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Nix v. Williams: The Inevitable Discovery Exception to the Exclusionary Rule

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NIX v. WILLIAMS: THE INEVITABLE DISCOVERY EXCEPTION TO THE EXCLUSIONARY RULE

In *Nix v. Williams*,[1] the Supreme Court created an "inevitable discovery" exception to the exclusionary rule.[2] This exception allows the prosecution to introduce illegally obtained evidence at trial upon a showing that such evidence would inevitably have been obtained, even without the police misconduct.[3] The Supreme Court rejected the imposition of a second prong on the inevitable discovery exception which would have required the government to prove the absence of bad faith.[4] The purpose of the inevitable discovery exception is to prevent the "setting aside [of] convictions that would have been obtained without police misconduct."[5]

The Court's inquiry in *Nix* includes a perfunctory balancing of the cost to society of excluding the illegally obtained evidence against the deterrent effect that the suppression of evidence will have on police misconduct.[6] This comment assesses the parameters of the inevitable discovery exception created in *Nix v. Williams*, including its practical implications and its potential impact on the continuing viability of the exclusionary rule as a remedy for constitutional violations.

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1. 104 S. Ct. 2501 (1984).

2. The exclusionary rule prohibits the use at trial of any evidence obtained in violation of the United States Constitution. It is generally recognized as a judicially created remedy designed to safeguard fourth amendment rights. United States v. Calandra, 414 U.S. 338, 348 (1974). However, the rule has been extended to apply to fifth and sixth amendment violations as well. *See, e.g.*, United States v. Henry, 447 U.S. 264 (1980); Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 337 U.S. 201 (1974). Inevitable discovery is one of several exceptions to the exclusionary rule recognized by the Supreme Court. *See generally* United States v. Leon, 104 S. Ct. 3405 (1984) (creating a good faith exception where the police act within the scope of an invalid warrant issued by magistrate); Note, *Should "Good Faith" be an Element of the Inevitable Discovery Exception to the Exclusionary Rule*, 17 CREIGHTON L. REV. 1123, 1131-33 (1984) (listing other exceptions to the exclusionary rule, including the attenuation doctrine and the independent source doctrine).

3. *See Nix*, 104 S. Ct. at 2511-12.

4. Williams v. Nix, 700 F.2d 1164, 1169 n.5 (9th Cir. 1983), *rev'd*, 104 S. Ct. 2501, 2510 (1984) (the Supreme Court held that an officer's objective good or bad faith is legally irrelevant under the inevitable discovery exception).

5. *Nix*, 104 S. Ct. at 2509 n.43 (stating that the purpose of inevitable discovery is similar to the harmless error rule).

6. *Id.* at 2510; *see also* W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4(a), at 614 (1978) (The obvious competing consideration is that excluding evidence thwarts society's interest in convicting the guilty.). *See generally* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

I. The Case of *Nix v. Williams*

On Christmas Eve, 1968, ten-year old Pamela Powers disappeared from a YMCA building in Des Moines, Iowa, where she had accompanied her parents to watch a wrestling tournament.[7] Shortly after her disappearance, Robert Anthony Williams, a resident of the YMCA, was seen leaving the building with a large bundle wrapped in a blanket.[8] A young boy who had helped Williams open his car door reported that he had seen "two legs in it and they were skinny and white."[9]

On December 26, 1968, Henry McKnight, a Des Moines attorney informed the Des Moines police department that he had just received a telephone call from Williams and that he had advised Williams to turn himself in to the Davenport, Iowa, police.[10] Williams then surrendered himself.[11] Detective Leaming and another police officer agreed to drive to Davenport and pick Williams up, and they promised McKnight that they would not question Williams during the return trip.[12] Before leaving Davenport, Williams was arraigned before a judge on the outstanding arrest warrant and advised of his *Miranda* rights.[13] While still in Davenport, Williams conferred with another lawyer, a Mr. Kelly, who advised him not to say anything before consulting with McKnight in Des Moines.[14] Having been denied permission to ride in the police car back to Des Moines, Mr. Kelly reminded Leaming not to interrogate Williams.[15]

During the drive from Davenport to Des Moines, Williams never waived his sixth amendment right to have an attorney present during police interrogation.[16] Shortly after leaving for Des Moines, Detective Leaming began conversing with Williams and delivered the now famous "Christian burial speech."[17] The speech was an appeal to Williams to assist

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7. State v. Williams, 182 N.W.2d 396, 399 (Iowa 1970).

8. *Id.*

9. *Id.*

10. Brewer v. Williams, 430 U.S. 387, 390 (1977) (also referred to as *Williams I*).

11. *Id.*

12. *Id.* at 391.

13. *Id.*; *see also* Miranda v. Arizona, 384 U.S. 436 (1966).

14. *Brewer*, 430 U.S. at 391.

15. *Id.* at 392 (Leaming expressed some reservations about their agreement not to interrogate Williams, but Kelly firmly insisted that the agreement be carried out).

16. "At no time during the trip did Williams express a willingness to be interrogated in the absence of an attorney. Instead, he stated several times that '[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story'." *Id.*

17. Detective Leaming, began a conversation with Williams, saying:

> I want to give you something to think about while we're traveling down the road . . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is . . . and if you get a snow on top of it you yourself may be unable to find it. And since we will be going right past the area [where the body is] on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be enti-

them in locating the body of young Pamela Powers so that she could be given a decent "Christian" burial.[18] Williams told the officers where certain articles of clothing and the blanket could be found. When these items could not be located, Williams led the officers to a culvert where he had hidden the body.[19] The body was found and Williams was subsequently indicted for first-degree murder.[20]

The Iowa trial court overruled Williams' motion to suppress all evidence connected with the statements he made to the police officers en route to Des Moines.[21] Williams was convicted of murder and sentenced to life imprisonment.[22] On appeal, the Iowa Supreme Court affirmed with four justices dissenting.[23] Williams then filed a writ of habeas corpus in the United States District Court. The district court found that the state court's admission of Williams' incriminating statements to the police violated his fifth and sixth amendment rights.[24] On appeal, both the Eighth Circuit and Supreme Court affirmed, holding that the admission of the incriminating statements violated Williams' constitutional rights.[25] The Supreme Court, however, explained in a footnote that while the statements themselves were not admissible, the evidence obtained as a result of the statements might be admissible upon a showing that it *would have* been discovered regardless of Williams' incriminating statements.[26]

The state of Iowa then initiated a new trial, and Williams was again convicted of first-degree murder. On appeal, the Iowa Supreme Court affirmed by applying an "inevitable discovery" exception to the exclusion-

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> tled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered . . . . [A]fter a snow storm [we may not be] able to find it at all.

