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Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule

Stephen E. Hessler
University of Michigan Law School

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Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule

Stephen E. Hessler*

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INTRODUCTION

Few doctrines of constitutional criminal procedure generate as much controversy as the Fourth Amendment¹ exclusionary rule.² Beyond the basic mandate of the rule — that evidence obtained in violation of an individual's right to be secure against unreasonable search and seizure is inadmissible in a criminal proceeding — little else is agreed upon.³ The precise date of the exclusionary rule's inception is

* Many thanks to Professor Yale Kamisar for invaluable guidance and commentary.

1. U.S. CONST. amend. IV states:

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

2. See WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.2, at 24 (3d ed. 1996) ("For well over half a century now, the validity and efficacy of the Fourth Amendment exclusionary rule have been vigorously debated by legal commentators."); see also *id.* at n.1 for a sampling of the vast body of literature debating the merits of the exclusionary rule.

3. The exclusionary rule is not limited to the Fourth Amendment; it is implicated also by violations of the Fifth Amendment right against self-incrimination and the Sixth Amend-

uncertain, but it has been applied by the judiciary for over eight decades.⁴ While the Supreme Court has emphasized that the rule is a “judicially created remedy,” and not a “personal constitutional right,”⁵ this characterization provokes argument as to the doctrine’s susceptibility to statutory or judicial attrition.⁶ Indeed, essentially the only element of the Fourth Amendment exclusionary rule that generates consensus is that the contours of this fundamental doctrine remain ill-defined.⁷

The exclusionary rule applies not only to evidence seized as a “direct” or “primary” result of an illegal search, but also to “derivative” or “secondary” evidence obtained from unlawful police action.⁸ For instance, a gun seized during a warrantless search of a residence would

ment right to counsel. See *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment); *Massiah v. United States*, 377 U.S. 201 (1964) (Sixth Amendment).

4. See Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 COLUM. L. REV. 1365, 1372 (1983) (“None of the three Supreme Court cases credited with producing the rule [(*Boyd v. United States*, 116 U.S. 616 (1886), *Adams v. New York*, 192 U.S. 585 (1904), *Weeks v. United States*, 232 U.S. 383 (1914))] focused on whether the exclusionary rule, as we know it, should exist — yet somehow, in 1914, after all three cases had been decided, the rule was established.”).

5. *United States v. Leon*, 468 U.S. 897, 906 (1984) (stating that the exclusionary rule “operates as a ‘judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.’”) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

6. See LAFAVE, *supra* note 2, § 1.1(f), at 22 (noting the presence of “an intense debate as to the precise constitutional status of the exclusionary rule and, in particular, whether Congress could place significant limitations upon the rule or even abolish it entirely. . . .”); Yale Kamisar, *Does (Did)(Should) The Exclusionary Rule Rest On A “Principled Basis” Rather Than An “Empirical Proposition”?*, 16 CREIGHTON L.R. 565, 624 (1983) [hereinafter Kamisar, *Exclusionary Rule*] (arguing that the Court’s decision in *Mapp v. Ohio* established that “the exclusionary rule is not a ‘mere rule of evidence’ or an exercise of the Court’s supervisory powers over federal criminal justice, but a command of the Constitution.”) (citing *Mapp v. Ohio* 367 U.S. 643, 646-50 (1961)).

7. See LAFAVE, *supra* note 2, § 1.1, at 3 (“It is primarily because of the exclusionary rule that courts are called upon to meet the seemingly unceasing challenge of marking the dimensions of the protections flowing from the Fourth Amendment.”).

The history of the Fourth Amendment exclusionary rule was not always marked by contention. A half century ago, in *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court held that the exclusionary rule, applied for years at the federal level, see *Weeks v. United States*, 232 U.S. 383 (1914), need not be enforced in state. Only twelve years later, the Court, in *Mapp v. Ohio*, 367 U.S. 643 (1961), overruled *Wolf*, holding that the Due Process Clause of the Fourteenth Amendment made the Fourth Amendment’s guarantees against unreasonable search and seizure applicable to the states. Although *Mapp* featured a vigorous dissent by Justice Harlan, he did not malign the validity of the exclusionary rule, but rather questioned the wisdom of superseding contrary practice in the individual states’ administration of their respective criminal laws. But the criticism was so harsh that general acceptance of the exclusionary rule eroded, and the tactics of the opposition shifted to an assault on the doctrine itself. See Kamisar, *Exclusionary Rule*, *supra* note 6, at 565-66.

8. *Segura v. United States*, 468 U.S. 796, 804 (1984) (“[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered to be derivative of an illegality or ‘fruit of the poisonous tree.’” (internal citations omitted)).

be subject to suppression under the exclusionary rule. But if the gun was seized on the basis of information learned from an illegal search, the court must ask whether the challenged evidence was "tainted" by the initial Fourth Amendment violation, and thus the "fruit of the poisonous tree."⁹

Much of the confusion surrounding the exclusionary rule results from the Supreme Court's historical development of multiple exceptions to the rule generally, and to the fruit of the poisonous tree doctrine specifically.¹⁰ The Court has recognized three exceptions to the fruit of the poisonous tree doctrine: the "independent source," "attenuation," and "inevitable discovery" exceptions.¹¹ The first was announced in the 1920 decision *Silverthorne Lumber Co. v. United States*,¹² where the Court held that the exclusionary rule forbids the introduction of not only illegally obtained evidence, but also any additional incriminating evidence derived from the primary evidence.¹³ The Court limited its decision, however, stating that if law enforcement acquired the derivative evidence from an "independent source," those facts thus obtained did not become "sacred and inaccessible."¹⁴ The second exception came two decades later in *Nardone v. United States*,¹⁵ where the Court established that even if unlawfully obtained evidence

9. *Nardone v. United States*, 308 U.S. 338, 341 (1939). In the context of the phrase, "fruit of the poisonous tree," the unlawful search and seizure is the poisonous tree; the illegally obtained evidence is the fruit. Despite the widespread use of the term, courts occasionally confuse the distinction and misapply the doctrine. See, e.g., *United States v. Pimentel*, 810 F.2d 366, 368 n.1 (2d Cir. 1987) (correcting the district court's description of the evidence as the poisonous tree).

See also LAFAYE, *supra* note 2, § 11.4, at 230-32. Professor LaFave has described additional examples of challenged evidence that is derivative in nature:

An illegal arrest may result in the arrestee giving a confession or in his being identified by the victim of or a witness to a crime; an illegal search may result in the police obtaining a confession or a witness who is now prepared to testify against the defendant, or may uncover facts which lead to an arrest or to another search on some occasion.

Id. at 232.

Finally, as with the exclusionary rule itself, see *supra* note 3, the "fruit of the poisonous tree" doctrine extends beyond the Fourth Amendment and applies also to violations of the Fifth and Sixth Amendments. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964) (Fifth Amendment); *United States v. Wade*, 388 U.S. 218 (1967) (Sixth Amendment).

10. See, e.g., Carmen R. Parcelli, *Twenty-Ninth Annual Review of Criminal Procedure: The Exclusionary Rule*, 88 GEO. L.J. 799, 1043-56 (2000) (surveying the many exceptions to the exclusionary rule).

11. E.g., *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1396 (9th Cir. 1989).

12. 251 U.S. 385 (1920).

13. The *Silverthorne* opinion was authored by Justice Oliver Wendell Holmes, and his eloquent words are oft-repeated: "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." *Id.* at 392.

14. *Id.*

15. 308 U.S. 338 (1939).

did not come from an independent source, it may still be admissible if the state proved that the causal connection between the challenged evidence and the officer's illegal actions had "become so attenuated as to dissipate the taint."¹⁶ If the prosecution failed to prove adequate dissipation, noted Justice Frankfurter, the evidence was suppressed as the "fruit of the poisonous tree."¹⁷ In 1963, the Court further refined the independent source and attenuation doctrines in *Wong Sun v. United States*.¹⁸ On this occasion, although reaffirming the fruit of the poisonous tree doctrine, the Court again qualified the scope of the rule by permitting inquiry into whether derivative evidence was discovered by exploiting the prior unlawful police activity, or rather by "means sufficiently distinguishable to be purged of the primary taint."¹⁹ Thus, the Court's treatment of the exclusionary rule has been both sporadic and imprecise, repeatedly recognizing the validity of the rule while simultaneously emphasizing that it is not without exception.²⁰

Continuing this trend, in 1984 the Supreme Court in *Nix v. Williams*²¹ recognized a third exception to the fruit of the poisonous tree doctrine — the inevitable discovery exception.²² As the name im-

16. *Id.* at 341.

17. *Id.*

18. 371 U.S. 471 (1963).

19. *Id.* at 488 (quoting J. MAGUIRE, EVIDENCE OF GUILT 211 (1959)).

20. See LAFAVE, *supra* note 2, § 11.4(a), at 235 ("In neither *Nardone* nor *Wong Sun* did the Court elaborate upon the 'attenuated connection' test, thus leaving it rather uncertain exactly what it was that lower courts were expected to look for, to say nothing of what facts would be relevant to an 'attenuation' determination."). Cf. Stewart, *supra* note 4, at 1366:

Looking back, the exclusionary rule seems a bit jerry-built — like a roller coaster track constructed while the roller coaster sped along. Each new piece of track was attached hastily and imperfectly to the one before it, just in time to prevent the roller coaster from crashing, but without the opportunity to measure the curves and dips preceding it or to contemplate the twists and turns that lay ahead.

21. 467 U.S. 431 (1984).

22. The inevitable discovery exception did not originate from the U.S. Supreme Court. Rather, the *Nix* Court noted that, in 1984, "the 'vast majority' of all courts, both state and federal, recognize an inevitable discovery exception to the exclusionary rule." 467 U.S. at 440.

In fact, the inevitable discovery exception appears to have first been applied in 1943 by Judge Learned Hand. See *The Supreme Court, Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 123 (1984) [hereinafter *Leading Cases of the 1983 Term*]. In *Somers v. United States*, 138 F.2d 790 (2d Cir. 1943), investigators from the "Alcohol Tax Unit" unlawfully entered and searched the home of the defendant, in which they found an illegal still in operation. *Id.* at 791. Somers was not home at the time, but his wife told the investigators he would be returning soon. *Id.* The agents waited outside, and when Somers arrived twenty minutes later, they proceeded legally to search his car, and found alcohol in the trunk. *Id.* The district court suppressed all evidence from the illegal search of the apartment, but denied a motion to suppress the evidence seized from the search of the car. *Id.* The Second Circuit, relying on *Silverthorne Lumber*, see *supra* notes 12-14 and accompanying text, reversed the lower court's order to admit the jugs of alcohol found in Somers's car because that subsequent search was based in part upon information unlawfully obtained from the search of the home. *Id.* Judge Hand remanded the case, however, as:

plies, when the challenged evidence would ultimately have been found absent the constitutional violation, the evidence will be admitted.²³ Like its predecessors, however, the *Nix* Court unfortunately failed to establish with sufficient clarity the parameters of when to apply the inevitable discovery exception.²⁴ Most importantly, the Court neglected to define adequately when a discovery is truly inevitable.²⁵

The inevitable discovery exception bears a "functional similarity" to its ancestor the independent source doctrine,²⁶ under which evidence is admissible if it was discovered by means entirely separate from the police misconduct.²⁷ The inevitable discovery exception is more difficult to administer, however, because courts must determine whether the hypothetical independent investigation would, in fact, have led to the discovery of the challenged evidence.²⁸ Indeed, the *Nix*

[I]t does not follow that that the seizure was inevitably invalid. Possibly, further inquiry will show that, quite independently of what Somers' wife told them, the officers would have gone to the street, have waited for Somers 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.

23. See *Nix*, 467 U.S. at 448 ("[W]hen, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint, and the evidence is admissible.").

24. United States v. Cherry, 759 F.2d 1196, 1204 (5th Cir. 1985) ("Although the Supreme Court in *Nix v. Williams* adopted the inevitable discovery exception to hold certain evidence admissible, no attempt was made in that case to define the contours of that exception."); United States v. Satterfield, 743 F.2d 827, 845-46 (11th Cir. 1984) ("The [*Nix*] Court stated without much elaboration that if the information 'ultimately or inevitably would have been discovered by lawful means' the exclusionary rule should not be applied.").

Commentators have been no less critical. See *Leading Cases of the 1983 Term*, *supra* note 22, at 123 ("the [*Nix*] Court produced an imprecise formulation of the exception that fails to address even the most basic problems raised by its application . . ."); William M. Cohn, Note, *Sixth Amendment - Inevitable Discovery: A Valuable But Easily Abused Exception to the Exclusionary Rule*, 75 J. CRIM. L. & CRIMINOLOGY 729, 730 (1984) ("The casual treatment that the Court afforded to inevitable discovery in [*Nix*] raises important questions about the doctrine's practical application . . ."); R. Bradley Lamberth, Note, *The Inevitable Discovery Doctrine: Procedural Safeguards to Inevitability*, 40 BAYLOR L. REV. 129, 136 (1988) ("In its articulation of the inevitable discovery exception, the Court left unanswered many questions as to when discovery is inevitable . . .").

25. See *Cherry*, 759 F.2d at 1204 ("The Supreme Court especially provided no guidance as to what, beyond the specific facts of *Williams* itself, constitutes an 'inevitable' discovery."); *Satterfield*, 743 F.2d at 846 ("Except for the application of its rule to the specific facts before the Court . . . the Supreme Court was silent as to what constitutes an 'inevitable discovery' under the doctrine.").

26. *Nix*, 467 U.S. at 444; see also *Murray v. United States*, 487 U.S. 533, 539 (1988) ("The inevitable discovery exception, with its distinct requirements, is in reality an extrapolation from the independent source exception: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.").

27. See *Nix*, 467 U.S. at 443.

28. See *id.*, 467 U.S. at 459 (Brennan, J., dissenting) ("The inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule."); see also *United States v. Herrold*, 962

Court, cognizant of the necessity that a defined conception of inevitability be enforced, maintained that "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment"²⁹ Lower courts have pointed out that this statement is partially inaccurate, as some speculation is required to determine whether the evidence in question would have been discovered but for the police illegality.³⁰ Courts therefore look to "demonstrated historical facts"³¹ that establish a causal connection between the lawful investigation and unlawful discovery, to minimize the amount of necessary speculation.³²

Prominent among the uncertain directives in *Nix* is whether law enforcement officials are required to have been actively pursuing an alternate line of investigation at the time of the constitutional misconduct. In other words, at the time one officer is engaged in a search violative of the Fourth Amendment, must another officer have already set in motion an independent and lawful inquiry that would have led to the discovery of the same evidence? The majority in *Nix* did not explicitly address the "active pursuit" doctrine, but the concurring and dissenting opinions characterized the decision as requiring such,³³ and

F.2d 1131, 1140 (3d Cir. 1992) ("[U]nder the independent source doctrine, evidence that was *in fact* discovered lawfully, and not as a direct or indirect result of illegal activity, is admissible. In contrast, the inevitable discovery doctrine, applied in *Nix*, permits the introduction of evidence that *inevitably would have* been discovered through lawful means, although the search that actually led to the discovery of the evidence was unlawful. The independent source and inevitable discovery doctrines thus differ in that the former focuses on what actually happened and the latter considers what would have happened in the absence of the initial search."); Robert M. Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 AM. J. CRIM. L. 79, 81 (1992) ("[U]nlike 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.").

