

Golden Gate University Law Review

Volume 40

Issue 3 *Ninth Circuit Survey*

Article 4

January 2010

Limits of the Inevitable Discovery Doctrine in United States v. Young: The Intersection of Private Security Guards, Hotel Guests, and the Fourth Amendment

Lauren Young Epstein

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>

 Part of the [Evidence Commons](#)

Recommended Citation

Lauren Young Epstein, *Limits of the Inevitable Discovery Doctrine in United States v. Young: The Intersection of Private Security Guards, Hotel Guests, and the Fourth Amendment*, 40 Golden Gate U. L. Rev. (2010).
<http://digitalcommons.law.ggu.edu/ggulrev/vol40/iss3/4>

This Note is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

NOTE

LIMITS OF THE INEVITABLE DISCOVERY DOCTRINE IN *UNITED STATES V. YOUNG*: THE INTERSECTION OF PRIVATE SECURITY GUARDS, HOTEL GUESTS AND THE FOURTH AMENDMENT

INTRODUCTION

In *United States v. Young*, the United States Court of Appeals for the Ninth Circuit confronted the question of whether a violation of a hotel guest's Fourth Amendment right to be free from unreasonable searches and seizures can be ignored if the evidence obtained during the commission of the violation would have been inevitably discovered by the police by lawful means.¹ In *Young*, private hotel security officers invited a police officer to observe their search of a guest's hotel room and personal effects,² some of which the police officer ultimately seized as evidence of the hotel guest's suspected criminal activity.³ The Ninth Circuit affirmed the district court's holding that this search violated the hotel guest's Fourth Amendment right and that, under the exclusionary rule, the gun discovered during the search should be suppressed as the tainted fruit of that unlawful search.⁴

The Ninth Circuit in *Young* correctly affirmed the district

¹ *United States v. Young*, 573 F.3d 711 (9th Cir. 2009).

² On appeal before the Ninth Circuit, the government did "not dispute the district court's conclusion that Hilton security should be considered state actors." *Id.* at 717.

³ *Id.* at 715.

⁴ *Id.* at 715, 723.

332 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40

court's grant of the motion to suppress the illegally obtained evidence. However, the court failed to articulate the clear limitations on the inevitable discovery doctrine. In light of the strong argument by the dissent in favor of an expansion of the inevitable discovery doctrine when private security guards assist police officers in obtaining evidence that would otherwise be off limits, *Young* may have unintentionally set the stage for a significant curtailment of Fourth Amendment protections.

This Note analyzes the *Young* court's opinion and the potential consequences of the majority's cursory rejection of the government's inevitable discovery argument. This Note also reconciles the differing applications of the inevitable discovery doctrine by the *Young* majority and dissent and highlights the speculative nature of employing the inevitable discovery doctrine based on the facts of *Young*. Part I of this Note presents the background of the case and the historical development of Fourth Amendment jurisprudence, focusing on the inevitable discovery doctrine as articulated by the Supreme Court in *Nix v. Williams*.⁵ Part II outlines the *Young* decision and analyzes *Young*'s expectation of privacy in comparison with other cases involving similar facts and the inevitable discovery doctrine. Part II also discusses the dissent's vigorous, but misguided, argument in favor of applying the inevitable discovery doctrine to *Young*'s case. Part III discusses the potential consequences of the majority's cursory examination of the inevitable discovery doctrine and presents a more in-depth analysis of why the inevitable discovery doctrine does not apply in this case.

I. BACKGROUND

A. FACTS AND PROCEDURAL HISTORY

On the evening of August 5, 2007, James Johnson, a guest at the downtown San Francisco Hilton Hotel, reported to hotel staff that a laptop computer, an iPod, and other items were missing from his hotel room, Room 13572.⁶ Hilton Hotel's Assistant Director of Security & Safety, Officer Dirk J. Carr (Hilton Officer Carr), reviewed a lock interrogation report⁷ and found that a copy

⁵ *Nix v. Williams*, 467 U.S. 431 (1984).

⁶ *Young*, 573 F.3d at 713-14.

⁷ A lock interrogation report is generated by a software system called Saflok. Declaration of William Marweg in Support of United States' Opposition to Defendant's Motion to Exclude Evidence, Ex. 2, United States' Opposition to Defendant's Motion to

of the key to Room 13572 had also been inadvertently registered to hotel guest Michael Young by hotel front desk personnel.⁸ Suspecting Young's involvement in the theft of Johnson's personal belongings, Hilton Officer Carr called Young in his hotel room, Room 13575, to ask whether he had accessed Room 13572, to which Young replied "no."⁹

A few hours later, at roughly 8:30 p.m., Hilton Officer Carr and Hilton Hotel Security Officer Roger Hicks (Hilton Officer Hicks) went up to Rooms 13572 and 13575 to investigate the missing items and the room discrepancy.¹⁰ They found Room 13572 to be completely vacant.¹¹ In Room 13575, the room registered to Young, the private security officers found an empty key card packet on the bed with Room Number 13572 written on it.¹² Hilton Officers Carr and Hicks found two backpacks in the room: one under the bed and another in the closet.¹³ They opened the backpack in the closet and found a gun in the zipped front pocket, in addition to credit cards and checkbooks in other names.¹⁴ Hilton's written security policy required that "[i]n the event a team member in the course of his/her duties observes or finds a weapon in a guest room . . . [s]ecurity shall E-key¹⁵ the guest room without disturbing the weapon and leave a note on the door for the guest to call Security upon returning to the room."¹⁶ When the hotel guest returns to his or her room and finds a note on the door indicating the electronic lockout, he or she "is to be informed that

Suppress Fruits of Search at ¶ 4, *United States v. Young*, No. CR-07-0559 JSW (N.D. Cal. Sept. 20, 2007) [hereinafter *Marweg Decl.*]. Saflok allows Hilton security to determine the activity of hotel keys and door locks by running a lock interrogation report. *Id.* This system also facilitates the electronic lockout of a hotel room, which can be accessed only by a special electronic lockout key issued only to Hilton's security staff. *Id.*

⁸ Report of Hilton Security Officer Dirk Carr, Ex. D, Notice of Motion and Motion to Suppress Fruits of Unlawful Search and Seizure; Memorandum of Points and Authorities in Support of Motion to Suppress, *United States v. Young*, No. CR-07-0559 JSW (N.D. Cal. Sept. 6, 2007) [hereinafter *Carr Report*].

⁹ *Id.*

¹⁰ Declaration of Dirk Carr in Support of United States' Opposition to Defendant's Motion to Exclude Evidence, Ex. 1, *United States' Opposition to Defendant's Motion to Suppress Fruits of Search* at ¶ 6, *United States v. Young*, No. CR-07-0559 JSW (N.D. Cal. Sept. 20, 2007) [hereinafter *Carr Decl.*].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*; *Carr Report*, *supra* note 8, at ¶ 4.

¹⁴ *Carr Decl.*, *supra* note 10, at ¶ 6.

¹⁵ "E-key" refers to the practice of placing a hotel room on electronic lockout. See *Marweg Decl.*, *supra* note 7, at ¶ 4.

¹⁶ Hilton Hotels Corp. Standard Practice Instructions, Tab A, *Marweg Decl.* § 4(A) [hereinafter *Hilton SPI*].

334 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40]

company policy prohibits possession of weapons on company and/or hotel property and offered a secured location on company or hotel property, if available, for the storage of such weapon until the time of his/her departure."¹⁷ Hilton Officers Carr and Hicks placed Room 13575 on electronic lockout but failed to leave a note directing Young to the front desk for advisement of the policy and proper storage of his weapon.¹⁸

That same night, when Young returned to his hotel room at approximately 11:48 p.m., he was denied entry by his electronic key card.¹⁹ Likely believing his card had been inadvertently deactivated, Young went to the front desk to remedy his access problem,²⁰ only to be seated in the lobby as hotel security summoned local San Francisco Police Department (SFPD) Officer Koniaris.²¹ There are no facts indicating that Young believed he had been evicted or that Hilton intended to evict him from his hotel room. Hilton Officer Hicks, who contacted Hilton's Director of Security, Bill Marweg (Hilton Director Marweg), after being informed of Young's return, radioed SFPD Officer Koniaris and requested that he come inside.²² Hilton Officer Hicks told SFPD Officer Koniaris that he believed that Young had stolen items from another hotel guest.²³ SFPD Officer Koniaris asked Young for his name and his driver's license.²⁴ Young then asked if his

¹⁷ *Id.* § 4(A)(9).