Nix, 104 S. Ct. at 2505.

18. *Id. See generally* Kamisar, Brewer v. Williams—*A Hard Look at a Discomforting Record*, 66 GEO. L.J. 209, 215-33 (1977) (noting factual discrepancies in the record).

19. *Nix*, 104 S. Ct. at 2505. Before leading the police officers to the body, Williams stated several times that he would tell them the whole story *after* he had spoken with his attorney in Des Moines. *Brewer*, 430 U.S. at 392.

20. *Nix*, 104 S. Ct. at 2505

21. State v. Williams, 182 N.W.2d 396, 402 (Iowa 1970).

22. *Id.* at 398.

23. *Id.* at 406. The dissenting opinion was unable to agree that Williams knowingly and intelligently waived his constitutional rights. *Id.* at 408 (Stuart, J., dissenting).

24. Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa 1974), *aff'd*, 509 F.2d 227 (8th Cir. 1975), *aff'd*, 430 U.S. 387 (1977).

25. Williams v. Brewer, 509 F.2d 227, 228 (8th Cir. 1975), *aff'd*, 430 U.S. 387, 406 (1977).

26. While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams.

Brewer, 430 U.S. at 407 n.12.

ary rule.[27] Under this exception, the derivative evidence[28] was admissible where: (1) the police did not act in bad faith and (2) even absent any police misconduct, the evidence would inevitably have been discovered.[29] Williams then filed a writ of habeas corpus in the United States District Court which was denied.[30] Without deciding the substantive validity of the inevitable discovery exception, the Eighth Circuit reversed and remanded the case to the district court with directions to issue the writ of habeas corpus.[31] The United States Supreme Court granted certiorari to determine whether "evidence pertaining to the discovery and condition of the victim's body was properly admitted on the ground that it would ultimately or inevitably have been discovered even if no violation of any constitutional or statutory provision had taken place."[32]

Upon review, the Supreme Court reversed the Eighth Circuit, holding that the physical evidence—the body and the articles of clothing—was admissible under the inevitable discovery exception although Williams' statements relating to this physical evidence were excluded. The Court rejected the prerequisite that an absence of bad faith must be shown.[33] To satisfy the *Nix* test for "inevitable discovery," the prosecution must show by a preponderance of the evidence that if there had been no constitutional violation, the information or items received into evidence would "inevitably" have been discovered by the police.[34] The *Nix* decision fo-

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27. State v. Williams, 285 N.W.2d 248, 255 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980).

28. *See infra* notes 81-85 and accompanying text.

29. *Williams*, 285 N.W.2d at 262.

30. Williams v. Nix, 528 F. Supp. 664, 675 (S.D. Iowa 1981).

31. Our analysis of this case makes it unnecessary to decide whether to recognize the inevitable-discovery or hypothetical-independent-source exception to the rule excluding evidence obtained in violation of the Sixth Amendment right to counsel. We assume *arguendo* that there is such an exception and that the opinion of the Supreme Court of Iowa in this case correctly states the requirments for establishing it. The exception as thus stated requires the State to prove two things: that the police did not act in bad faith, and that the evidence would have been discovered in any event. We hold that the State has not met the first requirement. It is therfore unnecessary to decide whether the state courts' finding that the body would have been discovered anyway is fairly supported by the record. It is also unnecessary to decide whether the State must prove the two elements of the exception by clear and convincing evidence, as defendant argues, or by a preponderance of the evidence, as the state courts held.

Williams v. Nix, 700 F.2d 1164, 1169 (8th Cir. 1983) (footnote omitted).

32. *Nix*, 104 S. Ct. at 2504.

33. "The Court of Appeals concluded, without analysis, that if an absence of bad faith requirement was not imposed, 'the temptation to risk deliberate violation of the Sixth Amendment would be too great, and the deterrent effect of the [e]xclusionary [r]ule reduced too far.' . . . We reject that view." *Id.* at 2510 (citation omitted).

34. *Id.* at 2510-11. It is unclear exactly what facts are relevant in determining inevitability and whether varying degrees of inevitability will suffice. *See Nix*, 104 S. Ct. 2516 & n.8 (Stevens, J., concurring) (interpreting "inevitable" to mean "in the natural and probable course of events.") *See also* Kamisar, *supra* note 18; Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L. CRIMINOLOGY &

cused solely on the admissibility of the "illegally" obtained derivative evidence, expressly refusing to consider Williams' statements or the police misconduct.[35]

II. Origin and Development

A. *The Exclusionary Rule*

The exclusionary rule, created by the Supreme Court in *Weeks v. United States*,[36] ensures adequate enforcement of fourth amendment rights incident to illegal searches and seizures by the federal government.[37] Under this rule, evidence secured through an illegal search and seizure is not admissible at trial.[38] In *Wolf v. Colorado*,[39] the Supreme Court held that the fourth amendment right to privacy is enforceable in state courts under the fourteenth amendment due process clause, but the Court also held that the exclusionary rule is not an essential part of the fourth amendment. After *Wolf*, the states were free to fashion their own remedies for fourth amendment violations.

This freedom led to inconsistent methods of enforcement among the states, and a double standard of enforcement in the federal courts.[40] In order to resolve these irregularities among the states and to ensure adequate protection against illegal searches and seizures, the Supreme Court, in *Mapp v. Ohio*,[41] held that the exclusionary rule was applicable to the

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Police Sci. 307, 313-17 (1964).

It should be noted that the application of the inevitable discovery exception necessarily presupposes the existence of a constitutional violation.

35. *See* Brewer v. Williams, 430 U.S. 387, 407 n.12 (1977) (holding that admission of Williams' statements violated his sixth and fourteenth amendment rights, but noting that the victim's body and related evidence might be admissible under the inevitable discovery theory); *see also* Nix v. Williams, 104 S. Ct. at 2512 & n.7 (finding it unnecessary to decide whether Stone v. Powell, 428 U.S. 465 (1976), should be extended to bar federal habeas corpus review of Williams' sixth amendment claim).

36. 232 U.S. 383 (1914), *rev'd in part*, Elkins v. United States, 364 U.S. 206 (1960). *But see* Boyd v. United States, 116 U.S. 616 (1886) (emphasizing the need for the Court to enforce constitutional rights).

37. The exclusionary rule is implicit in the fifth amendment. *See* Brown v. Illinois, 422 U.S. 590, 601 (1975).

38. *Weeks*, 232 U.S. 383 (1914).

39. 338 U.S. 25 (1949) (exclusion necessary to deter arbitrary police conduct), *overruled in part*, Mapp v. Ohio, 367 U.S. 643 (1961).

