Inevitable Discovery: An Exception beyond the Fruits

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Robert M. Bloom*

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I. Introduction

The major remedy in the United States for addressing a police illegality is the suppression of the evidence found as a result of the illegality. This is the so-called exclusionary rule. This remedy was thought to be necessary because, as Justice Clark explained in *Mapp v. Ohio*,¹ other remedies, civil monetary relief or criminal prosecution of the offending officer, had not been effective. If the police officer knows that the evidence illegally obtained cannot be used at a later trial, he will be deterred from violating an individual’s rights.² Although in *Mapp* other reasons for the exclusionary rule were suggested, such as “the imperative of judicial integrity,”³ deterrence has become the sole justification relied on by the present Court.

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* Associate Professor, Boston College Law School. I wish to acknowledge the excellent research assistance of Beth Waldman, class of 1993, and of Tanya Gurevich, class of 1994.

2. Although *Mapp* was a Fourth Amendment case, the exclusionary rule has been held applicable to other amendments.
3. *Mapp* at 659 (“The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own law, or worse, its disregard of the charter of its own existence.”). *See generally* ROBERT M. BLOOM & MARK S. BRODIN, CONSTITUTIONAL CRIMINAL PROCEDURE 1-6 (1992).
In Silverthorne Lumber Co. v. United States, the Supreme Court reasoned that to give meaning to the exclusionary rule it was necessary to apply the exclusionary sanction not only to the direct result of the illegality, but also to the indirect consequences of the illegality as well. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." This concept later became known as the "fruit of the poisonous tree" doctrine. In this Article I shall refer to the direct or immediate result of an illegality as primary evidence and the indirect result or the fruits of the illegality as secondary evidence.

The wisdom of the exclusionary remedy has been questioned by the Supreme Court since the 1970s. Consequently, the Court has chipped away at the applicability of the exclusionary rule; particularly with regard to the exclusion of secondary evidence, the so-called harvest of the fruits of the poisonous tree. The Court has created new exceptions and expanded on existing exceptions to the exclusion of the secondary evidence.

This concern for a limitation on the exclusionary rule with regard to secondary evidence was first expressed in Silverthorne, as the Court, on the one hand, created a derivative evidence exclusion standard and, at the same time, modified its effect by stating: "Of course this does not mean that the facts thus obtained [illegally] become sacred and inaccessible." Based on this rationale, the Court created an exception to secondary evidence exclusion, the so-called "independent source" exception. This exception, arguably, is really not an exception to the fruits doctrine because it allows for the introduction of evidence obtained not by the illegality, but by a separate and distinct method, an independent source. In the independent source situation, it can be said that the fruit not only grows from the poisonous tree, but also grows from another, non-poisonous tree.

Another exception to the fruit of the poisonous tree doctrine created

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4. 251 U.S. 385 (1920).
5. Id. at 391.
6. This phrase was coined in Nardone v. United States, 308 U.S. 338, 341 (1939).
10. Id. at 392.
by the Supreme Court is the “attenuation of the taint” exception. This exception is analogous to the tort doctrine of proximate cause. The rationale for this exception is that the secondary evidence, even though it can be traced back to the initial illegality, is too distant or attenuated from the illegality to be excluded. In other words, much has occurred between the illegality and the finding of the secondary evidence:

We need not hold that all evidence is “fruit of the poisonous tree” simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such cases is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”

The final and most recent exception created by the Supreme Court is the inevitable discovery exception. This exception is closely aligned analytically with the independent source doctrine in that it allows the government to avoid the fruits doctrine if it can show that an independent or alternate investigation would have led to the evidence in question. However, unlike the independent source doctrine in which the alternative source actually leads to the evidence in question, the inevitable discovery exception is speculative, since the independent investigation only hypothetically, not actually, leads to the evidence.

It is this inevitable discovery exception that this Article explores. It takes a close look at Nix v. Williams, the Supreme Court decision that recognized the inevitable discovery exception, analyzes its various components, and briefly looks at how these components have been applied by subsequent courts. The Article then separately explores two areas which were not directly discussed in Nix: the utilization of the inevitable discovery exception to avoid exclusion of primary evidence, and its utilization to avoid the warrant requirement of the Fourth Amendment. This Article will demonstrate that in these two areas the lower courts have expanded the inevitable discovery exception beyond what was originally envisioned by the Supreme Court in Nix, and that this expansion has seriously affected the vitality of the exclusionary rule as well as the Fourth Amendment warrant requirement. The article will further demonstrate that this significant expansion has not received the concern or the analysis it deserves.

II. Nix Decision

The inevitable discovery exception had its genesis in *Somer v. United States*. In *Somer*, police entered the defendant's premises unlawfully and were informed by the defendant's wife that he was out, but that he would be delivering the "stuff" and returning to the apartment shortly. After conducting a search of the apartment, the officers went outside and waited for the defendant's arrival. Within a short period of time, the defendant drove up and the police observed the "stuff" (alcohol and sugar) in the car. Somer admitted to possession of alcohol and was arrested. The alcohol and sugar were seized. Defendant filed a motion to suppress the physical evidence, which the lower court granted. However, the Second Circuit remanded to the lower court to retry the issue of evidence admissibility, stating that the inquiry may show that "quite independently [from the information unlawfully obtained from the defendant's wife] the officers would have gone to the street, have waited for Somer and have arrested him, exactly as they did. If . . . it appears that they did not need the information, the seizure may have been lawful." The circuit court did not define this holding as an inevitable discovery, nor did it address it in terms of the exception to the fruits doctrine.

The inevitable discovery exception was first adopted by the Supreme Court in *Nix v. Williams*, which involved the horrendous crime of kidnapping and murdering a ten-year-old girl on Christmas Eve. The police legality in this case was a violation of the Sixth Amendment, and a statement was obtained as a direct result of that violation. This statement was the primary evidence, which led the police to the body of the victim, the secondary evidence. Despite the clear causation between the constitutional violation and the secondary evidence, the Court held that the evidence of the body could be introduced because the body would inevitably have been discovered. The decision was based on a factual

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16. 138 F.2d 790 (2d Cir. 1943).
17. Id. at 791.
18. Id. at 792.
19. The term "inevitable discovery" is generally traced to the 1974 Seventh Circuit decision in *United States ex rel. Owens v. Twomey*, 508 F.2d 853, 855-66 (7th Cir. 1974). The facts of *Owens* were such that the independent source rule could be used to avoid exclusion of evidence and the court did, in fact, use that doctrine. The court, however, went further and expressed approval of the "so-called 'inevitability test.'" Id. at 866.
21. The police, by use of a psychological ploy (a Christian burial speech), obtained a statement from the defendant after his right to counsel had attached. Since counsel had attached this deliberate elicitation of the statement, it constituted a violation of the Sixth Amendment. See *Massiah v. United States*, 377 U.S. 201 (1964). The Court pointed out that the fruits doctrine was applicable to the Fourth and Fifth Amendment as well. Thus the inevitable discovery exception has applicability beyond the Sixth Amendment. *Nix*, 467 U.S. at 442.
22. As the facts of *Nix* indicate, the inevitable discovery exception was used to avoid the exclusion of a body, i.e. physical evidence. This factor was relied upon by the Alaska Court of Appeals when it refused to apply the inevitable discovery exception to a statement, as opposed to physical evidence. *Unger v. State*, 640 P.2d 151 (Alaska Ct. App. 1982), *overruled on other grounds by*, *Johnson v. Alaska*, 662 P.2d 981, 984 (1983). The court held that a statement was not the
determination by the lower court that a search party operating in the area would have found the body had the search not been suspended. Thus, the Court adopted the inevitable discovery exception to the fruits doctrine.

The Court, in adopting the inevitable discovery doctrine, compared it to the independent source doctrine. Justice Brennan, in his dissent, took exception with the comparison to the independent source exception. He pointed out that the independent source exception allows the prosecution to use evidence that was in fact obtained by lawful means, whereas the inevitable discovery doctrine deals with evidence which was discovered as a result of an illegality.

The *Nix Court, in determining the scope of the exclusionary rule for secondary evidence, reasoned that the police should be put "in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." In other words, if the police can establish that they would have found the evidence regardless of the illegality, they should not be put in a worse position simply because the illegality had, in fact, taken place. It should be emphasized that the Court was directing this comment to the derivative quality of the evidence and limited its comment

type of evidence that would "be 'discovered' by legal, predictable police procedures." *Id.* at 159. Even though an arrest of a defendant may have been inevitable, this does not necessarily mean a statement would have been obtained. *Id.* at 159.

