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Fourth Amendment--An Acceptable Erosion of the Exclusionary Rule

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FOURTH AMENDMENT—AN ACCEPTABLE EROSION OF THE EXCLUSIONARY RULE

Murray v. United States, 108 S. Ct. 2529 (1988).

I. INTRODUCTION

In *Murray v. United States*,[1] the Supreme Court substantially expanded the independent source doctrine.[2] The Court held that "the Fourth Amendment[3] does not require the suppression of evidence initially discovered during police officers' illegal entry of private premises, if the evidence is also discovered during a later search pursuant to a valid warrant that is wholly independent of the initial illegal entry."[4] By allowing the admission of evidence first discovered during a warrantless search, the Court further eroded the exclusionary rule.[5]

This Note argues that despite the erosion permitted in *Murray*, there still remains sufficient deterrence against unlawful searches, provided that independence between the unlawful search and the lawful seizure is required. This Note further argues that in order to ensure genuine independence, a requirement of "demonstrated historical facts capable of ready verification or impeachment" need not be met. Instead, the Court should also look to the circumstances surrounding the unlawful search, and the good faith of the officers conducting the unlawful search.

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1 108 S. Ct. 2529 (1988).

2 "The 'independent source' doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality." *Id.* at 2531 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)). *See infra* notes 25-44 and accompanying text.

3 The fourth amendment provides:

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

U.S. CONST. amend. IV.

4 *Murray*, 108 S. Ct. at 2531.

5 The exclusionary rule requires the suppression of evidence seized during an unlawful search. *Id.* at 2532. *See infra* notes 6-24 and accompanying text.

II. BACKGROUND

A. THE EXCLUSIONARY RULE

The exclusionary rule prohibits the admission of evidence seized during an unlawful search. The Court first announced this doctrine in *Weeks v. United States*.[6] There, a United States Marshall seized letters and correspondence belonging to the defendant during a warrantless search of the defendant's house.[7] The trial court overruled the defendant's objection that the papers should not be admitted as evidence because they had been obtained without a search warrant.[8] The Supreme Court reversed, holding that the federal courts cannot retain for purposes of evidence items seized during an unlawful search.[9] In reaching this conclusion, the Court said that while "the efforts of the courts and their officials to bring the guilty to punishment [are] praiseworthy . . . they are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[10]

The Court originally held the exclusionary rule to be only a federal remedy. In *Wolf v. Colorado*,[11] the Court held that the exclusionary rule created in *Weeks* is not imposed upon the states by the due process clause of the fourteenth amendment.[12] Justice Black, in a concurring opinion, stated that he agreed "with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."[13]

However, in *Mapp v. Ohio*, the Court held that all evidence obtained by searches and seizures in violation of the United States Constitution is inadmissible in a criminal trial in a state court.[14]

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6 232 U.S. 383 (1914).

7 *Id.* at 388-89.

8 *Id.* at 389.

9 *Id.*

10 *Id.* at 393.

11 338 U.S. 25 (1949).

12 *Id.* at 33. The fourteenth amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

13 *Wolf*, 338 U.S. at 39-40 (Black, J., concurring).

14 367 U.S. 643 (1961). Mapp was convicted of possession of lewd and lascivious materials in violation of § 2905.34 of Ohio's Revised Code. *Id.* The Supreme Court of

Wolf was expressly overruled to the extent that it held to the contrary.[15] The Court rejected its prior conclusion in *Wolf* that the exclusionary rule is a matter of judicial interpretation.[16] Instead, the Court in *Mapp* concluded that the exclusionary rule is implicit in the Constitution.[17] Writing for the majority, Justice Clark stated that "[t]he exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause."[18]

In addition to evidence directly obtained from an unlawful search, the Court has also applied the exclusionary rule to derivative evidence that is the product of the primary evidence or that is otherwise acquired as an indirect result of the unlawful search. In *Nardone v. United States*,[19] the unlawful entry consisted of tapping wires and eavesdropping on conversations. The Court held that not only was the evidence obtained directly from the wiretapping inadmissible under the exclusionary rule, but "any evidence procured from the knowledge gained from such conversations" must also be excluded.[20]

The Court further extended the exclusionary rule in *Silverman v. United States*[21] to include testimony regarding information learned during an unlawful entry. There, the petitioners objected to the admission of testimony of police officers describing incriminating conversations, which the officers had overheard by means of an electronic listening device.[22] The Court determined that because the eavesdropping was accomplished by means of an "unauthorized

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Ohio affirmed her conviction, despite the fact that the evidence was unlawfully seized during a warrantless search of Mapp's home. *Id.* That court, citing *Wolf*, found that even if the search was made without a valid warrant, the unconstitutionally seized evidence may still be used at trial. *Id.* at 645. The United States Supreme Court reversed. *Id.* at 660.

15 *Id.* at 643.

16 *Id.* at 655.

17 *Id.* at 657.

18 *Id.* at 651.

19 308 U.S. 338 (1939). In *Nardone*, law enforcement officials unlawfully intercepted telephone messages in violation of the Communications Act of 1934. *Id.* at 339. The trial judge held that the telephone messages themselves were inadmissible, but refused to allow the defense to examine the prosecution as to how it used the information. *Id.* The appellate court affirmed. *Nardone v. United States*, 106 F.2d 41 (2d Cir. 1939). The Supreme Court reversed, finding that the prosecution was not free to make use of unlawfully seized evidence. *Nardone*, 308 U.S. at 338.

20 *Nardone* 308 U.S. at 338.

21 365 U.S. 506 (1961).

22 *Id.* at 505. Police officers utilized a microphone which was pushed through the party wall of an adjoining building until it touched the heating ducts in the house occupied by the defendants. *Id.* at 506. The heating ducts conducted the sound, enabling the officers to overhear conversations which took place throughout the house. *Id.* at

physical penetration into the premises," it violated the petitioner's rights under the fourth amendment.[23] Therefore, the Court ruled that testimony describing conversations unlawfully overheard should not be admitted into evidence.[24]

In sum, the exclusionary rule is a federal remedy that prohibits the admission of evidence obtained in violation of the fourth amendment. The doctrine may be invoked to exclude tangible evidence seized during a warrantless search. In addition, the rule may be applied to evidence which is an indirect product of unlawful activity, as well as testimony concerning knowledge acquired during an illegal search. Despite the seemingly broad scope of the exclusionary rule, the Court has developed some exceptions. In certain circumstances, police conduct in violation of the fourth amendment will not operate to exclude all evidence eventually obtained.

B. EXCEPTIONS TO THE EXCLUSIONARY RULE

1. The Independent Source Doctrine

Shortly after the development of the exclusionary rule, the Court created the independent source doctrine in *Silverthorne Lumber Co. v. United States*.[25] This exception permits the introduction of evidence initially discovered during, or as the consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality.[26] In *Silverthorne Lumber*, the Court concluded that "illegal action of subordinate public officials can not forever prevent the United States from securing by legal process relevant evidence of a violation of its laws."[27] Furthermore, facts illegally obtained as a result of a fourth amendment violation do not become "sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . . ."[28]

The test to be applied to the independent source doctrine was articulated by the Court in *Wong Sun v. United States*.[29] The Court rejected a "but for" test, finding that it was not necessary to conclude that the evidence would not have come to light "but for" the

507. The trial judge permitted the police officers to describe these conversations, and the court of appeals affirmed. *Id.* at 506.

23 *Id.* at 509-10.

24 *Id.* at 512.

25 251 U.S. 385 (1920).

26 Murray v. United States, 108 S. Ct. 2529, 2531 (1988).

27 *Silverthorne Lumber*, 251 U.S. at 389.

28 *Id.* at 392.