40. In non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated.

Mapp v. Ohio, 367 U.S. 643, 658 (1961).

41. *Id.*

states under the due process clause of the fourteenth amendment.[42] The majority opinion in *Mapp* advances four separate rationales to support application of the exclusionary rule: first, is the fundamental nature of the right to privacy and the need to protect this right;[43] second, is the "intimate relationship" between the fourth and fifth amendments;[44] third, is the "imperative of judicial integrity" which was presumed to be threatened by a potential conspiracy between police and judges to utilize illegally obtained evidence;[45] and fourth, and perhaps most importantly, is the deterrence of police misconduct.[46]

Aside from protecting the fundamental right to privacy, the Supreme Court relied upon the deterrence of police misconduct as its primary rationale in supporting the application of the exclusionary rule to the states.[47] Some critics, however, believe that the rule should be abolished altogether.[48] These critics argue that the exclusion of evidence is an ineffective deterrent and is an unjustifiable rationale to support the exclusionary rule.[49] The deterrence rationale presupposes the desire of individual policemen to see the defendant convicted.[50] If, however, the police are

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42. *See also* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

43. *Mapp*, 367 U.S. at 656.

44. *Id.* at 657 ("The philosophy of each Amendment and of each freedom is complimentary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.").

45. *Id.* 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 laws, or worse, its disregard of the charter of its own existence."); *see also id.* at 661 (Black, J., concurring); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); Schrock & Welsh, *Up From* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

46. "[T]he purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' " *Mapp*, 367 U.S. at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)); *see also* United States v. Leon, 104 S. Ct. 3405, 3443 (1984) (Brennan, Marshall, JJ., dissenting) (purpose of exclusionary rule is to promote institutional compliance with the fourth amendment by law enforcement agencies generally).

47. *See Nix*, 104 S. Ct. at 2508 ("The core rationale consistently advanced by this Court for extending the [e]xclusionary [r]ule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections."); *see also* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (Burger, C.J., dissenting) (citing Oaks, *supra* note 6, at 667); Note, *supra* note 2, at 1129; Note, *Utah's Alternative to the Exclusionary Rule*, 9 J. CONTEMP. L. 171, 176-77 & n. 37 (1938) [hereinafter cited as *Utah's Alternative*].

48. *See Bivens*, 403 U.S. at 420 (Burger, C.J., dissenting); Forbes, *Fact and Comment: Good Intentions, Bad Results*, FORBES, Feb. 28, 1983, at 23 (exclusionary rule only benefits criminal and lawyer).

49. *See supra* note 48; *see also* Note, *supra* note 2, at 1131 (listing six major criticisms of the rule).

50. *See* Oaks, *supra* note 6, at 720-36.

concerned only with the immediate arrest, then it is unlikely that their conduct will be affected simply because certain evidence might later be deemed inadmissible.

Courts weigh this need to deter the unlawful exercise of police discretion against "[t]he enormous societal cost of excluding truth in the search for truth in the administration of justice."[51] Ultimately, this balance may include aquittals for otherwise guilty defendants since the prosecution is crippled by a lack of admissible evidence.[52] However, the courts often overlook the essential benefit derived from a rigid application of the exclusionary rule: it protects the constitutional rights of all citizens, the innocent as well as those who may be found guilty after proper inquiry.[53] Arguably, if the exclusionary rule prevents incarceration of only a few innocent individuals, then the cost to society of releasing a few obviously guilty individuals is greatly diminished. Although the current efficacy of the exclusionary rule is open to debate, the Supreme Court continues to focus on the deterrence rationale when applying the rule or one of its exceptions.[54]

B. *The Inevitable Discovery Exception*

Although distinguishable, the "independent source" exception is, in many ways, the precursor of the inevitable discovery exception.[55] The independent source doctrine allows the admission of evidence that has actually been discovered by means wholly independent of any constitutional violation.[56] In *Silverthorne Lumber Co. v. United States*,[57] government agents obtained corporate records through an illegal search. The records were deemed inadmissible at trial, and afterwards the government subpoenaed the records in order to have them reviewed by a grand jury. The Supreme Court held that the illegally obtained evidence was inadmissible for any purpose. The Court, however, explained in dictum that such evidence might be admissible if knowledge of the evidence was gained from

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51. Note, *supra* note 2, at 1139.

52. *But see Nix*, 104 S.Ct. at 3437 (Brennan, Marshall, JJ., dissenting) ("[t]he [fourth] Amendment directly contemplates that some reliable and incriminating evidence will be lost to the government; therefore, it is not the exclusionary rule, but the amendment itself that has imposed this cost.").

53. *Cf.* Fay v. Noia, 372 U.S. 391 (1963) (granting habeas relief to defendants convicted solely on basis of coerced confessions). *See generally* Stone v. Powell, 428 U.S. 465 (1976) (limiting habeas review of fourth amendment exclusionary rule cases); United States v. Janis, 428 U.S. 433 (1976) (refusing to extend the exclusionary rule to civil cases).

54. *See, e.g., Nix*, 104 S. Ct. at 2508-09.

55. W. LAFAVE, *supra* note 6, § 11.4, at 620-21; *see generally* Note, *supra* note 2, at 1131-32.

56. *Nix*, 104 S. Ct. at 2509.

57. 251 U.S. 385 (1920).

an independent source.[58]

The "independent source" doctrine applies where no causal connection exists between the illegal act and the acquisition of the evidence in question, since the evidence was obtained apart from the illegality.[59] In *Wong Sun v. United States*,[60] the Supreme Court applied this doctrine and held that the connection between the petitioner's unlawful arrest and an unsigned statement made several days after the petitioner had been released on his own recognizance, was so attenuated that the unsigned statement was not the fruit of the unlawful arrest and, therefore, it was properly admitted in evidence.[61]

The inevitable discovery exception was first articulated by Judge Learned Hand in *Somer v. United States*.[62] In *Somer*, federal agents illegally entered defendant's apartment where he was operating a still. After talking with the defendant's wife, the agents learned of the defendant's whereabouts and subsequently arrested him.[63] The trial court suppressed the evidence seized pursuant to the arrest because of the "illegal taint"; the Second Circuit, however, reversed and remanded explaining that the evidence might be admissible if the government could show that the evidence would have been discovered regardless of the illegal conduct.[64]

The inevitable discovery exception applies where the causal connection between the evidence and the illegal conduct cannot actually be severed because the evidence is obtained as a result of the illegal conduct. Conse-

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58. *Id.* at 392 (independent meant distinct from the illegal act). This notion of an "independent source" exception to the exclusionary rule was extended in Nardone v. United States, 308 U.S. 338, 341 (1939),where the Supreme Court noted that even evidence somehow connected to the illegal act might be admissible if the connection between the illegality and the evidence at trial has "become so attenuated as to dissipate the taint" of the illegality. *See also* Wong Sun v. United States, 371 U.S. 471 (1963) (one confession was closely related to the illegal entry by police and therefore inadmissible, but another confession was admissible since it was sufficiently unrelated as to "purge the taint"). Not "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." *Id.* at 487-88.

