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United States v. Payner: Closing a Loophole in the Fourth Amendment Exlusionary Rule Standing Requirement

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UNITED STATES V. PAYNER: CLOSING A LOOPHOLE IN THE FOURTH AMENDMENT EXCLUSIONARY RULE STANDING REQUIREMENT

INTRODUCTION

The fourth amendment exclusionary rule is restricted by a standing requirement. Evidence which results from an illegal search or seizure cannot be suppressed unless the constitutional rights violated are the defendant's; violation of a third party's rights is insufficient.[1] In *United States v. Payner*,[2] a majority of the Supreme Court adhered to this requirement of standing even though: (1) the Government's search and seizure clearly violated the fourth amendment[3] and, under state law, probably constituted the crime of larceny;[4] (2) the Government was aware its action would violate state law and the United States Constitution;[5] (3) the Government's illegal search and seizure was for the relatively insignificant purpose of gathering information about suspected tax evasion;[6] and (4) the Government deliberately circumvented the exclusionary rule by apparently instructing its agents to select their victims prudently.[7]

The Internal Revenue Service (IRS) suspected in 1972 that American taxpayers were illegally concealing funds in the Bahamas.[8] As part of its investigation, the IRS devised a scheme to relieve a visiting Bahamian bank vice president of the contents of his briefcase.[9] The IRS correctly theorized that the briefcase's contents would lead to the names of Americans holding Bahamian bank accounts not disclosed on their tax returns.[10] A woman was paid $1,000 to go out to dinner with the bank officer, who left the briefcase at her apartment.[11] A paid informant and an IRS special agent entered the apartment with a key the woman had provided and removed the briefcase.[12]

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1. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963); Tileston v. Ullman, 318 U.S. 44 (1943); Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 NW. L. REV. 493 (1952).

2. 447 U.S. 727 (1980).

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

U.S. CONST. amend. IV.

4. 447 U.S. at 747 n.13 (Marshall, J., dissenting) (quoting United States v. Payner, 434 F. Supp. 113 (N.D. Ohio 1977)).

5. 447 U.S. at 742.

6. *Id.* at 728.

7. *Id.* at 742 (Marshall, J., dissenting) (quoting United States v. Payner, 434 F. Supp. 113 (N.D. Ohio 1977)).

8. 447 U.S. at 738 (Marshall, J., dissenting).

9. *Id.*

10. *Id.*

11. *Id.* at 738-40. Justice Marshall implied that the $1,000 paid to the woman may have been in part "for what occurred in the [woman's] apartment prior to the couple's departure for dinner." *Id.* at 740 n.4.

12. *Id.* at 740-41. The IRS had earlier referred the special agent to a locksmith who made a key to fit the briefcase lock. *Id.*

IRS photography experts copied the contents, and the special agent replaced the briefcase. The district court found that the operation, entirely approved of by IRS supervisors,[13] "appear[ed] to satisfy a prima facie case of larceny under Florida law."[14]

Jack Payner was subsequently indicted.[15] The district court suppressed the fruit of the illegal search and seizure, without which the Government could not prove Payner "knowingly and willfully"[16] falsified his tax return.

The district court recognized that Payner lacked standing to invoke the fourth amendment exclusionary rule.[17] The suppression order was based instead on fifth amendment due process[18] and on the federal courts' inherent supervisory power.[19] The Sixth Circuit Court of Appeals affirmed on the basis of the supervisory power alone.[20] The Supreme Court reversed, holding that the supervisory power and fifth amendment due process could not substitute for fourth amendment standing.[21] This comment, like the Supreme Court opinion and the opinion for the Sixth Circuit Court of Appeals, will largely ignore *Payner's* fifth amendment implications[22] and will focus on the case's significance as a barometer of the interplay between the exclusionary rule standing requirement and the supervisory power of the federal courts. The merits of the exclusionary rule itself will be discussed only to the extent those merits are relevant to the supervisory power and to standing.

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13. *Id.* at 739.

14. *Id.* at 746-47 n.12 (quoting United States v. Payner, 434 F. Supp. 113 (N.D. Ohio 1977)).

