third person in cases of grossly improper government misconduct, and that the district court in *Payner* was correct in suppressing the evidence so obtained by the illegal search of Wolstencroft's briefcase. The admission of this evidence due to the ultimate reversal by the Supreme Court poses questions about the Court's desire to sustain the integrity of the administration of justice in the federal courts.

C. *The Fallout of Payner*

After the Supreme Court's decision in *Payner*, no future defendant will be able to vindicate the unconstitutional intrusions perpetrated in the "briefcase caper."¹⁹⁹ Yet, as the district court recognized, the "briefcase caper" is a classic example of an abuse "capable of repetition, yet evading review," a traditional justification for relaxing standing requirements.²⁰⁰ Moreover, while the Court's

¹⁹⁴ *Id.* at 620-21.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 622-23. The case was remanded to determine whether the defendants had been convicted on the basis of the tainted evidence. *Id.* at 624.

¹⁹⁷ *Id.* at 621-22.

¹⁹⁸ *Id.* at 621 (quoting the trial court (unreported opinion)).

¹⁹⁹ The alternative remedy of a civil cause of action against the government by the person whose rights were invaded by the illegal search was created by the Court in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397 (1971). Yet it is highly unlikely that Wolstencroft will return to this country to file such an action.

²⁰⁰ See, e.g., *Roe v. Wade*, 410 U.S. 113, 125 (1973) (end of pregnancy not permitted to moot woman's constitutional challenge to Texas abortion statute); *United States v. W. T. Grant*

ruling may have limited the ability of judges to exclude evidence obtained by the methods present in *Payner*, it has not limited their desire to do so.²⁰¹ The conflict presented to such judges is illustrated by the subsequent case of *United States v. Cortina*,²⁰² which purports to follow *Payner* in its application of the supervisory power.

In *Cortina*, a federal agent lied to a United States magistrate in order to obtain a warrant to search two premises suspected of harboring gambling operations.²⁰³ Evidence seized in the search was suppressed in favor of several defendants who lacked fourth amendment standing to challenge the search.²⁰⁴ The United States Court of Appeals for the Seventh Circuit affirmed on the basis of the supervisory power despite the absence of a constitutional violation as to these defendants.²⁰⁵ The appeals court interpreted *Payner* as authorizing suppression when there has been fraud upon the court in conjunction with the violation of other, non-constitutional rights of the defendant.²⁰⁶ The *Cortina* court found that such violations had occurred, stating: "the evidence was seized from the defendants in violation of *their own rights*, and was seized only by defrauding the court. . . ."²⁰⁷ Yet, the court did not indicate clearly the nature of the defendants' rights or how they had been violated.²⁰⁸ The Seventh Circuit's decision in *Cortina* thus oversteps the logic of *Payner* which seeks to limit exclusion under the power to situations where the defendant's rights are plainly violated.²⁰⁹ This analytical side-stepping of *Payner* by the Seventh Circuit in *Cortina* demonstrates the need to expand the contours of the supervisory power to allow federal judges to combat grossly improper governmental conduct that threatens the integrity of the federal justice administration. The final task of this casenote is to propose a standard for such an expansion.

Co., 345 U.S. 629, 632-33 (1953) (director's resignations from three corporate boards not permitted to moot Clayton Act action for interlocking directorates); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (expiration of ICC order did not moot action to enjoin enforcement of the order).

²⁰¹ The Court stated in *Payner*: "We certainly can understand the District Court's commendable desire to deter deliberate intrusions into the privacy of persons who are unlikely to become defendants in a criminal prosecution. No court should condone the unconstitutional and possibly criminal behavior of those who planned and executed this 'briefcase caper'." *United States v. Payner*, 100 S. Ct. at 2445 (citation and footnote omitted).

²⁰² 630 F.2d 1207 (7th Cir. 1980).

²⁰³ *Id.* at 1208.

²⁰⁴ *Id.* at 1213.

²⁰⁵ *Id.* at 1214.

²⁰⁶ *Id.* at 1216.

²⁰⁷ *Id.* (emphasis added).

²⁰⁸ The court of appeals apparently relied on *Franks v. Delaware*, 438 U.S. 154 (1978), in concluding that the defendants' own rights were violated. *See United States v. Cortina*, 630 F.2d at 1214. In *Franks*, the Supreme Court held that a criminal defendant whose own apartment had been searched under a facially valid warrant could challenge the veracity of the warrant by demonstrating that it was based upon intentional or flagrantly reckless misrepresentations. 438 U.S. at 171-72. The Seventh Circuit cited no authority for extending the *Franks* rule to defendants who lacked a privacy interest in the area that was searched.

²⁰⁹ *United States v. Payner*, 100 S. Ct. at 2444, 2446.