The Michigan Court of Appeals referred to *Unger* in *People v. Thomas*, 478 N.W.2d 712, 716 (Mich. Ct. App. 1991), *cert. denied*, 113 S. Ct. 297 (1992). The court pointed out that it was just too speculative to know if the defendant, at another time, would have made the same type of statement that had been made initially:

To conclude that a person would make the same statement under different circumstances requires, in essence, both the ability to read the defendant's mind to ascertain why he was willing to make the statement in the first place and a degree of prescognition concerning whether that willingness would extend to different circumstances, which ordinarily would be beyond the power of either the prosecutor or the court to perform. *Id.*, discussing *Unger*, 640 P.2d at 159. The Michigan court agreed with *Unger*, although the court qualified its approval by stating that the inevitable discovery exception could be used for a statement, but it would have to be done in rather unusual circumstances. 470 N.W.2d at 716.

For example, had, unknown to the arresting officers, another officer in the department obtained a warrant for defendant's arrest and arrived at defendant's residence moments after the arrest was conducted without a warrant, it might be valid to conclude that there is no reasonable distinction between the arrest without a warrant and an arrest a few moments later with the warrant and, therefore, any statements made by defendant after the arrival of a warrant would be admissible. *Id.* at 716 n.4.

23. "There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place." *Nix*, 467 U.S. at 443-45.

24. In its zealous efforts to emasculate the exclusionary rule, however, the Court loses sight of the crucial difference between the "inevitable discovery" doctrine and the "independent source" exception from which it is derived. When properly applied, the "independent source" exception allows the prosecution to use evidence only if it was, in fact, obtained by fully lawful means. It therefore does no violence to the constitutional protections that the exclusionary rule is meant to enforce. The "inevitable discovery" exception is likewise compatible with the Constitution, though it differs in one key respect from its next of kin: specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed. *Id.* at 459.

25. *Id.* at 443 (emphasis added).
to that.  

It is interesting to note that the Court took a restorative approach to the exclusionary rule, that is, police should not be put in a worse position as a result of an illegality. To justify this approach, the Court pointed out that in the inevitable discovery cases the deterrence rationale of the exclusionary rule would not be served because the evidence would have been found anyway. However, this approach does not adequately address the wrong that has occurred. It also deviates from the traditional understanding of the exclusionary rule, where the state is put in a worse position (by the loss of valuable evidence) whenever the exclusionary rule applies. The rule is primarily designed to prevent future wrongs, not to evaluate the present ramifications.  

In *Nix*, the Supreme Court established the “preponderance of evidence” as the burden of proof that the state must meet to establish the inevitable discovery exception. A vast majority of jurisdictions follow this evidentiary standard. The objective of the various burdens was to aid the courts in their effort to make certain that the evidence would indeed be found in the absence of unlawful police activity. For this reason, Justice Brennan, in his dissent in *Nix*, argued for requiring a higher standard of proof by the prosecution, due to the speculative aspect of the inevitable

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26. *Id.* at 444; see United States v. $639,558.00 in U.S. Currency, 955 F.2d 712, 720 (D.C. Cir. 1992) (discussing *Nix*).

27. *Nix*, 467 U.S. at 444.


29. *Nix*, 467 U.S. at 444. Prior to *Nix*, different standards were suggested for the burden of proof in the inevitable discovery cases. Some courts required the government to prove by “clear and convincing evidence” that the evidence would have been found without the initial illegality. E.g., Government of Virgin Islands v. Gereau, 302 F.2d 914, 927 (3d Cir. 1969), cert. denied, 402 U.S. 909 (1975); *Fain* v. *State*, 611 S.W.2d 503, 509 (Ark. 1981), *questioned in,* Brustein v. *State*, 753 S.W.2d 859, 861-62 (“Contrary to our position in *Fain* we now find that it is not incumbent that the state establish good faith conduct as to the accelerated discovery of the evidence....”); *State* v. *Byrne*, 595 S.W.2d 301, 305 (Mo. Ct. App. 1979), cert. denied, 449 U.S. 951 (1980).

29. *Nix*, 467 U.S. at 444. Prior to *Nix*, different standards were suggested for the burden of proof in the inevitable discovery cases. Some courts required the government to prove by “clear and convincing evidence” that the evidence would have been found without the initial illegality. E.g., Government of Virgin Islands v. Gereau, 302 F.2d 914, 927 (3d Cir. 1969), cert. denied, 402 U.S. 909 (1975); *Fain* v. *State*, 611 S.W.2d 503, 509 (Ark. 1981), *questioned in,* Brustein v. *State*, 753 S.W.2d 859, 861-62 (“Contrary to our position in *Fain* we now find that it is not incumbent that the state establish good faith conduct as to the accelerated discovery of the evidence....”); *State* v. *Byrne*, 595 S.W.2d 301, 305 (Mo. Ct. App. 1979), cert. denied, 449 U.S. 951 (1980). Other jurisdictions stated that the police had to prove that they were actively pursuing the evidence through legal channels and that there was a “reasonable probability” that the evidence would be discovered. E.g., United States v. *Brookins*, 614 F.2d 1037, 1043 (9th Cir. 1980); *Hernandez* v. *Superior Court of Sacramento County*, 185 Cal. Rptr. 127, 132 (Cal. Ct. App. 1982). The Second Circuit held that the government has to prove by a “preponderance of evidence” that the evidence in question would be obtained through means other that the illegal ones. United States v. *Foley*, 489 F.2d 33, 41 (2d Cir. 1973); United States v. *Schipani*, 239 F. Supp. 43, 64 (E.D.N.Y. 1965), aff’d, 414 F.2d 1262 (2d Cir. 1969), cert. denied, 397 U.S. 9222 (1970).

30. E.g., United States v. *Andrade*, 784 F.2d 1431, 1433 (9th Cir. 1986); United States v. *Thomas*, 787 F. Supp. 663, 683 (E.D. Tex. 1992); Commonwealth v. *O’Connor*, 546 N.E.2d 336, 339 (Mass. 1989); *State* v. *Milliron*, 794 S.W.2d 181, 185 (Mo. Ct. App. 1990). There have been some variations adopted by several courts, which have used terms like “reasonable probability.” E.g., United States v. *Cherry*, 759 F.2d 1186, 1204 (4th Cir. 1985), cert. denied, 105 U.S. 1055 (1985); United States v. *Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985); *State* v. *Purcell*, 480 N.E.2d 763, 767 (Ohio 1985). One state court follows a more flexible standard, one which varies with the circumstances of each individual case, and it states that “[w]hen the evidence is well concealed or timely when a critical factor, the state will have to make a more exact showing of how or when the discovery would have occurred.” *State* v. *Miller*, 709 F.2d 225, 243 (Or. 1983), cert. denied, 105 U.S. 1141 (1986). At least one state court does not accept the “preponderance of evidence” standard and requires “clear and convincing” evidence, but this requirement is directly tied to the application of the inevitable discovery to primary, as well as secondary evidence. *State* v. *Sugar*, 495 A.2d 90, 104 (N.J. 1985), cert. denied, 384 A.2d 247 (N.J. 1990); see also *State* v. *Johnson*, 576 A.2d 834, 848-49 (N.J. 1990); *State* v. *Hall*, 600 A.2d 1248, 1251-52 (N.J. Super. 1990), aff’d, 600 A.2d 1221 (N.J. Super. 1991). See infra text accompanying notes 82-85.
discovery exception. He argued for a “clear and convincing” standard, as opposed to the "preponderance of evidence" standard adopted by the majority.

To counter Justice Brennan’s argument, the majority sought to reduce the speculative aspect of the exception by requiring that the alternative investigation must have at least been started for the exception to apply. They stated that the inevitable discovery exception “involves no speculative elements but focuses on demonstrated historical facts.” This approach was consistent with the facts of Nix, in which police were in the process of scouring the roadside when the body was found. This Article explores this aspect in greater detail when it looks at the effect of the inevitable discovery exception on the warrant requirement.