15. Jack Payner was one of those Americans who had not disclosed his Bahamian bank account. Documents in the briefcase revealed a close association between the bank officer's Bahamian bank and a Florida bank. Subpoenas issued to the Florida bank uncovered a loan agreement in which Payner had pledged as security his funds in the Bahamian bank. Payner, however, had stated on his tax return that he did not have a foreign bank account.

The indictment charged violation of 18 U.S.C. § 1001 (1976) which provides that "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements . . . shall be fined not more than $100,000 or imprisoned not more than five years, or both." 447 U.S. at 728.

16. 18 U.S.C. § 1001 (1976).

17. United States v. Payner, 434 F. Supp. 113, 125-26 (N.D. Ohio 1977), *aff'd per curiam*, 590 F.2d 206 (6th Cir. 1979), *rev'd*, 447 U.S. 727 (1980).

18. The district court's fifth amendment argument was unprecedented. It stated flatly that "[t]here is no standing problem in this case in regard to the Fifth Amendment Due Process question." 434 F. Supp. at 129 n.65. Apparently standing was not a problem for the district court because it believed that "the Court must furnish those persons who are the ultimate targets with standing to raise the exclusionary rule in order to insure that some party is available to litigate the question of the Government's outrageously unconstitutional activity." The defendant cannot invoke the fourth amendment exclusionary rule, however, so there is no reason that he should be able to invoke a fifth amendment exclusionary rule since the policies underlying both considerations presumably are identical. The district court implicitly acknowledged that the purpose of its newborn fifth amendment exclusionary rule would be identical to the fourth amendment exclusionary rule's purpose: deterrence. The court quoted extensively from Rochin v. California, 342 U.S. 165 (1952). In *Rochin*, however, standing was not at issue.

19. 434 F. Supp. at 126-36.

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

21. 447 U.S. 727 (1980).

22. *See* note 18 *supra*.

I. THE EXCLUSIONARY RULE STANDING REQUIREMENT

In *Jones v. United States*,[23] a narcotics case, the Court held that the defendant had standing to object to evidence resulting from an illegal search, even though the premises searched were not his, because he was legitimately on the illegally searched premises.[24] *Jones* represents the broadest reading of the Court's general rule that fourth amendment rights are personal rights that cannot be vicariously asserted, a rule later reaffirmed in *Alderman v. United States*.[25]

The *Alderman-Jones* test of standing continued substantially intact until *Rakas v. Illinois*.[26] Justice Rehnquist's *Rakas* opinion replaced the legitimately-on-the-premises test with the narrower test of whether the search and seizure "infringed an interest of the defendant which the Fourth Amendment was designed to protect."[27] The question ultimately may be whether the search offended the defendant's expectation of privacy.[28]

In *Rakas*, Justice Rehnquist significantly changed the standing question terminology, though, as he admits, probably not its substance.[29] He pointed out that standing, strictly speaking, relates to the concern that issues be sharply focused by adversary proceedings.[30] The adversarial relationship between the defendant and the prosecution is ordinarily sufficient to contest thoroughly the issue of whether there was an illegal search and seizure, because the defendant's liberty is likely at stake. The new terminology offered in *Rakas* is that the search and seizure must have violated the defendant's fourth amendment rights in order to avail him of the fourth amendment's exclusionary rule.[31]

II. THE MEANING OF THE SUPERVISORY POWER

In its broadest sense, the supervisory power may be described as the

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23. 362 U.S. 257 (1960), *overruled in part*, Rakas v. Illinois, 439 U.S. 128 (1978) *and in part*, United States v. Salvucci, 448 U.S. 83 (1980). *See* note 27 *infra* and accompanying text.

24. 362 U.S. at 264.

25. 394 U.S. 165 (1969).

26. 439 U.S. 128 (1978).

27. *Id.* at 140. *Rakas* thus restricted one of the alternate holdings of *Jones*. The other *Jones* holding was that the defendant had "automatic" standing where the possession required for standing was the possession needed to establish an element of the offense charged. Automatic standing was to prevent the government from contending that the defendant lacked the requisite possession for purposes of exclusionary rule standing, yet had possession for purposes of the offense charged. Justice Rehnquist questioned whether the *Jones* rule of automatic standing still lived. *Id.* at 135 n.4. Two days after *Payner*, the Court overruled the *Jones* rule of automatic standing. United States v. Salvucci, 448 U.S. 83 (1980).