¹⁸ See Carr Declaration, *supra* note 10, at ¶ 7; Affidavit of Michael Hamilton, Ex. B, Notice of Motion and Motion to Suppress Fruits of Unlawful Search and Seizure; Memorandum of Points and Authorities in Support of Motion to Suppress § 5, United States v. Young, No. CR-07-0559 JSW (N.D. Cal. Sept. 6, 2007).

¹⁹ Marweg Decl., *supra* note 7, at ¶ 14.

²⁰ Judge Goodwin, who wrote the majority opinion in *United States v. Young*, hypothesized that "Young might reasonably have believed his key to be defective or demagnetized, rather than suspecting that he had been evicted from the room." *United States v. Young*, 573 F.3d 711, 717 (9th Cir. 2009).

²¹ Report of Hilton Security Officer Roger Hicks, Ex. C, Notice of Motion and Motion to Suppress Fruits of Unlawful Search and Seizure; Memorandum of Points and Authorities in Support of Motion to Suppress, United States v. Young, No. CR-07-0559 JSW (N.D. Cal. Sept. 6, 2007) [hereinafter Hicks Report]; Declaration of Officer Michael P. Koniaris in Support of United States' Opposition to Defendant's Motion to Exclude Evidence, Ex. 4, United States' Opposition to Defendant's Motion to Suppress Fruits of Search at ¶ 3, United States v. Young, No. CR-07-0559 JSW (N.D. Cal. Sept. 20, 2007) [hereinafter Koniaris Decl.].

²² Declaration of Roger Hicks in Support of United States' Opposition to Defendant's Motion to Exclude Evidence, Ex. 3, United States' Opposition to Defendant's Motion to Suppress Fruits of Search at ¶ 6, United States v. Young, No. CR-07-0559 JSW (N.D. Cal. Sept. 20, 2007) [hereinafter Hicks Decl.].

²³ *Id.*

²⁴ Koniaris Decl., *supra* note 21, at ¶ 4.

companion could leave, to which Officer Koniaris replied that he could after Hilton Security Officer Hicks verified that the individual had just arrived at the hotel with Young and was otherwise uninvolved.²⁵

SFPD Officer Koniaris exited the hotel and conducted a “warrants and identification” check, which indicated that Young had been arrested for felonies and misdemeanors in the past.²⁶ SFPD Officer Koniaris returned to the lobby and engaged Young in twenty to thirty minutes of conversation on topics such as family matters and Young’s felonious past and prison sentences, while awaiting further instructions from Hilton Officer Hicks.²⁷ Hilton Officer Hicks then informed SFPD Officer Koniaris that a gun had been found in Young’s room, at which point SFPD Officer Koniaris and various Hilton security staff took Young to the Hilton security office, searched him for weapons, and handcuffed him to a bench.²⁸ SFPD Officer Koniaris then called his sergeant to advise him of the situation and was instructed that he “could not enter Young’s hotel room” without a search warrant, “but that Hilton security staff could enter a guest’s hotel room” without authorization from a magistrate.²⁹ Hilton Officer Hicks, joined by Hilton Officer Carr, asked SFPD Officer Koniaris to accompany them upstairs to Room 13575.³⁰ The two private security officers entered the room, leaving the door open to allow SFPD Officer Koniaris to observe their activities inside the room.³¹

Once inside Room 13575, and while still visible to SFPD Officer Koniaris, Hilton Officer Hicks removed a backpack from the hotel room’s closet and placed it on the bed.³² Hilton Officer Hicks then unzipped the front pocket of the backpack to reveal a gun.³³ Upon viewing the gun, SFPD Officer Koniaris entered the room and took possession of the backpack containing the gun.³⁴ SFPD Officer Koniaris returned to the Hilton security office and arrested

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* The court noted that “[a]t no time did Officer Koniaris read Young his *Miranda* rights or indicate to him that he was a suspect.” *United States v. Young*, 573 F.3d 711, 715 (9th Cir. 2009). The court, however, failed to identify, analyze and dispose of the *Miranda* issue in this case, and its decision on that issue is beyond the scope of this Note.

²⁸ Koniaris Decl., *supra* note 21, at ¶ 6.

²⁹ *Id.* at ¶ 7.

³⁰ Hicks Decl., *supra* note 22, at ¶ 7; *Young*, 573 F.3d 711.

³¹ *See id.*; Koniaris Decl., *supra* note 21, at ¶ 8.

³² Koniaris Decl., *supra* note 21, at ¶ 9; *Young*, 573 F.3d at 715.

³³ Koniaris Decl., *supra* note 21, at ¶ 9.

³⁴ *Id.* ¶ 10.

336 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40

Young based on his belief that Young was a felon in possession of a gun.³⁵

Before trial, Young moved to suppress the evidence obtained that night by SFPD Officer Koniaris, alleging that his Fourth Amendment right was violated by the officer's unconstitutional search and seizure of his possessions without a warrant.³⁶ District Judge White granted Young's motion.³⁷ The government appealed, but the Ninth Circuit affirmed, holding that Young maintained a reasonable expectation of privacy in his hotel room and that the inevitable discovery doctrine did not apply to the search of Young's hotel room and the seizure of his personal belongings.³⁸

B. THE FOURTH AMENDMENT AND THE INEVITABLE DISCOVERY DOCTRINE

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.³⁹

The privacy protections granted by the Fourth Amendment extend to an individual who maintains a reasonable expectation of privacy in his or her person, effects, abode, or hotel room.⁴⁰ This expectation of privacy must not only be subjectively held by the individual but must also be "one that society is prepared to recognize as 'reasonable.'"⁴¹

The exclusionary rule, a court-created doctrine that prohibits the admission at a criminal trial of evidence obtained as a result of an illegal search or seizure,⁴² serves to deter police misconduct,⁴³

³⁵ *Id.* ¶ 12. About two months after Young's arrest at the hotel, the government determined that Young had used a stolen credit card to reserve his room, though that fact neither supports nor detracts from the court's analysis on this issue. *Young*, 573 F.3d at 715. This fact could affect the court's analysis of Young's expectation of privacy, but the hotel was unaware of this fact at the time the gun was discovered.

³⁶ *Young*, 573 F.3d at 715.

³⁷ *Id.*

³⁸ *Id.* at 723.

³⁹ U.S. CONST. amend. IV.

⁴⁰ *United States v. Dorais*, 241 F.3d 1124, 1128 (9th Cir. 2001) (citing *Minnesota v. Olson*, 495 U.S. 91, 95 (1990)).

⁴¹ *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990).

⁴² Although there has been recent dicta that the exclusionary rule is not

to protect individual rights, and to preserve judicial integrity.⁴⁴ The rule was first applied in *Weeks v. United States*,⁴⁵ where the United States Supreme Court reasoned:

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 searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.⁴⁶

In consideration of the tension between citizens' constitutional rights and the judiciary's role in achieving justice, the Supreme Court has created a variety of exceptions to the exclusionary rule.⁴⁷ One such exception, at issue in *Young*, is the inevitable

automatically invoked as a result of an unconstitutional search and seizure (see *Herring v. United States*, 129 S. Ct. 695, 698-700 (2009); see also *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (stating that "[s]uppression of evidence, however, has always been [this Court's] last resort, not our first impulse")), that specific issue is beyond the scope of this Note.