59. Nardone v. United States, 308 U.S. 338 (1939).

60. 371 U.S. 471 (1963).

61. *See id.* (test for admissibility requires balancing of societal, judicial, and constitutional interests); *see also* Mantel, *The Inevitable Discovery Exception to the Exclusionary Rule: What is Standing in the Way of Supreme Court Adoption*, 16 SUFFOLK U.L. REV. 1043, 1052-53 (1982).

62. 138 F.2d 790 (2d Cir. 1943).

63. The agents seized sugar and alcohol found in defendant's car, but the evidence was suppressed since it was the product of an unlawful search and seizure. *Id.* at 791-92.

64. The government had to show that:

> [Q]uite independently of what Somer's wife told them, the officers would have gone to the street, have waited for Somer and have arrested him, exactly as they did. If they can satisfy the court of this, so that it appears that they did not need the information, the seizure may have been lawful.

Id. at 792.

quently, the actual causal connection and the actual constitutional violation become irrelevant once the hypothetical "would have" analysis is superimposed.[65] This hypothetical analysis enables judicial hindsight, supplemented in part by particular facts before a court, to control the determination of admissibility.[66] Accordingly, some commentators contend that the inevitable discovery exception fails to provide for an adequate assessment of the policy considerations underlying the exclusionary rule.[67]

The inevitable discovery exception is usually applied where some illegal police conduct occurs during an ongoing investigation which leads the police to evidence that investigators would have found through routine police procedure.[68] Theoretically, the only effect of the illegal police conduct is to accelerate the discovery of evidence.[69] Generally, "where the prosecution can show that the standard prevailing investigatory procedure of the law enforcement agency involved would have led to the discovery of the questioned evidence, the exception will be applied to prevent its suppression."[70]

In *Nix v. Williams*,[71] the Supreme Court applied the inevitable discovery exception to admit evidence obtained in violation of defendant's sixth amendment right to counsel.[72] Presumably this exception is applicable whenever evidence is obtained in violation of any of the defendant's constitutional rights.[73] As of the *Nix* decision, every federal circuit court of

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65. *See Nix*, 104 S. Ct. at 2515 (Stevens, J., concurring).

66. *See generally* Note, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137 (1976).

67. *See, e.g.*, Novikoff, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88, 91 (1974); *cf.* Note, *supra* note 66, at 156-66 (in limited situations where the police have acted in good faith and the dangers of a "hypothetical search" are minimized, the inevitable discovery exception can be applied successfully as an exception to the exclusionary rule).

68. *See* Novikoff, *supra* note 67, at 91.

69. *Id.*

70. *Id.*

71. 104 S. Ct. 2501 (1984).

72. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. *See* Brewer v. Williams, 430 U.S. 387, 406 (statements made by Williams were obtained in violation of defendant's sixth and fourteenth amendment rights and therefore were inadmissible). *See generally* Strickland v. Washington, 104 S. Ct. 3562 (1984) (discussing effective assistance of counsel).

73. In *Nix* the majority opinion recognizes the inevitable discover exception as an expansion of the "independent source" exception that has been frequently applied to fourth and fifth amendment violations. *Nix*, 104 S. Ct. at 2509, & 2508 n. 3. *See also* United States v. Wade, 388 U.S. 218 (1967); Massiah v. United States, 377 U.S. 201 (1964).

appeals considering the issue had endorsed the inevitable discovery exception.[74]

III. The Scope of the Current Inevitable Discovery Exception

A. *The Burden of Proof*

The prosecution must prove by a preponderance of the evidence[75] that the illegally obtained evidence would inevitably have been obtained regardless of the illegal conduct. The prosecution must first show that certain investigatory procedures were underway or would have been performed; and second, that these procedures would have inevitably led to the discovery of the illegally obtained evidence.[76] Even where the defendant proves a violation of his constitutional rights, the prosecution need not prove good faith, or the absence of bad faith, since the officer's state of mind is irrelevant.[77]

If the prosecution can establish "inevitability" under the hypothetical "would have" inquiry, the defendant must then prove, by a preponderance of the evidence, that discovery was not "inevitable." This potentially insurmountable burden on the defendant[78] allows illegally obtained evidence to be admitted. It may also encourage police to ignore vital constitutional protections.[79] As a result, there may be an increased threat of

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74. *Nix*, 104 S. Ct. at 2507 n.2 (listing the circuit court decisions that have adopted the inevitable discovery exception).

75. *See id.* at 2509-10 n.5 (citing United States v. Matlock, 415 U.S. 164, 178 n.14 (1974) (preponderance standard required at suppression hearing); Lego v. Twomey, 404 U.S. 477 (1972) (prosecution must prove by a preponderance of the evidence that a confession sought to be used at trial was voluntary); *cf. Nix*, 104 S. Ct. at 2517-18 (Brennan, Marshall, JJ., dissenting) (the burden of proof should require a clear and convincing standard where the evidence has not actually been obtained from an independent source). *See generally* J. Hall, Search and Seizure § 22:14, at 638 (1982 & Supp. 1984).

76. *See* LaCount & Girese, *The "Inevitable Discovery" Rule, an Evolving Exception to the Constitutional Exclusionary Rule*, 40 Alb. L. Rev. 483, 502 (1976); *see also* Note, *supra* note 2, at 1134.

77. "Admission of the victim's body, if it would have been discovered anyway, means that the trial in this case was not the product of an inquisitorial process; that process was untainted by illegality. The good or bad faith of the Detective Leaming is therefore simply irrelevant." *Nix*, 104 S. Ct. at 2515 (Stevens, J., concurring).

78. Defenant's burden of proof may be insurmountable, given: (1) the difficulty of proving a negative hypothetical, *i.e.*, that the evidence would *not* have been inevitably discovered; (2) the presumption, absent contrary evidence, that police testimony is more credible than defendant's testimony; (3) the admissibility need only be proved by a preponderance of the evidence; and (4) the plaintiff's state of mind is irrelevant. *See also* J. Hall, *supra* note 75, §§ 22:13- :14, at 637-38 n.20.