28. Rawlings v. Kentucky, 448 U.S. 98 (1980); Rakas v. Illinois, 439 U.S. 128 (1979) (Powell, J., concurring).

The defendant in *Payner* lacked standing because he had no "reasonable expectation of privacy" in his Bahamian bank account. 447 U.S. at 732 n.4 (citing United States v. Miller, 425 U.S. 435 (1976)). The Court rejected the defendant's argument that Bahamian bank laws produced an expectation of privacy not present in *Miller*. *Id.*

29. 439 U.S. at 139-40.

30. *Id.*

31. *Id.* at 140.

federal courts' general power to supervise the administration of justice.[32] Confusion arises, however, regarding the extent to which the power may be exercised when courts parrot this vague description as if it were a definition. Cases in which courts have wielded the power may be classified into four categories.[33] First, an appellate court occasionally will overturn a lower court decision for prejudicial error but inexplicably contend it is exercising its supervisory power.[34] The resulting confusion is needless. An appellate court surely can perform its primary function of review without conjuring up apparitions like the supervisory power.

In a second group of cases courts have employed the supervisory power to fashion rules for improving the quality of the judicial process.[35] The aim here is to foster fair and proper adjudication. The evolution of rules of evidence is an example. Although the Constitution dictates a floor of minimum safeguards beneath which the court shall not descend, the judicially developed rules of evidence are far above that minimum. Rules designed to improve the judicial process normally do not define substantive rights. Instead, they specify the procedure that experience has proven is most likely to produce accurate determinations. This second group of cases exemplifies what may be dubbed procedural supervisory power.

The third set of cases deals with enforcement of constitutional provisions.[36] Some proscriptions in the Constitution are mere "thou shalt nots" which fail to include an effective set of subsidiary rules to implement the commandment. The fourth amendment is notorious in this regard.[37] It is important to distinguish those cases in which the rule asserted by use of the supervisory power is *itself* a fundamental constitutional right from those cases in which the rule asserted by use of the supervisory power is merely a means to protect a fundamental constitutional right. The holdings of those cases in which the rule itself is a constitutional right can be said to flow directly from the Constitution. They are not exercises of the supervisory power but are simply constitutional interpretations. Due process and freedom of speech cases are outstanding examples. The holdings of those cases in which the rule is a means to protect a constitutional right are legitimate exercises of the supervisory power. They are the substantive analogue to the procedural supervisory power used in connection with improving the judi-

32. McNabb v. United States, 318 U.S. 332, 341 (1943); Nardone v. United States, 308 U.S. 338, 342 (1939).

33. The last three of these four categories are similar, but not identical, to the three categories described in Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 193-94 (1969) [hereinafter cited as Hill].

34. *See* Burton v. United States, 483 F.2d 1182, *rev'd on rehearing*, 483 F.2d 1190 (9th Cir. 1973). In *Burton*, the appellate court initially reversed and remanded after finding prejudicial error. Needlessly, it rested its decision to reverse on the supervisory power, not on its general power to reverse for prejudicial error.

35. *See* McNabb v. United States, 318 U.S. 332 (1943) (exclusion of confessions obtained under duress); Hill, *supra* note 33, at 194-96, and cases cited therein.

36. *See* Nardone v. United States, 308 U.S. 338 (1939) (enforcement of wiretapping statute); Weeks v. United States, 232 U.S. 383 (1914) (enforcement of fourth amendment prohibition against illegal searches and seizures); Hill, *supra* note 33, at 198-99.

37. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 643-44.

cial process.[38]

Procedural supervisory power designs rules to achieve the goal of fair and proper adjudication. Substantive supervisory power designs rules to achieve the goal of enforcing the spirit of the Constitution. The key point is that supervisory power, both procedural and substantive, is the basis for rules of law that are not constitutionally mandated. Therefore, unlike rules of constitutional interpretation, any supervisory power rule may be replaced or eliminated. Because the supervisory power rules are the prophylaxes for constitutional rights, not sacrosanct themselves, the courts should mold them freely as conditions change and needs arise. Unfortunately, they are often confused with the rules that are constitutionally mandated.