29. *Nix*, 467 U.S. at 445 n.5.

30. *E.g.*, *United States v. Leake*, 95 F.3d 409, 412 (6th Cir. 1996) ("By its nature, the inevitable discovery doctrine requires some degree of speculation as to what the government would have discovered absent the illegal conduct."); *United States v. Eng*, 971 F.2d 854, 861, (2d Cir. 1992) ("[B]y its nature inevitable discovery analysis inevitably involves some degree of speculation.").

31. Courts have indicated that any of a number of elements may serve as a "demonstrated historical fact." *See, e.g.*, *Eng*, 971 F.2d at 859 ("[T]he facts of cases applying the inevitable discovery doctrine suggest that proof of inevitability is made more convincing when the areas of the search or investigation are well-defined, the government effort is planned and methodical, and a direct causal relationship and reasonably close temporal relationship exist between what was known and what had occurred prior to the government misconduct and the allegedly inevitable discovery of the evidence.").

32. *See Leake*, 95 F.3d at 412 ("Speculation . . . must be kept to a minimum; courts must focus on 'demonstrated historical facts capable of ready verification or impeachment.'") (quoting *Nix*, 467 U.S. at 444-45 n.5); *Eng*, 971 F.2d at 861 (noting "the requirement that an inevitable discovery inquiry focus on 'demonstrated historical facts' so as to keep speculation to an absolute minimum. . . .") (quoting *Nix*, 467 U.S. at 444-45 n.5).

33. *See infra* Section I.B.

the conventional understanding of the case is that the facts did include a separate, constitutionally permissible investigation.³⁴

Some lower courts have interpreted active pursuit by law enforcement of an alternate, independent line of investigation as the necessary "demonstrated historical fact" required by the *Nix* Court³⁵ to be proven by a preponderance of the evidence³⁶ to admit the evidence under the inevitable discovery exception.³⁷ Some of the federal circuits

34. See *infra* Section I.A.

35. See *supra* text accompanying note 29 (discussing the *Nix* Court's requirement that the prosecution present "demonstrated historical facts capable of ready verification or impeachment" that discovery was inevitable, in order for the exception to apply).

36. The burden of proof standard imposed in *Nix* — preponderance of the evidence — is not without controversy. In fact, this was the stated reason for Justice Brennan's dissent:

To ensure that this hypothetical finding [of inevitable discovery] is narrowly confined to circumstances that are functionally equivalent to an independent source, and to protect fully the fundamental rights served by the exclusionary rule, I would require clear and convincing evidence before concluding that the government had met its burden of proof on this issue.

Nix, 467 U.S. at 459 (Brennan, J. dissenting).

Lower courts have also questioned the standard. For example, the Second Circuit has noted "the difference between proving by a preponderance that something would have happened and proving by a preponderance that something would inevitably have happened." *United States v. Cabassa*, 62 F.3d 470, 474 (2d Cir. 1995). According to the Second Circuit:

There are, of course, semantic problems in using the preponderance of the evidence standard to prove inevitability. To say that more probably than not event "X" would have occurred is to say only that there is a 50%+ chance that "X" would have occurred. Clearly, the doctrine of inevitable discovery requires something more where the discovery is based upon the expected issuance of a warrant. Otherwise, it would result in illegally seized evidence being received when there was a 49% chance that a warrant would not have issued or would not have issued in a timely fashion, hardly a showing of inevitability.

Id. at 474.

Nevertheless, preponderance of the evidence remains the applicable standard, and courts emphasize the care with which it must be strictly enforced. The Seventh Circuit, for instance, has stated that:

Nix . . . speaks in terms of *proof* by preponderance of the *evidence* that the government would have discovered the challenged evidence through lawful means; and typically that will entail testimony rather than mere argument. It is all too easy to imagine in retrospect lawful avenues through which the government might have obtained evidence that in reality it came upon in contravention of the Fourth Amendment. Speculation and assumption do not satisfy the dictates of *Nix*, however. Inevitable discovery is not an exception to be invoked casually, and if it is to be prevented from swallowing the Fourth Amendment and the exclusionary rule, courts must take care to hold the government to its burden of proof.

United States v. Jones, 72 F.3d 1324, 1334 (7th Cir. 1995) (internal citations omitted).

For additional criticism of a preponderance of the evidence standard, see *Leading Cases of the 1983 Term*, *supra* note 22, at 129-30; Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It A Fair Trial?*, 22 AM. CRIM. L. REV. 85, 172-75 (1984); Lamberth, *supra* note 24, at 144-46.

37. *E.g.*, *United States v. Cherry*, 759 F.2d 1196, 1205 n.10 ("[T]he Supreme Court stated in [*Nix*] that the inevitable discovery exception 'involves no speculative elements but focuses on demonstrated historical facts.' This comment implies that the alternate means of obtaining the evidence must at least be in existence and, at least to some degree, imminent, if yet unrealized. If the inevitable discovery exception can be applied on the basis of the police officer's mere intention to use legal means subsequently, the focus of the inquiry would hardly be on historical fact." (internal citation omitted)).

have explicitly rejected the active pursuit requirement.³⁸ Other courts, by contrast, adhere to the doctrine.³⁹ Finally, further complicating matters is the fact that some circuits that require active pursuit have indicated that the doctrine may, at times, be avoided.⁴⁰ The federal judiciary therefore applies inconsistent interpretations of whether the inevitable discovery exception may be invoked in the absence of an ongoing, independent investigation. Lower courts' divergent adoption of the active pursuit doctrine has resulted in an uneven application of

38. *United States v. Ford*, 22 F.3d 374, 377 (1st Cir. 1994) ("declin[ing] to adopt such a strict approach" as the active pursuit doctrine); *United States v. Thomas*, 955 F.2d 207, 210 (4th Cir. 1992) (rejecting the active pursuit doctrine as a "blanket requirement"); *United States v. Kennedy*, 61 F.3d 494, 499-500 (6th Cir. 1995) ("[A]n alternate, independent line of investigation is not required for the inevitable discovery exception to apply."); *United States v. Boatwright*, 822 F.2d 862, 864 (9th Cir. 1987) ("The existence of two independent investigations at the time of discovery is not . . . a necessary predicate to the inevitable discovery exception."); *United States v. Larsen*, 127 F.3d 984, 986 (10th Cir. 1997) ("[T]he inevitable discovery exception applies . . . whether or not the investigation was ongoing at the time of the illegal police misconduct."). Further, it appears two additional circuits have implicitly rejected the active pursuit requirement. See *United States v. De Reyes*, 149 F.3d 192, 195 (3d Cir. 1998) (citing, with approval, the inevitable discovery approaches of the Tenth and Sixth circuits, neither of which require active pursuit); *United States v. Warren*, 997 F. Supp. 1188, 1193 (E.D. Wisc. 1998) (noting that "the Seventh Circuit's recent formulations of the test for inevitable discovery do not explicitly require that the government be actively pursuing a substantial alternate line of investigation at the time of the constitutional violation.").

39. *United States v. Eng*, 971 F.2d 854, 861 (2d Cir. 1992) ("We agree with the Fifth Circuit's observation that: '[T]he alternate means of obtaining the evidence must at least be in existence and, at least to some degree, imminent, if yet unrealized.' " (quoting *Cherry*, 759 F.2d at 1205 n.10)); *United States v. Kirk*, 111 F.3d 390, 392 (5th Cir. 1997) ("In order for the inevitable discovery exception to apply, the Government must demonstrate . . . [that it] was actively pursuing a 'substantial alternate line of investigation at the time of the constitutional violation.' " (quoting *United States v. Lamas*, 930 F.2d 1099, 1102 (5th Cir. 1991)); *United States v. Williams*, 181 F.3d 945, 954 (8th Cir. 1999) (stating "evidence is admissible if the government demonstrates . . . [that it] was actively pursuing a substantial alternative line of investigation at the time of the constitutional violation." (citing *United States v. Conner*, 127 F.3d 663, 667 (8th Cir. 1997)); *United States v. Khoury*, 901 F.2d 948, 960 (11th Cir. 1990) ("This circuit's rule is that in order to establish inevitable discovery the prosecution must show that the police possessed and were actively pursuing the lawful avenue of discovery when the illegality occurred."). In addition, although the District of Columbia Circuit has never directly addressed the active pursuit doctrine, it appears to have adopted implicitly the requirement in affirming a district court's application of the inevitable discovery exception on the basis of, *inter alia*, an officer's testimony "that at the time he received the tainted information over the telephone [another officer] was in the process of 'searching from the top shelf down' the very set of shelves where the money was located." *United States v. Moy*, No. 93-3002, 1995 U.S. App. LEXIS 1568, at *5 (D.C. Cir. Jan. 18, 1995).

40. See *United States v. Chandler*, 197 F.3d 1198, 1201 (8th Cir. 1999) ("[T]he inevitable discovery doctrine applies, not because the government was actively pursuing a substantial alternative line of investigation, which is the typical inevitable discovery situation, but because the law enforcement agency's legitimate interests as employer would have inevitably led it to discover contraband before Chandler, a suspended employee, could remove it from the workplace."); *Lamas*, 930 F.2d at 1104 (noting that none of the Fifth Circuit's precedent "disputes that a showing of active pursuit of an alternate line of investigation together with a showing of a reasonable probability of discovery — as is present in this case — is *sufficient* to sustain the application of the inevitable discovery exception. Whether this active pursuit element from *Cherry* is still *necessary* to implicate the inevitable discovery rule must await the case that turns on that question.").

the inevitable discovery exception, and differing standards of justice for similarly situated criminal defendants.⁴¹

Because defining the scope of the exclusionary rule implicates fundamental liberties — citizens' dual interests in protection from criminal behavior as well as from overzealous law enforcement⁴² — proper use of the inevitable discovery exception requires that it be applied with caution.⁴³ These concerns, however, do not provide adequate justification for grafting the active pursuit doctrine onto the inevitable discovery exception. This Note demonstrates that the active pursuit doctrine is not only contrary to the Court's decision in *Nix*, but that it also fails to advance the requirement's purported goal of imposing proper limits upon the inevitable discovery exception.

This Note argues that the inconsistent application of the inevitable discovery exception should be resolved by rejecting the narrow and formalistic active pursuit doctrine in favor of an "independent circumstances" standard that "requires that the fact or likelihood which makes discovery inevitable arise from circumstances other than those disclosed by the illegal search itself."⁴⁴ Part I examines the Court's opinion in *Nix*, and demonstrates that, although active pursuit was both present and relevant, at no point did the majority hold that it was required for the inevitable discovery exception to apply. Part II explains how the active pursuit requirement operates as an inflexible per se rule incapable of adequately addressing the varied fact patterns that trigger the inevitable discovery exception. This Part also demonstrates that, under the independent circumstances test, inevitability legiti-

41. See Troy E. Golden, Note, *The Inevitable Discovery Doctrine Today: The Demands of the Fourth Amendment, Nix, and Murray, and the Disagreement among the Federal Circuits*, 13 BYU J. PUB. L. 97, 125 (1998) ("The split in the circuits over . . . the active pursuit rule creates confusion and injustice in American criminal procedure law. Because the lower courts are divided . . . criminal defendants receive vastly different results in very similar trials depending on which circuit they are prosecuted in."); Lamberth, *supra* note 24, at 137-38 (noting that lower courts' misuse of the inevitable discovery exception has "result[ed] in a chaotic state of affairs that sees virtually identical factual scenarios being decided differently in different jurisdictions").

42. See, e.g., *Arizona v. Hicks*, 480 U.S. 321, 329 (1987) (noting that when applying the Fourth Amendment exclusionary rule "the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all"); see also, e.g., Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 331 (1973) ("Narrowly viewed, the exclusionary rule is very unattractive, because in the vast majority of cases in which it is applied, the immediate result is to free an obviously guilty person. But the guilty defendant is freed to protect the rest of us from unlawful police invasions of our security and to maintain the integrity of our institutions.").

43. See LAFAVE, *supra* note 2, § 11.4(a), at 244 ("In carving out the 'inevitable discovery' exception to the taint doctrine, courts must use a surgeon's scalpel and not a meat axe."). Cf. Bloom, *supra* note 28, at 95 ("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.").

44. *United States v. Thomas*, 955 F.2d 207, 211 (4th Cir. 1992); *United States v. Boatwright*, 822 F.2d 862, 864-65 (9th Cir. 1987).

mately may be established in the absence of active pursuit. Part III examines the Fourth Amendment implications of rejecting the active pursuit doctrine, particularly the effects on deterring police misconduct and enforcing the warrant requirement, and argues that active pursuit provides no additional safeguards against an unmerited application of the inevitable discovery exception.

I. UNDERSTANDING *NIX V. WILLIAMS*

The lack of instruction provided by *Nix* is both unfortunate and surprising, especially in light of the case's extensive procedural history⁴⁵ and the fact that it involved one of the most infamous and closely scrutinized crimes of its era.⁴⁶ Because this was, after all, the first time that the Supreme Court officially recognized the inevitable discovery exception, it seems justified to expect greater guidance than the Court provided in its relatively cursory statement of the doctrine.⁴⁷ There are multiple ambiguities in the opinion, allowing proponents of the active pursuit doctrine to find support in *Nix*'s facts. This Part argues that, while it is generally understood that there was active pursuit in *Nix*,⁴⁸ this factor was not essential to the Court's holding. Section I.A explains the facts and history of *Nix*, and examines the role of active pursuit in the decision. Section I.B argues that at no point did the *Nix* majority hold active pursuit to be a necessary prerequisite to the application of the inevitable discovery exception to the exclusionary rule.

A. *The Decision: Active Pursuit was Relevant*

The facts in *Nix* were particularly compelling, and undeniably tragic. On Christmas Eve 1968, ten-year-old Pamela Powers and her parents were at the Des Moines, Iowa YMCA to watch her brother's wrestling tournament. Powers excused herself to use the restroom, and disappeared. Shortly thereafter, witnesses saw Robert Williams, an escaped mental patient lodging at the YMCA, exiting the building and

45. The eventual conviction of Robert Anthony Williams for first-degree murder required fifteen years and ten court decisions, including two by the U.S. Supreme Court. See *infra* Section I.A.