⁴³ *Herring*, 129 S. Ct. at 700. At the core of the current debate over the exclusionary rule is whether the only purpose of the rule is to deter police misconduct. See *id.* (stating that "the exclusionary rule is not an individual right and applies only where it results in appreciable deterrence" (citing *United States v. Leon*, 468 U.S. 897, 909 (1984))). But see *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (maintaining that the exclusionary rule protects individuals' fundamental rights and maintains judicial integrity). The United States Supreme Court majority currently maintains that the rule serves only the deterrence purpose, but this particular exploration is beyond the scope of this Note.

⁴⁴ See, e.g., *United States v. Connelly*, 479 U.S. 157, 169 (1986) (explaining that exclusionary rules are "aimed at deterring lawless conduct by police and prosecution"); *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (reasoning on the basis of judicial integrity that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence"); *Elkins v. United States*, 364 U.S. 206, 223 (1960) (citing *McNabb v. United States*, 318 U.S. 332, 345 (1943) (holding that a conviction resting on illegally obtained evidence cannot stand without making the courts themselves accomplices to "willful disobedience" of law)); *Weeks v. United States*, 232 U.S. 383, 394 (1914) (implying that to sanction by judicial decision unconstitutional searches and seizures would be to affirm an "open defiance" of the prohibitions enumerated by the Constitution); *People v. Navarro*, 41 Cal. Rptr. 3d 164, 170 n.6 (Cal. Ct. App. 2006) (stating that the exclusionary rule "is designed to deter police misconduct"); *State v. Childress*, 666 P.2d 941, 942 (Wash. Ct. App. 1983) (describing exclusionary rule as "designed not only to deter unlawful police conduct, but also to protect individual rights").

⁴⁵ *Weeks*, 232 U.S. 383.

⁴⁶ *Id.* at 393.

⁴⁷ See *Pearson v. Callahan*, 129 S. Ct. 808, 821 (2009) (explaining that the good faith exception to the exclusionary rule where officers rely on a facially valid search warrant will allow the admission of evidence if either the warrant issued was supported by probable cause, or it was not, but the officers executing it reasonably believed that it was); *Murray v. United States*, 487 U.S. 533, 537 (1988) (discussing the independent source doctrine, which holds evidence admissible if the prosecution can show that illegally acquired evidence was also acquired from a source independent of the initial illegality); *Nardone v.*

338 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40]

discovery doctrine.

The inevitable discovery doctrine, which is closely related to the harmless-error doctrine,⁴⁸ permits illegally obtained evidence to be admitted in a criminal trial if “the evidence in question would inevitably have been discovered without reference to the police error or misconduct.”⁴⁹ The seminal case on the doctrine of inevitable discovery, *Nix v. Williams*, involved a man arraigned in the kidnapping and suspected murder of a ten-year-old girl.⁵⁰ The defendant, Williams, had surrendered to the police after a warrant was issued for his arrest.⁵¹ While two police officers escorted Williams from Davenport, Iowa, to Des Moines in a patrol car, the young girl was still missing, and two hundred law enforcement officers and private citizens had been deployed in the area to find her body.⁵² During the car ride, one of the officers began speaking to Williams despite a promise both officers gave to Williams’s attorney that they would not engage Williams in conversation.⁵³ This discussion resulted in Williams’s eventual agreement to direct the officers to the location of the young girl’s body.⁵⁴

Nix v. Williams is notably one of the few cases to make it to the United States Supreme Court twice for review.⁵⁵ On the first appeal, the Court suppressed evidence of Williams’s statements

United States, 308 U.S. 338, 341 (1939) (holding that, under the attenuation doctrine, evidence obtained illegally can be introduced where the connection between the illegality and the evidence “may have become so attenuated as to dissipate the taint”).

⁴⁸ *Chapman v. California*, 386 U.S. 18, 22 (1967), set out the rationale behind the harmless-error rule as follows:

All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for “errors or defects which do not affect the substantial rights of the parties.” 28 U. S. C. § 2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

Id. (footnote omitted).

⁴⁹ *Nix v. Williams*, 467 U.S. 431, 448 (1984).

⁵⁰ *Id.* at 434-36.

⁵¹ *Id.* at 435.

⁵² *Id.* at 435, 448.

⁵³ *Id.* at 435.

⁵⁴ *Nix*, 467 U.S. at 436.

⁵⁵ See *Brewer v. Williams*, 430 U.S. 387 (1977); *Nix*, 467 U.S. at 431.

on the ground that the police had violated Williams's Sixth Amendment right to counsel.⁵⁶ On remand,⁵⁷ the prosecution presented no evidence of Williams's statements, but relied instead on evidence of the condition of the girl's body and clothing and on the results of postmortem medical and chemical tests on the body.⁵⁸ On his second appeal, Williams contended that evidence of the body's location and condition was "fruit of the poisonous tree"⁵⁹ taken in violation of his Sixth Amendment right to counsel because Williams's statements resulted in the discovery by police of incriminating information that was later used against him at trial.⁶⁰ The Supreme Court, however, held that the evidence was admissible; in so holding, the Court applied the inevitable discovery doctrine for the first time.⁶¹ The Court held that the unconstitutionally obtained evidence was nevertheless admissible because the government had shown that the girl's body "inevitably would have been found" by search crews.⁶²

The *Nix* Court explained that the "purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct."⁶³ The Court reasoned that if the "prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have

⁵⁶ *Brewer*, 430 U.S. at 406; see U.S. CONST. amend. VI (stating in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.").

⁵⁷ In affirming the appellate court's holding that Williams had not waived his Sixth Amendment right to counsel and that evidence of his statements was properly suppressed, 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." *Brewer*, 430 U.S. at 406 n.12.

⁵⁸ *Nix*, 467 U.S. at 437.

⁵⁹ The contention, in other words, was that the evidence was a product of the detective's unconstitutional questioning. See *Nardone v. United States*, 308 U.S. 338, 341 (1939).

⁶⁰ *Nix*, 467 U.S. at 440-43.

⁶¹ The Supreme Court in *Nix* had substantial support for its adoption of the inevitable discovery doctrine from the majority of state and federal courts in the country, and the doctrine has developed an even more impressive following in the fifteen years since its inception. See, e.g., *United States v. Apker*, 705 F.2d 293, 306-07 (8th Cir. 1983); *United States v. Fisher*, 700 F.2d 780, 784 (2d Cir. 1983); *United States v. Romero*, 692 F.2d 699, 704 (10th Cir. 1982); *United States v. Roper*, 681 F.2d 1354, 1358 (11th Cir. 1982); *Papp v. Jago*, 656 F.2d 221, 222 (6th Cir. 1981); *United States v. Bienvenue*, 632 F.2d 910, 914 (1st Cir. 1980); *United States v. Brookins*, 614 F.2d 1037, 1042, 1044 (5th Cir. 1980).

⁶² *Nix*, 467 U.S. at 450.

⁶³ *Id.* at 443-44 n.4.

been discovered by lawful means – here the volunteers’ search – then the deterrence rationale has so little basis that the evidence should be received.”⁶⁴ In supporting its requirement of a preponderance-of-the-evidence standard, the Court explained that “inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings.”⁶⁵ The “demonstrated historical facts capable of ready verification” in *Nix* that were sufficient to prove inevitability were the following: the massive police-led search teams and their deliberate grid-fashion mapping, their close proximity to the site of the body, the trial court’s finding that the search team would have resumed and found the body “in short order,”⁶⁶ the teams’ strict instructions to search all ditches and culverts (one of which was where the girl’s body was found), and the freezing temperatures that the trial court found would have suspended tissue deterioration.⁶⁷

The Supreme Court was convinced in *Nix* that the girl’s body would have been inevitably discovered by the police force’s lawful and aggressive search efforts.⁶⁸ However, the question moving forward from *Nix* continues to be about less conclusive factual scenarios. *Nix*’s preponderance-of-the-evidence standard provided the framework for the Ninth Circuit’s inevitable discovery doctrine analysis in *Young*.