79. *See supra* notes 52-54 and accompanying text (discussing the deterrence rationale of the exclusionary rule); *cf.* Kamisar, *supra* note 6, at 565 (purpose of exclusionary rule is not to deter individual police misconduct, but to encourage institutional or "systemic" compliance with the fourth amendment). *But see Nix*, 104 S. Ct. at 2510 ("[w]hen an officer is aware that evidence will inevitably be discovered, he will try to avoid engaging in any ques-

incarcerating innocent individuals.[80]

1. When is Discovery Inevitable?[81]

Although *Nix* purports to require a hypothetical inevitable discovery, lesser standards, such as a high probability or a reasonable certainty of discovery, may suffice.[82] It is unclear whether a court should determine if discovery was inevitable when the police misconduct occurred or when the evidence was discovered. In all likelihood, the time of actual discovery will control,[83] but in *Nix*, since both events occurred at approximately the

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tionable practice").

80. Although Williams was found guilty of first-degree murder, his guilt was *not* undisputed.

> The defense conceded that Williams had left the YMCA with the little girl's body, but claimed that someone else had killed her and placed her body in Williams's room in the hope that suspicion would focus on him. Williams, the theory went, then panicked, fled, and hid the body by the side of a road, until he came to his senses and gave himself up two days later. The theory is not so far-fetched as it sounds. The State contended that the murder was related to sexual abuse of the victim, and in fact acid phosphatase, a component of semen, was found in her body. But no traces of spermatozoa, living or dead, were found either in the body or on Pamela's clothing. One inference that could be drawn is that the victim was attacked by a sterile male. Williams is concededly not sterile. The State's witnesses suggested that sperm, initially present, had been destroyed by freezing, but this theory was arguably inconsistent with the hypothesis, earlier urged and accepted in connection with the motion to suppress, that extreme cold would preserve the body's condition, not change it. The defense called experts who testified that freezing would not destroy sperm cells. In addition, although pubic hairs said by an FBI expert to be "like" those of the defendant were found on the victim's clothing, so were other pubic hairs concededly belonging neither to Williams nor to the victim.

Williams v. Nix, 700 F.2d 1164, 1168 (8th Cir. 1983).

81. Inevitable is defined as: "Incapable of being avoided; fortuitous; transcending the power of human care, foresight, or exertion to avoid or prevent, and therefore suspending legal relations so far as to excuse from the performance of contract obligations, or from liability for consequent loss." BLACK'S LAW DICTIONARY 698 (5th ed. 1979).

82. When Williams told the police where the body was located, two hundred volunteers were searching the surrounding counties, but the search was discontinued once Williams promised to lead the police to the body. When the search was discontinued, the searchers were within two and one-half miles of the body, perhaps three to five hours away from discovery. Although it is likely the searchers "would have" discovered the body, it was not "inevitable." *See Nix*, 104 S. Ct. at 2511-12; *see also* Wayne v. United States, 318 F.2d 205 (D.C. Cir. 1963) (finding that the discovery of the body was inevitable since the coroner would have to investigate, but not considering the possibility that someone could permanently dispose of the body before it was legally discovered), *cert. denied*, 375 U.S. 860 (1963); People v. Soto, 55 Misc. 2d 219 (N.Y. Crim. Ct.), 285 N.Y.S.2d 166 (1967) (defendant's confession was suppressed but the murder weapon left in mailbox was admitted since it would inevitably have been turned over to police the next day). *See also Nix*, 104 S. Ct. at 2516 (Stevens, J., concurring) (the burden was on prosecution to show that "[i]n the *natural and probable course of events*, [the searchers] would have soon discovered the body") (emphasis added); J. HALL, *supra* note 75, § 22:14, at 638-40.

83. If no evidence is found, then the question of inevitability does not arise. Arguably, the

same time, the distinction was insignificant.[84]

Nonetheless, timing may be a critical factor in the successful application of the inevitable discovery exception. For example, in *Nix*, if the defendant was arrested shortly after disposing of the body and before a search party was organized, then the likelihood of discovery would have been greatly reduced. Even if the police can show that an organized search is routine and would have been conducted, it may still be difficult to document the number of searchers that would have been employed or the exact area that would have been searched. Factual considerations unique to each case may lead a court to distinguish between degrees of "inevitability" or to create guidelines for "inevitability" based on arbitrary factual distinctions.[85] Until the Court provides a clearer definition of "inevitable," all facts influencing the likelihood of the hypothetical discovery will be relevant.[86]

2. The Distinction Between Primary and Derivative Evidence

"Primary" evidence flows immediately from the illegality, whereas, "secondary" or derivative evidence is derived from illegally obtained evidence.[87] The *Nix* Court applied the inevitable discovery exception only to secondary or derivative evidence.[88] This distinction, however, may not always be useful.[89] For example, it is difficult to see how "primary" evidence such as an illegally obtained confession would otherwise have been discovered; conversely, in many fourth amendment cases, it is easier to see how "primary" evidence flowing from the illegal entry or the illegal

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time of the constitutional violation should control because the violation may indirectly lead the police to the evidence. The violation allows the police to initiate additional searches, after the violation has occurred, which may support the conclusion that the evidence would have inevitably been discovered.

84. The search was halted when Williams promised to lead police to the body, therefore upon actual discovery of the body the same degree of inevitability existed. *Nix*, 104 S. Ct. at 2512. *But cf.* United States v. Apker, 705 F.2d 293 (8th Cir. 1984) ("inevitable discovery" depended on the validity of the search warrants and on the sequence of events), *cert. denied*, 104 S. Ct. 996 (1984).

85. The *Nix* Court purports to reject both of these alternatives and avoids their trappings by simply examining all of the circumstances and concluding that discovery would have been "inevitable." The Court noted that "[i]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment . . . ." *Nix*, 104 S. Ct. at 2510 n.5. *See* Novikoff, *supra* note 67, at 101-03 (different standards of inevitability applied in different situations).

86. Facts relating directly to violation of defendant's constitutional rights will not, however, be relevant. *See infra* note 89 and accompanying text.

87. *See generally* LaCount & Girese, *supra* note 76, at 506-09.

88. *See Nix*, 104 S. Ct. at 2509; *see also* Taylor v. Alabama, 457 U.S. 687, 694 (1982); Brewer v. Williams, 430 U.S. 387, 406 n.12 (1977); Adler, *The Return of the Christian Burial Case*, 70 A.B.A. J. 100 (1984).