46. See, e.g., Wasserstrom & Mertens, *supra* note 36, at 130-31 ("The Supreme Court's 1977 case of *Brewer v. Williams* (*Williams I*) was one of the most written about criminal procedure decisions in U.S. history. The decision, by a bare majority of five justices, reversed the murder conviction of [Robert] Anthony Williams, instigating wide discussion in both the academic literature and the popular media. This interest was hardly surprising. Before it had ever reached federal court, [*Williams*] was one of the most notorious murder cases in the history of Iowa.").

47. See *supra* text accompanying notes 24-25.

48. But see *infra* notes 67-68.

carrying a blanket that concealed a bulky object. A boy who opened Williams's car door for him stated that he saw the bundle had "two legs in it and they were skinny and white." The next day, December 25, Williams's car was found in Davenport, Iowa, 160 miles east of Des Moines. Other evidence, including items of Powers's clothing and an army blanket resembling the one Williams had carried to his car, was found at a highway rest stop near Grinnell, between Des Moines and Davenport. The police, accordingly, initiated and directed a systematic effort involving two hundred volunteers to search the vicinity of the Grinnell rest stop.⁴⁹

On December 26, Williams surrendered to local police in Davenport, and was arraigned. Williams contacted an attorney in Des Moines, who arranged for local counsel in Davenport to meet the suspect at the police station. Two Des Moines detectives were dispatched to Davenport to transport Williams back, and they assured his Des Moines attorney that Williams would not be questioned while in transit. Upon arrival in Davenport, the Des Moines detectives again assured Williams's local counsel that he would not be interrogated, but denied the Davenport lawyer's request to accompany the group in the car back to Des Moines.⁵⁰ Despite these assurances, on the return drive one of the detectives, Captain Leaming, "began a conversation"

49. *Nix*, 467 U.S. at 434-36. For a more comprehensive rendering of the intricate facts in the *Nix* line of decisions, see generally Phillip E. Johnson, *The Return of the "Christian Burial Speech" Case*, 32 EMORY L.J. 349 (1983).

50. The details of the "agreements" made between the Des Moines police and Williams's attorneys were disputed. The *Nix* majority described this series of events as follows: "Williams contacted a Des Moines attorney who arranged for an attorney in Davenport to meet Williams at the Davenport police station. Des Moines police informed counsel they would pick Williams up in Davenport and return him to Des Moines without questioning him." 467 U.S. at 435.

In his concurrence, Justice Stevens further noted that:

The [Des Moines] lawyer notified the Des Moines police of Williams' imminent surrender, and police officials . . . agreed that Williams would not be questioned while being brought back from Davenport. Williams was advised of this agreement by his attorney. After he was arraigned in Davenport, Williams conferred with another lawyer who was acting as local counsel. This lawyer reminded Williams that he would not be questioned. When [Des Moines] police arrived in Davenport, local counsel stressed that the agreement was to be carried out and that Williams was not to be questioned. [The Des Moines detectives] then took custody of [Williams], and denied counsel's request to ride to Des Moines in the police car with Williams.

Id. at 452-53 (Stevens, J., concurring).

Because this was the second time that Williams's case was before the Supreme Court, inquiry into these crucial facts was not reopened. But, "[a]s Professor Kamisar has demonstrated, there are a number of unexplained ambiguities in the record. Nevertheless, this account of the facts was the basis for *Williams I*, and neither party seeks reexamination of those findings." *Id.* at 453 n.2 (Stevens, J., concurring) (citing Yale Kamisar, *Foreword: Brewer v. Williams — A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209 (1977) [hereinafter Kamisar, *Brewer v. Williams*]).

with Williams.⁵¹ Leaming told Williams the police knew that Powers's body was near Mitchellville, which they would pass en route to Des Moines. Later in the drive, Williams directed the officers to a spot near a Grinnell service station where he said he had left Powers's shoes, which they could not locate. He next led the police to a Grinnell rest area where he said he had discarded his blanket, which also was not found. Finally, as the car approached Mitchellville, Williams directed the convoy to the girl's body in a culvert two miles south of Interstate 80.⁵² This location was "essentially within the area to be searched," only two and a half miles away from where the volunteer searchers had earlier halted their progress when informed that Williams had begun to cooperate.⁵³

In February 1969, Williams was tried for murder in Polk County Court. His motion to suppress all evidence related to the discovery of the body as the "fruit" of an impermissible interrogation by the police during the car ride from Davenport to Des Moines was denied.⁵⁴ A jury found Williams guilty of first-degree murder, and the Iowa Supreme Court affirmed his conviction.⁵⁵ Williams's petition for habeas corpus was sustained by a federal district court⁵⁶ and upheld by the Eighth Circuit.⁵⁷ In a bitterly divided decision,⁵⁸ the Supreme Court affirmed the reversal of Williams's conviction on the ground that Williams had been denied his Sixth Amendment right to counsel

51. *Nix*, 467 U.S. at 435. The "conversation" between Captain Dan Leaming, the chief of detectives and a nineteen-year veteran of the Des Moines Police Department, destined to later be the subject of intense scrutiny, became known as the "Christian Burial Speech." The gist of Leaming's message to Williams, who professed to be a religious man, was as follows:

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 entitled 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.

Id. at 435-36. For an exhaustive examination of the Christian Burial Speech, and the circumstances under which it arose, see *generally* Kamisar, *Brewer v. Williams*, *supra* note 50.

52. *Nix*, 467 U.S. at 436. Whether Williams was as willingly cooperative as depicted by the *Nix* majority has been challenged. See *generally* Kamisar, *Brewer v. Williams*, *supra* note 50.

53. *Nix*, 467 U.S. at 436.

54. *State v. Williams*, 182 N.W.2d 396 (Iowa 1970).

55. *Id.*

56. *Williams v. Brewer*, 375 F. Supp. 170 (S.D. Iowa 1974).

57. *Williams v. Brewer*, 509 F.2d 227 (8th Cir. 1975).

58. *Brewer v. Williams*, 430 U.S. 387, 388 (1977), featured seven opinions: Justice Stewart authored the 5-4 majority decision; Justices Marshall, Powell, and Stevens each filed concurring opinions; and Chief Justice Burger and Justices White and Blackmun filed separate dissents.

at the moment of his self-incriminating statements.⁵⁹ The majority, however, indicated in a concluding footnote that it might be possible to reconvict Williams. The Court stated:

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.⁶⁰

The state of Iowa followed the Supreme Court's guidance, and in 1977, tried Williams a second time. Although his statements were not admitted, the trial judge permitted the prosecution to introduce evidence of the condition of the body, on the ground that it would have been inevitably discovered, and Williams was then reconvicted by a jury of first-degree murder. The Iowa Supreme Court again affirmed Williams's conviction, holding that there exists a "hypothetical independent source" exception to the exclusionary rule which, as applied here, provided that the police would ultimately have discovered the body in the absence of the unlawful interrogation.⁶¹ Williams's second petition for writ habeas corpus was this time denied by the federal district court,⁶² but the Eighth Circuit reversed on the ground that, assuming such an exception to the exclusionary rule existed, it was in any event misapplied by the Iowa Supreme Court.⁶³ Again the United

59. *Id.* at 403-06.

60. *Id.* at 407 n.12. It should be noted that at the time the Supreme Court voided Williams's first conviction, Chief Justice Burger, in a bitter dissent, was openly hostile to the possibility that Williams could be successfully retried under the inevitable discovery theory posited by the majority, arguing that "the Court renders the prospects of doing justice in this case exceedingly remote." *Id.* at 416 n.1 (Burger, C.J., dissenting).

When Williams's second conviction was upheld seven years later in *Nix*, it was the Chief Justice who wrote the opinion, a fact that Justice Stevens did not hesitate to point out: "It was the author of today's opinion of the Court who characterized this rule of law as a 'remarkable' and 'unlikely theory.'" *Nix v. Williams*, 467 U.S. 431, 452 (1984) (Stevens, J., concurring) (quoting *Brewer v. Williams*, 430 U.S. at 416-17 n.1 (Burger, C.J., dissenting)).

61. *State v. Williams*, 285 N.W.2d 248, 255-62 (Iowa 1979).

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

63. *Williams v. Nix*, 700 F.2d 1164, 1169 (8th Cir. 1983). The Court stated:

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 Supreme Court of Iowa in this case correctly states the requirements 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.

Id.

For a more detailed discussion of the good faith requirement to the inevitable discovery exception imposed by lower courts, see *supra* 148-150 and accompanying text. The general wisdom of a good faith requirement is beyond the scope of this Note, but the difficulties of administering such a test are clear:

States Supreme Court granted certiorari to determine the fate of Robert Williams.

The Court reversed the Eighth Circuit's decision, and the active pursuit of an alternate line of investigation was relevant to the recognition in *Nix* of the inevitable discovery exception.⁶⁴ Williams challenged the finding that the volunteer search party would have ultimately found the body, regardless of the Sixth Amendment violation by the police, as a "post hoc rationalization" unsupported by the record.⁶⁵ At the suppression hearing before Williams's second trial, the prosecution introduced testimony that at 10:00 AM on the day of Williams's surrender, Agent Ruxlow of the Iowa Bureau of Criminal Investigation initiated a search with over two hundred volunteers. Ruxlow marked highway maps of Poweshiek and Jasper Counties, both near the Grinnell rest stop, into grids that could be searched by four to six people. At about 3:00 PM that same day, after Williams had "volunteered to cooperate with the police," Detective Leaming "sent word" to Agent Ruxlow to meet them at the Grinnell truck stop, and the search was discontinued.⁶⁶ At this time, Agent Ruxlow had neither subdivided a map of nor sent any searchers into Polk County, where the body was found. Nevertheless, the Supreme Court showed great deference to the lower courts' findings that if Williams had not been impermissibly interrogated, the search "would have resumed," contin-

"Bad faith" is not a self-defining concept. If we assume that constitutional rules are on the whole reasonable, there will usually be a certain degree of fault on the part of an officer who is found to have violated them. Presumably, bad faith means something more than that the officer acted in a manner that a court has found, in retrospect, to have been unreasonable, or coercive.

Johnson, *supra* note 49, at 366. Further, "[t]he Iowa Supreme Court, which brought up the bad faith limitation in the first place, thought that Leaming must have acted in good faith because about half the judges, state and federal, who ruled on the issue found his actions lawful." *Id.* at 367.

Even in *Nix*, which was, it must be remembered, the tenth court decision dealing with Williams's case, whether Detective Leaming had acted in bad faith was still being debated. Justice Stevens asked:

What is the consequence of the shortcut that Detective Leaming took when he decided to question Williams in this case and not to wait an hour or so until he arrived in Des Moines? The answer is years and years of unnecessary but costly litigation. Instead of having a 1969 conviction affirmed in routine fashion, the case is still alive 15 years later. Thanks to Detective Leaming, the State of Iowa has expended vast sums of money and countless hours of professional labor in his defense.

Nix, 467 U.S. at 457-58 (Stevens, J., concurring).

Justice White also wrote a short concurrence, solely to defend Detective Leaming, who "was no doubt acting as many competent police officers would have acted under similar circumstances and in light of the then-existing law. That five Justices later thought he was mistaken does not call for making him out to be a villain or for a lecture on deliberate police misconduct and its resulting costs to society." *Id.* at 451 (White, J., concurring).

64. *Id.* at 448-50.

65. *Id.* at 448.

66. *Id.* at 449.

ued for two-and-a-half miles into Polk County, and the body would have been discovered within three to five hours.⁶⁷ Thus, the active pursuit by law enforcement of an alternate, independent line of investigation at the time Williams's constitutional rights were violated reassured the *Nix* majority that Powers's body would have been inevitably discovered.⁶⁸

67. *Id.* at 449-50 ("On this record it is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found.").

At least one commentator has raised doubts about the certainty of this reading of the record. See Johnson, *supra* note 49, at 371-73. The *Nix* Court found important the fact that the body was discovered near a culvert, which the volunteers had been specifically instructed to search. *Nix*, 467 U.S. at 449. Johnson points out, however, that at the time of discovery, snow had already fallen and photographs show that both the body and the culvert were difficult to see. Johnson, *supra* note 49, at 372. Johnson also writes that contemporaneous reports written by law enforcement directed a search of only the two counties east of Polk, and not Polk County itself. He writes: "From these reports one could infer that the search terminated at the Polk County line on December 26, 1968, because it was meant to end there, and not because Captain Leaming had obtained Williams' cooperation." *Id.* at 373.

68. Professor Yale Kamisar likewise challenges the conventional wisdom that the facts in *Nix* are clear that, had Williams not "cooperated," the volunteer searchers "would have resumed" their efforts and inevitably discovered Powers's body in the manner presumed by the Court. Moreover, this uncertainty raises two additional problems with the active pursuit doctrine. Interview with Professor Yale Kamisar, Clarence Darrow Distinguished University Professor of Law, University of Michigan Law School, in Ann Arbor, Mich. (Aug. 9, 2000) [hereinafter *Kamisar Interview*].

The first problem involves the faulty premise of the active pursuit doctrine's formulation. Courts that adhere to the requirement state that evidence may be admissible under the inevitable discovery exception if "the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation." *United States v. Williams*, 181 F.3d 945, 954 (8th Cir. 1999) (emphasis added). According to Professor Kamisar, for the active pursuit doctrine to be effective, it should properly require that the government was engaged in an ongoing, independent line of investigation at the time of the discovery of the evidence. Otherwise, a significant delay between the time of the constitutional violation and the time the evidence was found undermines any determination that the subsequent discovery by lawful means would have legitimately been inevitable. The facts of *Nix* illustrate this point. In the "Christian burial speech," Detective Leaming admonished Williams that "[t]hey are predicting several inches of snow for tonight . . . and if you get a snow on top of [the body] you yourself may be unable to find it." *Nix* 467 U.S. at 435. The search was suspended at approximately 3:00 PM. Had Williams not led police to the body, it is reasonable to assume that in late December it would soon be too dark to continue searching. The estimate that it would have taken the volunteer searchers another three to five hours to cover the two and one half miles into Polk County, which Agent Ruxlow had not yet even divided into grids, indicates that the earliest the body would have been discovered, if at all, was at some point the next day. If not then, of course it probably would have been found eventually, but when and in what condition? After the snow melted in the spring? After the body had begun to deteriorate? If law enforcement need only have initiated an independent investigation at the time of the constitutional violation, especially when the challenged evidence is a corpse (which arguably always will be found sooner or later), the active pursuit doctrine does little to establish that discovery by lawful means was inevitable. *Kamisar Interview*.