II. THE *YOUNG* MAJORITY OPINION

A. *YOUNG* MAINTAINED A REASONABLE EXPECTATION OF PRIVACY IN HIS HOTEL ROOM

The *Young* court’s first step was to consider whether *Young* maintained a reasonable expectation of privacy in his hotel room.⁶⁹ If he did not maintain a reasonable expectation of privacy in his hotel room, no Fourth Amendment protections would extend to his belongings that were seized as evidence by SFPD Officer Koniaris. The search would therefore be deemed lawful and the inquiry would not need to proceed to an analysis of the inevitable

⁶⁴ *Id.* at 444.

⁶⁵ *Id.*

⁶⁶ *Id.* at 438.

⁶⁷ *Id. passim.*

⁶⁸ *Nix*, 467 U.S. at 449-50.

⁶⁹ *United States v. Young*, 573 F.3d 711, 715-16 (9th Cir. 2009).

discovery doctrine.

Under firmly established law, an individual maintains the same expectation of privacy against unreasonable searches and seizures under the Fourth Amendment in a hotel room as that individual would in his or her home.⁷⁰ To invoke Fourth Amendment protection, “a person must . . . demonstrate a subjective expectation that his activities would be private, and he must show that his expectation was one that society is prepared to recognize as reasonable.”⁷¹ The *Young* court first analogized the facts to those of *United States v. Bautista* in making this determination, and found them to preclude application of the inevitable discovery doctrine.⁷²

In *Bautista*, the defendant rented a motel room using a stolen credit card, though that fact was unknown to the motel manager at the time of check-in.⁷³ When the manager discovered the fraud after receiving a phone call from the third-party company that reserved the defendant’s room, she called the local police department and asked them to “find out what was going on with [the defendant] and the credit card.”⁷⁴ If the defendant could not explain the credit card situation to the manager’s satisfaction, she was prepared to have him evicted unless he could make alternative payment arrangements.⁷⁵ After police officers arrived, the motel manager gave them a key to the defendant’s room. The officers knocked on the door and said, “San Diego police. Open the door.”⁷⁶ The defendant’s wife opened the door and was silent.⁷⁷ The officers asked for and received her consent to search the room, but the Ninth Circuit found her consent to have been tainted and consequently ordered the trial court to suppress the evidence of counterfeit money and related paraphernalia found

⁷⁰ See *Stoner v. California*, 376 U.S. 483, 490 (1964) (holding that “[n]o less than a tenant of a house, or the occupant of a room in a boarding house, . . . a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures”); *United States v. Cormier*, 220 F.3d 1103, 1108-09 (9th Cir. 2000) (stating that the “Fourth Amendment protection against unreasonable searches and seizures is not limited to one’s home, but also extends to such places as hotel or motel rooms”).

⁷¹ *United States v. Bautista*, 362 F.3d 584, 589 (9th Cir. 2004) (citing *United States v. Nerber*, 222 F.3d 597, 599 (9th Cir. 2000)).

⁷² See *id.*

⁷³ *Id.* at 586-87.

⁷⁴ *Id.* at 587.

⁷⁵ *Id.*

⁷⁶ *Id.* at 591.

⁷⁷ *Id.*

within the room.⁷⁸

The court of appeals in *Bautista* held that the search of the defendant's motel room and the subsequent seizure of the counterfeit money and paraphernalia violated the defendant's Fourth Amendment right. The *Bautista* court based its holding on two points: (1) the defendant's occupancy had not been lawfully terminated by management or by the police so as to constitute an eviction, so the defendant maintained a reasonable expectation of privacy in the hotel room, and (2) because he retained that reasonable expectation, the search and seizure were unconstitutional.⁷⁹ The court found that it was "undisputed in this case that the motel's manager took no affirmative steps to repossess the room once she learned that it had been reserved with a stolen credit card."⁸⁰ The manager never asked the police to evict the defendant, pursuant to the motel's "generally lax practices."⁸¹

In *Young*, the hotel's security guards were concerned with strictly adhering to hotel security policy. Their concern for proper compliance was indicated by their immediate efforts to contact Hilton Director Marweg upon discovering the gun in Young's hotel room.⁸² Given that nothing in Hilton's procedure manual mandated eviction in the event of a room-key mix-up, there was nothing in the record to suggest that Hilton intended to evict Young or that he believed he was being or had been evicted. As the majority stressed, "Young's return to his room and attempt to enter it are evidence Young still believed he was a guest at the hotel, a reasonable belief given that the hotel had not actually evicted him or told him that he was evicted."⁸³ The court cited additional facts that "militate against a factual finding that Young had been evicted from his room," including the following: Young was never told by Hilton security staff that he had been evicted; Young's belongings were never removed from his room; Young had not been removed from the registered guest list; Hilton security staff did not contact the police after first discovering the firearm, but only after Young returned to his room; and at the time of the warrantless search and seizure, Hilton security staff and

⁷⁸ *Bautista*, 362 F.3d at 588, 592.

⁷⁹ *Id.* at 593.

⁸⁰ *Id.* at 590.

⁸¹ *Id.* at 590 (citing *United States v. Dorais*, 241 F.3d 1124 (9th Cir. 2001)).

⁸² See *United States v. Young*, 573 F.3d 711, 714 (9th Cir. 2009).

⁸³ *Id.* at 718.

SFPD Officer Koniaris considered Young to be in possession of the room, based upon their references to the room as “Young’s room” and SFPD Officer Koniaris’s statement to Hilton Officer Hicks that he “could not enter Young’s room to search it.”⁸⁴

The *Young* court next distinguished the case from those cited by the government in support of its appeal: *United States v. Cunag*,⁸⁵ *United States v. Allen*,⁸⁶ and *United States v. Jacobsen*.⁸⁷ In *Cunag*, the Ninth Circuit found that nothing in the Fourth Amendment prohibited the police’s entry, search and seizure of the defendant’s hotel room because the hotel took “justifiable affirmative steps to repossess [his room] and to assert dominion and control over it when they discovered and confirmed that [the defendant] had procured occupancy by criminal fraud and deceit.”⁸⁸ *Cunag* involved a defendant who checked into a hotel room using a deceased woman’s credit card with a forged governmental identification card and a forged letter authorizing his use of the credit card.⁸⁹ The morning after the defendant checked into the hotel room, the hotel manager was informed that the defendant’s registration paperwork was “irregular,” and he called the Department of Motor Vehicles to investigate the suspicious documentation.⁹⁰

After conclusively determining that the materials provided by the defendant to reserve the hotel room were fraudulent, hotel management locked him out of the hotel room and contacted the local police department to report the crime.⁹¹ When three police officers arrived at the hotel, the manager discovered that someone was using the telephone in the hotel room, which was surprising because the defendant had been locked out of the room.⁹² The officers accompanied the hotel manager to the room in question and, when the defendant opened the door, the police officers smelled a strong odor of smoke coming from the room and grew concerned that there was a fire in the designated nonsmoking hotel room.⁹³ The officers removed the defendant and his

⁸⁴ *Id.* at 717.

⁸⁵ *United States v. Cunag*, 386 F.3d 888 (9th Cir. 2004).

⁸⁶ *United States v. Allen*, 106 F.3d 695 (6th Cir. 1997).

⁸⁷ *United States v. Jacobsen*, 466 U.S. 109 (1984).

⁸⁸ *Cunag*, 386 F.3d at 895.

⁸⁹ *Id.* at 889.

⁹⁰ *Id.* at 890.

⁹¹ *Id.*

⁹² *Id.* at 892.