29 371 U.S. 471 (1963). See *infra* notes 49-51 and accompanying text for a more detailed discussion of *Wong Sun*.

unlawful police conduct.[30] Instead, the Court concluded that the more apt question was "whether, granting establishment of the primary illegality, the evidence to which . . . objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[31]

The Court recently invoked the independent source exception in *Segura v. United States*.[32] There, the Court held that when there is an independent source for the challenged evidence, it is irrelevant whether an earlier entry was illegal.[33] As long as the information upon which the warrant was secured is wholly unconnected with the prior entry, the exclusionary rule does not mandate suppression of evidence later obtained.[34] In *Segura*, the petitioner was arrested in the lobby of his apartment building.[35] The agents took the petitioner upstairs to his apartment, entered the apartment, and conducted a limited security check of the premises.[36] Various drug paraphernalia were observed in plain view.[37] The agents then secured the apartment, and two agents remained inside the apartment while others left to obtain a warrant.[38] Nineteen hours later, agents returned with a valid warrant and searched the premises.[39] The agents discovered almost three pounds of cocaine and records of narcotics transactions.[40]

The petitioners moved to suppress the evidence, claiming that

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30 *Id.* at 487-88.

31 *Id.* at 488 (citing MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

32 468 U.S. 796 (1984).

33 *Id.* at 799.

34 *Id.*

35 *Id.* at 800. More than one month prior to the arrest, agents of the Drug Enforcement Task Force received information indicating that petitioners were engaged in cocaine trafficking from their New York apartment. *Id.* at 799. Based on this information, the agents maintained a constant surveillance over petitioners until the day of their arrest. *Id.* Then, earlier during the day of Segura's arrest, the agents arrested one Rivudalla-Vidal, who admitted that he had purchased cocaine from petitioner Segura. *Id.* at 800. Segura's arrest ensued. *Id.*

36 *Id.* at 800-01. The agents conducted the security check in order to ensure that no one else was there who might pose a threat to their safety or destroy evidence. *Id.* at 801.

37 *Id.* at 801. "[T]he agents observed, in a bedroom in plain view, a triple-beam scale, jars of lactose, and numerous small cellophane bags, all accouterments of drug trafficking." *Id.*

38 *Id.*

39 *Id.* The unusually long delay between the initial search and the warranted search resulted from the fact that the agents arrived at the petitioners' apartment in the evening (thus, a warrant could not be obtained until the following day) and also from what was described as "administrative delay." *Id.*

40 *Id.* The agents also discovered eighteen rounds of .38 caliber ammunition and more than $50,000 in cash. *Id.*

it was the product of an unlawful search.[41] The district court granted the petitioners' motion, holding that both the drug paraphernalia observed in plain view as well as the evidence seized under the valid warrant must be suppressed.[42] The Court of Appeals for the Second Circuit affirmed in part and reversed in part, finding that the paraphernalia discovered during the initial warrantless entry was properly excluded, but the exclusionary rule did not require suppression of evidence seized as a result of the valid warrant because that evidence was procured pursuant to an independent source.[43] The Supreme Court affirmed,[44] thus validating the independent source doctrine as applied to evidence discovered for the first time pursuant to an independent, lawful source, regardless of a prior fourth amendment violation.

2. *The Attenuated Basis Exception*

A second exception to the exclusionary rule was developed by the Court in *Nardone*.[45] Under the attenuated basis exception, the exclusionary rule does not apply where the connection between the fourth amendment violation and the acquisition of the challenged evidence is very remote.[46] The Court, citing *Silverthorne Lumber*, repeated that even though facts may be improperly obtained, they do not necessarily become "sacred and inaccessible."[47] The Court went on to state that the connection between the improper act and the challenged evidence, "may have become so attenuated as to dissipate the taint."[48] In such situations, the evidence may be properly admitted.

The attenuated basis exception was affirmed by the Court in *Wong Sun*.[49] In analyzing petitioner's challenge to the evidence, the

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41 *Id.*

42 *Id.* at 801-02. The court ruled that there were "no exigent circumstances justifying the initial entry into the apartment." *Id.* at 802. Therefore, the seizure of the drugs and paraphernalia was illegal, and the evidence must thereby be suppressed as " 'fruits' of illegal searches." *Id.* See *infra* note 46 for the origin of the term "fruits" as used by the Court.

43 *Id.* at 802-03.

44 *Id.* at 804.

45 308 U.S. 338. *See supra* note 19 and accompanying text for discussion of the facts of *Nardone*.

46 *Id.* at 341. In *Nardone*, evidence was procured from unlawful wiretapping. *Id.* at 339. The Court held that first, the accused has the burden of proving that the wiretapping was unlawfully employed. Then, once that is established, the accused must be given the opportunity to prove that "a substantial portion of the case against him was a fruit of the poisonous tree." *Id.* at 341.

47 *Id.* (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

48 *Id.* at 341.

49 371 U.S. 471. *See supra* notes 29-31 and accompanying text.

Court reaffirmed that the exclusionary rule will not apply to cases in which the government "learned of the evidence 'from an independent source,' "[50] or in which "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.' "[51]

3. The Inevitable Discovery Doctrine

A final exception to the exclusionary rule was recently articulated by the Court in *Nix v. Williams*.[52] The inevitable discovery exception permits the introduction of evidence that would ultimately or "inevitably have been discovered wothout reference to the police error or misconduct."[53] In *Nix*, the Court permitted the admission of evidence obtained pursuant to a police officer's questioning of the defendant in violation of his sixth amendment[54] right to counsel.[55] Writing for the Court, Chief Justice Burger concluded that

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50 *Id.* at 487. (quoting *Silverthorne Lumber*, 251 U.S. at 392).

51 *Id.* (quoting *Nardone*, 308 U.S. at 341). After an unlawful arrest, Wong Sun was lawfully arraigned and released on his own recognizance. *Id.* at 491. Several days later he voluntarily returned and made an unsigned statement. *Id.* The Court held that the unsigned statement was properly admitted into evidence because the connection between his unlawful arrest and the making of the unsigned statement was so attenuated that the making of the statement was not the fruit of the unlawful arrest. *Id.*

52 467 U.S. 431 (1984). In *Nix*, the evidence was held to be admissible despite unlawful questioning of the defendant. *Id.* Shortly after the disappearance of a ten year old girl from a YMCA in Des Moines, Iowa, over two hundred volunteers began searching the area for the child. *Id.* at 434-35. Meanwhile, Williams was arrested in Davenport, Iowa in connection with the girl's disappearance. *Id.* at 435. The police officers told Williams' attorney that they would drive Williams back to Des Moines without questioning him. *Id.* However, during the trip, one of the police officers began a conversation with Williams which ultimately resulted in Williams directing the police officers to the body. *Id.* at 435-36. The search was called off when Williams took police to the body. *Id.* at 436.

53 *Id.* at 432.

54 The sixth amendment states:

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

U.S. CONST. amend. VI.

55 *Nix*, 467 U.S. at 431. The police officer's unlawful questioning of Williams is often referred to as the "Christian Burial Speech." During the trip to Des Moines, one of the officers said to Williams:

> 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 Christ-

there was no reason to exclude the evidence because an independent search, already in progress, would have inevitably discovered the evidence regardless of the police officers' unlawful questioning of the defendant.[56] Furthermore, the Court concluded that society's competing interests of deterring unlawful police conduct and having juries receive all probative evidence of a crime would not be properly balanced by suppression of the evidence in this case.[57] Instead, the evidence should be admitted because the interests of society are balanced by putting the police in the same, rather than a worse, position than they would have been had no police error or misconduct occurred.[58]

Thus, the exclusionary rule prohibits the introduction of evidence obtained pursuant to police activity in violation of the fourth amendment. Nevertheless, evidence will not be barred from trial in every situation in which police misconduct occurs. Instead, even in the event of unlawful police activity, evidence should be admissible when: (1) the evidence was obtained pursuant to a lawful search wholly independent of the initial illegality; (2) the connection between the challenged evidence and the unlawful act was remote; or (3) the evidence inevitably would have been discovered regardless of the official's misconduct.