The second, related problem with the active pursuit doctrine is ease of administration; that is, it is hard to tell when pursuit is "active" as opposed to "passive." Again looking to the facts of *Nix*, the volunteer searchers had suspended their efforts before Williams took the police to the location of the body. Therefore, this pursuit should more accurately be described as "passive," and the doubts as to whether the searchers would have discovered the body demonstrate the broad sweep of the term "active" pursuit. Consider also the following

B. *The Doctrine: Active Pursuit was not Required*

Although active pursuit was both present and relevant in *Nix*, nowhere in the opinion did the majority explicitly hold that it was necessary for the inevitable discovery exception to apply.⁶⁹ As this much is uncontested, those trying to limit the inevitable discovery exception by imposing an active pursuit requirement find support elsewhere in *Nix* — the concurring opinion of Justice Stevens and the dissenting opinion of Justice Brennan (joined by Justice Marshall).⁷⁰ Because both opinions discuss the majority decision as requiring active pursuit, defendants have argued that the inevitable discovery exception is thus limited,⁷¹ and courts have even relied on this alternate language as the proper formulation of *Nix*'s holding.⁷² These efforts should be properly

hypothetical: following a murder, law enforcement officials typically go to nearby pawn shops to see if any guns resembling the murder weapon have recently been sold there. Assume the police visit all the local pawn shops, and find nothing. They then proceed to perform an unlawful search of a suspect's residence, where they find a pawn ticket for a gun sold to a pawn shop in another town. After the police retrieve the firearm, the defendant moves to suppress the evidence as the fruit of the unlawful search of the residence. The prosecution could argue that, but for the illegal search, they would have eventually gone to surrounding towns to canvas pawn shops there, and thus they would have inevitably discovered the murder weapon. Should the investigation of the pawn shops be considered "active" or "passive" pursuit? If the court finds the officers' testimony to be credible, the answer would be the former. In either outcome, these semantic difficulties highlight the problem of determining when pursuit legitimately was active, and limit the doctrine's usefulness in determining when discovery was inevitable. *Id.*

69. *United States v. Thomas*, 955 F.2d 207, 210 (4th Cir. 1992) ("The Supreme Court majority in *Nix* did not require an alternate line of investigation, although a concurring Justice and two dissenting Justices stated that the inevitable discovery exception should have that prerequisite.").

70. See Lamberth, *supra* note 24, at 146-47 ("The significance of the active pursuit requirement is evidenced by the fact that the concurring and dissenting opinions in [*Nix*] agreed with the majority on the criticalness of the ongoing investigation. . . . This is especially persuasive considering the Court's discussion in [*Nix*] gave no indication that the Court would have adopted the inevitable discovery doctrine absent a showing of the proximity of the ongoing search of the victim's body.").

71. See *United States v. Silvestri*, 787 F.2d 736, 742 (1st Cir. 1986) (considering the "defendant's claim that the inevitable discovery exception applies only where the legal process for discovering the evidence has been set in motion at the time of the illegal discovery. We have looked closely at the Court's opinion in *Nix* to see if such a holding may be found there and, in our view, *Nix* does not provide a conclusive answer on this issue. To the extent that the Court's holding may be limited by the facts of the case before it, it is possible to narrow the holding of the case, as was done by the dissent" to require active pursuit. "Nonetheless, the majority did not say that discovery could only be found inevitable if the legal means of obtaining the evidence were in progress at the time the evidence was illegally discovered. It concluded only that the inevitability of the discovery was demonstrated by the ongoing nature of the search and the progress it had already made.").

72. *United States v. Owens*, 782 F.2d 146, 152 (10th Cir. 1986) (stating that in *Nix* "Justices Brennan and Marshall, in dissent . . . capsulized the majority's holding," and then refusing to apply the inevitable discovery exception because "the unconstitutional search . . . tainted the only police investigation that was ongoing. Clearly these officers were not conducting an independent investigation that would have uncovered the [evidence]").

understood as misguided, however, as they unjustifiably limit *Nix*'s formulation of the inevitable discovery doctrine.

Concurring in the Court's judgment, Justice Stevens indicated that the ongoing, independent line of investigation was an indispensable factor in establishing the inevitability of the discovery of Powers's body:

The uncertainty as to whether the body would have been discovered can be resolved in [the state's] favor here *only* because petitioner . . . adduced evidence demonstrating that at the time of the constitutional violation an investigation was already under way which, in the natural and probable course of events, would have soon discovered the body (emphasis added).⁷³

Justice Brennan's dissent went even further, unequivocally stating that the majority had held that active pursuit was required:

The Court concludes that unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional violation occurred.⁷⁴

While this statement, when considered alone, could be viewed as an adroit move to narrow the majority's holding,⁷⁵ the force of Justice Brennan's attempt is undermined by the statement that immediately followed. He continued:

As has every Federal Court of Appeals previously addressing this issue, see *ante*, at 440-41, n. 2, I agree that *in these circumstances* the 'inevitable discovery' exception to the exclusionary rule is consistent with the requirements of the Constitution."⁷⁶

The defect in this seemingly simple statement of fact is that the overwhelming majority of the circuit cases cited by the majority at footnote two⁷⁷ did not even discuss, much less require, "these circumstances":

73. *Nix*, 467 U.S. at 456-57 (Stevens, J., concurring).

74. *Id.* at 459 (Brennan, J., dissenting).

75. Ascribing such a motive to Justice Brennan hardly seems inappropriate. As the justice himself once stated, "The dissent is . . . commonly used to emphasize the limits of a majority decision that sweeps, so far as the dissenters are concerned, unnecessarily broadly — a sort of 'damage control' mechanism." William J. Brennan, Lecture, *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

76. *Nix*, 467 U.S. at 459 (Brennan, J. dissenting) (emphasis added).

77. The cases cited by the *Nix* majority were: *Wayne v. United States*, 318 F.2d 205 (D.C. Cir. 1963), *United States v. Bienvenue*, 632 F.2d 910 (1st Cir. 1980), *United States v. Fisher*, 700 F.2d 780 (2d Cir. 1983), *Virgin Is. v. Gereau*, 502 F.2d 914 (3d Cir. 1974), *United States v. Seohnlein*, 423 F.2d 1051 (4th Cir. 1970), *United States v. Brookins*, 614 F.2d 1037 (5th Cir. 1980), *Papp v. Jago*, 656 F.2d 221 (6th Cir. 1981), *United States ex rel. Owens v. Twomey*, 508 F.2d 858 (7th Cir. 1974), *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983), *United States v. Schmidt*, 573 F.2d 1057 (9th Cir. 1978), *United States v. Romero*, 692 F.2d 699 (10th Cir. 1982), *United States v. Roper*, 681 F.2d 1354 (11th Cir. 1982). See *id.* at 440 n.2.

namely, the presence of active pursuit.⁷⁸ Thus, despite Justice Brennan's effort to alter the scope of the majority's opinion,⁷⁹ the tenuous foundation of his reasoning weakens the persuasiveness of the dissent's attempt to read an active pursuit requirement where none was written.⁸⁰

Another tactic employed by lower courts that require active pursuit is to claim fidelity to the facts of *Nix*, and therefore consistency with the Court's general formulation of the inevitable discovery exception.⁸¹ In other words, because the *Nix* Court was not confronted with

78. In only two of the twelve cases cited in footnote two of *Nix* was active pursuit required in invoking the inevitable discovery exception. *Romero*, 692 F.2d at 704; *Brookins*, 614 F.2d at 1042. In fact, the phrase "active pursuit" appears to have been coined by the *Brookins* Court. However, the *Brookins* Court acknowledged that, in requiring active pursuit, it was altering the inevitable discovery standard recognized by its sister circuits:

We have used the phrase 'inevitable discovery exception' because that is the designation employed most frequently by other circuits and commentators Unlike precedents from those circuits, the ruling in this case is based on two additional factors: first, that the prosecutor demonstrated that the leads, which made discovery inevitable, were possessed by the police and were being actively pursued by the police prior to the occurrence of the illegal police conduct. . . .

Id. at 1042 n.2.

The *Romero* Court was less emphatic about establishing a per se active pursuit rule: "We recognize the danger of admitting unlawfully obtained evidence on the strength of some judge's speculation that it would have been discovered legally anyway, but that danger is diminished when, as here, the evidence clearly would have been discovered within a short time through a lawful investigation already underway." 692 F.2d at 704 (internal citation omitted). Note, however, that the Tenth Circuit today no longer follows *Romero*'s adherence to the active pursuit doctrine. See *United States v. Larsen*, 127 F.3d 984, 987 (10th Cir. 1997) ("The fact that another investigation was already underway when a constitutional violation occurred is strong proof that it was independent of the illegal investigation, as *Nix* . . . illustrate[s]. However, it is possible for an investigation that begins after the violation to be independent of the illegal investigation.").

79. Despite ostensible agreement with the inevitable discovery exception in theory, Justice Brennan was highly critical of the majority's "zealous efforts to emasculate the exclusionary rule." *Nix*, 467 U.S. at 459 (Brennan, J., dissenting).

80. It is interesting to note that those on both sides of the debate of whether active pursuit was part of *Nix*'s holding find additional support in the Court's later decision of *Murray v. United States*, 487 U.S. 533 (1988). The *Murray* Court held that evidence may be admitted under the independent source exception to the exclusionary rule if police initially discover evidence illegally, and the same evidence is again discovered during a subsequent search conducted pursuant to a valid warrant obtained independently of the illegal search. *Id.* at 542. At least one commentator has argued that "Justice Marshall pointed out in his dissent in *Murray* that active pursuit was required by the *Nix* decision." Bloom, *supra* note 28, at 101 (citing *Murray*, 487 U.S. at 544-45). In contrast, one circuit judge has asserted that the "alternate investigation" (i.e., active pursuit) requirement purportedly advanced in *Nix* was "squarely rejected" by the Supreme Court in *Murray*. See *United States v. Johnson*, 22 F.3d 674, 686 n.4 (6th Cir. 1994) (Suhrehrich, J., dissenting).

81. See *United States v. Cherry*, 759 F.2d 1196, 1204 (5th Cir. 1985) (finding the active pursuit requirement to be "fully consistent" with *Nix*, where "the search was already underway in the general vicinity where the body was found when the police initiated the illegal interrogation."); *United States v. Satterfield*, 743 F.2d 827, 847 (11th Cir. 1984) (noting the *Nix* Court's "general statement" of the inevitable discovery exception was based on the fact that "[t]he search party there was well on its way to uncovering the body when the suspect revealed its precise location. Thus *Nix* is not inconsistent with the rule in this circuit that the

a fact pattern that lacked an ongoing, alternate line of investigation, it had no occasion to announce whether the inevitable discovery exception applied only in cases involving active pursuit.⁸² Therefore, it is claimed, by not explicitly rejecting the active pursuit requirement, the *Nix* Court did not affect the active pursuit requirement,⁸³ or even impliedly affirmed it.⁸⁴

This argument, while literally accurate, is too limiting.⁸⁵ First, the language of *Nix* indicates that the Court by no means intended its holding to apply only to the fact pattern of the instant case. For example, at one point the Court stated:

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 evidence should be received (emphasis added).⁸⁶

The apparent syllogism of this statement is that the Court announced the broad premise of the inevitable discovery rule, applied it to the specific facts, and drew a conclusion. The most logical reading of *Nix*'s holding, therefore, is that the Court viewed active pursuit as sufficient in this case to establish inevitability, but not a necessary element that must be proven in every case.

Second, courts that reject the active pursuit requirement appropriately do so on the ground that it is a limitation of the *Nix* Court's intended formulation of the inevitable discovery exception.⁸⁷ It seems

police must possess and be actively pursuing the lawful avenue of discovery when the illegality occurred").

82. *Satterfield*, 743 F.2d at 847 ("In adopting . . . the inevitable discovery rule, the Court was not presented with a situation in which the lawful means leading to an 'inevitable' discovery had not yet been acquired by the police at the time the illegal evidence was seized.").

83. *Id.* at 846 ("Except for the application of its rule to the specific facts before the [*Nix*] Court and its holding that the Government must establish the inevitability of discovery by a preponderance of the evidence, the Supreme Court was silent as to what constitutes an 'inevitable' discovery under the doctrine. Because the *Nix* decision is consistent with the previous case law of this circuit, we look to our earlier decisions for guidance in determining whether the facts of this case come within the exception."). The *Satterfield* Court, therefore, concluded that "[t]he Supreme Court's recent pronouncement in *Nix* does not affect" the active pursuit requirement. *Id.* at 847.

84. See *Cherry*, 759 F.2d at 1205 n.10 (stating that *Nix* is "generally supportive" of the Fifth Circuit's prior holding that active pursuit is required, because, *inter alia*, "the Supreme Court stated in [*Nix*] that the inevitable discovery exception 'involves no speculative elements but focuses on demonstrated historical facts.' This comment implies that the alternate means of obtaining the evidence must at least be in existence and, at least to some degree, imminent, if yet unrealized" (internal citation omitted)).

85. *United States v. Boatwright*, 822 F.2d 862, 864 (9th Cir. 1987) (stating that "though the existence of two independent inquiries in progress comports with the facts of *Nix* . . . the rationale of *Nix* is not so limited.").

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

87. See *United States v. Larsen*, 127 F.3d 984, 987 (10th Cir. 1997) (noting that "the majority opinion in *Nix*" did not "*limit* the inevitable discovery exception to lines of investigation that were already underway.") (emphasis added); *Boatwright*, 822 F.2d at 864 ("though

counterintuitive for lower courts to impose an additional factor, beyond those established by the Supreme Court, upon a doctrine that, by its very nature, is designed to mitigate the exclusionary rule's unduly harsh effects on law enforcement.⁸⁸ To reply that the active pursuit doctrine provides a necessary check against the unwarranted application of the inevitable discovery exception is actually to argue against the exception itself, despite the Court's recognition of the doctrine's validity. Phrased somewhat differently, the addition of the active pursuit doctrine may be justified only if one presupposes that the Court's formulation of the inevitable discovery exception is flawed, and therefore requires correction by lower judges.⁸⁹ It is axiomatic to assert that the inevitable discovery exception cannot be crafted and applied so as to eradicate the fundamental constitutional guarantees enforced by the exclusionary rule.⁹⁰ But to make active pursuit a requirement unsoundly assumes that the *Nix* Court did not already perform this crucial calculus,⁹¹ and too deeply infringes upon the Court's authority

the existence of two independent inquiries in progress comports with the facts of *Nix* . . . the rationale of *Nix* is not so *limited*." (emphasis added); *United States v. Silvestri*, 787 F.2d 736, 742 (1st Cir. 1986) (acknowledging that "[t]o the extent that the Court's holding [in *Nix*] may be *limited* by the facts of the case before it, it is possible to narrow the holding of the case . . . so as to *limit* the admission of evidence [to circumstances involving active pursuit]," but rejecting the limitation in the same opinion) (emphases added).

88. See *Nix*, 467 U.S. at 443, 446 ("This Court has accepted the argument that the way to ensure [constitutional and statutory] protections [against police misconduct] is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes," but "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial.").