⁹³ *Id.* at 890, 895.

companions from the room and detained them in the hallway, then entered the room and observed a “red hot burner” on the room’s stove that had been burning tissue, as well as evidence of stolen mail in plain view of the officers.⁹⁴ The Ninth Circuit affirmed the district court’s denial of the defendant’s motion to suppress the evidence, after finding that the hotel’s lockout of the defendant and the room’s other occupants, in combination with registering a police report, was “a justifiable ‘affirmative act of repossession by the lessor’ [that] is the factor that finally obliterates any cognizable expectation of privacy a lessee might have.”⁹⁵

The court in *Young* held that “[u]nlike *Bautista*, *Cunag* is inapplicable to the facts presented here.”⁹⁶ In *Cunag*, the defendant had been conclusively evicted, but in *Young*, the electronic lockout was only a temporary measure, as the Hilton SPI did not require eviction of a guest upon the discovery of a weapon. Furthermore, at the time of the lockout, Young was not suspected of committing a crime, which may have implicated a different clause of the security manual.⁹⁷ As the majority in *Young* stated, “the intent [of the hotel] apparent to Young critically distinguishes *Cunag* from the circumstances before us now.”⁹⁸ The court held that, unlike the defendant in *Cunag*, Young maintained a reasonable expectation of privacy in his hotel room.⁹⁹ Additionally, none of the facts suggested that the Hilton Hotel would have taken affirmative steps to evict Young even if they had discovered his credit card fraud.¹⁰⁰ Young therefore maintained both a subjective and a reasonably objective expectation of privacy in his hotel room.¹⁰¹

Similarly, the court distinguished *Allen*.¹⁰² The defendant in *Allen* rented a motel room with cash and, at the time of the search and seizure, his rental period had lapsed and the motel had retaken possession of the room.¹⁰³ Upon entering the motel room

⁹⁴ *Cunag*, 386 F.3d at 890.

⁹⁵ *Id.* at 895 (citing *Dorais*, 241 F.3d at 1129).

⁹⁶ *United States v. Young*, 573 F.3d 711, 719 (9th Cir. 2009).

⁹⁷ *See id.*; *see also* Hilton SPI, *supra* note 16, § 4(D) (stating that “[i]f the circumstances surrounding a found or observed weapon suggest[] the potential for unlawful activity, the local police are to be informed by the Director of Safety and Security or the General Manager”).

⁹⁸ *Young*, 573 F.3d 711, 719 (9th Cir. 2009).

⁹⁹ *Id.* at 718-19.

¹⁰⁰ *Id.* at 719.

¹⁰¹ *Id.* at 720.

¹⁰² *Id.*

¹⁰³ *United States v. Allen*, 106 F.3d 695, 697 (6th Cir. 1997).

after the rental period lapsed, the motel manager discovered contraband, which was ultimately seized by the police.¹⁰⁴ The Sixth Circuit held that the motel's repossession of the room extinguished the defendant's expectation of privacy.¹⁰⁵ But the *Young* majority held that the facts in *Allen* were distinguishable; unlike the defendant in *Allen*, Young did not have a diminished expectation of privacy, because his rental period had not lapsed nor had he been evicted from his room.¹⁰⁶

The Ninth Circuit also found the Supreme Court's holding in *United States v. Jacobsen*¹⁰⁷ inapplicable to the facts of *Young*.¹⁰⁸ *Jacobsen* involved the search of a Federal Express package initially opened and searched by private employees, and the ultimate seizure of contraband contained within the package by Drug Enforcement Agency officers.¹⁰⁹ The Supreme Court held that "the package could no longer support any expectation of privacy," in part because it "contained contraband and little else."¹¹⁰ The *Young* court agreed with the Sixth Circuit's reasoning in *United States v. Allen*¹¹¹ that applying *Jacobsen* to searches of private residences would "make the government the undeserving recipient of considerable private information of a home's contents," and distinguished the facts of *Young* from those of *Jacobsen*.¹¹² The court reasoned that neither Young's backpack nor the hotel room contained "only contraband" and, therefore his expectation of privacy in his hotel room was not extinguished.¹¹³

Because the Ninth Circuit found that Young had maintained a reasonable expectation of privacy in his hotel room, SFPD Officer Koniaris's warrantless search of that room and seizure of evidence from within it violated Young's Fourth Amendment right.¹¹⁴ The court concluded that the evidence was therefore properly suppressed under the exclusionary rule. However, the

¹⁰⁴ *Id.* at 697-98.

¹⁰⁵ *Id.* at 700.

¹⁰⁶ *Young*, 573 F.3d at 720.

¹⁰⁷ *United States v. Jacobsen*, 466 U.S. 109 (1984).

¹⁰⁸ *Young*, 573 F.3d at 720.

¹⁰⁹ *See Jacobsen*, 466 U.S. 109.

¹¹⁰ *Id.* at 120-21.

¹¹¹ *United States v. Allen*, 106 F.3d 695 (6th Cir. 1997).

¹¹² *Young*, 573 F.3d at 720-21 (citing *United States v. Paige*, 136 F.3d 1012, 1021 n.11 (5th Cir. 1998)).

¹¹³ *Young*, 573 F.3d at 721.

¹¹⁴ *Id.* at 723.

346 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40]

government argued that the inevitable discovery doctrine applied and that, pursuant to the doctrine, evidence of the gun was admissible.¹¹⁵ As discussed below, the appellate court rejected that argument and affirmed the trial court's suppression of the evidence.¹¹⁶

B. THE INEVITABLE DISCOVERY DOCTRINE WAS INAPPLICABLE TO ADMIT THE EVIDENCE

The government argued, as an alternative to its argument that Young lacked a reasonable expectation of privacy in his hotel room, that under the inevitable discovery doctrine, the gun would have been inevitably discovered regardless of police misconduct.¹¹⁷ It is on this point that the *Young* majority and dissent diverged. The majority narrowly disposed of the issue of inevitable discovery, holding that the government failed to show by a preponderance of the evidence that Young would never have been allowed back into his room; because the failure to obtain a warrant cannot form the basis for inevitability, the court concluded that inevitable discovery did not apply.¹¹⁸ However, the government argued, and the dissent maintained, that the record showed that the gun would have been inevitably discovered.¹¹⁹

What both the majority and the dissent neglected to explicitly address was whether the government showed by a preponderance of the evidence that the gun *would* inevitably have been discovered by lawful means. Both opinions left open the possibility that the gun *could* inevitably have been discovered by lawful means. As stated in *Nix v. Williams*, "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at

¹¹⁵ *Id.* at 721.

¹¹⁶ *See id.*

¹¹⁷ *See* United States' Opposition to Defendant's Motion to Suppress Fruits of Search at 14-15, *United States v. Young*, No. CR-07-0559 JSW (N.D. Cal. Sept. 20, 2007).

¹¹⁸ *Young*, 573 F.3d at 721.

¹¹⁹ *Id.* at 722 (majority opinion) (describing the government's argument that "once Young was arrested and immobilized in the hotel security office, the officer then had not only the right, but the duty, for public safety reasons, to take possession of the firearm, which he had seen in the course of his earlier search of the room. Once the police had possession of the firearm, that possession became lawful because it was inevitable"); *id.* at 727 (Ikuta, J., dissenting) (stating that "[b]ecause the hotel staff had discovered the gun before Officer Koniaris commenced his investigation, it was a reasonable certainty that the police ultimately would have obtained possession of the gun by lawful means").

suppression hearings.”¹²⁰ Over time, the speculative approach adopted by the *Young* court will make the inevitable discovery doctrine ripe for a potentially dramatic, and unwelcome, expansion.