Prior to Nix, the Supreme Court had recognized the importance of good faith when considering the exceptions to the fruits doctrine. In Brown v. Illinois, the Court, in determining the thrust of the fruits doctrine, stated that “the purpose and flagrancy of the official misconduct [is particularly] relevant.” Later on, the Supreme Court in United States v. Ceccolini analyzed the “attenuation of the taint” doctrine as it applied to the finding of live witnesses. There the Court indicated “that considerations relating to the exclusionary rule and the constitutional principles which it is designed to protect must play a part in this attenuation analysis.” It further indicated that the flagrancy of the illegality was an important factor in determining whether the application of the exclusionary rule would have a deterrent effect.

Nix was a departure from these good faith concerns. In Nix, the

31. Nix, 467 U.S. at 459-60.
32. Id. at 459.
33. Id. at 444 n.5.
34. See infra text accompanying notes 93-147.
35. 422 U.S. 590 (1975).
36. Id. at 604-05.
38. Id. at 279.
39. Id. at 279-80; see also Michigan v. Tucker, 417 U.S. 433, 447 (1974) (“The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrent rationale loses much of its force.”).
40. Prior to Nix, there was a limited number of jurisdictions which addressed the element of "good faith" in the application of the inevitable discovery doctrine. Some courts mentioned the "good faith" factor in passing. See e.g., United States v. Alvarez-Porras, 643 F.2d 54, 65 (2d Cir. 1981) (stressing officer's good faith in trying to comply with warrant requirement), cert. denied, 454 U.S. 839 (1981); State v. Holler, 459 A.2d 1143, 1147 (N.H. 1983) (asserting that the element of good faith on the part of police is inherent in the inevitable discovery); People v. Superior Court, 80 Cal. App. 3d. 665, 683 (Cal. Ct. App. 1978) (reasoning that an inquiry into police officer's good faith would serve the interest of justice). Other courts followed the approach taken by the Iowa Supreme Court in State v. Williams, 285 N.W.2d 248, 260 (Iowa 1979), cert. denied, 446 U.S. 921 (1980), rev'd, 700 F.2d 1164 (8th Cir. 1983) (holding that the factual proof was not sufficient for the state to fall under the "inevitable discovery" rule and reversing on facts only), rev'd, Nix v. Williams, 467 U.S. 431 (1984), where the government was required to show an "absence of bad faith" in order for the inevitable discovery doctrine to apply. See e.g., Fein v. State, 611 S.W.2d 508, 509 (Ark. 1981) (imposing a "good faith"
notion of a good faith requirement was rejected by the Court, as it did not require the state to show an absence of bad faith. The Court went through a balancing test, weighing the costs of imposing a good faith requirement on the state with whatever deterrence benefit might result. It concluded that to require the state to show an absence of bad faith would impose a huge societal cost, because it would deprive juries of truthful facts, as well as put the police in a worse position. The Court found that the use of the inevitable discovery exception would have a limited deterrent effect because a police officer "would rarely if ever be in a position to calculate whether the evidence sought would inevitably be discovered." He would therefore avoid any questionable practices which might result in suppression of the evidence, as well as departmental sanctions and civil liability. However, the Court seems short-sighted in this conclusion, especially with regard to avoiding the warrant requirement.

41 State v. Byrnes, 595 S.W.2d 301, 305 (Mo. Ct. App. 1979) (requiring "good faith" on the part of government for inevitable discovery to apply); cert. denied, 449 U.S. 951 (1980); State v. Phelps, 297 N.W.2d 769, 775 (N.D. 1980) (holding that the "use of doctrine is permitted only when police have not acted in bad faith"). However, the Neb decision led some state courts, which originally had a good-faith requirement, to reject or to question it. E.g., Branson v. State, 253 S.W.2d 839, 861-62 (Ark. 1958) (holding Faiz a good faith requirement no longer necessary); State v. Coreau, 781 P.2d 1159, 1168 (N.M. Ct. App. 1989) (questioning earlier decision requiring absence of bad faith in light of Neb decision).

42. 467 U.S. at 445.
43. Id.
44. Id. at 446.
45. Despite the Neb decision, some courts have considered the flagrancy of the violation in assessing whether to apply the inevitable discovery exception. At least one court interpreted Neb to mean not that the presence of intentional misconduct is irrelevant, only that the government does not have to prove an absence of bad faith. Fortier v. State, 515 So. 2d 101, 111-12 (Ala. Crim. App. 1987), cert. denied, 484 U.S. 1043 (1988). A number of state courts felt that the inevitable discovery doctrine would lead to unconstitutional short cuts, thereby defeating the deterrence effect of the exclusionary rule. These courts have reasoned that a "good faith" requirement would avoid this effect. Thus, as a precondition to the use of the inevitable discovery exception, these courts require that the state prove that the police have not acted in bad faith by accelerating the discovery of evidence.


The Model Code of Pre-Arrestment Procedure, § 290.2(5) (1975) would seem to support this "good faith" requirement. The Code sets out two requirements for the state to avoid the suppression of "fruits." First, the state must prove that evidence would have been discovered anyway (inevitable discovery). Id. Second, it has to be shown "that exclusion of such evidence is not necessary to deter violation of this code." Id. It is this language that would seem to implicitly establish a "good faith" requirement.

Brent R. Appel, Deputy Attorney General, Department of Justice, Des Moines, Iowa and attorney for the state of Iowa in Neb v. Williams, suggests that "[i]n order to prevent police officers from using dependent inevitable discovery as a bootstrap to introduce evidence, the state should generally be required to show 'absence of bad faith' in order to avoid the bite of the exclusionary rule." Brent R. Appel, The Inevitable Discovery Exception to the Exclusionary Rule, 21 CRIM. L. BULL. 101, 116 (1985).

Some courts have looked at the severity of the constitutional violation in assessing whether or not to apply the inevitable discovery exception to primary as well as secondary evidence. E.g., Commonwealth v. O'Connor, 546 N.E.2d 336, 340 (Mass 1989); Commonwealth v. Boscott, 415 N.E.2d 818, 823 (Mass. 1981). Other courts, when faced with an intentional bypass of the Fourth Amendment warrant requirement, have not applied inevitable discovery. E.g., State v. Satterfield, 743 P.2d 827, 846 (11th Cir. 1987), cert. denied, 471 U.S. 1117 (1985); Fortier v. State, 515 So. 2d 101, 112 (Ala. Crim. App. 1987) (construing United States v. Cherry, 759 F.2d 1196, 1205 (5th Cir. 1985), cert. denied, 479 U.S. 1056 (1985)); State v. Johnson, 301 N.W.2d 625, 629 (N.D.1981). The First Circuit, in its desire to avoid the active pursuit requirement of Neb, seems to have, at least implicitly, adopted a good faith requirement by requiring a determination...
III. Expansion to Primary Evidence

Most of the circuits have utilized the inevitable discovery exception to allow the introduction of primary evidence, and this has usually been done without any discussion. United States v. Mancrea-Londono, in facts similar to United States Currency, presents a good example of a circuit utilizing the inevitable discovery exception to avoid exclusion of the primary evidence. The case involved an illegal search of an automobile in which primary evidence was found. Due to an inventory procedure which would have uncovered the evidence, exclusion was avoided by the use of the inevitable discovery exception. The court did not discuss the appropriateness of the use of inevitable discovery for primary evidence; it just automatically applied it.

Following the lead of the circuits, states have started to apply the inevitable discovery exception to primary as well as secondary evidence, and generally this has also been done without any discussion. New Jersey, the court explicitly allowed application of the inevitable discovery rule to primary evidence, but it created a more stringent standard — "restrictive formulation of the inevitable discovery exception." This formulation imposes a "clear and convincing" burden of proof on the prosecution, a higher standard than the "preponderance of the evidence" standard adopted by the Supreme Court in Nix.

The expansion to primary evidence of the inevitable discovery

of whether "the application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken [F]ourth [A]mendment protection." United States v. Silvestri, 787 F.2d 736, 744 (1st Cir. 1986), cert. denied, 487 U.S. 1223 (1988). This is an indication that the courts should consider whether use of the inevitable discovery exception will encourage police misconduct. See also United States v. Rullo, 748 F. Supp. 36, 44 (D. Mass. 1990) (reviewing test for police misconduct in context of inevitability and independence).