89. See Cohn, *supra* note 24, at 754 ("The inevitable discovery exception to the exclusionary rule is a logical extension of the doctrines of independent source and attenuation and can be a valuable addition to the criminal justice system. Courts can apply it in a way that protects the law enforcement interests of society, and also provides substantial deterrence of unlawful police activity and protection of the rights of criminal suspects. Inevitable discovery, however, must be applied with caution and discretion. A mechanical application of the doctrine will encourage unconstitutional shortcuts such as those taken by the Court in [*Nix*].").

90. See Johnson, *supra* note 49, at 364 ("[A] properly administered inevitable discovery exception gives the authorities only what they would have had if they had not violated the Constitution.").

91. The *Nix* Court explicitly discussed the balancing of values that must be undertaken when developing exceptions to the exclusionary rule. At his second trial, Williams argued that "the Court may not balance competing values in deciding whether the challenged evidence was properly admitted" because "unlike the exclusionary rule in the Fourth Amendment context, the essential purpose of which is to deter police misconduct, the Sixth Amendment exclusionary rule is designed to protect the right to a fair trial and the integrity of the factfinding process." *Nix*, 467 U.S. at 446. The majority explicitly disagreed, stating:

Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no

as the ultimate arbiter of the Constitution to establish doctrines that are binding upon lower courts.

II. PROPERLY LIMITING THE SCOPE OF THE INEVITABLE DISCOVERY EXCEPTION

Exceptions to the exclusionary rule must be detailed enough to produce reasonably uniform outcomes, but also flexible enough to address adequately the limitless range of fact patterns encountered by courts.⁹² In determining whether law enforcement activity violates the Fourth Amendment, the Supreme Court has “consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry” into the totality of the circumstances.⁹³ The active pursuit doctrine functions as precisely such a disfavored per se rule, limiting any reasonableness inquiry solely to the narrow issue of whether the police had engaged in an ongoing, alternate line of investigation at the time of the official misconduct.⁹⁴ This Part demonstrates that active pursuit is a formalistic doctrine, and unnecessary in light of an alternative “independent circumstances” test that permits a more inclusive inquiry into inevitability without sacrificing criminal defen-

prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct. Williams’ argument that inevitable discovery constitutes impermissible balancing of values is without merit.

Nix, 467 U.S. at 447.

92. See Stewart, *supra* note 4, at 1393 (“The occupation of a judge requires application of [the Fourth Amendment’s] sweeping language to cases presenting the infinite variety of factual situations that arise in real life. The art of being a judge, if there is such an art, is in announcing clear rules in the context of these infinitely varied cases, rules that can be understood and observed by conscientious government officials.”).

93. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (rejecting the per se rule of the Ohio Supreme Court that before officers may attempt to obtain consent to interrogate citizens stopped for traffic offenses they must be informed that they are “free to go”).

94. See, e.g., *United States v. Conner*, 127 F.3d 663, 668 (8th Cir. 1997) (“Given . . . the fact that the government offers no concrete evidence that police explored any alternative investigatory approach, we find no basis to apply the inevitable discovery exception to this case.”); *United States v. Wilson*, 36 F.3d 1298, 1305 (5th Cir. 1994) (“Because there has been an insufficient showing that the government was *actively pursuing* a substantial alternate line of investigation at the time of this warrantless search and seizure, the [evidence] was not admissible under the ‘inevitable discovery’ doctrine.”).

This is not to say, of course, that if the prosecution may establish active pursuit by law enforcement then evidence is a priori admissible. The active pursuit requirement is only one prong of the inevitable discovery test. See, e.g., *Wilson*, 36 F.3d at 1304 (“In order for the ‘inevitable discovery’ rule to apply the government must demonstrate, by a preponderance of the evidence, both (1) that there is a reasonable probability that the contested evidence would have been discovered by lawful means in the absence of police misconduct and (2) that the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation.”). Therefore, although the active pursuit doctrine itself operates as a per se rule of exclusion, satisfying this single prong is not the end of the analysis. If the police were in active pursuit, but the prosecution cannot otherwise demonstrate a reasonable probability of inevitable discovery, the evidence would still be suppressed.

dants' Fourth Amendment rights. Section II.A argues that the active pursuit requirement, operating as a bright-line rule, is contrary to the Supreme Court's recent Fourth Amendment jurisprudence, and unwisely constrains the scope of the inevitable discovery exception. Section II.B advocates the adoption of a standard under which inevitability, the key element of a just application of the exception, may be legitimately established in the absence of active pursuit.

A. *Formalism versus Flexibility*

Over the past two decades, the Supreme Court has expressed frequent hostility towards narrow, bright-line Fourth Amendment rules, adhering instead to standards that permit a broader investigation into surrounding circumstances.⁹⁵ The Court's reluctance to adopt per se rules seems due, in large part, to the infinite and unpredictable search and seizure scenarios that defy advance judicial contemplation.⁹⁶ Commentators, on the other hand, assert that it is exactly because police regularly confront such diverse situations under intense pressure that their decisionmaking processes benefit from judicial rules.⁹⁷

95. See *Robinette*, 519 U.S. at 39; see also *Florida v. Bostick*, 501 U.S. 429, 440, 439 (1991) ("The Florida Supreme Court erred in adopting a per se rule. [Instead w]e adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter . . ."); *Michigan v. Chesternut*, 486 U.S. 567, 572-73 (1988) ("Both petitioner and respondent, it seems to us, in their attempts to fashion a bright-line rule applicable to all investigatory pursuits, have failed to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account 'all of the circumstances surrounding the incident' in each individual case. Rather than adopting either rule proposed by the parties and determining that an investigatory pursuit is or is not *necessarily* a seizure under the Fourth Amendment, we adhere to our traditional contextual approach . . .") (internal citations omitted); *Florida v. Royer*, 460 U.S. 491, 506 (1983) ("We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop.").

But note, however, that Chief Justice Rehnquist, who authored the Court's opinion in *Robinette*, later that same term wrote the decision in *Maryland v. Wilson*, 519 U.S. 408, 413 n.1 (1997), in which he stated that although "we typically avoid per se rules concerning searches and seizures does not mean that we have always done so."

Cf. *Dickerson v. United States*, 120 S. Ct. 2326, 2329-30 (2000) (holding that *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny continue to "govern the admissibility of statements made during custodial interrogation in both state and federal courts"). The majority opinion in *Dickerson*, also authored by Chief Justice Rehnquist, noted that: "The *Miranda* opinion itself begins by stating that the Court granted certiorari . . . 'to give concrete constitutional guidelines for law enforcement agencies and courts to follow.' "). *Id.* at 2333-34 (quoting *Miranda*, 384 U.S. at 441-42).

96. See *Royer*, 460 U.S. at 506-07 ("Even in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.").

97. See, e.g., Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Intrusive Analysis*, 63 N.Y.U. L. REV. 1173, 1193-94 (1988)

A per se active pursuit requirement is unwarranted in this context, however, because the principal justification for bright-line Fourth Amendment rules is to provide guidance to the officers themselves.⁹⁸ But the inevitable discovery exception is a doctrine applied by the judiciary, not by law enforcement. On the basis of this underlying rationale, it can be argued that bright-line Fourth Amendment rules are inapposite to the inevitable discovery exception. After all, if a court is faced with the decision of whether to avoid the effect of the exclusionary rule, there necessarily already has been a constitutional violation by law enforcement.⁹⁹ It seems inappropriate, to say the least, to develop a bright-line rule that informs police how to "properly" violate someone's Fourth Amendment rights. The active pursuit doctrine provides instruction to courts, not guidance to law enforcement, and the benefits that flow from per se rules that confine police conduct do not likewise extend to circumscribing the discretion of judges.

Courts that reject the active pursuit doctrine have accurately characterized the requirement as a disfavored bright-line rule.¹⁰⁰ These circuits decline to engage in the unrealistic and impractical effort to delineate a per se rule that anticipates all (or even most) of the search and seizure situations that trigger the inevitable discovery exception, and opt instead for a standard that reserves for judges the flexibility to analyze fact patterns in a manner more comprehensive than focusing

("Decisions implicating fourth amendment rights are often made by individual law enforcement officials responding to the exigencies of specific, rapidly unfolding situations. Therefore, the judicial enunciation of fixed categorical rules is especially important to promote both law enforcement goals and fourth amendment freedoms."). *But see* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 242 (1984) (arguing that " 'bright line' fourth amendment rules usually fail on their own terms").

98. *See, e.g., The Supreme Court, 1996 Term: Leading Cases*, 111 HARV. L. REV. 197, 305 (1997) ("Rules are thought to provide guidance to the police at the expense of precise conformity to the underlying rationales, and a reasonableness test is thought to assure full consideration of the varying circumstances at the expense of predictability."); Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 320, 333 (1982) ("Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged.") (quoting Wayne R. LaFare, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141) ("[I]t is extremely important that fourth amendment doctrine be expressed in terms understandable to the police, to whom, after all, it is directed.")).

99. *See* *Nix v. Williams*, 467 U.S. 431, 444 (1984) ("It is clear that the cases implementing the exclusionary rule 'begin with the premise that the challenged evidence is in some sense the product of illegal government activity.' ") (quoting *United States v. Crews*, 445 U.S. 463, 471 (1980)).

100. *See* *United States v. Thomas*, 955 F.2d 207, 210 (4th Cir. 1992) (rejecting the active pursuit doctrine as a "blanket requirement"); *United States v. Silvestri*, 787 F.2d 736, 745 (1st Cir. 1986) (criticizing the active pursuit requirement as a "bright-line rule" that, in some situations, "goes too far").

solely on active pursuit.¹⁰¹ This reasonable approach allows for the inevitable discovery doctrine to develop on a case-by-case basis,¹⁰² and prevents a formalistic application of the exception that could result in the unwarranted suppression of evidence where the facts demonstrate inevitability, but do not otherwise include an ongoing, alternate line of investigation.¹⁰³

B. *Establishing Inevitability Without Active Pursuit*

While an alternate, ongoing investigation may be one way to satisfy the courts that the police inevitably would have discovered the unconstitutionally obtained evidence by lawful means,¹⁰⁴ it need not be the only way.¹⁰⁵ Indeed, the active pursuit doctrine erroneously presupposes that this requirement is indispensable to protect citizens' Fourth Amendment rights against a thoughtless application of the inevitable discovery exception.¹⁰⁶ The overriding concern of the *Nix* Court was that "inevitable discovery involves no speculative elements. . . ."¹⁰⁷ To safeguard against such speculation, courts must "focus[] on demonstrated historical facts capable of ready verification or impeachment."¹⁰⁸ The phrase "demonstrated historical facts" is somewhat misleading, as a showing of inevitable discovery is necessarily based on

101. See *United States v. Ford*, 22 F.3d 374, 377 (1st Cir. 1994) (adhering to a "flexible standard, [where] independence and inevitability remain the cornerstones of the analysis"); *Silvestri*, 787 F.2d at 746 ("Rather than setting up an inflexible "ongoing" test . . . we suggest that the analysis focus on the questions of independence and inevitability and remain flexible enough to handle the many different fact patterns which will be presented.").

102. See *Ford*, 22 F.3d at 377 ("The specific facts of each case will determine the requirements necessary to prove independence and inevitability."); *United States v. Boatwright*, 822 F.2d 862, 864 (9th Cir. 1987) ("The facts of this case do not justify a comprehensive definition of inevitable discovery. The doctrine is best developed on a case by case basis.").

103. See *Boatwright*, 822 F.2d at 864 ("There will be instances where, based on historical facts, inevitability is demonstrated in such a compelling way that operation of the exclusionary rule is a mechanical and entirely unrealistic bar, preventing the trier of fact from learning what would have come to light in any case.").

104. See *United States v. Larsen*, 127 F.3d 984, 987 (10th Cir. 1997) ("The fact that another investigation was already underway when a constitutional violation occurred is strong proof that it was independent of the illegal investigation. . . ."); *Silvestri*, 787 F.2d at 746 ("A *Nix*-like case may well require that active pursuit of an investigation be underway to satisfy the test of inevitability and independence.").

105. See *Larsen*, 127 F.3d at 987 ("[I]t is possible for an investigation that begins after the violation to be independent of the illegal investigation.").

106. See *Lamberth*, *supra* note 24, at 146 ("Requiring the police to be actively pursuing an ongoing alternate legal line of investigation at the time the illegality occurred is of paramount importance to the satisfactory determination of inevitability.").

107. *Nix v. Williams*, 467 U.S. 431, 444-45 n.5 (1984).

108. *Id.* at 445 n.5.

hypothetical circumstances.¹⁰⁹ It is therefore crucial that the prosecution must prove by a preponderance of the evidence not merely that the police *could* have legally discovered the challenged evidence, but that they *would* actually have done so.¹¹⁰

There exists an alternative standard that allows for the prosecution to establish inevitability even in the absence of active pursuit, but only by proving demonstrated historical facts that were discovered separate from the constitutional misconduct. This "independent circumstances" test¹¹¹ "requires that the fact or likelihood that makes the discovery inevitable arise from circumstances other than those disclosed by the illegal search itself."¹¹² This standard was first announced in a 1987 decision, *United States v. Boatwright*,¹¹³ authored by then-Ninth Circuit Judge Anthony M. Kennedy.¹¹⁴ In this case, while attempting to execute a lawful probation search of Rocky Boatwright's residence, officers first engaged in an illegal search of a another structure on the premises, a converted garage, where they discovered illegal weapons in the possession of Rocky's brother, the defendant Rickie Boatwright.¹¹⁵ The police then conducted a lawful search of the main

109. See *United States v. Allen*, 159 F.3d 832, 840 (4th Cir. 1998) ("A finding of inevitable discovery necessarily rests on facts that did not occur. However, by definition the occurrence of these facts must have been likely, indeed 'inevitable,' absent the government's misconduct.").

110. See *id.* (refusing to apply the inevitable exception on the ground that "[w]e have no doubt that [the officer] *could* have used the [drug sniffing] dog, but whether she *would* have presents an entirely different question."); *United States v. Eng*, 971 F.2d 854, 861 (2d Cir. 1992) ("The [inevitable discovery] exception requires the district court to determine, viewing affairs as they existed at the instant before the unlawful search, what *would have happened* had the unlawful search never occurred."); *United States v. Namer*, 835 F.2d 1084, 1088 (5th Cir. 1988) (stating that in order for the inevitable discovery exception to apply, "at a minimum, the government would have to offer a theory as to the manner in which agents would have made their discovery. We agree with commentators that emphasis is on 'would' not 'might' or 'could.' ") (internal citations omitted).