III. FACTS

On April 6, 1983, agents of the Drug Enforcement Agency (DEA) arrested James D. Carter and Michael F. Murray.[59] Two weeks later Murray and Carter were charged in a five count indictment for various drug violations.[60] They were subsequently convicted of conspiracy to possess and distribute illegal drugs in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(6), and 846.[61]

The events leading to their indictment began in July, 1982, when federal agents initiated a spot surveillance of Murray, Carter, and the other original defendants.[62] Then, early in 1983, the agents

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mas [E]ve and murdered .... [A]fter the snowstorm [we may not be] able to find it at all.

Id. at 435-36.

56 Id. at 448. *See supra* note 52.

57 *Nix*, 467 U.S at 432.

58 *Id.* at 447.

59 United States v. Moscatiello, 771 F.2d 589, 591 (1st Cir. 1985). Also involved in the conspiracy were John M. Rooney, Christopher Moscattiello, Arthur Barrett and Stephen King ("the other original defendants"). *Id.*

60 *Id.*

61 *Id.* at 591-92.

62 *Id.* at 591. *See supra* note 59. Brief for the United States at 2-3, Murray v. United States, 108 S. Ct. 2529 (1988)(Nos. 86-995 and 86-1016).

received information implicating Murray and Carter in a conspiracy to possess and distribute illegal drugs.[63] This information was corroborated by local law enforcement officials, and by April 6, 1983, the federal agents believed that a drug transaction was imminent.[64]

During the early afternoon of April 16, fifteen federal agents closely monitored Murray, Carter, and the other original defendants.[65] The agents observed a truck and a green camper enter a warehouse in South Boston.[66] The vehicles were driven by Murray and Carter.[67] When Murray and Carter drove the vehicles out of the warehouse about twenty minutes later, the agents saw two individuals and a tractor trailer carrying a long, dark container inside the warehouse.[68] The agents followed both of the vehicles, and, shortly thereafter, Murray and Carter turned over the vehicles to two new drivers.[69] The agents continued to follow the truck and camper and eventually stopped the vehicles and arrested the drivers.[70] The vehicles were lawfully seized and found to contain marijuana.[71]

After the agents learned that the truck and the camper contained marijuana, they converged on the warehouse.[72] The agents knocked on the door and announced their presence several times, but received no response.[73] They opened a mail slot and noticed a

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63 *Moscatiello*, 771 F.2d at 591.

64 *Id.*

65 *Murray*, 108 S. Ct at 2532. Brief for the Petitioners at 5, Murray v. United States, 108 S. Ct. 2529 (1988)(Nos. 86-995 and 86-1016).

66 *Murray*, 108 S. Ct. at 2532.

67 *Id.*

68 *Id.*

69 *Id.* John Rooney and Christopher Moscatiello were the new drivers of the vehicles. Brief for the United States at 4, *Murray*, 108 S. Ct. 2529.

70 *Murray*, 108 S. Ct. at 2532.

71 *Id.* Moscatiello, who was driving the camper, was pulled over on the Massachusetts Turnpike. Brief for the United States at 2-3. As one of the agents pulled the camper to the side of the road, he noticed a burlap covered bale in the camper compartment. *Id.* He immediately radioed the other agents. *Id.* Minutes later, Rooney, who was driving the truck, was pulled over as he backed out of a driveway. *Id.* at 5. One of the agents noticed the odor of marijuana, and, using Rooney's keys, opened the rear of the truck and found sixty bales of marijuana inside. *Id.* The district court held, and the appellate court affirmed, that the agents who stopped the vehicles had probable cause to believe that contraband was being transported. *Moscatiello*, 771 F.2d at 596. Therefore, they were empowered to stop and search the vehicles under the automobile exception to the warrant requirement of the fourth amendment. *Id.* (citing United States v. Ross, 456 U.S. 798, 825 (1982); Carroll v. United States, 267 U.S. 132 (1925)).

72 *Murray*, 108 S. Ct. at 2532.

73 *Id. See also*, Brief for the United States at 5 (The agents stated that they walked around the warehouse several times, looking for windows that would give them a view of the inside of the building, but they found none). Brief for the United States at 5.

strong odor coming from within the warehouse.[74] The agents forced open the door, and several of the agents entered the warehouse. Inside the warehouse, the agents saw in plain sight numerous burlap wrapped bales, which they suspected contained marijuana.[75] The agents left the bales undisturbed and exited the warehouse.[76]

While some of the agents maintained surveillance over the warehouse, others began to prepare affidavits in support of warrants to search the warehouse.[77] The affidavits did not mention the earlier entry, nor any information obtained during that entry.[78] Instead, the agents relied upon information derived from other FBI and DEA activities.[79]

Before the trial, Murray, Carter, and the other original defendants moved to suppress the evidence seized in the warehouse.[80] They claimed that the warrant was invalid on the grounds that the agents did not divulge the earlier entry when applying for the warrant, and that the warrant was "tainted" by that entry.[81] The district court denied the petitioners' pretrial motion.[82] The First Circuit affirmed, holding that even if the initial entry of the warehouse violated the fourth amendment, the evidence uncovered pursuant to the second, lawful entry should not be suppressed because such evidence was discovered through an independent, untainted source and would have been discovered even if the illegality had not occurred.[83] The Supreme Court granted certiorari to determine whether the fourth amendment requires the suppression of evidence initially discovered during an unlawful search of private premises, if that evidence is also discovered during a later search pursuant to a valid warrant that is completely independent of the initial entry.[84]

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74 *Murray*, 108 S. Ct. at 2532. Brief for the United States at 5.

75 *Murray*, 108 S. Ct. at 2532. Brief for the United States at 6.

76 *Murray*, 108 S. Ct. at 2532.

77 *Id.* Brief for the United States at 6.

78 *Murray*, 108 S. Ct. at 2532.

79 *Id.* at 2536. Brief for the American Civil Liberties Union and the Civil Liberties Union of Massachusetts as Amici Curiae in Support of the Petitioner at 3, Murray v. United States, 108 S. Ct. 2529 (1988)(Nos. 86-995 and 86-1016).

80 *Moscatiello*, 771 F.2d at 591.

81 *Murray*, 108 S. Ct. at 2532.

82 *Id.*

83 *Moscatiello*, 771 F.2d at 604.

84 *Murray*, 108 S. Ct. at 2532. Murray and Carter filed separate petitions for certiorari. *Id.* The original petitions raised the fourth amendment issue and also a Speedy Trial Act claim. *Id.* at 2532 n.1. The Supreme Court granted and consolidated both of the petitions, vacated the judgment below and remanded for reconsideration in light of Henderson v. United States, 476 U.S. 321 (1986). *Murray*, 108 S. Ct. at 2532 n.1 (citing

IV. THE SUPREME COURT DECISION

A. THE MAJORITY OPINION

Writing for the majority,[85] Justice Scalia vacated and remanded the decision of the court of appeals.[86] The majority affirmed the validity of the independent source doctrine,[87] and held that the fourth amendment does not require the suppression of evidence initially discovered during, or as the consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegal search.[88] However, since the district court did not explicitly find that the federal agents would have obtained the warrant even if they had not previously entered the warehouse, the majority held that this case should be remanded in order to determine the "ultimate question" of whether the second, lawful search was in fact a genuinely independent source of the evidence.[89]

At the outset, Justice Scalia reviewed the principles of the exclusionary rule.[90] In addition to requiring the suppression of evidence acquired during an illegal search, the rule further requires that any evidence which stems from the warrantless search must also be suppressed, unless the connection with the illegality is " 'so attenuated as to dissipate the taint.' "[91]

The Court went on to note that the exclusionary rule is not an absolute rule to be applied to all situations in which evidence is seized pursuant to a warrantless search. Justice Scalia said that, in *Silverthorne Lumber*,[92] the Court first articulated the idependent source exception to the exclusionary rule.[93] Under this doctrine, evidence which has a source independent from the illegality may be

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Carter v. United States, 476 U.S. 1138 (1986)). On remand, the appellate court again rejected the Speedy Trial Act claim and did not reexamine its prior ruling of the fourth amendment question. 803 F.2d at 20 (1st Cir. 1986). Petitioners again sought writs of certiorari, which the Court granted limited to the fourth amendment issue. *Murray*, 108 S. Ct. at 2532 n.1.