The Second Circuit specifically addressed the issue of the application of the inevitable discovery exception to primary, as well as secondary evidence. The Circuit characterized inevitable discovery as an exception to the exclusionary rule, rather than an exception to the fruits of the poisonous tree doctrine. United States v. Pimentel, 810 F.2d 366, 368-69 (2d Cir. 1987). Thus, explicitly, as well as in its analysis of the facts of an individual case, the Second Circuit does not distinguish between primary and secondary evidence. United States v. Gorski, 832 F.2d 692 (2d Cir. 1988); Whithorn, 829 F.2d at 1233; United States v. Taddeo, 724 F. Supp. 81, 87 (W.D.N.Y. 1989), aff'd, 932 F.2d 956 (1991) ("Second Circuit has expressly rejected the direct-indirect evidence distinction.").

91. 912 F.2d 373 (9th Cir. 1990).
93. 49. Mancrea-Londono, 912 F.2d at 375-76.
52. Id. at 104.
exception occurring in the circuit courts and the state courts potentially has great ramifications on the continued vitality of the exclusionary rule. To analyze this trend properly, it is useful to have an understanding of the Supreme Court's approach to the exclusionary rule.

Over time, the Court, in continuing to apply the exclusionary rule to address police illegality, has concluded that its only benefit is to deter police misconduct. "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Through a balancing test which is utilized to determine whether to apply the exclusionary rule in a particular context, the Court has implemented its deterrence rationale. This test balances the benefit of deterrence with the societal costs of suppressing reliable evidence. When the costs of exclusion outweigh the benefits of deterrence, the exclusionary rule is not applied. In applying this balancing test, the Court has been especially cognizant of the deterrence benefit resulting from excluding primary evidence at a criminal trial from the prosecution case in chief, and it has been reluctant to create exceptions to the exclusionary rule in this context. For example, in Stone v. Powell, the Court specifically indicated that the

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54. The close relationship of the inevitable discovery exception to the exclusionary rule and its potential effect on the rule was briefly discussed in 1974 by the Fifth Circuit in U.S. v. Castellana, 469 F.2d 65, 68 (5th Cir. 1974), modified, 500 F.2d 325 (5th Cir. 1974) (en banc). (To admit unlawfully obtained evidence on the strength of some judge's speculation that it would have been discovered legally anyway would be to cripple the exclusionary rule as a deterrent to improper police conduct.)


57. The balancing test has been applied in different contexts, usually to avoid the scope of the exclusionary rule. For example, United States v. Calandra, 414 U.S. 338 (1974), held that the exclusionary rule was not applicable for grand jury proceedings. Also, in United States v. Janis, 428 U.S. 433 (1976), evidence illegally obtained was admitted for civil (as opposed to criminal) proceedings. In Stone v. Powell, 428 U.S. 465 (1976), the exclusionary remedy review was limited during a habeas corpus proceeding. Justice Brennan, in his dissent in United States v. Leon, had this to say about the so-called balancing approach:

The Court seeks to justify this result on the ground that the "costs" of adhering to the exclusionary rule in cases like those before us exceed the "benefits." But the language of deterrence and of cost/benefit analysis, if used indiscriminately, can have a narcotic effect. It creates an illusion of technical precision and ineluctability. It suggests that not only constitutional principle but also empirical data support the majority's result. When the Court's analysis is examined carefully, however, it is clear that we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been driven into a curious world where the "costs" of excluding illegally obtained evidence loom to exaggerated heights and where the "benefits" of such exclusion are made to disappear with a mere wave of the hand.


All of these "balancing tests" amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will. Perhaps this doctrinally destructive utilitarianism is merely a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences.

469 U.S. at 369.

deterrent rationale had its greatest benefit for the suppression of evidence at the trial stage.\textsuperscript{59}

Even in \textit{United States v. Leon}, where the Court created a good faith exception to the exclusionary rule for the exclusion of evidence in the prosecution case in chief, the Court took a narrow view as to what would amount to a good faith exception.\textsuperscript{60} The Court limited the good faith exception to those instances where the officer conducts a search pursuant to a warrant:

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."\textsuperscript{61}

In short, where the officer’s conduct is objectively reasonable, “excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty."\textsuperscript{62}

The Court, in creating this narrow exception, continued to recognize the vitality of the exclusionary rule by pointing out that “[t]he Court has, to be sure, not seriously questioned, in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the [prosecution’s] case where a Fourth Amendment violation has been substantial and deliberate.”\textsuperscript{63}

The Court has recognized, in its employment of the exclusionary rule, a distinction between primary and secondary evidence.\textsuperscript{64} The concern for limiting the exceptions to the exclusionary doctrine during the prosecution’s case, especially with regard to primary evidence, has permeated the Court’s analysis of the exceptions to the fruits doctrine. In applying the attenuation of the taint exception, the Court has examined how closely the secondary evidence is tied to the primary evidence in order to determine

\begin{itemize}
  \item 59. Id. at 493.
  \item 60. 468 U.S. 897, 923 (1984).
  \item 61. Id. at 919 (quoting United States v. Peltier, 422 U.S. 531, 539 (1975)).
  \item 62. Id. at 919-20 (quoting Stone v. Powell, 428 U.S. at 539-540 (White, J., dissenting)).
  \item 63. Id. at 908-09 (alteration in original) (quoting Franks v. Delaware, 438 U.S. 154, 171 (1978)); see also Stone v. Powell, 428 U.S. at 492 (assuming that exclusion deters law enforcement officers from wrongful conduct and noting that exclusion encourages officers to incorporate the Fourth Amendment into their value systems).
  \item 64. The distinction between the deterrent effect on primary and secondary evidence was discussed in dicta in \textit{Segura v. United States}, 468 U.S. 796, 804 (1984), a case decided just prior to \textit{Leon}. In \textit{Segura}, the Court indicated that “evidence obtained as a direct result of an unconstitutional search and seizure is plainly subject to the exclusion.” Id. (emphasis added). Since the primary evidence issue was not litigated in \textit{Segura}, the Court’s recognition of the differences between primary and secondary evidence and its effect on the exclusion of evidence is only \textit{dicta}. In this way the court has implicitly recognized a difference between primary and secondary evidence.
\end{itemize}
the benefits from the use of the exclusionary rule. The point at which the taint becomes attenuated has been viewed as "the point of diminishing returns" of the deterrence principle,\(^6\) at which point the detrimental consequences of the illegal police action no longer justify the cost of exclusion. This proposition was also emphasized in *Wong Sun v. United States*:\(^6^6\) "The exclusionary rule has traditionally barred from trial all physical, tangible materials obtained either during or as a result of an unlawful invasion."\(^6^7\) The Court has indicated that one would have to analyze each factual situation and determine how closely tied the contested evidence was to the illegality.\(^6^8\) Where there is a close causal connection between the illegality and the secondary evidence, the exclusionary remedy would be most efficacious. However, if the causal connection is sufficiently attenuated, an exception to the exclusionary rule would be appropriate. Thus, in both the application of the fruits doctrine as well as in the creation of exceptions to the exclusionary rule, the court has shown sensitivity and indeed reluctance to limiting the exclusionary remedy for primary evidence.

The *Nix* decision, which established the inevitable discovery exception and to date remains the only Supreme Court case which directly deals with this exception, presents a strong argument for limiting this exception to secondary evidence as it involved facts that dealt with the exclusion of secondary evidence.\(^6^9\) In its analysis, the Court referred to suppression of "tainted" fruit,\(^7^0\) and the cases cited in this context involved the exceptions to the fruits doctrine.\(^7^1\) Further, the Court, in its discussion of the exclusionary rule, once again referred exclusively to the secondary evidence.\(^7^2\) Thus, based upon the facts, as well as the rationale of *Nix*, the Court's attention understandably was focused exclusively on secondary evidence. There was no discussion of the effect of this exception on primary evidence.

At least one circuit has subsequently utilized the *Nix* decision to limit explicitly the inevitable discovery doctrine to secondary evidence. In *United States v. $639,558.00 in U.S. Currency*,\(^7^3\) in facts similar to *Mancera-Londono*,\(^7^4\) the government sought to use an inevitable inventory search to justify a warrantless discovery of primary evidence. The case

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\(^{67}\) Id. at 485.

\(^{68}\) Id.


\(^{70}\) Id. at 441.

\(^{71}\) Id. at 441-42 (referring to *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) and *Wong Sun v. United States*, 371 U.S. 471 (1963)).

\(^{72}\) Id. at 442-43.