89. *See* W. LAFAVE, *supra* note 6, § 11.4, at 622-24.

search might inevitably be discovered. In practice, this distinction between primary and derivative evidence can only add to the confusion surrounding the application of the inevitable discovery exception. This distinction is important only where the plaintiff seeks to "purge the taint" from the illegally obtained evidence, an objective that is irrelevant under the inevitable discovery exception.[90]

3. The "Blind Faith" Exception

In *Nix*, the Court indicated that, by its nature, the inevitable discovery exception eliminates any threat of police misconduct.[91] Furthermore, the Court explained that there are significant disincentives to obtaining evidence illegally which also lessen the likelihood that the inevitable discovery exception will promote police misconduct. These disincentives include the possibility of departmental discipline and civil liability.[92] In practice, however, civil remedies and departmental discipline are ineffective deterrents to police misconduct due to prosecutors' and jurors' reluctance to confront or condemn officers of the law.[93]

By relying on a theory of inevitable discovery, the Court ignores actual police misconduct or constitutional violations and focuses on what might have occurred.[94] This exception allows the police to exercise discretion in determining when to violate a suspect's constitutional rights—regardless of the police's conduct, the evidence may be admitted because of the inevitable discovery exception. Many commentators agree that this failure to distinguish intentional or bad faith violations undermines the rationale of the exclusionary rule.[95] Where the inevitable discovery exception is applied, the defendants are without recourse no matter how egregious the constitutional violation may have been since the degree of police misconduct is irrelevant to the Court's determination of "inevitability."[96]

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90. *See supra* note 72 and accompanying text; *see also* Wong Sun v. United States, 371 U.S. 471 (1963) (the "taint" may be removed from illegally obtained evidence by showing that intervening factors severed the causal link between the illegality and the evidence; arguably once the taint is purged from the illegal evidence, it should be admissible); *cf.* Dunaway v. New York, 442 U.S. 200 (1979) (where the suspect was detained without probable cause and the *Miranda* warnings were not sufficient to purge the taint from the illegally obtained "voluntary" confession); Brown v. Illinois, 422 U.S. 590 (1975) (discussing "taintedness" of confessions).

91. *Nix*, 104 S. Ct. at 2510; *see also* Williams v. Nix, 700 F.2d 1164 (8th Cir. 1983); State v. Williams, 285 N.W.2d 248, 258 (Iowa 1979).

92. *Nix*, 104 S. Ct. at 2510.

93. *See Utah's Alternative*, *supra* note 47, at 179-81.

94. *Nix*, 104 S. Ct. at 2515.

95. *See, e.g.*, Note, *supra* note 2, at 1135-36, 1140-42; Adler, *supra* note 88, at 102-03; *see also* W. LAFAVE, *supra* note 6, § 11.4, at 623-24.

96. *See generally* Adler, *supra* note 88, at 103 (quoting David Crump, president of the Legal Foundation of America) (the separate policy bases for a general good faith exception and inevitable discovery are (1) an officer acting in good faith could not be deterred, and (2)

B. *The Rationale for Inevitable Discovery in* Nix v. Williams

1. The Inherent Logic of Inevitable Discovery

In *Nix* the Court noted that the "[d]rastic and socially costly [exclusionary rule] is needed to deter police from violations of constitutional and statutory protections."[97] The majority opinion, however, focused on the immediate effect of exclusion: to prevent the prosecution from being in a better position than it would have been in if no illegality had transpired.[98] The majority, thereby disregarded the underlying deterrence rationale of the exclusionary rule.[99] Similarly, the Court noted that the admission of "derivative" evidence serves the purpose of ensuring that the prosecution is not put in a worse position simply because of an earlier police error.[100] Again, the Court avoided any discussion of the impact of the inevitable discovery exception on the deterrence rationale,[101] and instead offered the simple logic of an "inverse" exclusionary rule.[102]

The Court relied heavily on the rationale of the independent source exception to justify its adoption of the inevitable discovery exception.[103] The two are logically and functionally similar, yet they differ in one key

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irrespective of the showing of good faith or bad faith, if the alleged constitutional violation was not the cause of discovery, i.e., discovery was inevitable, then suppression is not justified); *cf.* United States v. Leon, 104 S. Ct. 3405, 3421 (1984) (stating that "[s]uppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.") (citing Franks v. Delaware, 438 U.S. 154 (1978)).

97. *Nix*, 104 S. Ct. at 2508.

98. *Id.* at 2509.

99. *See supra* notes 88-90 and accompanying text.

100. *Nix*, 104 S. Ct. at 2509.

101. The majority opinion implied that inevitable discovery will not undermine the deterrence rationale. The Court explained:

> A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered. On the other hand, when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice.

Id. at 2510. The Court also refused to recognize a separate sixth amendment justification for exclusion since the evidence was reliable and subject to cross-examination. *Id.* at 2510-11.

102. Illegally obtained evidence is to be excluded, and legally obtained evidence is admissible. The Court applied inevitable discovery in order to deem the evidence "legally obtained," instead of reconciling the admission of illegally obtained evidence with justifications for exclusion.

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject *logic, experience, and common sense.*

Id. at 2509 (emphasis added).

103. *Id.*

respect: under inevitable discovery, the evidence in question "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."[104] In *Nix*, the logical appeal of the inevitable discovery exception is magnified by the unusually tragic nature of the crime and the apparent guilt of the defendant.[105] The circumstances of *Nix* enabled the Supreme Court to effect a balancing test solely for the purpose of validating the inevitable discovery exception.

2. A Balancing of Values to Support Admissibility

The *Nix* decision feigned a balancing test to substantiate its theory of inevitable discovery.[106] While the majority opinion emphasized the need to balance society's interest in deterring unlawful police conduct with the public's interest in having juries receive all probative evidence of a crime,[107] the Court failed to consider how the inevitable discovery exception may affect these interests. Instead, the Court merely explained that inevitable discovery is the mechanism necessary to balance these competing interests.[108] It appears the Court began with the assumption that the admission of inevitably discoverable evidence has no impact on the deterrence rationale of the exclusionary rule, even if that evidence was illegally obtained.

The Supreme Court briefly examined possible sixth amendment justifications[109] for the exclusionary rule including the need to protect the integrity and fairness of a criminal trial. The Court determined, however, that the illegal interrogation of the defendant did not make the derivative evidence any less reliable, or the trial any less fair.[110] The majority con-

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104. *Id.* at 2517 (Brennan, Marshall, JJ., dissenting).

105. *See id.* at 2513 (Stevens, J., concurring); *see also*, Brewer v. Williams, 430 U.S. 387, 415-17 (1977) (Burger, C.J., dissenting).