Confusing constitutional interpretation with the supervisory power does not necessarily delay the development of constitutional law, but it does mislabel the court's action. The effect of this mislabeling is that a rule based on the supervisory power mistakenly becomes elevated to a rule of constitutional law. Because courts are loath to revise an interpretation of the Constitution, the rule lingers on long after it should have been revised. Less confusion would result if courts forging new constitutional rights would initially declare that those rights have constitutional status. Rules created by legitimate exercises of the supervisory power, those rules that merely enforce already established constitutional rights, could then be subjected to more rapid and responsive shaping over time by the Congress, the state legislatures, and the courts themselves.

Most jurists and commentators do not doubt that the above three strains of supervisory power, though often misnamed, exist.[39] Others disagree, however. Chief Justice Burger, in his concurring opinion in *Payner*, stated that "[o]rderly government under our system of separate powers calls for internal self-restraint and discipline in each Branch; this Court has no general supervisory authority over operations of the Executive Branch, as it has with respect to the federal courts."[40] Does the Chief Justice mean to say that the Court, in its effort to promote the Bill of Rights, cannot develop rules of enforcement against government agents if those agents happen to work in the executive branch? If the answer is yes, how does he justify the exclusionary rule when the defendant does indeed have standing?[41]

The Chief Justice may have had in mind the fourth possible exercise of the supervisory power. This fourth category comprises cases in which courts invent a rule which does not flow from, and does not purport to enforce, the Constitution, and is not meant to improve the accuracy of the judicial process. The rule is simply a judicial response to distasteful official conduct.[42]

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38. *See* text accompanying note 35 *supra*.

39. *See* Hill, *supra* note 33; Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963). *See also* note 56 *infra*.

40. 447 U.S. at 737 (Burger, C.J., concurring).

41. Perhaps he does not. The Chief Justice has been a steadfast critic of the rule in any form since long before he joined the Supreme Court. *See* Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964). Shortly after becoming Chief Justice, he again attacked the rule and proposed in some detail a statutory alternative. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 422-23 (1971) (Burger, C.J., dissenting).

42. Hill, *supra* note 33, at 199.

Here lies a real danger of boundless judicial lawmaking. The apprehension of an uncircumscribed power of adjudication by judicial discretion is well-founded. To date, fortunately, few if any courts have gone this far.[43]

III. THE EXCLUSIONARY RULE AS AN EXERCISE OF THE SUPERVISORY POWER

The effect of the exclusionary rule often hinges on the analysis of its purpose and on the power of the courts to apply it. Aside from the above outline, some authorities have advanced a type of supervisory power based on what may be called the judicial integrity theory.[44] With regard to the exclusionary rule, the argument is that illegally seized evidence must be excluded to protect the integrity of the judiciary, by preventing the courts from becoming "accomplices"[45] to wrongful official acts. This rationale appears appealing, for it promotes the illusion that the rule does not interfere with the prerogatives of other branches. As in civil litigation, the courts merely withhold their facilities from those with "unclean hands."[46]

The case which created the exclusionary rule[47] was based on the judicial integrity theory, and it was not until about the time the rule was applied to the states that the deterrence theory appeared.[48] Presumably, the shift in reasoning occurred because a theory of supervisory power exclusion that is defended as necessary to maintain judicial integrity is quickly met at the

43. *Id.* at 200. Justice Frankfurter's broad language in Rochin v. California, 342 U.S. 165 (1952) is the nearest precedent for exercise of this fourth type of supervisory power. There he spoke of the need to observe "canons of decency and fairness" as a due process requirement. *Id.* at 169. By basing his holding on due process grounds it is evident the decision was actually a constitutional interpretation. Furthermore, any precedential value of *Rochin* is diminished because it was decided before the exclusionary rule was imposed on the states by Mapp v. Ohio, 367 U.S. 643 (1961). After *Mapp*, a *Rochin* situation could be decided on the fourth amendment exclusionary rule without resorting to due process.