IV. A STANDARD FOR THIRD PARTY EXCLUSION UNDER THE SUPERVISORY POWER

In the *Payner* opinion, the Supreme Court stated that the district court's application of the power was standardless.²¹⁰ Despite the Sixth Circuit's failure to enunciate a standard for the power's application in excluding evidence, it is clear that the district court had attempted to articulate when such application would be proper.²¹¹ Using the district court's notions as a foundation, it is possible to define when evidence may properly be excluded on the motion of a defendant who was not the victim of the search and who lacks standing to challenge the search under the fourth amendment.

It is submitted that evidence may be excluded when the defendant can show a preconceived plan to conduct a search which knowingly and wilfully violates the constitutional or statutory rights of others and which is intended primarily to gather evidence, or information likely to produce evidence, for use against the defendant, or a class of persons in which the defendant is a member. This plan must be pre-arranged and approved prior to the point in time at which the sequence of events directly culminating in the illegal conduct began to occur.²¹² Further, the government agents executing the plan must act in bad faith, fully cognizant that their conduct is illegal.²¹³ A major purpose of the search must be to obtain evidence against someone other than the person whose own rights are violated by the search.²¹⁴ The defendant must be a member of a recognizable group against which the government sought the information.²¹⁵ This use of the supervisory power would be limited to cases in the federal courts.²¹⁶

Most of the Supreme Court's recent fourth amendment standing decisions would not be affected by such a rule. For instance, the proposed rule would not alter the result in *Rakas*, where the illegality did not approach the sort of preconceived plan present in *Payner*. The police officers in *Rakas* stopped the car in which the defendants were riding after receiving a report of a robbery and a description of the getaway car.²¹⁷ The sequence of events which culminated in the illegal search had therefore begun without any intent to take advantage of Fourth Amendment standing restrictions, and the requisite pre-arrangement

²¹⁰ *Id.* at 2445, 2447. Similarly, the Government argued that the Sixth Circuit's affirmance of the district court's order provided no standard for applying the exclusionary rule under the supervisory power. Brief for the United States at 13-14.

²¹¹ See *United States v. Payner*, 434 F. Supp. at 134-35.

²¹² In *Payner*, Casper had formulated the plan to search Wolstencroft's briefcase, and had obtained the approval to implement the plan prior to the actual seizure of the briefcase. See 100 S. Ct. at 2443.

²¹³ Cf. *United States v. Payner*, 434 F. Supp. at 130, 133, 134-35 (the district court's notion of "bad faith hostility").

²¹⁴ See *United States v. Payner*, 100 S. Ct. at 2448 (Marshall, J., dissenting).

²¹⁵ See *id.*

²¹⁶ Principles of federalism require that state courts determine their own response to any instances of such conduct by their own state's law enforcement agents in procuring evidence for state criminal proceedings. The federal courts' supervisory power can only operate properly within the sphere of the federal judiciary. For a discussion of the relation of the federal courts' supervisory power to state court proceedings, see Note, *The Supervisory Power*, *supra* note 129, at 1664-66; Note, *The Judge-Made Power*, *supra* note 129, at 1071-74.

²¹⁷ *Rakas v. Illinois*, 439 U.S. at 130.

was not present.²¹⁸ In *Alderman v. United States*,²¹⁹ however, another major decision of the Court which tightened the restrictions on fourth amendment standing, application of this standard may have altered the holding. The *Alderman* Court ruled that evidence obtained through illegal wiretaps would not be excluded in favor of those defendants whose own fourth amendment rights were not violated.²²⁰ If the government's misconduct in *Alderman* amounted to the type of preconceived plan present in *Payner*, then under the proposed standard the evidence would have been excluded to benefit all of the defendants. The facts of *Payner* fall squarely within this proposed standard. Casper's plan was approved by the IRS prior to Wolstencroft's visit to Miami in January 1973.²²¹ Moreover, the district court's findings establish the bad faith of those who conducted the search.²²² Lastly, the search was aimed at obtaining the names of persons maintaining accounts at the Castle Bank, rather than at Wolstencroft.²²³ Payner, unfortunately, was a member of this class.