The *Young* majority explained that, if Hilton’s security staff had followed the written manual, “it is entirely likely that after some discussion with hotel security, Young might have decided to store the firearm, or, alternatively, take his belongings with him and vacate the room.”¹²¹ The Hilton SPI required that hotel security officers E-key the hotel room containing the weapon, leave a note on the door for the room’s guest and, upon the guest’s return, inform him or her of the hotel’s weapon policy and offer a secured location for storage of the weapon until the guest’s departure.¹²² Young’s room was E-keyed and, under Hilton’s protocols, he should have been offered alternative storage options. Instead, upon returning to his room, Young was unable to access his room, but he was left with no indication by Hilton personnel of their reasons for locking him out.¹²³ Young, therefore, was unaware that he had anything but a reasonable expectation of privacy in his room and reasonably expected to have his hotel room unlocked so that he could resume his occupancy. The majority stated that these facts demonstrated a “warrantless search of a private residence, not incident to an arrest, by hotel staff working with a police officer.”¹²⁴

The government argued that no warrant was necessary because SFPD Officer Koniaris knew, prior to arresting Young, that he had been to prison and that the officer therefore had probable cause to arrest Young based upon the report by hotel security that Young had a gun in his hotel room.¹²⁵ The government continued that, once Young was arrested and immobilized in the hotel security office, SFPD Officer Koniaris had a right and a duty to take possession of the firearm.¹²⁶

The majority pointed out that this circular reasoning failed to recognize that SFPD Officer Koniaris could have and should have¹²⁷ obtained a warrant prior to seizing the gun found in Room

¹²⁰ *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984).

¹²¹ *Young*, 573 F.3d at 722.

¹²² Hilton SPI, *supra* note 16, § 4.

¹²³ *Young*, 573 F.3d at 717.

¹²⁴ *Id.* at 722.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Officer Koniaris’s sergeant even told the officer that he “could not enter Young’s

348 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40]

13575.¹²⁸ The court cited *United States v. Echegoyen*¹²⁹ in explaining that it “has stated in no uncertain terms that ‘to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the [F]ourth [A]mendment.’”¹³⁰ For additional support, the court cited *United States v. Mejia*¹³¹ as authority for the proposition that the Ninth Circuit had never applied the inevitable discovery doctrine as an exception to the exclusionary rule so as to excuse the failure to obtain a warrant where the police had probable cause but simply did not seek a warrant.¹³²

The majority found that “nothing more than speculation – not the ‘demonstrated historical facts capable of ready verification’ required by *Nix* – support[s] the discovery of the challenged evidence outside the improper search by [SFPD] Officer Koniaris.”¹³³ The court punished SFPD Officer Koniaris’s failure to obtain a warrant by refusing to apply the inevitable discovery doctrine, because the doctrine’s application on these facts would place the police in a better position than if the illegal search had not occurred.¹³⁴

C. THE *YOUNG* DISSENT

After summarizing the facts of *Young*, the dissent concluded that “the record shows that the police ultimately would have obtained possession of the gun based on the situation as it existed before SFPD Officer Koniaris unlawfully took the gun out of the hotel room.”¹³⁵ The dissent explained that, because the private security actors had already conducted an independent search before Young was detained and SFPD Officer Koniaris had

hotel room to search it but that Hilton security staff could enter a guest’s room.” Koniaris Decl., *supra* note 21, at ¶ 7.

¹²⁸ *Young*, 573 F.3d at 722.

¹²⁹ *United States v. Echegoyen*, 799 F.2d 1271 (9th Cir. 1986).

¹³⁰ *Young*, 573 F.3d at 723 (citing *Echegoyen*, 799 F.2d at 1280 n.7).

¹³¹ *United States v. Mejia*, 69 F.3d 309 (9th Cir. 1995).

¹³² *Young*, 573 F.3d at 723.

¹³³ *Id.*

¹³⁴ *Id.*; see *Nix v. Williams*, 467 U.S. 431, 442-43 (1984) (explaining that the rationale behind the exclusionary rule has been to deter police from violating constitutional and statutory protections and that a way to ensure such protections is to exclude evidence obtained in violation of these protections; “On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.”).

¹³⁵ *Young*, 573 F.3d at 726 (Ikuta, J., dissenting).

probable cause, “it was a reasonable certainty that the police ultimately would have obtained possession of the gun by lawful means.”¹³⁶ This reasoning is incomplete, however, because the dissent essentially sidestepped the warrant requirement of the Fourth Amendment by failing to recognize that the missing link between a suspect in custody based on probable cause and the inevitable discovery of evidence by lawful means is a search warrant.¹³⁷

Another misstep in the dissent’s analysis was its failure to explain the “reasonable certainty” of the inevitable discovery of the gun.¹³⁸ It was far from certain how the private actors would have proceeded absent the police misconduct. Given the Hilton security officers’ heightened concern for compliance with the Hilton SPI, it is equally likely that they would have required a warrant before turning the gun over to the police, as suggested by SFPD Officer Koniaris’s sergeant,¹³⁹ or would have independently handled the weapon issue with Young and allowed the police to investigate the hotel-room theft.

In rejecting the majority’s interpretation of the hotel’s policy and the district court’s finding that applicability of the inevitable discovery doctrine would be incompatible with the hotel’s written policy, the dissent stated that the “hotel’s written policy does not address the situation where, as here, the guest in possession of a weapon is a known felon and the lead suspect in an ongoing criminal investigation taking place at the hotel.”¹⁴⁰ However, the dissent’s application of the facts was misinformed because the Hilton security officers were unaware of Young’s criminal history and they never indicated in their declarations or incident reports that he was a lead suspect in any investigation they were conducting.¹⁴¹ The officers were simply responding to a report by a hotel guest that items were missing from his room, a task that is “in the course of his/her duties” per the Hilton SPI.¹⁴² This situation was accounted for in Hilton’s SPI and there is no reason

¹³⁶ *Id.* at 727 (Ikuta, J., dissenting).

¹³⁷ *United States v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986).

¹³⁸ *See Young*, 573 F.3d at 727 (Ikuta, J., dissenting).

¹³⁹ *See id.* at 715 (majority opinion) (finding that “Officer Koniaris then called his sergeant to advise him of the situation. The sergeant informed Officer Koniaris that Officer Koniaris could not ‘enter Young’s hotel room to search it,’ but the sergeant also told him that ‘Hilton security staff could enter a guest’s room.’ ”); *see also* Koniaris Decl., *supra* note 21, at ¶ 7.

¹⁴⁰ *Young*, 573 F.3d at 727 (Ikuta, J., dissenting).

¹⁴¹ *See generally* Hicks Decl., *supra* note 22; Marweg Decl., *supra* note 7.

¹⁴² Hilton SPI, *supra* note 16, § 4(A).

350 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40

to believe Hilton's security officers would have departed from its mandate, absent improper police influence.

The dissent's analysis is also unsatisfactory because it conflicts with Ninth Circuit precedent that holds " 'to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment.' "¹⁴³ Instead, the dissent seeks to excuse SFPD Officer Koniaris's failure to obtain a search warrant by explaining that, at the moment before the unlawful police misconduct, Young was already handcuffed and soon to be en route to the police station for booking.¹⁴⁴ However, this would align the facts with those in *United States v. Echegoyen*¹⁴⁵ or *United States v. Mejia*,¹⁴⁶ both of which held that the failure to obtain a search warrant cannot form the basis for the application of the inevitable discovery doctrine.

The dissent relied heavily on the cooperation of the private actors involved. This cooperation – or, perhaps more accurately, acquiescence – must not be confused with predictability. The result would be an inevitable discovery doctrine that would be overly applicable to searches conducted by private actors working in concert with police officers. The majority should have directly rebutted the dissent so as not to inadvertently help to expand the inevitable discovery doctrine. The dramatic expansion of the inevitable discovery doctrine that would result from adopting the position of the *Young* dissent would erode Fourth Amendment protections and diminish the effectiveness of the exclusionary rule.

III. THE *YOUNG* COURT SHOULD HAVE DIRECTLY REJECTED THE GOVERNMENT'S FLAWED INEVITABLE DISCOVERY ARGUMENT, WHICH UNDERMINES FOURTH AMENDMENT PROTECTIONS

Despite the dissent's troubling reliance on the unwritten policies of private security organizations, the majority neglected to analyze in depth the theory set forth in the dissenting opinion:

¹⁴³ *Young*, 573 F.3d at 723 (citing *United States v. Echegoyen*, 799 F.2d 1271 (9th Cir. 1986)).