Later, in Hampden v. United States, 425 U.S. 484 (1976), Justice Rehnquist asserted for the Court that due process is relevant "only when the Government activity in question violates some protected right of the *defendant*." *Id.* at 490 (emphasis in original). Justices Powell and Blackmun were unwilling to join in such a rigid approach. They suggested that under some circumstances, due process principles or the supervisory power could bar conviction. *Id.* at 495 (Powell, J., concurring). Justice Blackmun apparently thought *Payner* presented those circumstances, for he dissented in *Payner*. Justice Powell apparently disagreed, for he wrote the *Payner* opinion for the Court.

44. Elkins v. United States, 364 U.S. 206, 217 (1960); Mesarosh v. United States, 352 U.S. 1, 14 (1956); McNabb v. United States, 318 U.S. 332, 342 (1943).

45. Elkins v. United States, 364 U.S. 206, 223 (1960); McNabb v. United States, 318 U.S. 332, 345 (1943).

46. Olmstead v. United States, 277 U.S. 438, 483 (1928) (Brandeis, J., dissenting).

Some writers have embraced the judicial integrity theory but only as a pretense for the rapid development of constitutional law. *See, e.g.*, Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1666-67 (1963). Those writers would have the courts promulgate tentative rules, which, if met with public acceptance, would become constitutional rights of due process. Such an approach has at least three defects. First, the process would overtly subordinate the judiciary to the cry of popular opinion. Second, it is not certain that the growth of constitutional law is or need be slow. Third, it does not follow that if the supervisory power is to protect the integrity of the judiciary, then the principles it produces should become constitutional rights of due process. The defendant, not the judiciary, is the object of due process. Any benefits accruing to defendants out of a system designed to protect the judiciary would be happenstance.

47. Weeks v. United States, 232 U.S. 382 (1914).

48. *See* Elkins v. United States, 364 U.S. 206 (1960).

state level with the response that state courts are free to establish their own standards of integrity. Federal courts lack the power to impose subjective levels of integrity upon state courts.[49]

The judicial integrity rationale has always been unsound. Permitting adjudication after official misconduct no more makes the court an accomplice to the misconduct than permitting the defendant to state his case makes the court an accomplice to his crime. By closing the courthouse doors when confronted with official misconduct, the judiciary does more than avoid complicity; it affirmatively stymies law enforcement. It is a fantasy to pretend that the judiciary, merely because it is a separate branch, is not an integral and necessary component of law enforcement. Courts that simply close their doors wrongfully decline to perform the function that is theirs alone. In effect, they pass on the merits of the prosecution.[50]

The judicial integrity theory notwithstanding, the exclusionary rule is best justified as an exercise of substantive supervisory power.[51] It enforces a constitutional directive; it is not a constitutional directive in itself. *Mapp v. Ohio*,[52] according to some commentators, concluded the opposite—that the rule was more than a product of the supervisory power.[53] If the rule is not compelled by the Constitution, how could it be imposed on the states? The answer requires consideration of the peculiar genesis of *Mapp*.

The court in the earlier case of *Wolf v. Colorado*[54] reaffirmed that the rule was not constitutionally mandated and, therefore, the states were free to enforce the fourth amendment with methods of their choice. Unfortunately, in the interim between *Wolf* and *Mapp*, most states failed to devise any enforcement methods whatsoever. Exasperated by state indifference, the *Mapp* Court finally insisted that the states adopt the rule. Analyzed in this light, it is apparent that the exclusionary rule per se is not necessary to the fourth amendment. Rather, it is necessary that the amendment be enforced. *Wolf* appeared to issue a warning, which the states ignored, of the upcoming *Mapp* decision.[55] In summary: (1) *Wolf* necessarily read into the fourth amendment a constitutional requirement of enforcement; (2) as an exercise of its supervisory power, the federal courts chose to enforce the amendment with the exclusionary rule; (3) the states were allowed to develop their own enforcement provisions; and (4) *Mapp* imposed the enforcement provision with which it was acquainted, the exclusionary rule, on the states when the states failed to develop their own effective enforcement. The plurality opinions of *Mapp* are garbled, but commentators and subsequent cases have supported the foregoing analysis of *Wolf* and *Mapp*.[56]

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49. Mapp v. Ohio, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting).