85 Justices Scalia, Rehnquist, White, and Blackmun constituted the majority. Justices Brennan and Kennedy took no part in the consideration or the decision of this case. *Murray*, 108 S. Ct. at 2531.

86 *Id.* at 2529.

87 *Id.* at 2533. *See supra* notes 25-44 and accompanying text for a discussion of the independent source doctrine.

88 *Murray*, 108 S. Ct. at 2532-36.

89 *Id.* at 2536.

90 *Id.* at 2532-33. For a review of these principles, see *supra* notes 6-24 and accompanying text.

91 *Murray*, 108 S. Ct. at 2532-33 (quoting *Nardone*, 308 U.S. at 341).

92 251 U.S. 385, 392 (1920).

93 *Murray*, 108 S. Ct. at 2533. See *supra* notes 25-28 and accompanying text for a discussion of *Silverthorne Lumber*.

admitted.[94]

Justice Scalia then referred to the Court's recent application of the independent source doctrine in *Segura*.[95] There, he said, the Court held that evidence uncovered for the first time during an independent search conducted with a valid warrant need not be suppressed despite a prior, illegal entry.[96] Justice Scalia framed the dispute in *Murray* as whether the Court should extend the independent source doctrine to include the admission of evidence which is first discovered during an illegal search and later "discovered" again pursuant to a valid warrant.[97] The Court decided this question in the affirmative.[98]

In reaching this decision, Justice Scalia first discussed the original use of the independent source doctrine.[99] Justice Scalia noted that in both *Silverthorne Lumber*[100] and in *United States v. Silvestri*,[101] the independent source doctrine was invoked specifically with reference to "that particular category of evidence acquired by an untainted search *which is identical to the evidence unlawfully acquired.*"[102] Justice Scalia, quoting *Silverthorne Lumber*, stated that " 'of course this does not mean that the facts thus obtained [from an illegal source] become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others.' "[103] Also, Justice Scalia pointed out that the First Circuit concluded in *Silvestri* that, " '[i]n the classic independent source situation, information which is received through an illegal source is considered to be cleanly obtained when it arrives through an independent source.' "[104] Thus, based on his reading of these cases, Justice Scalia concluded that the independent source doctrine

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94 *Murray*, 108 S. Ct. at 2533. Justice Scalia noted that the independent source doctrine was recently described as follows:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that [sic] they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Id. (citing *Nix*, 467 U.S. at 443)(emphasis in original).

95 *Id.* (citing *Segura*, 468 U.S. 796). See *supra* notes 32-44 and accompanying text for a discussion of *Segura*.

96 *Murray*, 108 S. Ct. at 2533 (citing *Segura*, 468 U.S. at 813-14).

97 *Id.*

98 *Id.*

99 *Id.*

100 251 U.S. 385 (1920).

101 787 F.2d 736 (1st Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988).

102 *Murray*, 108 S. Ct. at 2533 (emphasis in original).

103 *Id.* at 2533-34 (quoting *Silverthorne Lumber*, 251 U.S. at 392).

104 *Id.* at 2533-34 (quoting *Silvestri*, 787 F.2d at 739).

covers both evidence seized for the first time during a lawful search as well as evidence discovered for the first time during an unlawful search and later seized pursuant to a valid warrant.[105]

Furthermore, the Court concluded that its recent application of the "inevitable discovery doctrine"[106] affirms that the independent source doctrine may be invoked even if the evidence in question was discovered pursuant to a warrantless search.[107] *Nix* involved the application of the inevitable discovery doctrine in a sixth amendment context. There, police discovered the challenged evidence after questioning the defendant in violation of his right to counsel.[108] Nevertheless, the *Nix* Court held that the evidence was admissible because a search was already under way that would have inevitably discovered the evidence regardless of the unlawful questioning.[109] Although the Court in *Nix* explicitly found the independent source doctrine to be inapplicable, the Court in *Murray* concluded that the inevitable discovery doctrine was "in reality an extrapolation from the independent source doctrine."[110] Therefore, Justice Scalia concluded that since the inevitable discovery doctrine may be applied to evidence obtained for the first time through illegal means, the independent source doctrine should also apply to such evidence.[111]

The Court then analyzed the effect that such a holding would have on incentives for law enforcement authorities to conduct unlawful searches.[112] Justice Scalia rejected the petitioners' contention that a failure to exclude evidence which is initially discovered during an illegal search, but later acquired during an independent, legal search, would provide a positive incentive to conduct unlawful

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105 *Id.*

106 Justice Scalia was referring to *Nix*, 467 U.S. 431 (1984). See *supra* notes 52-58 and accompanying text for a discussion of *Nix*.

107 *Murray*, 108 S. Ct. at 2534.

108 *Nix*, 467 U.S. at 448-50. See *supra* note 55 for the text of the "Christian Burial Speech."

109 *Nix*, 467 U.S. at 448-50. See *supra* note 52 and accompanying text for a discussion of the search for the missing girl.

110 *Murray*, 108 S. Ct. at 2534.

111 *Id.* Justice Scalia stated:

> This "inevitable discovery" doctrine obviously assumes the validity of the independent source doctrine as applied to evidence initially acquired unlawfully. It would make no sense to admit the evidence because the independent search, had it not been aborted, would have found the body, but to exclude the evidence if the search had continued and had in fact found the body. The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: *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.

Id. (emphasis in original).

112 *Id.*

police searches.[113] Instead, the Court concluded that incentives to obtain a valid warrant remain despite such a rule.[114] First, an officer with probable cause would have no incentive to conduct a warrantless search.[115] Such an action would be accompanied by the risk of suppression of all evidence if the officer is unable to convince a trial judge that the second, lawful search truly constituted an independent source of the information.[116] Furthermore, according to the Court, an officer without probable cause would also have no incentive to conduct a warrantless search "since whatever he finds cannot be used to establish probable cause before a magistrate."[117]

Finally, the Court concluded that there was no basis to distinguish between tangible and intangible evidence.[118] The Court acknowledged that the First Circuit made such a distinction, finding that objects " 'once seized cannot be cleanly reseized without returning the objects to private control.' "[119] However, Justice Scalia found no merit to this distinction, and instead concluded that "reseizure of tangible evidence already seized is no more impossible than rediscovery of intangible evidence already discovered."[120]

In concluding his opinion, Justice Scalia emphasized the importance of independence, stating that "[t]he ultimate question . . . is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here."[121] He then noted two situations in which there would be no genuine independence. First, the search pursuant to the warrant would not be an independent source of the information if the "agents' decision to seek the warrant was prompted by what they had seen during the initial entry."[122] Second, there would be no independence if information obtained during the warrantless entry was "presented to the Magistrate and affected his decision to issue

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113 *Id.* Petitioners claim that such a rule would lead to "confirmatory" searches, or "entries just to make sure that what is expected to be on the premises is in fact there." Brief for the Petitioners at 42, Murray v. United States, 108 S. Ct. 2529 (1988)(Nos. 86-99 and 86-1016). Petitioners argued that law enforcement officials would be induced to conduct these searches because they would be able to spare themselves the time and trouble of getting a warrant if they could later obtain a warrant and use the evidence despite the unlawful entry. *Id.*

114 *Murray*, 108 S. Ct. at 2534.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.* at 2535.

119 *Id.* (quoting *Silvestri*, 787 F.2d at 739).