\(^{73}\) 955 F.2d 712 (D.C. Cir. 1992).

\(^{74}\) 912 F.2d 373 (9th Cir. 1990).
involved a warrantless search of luggage which resulted in the finding of evidence. Since there was an existing inventory procedure,75 the government argued that the evidence in the luggage would have been found anyway.76

The D.C. Circuit rejected this argument, stating that Nix was limited to derivative evidence: "Whatever one may think of the distinction [between primary and secondary evidence], the fact remains that Nix drew it, and did so for the purpose of demonstrating that the deterrent effects of the exclusionary rule would not be lessened."77 The D.C. Circuit admitted, however, that many circuits have "either rejected or ignored any distinction between primary and derivative evidence, as well as the deterrence inquiry called for by Nix."78

In some states, the distinction between primary and secondary evidence has been explicitly recognized by the courts for some time. As early as *State v. Crosen,*79 inevitable discovery has been applied only to purge the taint of secondary, not primary, evidence. Subsequent to Nix, some of the state courts, through the use of their own laws, have been even more vigilant in limiting the use of inevitable discovery exclusively to secondary evidence.80

In New York, the courts have interpreted the state constitutional provisions so as to ensure that the use of the inevitable discovery exception is limited to secondary evidence.81 In Oregon, the appeals court has turned to a state statute that codified the fruits of the poisonous tree

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75. This is a police procedure used to safeguard valuables and other property while an individual is in police custody or when an automobile is seized by the police.
76. U.S. Currency, 955 F.2d at 714.
77. Id. at 720. For a different treatment of Nix, see United States v. McConnell, 903 F.2d 566, 570 (8th Cir. 1990) (holding that the primary evidence seized from an illegally opened briefcase was held admissible), cert. denied, 111 S. Ct. 1393 (1991).
78. 955 F.2d at 720.
79. 536 F.2d 1263 (Or. Ct. App. 1975); see also Hernandez v. Superior Court of Sacramento County, 110 Cal. App. 3d 355, 361 (3d Dist. 1979) (holding that the inevitable discovery exception applies only to evidence obtained as the indirect product of an illegal search); State v. Jorgensen, 526 N.E.2d 1004, 1008 (Ind. Ct. App. 1st Dist. 1988) (holding that the evidence found in defendant's house was primary evidence and taint could not be removed, even if the state proved that evidence would have been discovered legally).
81. E.g., People v. Solano, 539 N.Y.S.2d 494 (App. Div. 1989). New York presents a good example of a state court that has specifically limited the use of inevitable discovery to secondary evidence. This distinction was originally mentioned in People v. Stith, 506 N.E.2d 911, 914 (N.Y. 1987):

> When inevitable discovery rule is applied to secondary evidence . . . the effect is not to excuse the unlawful police action by admitting what was obtained as a direct result of initial misconduct . . . . When the inevitable discovery rule is applied to primary evidence . . . the result is quite different . . . . It amounts to an after the fact purging of initial wrongful conduct.

doctrine and interpreted the language of the statute, which reads "as a result of [an unlawful] search or seizure, other evidence is discovered subsequently," to mean that the inevitable discovery exception applies only to secondary, as opposed to primary, evidence. The Texas Court of Appeals, although it does not explicitly discuss the use of the inevitable discovery exception for primary evidence, implicitly indicates that its application is limited to secondary evidence, because the court classifies the inevitable discovery as an exception to the fruits of the poisonous tree doctrine.

On the other side of the ledger, Murray v. United States, an independent source decision, has provided support for excluding primary evidence via the inevitable discovery exception. This is not surprising, given the previously discussed close relationship between the independent source exception and the inevitable discovery exception. Murray has been cited for the proposition that there is no distinction to be drawn between primary and secondary evidence, at least with regard to the deterrent effect of the exclusionary rule. In Murray, federal agents performed an illegal warrantless search, which resulted in the discovery of bales of marijuana (primary evidence, as it was the direct result of an illegality). The federal agents left the bales untouched and then got a warrant based upon previously obtained evidence, evidence which was separate and distinct from the discovery of the marijuana. The same agents executed the warrant some eight hours after the initial entry and seized the previously discovered marijuana. The majority of the Court, in a decision by Justice Scalia, allowed for the introduction of the bales, despite the illegal initial search, provided that the lawful entry with the warrant was based upon information not related to the initial entry. The majority refused to distinguish between primary and secondary evidence. This reasoning, coupled with the previously mentioned close relationship between the inevitable discovery doctrine and the independent source doctrine, has invited lower courts to utilize the Murray decision to support the use of the

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83. Reed v. Texas, 809 S.W.2d 940, 944 (Tex. Ct. App. 1991). In a recent decision, the Texas Court of Criminal Appeals, in interpreting a state statute, found that the inevitable discovery exception was not an exception to the Texas exclusionary rule and therefore refused to apply it. Garcia v. Texas, 829 S.W.2d 786 (Tex. Crim. App. 1992).
84. 487 U.S. 533 (1988). It should be pointed out that Murray was a 5-4-3 decision with Justices Brennan and Kennedy not participating.
85. E.g., United States v. $639,559.00 in U.S. Currency, 955 F.2d 712, 720 (D.C. Cir. 1992) ("[The Murray Court] rejected the argument that a different result was compelled because primary, not derivative, evidence was involved."); People v. Schoenborn, 739 P.2d 715, 719 (Colo. 1987) (on banc) (holding that based on the Murray rationale, primary evidence may be admitted if government proves that warrant would have been obtained absent information gained by initial illegality).
86. 487 U.S. at 535.
87. Id. at 541.
88. Id. Justice Scalia characterized Silverthorne, the case which, as previously mentioned, established the independent source exception, as "referring specifically to [primary] evidence seized during an unlawful search." Id.
89. "The inevitable discovery doctrine, with its distinct requirements is in reality an extrapolation from the independent source doctrine." Id. at 539.
inevitable discovery exception to avoid exclusion of primary evidence.

As indicated, support can be found for either applying inevitable discovery to primary evidence or limiting its use exclusively to secondary evidence. On one hand, the Court’s sensitivity to limiting exceptions to the exclusionary rule during the prosecution’s case in chief, as expressed throughout Leon, its efforts to limit exceptions to the fruits doctrine when the secondary evidence is closely tied to the primary evidence, and the benefits of deterrence when dealing with the direct result of the illegality, argue persuasively for limiting the inevitable discovery exception to secondary evidence. In addition, the Nix decision was specifically limited by its facts and analysis to secondary evidence.

On the other hand, the Murray decision, recognizing the close relationship between the independent source rule and the inevitable discovery exception, provides support for expansion of the inevitable discovery exception to primary evidence:

It is possible to read petitioner’s brief as asserting the more narrow position that the “independent source” doctrine does apply to independent acquisition of evidence previously derived indirectly from the unlawful search, but does not apply to what they call “primary evidence,” that is, evidence acquired during the course of the search itself. In addition to finding no support in our precedent, this strange distinction would produce results bearing no relation to the policies of the exclusionary rule. It would mean, for example, that the government’s knowledge of the existence and condition of a dead body, knowledge lawfully acquired through independent sources, would have to be excluded if government agents had previously observed the body during an unlawful search of the defendant’s apartment; but not if they had observed a notation that the body was buried in a certain location, producing consequential discovery of the corpse.

Given the ramifications that the use of the inevitable discovery exception has on the exclusionary rule, it seems that courts should, at least, recognize that they are using it to exclude primary evidence, and discuss this expansion, rather than applying it automatically. It further should be recognized that this expansion is beyond Nix, the only Supreme Court case dealing directly with the inevitable discovery exception.

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90. United States v. Leon, 468 U.S. 897 (1984); see supra notes 59-63 and accompanying text.
91. A failure to exclude primary evidence would likely dilute the exclusionary rule deterrence effect: [Falling to exclude primary evidence is] an after-the-fact purging of the initial wrongful conduct, and it can never be claimed that a lapse of time or the occurrence of intervening events has attenuated the connection between the evidence ultimately acquired and the initial misconduct. The illegal conduct and the seizure of the evidence are one and the same.
IV. Warrant Requirement

A. Overview

The Supreme Court has indicated that the Fourth Amendment warrant requirement provides a useful buffer between the police officer and the individual.