50. *See* Sorrells v. United States, 287 U.S. 435, 450 (1932); Hill, *supra* note 33, at 205-07.

51. *See* text accompanying note 38 *supra*.

52. 367 U.S. 643 (1961).

53. Allen, *Federalism and the Fourth Amendment: A Requiem for* Wolf, 1961 SUP. CT. REV. 1.

54. 338 U.S. 25 (1949).

55. *See id.*

56. Most of the commentators on the exclusionary rule have debated the merits of the rule itself, not the power of the court to apply it. Geller, *supra* note 37; Burger, *supra* note 41; Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). It is noteworthy that Judge Friendly remarked that no majority of the Supreme Court has ever held that the

IV. THE SUPERVISORY POWER IN *PAYNER*

Justice Powell's opinion for the Court and Justice Marshall's dissent are founded on different premises. Justice Marshall based his dissent on the judicial integrity theory,[57] a theory upon which a majority of the Court has not relied in a decade or more.[58] Accordingly, standing is irrelevant to Justice Marshall because the taint on the judiciary is identical whether the evidence was illegally seized from the defendant or from a stranger. The defendant is the lucky beneficiary of a rule designed to protect the courts. This comment rejects the judicial integrity rationale but, if embraced, Justice Marshall's analysis follows logically.

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fourth amendment compels the exclusionary rule. United States v. Soyka, 394 F.2d 443 (2d Cir. 1968) (Friendly, J., dissenting). Since Judge Friendly's 1968 *Soyka* opinion the Supreme Court has, if anything retreated still further from any lingering notion that the rule is constitutionally compelled. Shortly after *Soyka*, Justice White said for the Court that "[n]either [Linkletter v. Walker, 381 U.S. 618 (1965) and Elkins v. United States, 364 U.S. 206 (1960)] nor any others hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment." Alderman v. United States, 394 U.S. 165, 174 (1969). Later the rule was called by Justice Powell a "judicially created remedy . . . rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348 (1974). Justice Blackmun's opening sentence for the Court in United States v. Janis, 428 U.S. 433 (1976) referred to "the judicially created exclusionary rule . . . ." Id. at 434.

If the rule is not constitutionally compelled, it seems likely that it is a product of the supervisory power, as broadly defined by Professor Hill and in this Comment. Hill, *supra* note 33, at 193. Another interesting explanation is that the exclusionary rule and other subsidiary rules not required by the Constitution comprise the "Constitutional common law." Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 1 (1975). *But see* Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978). Professor Monaghan's Constitutional common law differs from this comment's procedural and substantive supervisory power mainly in name. The point is that a body of rules exists, which is specifically mandated by the Constitution, but which can be imposed on the states to enforce the Constitution.

57. 447 U.S. at 747-48.

58. *See* text accompanying notes 44-48 *supra*. One would probably have to look all the way back to McNabb v. United States, 318 U.S. 332 (1943), to find a Supreme Court decision resting exclusively on the judicial integrity rationale. The most lucid descriptions of the theory are in the dissents of Justices Brandeis and Holmes in Olmstead v. United States, 277 U.S. 438 (1928). Cases decided shortly before and after Mapp v. Ohio, 367 U.S. 643 (1961), relied on both the judicial integrity and deterrence theories, *see, e.g.*, Elkins v. United States, 364 U.S. 106 (1960), or principally on the deterrence theory, *see, e.g.*, Linkletter v. Walker, 381 U.S. 618 (1965). Justice White, in Alderman v. United States, 394 U.S. 165 (1969), declared that "[t]he necessity for [standing] was not eliminated by recognizing and acknowledging the deterrent aim of the rule." *Id.* at 174 (citing *Linkletter* and *Elkins*). The judicial integrity theory was altogether abandoned in United States v. Calandra, 414 U.S. 338 (1974). "For the first time, the Court today discounts to the point of extinction the vital function of the rule to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct." *Id.* at 360 (Brennan, J., dissenting). *Accord*, United States v. Janis, 428 U.S. 433 (1976) (citing *Calandra*). *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 669 (1970).