120 *Id.*

121 *Id.*

122 *Id.*

the warrant."[123] Justice Scalia noted that the district court found that the agents did not use any information discovered during the warrantless entry when they applied for a warrant.[124] However, Justice Scalia concluded that, since the district court did not "explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse," the case should be remanded for a determination of whether the second, lawful search was indeed an independent source of the challenged evidence.[125]

Thus, the Court extended the independent source doctrine from its application in *Segura*.[126] The Court held that the doctrine is not limited to evidence discovered for the first time during a lawful search, but instead includes the admissibility of evidence which authorities discovered for the first time during an unlawful search, and then later seized pursuant to a valid warrant, provided that the second search is truly an independent source of the evidence at issue.[127]

B. THE DISSENTING OPINION

In dissent, Justice Marshall[128] concluded that the majority's interpretation of the independent source doctrine "emasculates the Warrant Clause and undermines the deterrence function of the exclusionary rule."[129]

At the outset, the dissent set forth the purposes underlying the exclusionary rule and the independent source exception.[130] Relying upon *United States v. Leon*,[131] and *Elkins v. United States*,[132] Justice

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123 *Id.* at 2535-36.

124 *Id.* at 2536.

125 *Id.*

126 *Id.* at 2533. See *supra* notes 32-44 for a discussion of the Court's application of the independent source doctrine in Segura v. United States, 468 U.S. 796 (1984).

127 *Murray*, 108 S. Ct. at 2531-36.

128 Joining Justice Marshall in dissent were Justices Stevens and O'Connor. 108 S. Ct. at 2536.

129 *Id.* at 2536 (Marshall, J., dissenting).

130 *Id.* at 2536-37 (Marshall, J., dissenting).

131 468 U.S. 897 (1984). In *Leon*, the Court held:

> The Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid. . . . The question whether the exclusionary sanction is appropriately imposed in a particular case as a judicially created remedy to safeguard Fourth Amendment rights *through its deterrent effect*, must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence.

Id. (emphasis added).

132 364 U.S. 206 (1960). In *Elkins*, the Court stated that "[t]he [exclusionary] rule is calculated to prevent, not to repair. *Its purpose is to deter*—to compel respect for the con-

Marshall asserted that the exclusionary rule is primarily designed to deter violations of the fourth amendment.[133] Furthermore, he stated that the independent source and inevitable discovery exceptions are "primarily based on a practical view that under certain circumstances the beneficial deterrent effect that exclusion will have on future constitutional violations is too slight to justify the social cost of excluding probative evidence from a criminal trial."[134] Therefore, given this rationale for the independent source doctrine, Justice Marshall concluded that any application of the doctrine must involve a balancing of the constitutional violation and the deterrent effect based on the facts of each case.[135] Justice Marshall then concluded that the majority's application of the doctrine to the facts of the instant case "can find no justification in the purposes underlying both the exclusionary rule and the independent source exception."[136]

Justice Marshall further explained that the application of the independent source doctrine in this case not only undermines the deterrent function of the exclusionary rule, but also provides positive incentives for unlawful searches.[137] Justice Marshall argued that law enforcement officers will have the incentive to conduct "confirmatory" searches.[138] Because it is often time consuming and inconvenient to obtain a warrant, he said, law enforcement officials would conduct an initial, unlawful search in order to determine if it would be worthwhile to seek a warrant.[139] Only if the officials discover incriminating evidence, Justice Marshall asserted, would they later seek a warrant in order to "shield the evidence from the taint of the illegal search."[140]

The dissent flatly rejected the majority's interpretation of the incentives, finding little burden in convincing a trial court that information gained from the illegal entry did not affect the decision to seek a warrant.[141] First, Justice Marshall argued, it is easy for the officers to exclude information obtained from the illegal entry when

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stitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 217 (emphasis added).

133 *Murray*, 108 S. Ct. at 2536 (Marshall, J., dissenting).

134 *Id.* at 2537 (Marshall, J., dissenting)(citing *Nix*, 467 U.S. at 444-46; *Leon*, 468 U.S. at 906-09).

135 *Id.* (Marshall, J., dissenting).

136 *Id.* (Marshall, J., dissenting).

137 *Id.* at 2538 (Marshall, J., dissenting).

138 *Id.* (Marshall, J., dissenting). See *supra* note 113 and accompanying text for a discussion of "confirmatory" searches.

139 *Murray*, 108 S. Ct. at 2538 (Marshall, J., dissenting).

140 *Id.* (Marshall, J., dissenting).

141 *Id.* (Marshall, J., dissenting).

seeking the warrant because the officers are in control and possession of the information.[142] Also, he argued, because the application of the independent source doctrine hinges on the officers' intent, it is difficult for a defendant to rebut the officers' assertion that they always intended to obtain a warrant.[143] Thus, Justice Marshall concluded that "the litigation risk described by the Court seems hardly a risk at all; it does not significantly dampen the incentive to conduct the initial illegal search."[144]

Justice Marshall then asserted that the majority opinion failed to ensure genuine independence.[145] Relying on *Nix*,[146] the dissent stated that the basis for finding that a second search was untainted by the prior illegal search must focus on " 'demonstrated historical facts capable of ready verification or impeachment.' "[147] Absent such facts, Justice Marshall argued, "the threat that the subsequent search was tainted by the illegal search is too great to allow for the application of the independent source exception."[148] The majority's holding to the contrary, he said, "lends itself to easy abuse" and provides incentives to bypass the Constitution.[149]

In conclusion, Justice Marshall asserted that the independent source doctrine as applied in *Segura* should not be extended to include evidence initially discovered during an unlawful search.[150] Such an extension of the doctrine, he said, would eliminate any remaining incentives to obtain a warrant prior to entry.[151] Further-

142 *Id.* (Marshall, J., dissenting).

143 *Id.* (Marshall, J., dissenting). Justice Marshall offered two additional arguments against an "intent-based" rule. First, he argued that whether the officers intended to obtain a warrant prior to their initial, illegal entry is of little significance to the "relevant question: whether, even if the initial entry uncovered no evidence, the officers' [sic] would return immediately with a warrant to conduct a second search." *Id.* at 2538 n.2 (Marshall, J., dissenting). Justice Marshall contended that even if the officers had intended to obtain a warrant prior to the illegal search, if the search failed to uncover contraband, "those same officers might decide their time is better spent than to return with a warrant." *Id.* (Marshall, J., dissenting). Second, Justice Marshall argued that an "intent-based" rule would be difficult to apply, because "[i]ntentions clearly may differ both among supervisory officers and among officers who initiate the illegal search." *Id.* (Marshall, J., dissenting).

144 *Id.* at 2538-39 (Marshall, J., dissenting).

145 *Id.* at 2539 (Marshall, J., dissenting).

146 467 U.S. 431 (1984). See *supra* notes 52-58 and accompanying text for a discussion of *Nix*.

147 *Murray*, 108 S. Ct. at 2539 (Marshall, J., dissenting) (quoting *Nix*, 467 U.S. at 445). In *Nix*, the "historical facts" were that a volunteer search party was already in progress that was heading toward the hidden body.

148 *Murray*, 108 S. Ct. at 2539 (Marshall, J., dissenting).

149 *Id.* (Marshall, J., dissenting).

150 *Id.* at 2540 (Marshall, J., dissenting).

151 *Id.* (Marshall, J., dissenting).

more, he continued, when the evidence is first discovered during a warrantless search, there is a much greater probability that any subsequent search will be tainted by such evidence.[152]

C. JUSTICE STEVENS' DISSENTING OPINION

Justice Stevens joined Justice Marshall's dissent in concluding that the majority's decision " 'emasculates the Warrant Clause and provides an intolerable incentive for warrantless searches.' "[153] However, rather than draw a line at *Segura* as did Justice Marshall, Justice Stevens remained "convinced that the *Segura* decision itself [is] unacceptable" because even that decision "provide[s] government agents with an affirmative incentive to engage in unconstitutional violations of the privacy of the home."[154]

V. ANALYSIS

A. JUSTIFICATIONS FOR THE EXCLUSIONARY RULE

Throughout its history, several justifications for the exlusionary rule have been offered by the Court.[155] Initially, the Court justified the rule as a protection of individual rights.[156] In *Weeks*, the Court stated:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such [unreasonable] searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[157]

However, the personal rights rationale has been seriously impaired in recent years.[158] In *United States v. Calandra*,[159] the Court

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152 *Id.* (Marshall, J., dissenting).