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. 93

Given this important objective, the Court has, at times, limited the opportunities for warrantless police activity. 94 "It is a cardinal principle that warrantless searches are per se unreasonable unless the search falls within the few specifically established and well delineated exceptions." 95 Nevertheless, the Court, as pointed out by Justice Scalia, has "lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone." 96 He further points out that "the 'warrant' requirement [has] become so riddled with exceptions that it [is] basically unrecognizable." 97

The deeds of the Supreme Court would support Scalia's observation, as the Court has been liberal in its expansion of the exceptions to the warrant requirements of the Fourth Amendment. By extending the existing exceptions to the warrant requirement, the Court has expanded on the opportunities for warrantless police activity. For example, in Florida v. Jimeno, 98 the Court expanded on the scope of a consent search, one of the traditional ways avoiding warrants, and in California v. Acevedo 99 it expanded the automobile exception to the warrant requirement by allowing for a search of containers. 100 As this Article will demonstrate, the

96. Acevedo, 111 S. Ct. at 1992 (Scalia, J., concurring).
97. Id.
98. 111 S. Ct. 1901 (1991) (holding that when a motorist gives an officer permission to search his car for narcotics, the scope of the search may extend to anywhere in the vehicle where narcotics may be hidden, including a closed container).
100. Id. at 1991. Prior to Acevedo, the police could search a container found in a car only if they had probable cause to search the entire car. If probable cause was limited to the container the container could be seized but not opened until a warrant was obtained. United States v. Ross, 456 U.S. 798 (1982). Acevedo allowed for the warrantless search of the container without regard for the extent of probable cause. 111 S. Ct. at 1991.
utilization of the inevitable discovery exception further limits the use of the already limited warrant requirement.

B. Inevitable Discovery

The Nix Court, in discounting the negative effect that the inevitable discovery exception would have on the deterrence rationale of the exclusionary rule, stated in reference to the police that "there would be little to gain from taking any dubious shortcuts to obtain the evidence."\textsuperscript{101} The Court naively felt that a police officer who is about to obtain evidence in an illegal manner would not be able to calculate whether the evidence would have inevitably been discovered. Because the Nix decision dealt with a Sixth Amendment violation, the Court probably was not focusing on the effect this exception would have on the Fourth Amendment warrant requirement. To the extent that the Nix Court concluded that there would be a limited deterrence effect by utilizing the inevitable discovery exception, its reasoning was flawed with regard to the warrant requirement.

The exclusionary rule provides an incentive for the police to follow the law. When exceptions to the exclusionary rule are created, the result is to remove the incentive. The exceptions created thus far, by way of the balancing previously mentioned, have, at least arguably, done little to remove the incentive to follow the law.\textsuperscript{102} For example, as the Court pointed out in Leon, if the police did everything they thought they needed to do, no incentives would be removed because in hindsight they would have done things in the same way.\textsuperscript{103} However, the existence of the inevitable discovery exception will provide the police with an incentive to avoid the warrant requirement. The police might seek the most expeditious method of obtaining the evidence without regard to its illegality, knowing that, as long as they could have obtained the evidence legally, their efforts will not result in its suppression. This approach will indeed affect the deterrence rationale of the exclusionary rule as it will encourage the police to take procedural shortcuts rather than to comply with the law.\textsuperscript{104} For example, if the police can demonstrate that they could have gotten a search warrant, what incentive will there be for them to go actively through the procedural hassle of actually obtaining one, since the effects of an illegal warrantless search could be nullified by the application of the inevitable discovery exception?\textsuperscript{105}

\textsuperscript{101} Nix v. Williams, 467 U.S. 431, 446 (1984).
\textsuperscript{102} One of the components of the balancing test is the amount of deterrent benefit to be served by the exclusionary rule.
\textsuperscript{104} See Nix, 467 U.S. at 457 (Stevens, J., concurring).
\textsuperscript{105} As LaFave points out in his treatise, the removal of incentives to comply with the law is not limited to situations when "an illegal confirming search can determine whether obtaining a warrant is worth the bother, and the only way to deter
United States Currency is illustrative of this point. This case involved an illegal warrantless search of luggage in which the government sought to avoid the scope of the exclusionary rule by arguing the "cash, keys and ledgers" would have been discovered through an existing inventory procedure. The court, in rejecting the government argument, accurately pointed out:

In the vast run of cases, there would be no incentive whatever for police to go to the trouble of seeking a warrant (or, we should add, of waiting for a lawful inventory to occur during normal processing). The police could readily make this assessment on their own. Contrary to what Nix supposed, they would almost invariably be in a position "to calculate whether the evidence ... would inevitably have been discovered," because they would know that inventory procedures were in place.

This concern for the effect of the inevitable discovery exception on the warrant requirement has been articulated by some state courts. To allow for inevitable discovery to be utilized to sanctify an otherwise illegal search due to a lack of a warrant would undermine the warrant requirement. A police officer with the requisite justification to obtain a warrant might be encouraged to avoid the chore of obtaining a search warrant when he can obtain the evidence faster and more easily by an illegal (warrantless) search and still have the evidence introduced by way of inevitable discovery. For this reason, as well as the concern that the inevitable discovery exception would conflict with the deterrent rationale of the exclusionary rule, some states have eliminated the inevitable discovery exception when it is used to avoid the need for a warrant.

Were the rule otherwise, every warrantless nonexigent seizure automatically would be legitimized by assuming the hypothetical alternative that a warrant had been obtained. Without the deterrent effect of the exclusionary rule, in such circumstances the constitutional warrant procedure for shielding Americans from unreasonable searches and seizures would be a shambles.

Although the Supreme Court has not dealt directly with the impact that

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107. Id. at 714.
111. People v. Knapp, 439 N.Y.S.2d 871, 876 (1981); Commonwealth v. Benoit, 415 N.E.2d 818, 823 (Mass. 1981) (rejecting the idea that a warrantless search can be upheld because a search warrant could have been obtained) cited with approval in Commonwealth v. O'Connor, 546 N.E.2d 336, 338-39 (Mass. 1990); State v. Haasmann, 437 N.W.2d 830, 838 (N.D. 1989) (declining to extend the inevitable discovery doctrine where the court asserted that it would have obtained a valid warrant and subsequently discovered the evidence, because it would "render the warrant protection of the Fourth Amendment meaningless"); Burr, 514 N.E.2d at 1367 (allowing police to search first and obtain warrant later "would undermine the very purpose of warrant requirement"). However, it should be pointed out that some states have allowed for the inevitable discovery exception even when it avoids the warrant requirement. E.g., State v. Storer, 503 A.2d 1016 (Me. 1989); Commonwealth v. Arceo, 580 A.2d 34 (Pa. Super. Ct. 1990).
inevitable discovery might have on the warrant requirement, there is at least some indication by the Court that this factor is not viewed as a problem. *Murray* has been used to support the proposition that inevitable discovery can be used even where it would sanction warrantless activity.112 The facts of *Murray* indicate that there was an illegal warrantless search performed prior to the obtaining of a lawful warrant.113 The Court allowed the introduction of the initially illegally discovered evidence because it was subsequently discovered by lawful means.114 The majority refused to consider the effect that the initial illegal warrantless search would have had on the officers if nothing illegal was found.115 Or to state it more graphically—why bother with a warrant if it will turn up nothing? Due to their concern for the warrant requirement, dissenting Justices Marshall, Stevens, and O'Connor argued for a broader notion of independence in order to be certain that the illegal warrantless search would have no whatever effect on a decision to seek a warrant. “The Court’s . . . holding lends itself to easy abuse, and offers an incentive to bypass the constitutional requirement that probable cause be assessed by a neutral and detached magistrate before the police invade an individual’s privacy.”116

The courts circuit generally have been less sensitive to the effect that the inevitable discovery doctrine may have on the warrant requirement.117