¹⁴⁴ *Id.* at 727-28 (Ikuta, J., dissenting).

¹⁴⁵ *United States v. Echegoyen*, 799 F.2d 1271, 1280 (9th Cir. 1986).

¹⁴⁶ *United States v. Mejia*, 69 F.3d 309, 320 (9th Cir. 1995).

[A]t the crucial moment before the unlawful entry, Young was a criminal suspect handcuffed to a chair in the hotel's security office. Whether or not Officer Koniaris conducted the unlawful search of the hotel room, Young's next destination was the police station for booking, not back to his hotel room to pack up. Under the facts of this case, no reasonable sequence of events would lead to Young retrieving his gun before the police inevitably obtained it.¹⁴⁷

According to the government and the *Young* dissent, the opportunity for Young to re-enter his hotel room for his belongings had lapsed, and the Hilton security officers were not following the written policy when they recruited the assistance of SFPD Officer Koniaris.¹⁴⁸ As stated by the dissent, the private security officers' failure to adhere to the written Hilton SPI allowed for weight to be accorded to Hilton Director Marweg's testimony that "under such circumstances, 'the police must come to the hotel and take possession of the weapon.'"¹⁴⁹ The dissent suggested that the majority and the district court misread the written policies of the hotel, and that consideration must therefore be given to the hotel's unwritten policy.¹⁵⁰ This argument is without merit, but the majority nonetheless should have explored and then dismissed it.

The majority should have explained that, in the absence of a written policy addressing circumstances like those of this case, the hotel's conduct was not sufficiently predictable to support a reasonably certain conclusion that the police would ultimately have obtained possession of the gun by lawful means. Finding otherwise would expand the inevitable discovery doctrine by allowing a court to engage in speculation regarding the actions of private security entities. With the increasing prevalence of such entities and a decreasing distinction between state actors and private actors, courts run the risk of engaging in inevitable discovery analyses that may contribute to the gradual erosion of the constitutional protections established centuries ago against unreasonable searches and seizures.¹⁵¹ The majority's holding

¹⁴⁷ *Young*, 573 F.3d at 727-28 (Ikuta, J., dissenting).

¹⁴⁸ *See id.* at 726-27 (Ikuta, J., dissenting).

¹⁴⁹ *Id.* at 727 (Ikuta, J., dissenting).

¹⁵⁰ *Id.* (Ikuta, J., dissenting).

¹⁵¹ *See, e.g.,* Al Youngs, *The Future of Public/Private Partnerships*, 73 FBI LAW ENFORCEMENT BULLETIN 7 (Jan. 2004) (describing the 1980s and 1990s as the "era of collaboration and joint ventures between public law enforcement and private security," as well as discussing the increase of private as exemplified by corporate security and the number of gated communities).

352 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40

that the inevitable discovery doctrine was inapplicable here was proper, but the majority should have engaged in a more complete analysis of the doctrine and made its narrow applicability under such circumstances clear.

A. AN INEVITABLE DISCOVERY ARGUMENT BASED ON PRIVATE SECURITY POLICIES IS INHERENTLY TOO SPECULATIVE

An inevitable discovery analysis involving the actions of governmental law enforcers generally incorporates policies and protocols that are widely known, accepted and anticipated.¹⁵² Conversely, an inevitable discovery analysis involving the actions of private actors involves speculative elements due to the very nature of their private and unregulated behavior and procedures. With the increasing privatization of law enforcement and security services, therefore, comes the decreasing predictability of state action and the increasing probability that illegally obtained evidence will be admissible under the inevitable discovery doctrine.¹⁵³

The *Young* majority held that the government had not met its burden of showing by a preponderance of the evidence that Young would never have been allowed back into his room because, even “assuming that staff had followed the written policy when Young returned to the room, it is entirely likely that after some discussion with hotel security, Young might have decided to store the firearm, or, alternatively, take his belongings with him and vacate the room.”¹⁵⁴ However, the majority’s fanciful approach to what the “demonstrated historical facts capable of

¹⁵² See, e.g., *Nix v. Williams*, 467 U.S. 431, 449-50 (1984) (reasoning that the actions of an agent of the Iowa Bureau of Criminal Investigation in arranging a search team based on a grid-mapping system, which demonstrated the predicted course of searching, which would inevitably have uncovered the evidence in the case); *United States v. Boatwright*, 822 F.2d 862 (9th Cir. 1987) (analyzing the unlawful search and seizure of evidence by police officers without a warrant); *United States v. Merriweather*, 777 F.2d 503 (9th Cir. 1985) (analyzing the actions of an FBI agent searching an arrested suspect’s motel room).

¹⁵³ See Brian Forst, *The Privatization and Civilianization of Policing*, in 2 BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 21 (2000) (“Policing is widely regarded as an exclusively public-sector activity conducted by sworn officers, but a large and increasing share of the aggregate demand for public safety and security is being handled by the private sector and by civilians. As recently as 1965, there were more sworn police officers than private security personnel and vastly more sworn officers than civilians — the number of sworn officers surpassed the number of full-time civilians employed by law enforcement agencies by 8.3 to 1 Within 30 years, the number of private security personnel soared to about triple the number of sworn officers, while the ratio of sworn officers to full-time civilians in law enforcement agencies had declined similarly by a factor of 3, to 2.6 to 1.”).

¹⁵⁴ *Young*, 573 F.3d at 722.

ready determination”¹⁵⁵ would produce did not rebut the dissent’s argument that, since SFPD Officer Koniaris had arrested Young based upon probable cause that he was a felon in possession of a firearm, Young therefore would not likely have had an opportunity to recover the gun before it was lawfully seized by the police.¹⁵⁶

The inevitable discovery doctrine permits the introduction of illegally obtained evidence if the government can show by a preponderance of the evidence that the tainted evidence would inevitably have been discovered through lawful means.¹⁵⁷ The doctrine requires that the fact or likelihood that makes the discovery inevitable must arise from circumstances other than those disclosed by the illegal search itself.¹⁵⁸ Inevitable discovery “involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment.”¹⁵⁹ As Justice Breyer explained in his dissenting opinion in *Hudson v. Michigan*:¹⁶⁰

[The inevitable discovery] rule does not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been lawful. The doctrine does not treat as critical what *hypothetically could* have happened had the police acted lawfully in the first place. Rather, “independent” or “inevitable” discovery refers to discovery that did occur or that would have occurred (1) *despite* (not simply *in the absence of*) the unlawful behavior and (2) *independently* of that unlawful behavior. The government cannot, for example, avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could have obtained a valid warrant had it sought one. Instead, it must show that the same evidence “inevitably *would* have been discovered *by lawful means*.” “What a man *could* do is not at all the same as what he *would* do.”¹⁶¹

¹⁵⁵ *Nix*, 467 U.S. at 444.

¹⁵⁶ See *Young*, 573 F.3d at 726-27.

¹⁵⁷ *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1396 (9th Cir. 1989) (citing *Nix*, 467 U.S. at 444).

¹⁵⁸ *Ramirez-Sandoval*, 872 F.2d at 1396 (citing *United States v. Boatwright*, 822 F.2d 862, 864-65 (9th Cir. 1987)).

¹⁵⁹ *Nix*, 467 U.S. at 444.

¹⁶⁰ *Hudson v. Michigan*, 547 U.S. 586 (2006) (5-4 decision, with Breyer, J., dissenting and joined by Stevens, J., Souter, J., and Ginsburg, J.).

¹⁶¹ *Hudson*, 547 U.S. at 616 (Breyer, J., dissenting) (citations omitted) (quoting *Nix*, 467 U.S. at 444 and adding emphasis, and quoting J.L. Austin, *Ifs and Cans*, 42 PROC. BRIT. ACAD. 109, 111-12 (1956)).

354 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40

The question then becomes whether the private actors' policy, the Hilton SPI, would have led to lawful discovery despite the officer's unlawful search and seizure. The answer here is "no."