153 *Id.* (Stevens, J., dissenting)(quoting *Id.* (Marshall, J., dissenting)).

154 *Id.* (Stevens, J., dissenting)(citing *Segura*, 468 U.S. at 817 (Stevens, J., dissenting)).

155 Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 875, 878-79 (1982) [hereinafter "Schlag"].

156 Schlag, *supra* note 155, at 879. Schlag explains that there are two views of the individual rights rationale. *Id.* First, the fourth amendment may be seen as addressed not only to law enforcement agencies, but to the courts as well. *Id.* Thus, under this view, admission of illegally obtained evidence constitutes a continuing or separate fourth amendment violation. *Id.* Second, the exclusionary rule may be seen as "the appropriate means by which an individual asserts the right to judicial review of the constitutionality of law enforcement actions connected to his or her prosecution." *Id.* (citing Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 257-60 (1974)).

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

158 Schlag, *supra* note 155, at 879.

159 414 U.S. 338 (1974).

expressly rejected this rationale, stating that "the purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim."[160] And a similar conclusion was reached in *Elkins*, where the Court again rejected the personal rights rationale.[161]

A second justification for the exclusionary rule is the maintenance of judicial integrity.[162] One commentator has argued:

> [T]he judicial branch should not participate in or sanction illegal conduct in the administration of the law. Hence, exclusion of tainted evidence is necessary to divorce the judgments of the courts from any illegal conduct employed in securing evidence and to ensure that judicial decisions in no way defy constitutional prohibitions.[163]

The judicial integrity justification has also been offered by the Court since the origin of the doctrine. In *Weeks v. United States*, the Court stated:

> The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and forced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[164]

However, like the personal rights rationale, the judicial integrity justification has been seriously impaired by subsequent decisions and recent criticism.[165] For example, in *Stone v. Powell*,[166] the Court stated that the "[imperitive] of judicial integrity . . . has limited force as a justification for the exclusion of highly probative evidence."[167] Also, it has been argued that judicial integrity is harmed a good deal more when the Court turns a criminal loose to prey upon society than it does when it affirms a conviction despite a fourth amendment violation.[168]

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160 *Id.* at 347. In rejecting the individual rights rationale, the Court relied upon the deterrence justification, stating that, "the rule is 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." *Id.* at 348. *See infra* notes 169-76 and accompanying text.

161 364 U.S. 206, 217 (1960).

162 Schlag, *supra* note 155, at 880.

163 Comment, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88 (1974). *See also, Weeks*, 232 U.S. at 394; Olmstead v. United States, 277 U.S. 438, 469-85 (1928)(Brandeis, J. and Holmes, J. dissenting).

164 232 U.S. 383, 392 (1914).

165 Schlag, *supra* note 155, at 881.

166 428 U.S. 465 (1976).

167 *Id.* at 485.

168 Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 2 (1987). Kamisar has developed what he calls a "comparative repre-

A third justification for the exclusionary rule that has been relied upon by the Court is the deterrence rationale.[169] The Court has stated that the purpose of the exclusionary rule is to "compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[170] The deterrence rationale was again discussed in *United States v. Calandra*.[171] There, the Court concluded that the exclusionary rule is justified because it has the effect of safeguarding fourth amendment rights by deterring future unlawful police conduct.[172]

There are two ways in which the exclusionary rule operates to deter police misconduct.[173] First, the exclusionary rule deters individual violations of the fourth amendment by " 'removing the incentive to disregard it.' "[174] Thus, a police officer faced with the decision of whether to unlawfully search premises or wait until a warrant is obtained would find it advantageous to first obtain a warrant because he knows that any evidence discovered during a warrantless entry will not be admissible in court. Second, systematic deterrence is furthered.[175] The exclusionary rule "encourage[s] those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system."[176]

Thus, the rationale that has emerged as the most significant is the exclusionary rule's deterrent effect. A decision as to whether to apply the exclusionary rule in a particular situation must be made in light of the deterrent effects. If exclusion will not result in appreciable deterrence, then, clearly, its use is unwarranted.[177]

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hensibility test." He argues that "where the defendant's conduct is more reprehensible than the police officers' (as . . . it usually will be), the 'judges shouldn't soil their hands' argument is a good reason for *admitting* illegally seized evidence." *Id.* at 2 (emphasis in original).

169 Schlag; *supra* note 155, at 881.

170 Elkins v. United States, 364 U.S. 206, 217 (1960).

171 414 U.S. 338 (1974).

172 *Id.* at 347-48.

173 Comment, *Illegally Acquired Information, Consent Searches, and Tainted Fruit*, 87 COLUM. L. REV. 842, 844 (1987).

174 *Id.* at 844 (quoting Stone v. Powell, 428 U.S. 465, 492 (1976)).

175 *Id.*

176 *Id.* (quoting *Stone*, 428 U.S. at 492). *See also* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 756 (1970).

177 United States v. Leon, 468 U.S. 897, 909 (1984). In *Leon*, a search of the defendants' residences and automobiles was conducted pursuant to a facially valid search warrant issued by a state court judge. *Id.* at 902. Large quantities of drugs and other incriminating evidence were seized. *Id.* However, the district court granted defendants' motions to suppress the evidence, finding that the affidavits used in obtaining the warrant were not sufficient to establish probable cause. *Id.* at 903. The Ninth Circuit affirmed. *Id.* at 904-05. But, the Supreme court reversed, holding that "admitting

B. THE BALANCING TEST

The Court has adopted a balancing approach for considering exclusionary rule questions.[178] The social costs of excluding probative evidence and thus releasing a clearly guilty defendant must be weighed against the effect that a failure to exclude evidence would have upon incentives to conduct future warrantless searches and the ensuing fourth amendment violations.[179]

When the balancing test is applied to the facts of *Murray*, it is clear that the Court reached the correct conclusion. First, the result reached in *Murray* will not have an appreciable effect on incentives to conduct unlawful searches. As long as the Court requires genuine independence[180] between the initial unlawful search and the subsequent lawful seizure, the risk of suppression will continue to deter law enforcement officials from conducting warrantless searches.[181]

Furthermore, there remain other deterrents against warrantless searches even in the absence of any exclusionary rule. One significant deterrent is public outrage. Law enforcement officials would hesitate to conduct indiscriminate warrantless searches because this

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evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will not reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests." *Id.* at 898. *See also* United States v. Janis, 428 U.S. 433, 454 (1976). In *Janis*, the Court also concluded that "[t]he prime, if not the sole, purpose of the exclusionary rule is to deter future unlawful police conduct." *Id.* at 433. The Court held:

> The judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign (here the federal government) of evidence illegally seized by a criminal law enforcement agent of another sovereign (here the state government) since the likelihood of deterring law enforcement conduct through such a rule is not sufficient to outweigh the societal costs imposed by the exclusion.

Id.

178 *Leon*, 468 U.S. at 897.

179 *Id.* at 906-08. *See also Janis*, 428 U.S. at 454.

180 See *infra* notes 203-25 and accompanying text for a discussion of assuring independence.

181 In his opinion, Justice Scalia stated:

> 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.