111. The "independent circumstances" test should not be confused with the "independent source" doctrine. The latter "allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." *Nix*, 467 U.S. at 443. Under the independent source doctrine, "evidence that was in fact discovered lawfully, and not as a direct or indirect result of illegal activity, is admissible." *United States v. Herrold*, 962 F.2d 1131, 1140 (3d Cir. 1992). The independent circumstances test, part of the inevitable discovery doctrine, differs in that the court must still make a hypothetical finding that, if the unlawful search would not have first found the evidence in question, it would have ultimately been discovered by lawful means.

112. *United States v. Boatwright*, 822 F.2d 862, 864-65 (9th Cir. 1987).

113. 822 F.2d 862 (9th Cir. 1987).

114. It is interesting to note that two members of the current Supreme Court have participated in decisions as Circuit Judges that repudiated the active pursuit doctrine, Justice Kennedy in *Boatwright*, and then-First Circuit Judge Steven G. Breyer in *United States v. Silvestri*, 787 F.2d 736 (1st Cir. 1986).

115. *Boatwright*, 822 F.2d at 863. Rocky Boatwright, a convicted drug manufacturer, was subject to involuntary searches by the terms of his probation agreement. After Rocky Boatwright moved to Paradise, California, a probation officer from his home county was accompanied by Paradise police to his new residence at 1024 Maple Drive to conduct a search,

residence, where they found incriminating evidence of narcotics production. They also performed a third search of a trailer on the grounds, which disclosed a methamphetamine lab.¹¹⁶ The officers summoned to the scene an agent of the Drug Enforcement Administration, who later testified that on the basis of the drug evidence found in the main residence and trailer, he would have secured a search warrant for the garage and inevitably discovered the guns.¹¹⁷ Rocky moved to suppress the evidence of the guns, arguing that the inevitable discovery exception was inapplicable because two independent investigations were not in progress (i.e., there was no active pursuit) at the time of the illegal search and seizure.¹¹⁸ The Ninth Circuit rejected the claim that active pursuit was required, but nonetheless declined to apply the inevitable discovery exception, reasoning that:

There is nothing outside the unlawful search itself that points to the inevitable discovery of weapons in control of this defendant. Applying the inevitable discovery doctrine here would, therefore, permit the government to ignore search requirements at any convenient point in the investigation, and would go well beyond the present scope of the doctrine. This we decline to do.¹¹⁹

Thus, the independent circumstances test allows for a broader inquiry beyond simply active pursuit, while still safeguarding defendant's Fourth Amendment rights.

The Ninth Circuit is not alone in rejecting the active pursuit doctrine in favor of a more inclusive inquiry into inevitability. The Fourth Circuit also adopted the independent circumstances standard in *Boatwright*,¹²⁰ and in doing so, likewise demonstrated an unwillingness to limit the inevitable discovery exception. In *United States v. Thomas*,¹²¹ hotel employees suspected that the defendant might be

interview him, and learn of his activities. Upon arrival, the officers called for Rocky, and he emerged from a converted garage that bore a separate address, 1024A Maple Drive. Rocky smelled of a strong chemical odor, and the officers, none of whom were trained to identify drug odors, decided to enter 1024A. Inside they found a partial drug laboratory and a closed door. They left the converted garage, asked Rocky if anyone else was inside 1024A, and proceeded back inside and opened the door. There they found Rickie Boatwright attempting to conceal two sawed-off shotguns. The officers seized the guns and arrested Rickie, who was subsequently convicted on weapons charges. *Id.*

116. *Id.* at 863-64.

117. *Id.* at 864.

118. *Id.*

119. *Id.* at 865.

120. See *United States v. Thomas*, 955 F.2d 207, 210-11 (4th Cir. 1992) ("[T]his court believes the most sensible examination of inevitable discovery is [in] *United States v. Boatwright* . . . We agree that the fact making discovery inevitable must 'arise from circumstances other than those disclosed by the illegal search itself.'").

121. *Id.*

dealing drugs from his room, and contacted law enforcement.¹²² Officers proceeded to unlawfully enter and search Thomas's room, finding large sums of cash in wrappers from a bank that had been robbed the previous day.¹²³ Officers began surveillance from across the hall, and subsequently stopped and questioned another person entering and exiting Thomas's room, who implicated Thomas in the bank robbery.¹²⁴ The government conceded that the initial search was illegal, but relied on a "string of conjecture" to argue that the evidence would have been inevitably discovered.¹²⁵ Because only the initial illegal search for drugs led to the ultimate discovery of the stolen bank money, the Fourth Circuit suppressed the evidence and reversed Thomas's conviction.¹²⁶

Courts that adhere to the active pursuit doctrine assert that the requirement is necessary to ensure that law enforcement's "mere assertion of inevitable discovery must fail."¹²⁷ But these words of caution do not counsel against an independent circumstances test that operates with equal force as the active pursuit doctrine, effectively precluding law enforcement from rehabilitating tainted evidence on the basis of anything other than "demonstrated historical facts."¹²⁸ For example, in *United States v. Kennedy*,¹²⁹ the Sixth Circuit declined to adhere to an inflexible active pursuit requirement, holding that evidence would still be admissible if the prosecution could establish "other compelling facts" that establish inevitability.¹³⁰ In this case, employees of Northwest Airlines at National Airport in Washington, D.C., encountered two unclaimed suitcases. Company policy was to open lost luggage to look for identification. One case was opened with a Northwest key, revealing a huge sum of cash. The other had a combination lock, and the airline summoned the airport police. An officer unlawfully

122. *Id.* at 208.

123. *Id.* at 208.

124. *Id.* at 208-09.

125. *Id.* at 209. The Fourth Circuit noted that the government's "chain of inevitability" had too many "broken links." *Id.* at 210.

126. *Id.* at 211.

127. *United States v. Brookins*, 614 F.2d 1037, 1048 (5th Cir. 1980).

128. See *supra* note 29 and accompanying text (discussing the *Nix* Court's requirement that the prosecution present "demonstrated historical facts capable of ready verification or impeachment" that discovery was inevitable, in order for the exception to apply).

129. 61 F.3d 494 (6th Cir. 1995).

130. *Kennedy*, 61 F.3d at 499-500 (concluding "that the inevitable discovery exception to the exclusionary rule applies when the government can demonstrate *either* the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence *or* other compelling facts establishing that the disputed evidence inevitably would have been discovered. Therefore, we hold that alternate, independent line of investigation is not required for the inevitable discovery exception to apply.").

opened the second case, which was determined to contain cocaine.¹³¹ Although the police were not in active pursuit of an alternate line of investigation, the court found dispositive the fact that even had the police not conducted the illegal search, Northwest employees would have eventually opened the suitcase themselves in accordance with company policy. The discovery of the cocaine was therefore inevitable, regardless of the absence of active pursuit by law enforcement, and the evidence was admitted.¹³²

In sum, these cases demonstrate that inevitability may be legitimately established in the absence of active pursuit, and that alternative standards, like the independent circumstances test, permit courts the necessary flexibility to perform an inquiry into the circumstances of widely varying cases.

III. FOURTH AMENDMENT IMPLICATIONS

The exclusionary rule functions to enforce fundamental Fourth Amendment rights, while exceptions, such as the inevitable discovery doctrine, by design block the operation of the exclusionary rule. Thus, it is imperative that rejecting the active pursuit doctrine does not result in the frequently expressed fear that the inevitable discovery exception may “swallow” or “emasculate” the protections guaranteed by the Fourth Amendment.¹³³ This Part examines the Fourth Amendment implications of an inevitable discovery standard that does not include the active pursuit requirement. Section III.A argues that rejecting the active pursuit doctrine will not erode the exclusionary rule’s deterrent effect on constitutional violations by law enforcement. Section III.B recognizes that limits must be imposed upon the use of the inevitable

131. *Id.* at 496. Two members of the Metropolitan Washington Airport Authority Police responded to the call by Northwest Airlines. The officers were suspicious of the suitcase with the combination lock because it had a strong odor of perfume. Concerned that it might contain explosives, the suitcase was x-rayed, which revealed a number of rectangular-shaped objects. One officer left the scene to make arrangements to transport the luggage to the airport police station, while the other officer remained behind. For reasons unexplained by the record, “[a]t that point, [a Northwest employee] decided to go ahead and open the black suitcase.” She received permission from her supervisor, and asked the officer present to open it for her. The officer radioed his departed colleague, and asked if he could do so. The reply was that he “could open the suitcase if Northwest wanted it opened.” The officer then proceeded to do so. *Id.*

132. *Id.* at 500-01 (“[I]t is clear that, pursuant to Northwest’s lost luggage policy, [a Northwest employee] would have opened the black suitcase and discovered the evidence in a private search had the airport police not become involved. Because a private search was inevitable, the cocaine is admissible pursuant to the inevitable discovery exception to the exclusionary rule.”).

133. See, e.g., *United States v. Eng*, 971 F.2d 854, 860 (2d Cir. 1992) (recognizing “the need to prevent the inevitable discovery exception from swallowing the exclusionary rule”); *United States v. Cherry*, 759 F.2d 1196, 1205 (5th Cir. 1985) (same); see also Lamberth, *supra* note 24, at 130 (“Application of inevitable discovery in the context of a fourth amendment violation would emasculate the warrant requirement. . .”).

discovery exception to admit evidence obtained without a warrant, but also argues that the active pursuit doctrine itself provides no additional protection of the Fourth Amendment warrant requirement.

A. *Detering Police Misconduct*

According to the *Nix* Court, deterring law enforcement violations of constitutional rights is the “core rationale” for excluding illegally obtained evidence that is the “fruit of the poisonous tree.”¹³⁴ Although there is a “high social cost of letting persons obviously guilty go unpunished for their crimes,” probative evidence is suppressed so as to prevent the prosecution from exploiting to its benefit the illegal actions of the police.¹³⁵ The *Nix* Court advanced what has been termed a “status quo ante” analysis of when the exclusionary rule applies.¹³⁶ In other words, “the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.”¹³⁷ But neither should the prosecution be “put in a *worse* position simply because of some earlier police error or misconduct.”¹³⁸ When the evidence would have inevitably been discovered — regardless of the constitutional

134. *Nix v. Williams*, 467 U.S. 431, 442-43 (1984) (“The core rationale consistently advanced by this Court for extending the exclusionary rule 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.”). This point, like many of the issues surrounding the exclusionary rule, is contested, as the Court had in years prior indicated that the “imperative of judicial integrity” is a twin purpose of the exclusionary rule. See *Elkins v. United States*, 364 U.S. 206, 222 (1960). But see, e.g., *United States v. Brookins*, 416 U.S. 1037, 1046-47 (1980) (“In the fourth amendment context, the ‘single and distinct’ purpose for the exclusionary rule is deterrence of police violations”) (citing *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 413 (1966)).

The distinction is not merely esoteric, as many commentators assert that grounding the exclusionary rule upon a deterrence justification requires defending the doctrine’s efficacy, rather than its constitutionality. See generally Kamisar, *Exclusionary Rule*, *supra* note 6. Consequently, proponents of the exclusionary rule assert that “the deterrence rationale seemed to provide the club with which [Chief Justice Burger] proposed to bludgeon the rule to death.” Wasserstrom & Mertens, *supra* note 36, at 152. But this criticism is not universal, as another commentator has argued:

[T]he deterrent view’s lack of academic popularity has less to do with its inherent defects than with the Burger Court’s having followed it while cutting back the scope of the rule. There is, however, no inevitable connection between the deterrent theory and a narrow scope for the exclusionary rule; the deterrent theory could equally well be invoked by a different Court to reach results far more protective of individual rights.

Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants As Private Attorneys General*, 88 COLUM. L. REV. 247, 268-69 (1988).

135. *Nix*, 467 U.S. at 443.

136. See *Leading Cases of the 1983 Term*, *supra* note 22, at 122 (“The [*Nix*] majority justified its acceptance of the [inevitable discovery] exception by stating that the role of the exclusionary rule is to restore the ‘status quo ante’ that would have existed in the absence of a constitutional violation.”).

137. *Nix*, 467 U.S. at 443.

138. *Id.* at 443.

violation — the disincentive provided by exclusion is less necessary.¹³⁹ In these instances the evidence will be admitted; to hold otherwise “would reject logic, experience, and common sense.”¹⁴⁰

Courts that adhere to the active pursuit doctrine posit that not requiring an ongoing, independent investigation has the adverse effect of providing an incentive to the police to violate the Constitution, and permits courts to sanction this behavior. It has been argued that applying the inevitable discovery exception when the police have not been in active pursuit would actually encourage the officers to act unlawfully.¹⁴¹ Allegedly, without an ongoing, independent investigation, “(1) the police would usually be less certain that the discovery of the evidence is ‘inevitable’ in the absence of illegal conduct and (2) the danger that the evidence illegally obtained may be inadmissible would be reduced.”¹⁴² This reasoning is unpersuasive, however, because it inaccurately perceives the importance of the officers’ awareness of whether the evidence would ultimately be discovered.

Deterring police misconduct turns on the knowledge of the officer at the time of the constitutional violation.¹⁴³ In other words, when an officer knows with absolute certainty that evidence may be obtained later by lawful means, there is an obvious incentive to go ahead and seize the evidence illegally, confident the evidence will be ultimately admissible under the inevitable discovery exception.¹⁴⁴ In contrast, when the officer is unaware that the evidence may later be obtained lawfully, the incentives for an immediate illegal seizure are less clear.¹⁴⁵

139. See *id.* at 444 (“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.”).

140. *Id.* at 444.

141. *E.g.*, *United States v. Cherry*, 759 F.2d 1196, 1204-05 (5th Cir. 1985) (“[W]hen the police have not been in active pursuit of an alternate line of investigation that is at a minimum supportable by leads, the general application of the inevitable discovery exception would greatly encourage the police to engage in illegal conduct . . .”).

142. *Id.* at 1204-05.

143. “[T]he concept of effective deterrence assumes that the police officer consciously realizes the probable consequences of a presumably impermissible course of conduct.” *Nix*, 467 U.S. at 445 (quoting *United States v. Ceccolini*, 435 U.S. 268, 283 (1978)).

144. See *Wasserstrom & Mertens*, *supra* note 36, at 167 (“[W]hen the officer knows that the evidence that he can acquire illegally now will otherwise be inevitably discovered later, then the exclusionary rule will no longer provide any *disincentive* to go after it now. The greater convenience of getting it now, rather than waiting, could well determine the officer’s choice.”).