106. *But see* United States v. Leon, 104 S. Ct. 3430 (1984) (Brennan, Marshall, JJ., dissenting). The dissent described the majority's rationale for adopting a good faith exception to the exclusionary rule as follows:

> Thus, in this bit of judicial stagecraft, while the sets sometimes change, the actors always have the same lines. Given this well-rehearsed pattern, one might have predicted with some assurance how the present case would unfold. First there is the ritual incantation of the "substantial social costs" exacted by the exclusionary rule, followed by the virtually foreordained conclusion that, given the marginal benefits, application of the rule in the circumstances of these cases is not warranted. Upon analysis, however, such a result cannot be justified even on the Court's own terms.

Id. at 3441.

107. *Nix*, 104 S. Ct. at 2509-11.

108. *Id.* at 2509 & n.4 (stating that the interests of society "are properly balanced by putting the police in the same, not a *worse* position than they would have been in if no police error or misconduct had occurred.") (emphasis original) (citations omitted).

109. *Nix*, 104 S. Ct. at 2511.

110. *Id.*

cluded that the inevitable discovery exception ensures fairness "by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place."[111] Again, the Court emphasized the immediate effects of admitting "relevant and undoubted truth"[112] without regard to the potential for police misconduct and unchecked constitutional violations.

3. Deterrents Other Than the Exclusionary Rule

Nix suggests that the inevitable discovery exception is equipped with built-in deterrents to combat the potential for police misconduct.[113] However, the effectiveness of such deterrents depends solely on the exercise of individual police discretion. These deterrents necessarily presuppose that police officers are unwilling to make an educated guess concerning the applicability of the inevitable discovery exception in a given situation. Furthermore, as noted by Justice Stevens, the potential cost of any litigation is, by itself, an adequate deterrent to police misconduct.[114] These costs, however, are not borne by individual policemen and most incidents of police misconduct rarely end in litigation.[115]

Justice Stevens further noted that the prosecution's burden of proving inevitability serves as an additional deterrent.[116] This conclusion, however, is questionable since the prosecution is allowed to use the evidence it obtained in order to meet its burden.[117] While these "other deterrents" are theoretically plausible, their tenuous bearing on actual police misconduct probably renders them ineffective.

C. *Inevitable Discovery and Virginia Law*

The inevitable discovery exception created in *Nix v. Williams* will have little, if any, impact on pre-existing Virginia law. The Virginia Supreme Court appears to have already adopted the concept of inevitable discovery in *Warlick v. Commonwealth.*[118]

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111. *Id.*

112. *Id.* at 2510.

113. *Id.* at 2508.

114. *Id.* at 2517 (Stevens, J., concurring) (stating that the responsibility for that expenditure [for litigation] lies not with the Constitution, but rather with the constable.").

115. Victims may be unwilling or unable to bring suit because of the inconvenience, the cost, or because they are in jail; or perhaps because they seek to avoid the publicity.

116. *Nix*, 104 S. Ct. at 2516 (Stevens, J., concurring).

117. *Id.*

118. 215 Va. 263, 208 S.E.2d 746 (1974); *see also* Keeter v. Commonwealth, 222 Va. 134, 278 S.E.2d 841 (1981); *cf.* Hart v. Commonwealth, 221 Va. 283, 269 S.E.2d 806 (1980) (oral confession inadmissible as product of an unlawful search and seizure of defendant's clothing); Reese v. Commonwealth, 220 Va. 1035, 265 S.E.2d 746 (1980) (confession properly admitted when not causally connected to illegal search). *See generally* R. BACIGAL, VIRGINIA

In *Warlick*, the police recovered two vials of stolen drugs during an illegal search of the defendant's home; later these drugs were suppressed. After arresting the defendant and reading him the *Miranda*[119] warnings, the police officer asked the defendant to disclose the hiding place of the other stolen drugs. The defendant was unresponsive until the officer asked him "[h]ow he would feel if some children got hold of the drugs."[120] The defendant then led the officer to a field where the drugs were hidden.

In *Warlick*, the defendant failed to allege any sixth amendment violation, but claimed that all of the evidence should have been suppressed because of the illegal search. The Virginia Supreme Court held that the evidence obtained pursuant to the defendant's own statements was admissible since the statements were made "freely and voluntarily" as a result of the defendant's humanitarian concerns and not as a result of being confronted with the evidence by the police. The defendant's admission that he had driven his father's car on the night of the break-in was also admissible under the independent source doctrine because at trial a witness identified the defendant as the driver of the car involved; however, the Virginia Supreme Court noted that this "evidence would have inevitably been gained by the police without unlawful action on their part."[121] Of course, the future of the inevitable discovery exception under Virginia law will depend largely on what additional guidelines, if any, are provided by Congress or the United States Supreme Court.

IV. The Future Application of Inevitable Discovery

The future application of the inevitable discovery exception depends largely on the continuing viability of the exclusionary rule. In light of recent Supreme Court decisions which curtail the scope of the exclusionary rule,[122] it has become increasingly difficult to determine when the exclusion of evidence is proper. So far, the Supreme Court has been unwilling to abandon the rule and Congress has failed to create a suitable substitute.[123] Although only Justices Marshall and Brennan find the rule

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Criminal Procedure § 6-4, at 80 (1983); Comment, *Evidence—Defendant's Confession Following Confrontation With Illegally Seized Evidence Not Excluded Where Independent Motive Induced The Confession*—Warlick v. Commonwealth, 9 U. Rich. L. Rev. 767-72 (1975).

119. Miranda v. Arizona, 384 U.S. 436 (1966).

120. 215 Va. at 264-65, 208 S.E.2d at 747.

121. *See id.* at 268; 208 S.E.2d at 749. *See also* Annot., 43 A.L.R.3d 385, 398-406 (1972).

122. Immigration and Naturalization Serv. v. Lopez-Mendoza, 104 S. Ct. 3479 (1984) (exclusionary rule does not apply in civil deportation hearing); *see also* United States v. Leon, 104 S. Ct. 3405 (1984) (creating good faith exception where officer relies on magistrate's determination of probable cause); Segura v. United States, 104 S. Ct. 3308 (1984) (exclusion of evidence not warranted because the lawful search was not invalidated by illegal entry).