Murray, 108 S. Ct. at 2534 (emphasis in original).

would lead to widespread criticism. This in turn would cause policy makers to increase restrictions on police conduct. Additionally, education of police officers and departmental sanctions would play a role in preventing unlawful conduct.[182] In order to avoid criticism and possible exclusion of probative evidence, police departments have an incentive to educate officers about the fourth amendment and impose sanctions against offending officers for their conduct. Finally, a third potential deterrent is the possibility of private tort claims.[183]

Thus, the decision reached by the Court in *Murray* will not have the effect of providing incentives to conduct warrantless searches. Moreover, even in the event that such a search does occur, the social cost occasioned by the loss of fourth amendment rights is not great. Cases similar to *Murray* do not involve situations in which innocent people are being subjected to random searches. Instead, these cases involve situations in which probable cause existed before any search was conducted.[184]

In his dissent in *Segura*, Justice Stevens argued that such an application of the independent source doctrine does involve a significant fourth amendment violation because any warrantless search prevents the defendant from having the opportunity to destroy the incriminating evidence.[185] However, the Court wisely rejected this

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182 Mertens and Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 399-401 (1981). Mertens and Wasserstrom argue that the threat of the exclusionary rule really does influence police departments, and through them, individual police officers. *Id.* at 399. Even if a particular police officer is indifferent as to whether his or her arrests and seizures result in actual convictions, the officer's superiors are clearly concerned with successful prosecutions. *Id.* Furthermore, even if some individual police officers are hostile toward the fourth amendment, the police department is "not likely to share such a view, at least officially." *Id.* Moreover, police officers are in "an excellent position to assimilate" fourth amndment standards because the fourth amendment "permeates the officers' day-to-day professional life." *Id.* Further, "[e]ven if prosecutors cannot always find the time to explain the Fourth Amendment to the police, many of the larger police departments hire legal counsel to make legal standards intelligible to the policeman on patrol." *Id.*

183 Nix v. Williams, 467 U.S. 431, 446 (1984).

184 As long as independence is required, a police officer without probable cause will have no incentive to conduct a search without a valid warrant because nothing that he or she learns during such a search can be used in obtaining a warrant. *Murray*, 108 S. Ct. at 2534. Therefore, the result reached in *Murray* should have no effect on the possibility of innocent people being subjected to random searches.

185 Segura v. United States, 468 U.S. 796, 833 (1984)(Stevens, J., dissenting). Justice Stevens stated that the Court has "regularly invoked the exclusionary rule because the evidence would have eluded the police absent the illegality." *Id.* (Stevens, J., dissenting). Justice Stevens further stated that:

> The element of access, rather than information, is central to virtually the whole of our jurisprudence under the Warrant Clause of the Fourth Amendment. In all of

argument, stating that the idea that there is a constitutional right to destroy such evidence "defies both logic and common sense."[186]

On the other side of the equation, the social cost of excluding probative evidence and releasing obviously guilty criminals is great. The exclusionary rule "already exacts an enormous price from society,"[187] and any rule which increases this price must be accompanied by significant benefits in the form of deterrence.[188] Furthermore, the cost of dismissing only one case and releasing an obviously guilty defendant may be enormous. To the costs of the crime itself, the wasted efforts of law enforcement officials must also be added. Moreover, the loss of respect for the judicial system and the law weakens the disincentive for criminals to commit crimes.[189]

C. CAN THE COURT MODIFY OR ELIMINATE THE EXCLUSIONARY RULE?

Even though the Court's decision not to suppress evidence in *Murray* passes the balancing test,[190] it could be argued that the Court is not free to alter the exclusionary rule through such exceptions as the independent source doctrine. In *Mapp v. Ohio*,[191] the Court concluded that "the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause . . . ."[192] This holding would seem to leave little room for modification of the exclusionary rule.

> our cases suppressing evidence because it was obtained pursuant to a warrantless search, we have focused not on the authorities' lack of appropriate information to authorize the search, but rather on the fact that that information was not presented to a magistrate. Thus, suppression is the consequence not of a lack of information, but of the fact that the authorities' access to the evidence in question was not properly authorized and hence was unconstitutional.

Id. at 833 n.27.

186 *Id.* at 816.

187 *Id.*

188 *Cf.* Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585 (1983). In a recent empirical study, Nardulli concluded that the social cost of exclusion is not great because a small percentage of lawsuits are dismissed for this reason. *Id.* Nardulli's study used data collected for 7,500 cases. *Id.* His results indicated that successful motions to suppress physical evidence occur in 0.69% of the cases, and successful motions to suppress identifications or confessions occur in less than 0.6% of the cases. *Id.*

189 This may be especially true because cases involving successful motions to exclude probative evidence are likely to be publicized.

190 See *supra* notes 178-89 and accompanying text for a discussion of the balancing test.

191 367 U.S. 643 (1961).

192 *Id.* at 651. *Mapp* overruled Wolf v. Colorado, 338 U.S. 25 (1949). In *Wolf*, Justice Black concluded that "the federal exclusionary rule is not a command of the fourth amendment but is a judicially created rule of evidence which Congress might negate." *Id.* at 39-40 (Black, J., concurring).

Nevertheless, it has been argued that there are at least two possible interpretations of *Mapp*, one of which is not inconsistent with a freedom to significantly alter the exclusionary rule.[193] One possible interpretation is that "the fourth amendment requires an effective deterrent and that exclusion is conclusively presumed, as a matter of constitutional law, to be that effective deterrent."[194] But a second possible interpretation is that the fourth amendment "requires an effective deterrent, and that exclusion is the only (or the only acceptable) enforcement mechanism available to the Court."[195] If this interpretation is accepted, "then Congress [or the Court] by providing a substitute enforcement mechanism or by concluding through fact-finding that historical circumstances have changed, would have greater latitude to modify or eliminate the exclusionary rule."[196]

There are several indications that the second interpretation is the one that the Court has indeed accepted. First, this interpretation is implicit in the Court's reliance upon the deterrence rationale.[197] The balancing approach advocated in *United States v. Leon*[198] requires that the Court ignore the exclusionary rule if admission would have little or no effect on incentives to conduct unlawful searches. For example, in *Nix*, the Court declined to apply the exclusionary rule, finding that any possible reduction in deterrence was outweighed by the "enormous societal cost of excluding truth."[199] The Court also noted that substitute enforcement mechanisms existed which lessened the likelihood that admission of the evidence would promote police misconduct.[200] Second, statements made by the Court in subsequent decisions indicate that the second interpretation has been adopted. In both *Calandra* and *Leon*, the Court referred to the exclusionary rule as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect" on future unlawful police conduct.[201] "Accordingly, '[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives

193 Schlag, *supra* note 155, at 884.

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.*

198 468 U.S. 897 (1984). See *supra* note 177 and accompanying text for a discussion of *Leon*.

199 Nix v. Williams, 467 U.S. 431, 432 (1984).

200 *Id.* at 446. "Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct." *Id.*

201 *Leon*, 468 U.S. at 906 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

are thought most efficaciously served.' "[202]

Thus, when weighing the effect on incentives to conduct warrantless searches against the social cost of releasing clearly guilty defendants, the Court should be able to freely utilize the independent source, inevitable discovery, and attenuated basis exceptions to the extent permitted under the balancing test.

D. ASSURANCE OF INDEPENDENCE

The Court in *Murray* invoked the independent source doctrine, finding that the doctrine is applicable when evidence is initially discovered during a warrantless search, if that evidence is also discovered during a later search conducted with a valid warrant.[203] In reaching this conclusion, the Court determined that the balancing test[204] can still be satisfied as long as the second search is completely independent of the initial, warrantless entry.[205]

In dissent, Justice Marshall criticized the majority opinion, arguing that it failed to provide for sufficient guarantees of independence.[206] Justice Marshall further argued that in order to ensure genuine independence, such a finding must rest on " 'demonstrated historical facts capable of ready verification or impeachment.' "[207] Absent such facts, Justice Marshall asserted, independence cannot be assured, and adequate deterrence against unlawful searches will not be provided.[208]

The dissent's proposed standard of proof is needlessly rigid. A showing of such "demonstrated historical facts" need not be made in order to ensure adequate deterrence against unlawful searches. Instead, the Court should look to several factors in order to ensure that a second, lawful search is indeed an independent source of the evidence in question.

As the dissent argued, the initial inquiry should be whether there are "demonstrated historical facts capable of ready verification or impeachment" which show that the officers planned on obtaining a valid warrant prior to the unlawful search, or that the evidence in question inevitably would have been discovered regardless of the

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202 *Id.* at 909 (quoting *Calandra*, 414 U.S. at 348).