145. Commentators generally conclude the police will go ahead and decide to break the law. See, *e.g.*, *id.* at 167 (“[I]f the officer does not know beforehand whether subsequent lawful measures are likely to lead to the evidence that he thinks he can acquire illegally now, then he could rationally conclude that he might as well try now.”); *Leading Cases of the 1983 Term*, *supra* note 22, at 125-26 (“One might just as easily believe that the [inevitable discovery] exception’s general effect . . . will be to increase police officers’ confidence that, even if

It may be argued that if it is later proven that discovery was inevitable, the officer's decision to proceed will have been vindicated.¹⁴⁶ If discovery is not found to have been inevitable, the evidence will be excluded, but the officer's decision was still rational because the evidence probably never would have been admissible at trial, and the prosecution is not disadvantaged.¹⁴⁷ The problems with this analysis are two-fold. First, it directly contradicts the *Nix* Court's assessment of the incentives provided by the inevitable discovery exception. Second, even assuming the *Nix* Court perceived the incentives incorrectly, the active pursuit doctrine itself does little to promote deterrence.

The *Nix* Court addressed the deterrence of police misconduct in its rejection of the lower courts' holdings that the inevitable discovery exception applies only where the prosecution may prove the absence of bad faith by the investigating officers.¹⁴⁸ In reversing Williams' second conviction, the Eighth Circuit Court of Appeals stated that "if there is to be an inevitable-discovery exception the State should not receive its benefit without proving that the police did not act in bad faith."¹⁴⁹ The explicit justification for this requirement was that otherwise, "the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterrent effect of the Exclusionary Rule reduced too far."¹⁵⁰ Although the *Nix* Court was discussing deterrence in the context of Sixth Amendment violations, its reasoning illustrates the Fourth Amendment as well. The Court stated that an officer contemplating an illegal search "will rarely, if ever, be in a position to cal-

they violate fundamental rights to obtain evidence, prosecutors will be able to argue successfully for its admission.").

146. See *Wasserstrom & Mertens*, *supra* note 36, at 167 ("If it turns out that discovery of the evidence was in any event inevitable, then nothing has been lost.").

147. See *id.* 167 ("If, to the contrary, acquiring the evidence legally later seems to have been impossible, then the evidence will be suppressed. But again, nothing is lost because it likely never could have been obtained for use at trial anyway.").

148. In affirming Williams's second conviction, the Iowa Supreme Court, recognizing for the first time the constitutional permissibility of the inevitable discovery exception, held that "[a]fter the defendant has shown unlawful conduct on the part of the police, the State has the burden to show by a preponderance of the evidence that . . . the police did not act in bad faith for the purpose of hastening discovery of the evidence in question." *State v. Williams*, 285 N.W.2d 248, 260 (Iowa 1979). The Iowa Supreme Court then found that "it cannot be said that the actions of the police were taken in bad faith." *Id.* at 261. In Williams's second petition for writ of habeas corpus, the federal district court stated that the inevitable discovery test applied by the Iowa Supreme Court was "not constitutionally deficient," and denied relief. *Williams v. Nix*, 528 F. Supp. 664, 669 (S.D. Iowa 1981). The Court of Appeals for the Eighth Circuit, however, reversed the district court's judgment and set aside Williams's second conviction, "hold[ing] that the State did not satisfy its burden of proving by a preponderance of the evidence that the police did not act in bad faith in obtaining Williams's statements that led them to the body." *Williams v. Nix*, 700 F.2d 1164, 1173 (8th Cir. 1983). For a detailed history of Williams's convictions, see *supra* Section I.A.

149. *Williams v. Nix*, 700 F.2d at 1169 n.5.

150. *Nix*, 467 U.S. at 445 (quoting *Williams v. Nix*, 700 F.2d at 1169 n.5).

culate whether the evidence sought would inevitably be discovered.”¹⁵¹ And when an officer does have knowledge of inevitable lawful discovery, he will opt to wait and proceed legally because “there will be little to gain from taking any dubious ‘shortcuts’ to obtain the evidence.”¹⁵² Beyond the obvious potential that the evidence would then be inadmissible at trial, the Court cites as additional disincentives the possibility of departmental discipline and civil liability.¹⁵³ Critics may posit that the inevitable discovery exception encourages law enforcement to act illegally, but the fact remains that the *Nix* Court explicitly considered the incentives created by the doctrine, and concluded that it would not promote police misconduct.¹⁵⁴

The alleged flaws in the Court’s opinion in *Nix*, however, do not compel support for the active pursuit requirement. Assuming, for the sake of argument, that the *Nix* Court inaccurately calculated the incen-

151. *Id.*

152. *Id.* at 446.

153. *Id.* There is widespread skepticism that “alternative remedies” such as recovery in tort could effectively replace the exclusionary rule. See generally LAFAYE, *supra* note 2, § 1.2(c), at 34-38. On a related matter, it is interesting to note that at least two circuits have recently held that the inevitable discovery exception is not a bar to a 42 U.S.C. § 1983 civil suit by citizens against law enforcement for unlawful search and seizure. See *DeBoer v. Pennington*, 206 F.3d 857, 865 (9th Cir. 2000); *Chatman v. Slagle*, 107 F.3d 380, 382-83 (6th Cir. 1997) (“[T]he reasoning which supports the use of the Fourth Amendment exclusionary rule and the related inevitable discovery doctrine in criminal cases does not apply in civil rights actions. The Fourth Amendment exclusionary rule is in large part designed to deter unconstitutional police behavior. . . . A necessary part of this calculus is that there are other effective deterrents against police misbehavior which dwarf any incremental gain to be had from excluding evidence, most notably the possibility of civil liability. To hold that money damages are not available in such situations would turn *Nix* on its head and both eliminate an important disincentive to police misconduct and leave victims of unreasonable police action without any remedy.”).

154. *Nix*, 467 U.S. at 445-46 (“[W]hen an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice.”).

Cf. *Murray v. United States*, 487 U.S. 533, 539-40 (1988) (internal citations omitted), which involved the independent source exception, and featured a similar debate over the incentives created by exceptions to the exclusionary rule for law enforcement to act unlawfully:

Petitioners’ asserted policy basis for excluding evidence which is initially discovered during an illegal search, but is subsequently acquired through an independent and lawful source, is that a contrary rule will remove all deterrence to, and indeed positively encourage, unlawful police searches. As petitioners see the incentives, law enforcement officers will routinely enter without a warrant to make sure that what they expect to be on the premises is in fact there. If it is not, they will have spared themselves the time and trouble of getting a warrant; if it is, they can get the warrant and use the evidence despite the unlawful entry. We see the incentives differently. An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers’ decision to seek a warrant or the magistrate’s decision to grant it. Nor would the officer *without* sufficient probable cause to obtain a search warrant have any added incentive to conduct an unlawful entry, since whatever he finds cannot be used to establish probable cause before a magistrate.

tives officers are faced with — i.e., that the police have “nothing to lose” by searching illegally now and claiming lawful inevitable discovery later¹⁵⁵ — requiring the presence of an ongoing, independent investigation does little to remedy the problem. The reason that the active pursuit doctrine, in its present form, itself provides only negligible additional safeguarding of Fourth Amendment rights. To advance effectively the deterrence goals of the exclusionary rule, any active pursuit standard would have to require that the officer contemplating whether to proceed unconstitutionally be unaware of the presence of the alternate investigation. Otherwise, logic indicates that an officer may consciously rely on the active pursuit of his colleagues and proceed with an illegal search, confident that the ongoing investigation prong of the inevitable discovery exception is satisfied, and ensuring the admissibility of the evidence. There are multiple doctrinal and practical problems with any such lack-of-knowledge requirement that would mandate the offending officer be unaware of the lawful active pursuit of fellow law enforcement agents.

First, and most importantly, a lack-of-knowledge requirement is directly contradicted by the facts in *Nix*.¹⁵⁶ Detective Leaming’s awareness of the ongoing, alternate investigation of his fellow officers was obviously demonstrated by his command to Agent Ruxlow to cease with the search after Williams agreed to lead the police to Powers’ body.¹⁵⁷ Second, a lack-of-knowledge requirement that focuses on an officer’s subjective intent is too closely akin to the absence of bad faith requirement rejected by the *Nix* Court as “formalistic, pointless, and punitive.”¹⁵⁸ The inevitable discovery exception, it must be remembered, “involves no speculative elements,” and requires the prosecution to present “demonstrated historical facts” that establish by a preponderance of the evidence the legal means the prosecution would have employed to ultimately discover the evidence.¹⁵⁹ Whether the

155. See, e.g., Bloom, *supra* note 28, at 95 (“The [*Nix*] 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.”); *Leading Cases of the 1983 Term*, *supra* note 22, at 126 (“[T]he [*Nix*] Court’s assertion that the [inevitable discovery] exception will induce additional caution on the part of police ignores the incentives that the exception creates: obtaining evidence illegally, rather than waiting for its ‘inevitable’ discovery in due course, would eliminate *any* uncertainty that the evidence actually might not be obtained and would obviate the need for police to devote further resources to the search.”).

156. See generally *supra* Section I.A.

157. *Nix*, 467 U.S. at 449.

158. *Id.* at 445.

159. *Id.* at 444 n.5. Cf. *id.* at 457 (Stevens, J., concurring) (“Even if Detective Leaming acted in bad faith in the sense that he deliberately violated the Constitution in order to avoid the possibility that the body would not be discovered, the prosecution ultimately does not avoid that risk; its burden of proof forces it to assume the risk. The need to adduce proof sufficient to discharge its burden, and the difficulty in predicting whether such proof will be available or sufficient, means that the inevitable discovery rule does not permit state officials to avoid the uncertainty they would have faced but for the constitutional violation.”).

searching officer was unaware of the active pursuit of his colleagues in no way aids the state in demonstrating the presence of lawful measures that would have led to inevitable discovery.¹⁶⁰

Finally, a lack-of-knowledge requirement would vastly alter the scope of the active pursuit doctrine as presently applied. Not only do courts that adhere to the active pursuit doctrine not require unawareness by the offending officer of the independent actions by other officers, they do not even mandate that the alternate investigation have been undertaken by an additional, separate officer. For example, the Eighth Circuit in *United States v. Hammons*¹⁶¹ recently found active pursuit where a highway patrol officer during a traffic stop obtained involuntary consent to conduct a search that revealed narcotics. Because the officer told the defendant before the impermissible search that if he refused to consent, a drug-sniffing canine would be called, the court found that "[t]he officer's assertion that he would call a drug dog indicates that the officer had initiated an alternative plan at the time of the constitutional violation."¹⁶² The fact that the mere assertion that lawful means were available may suffice to establish an independent line of investigation demonstrates that the active pursuit requirement, by itself, does little to deter police misconduct.¹⁶³ To the contrary, the doctrine may actually erode the deterrence goals of the exclusionary rule by creating an incentive for officers, aware that the actions of themselves or others likely constitute active pursuit, to go ahead and circumvent the Fourth Amendment.

160. Cf. Cohn, *supra* note 24, at 749 ("The [*Nix*] Court was correct to dismiss the Court of Appeals 'bad faith' requirement . . . because this requirement rejects the logic on which the inevitable discovery rule is based. Proof of inevitable discovery severs any causal connection between the misconduct and the discovery of the challenged evidence. It therefore makes no sense to invoke a good or a bad faith test because the *mens rea* of the offending officer is irrelevant to the question of causation. When no causal connection exists between the police illegality and the evidence in question, the bad faith of the offending officer will not provide one.").

161. 152 F.3d 1025 (8th Cir. 1998).

162. *Id.* at 1030 ("In short, the only event that stopped the officer from calling the drug-canine unit before the officer opened the envelope was the defendant's consent. Similarly, the only event that stopped the *Nix* search team from resuming its search was the defendant's coerced agreement to lead the police to the body. We therefore find that a substantial, alternative line of investigation was underway which would have led to the inevitable discovery of the cocaine absent the police misconduct.").

163. Note, however, that the Eighth Circuit's language in *Hammons* seems to contradict directly the words one of its sister circuits that also requires active pursuit. Again, the Eighth Circuit stated that "[t]he officer's assertion that he would call a drug dog indicates that the officer had initiated an alternative plan at the time of the constitutional violation." *Hammons*, 152 F.3d at 1030. Contrast this statement with the language of the Fifth Circuit: "The mere assertion of inevitable discovery must fail . . . the police must show that when the illegality occurred they possessed and were actively pursuing the evidence or leads that would have led to the discovery of the challenged [evidence]." *United States v. Brookins*, 614 F.2d 1037, 1048 (5th Cir. 1980).

B. *Enforcing the Warrant Requirement*

Except in certain narrow circumstances, law enforcement officials may not decide independently to initiate a lawful search or seizure; the Fourth Amendment requires that police obtain advance judicial approval in the form of a warrant.¹⁶⁴ Because *Nix* involved a violation of the Sixth Amendment, the Court neglected to discuss explicitly the impact of the inevitable discovery exception on the Fourth Amendment warrant requirement.¹⁶⁵ Nevertheless, the inevitable discovery exception applies also to the Fourth Amendment exclusionary rule, and the active pursuit doctrine therefore necessarily implicates the warrant requirement.¹⁶⁶ A proper formulation of the inevitable discovery exception is thus vital to guard against the elimination of fundamental Fourth Amendment guarantees.¹⁶⁷ This Section demonstrates, however, that in light of the Supreme Court's post-*Nix* decision in *Murray v. United States*,¹⁶⁸ as well as the practice of courts that adhere to the independent circumstances test, the active pursuit requirement is unnecessary as an additional safeguard to the warrant requirement.

164. *E.g.*, *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[T]he Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be imposed between the citizen and the police' . . . and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." (internal citations omitted)); *see also* *United States v. Cardona-Rivera*, 904 F.2d 1149, 1155 (7th Cir. 1990) (noting the "modern rule that a warrant is a condition precedent to a lawful search or seizure, other than in exceptional circumstances of which superfluity is not one"). *But see* *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) ("Even before today's decision, the [Fourth Amendment] 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable.").

165. Bloom, *supra* note 28, at 95 ("Because the *Nix* decision dealt with a Sixth Amendment violation, the Court probably was not focusing on the effect [the inevitable discovery] exception would have on the Fourth Amendment warrant requirement."); *Leading Cases of the 1983 Term*, *supra* note 22, at 126 ("[T]he [*Nix*] Court ignores entirely a disturbing possibility — that a broad application of the [inevitable discovery] exception's logic might be employed to gut the warrant requirement of the fourth amendment by permitting the introduction of evidence obtained without a warrant on the theory that police 'inevitably' would have obtained one.").

166. Bloom, *supra* note 28, at 98 ("The alternative investigation required of the police to qualify for the inevitable discovery exception also has an effect on the warrant requirement.").

167. *See* *United States v. Allen*, 159 F.3d 832, 841 (4th Cir. 1998) ("The existence of probable cause for a warrant, in and of itself and without any evidence that the police would have acted to obtain a warrant, does not trigger the inevitable discovery doctrine any more than probable cause, in and of itself, renders a warrantless search valid. The inevitable discovery doctrine applies to alleviate 'formalistic' and 'pointless' applications of the exclusionary rule, but it does not and cannot eliminate Fourth Amendment protections.") (internal citation omitted); *see also* LAFAYE, *supra* note 2, § 11.4(a) at 244 ("If the [inevitable discovery] doctrine were applied when such a [constitutional] shortcut was intentionally taken, the effect would be to read out of the Fourth Amendment the requirement that other, more elaborate and protective procedures be followed. This is particularly apparent when the shortcut was a bypassing of the Fourth Amendment warrant requirement . . .").