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112. See United States v. Sanchez, 719 F. Supp. 128, 137 (E.D.N.Y. 1989) ("even though the agent's entry and security sweep were illegal ab initio, the items discovered . . . are nevertheless admissible because they inevitably would have been discovered when the valid warrant was executed"), affd, 962 F.2d 3 (2d Cir. 1992). In a case factually similar to Murray, a Utah appeals court did not limit the Murray rationale to the independent source exception, but also encompassed inevitable discovery and allowed for illegal warrantless seizures to be avoided by the inevitable discovery exception. State v. Northrup, 756 P.2d 1288, 1294 (Utah App. 1988).
114. Id. at 539.
115. Justice Marshall in his dissent argues that "the relevant question [is] whether even if the initial entry uncovered no evidence, the officers would return immediately with a warrant to conduct a second search." Id. at 548 n.2. The majority discounts this concern by classifying it as hypothetical and focuses on whether the information (the prior illegal search is not considered) in obtaining the warrant was totally distinct from the illegal search. Id. at 542 n.3.
116. Id. at 549-50.
117. See United States v. Whitehorn, 829 F.2d 1225, 1230-31 (2d Cir. 1987) (holding that evidence discovered illegally was admissible because police had probable cause and would inevitably discover it with a proper warrant), cert. denied, 487 U.S. 1234 (1988); United States v. Morrisweather, 777 F.2d 503, 506 (9th Cir. 1985) (holding that a warrant for second search was not invalidated by a prior illegal search because the magistrate did not rely on information form the illegal search to issue the warrant), cert denied, 475 U.S. 1093 (1986). The case of United States v. Díaz-Espinola, No. 89-3032, 1991 W.L. 103446 (9th Cir. June 11, 1991) (designated not for publication), provides a good illustration of how the inevitable discovery doctrine would substantially circumvent the warrant requirement. In this case the government sought to justify a warrantless search of a residence because of the exigency exception to the warrant requirement. (Because of an emergency evidence about to be destroyed it was not practical to get a warrant.) During the warrantless search cocaine was discovered. The court found that the search was illegal because no exigency existed. After this initial search, the police sought to get a warrant including in the affidavit the previously discovered cocaine. The court held that there was sufficient justification to issue a warrant without mentioning the cocaine discovered through the illegality and that the cocaine would have been inevitably discovered based on the valid warrant. "Therefore we held that any text from the inclusion of cocaine discovery in the affidavit was dissipated since the officers would have inevitably discovered it during their valid, warrant searched." Id. at 52; see also United States v. Gordils, 725 F. Supp. 181, 188 (S.D.N.Y. 1989) (holding that because evidence would have ultimately been found, the evidence seized during an unwarranted search was clearly admissible).
The case of *United States v. Whitehorn* \(^{118}\) provides a good illustration of how the inevitable discovery doctrine would substantially circumvent the warrant requirement. In this case there was an illegal warrantless search of a residence. At the time of the illegal search the government was working on the application for a search warrant. The court held that since there was sufficient justification to issue a warrant prior to the illegality, the evidence would have been inevitably discovered based upon the valid warrant. The court indicated even if the police had waited for the results of the illegal warrantless search, the evidence still would have been admitted. “Finally, the *Nix* Court rejected the assertion that this equilibrium somehow changed, and required suppression, when the police acted in bad faith in illegally detecting the challenged evidence. So long as it is clear that such evidence would inevitably have been discovered by lawful means, suppression is inappropriate.” \(^{119}\) It is interesting to note that courts utilizing inevitable discovery to avoid the warrant requirement do so without considering the ramifications of their actions on the warrant requirements. \(^{120}\)

### C. Active Pursuit Requirement \(^{121}\)

The alternative investigation required of the police to qualify for the inevitable discovery exception also has an effect on the warrant requirement. The oft cited case of *United States v. Griffin* \(^{122}\) provides a good example of this interrelationship. In this case the police illegally entered the suspect’s apartment with the purpose of securing it. Simultaneous with the discovery of various drug paraphernalia, an officer was sent to obtain a search warrant. The government sought to allow admission of evidence discovered as a result of a warrantless search by arguing that it planned to obtain a warrant. Because the agents could have obtained a warrant, the court was asked to find the inevitable discovery exception. In refusing to find inevitable discovery in this decision, a case in which the alternative investigation was pursued at the same time the illegality was occurring, the court indicated that if it were to find inevitable discovery in this situation it would “emasculate the search warrant requirement of the Fourth Amendment.” \(^{123}\) The Ninth Circuit followed this rationale in *United

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118. 829 F.2d 1225 (2d Cir. 1987).
119. Id. at 1231 (citing *Nix* at 445).
120. See supra notes 46-53 and accompanying text.
121. United States v. Satterfield, 743 F.2d 827 (1984) (“[T]he prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct.” Id. at 846 (emphasis in original), citing United States v. Brooking, 614 F.2d 1037, 1042 n.2, 1048 (5th Cir. 1980)).
123. Id. at 961; see, e.g., United States v. Satterfield, 743 F.2d 827, 846 (1984) (holding that the fact that a search warrant was obtained after illegal warrantless search does not allow application of inevitable discovery doctrine: “Because
States v. Allard, a case in which evidence was obtained as a result of illegally securing the suspect’s room while an officer was sent to get a warrant. The Allard Court stated that “[a]ny other holding would encourage law enforcement to ‘secure’ or seize places and things with or without probable cause in the absence of a warrant or exigent circumstances while they seek some independent evidentiary basis to justify a search warrant.” It should be pointed out that in light of Murray, if initially illegally discovered evidence is later discovered by lawful means, the court allows for the independent source exception. Both Griffin and Allard appear to be factually similar to Murray and, thus, the same rationale may apply.

As previously mentioned, the Nix decision involved “active pursuit” of the alternative investigation. There was a search party looking for the body when the illegality (the search) occurred. This active pursuit has been characterized by Brent R. Appel as “independent inevitable discovery” because the lawful investigation would get to the same evidence as the unlawful investigation without any relation whatsoever to the illegal investigation. “In this context, the inevitable discovery exception

a valid search warrant nearly always can be obtained after the search has occurred, a contrary holding would practically destroy the requirement that a warrant for the search of a home be obtained before the search takes place.

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merely stands for the common sense principle that vagaries of the timing of discovery will not defeat introduction of evidence that would otherwise clearly be admissible under the independent source rule."\textsuperscript{130} This is the type of inevitable discovery that Justice Burger referred to in \textit{Nix}, when he declared that there is "functional similarity between these two doctrines [inevitable discovery doctrine and the independent source rule]."\textsuperscript{131} Thus, the illegal discovery merely accelerated discovery which would have inevitably occurred.\textsuperscript{132}

The active pursuit requirement of \textit{Nix} has, for the most part, remained in effect. However, there appears to be at least a willingness among some of the courts to depart from the mandate of active pursuit as required by \textit{Nix}. For example, the Fifth Circuit in \textit{United States v. Namer}\textsuperscript{133} indicated that it might be more willing to find inevitable discovery without the necessity of actively pursuing the investigation.\textsuperscript{134} This represents a switch in analysis from "what was done" to "what would they have done." The Ninth Circuit, in \textit{United States v. Ramirez-Sandoval},\textsuperscript{135} asserts that it is not necessary that an investigation be initiated prior to illegal conduct, only that a routine procedure that the police would have followed would have led to the evidence.\textsuperscript{136} The First Circuit found that the requirement

\textsuperscript{130} Appel, supra note 45, at 112; see United States v. Agler, 705 F.2d 293, 306-07 (5th Cir. 1983) ("We do not think that probable evidence should be excluded merely because an invalid warrant affected timing of discovery of the evidence."). cert. denied, 420 U.S. 909 (1975).


\textsuperscript{132} Harold S. Noviloff, Comment, The Inevitable Discovery Exception to the Constitutional Exclusionary Rules, 74 COLUM. L. REV. 88, 91 (1974); see also United States v. Axford, 784 F.2d 1431, 1433 (1986) (holding that routine booking procedure and inventory would inevitably result in discovery of evidence). The prime advantage of an active pursuit requirement is that it would take the inevitable discovery exception out of the speculative realm. Historically, active pursuit has been required by most courts when faced with alternative, albeit inactive, standard police procedures, which would have led to the discovery of the evidence. Robert M. Piller, \textit{The Fruit of the Poisonous Tree* Revised and Shearated}, 56 CAL. L. REV. 579, 629 (1968) ("It is extremely rare to find a normal, lawful police procedure which is regularly followed and inevitably would have disclosed the exact same information."). One could always make a speculative argument as to what the police would have done in a particular situation. A concern for a lack of active pursuit was expressed by courts early on in \textit{United States v. Paroutan}, 299 F.2d 485 (2d Cir. 1962).

\textsuperscript{133} 835 F.2d 1064 (5th Cir.), cert. denied, 486 U.S. 1006 (1988).