123. The United States Senate passed a bill modifying the exclusionary rule to allow admission of evidence where the officer acted with a reasonable, good faith belief that he was

constitutionally mandated,[124] a majority of the Court nonetheless recognizes its validity as a method of deterring police misconduct.[125]

The inevitable discovery exception is inconsistent with the deterrence rationale of the exclusionary rule[126] because it does not distinguish an officer's "bad faith" conduct from "good faith" conduct. For example, when police have limited information concerning the commission of a crime, they may be encouraged to violate a suspect's constitutional rights in order to obtain additional evidence verifying the otherwise useless, limited information.[127] This type of police conduct is especially likely where it appears that the suspect will go free if no action is taken. If officers of the law are permitted to deliberately evade constitutional requirements, then our judicial system is manifestly unjust. Evidence exclusion is currently the only effective remedy recognized by the Court to curb police misconduct; the inevitable discovery exception deprives an aggrieved defendant of the use of this remedy.[128]

A. *The Need for a Uniform Approach*

The Supreme Court is continually redefining and reshaping the present exclusionary rule.[129] On the one hand, the Court has emphasized the importance of deterring police misconduct and protecting individual rights, such as privacy and the right to counsel, against the costs of exclusion and the degree of actual infringement on individual rights. Conversely, the Court has continued to create carefully delineated exceptions to the exclusionary rule without regard for these declared concerns. The inevitable discovery exception is one example of a technical and logically appealing exception.[130] The Court's reliance on the hypothetical nature of inevitable discovery permits the Court to avoid reconciling the inevitable discovery exception with the deterrence rationale of the exclusionary rule.

The inevitable discovery exception unnecessarily complicates litigation by inviting hypothetical inquiry that may be substantiated by little more

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acting in conformity with the fourth amendment. S. 1764, 98th Cong., 1st Sess (1984). *See generally* Rader, *Reforming the Exclusionary Rule*, 31 FED. B. NEWS & J. 250 (1984).

124. *See* United States v. Leon, 104 S. Ct. 3405, 3443 (1984) (Marshall, Brennan, JJ., dissenting).

125. *Id.* at 3421-22.

126. *See generally* Note, *supra* note 66, at 160.

127. *But see Nix*, 104 S. Ct. at 3445 (Brennan, Marshall, JJ., dissenting).

128. *See supra* note 47 and accompanying text.

129. *See supra* notes 52-53 and accompanying text.

130. *See* United States v. Place, 103 S. Ct. 2637 (1983) (emphasizing the value of a "totality of the circumstances" test); United States v. Mendenhall, 446 U.S. 544 (1980); Schneckloth v. Bustamonte, 412 U.S. 218 (1978) (voluntariness of a consent to search is to be determined from the totality of the circumstances). *Compare* Camara v. Municipal Court, 387 U.S. 523 (1967) *with* United States v. Leon, 104 S. Ct. 3405 (1984).

than a police officer's own testimony.[131] Although the uncertainty of the "inevitability" standard may increase litigation, a rigid test for "inevitability" may be equally undesirable. A static test which strictly defines "inevitability" would stifle further judicial development of the exclusionary rule.[132] For instance, landmark decisions such as *Brown v. Illinois*[133] might never have been litigated, despite the constitutional violation, if it could have been determined beforehand that the incriminating evidence was inevitably discoverable.

In *Brown*, the defendant was arrested without probable cause and questioned about a murder. After the defendant was given the *Miranda* warnings, he made several incriminating statements to the police. The Supreme Court refused to exclude the confessions solely because of the illegal arrest and expressly declined to adopt a *per se*, or "but for," rule.[134] Instead, the Court emphasized the need to consider all relevant factors bearing on the admissibility of the illegally obtained evidence.[135] The police misconduct which may have caused the defendant to confess was simply one of the considerations to be balanced. Similarly, the degree of "inevitability" is but one factor that must be considered in light of the costs of exclusion and the need to deter police misconduct.[136]

B. *Towards a "Totality of the Circumstances" Test*

A single, all-inclusive inquiry would allow the Court to abandon its string of exclusionary rule exceptions, and instead rely on express constitutional guidelines to temper police misconduct. The Court could focus on actual police misconduct in addition to "inevitability." The "totality of the circumstances" test, used to determine probable cause,[137] may provide a suitable model. Both the exclusionary rule and the probable cause requirement are regulatory and each aims to control law enforcement behavior—the probable cause requirement through a mandate to law en-

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131. J. HALL, *supra* note 75, § 22:15, at 641.

132. *See, e.g.*, Merten & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 371 (1981) (good faith exception would choke off development of fourth amendment law).

133. 422 U.S. 590 (1975).

134. *Id* at 603; *see also* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (the Court rejected the "but for" test concluding that not "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").

135. These facts include statistical data regarding the costs of exclusion; the need to admit the evidence; the extent of the constitutional violation; and the degree of police misconduct. *See generally* S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (1977).

136. *See* Illinois v. Gates, 103 S. Ct. 2317 (1983) (replacing the two-pronged *Aguillar-Spinelli* test for probable cause with a "totality of the circumstances" test).

137. Illinois v. Gates, 103 S. Ct. 2317 (1983).

forcement officers, the exclusionary rule through a mandate to trial courts.[138] A "totality of the circumstances test" would enhance judicial development of the exclusionary rule and allow the Court to escape the logical snares implicit in the inevitable discovery exception.[139]

In *Illinois v. Gates*,[140] the Supreme Court held that a "totality of circumstances" approach was appropriate for determination of probable cause by a magistrate. In *Gates*, the Court explained that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[141] A "totality of the circumstances" inquiry is also necessary to fairly and consistently determine whether the exclusion of evidence is an appropriate remedy for a particular constitutional violation. A "totality of the circumstances" test is widely adaptable both to cases where illegally obtained evidence might have been inevitably discovered and to cases where the application of the exclusionary rule is an issue. Furthermore, the test provides the Court with an opportunity to honestly evaluate all interests that are relative to questions of evidence exclusion.

V. Conclusion

The inevitable discovery exception undermines the existing bases for the exclusionary rule largely because of the exception's failure to inhibit intentional police misconduct. The inevitable discovery exception may, in fact, encourage such misconduct. The actual benefits of inevitable discovery are scarce, although the exception does provide an expedient means of circumventing the exclusionary rule. It is too easy for hypothetical factual distinctions, such as the time of discovery or the policeman's physical proximity to the evidence, to control the determination of inevitability. Until the Supreme Court adopts a "totality of the circumstances" test, the inevitable discovery exception will operate as an "exclusionary loophole" enabling the police to make full use of illegally obtained evidence while allowing the Court to avoid discussion of vital constitutional protections, thereby retarding the growth of fourth amendment jurisprudence.[142]

Edward M. Macon

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138. *See* Merten & Wasserstrom, *supra* note 132, at 391-93.

139. *See supra* notes 97-105 and accompanying text.

140. 103 S. Ct. 2317.

141. *Id.* at 2328.

142. The term "fourth amendment jurisprudence" as used here includes any study of the application of the exclusionary rule. Although the exclusionary rule originated as a remedy for fourth amendment violations, it has been readily extended to fifth and sixth amendment violations as well. *See supra* note 2.