168. 487 U.S. 533 (1988).

1. *Warrantless Searches Followed by a Warrant*

At the outset, a distinction must be made between warrantless searches in which a warrant is later sought and issued, and those in which one is not.¹⁶⁹ In the first situation, where the police obtain a warrant after committing the constitutional violation, the foremost concern is that information about criminal activity derived from the illegal search will be included in the affidavit presented to a magistrate, thereby ensuring judicial approval.¹⁷⁰ If the police were not in active pursuit of an alternate, lawful line of investigation at the time of the constitutional violation, the probability increases that facts essential to the probable cause determination were derived from the illegal search. The First Circuit, in *United States v. Silvestri*,¹⁷¹ recognized that, admitting the evidence in these circumstances potentially could compromise the integrity of the warrant requirement, but nonetheless it rejected the active pursuit doctrine. The *Silvestri* court analyzed the inevitable discovery exception as implicating the independence and inevitability of the warrant.¹⁷² To determine whether the warrant was inevitable, the fact that a warrant was actually issued is partially dispositive; but an active pursuit requirement may be useful to determine that the warrant was not issued solely in reliance on evidence found during the illegal search.¹⁷³ To protect the independence of the warrant, however, the First Circuit found that the active pursuit doctrine was a “bright-line rule” that “goes too far.”¹⁷⁴ The court stated that often the delay between the unlawful search and the initiation of the warrant will be due to “various practical problems entirely unrelated to a decision to seek a warrant.”¹⁷⁵ The First Circuit therefore rejected the “inflexible”

169. See *United States v. Silvestri*, 787 F.2d 736, 744-46 (1st Cir. 1986) (discussing the distinction between the two possible situations).

170. See, e.g., *United States v. Satterfield*, 743 F.2d 827, 846-47 (11th Cir. 1984) (“Because 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.”).

171. 787 F.2d 736 (1st Cir. 1986).

172. *Id.* at 744. The First Circuit also discussed whether active pursuit was:

necessary to remove what would otherwise be an incentive to police to take a chance that the inevitable discovery exception might save the evidence in a situation where the discovery of the evidence seemed doubtful. We do not find, however, that the use of this requirement achieves this purpose. If the demands that the legal means of obtaining the evidence be both inevitable and independent are strictly enforced, post hoc suggestions of alternate legal means will not be accepted as a basis for the inevitable discovery exception.

Id. at 745-46.

173. *Id.* at 745 (“[T]he requirement of active pursuit could be viewed as ensuring the independent inevitability of the police decision to seek the search warrant, i.e., to ensure that the evidence turned up in the illegal search did not influence this decision.”).

174. *Id.*

175. *Id.*

active pursuit requirement as ill-suited to handle the multiple fact patterns that arise in these situations in favor of a requirement that the police have probable cause prior to the unlawful search, and an analysis that focuses on the independence and inevitability of the eventual issuance of the warrant.¹⁷⁶

The First Circuit's conclusion that active pursuit is not required when a warrantless search is followed by the issuance of a warrant is bolstered by the Supreme Court's 1988 opinion in *Murray*.¹⁷⁷ Although this decision involved the independent source doctrine, the Court explicitly noted that "[t]he inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine."¹⁷⁸ In *Murray*, the police illegally entered a warehouse, observed in plain view bales of marijuana, left without disturbing the evidence, and did not reenter until after they had obtained a valid search warrant.¹⁷⁹ The Court ruled that evidence is admissible, although first discovered unlawfully, if subsequently "rediscovered" by legal means independent from the initial illegality.¹⁸⁰ To arrive at this conclusion, the *Murray* Court applied to the independent source the same "status quo ante" analysis developed by the *Nix* Court in recognizing the inevitable discovery exception.¹⁸¹ Dissenting in *Murray*, Justice Marshall repeated the argument he had made three terms earlier in *Nix* by asserting that the independent source doctrine (like the inevitable discovery exception) should not be applied unless the police demonstrated active pursuit by having already sought the warrant prior to the initiation of the illegal search.¹⁸² Justice Scalia, writing for the majority, flatly rejected this admonition to "adopt a per se rule of inadmissibility" in the absence of active pursuit, instead deferring to

176. *Id.* at 746.

177. *Murray v. United States*, 487 U.S. 533 (1988). See Bloom, *supra* note 28, at 96-97 ("Although the Supreme Court has not dealt directly with the impact that 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. The facts of *Murray* indicate that there was an illegal warrantless search performed prior to the obtaining of a lawful warrant.").

178. *Murray*, 487 U.S. at 539.

179. *Id.* at 535-36.

180. *Id.* at 542.

181. The Court stated:

Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. Invoking the exclusionary rule would put the police (and society) not in the *same* position they would have occupied if no violation occurred, but in a *worse* one.

Id. at 541 (citing *Nix v. Williams* 467 U.S. 431, 443 (1984)).

182. *Id.* at 549 (Marshall, J., dissenting).

courts the necessary discretion to adjudge independence on the basis of the facts they are presented.¹⁸³ In light of the multiple similarities between the two doctrines, *Murray*'s ruling that active pursuit is not required for the independent source exception to apply when a warrantless search is followed by the issuance of a valid warrant should be understood to extend to the application of the inevitable discovery exception in similar circumstances.¹⁸⁴ If a search requires a warrant, and one is later obtained, the active pursuit doctrine is unnecessary as an additional safeguard to the integrity of the Fourth Amendment warrant requirement.

2. *Warrantless Searches not Followed by a Warrant*

In the second situation — a warrantless search after which no warrant is ultimately obtained — the active pursuit requirement provides no additional protection of the Fourth Amendment warrant requirement. Courts that reject the active pursuit doctrine consistently adhere to a simple yet stringent standard: “when evidence could not have been discovered without a subsequent search, *and* no exception to the warrant requirement applies, *and* no warrant has been obtained, *and* nothing demonstrates that the police would have obtained a warrant absent the illegal search, the inevitable discovery doctrine has no place.”¹⁸⁵ Refusing to apply the inevitable discovery exception in these

183. *Id.* at 540 n.2 (“Justice Marshall argues, in effect, that where the police cannot point to some historically verifiable fact demonstrating that the subsequent search pursuant to a warrant was wholly unaffected by the prior illegal search — e.g., that they had already sought the warrant before entering the premises — we should adopt a per se rule of inadmissibility. We do not believe that such a prophylactic exception to the independent source rule is necessary. To say that a district court must be satisfied that a warrant would have been sought without the illegal entry is not to give dispositive effect to police officers’ assurances on the point. Where the facts render those assurances implausible, the independent source doctrine will not apply.” (internal citations omitted)).

184. Although no court has yet adopted (or repudiated) this reasoning, the government has argued it. See *United States v. Lamas*, 930 F.2d 1099, 1103-04 (5th Cir. 1991) (“The government argues . . . that a footnote in the Supreme Court’s decision in *Murray* undermines the rationale . . . for continuing to impose the active-pursuit requirement Neither *Murray* nor any of our cases, however, disputes that a showing of active pursuit of an alternate line of investigation together with a showing of reasonable probability of discovery . . . is *sufficient* to sustain the application of the inevitable-discovery exception. Whether this active-pursuit element . . . is still *necessary* to implicate the inevitable-discovery rule must await the case that turns on that question.” (internal citations omitted)).

185. *United States v. Allen*, 159 F.3d 832, 841 (4th Cir. 1998) (emphasis added); see also *United States v. Chanthavong*, No. 98-4244, 1999 U.S. App. LEXIS 21554, at *25 (4th Cir. Sept. 8, 1999) (“The inevitable discovery doctrine does not apply where the police officers had probable cause to conduct a search but simply failed to obtain a warrant.”); *United States v. Mejia*, 69 F.3d 309, 320 (9th Cir. 1995) (“This court has never applied the inevitable discovery exception so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant.”); *United States v. Johnson*, 22 F.3d 674, 683 (6th Cir. 1994) (“[T]o hold that simply because the police could have obtained a warrant, it was therefore inevitable that they would have done so would mean

instances undoubtedly is correct, as a contrary rule would nullify the essential function of a magistrate to stand between the police and the target of their investigation.¹⁸⁶ The police, whenever confident that they possessed sufficient probable cause, would have no incentive to obtain advance judicial consent to search, effectively reading the warrant requirement out of the Constitution.¹⁸⁷ In the words of Judge Richard Posner, “[t]o excuse getting a warrant on such grounds would be like saying that lynching a man is okay provided you have a well-grounded belief that if tried he would have been convicted and sentenced to death and the sentence carried out.”¹⁸⁸

Courts’ inconsistent notions of what constitutes active pursuit¹⁸⁹ severely undermine the doctrine’s utility, and demonstrate that the doctrine provides no additional protection of the Fourth Amendment warrant requirement where unlawful searches are not followed by the issuance of a warrant. For example, consider the following two similar, but not identical, factual scenarios. Assume law enforcement officials engaged in a warrantless entry into a suspect’s residence, performed a protective sweep, and observed incriminating evidence in plain view. In case *A*, prior to initiation of the search, government agents had already arrived at the U.S. Attorney’s office and commenced work on a search warrant affidavit. When informed of the unlawful entry, and that the suspect had consented to a further search, the agents ceased preparing the application, and a warrant was never issued. In case *B*, after the warrantless entry had already occurred, one of the participating officers began walking outside to his car to depart the premises and begin preparing an affidavit. Only moments later, before even getting into his vehicle, the officer was likewise informed that the suspect

that there is inevitable discovery and no warrant requirement whenever there is probable cause.”).

186. See *United States v. Salgado*, 807 F.2d 603, 608-09 (7th Cir. 1986) (“We do not suggest that in cases where a warrant is necessary for a lawful search, the government can use evidence seized without a warrant if it can show that it would have gotten a warrant if it had asked for one. That would defeat the purpose of requiring a warrant, which is to interpose a neutral judicial officer between the police and its quarry . . .”).

187. See *Allen*, 159 F.3d at 842 (“The inevitable discovery doctrine cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents *no* evidence that the police would have obtained a warrant. Any other rule would emasculate the Fourth Amendment.”); *Mejia*, 69 F.3d at 320 (“If evidence were admitted notwithstanding the officers’ unexcused failure to obtain a warrant, simply because probable cause existed, then there would never be *any* reason for officers to seek a warrant. To apply the inevitable discovery doctrine whenever the police could have obtained a warrant but chose not to would in effect eliminate the warrant requirement.”).

188. *Salgado*, 807 F.2d at 609.

189. Indeed, even in *Nix*, where every member of the Court apparently found active pursuit in the facts of that case, their interpretation is not immune from challenge. See *supra* notes 67-68.

consented to a full search, and the police abandoned any further effort to obtain a warrant.

Although the substantial steps taken by the agents in case *A* seemingly exhibited strong proof of active pursuit, the Second Circuit held otherwise, and refused to apply the inevitable discovery exception.¹⁹⁰ The court reasoned that if establishing inevitability rested on a showing that a warrant would have been ultimately issued, it was crucial to determine how close the police were to obtaining a magistrate's approval when they became aware of the illegal search and abandoned their efforts.¹⁹¹ If even a "residual possibility" existed that the government had insufficient probable cause to persuade a magistrate, assuming a warrant was forthcoming would be too speculative, and any incriminating evidence must be suppressed.¹⁹² The Fifth Circuit, on the other hand, found that the relatively minor actions of an officer in a series of events similar to those in hypothetical case *B* sufficed to establish active pursuit, and thus the inevitable discovery exception allowed for the admission of the challenged evidence.¹⁹³ The court stated that its precedents "did not mechanically particularize the steps prerequisite to the application of the inevitable discovery rule," and that no "line of inevitability" could not be drawn at the point of preparing the affidavit or contacting the magistrate; the evidence was therefore admissible under the inevitable discovery exception.¹⁹⁴ The fact that the mere initiation of the warrant application process may (or may not) constitute an ongoing, independent investigation indicates that the active pursuit doctrine does not, by itself, adequately safeguard the warrant requirement. The active pursuit doctrine, therefore, provides no greater Fourth Amendment protection beyond what is already afforded by courts that adhere to the general standard that the inevitable discovery exception may not be invoked when a warrantless search is not followed by the issuance of a valid warrant.

190. *United States v. Cabassa*, 62 F.3d 470 (2d Cir. 1995).

191. *Id.* at 473 ("In cases in which a claim of inevitable discovery is based on expected issuance of a warrant, the extent to which the warrant process has been completed at the time those seeking the warrant learn of the search is of great importance.").

192. *Id.* at 474 ("At best, the government's showing in the instant matter would support separate findings that more probably than not a warrant would eventually have issued and that more probably than not the evidence would have been in the apartment when a lawful search occurred. Either of these findings is susceptible to factual error — the magistrate judge might not be satisfied as to the showing of probable cause or, more likely, the evidence might disappear before issuance or execution of a warrant, or both — and the combined chance of error undermines the conclusion that discovery of the evidence pursuant to a lawful search was inevitable.").

193. *United States v. Lamas*, 930 F.2d 1099 (5th Cir. 1991).

194. *Id.* at 1103 ("It is not uncommon for officers to contend that if not for some intervening event — such as a confession or a consent to search — they would have gotten a valid search warrant and would have discovered the evidence legally in the absence of the illegal search.").

CONCLUSION

The inevitable discovery doctrine remains a controversial yet established exception to the Fourth Amendment exclusionary rule. As noted by the foremost scholar on search and seizure law: "The concerns expressed by opponents of the 'inevitable discovery' rule are legitimate and ought not be dismissed out of hand. A careful assessment of their arguments, however, indicates that they are directed not so much to the rule itself as to its application in a loose and unthinking fashion."¹⁹⁵ The active pursuit requirement, however, is not a necessary mechanism to ensure the proper application of the inevitable discovery exception, and it should be duly rejected.

The active pursuit doctrine is an unsupported extension of the Supreme Court's holding in *Nix*. It operates as a formalistic "bright-line" rule ill-equipped to address the multiple fact patterns that implicate the Fourth Amendment exclusionary rule. Further, there exists an alternative standard — the independent circumstances test — that adequately establishes inevitability in the absence of active pursuit. Finally, rejecting the active pursuit doctrine will not erode the deterrence goals of the exclusionary rule, nor will it compromise the integrity of the Fourth Amendment warrant requirement.

195. LAFAVE, *supra* note 2, § 11.4(a), at 243-44.