One pair of writers has contrasted the majority and dissenting *Calandra* opinions as based on the "fragmentary" and "unitary" models of government respectively. Schrock & Welsh, *Up from* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 255-60 (1974). Under the fragmentary model, the judiciary is seen as distinct from the prosecution and law enforcement. Since the court's function is to find the truth, the out-of-court activities of Government officials are immaterial. Illegally obtained evidence is admitted for its probative value without approval or condemnation of the means by which it was obtained. *Id.* at 255-56. By contrast, under the unitary model, the court is a part of the government. A wrong committed by Government agents becomes a wrong by the judiciary if the court permits the prosecution to enjoy the fruits of the wrong. *Id.* at 257-60. For an answer to the unitary model, see note 50 *supra* and accompanying text.

On the other hand, Justice Powell's opinion for the Court continues the trend which values the rule primarily for its deterrent function.[59] The exclusion of often highly probative evidence is the price paid to deny government agents the incentive to violate the fourth amendment. The price is paid only when the need to deter outweighs the general need to admit all relevant evidence.[60] The Court might have paused for pedagogical reasons to draw the line between constitutional rights and the supervisory power, but was correct in stating that "[t]he values assigned to the competing interests do not change because the court has elected to analyze the question under the supervisory power instead of the fourth amendment."[61]

This comment has asserted that the exclusionary rule is and always was a product of the supervisory power, despite its disguises.[62] Ironically, the district court circumvented the exclusionary rule standing requirement by asserting outright the same authority that covertly created the rule: the supervisory power. Analyzed in this perspective, the district court's supervisory power argument, which was but one of several grounds for its holding, must collapse. Moreover, Justice Powell's arguments that the competing interests are unchanged by a supervisory power analysis and that the fourth amendment exclusionary rule "serves precisely the same purposes"[63] are obviously accurate. The only confusion is semantics.

Payner is an example of a district court that, faced with particularly reprehensible official misconduct, avoided the fourth amendment exclusionary rule and its attendant standing requirement by means of a trick in terminology. The Supreme Court Justices, except perhaps the Chief Justice,[64] did not seem to dispute that the supervisory power exists. Justice Powell, though he may narrow the scope of the power more than the dissenters would, nonetheless, conceded its existence.[65] The disagreement was whether the power, whatever its name, should be exercised when an illegal search and seizure violates rights other than the defendant's. In other words, the issue was the familiar one of standing. The majority refused to permit new wording to influence old law. Justice Marshall for the dissenters saw a need to carve out

59. Justice Powell said that "the Fourth Amendment exclusionary rule . . . is applied in part 'to protect the integrity of the *court* rather than to vindicate the constitutional rights of the defendant . . . .'" 447 U.S. at 736 n.8 (quoting Justice Marshall's dissent in *Payner*, 447 U.S. at 746) (emphasis in the original). The judicial integrity interest apparently did not tip the balance of competing interests appreciably, because Justice Powell went on to state that "the interest in preserving judicial integrity and in deterring such conduct is outweighed by the societal interest in presenting probative evidence to the trier of fact." *Id.* The majority's footnoted judicial integrity discussion may have been an afterthought to meet the dissent's argument, or the majority may genuinely believe that the need to present probative evidence justifies tainting the Court by making it an "accomplice" to the Government's misconduct. The majority's argument would have been more persuasive had it forthrightly disavowed the judicial integrity theory, as in United States v. Calandra, 414 U.S. 338 (1974). *See* discussion in note 58 *supra*. Oddly, Justice Powell cites *Calandra* while also acknowledging the judicial integrity theory.

60. United States v. Janis, 428 U.S. 433, 453-54 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974).

61. 447 U.S. at 736.

62. *See* text accompanying note 51 *supra*.

63. 447 U.S. at 736 n.8.

64. *See* text accompanying note 40 *supra*.

65. 447 U.S. at 736 n.8.

an exception to the old law of standing. Neither opinion directly confronts the rationale of the standing requirement.