Despite the dissent's insistence that "no reasonable sequence of events" would have resulted in Young returning to his hotel room for the gun, the government did not prove by a preponderance of the evidence that the gun *would* have been inevitably discovered. The Hilton security officers were so concerned with complying with Hilton Hotel's policies that it was equally likely that, instead of the police officer automatically obtaining possession of the evidence by lawful means, the security officers would have demanded a search warrant issued by a magistrate before relinquishing the gun. As stated in *United States v. Mejia*,¹⁶² the Ninth Circuit has never applied the inevitable discovery doctrine so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to seek a warrant from a magistrate.¹⁶³

The government did not overcome the speculation prohibited in *Nix* because it failed to foreclose the possibility that SFPD Officer Koniaris might have been unable to obtain possession of the gun by any method other than a warrant.¹⁶⁴ As Justice Breyer explained in *Hudson*,

The question is not what police might have done had they not behaved unlawfully. The question is what they did do. Was there set in motion an independent chain of events that would have inevitably led to the discovery and seizure of the evidence despite, and independent of, that behavior?¹⁶⁵

In *Young*, there was no independent chain of events set in motion that would have resulted in the inevitable discovery of the gun. Although the dissent may be correct in pointing out that Young's most likely next destination was the police station, the government simply did not meet its burden of showing inevitable discovery by a preponderance of the evidence because there were multiple possible outcomes at the moment of SFPD Officer Koniaris's unlawful activity.

B. *YOUNG* LEAVES THE DOOR OPEN FOR AN EXCESSIVE EXPANSION

¹⁶² *United States v. Mejia*, 69 F.3d 309, 320 (9th Cir. 1995).

¹⁶³ *Id.*

¹⁶⁴ See generally *Nix v. Williams*, 467 U.S. 431 (1984).

¹⁶⁵ *Hudson*, 547 U.S. at 618 (Breyer, J. dissenting).

OF THE INEVITABLE DISCOVERY DOCTRINE

This case highlights the importance of the warrant requirement and strict adherence to the mandate of the Fourth Amendment. Private security agents do not need a warrant to conduct a private search on private property. Permitting a police officer to exploit a private search in order to seize evidence for use in a criminal prosecution is a dangerous maneuver around the Fourth Amendment right to be free from such unreasonable searches and seizures.¹⁶⁶

Relying upon the diligence and investigative tools of private security agents would considerably broaden the ability of the government to access otherwise unavailable evidence, while at the same time avoiding the constraints of the Fourth Amendment by limiting the “state action” required to invoke constitutional limitations. By relying so heavily on the written and unwritten policies of Hilton’s private security officers, the *Young* dissent encourages over-reaching by private actors and by the police. This directly conflicts with the purpose of the Fourth Amendment, which itself was a response to warrantless intrusions by British officers.¹⁶⁷

Although the inevitability of lawful discovery need not be established by clear and convincing evidence – a standard of proof that would have been imposed by the dissent in *Nix v. Williams* – the government nonetheless bears the burden of proving the likelihood that the evidence would have been inevitably discovered.¹⁶⁸ While a recommendation of the use of a higher standard is beyond the scope of this Note, it is as crucial a time as ever to reflect on the purpose of the inevitable discovery doctrine and the ramifications of broadening its applicability. Based on the likelihood of increased use of private police in American law enforcement, Fourth Amendment analysis –

¹⁶⁶ See *Walter v. United States*, 447 U.S. 649, 656 (1980) (explaining that “a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully”).

¹⁶⁷ Heather Winter, *Resurrecting the “Dead Hand” of the Common Law Rule of 1789: Why Terry v. Ohio is in Jeopardy*, 42 NO. 5 CRIM. L. BULL. 1, 5-7 (2006) (citing *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977) (explaining that the framing of the Fourth Amendment occurred in response to the American colonists’ experiences with the British writs of assistance)).

¹⁶⁸ See *Nix*, 467 U.S. at 459 (Brennan, J., dissenting) (“I would require clear and convincing evidence before concluding that the government had met its burden of proof on this issue.”).

356 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40]

particularly that involving the inevitable discovery doctrine – must focus on the applicable burden of proof. The standard for establishing the inevitable discovery doctrine as an exception to the exclusionary rule is preponderance-of-the-evidence.¹⁶⁹ Only through strict adherence to this standard will the constitutional protections against unreasonable searches and seizures be likely to endure for another two centuries.¹⁷⁰

The government failed to prove by a preponderance of the evidence that the gun seized by SFPD Officer Koniaris would have been discovered by lawful means unconnected to the officer's unlawful infringement of Young's Fourth Amendment right. At the moment of SFPD Officer Koniaris's unlawful intrusion into Young's hotel room, the demonstrated historical facts indicated his suspicion that Young was a felon in possession of a firearm. Young was detained in the Hilton Hotel security office, and when SFPD Officer Koniaris began searching Young's hotel room, it was not inevitable that his gun would have been discovered by lawful means. The Hilton security guards could have demanded a warrant before turning over their guest's private belongings to the police officer. Equally likely, Young could have been booked into the local jail and released on bail, after which he could have returned to the hotel for his belongings, including his gun. Also plausible is that Young's acquaintance, with whom he had returned to the hotel on the night of his arrest, could have entered Young's hotel room after the police left the premises and removed the gun.

The facts as they stood just before SFPD Officer Koniaris violated Young's Fourth Amendment right did not even suggest that the gun would likely have been discovered by lawful means, as required under *Nix* for inevitable discovery to apply.¹⁷¹ Regardless of Young's next destination, neither SFPD Officer Koniaris's failure to secure a search warrant, nor the facts as they stood just before the unlawful police conduct took place, supported an application of the inevitable discovery doctrine.

¹⁶⁹ See *id.* at 444 (majority opinion) ("If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then . . . the evidence should be received.").

¹⁷⁰ The Bill of Rights, including the Fourth Amendment, was ratified on December 15, 1791.

¹⁷¹ See *People v. Coffman*, 96 P.3d 30, 79 (Cal. 2004) (explaining that the inevitable discovery doctrine "recognizes that if the prosecution can establish by a preponderance of the evidence that the information inevitably would have been discovered by lawful means, then the exclusionary rule will not apply") (citing *Nix*, 467 U.S. 431).

Expanding inevitable discovery to apply to such cases would be contrary to Ninth Circuit and Supreme Court precedent and would jeopardize the privacy protections guaranteed to all Americans by the United States Constitution.

IV. CONCLUSION

The Ninth Circuit properly affirmed the suppression of evidence of the gun found in Young's hotel room. However, the *Young* majority should have engaged in a more thorough analysis of the issue of inevitable discovery. If law enforcement is allowed to hide behind, and at the same time benefit from, a search by private actors, the government's access to otherwise illegally obtained evidence will grow exponentially. The use of the inevitable discovery doctrine to admit such evidence against a criminal defendant is precisely the kind of result that the Fourth Amendment and the exclusionary rule were designed to prevent. Instead, *Young* has left the door open for those who seek to dramatically expand the inevitable discovery doctrine, a result that could swallow the exclusionary rule and undermine the important privacy rights that the Fourth Amendment was written to protect.

LAUREN YOUNG EPSTEIN^{*}

^{*} J.D. Candidate, 2011, Golden Gate University School of Law, San Francisco, Cal.; B.A. Global Economics, 2007, University of California, Santa Cruz, Cal. I would like to thank Professor Robert Calhoun, without whose invaluable contributions this Note would not have seen print. I would also like to thank the 2009-2010 Editorial Board for their motivation, expertise, and thoughtfulness during the writing and editing process. Countless thanks to my remarkable family and friends, with special thanks to Orien Nelson for her commentary and unwavering friendship during this writing process. Lastly, I wish to express my immeasurable love and gratitude in dedication of this Note to my mother, Stephanie, and my sister, Jilian, each of whom has provided endless strength, support, patience and encouragement as I pursue my dreams.