\textsuperscript{134} Id. at 1083; see also United States v. Cherry, 759 F.2d 1196, 1206 (9th Cir. 1985) ("[I]n certain circumstances . . . the absence of a strong deterrent interest may warrant the application of the inevitable discovery exception without a showing of active pursuit.").

\textsuperscript{135} 872 F.2d 1392 (9th Cir. 1989).

\textsuperscript{136} Id. at 1396; see United States v. Boatwright, 822 F.2d 882, 864 (9th Cir. 1987); see also United States v. Thomas,
that a separate investigation which constitutes inevitable discovery be set in motion is too rigid a test and interpreted Nix as not requiring active pursuit. 137 That circuit decided that where probable cause existed prior to illegality and where a warrant was applied for soon after, the inevitable discovery exception must apply. 138

The type of inevitable discovery in which the alternative means was undertaken after the illegal discovery has been characterized by Appel as "dependent inevitable discovery." 139 He described this as "after the fact repair of unlawful conduct." 140 This inactive pursuit of the alternative investigation at the time of the illegality appears to have found support in Murray. 141 In this independent source exception case, the majority refused to adopt a requirement of demonstrated verifiable fact, opting instead to rely on an assurance from the police that they intended to get a warrant. 142 Thus, an argument could be made that active pursuit is no longer necessary, and merely a reasonable probability of an alternative investigation is all that is required. 143

Justice Marshall pointed out in his dissent in Murray that active pursuit was required by the Nix decision. 144 He further pointed out the ramifications of not requiring active pursuit, stating that the police, even when they have sufficient justification, would perform a warrantless confirmatory search before going to the hassle of getting a warrant. 145 He disagreed with the majority’s approach of relying merely on the intent of the officers to obtain a search warrant. 146 He stated that he would prefer “demonstrated historical facts capable of ready verification or impeachment," or, in other words, a showing that the police were in the process or had sought a warrant prior to the initial entry. The Court’s

955 F.2d 207, 210-11 (4th Cir. 1992) (requiring a showing that the inevitability of discovery "arise from circumstances other than those disclosed by the illegal search itself," instead of imposing a “blanket requirement” of active pursuit), appeal after remand, 963 F.2d 368 (4th Cir. 1992); United States v. Giovannelli, 747 F. Supp. 891, 896 (S.D.N.Y. 1989) (rejecting argument that process of applying for warrant must begin before or during search before inevitable discovery doctrine may be invoked). Some state courts have also started to abandon the active pursuit requirement. See e.g., State v. Millhorn, 794 S.W.2d 181, 185 (Mo. 1990) ("[I]t makes little sense to conclude that the inevitable discovery exception applies only in circumstances in which law enforcement officers are already involved in a search."); State v. Miller, 709 P.2d 225, 243 (Or. 1985) ("[W]e do not understand Nix to require that one investigation actually be under way."); People v. Thomas, 478 N.W.2d 712, 715 (Mich. App. 1991) ("[W]e are satisfied that a search would have been conducted at subsequent time that would have yielded the physical evidence obtained.").

137. United States v. Silvestri, 787 F.2d 726, 746 (1st Cir. 1986); see also United States v. Diaz-Espinola, No. 89-30321, 1991 WL 103446, at *2 (9th Cir. June 11, 1991) (designated not for publication) (expressing that there is no distinction made between primary and secondary evidence and no concern for the avoidance of the warrant requirement).


139. Appel, supra note 45, at 120.

140. Id. at 114.


142. Id. at 540 n.2.

143. For an excellent discussion of this, see United States v. Lanna, 930 F.2d 1099, 1102 (5th Cir. 1991).

144. 487 U.S. at 544-45.

145. Id. at 547.

146. Id. at 549.

approach in *Murray*, along with the loosening of the active pursuit requirement of the inevitable discovery exception and the insensitivity that the Court has shown toward the use of warrants, could likely signal the further deterioration of the warrant requirement.

V. Conclusion

Although some courts have taken a more restrictive approach to the inevitable discovery exception than the Supreme Court in *Nix*, many jurisdictions, including most of the circuits, have expanded the exception beyond what was envisioned in *Nix*. The most widespread expansion and potentially the one with the greatest ramifications has to do with the utilization of this exception for primary as well as secondary evidence. Although the Supreme Court has not directly dealt with this issue, it has indicated a lack of sensitivity to the problem, as indicated by the *Murray* decision. The *Murray* case is consistent with the Court's decisions in recent years, which have generally shown reluctance to apply the exclusionary rule.

This reluctance can be seen in the Court's recent approach to derivative evidence. In *New York v Harris*, the Court limited the derivative effect of an illegal home arrest to the evidence that was obtained in the home. As a result of the arrest, the police acquired statements from the defendant, both in his home and later at the station house. The statement made at the station house was not subject to a fruits analysis. The Court focused on the purpose of the requirement for an arrest warrant in the home; finding that the rule was designed to protect the sanctity of the home, the Court limited its derivative evidence scope to the home. "[The rule] was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime." This avoidance of exclusion of the secondary evidence could indicate a willingness to limit the thrust of to the fruits doctrine. The

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148. In the area of good faith, see supra note 45. In the area of burden of proof, see supra notes 29-30. With regard to the necessity for a warrant, see supra notes 106-111 and accompanying text.
149. See supra text accompanying note 84.
150. BLOOM AND BRODIN, supra note 3 at 5. There are limitations imposed on who is deemed to have "stalking" to raise Fourth Amendment objections and on the type of proceedings where suppression remedy applies. The Court has also created a "good faith" exception, thereby removing police actions, which were carried out with reasonable belief that action was not a constitutional violation, from the scope of the exclusionary rule. In addition, the Court has modified the substantive constitutional doctrine in a way that minimizes the constraint on the police conduct.
152. Id. at 17-18; see also Oregon v. Elstad, 470 U.S. 298, 308 (1985) (refusing to apply the fruits analysis when there was a *Miranda* violation and indicating that the violation of *Miranda* did not implicate the Fifth Amendment).
153. 495 U.S. at 16.
154. Id. at 16-17.
155. Id. at 17.
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Court's general attitude toward the exclusionary rule, coupled with a decision like *Harris*, suggests that if the Court were faced with the opportunity it might liberalize the requirements for applying inevitable discovery to avoid the exclusion of secondary evidence. However, the Court has not explicitly indicated that it has plans to apply the inevitable discovery exception to primary evidence. Nevertheless, in light of *Murray*, it is not surprising that the lower courts have chosen to utilize the inevitable discovery exception to avoid the exclusion of primary evidence.

Another expansion of the inevitable discovery exception has to do with its utilization to avoid the warrant requirement of the Fourth Amendment. The demise of the warrant requirement by the Supreme Court has been going on for a number of years.\(^{156}\) This trend, coupled with the *Murray* decision, has encouraged most lower courts to give short shrift to the concerns of the warrant requirement and to apply the inevitable discovery exception even if it effectively eliminates the incentive to obtain a warrant. This approach is usually taken without discussion.\(^{157}\)

As this Article has shown, the inevitable discovery exception, which was, at least initially, an exception to the fruits doctrine, has been expanded beyond the *Nix* decision. Underlying this expansion has been the intent to avoid the application of the exclusionary rule. The application of the exception to avoid the exclusion of primary evidence could well signal the *de facto* elimination of the exclusionary rule. In addition, the utilization of the inevitable discovery exception to avoid the warrant requirement of the Fourth Amendment, along with other expansions to warrantless activity, could result in the diminution of an already diluted warrant requirement. Thus, these expansions of the inevitable discovery exception have very serious ramifications indeed. Given the Supreme Court's lack of sensitivity to these issues, it is likely that expansions to the inevitable discovery exception will continue unabated, unless the Court heeds the advice of Justice Stevens in his concurring opinion in *Nix*: “The majority refers to the societal cost of excluding probative evidence . . . . In my view, the more relevant cost is that imposed on society by police officers who decide to take procedural shortcuts instead of complying with the law.”\(^{158}\)

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156. See *supra* notes 93-100 and accompanying text; see generally Bloom, *supra* note 94 (analyzing historically the changes in the warrant requirement).

157. See *supra* notes 112-120 and accompanying text. Once again it should be pointed out that some state courts have been more sensitive to the warrant requirement. See *supra* text accompanying note 120.