Under the rule suggested here, a person who claims to have been prosecuted as a result of such outrageous conduct would have the burden of establishing that the elements of the proposed standard had been met. This procedural burden could best be achieved through a device comparable to that established by the Supreme Court in *Franks v. Delaware*.²²⁴ In *Franks*, the Court permitted a defendant to challenge the veracity of a facially valid warrant.²²⁵ The *Franks* defendant was required to make an offer of proof sufficient to demonstrate that specific sections of the affidavit, drawn up to establish probable cause for the issuance of the warrant, were either deliberate falsehoods or the product of a reckless disregard for the truth.²²⁶ The *Franks* defendant also had to show that, aside from these misrepresentations, no independent grounds existed for establishing probable cause.²²⁷ According to the *Franks* Court, if the offer of proof is sufficient, the trial court should grant a hearing on the defendant's allegations.²²⁸ Similar procedural requirements could be developed to implement the standard proposed here. Specifically, the movant should be required to make averments of the specific illegalities involved, and, through a proper offer of proof, demonstrate that such activities in fact occurred and were conducted by the federal government or agents of it. If the defendant meets this burden, a *Franks*-type hearing could be held to determine whether these allegations are true and whether the proposed evidence was in fact obtained as a result of the illegal conduct.²²⁹ If the truth of the defendant's allegations is established

²¹⁸ Of course, *Rakas* involved violations by state police, and hence would not come under the federal courts' supervisory power.

²¹⁹ 394 U.S. 165 (1969).

²²⁰ *Id.* at 171-72.

²²¹ 100 S. Ct. at 2443.

²²² 434 F. Supp. at 130, 133, 134-35.

²²³ See *United States v. Payner*, 100 S. Ct. at 2448 (Marshall, J., dissenting).

²²⁴ 438 U.S. 154 (1978).

²²⁵ *Id.* at 171-72.

²²⁶ *Id.* at 171.

²²⁷ *Id.* at 172.

²²⁸ *Id.*

²²⁹ The evidence offered at trial must have been obtained as a result of the search in order for suppression to occur. See *Nardone v. United States*, 308 U.S. 338, 341 (1939).

at the hearing, then all the fruits of the governmental misconduct should be suppressed.

The adoption of such a standard would permit the Federal courts to exclude evidence to benefit a third party only in cases of extreme misconduct, thus allaying the *Payner* Court's fears of standardless discretion. Nor would the *Payner* Court's fear that application of the exclusionary rule under the supervisory power would upset the balance between the interests of deterrence and the societal harm suffered by invoking the rule be justified under this standard.²³⁰ For it is clear that in no other situation would deterrence be more effective than against the sort of misconduct present in *Payner*. *Payner* was by no means an example of law enforcement officers becoming confused by complex circumstances or unclear signals from the courts. The misconduct present in this case was blatant and premeditated. It involved an explicit understanding on the part of those who planned the search that the proposed actions were illegal.²³¹ Exclusion in those circumstances could not possibly send a more definite signal to the Federal government that evidence obtained by such methods would be inadmissible in a court of law.²³² Similarly, the policy of judicial integrity could not have been served better than by exclusion in *Payner*. The government knew that the persons who ultimately would be prosecuted as a result of the "briefcase caper" would lack fourth amendment standing to challenge the search.²³³ The type of conduct exhibited by the government here breeds the contempt for law that so outraged Justice Brandeis in his *Olmstead* dissent.²³⁴ The Supreme Court's refusal in *Payner* to exclude the evidence obtained as a result of the search of Wolstencroft's briefcase strikes a blow at the integrity of the administration of justice in this country. Adoption of the proposed standards would prevent this harm while promoting the two-fold policy of the exclusionary rule in a reasoned manner.

CONCLUSION

The Supreme Court's holding in *Payner* restricts use of the supervisory power as a device for excluding illegally obtained evidence to situations where the defendant's own rights are violated. The decision reaffirms the Court's recent emphasis upon deterrence as the principal justification for the exclusionary rule. It does so, however, at the expense of the judicial integrity rationale. This rationale lies at the heart of both the Court's earlier supervisory power decisions, and, indeed, the origins of the exclusionary rule itself. The *Payner* holding effectively superimposes fourth amendment standing restrictions onto the supervisory power in the search and seizure area. In doing so, it limits the use of the supervisory power as a remedy for the sort of outrageous activities present in *Payner*.

Whatever the proper contours of fourth amendment standing may be, it

²³⁰ *United States v. Payner*, 100 S. Ct. at 2445.

²³¹ *United States v. Payner*, 434 F. Supp. at 120-21.

²³² *Cf. id.* at 129 n.65 (the district court's discussion of the deterrent effect of its ruling).

²³³ *Id.* at 131.

²³⁴ *Olmstead v. United States*, 277 U.S. at 485 (Brandeis, J., dissenting).

must not be used to shelter such outrageously lawless conduct by those charged with the law's enforcement. The Supreme Court should re-evaluate its decision in *Payner* in order to deter such misconduct in the future and to maintain the integrity of the federal courts. The standard proposed by this casenote for applying the exclusionary rule under the federal courts supervisory power is a basis for such an alteration. The Court's failure to so act would allow such abuses to continue to taint the integrity of those courts. A nation pledged to obey the rule of law cannot ignore such threats to its basic order.²³⁵

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²³⁵ Recall Justice Brandeis' remarks in *Olmstead*:

Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.

Id.