203 Murray v. United States, 108 S. Ct. 2529, 2531 (1988).

204 *See supra* notes 178-89 and accompanying text.

205 108 S. Ct. at 2534. The Court stated that its holding in *Murray* would avoid the cost of excluding probative evidence while still providing significant disincentives against unlawful searches. *Id. See supra* note 184 and accompanying text.

206 *Murray*, 108 S. Ct. at 2536 (Marshall, J., dissenting).

207 *Id.* at 2539 (Marshall, J., dissenting)(quoting *Nix v. Williams*, 467 U.S. 431, 445 n.5).

208 *Id.* (Marshall, J., dissenting).

unlawful search.[209] For example, in *Nix*, there was clear evidence that demonstrated that regardless of the officer's unlawful questioning of the defendant, an independent search party eventually would have discovered the girl's body.[210] If such a showing can be made, then the evidence in question should clearly be admitted, despite the unlawful conduct.[211]

However, absent a showing of "demonstrated historical facts," a finding of independence can still be made. The Court should look to the events leading to the unlawful search. The dissent argues that the majority's decision is erroneous because it "makes the application of the independent source exception turn entirely on an evaluation of the officers' intent."[212] While the dissent is correct in its assertion that a mere evaluation of the officers' intent would fail to ensure genuine independence, it is incorrect in its conclusion that the majority was basing its decision on such a narrow inquiry. Instead, Justice Scalia stated that "[t]o 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 the police officers' assurances on the point. Where the facts render those assurances implausible, the independent source doctrine will not apply."[213] Thus, rather than relying solely upon the officers' statements that they intended to obtain a warrant prior to the initial, warrantless entry, the Court should also look to the facts surrounding those assurances.

For example, in *Murray*, agents of the DEA had closely monitored the activities of the defendants for almost one year prior to the unlawful search.[214] The agents had received information from several sources implicating the defendants in a conspiracy to possess and distribute illegal drugs.[215] By the day of the search, the agents had concluded that a major drug transaction was imminent.[216] Based upon the sum of this information, the agents' statements that they intended to obtain a warrant prior to the unlawful entry were clearly not implausible. On the contrary, it seems much more im-

209 *Id.* (Marshall, J., dissenting).

210 467 U.S. at 448. *See supra* note 52 and accompanying text.

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

212 *Murray*, 108 S. Ct. at 2538 (Marshall, J., dissenting). Justice Marshall argued that "[i]t normally will be difficult for the trial court to verify, or the defendant to rebut, an assertion by officers that they always intended to obtain a warrant . . . ." *Id.* (Marshall, J., dissenting).

213 *Id.* at 2534, n.2.

214 United States v. Moscattiello, 771 F.2d 589, 591 (1st Cir. 1985).

215 *Id.*

216 *Id.*

plausible that after spending nearly twelve months collecting information, the agents did not intend to obtain a warrant to search the warehouse. In fact, the Court of Appeals for the First Circuit concluded that "[t]his is as clear a case as can be imagined where the discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant and the successful search that ensued."[217]

In addition to the events leading to an unlawful search, the Court should also inquire into the good faith of the officers conducting such a search. Whether the fourth amendment violation was deliberate is an important factor in exclusionary rule analysis because exclusion of evidence discovered pursuant to a good faith mistake will have little, if any, effect on deterrence of future violations.[218] A good faith exception to the exclusionary rule was adopted by the Court in *Leon*.[219]

There, the Court held that application of the exclusionary rule should continue when the fourth amendment violation has been "substantial and deliberate."[220] However, the balancing approach that has evolved for determining whether the rule should be applied in a variety of contexts suggests that the rule should be modified to permit the introduction of evidence obtained by officers reasonably relying on a warrant issued by a detached and neutral magistrate.[221]

This good faith exception to the exclusionary rule should be extended to include the admission of evidence obtained through an unlawful search conducted by officers who reasonably believed that

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217 *Id.* at 604. Despite the findings of the appellate court, the Supreme Court remanded the case, concluding that "it is the function of the District Court rather than the Court of Appeals to determine the facts . . . ." *Murray*, 108 S. Ct. at 2536.

218 United States v. Leon, 468 U.S. 897, 918-19 (1984).

219 *Id.* at 897. In *Leon*, the Court held that the exclusionary rule does not apply when evidence is discovered during a search conducted by officers who reasonably believed that they possessed a valid search warrant. *Id.* See *supra* note 177 for a discussion of *Leon*.

220 *Id.* at 908-09.

221 *Id.* at 908. *But see* Schlag, *supra* note 155, at 895. Schlag argues against a good faith test, stating that:

> Excluding evidence seized illegally but in good faith serves to deter fourth amendment violations insofar as it gives the law enforcement officer an incentive to engage in learning. A good faith exception, by contrast, treats law enforcement knowledge and application of fourth amendment law as a *fixed* rather than a *dynamic* phenomenon. Accordingly, such an exception makes sense only if a law enforcement officer is incapable of expanding his knowledge and capacities. The good faith exception necessarily focuses on the state of mind of the officer at the time of the violation, and thus implies that if the officer acted in good faith at that time, no more could be expected of him. Yet, if the law enforcement officer had engaged in greater learning activities prior to the violation, it is possible that no violation would have occurred.

Id. at 895-96.

there was a substantial likelihood of destruction of incriminating evidence, when there was also an independent, lawful source of the evidence. The Court in *Murray* seemed to make such an extension.[222] Justice Scalia noted that the district court found that the agents entered the warehouse " 'in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence.' "[223] Justice Scalia further argued that even if the agents "misjudged the existence of sufficient exigent circumstances to justify the warrantless entry . . . there is nothing to suggest that they went in merely to see if there was anything worth getting a warrant for."[224]

Such an extension of the good faith exception reinforces the balancing test.[225] By excluding evidence when the fourth amendment violation is deliberate, further deterrence against unlawful searches is provided. But, when the initial unlawful search was not made merely to see if there was anything worth getting a warrant for, admission of evidence discovered during a subsequent lawful search would not provide incentives for future warrantless searches. Instead, exclusion of such evidence "would put the police (and society) not in the *same* position they would have occupied if no violation occurred, but in a *worse* one."[226]

Thus, a showing of "demonstrated historical facts capable of ready verification or impeachment" such as those in *Nix* is unnecessary. If the Court looks to the circumstances leading to a warrantless search, and the good faith of the officers conducting the search, sufficient independence can be ensured to provide adequate deterrence against future violations.

VI. Conclusion

By substantially expanding the scope of the independent source doctrine, *Murray v. United States* further eroded what remained of the fourth amendment exclusionary rule. Evidence discovered during

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222 Murray v. United States, 108 S. Ct. 2529, 2534 (1988).

223 *Id.* at 2534-35 n.2 (quoting United States v. Carter, No. 83-102-S (D. Mass. Dec. 23, 1983)).

224 *Id.* at 2535, n.2. The facts in *Murray* clearly support this conclusion. There, the DEA agents observed two trucks leave the warehouse. *Id.* at 2532. They had no way of knowing whether anyone was left inside the warehouse. When it was determined that the trucks contained controlled substances, the agents had valid reason to fear that if they did not enter the warehouse someone in the warehouse would have the opportunity to destroy any drugs inside.

225 *See supra* notes 178-89 and accompanying text.

226 *Murray*, 108 S. Ct. at 2535 (emphasis in original)(citing *Nix*, 467 U.S. at 443).

an unlawful entry of private premises is now admissible when there is also an independent, lawful source of the evidence.

Despite this seemingly radical extension from previous applications of the independent source doctrine, the Court's decision in *Murray* was firmly grounded in the underlying principles of the exclusionary rule. The Court's holding provides adequate assurance of independence. Consequently, significant disincentives against unlawful searches remain intact. While strengthening the power of law enforcement officials to convict obviously guilty defendants, the *Murray* Court did not sacrifice "those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[227]

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