The modern view, however, to which this comment conforms, is that the exclusionary rule is not a constitutional right. It is merely a judicially created means to enforce the Constitution.[66] The defendant, therefore, does not assert his constitutional right to exclusion of the evidence. Rather, the defendant demands that the judiciary duly exercise its commitment to deter illegal searches and seizures. The deterrence is nonexistent absent the punishment of exclusion. Neither "standing" nor the shibboleth of "personal constitutional rights"[67] can justify restriction of the exclusionary rule to cases where the search violated the fourth amendment rights of the defendant rather than those of a stranger. The balance of competing interests should not shift toward the prosecution when the defendant lacks standing, because the rights of the particular defendant are not elements of the interests that are balanced. Rather, the principal interest for exclusion is the need to deter illegal searches generally. A rule for deterrence, unlike a rule for compensation, operates prospectively only, and for the benefit of an undetermined class. It is irrelevant that the victim was not the defendant because the purpose of the deterrence rule is to prevent future wrongs against other potential victims, not to compensate for a past wrong against the present victim. To withhold the exclusionary rule from all defendants except those who are victims deters illegal searches of defendants only. Limited application means limited deterrence. It seems that the rest of the public is equally entitled to protection by deterrence.[68]

CONCLUSION

Application of the unpopular and expensive exclusionary rule[69] is restricted by the rule that evidence obtained by an unconstitutional search is not excluded unless the defendant's constitutional rights were violated. The restrictive rule has been, and probably will continue to be, inaccurately called a rule of standing.[70] Whatever the rule's name, the restriction bears no rational relation to the purpose of the rule or to the source of the power

66. *See* note 56 *supra*.

67. *See* text accompanying notes 23-31 *supra*.

68. *See* Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 352-66 (1967).

69. The rule seems about to be swallowed by exceptions contrived to limit its application. The independent source exception, which developed almost immediately after the rule itself, permits the use of illegally seized evidence if the Government can show it would have obtained the evidence through independent legal means. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). The attenuation exception provides that fruits of an illegal search may be admissible if the connection between the offered evidence and the illegal search is sufficiently "attenuated as to dissipate the taint." Nardone v. United States, 308 U.S. 338, 341 (1939).

Illegally seized evidence may be used before a grand jury, United States v. Calandra, 414 U.S. 338 (1974); for purposes of impeachment, Walder v. United States, 347 U.S. 62 (1954); in a parole revocation hearing, United States v. Winsett, 518 F.2d 52 (9th Cir. 1975); and for purposes of sentencing, United States v. Schipan, 435 F.2d 26, 28 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971). Justice Marshall views the Court's recent decisions as an orchestrated "erosion" of the exclusionary rule. Rawlings v. Kentucky, 448 U.S. 98, 121 (1980) (Marshall, J., dissenting).

70. *See* text accompanying notes 26-31 *supra*.

which created the rule. What is worse, the standing restriction invites deliberate official violations of a third party's fourth amendment rights, which is exactly what happened in *Payner*. It is difficult to find logic or justice in a judicial system which suppresses evidence gathered from a technically and accidentally illegal search, such as when a warrant is defective, but admits evidence flowing from a grossly and deliberately illegal search, such as when government agents commit larceny.

Until courts or legislatures find substitutes for the exclusionary rule,[71] such paradoxes will persist. A broad application of the rule will continue to discourage fourth amendment violations. *Payner*, however, removes the supervisory power from the district courts' collection of devices with which to avoid the standing requirement, at least when the government acts are no more serious than larceny. It remains to be seen whether government conduct will descend still further to embrace worse crimes.[72] Unless other fourth amendment remedies are fashioned, *Payner* may encourage another step in that direction.

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71. Because the rule is not constitutionally mandated, there is no constitutional objection to replacing it. For a complete overview of the other remedies proposed, see Geller, *supra* note 37, at 689-722.

72. It has been suggested that the severity of the fourth amendment violation should be material when determining whether to apply the exclusionary rule. *See* Brown v. Illinois, 422 U.S. 590, 609-10 (1975) (Powell, J., concurring in part); Comment, *Fruit of the Poisonous Tree - A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136, 1153 (1967).