William Mitchell Law Review

Volume 17 | Issue 4 Article 4

1991

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REFINEMENT OF THE INEVITABLE DISCOVERY EXCEPTION: THE NEED FOR A GOOD FAITH REQUIREMENT

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INTRODUCTION

The United States Supreme Court formulated the inevitable discovery exception in *Nix v. Williams*.[1] The inevitable discovery exception presently permits the admission of illegally obtained evidence if the prosecution can demonstrate, by a preponderance of the evidence, that the evidence would have been obtained by other lawful means.[2] Considerations of due process require that the inevitable discovery exception be reexamined and refined. To ensure that the inevitable discovery exception is consistent with constitutional values, a good faith requirement should be added.

THE BASIS FOR THE EXCLUSIONARY RULE

In the 1914 decision of *Weeks v. United States*,[3] the United States Supreme Court mandated the exclusion of evidence ob-

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1. 467 U.S. 431 (1984).
2. *Id.* at 444.
3. 232 U.S. 383 (1914).

tained as a result of illegal searches and seizures. In *Weeks*, both state and federal officers conducted warrantless searches of Weeks' residence and obtained evidence used to convict him of federal lottery violations. The Supreme Court advanced two reasons for excluding the evidence: the fact that the fourth amendment exists and must be given meaning[4] and the obligation of the courts to uphold the fourth amendment.[5] Both theories were based on the substance of the fourth amendment.

Although *Weeks* applied only to prosecutions in federal court, some state appellate courts reached similar results. The state courts construed state constitutional provisions to exclude evidence obtained through illegal police activity. However, the state courts did not adopt the exclusionary rule for the purpose of deterring unlawful police activity. Instead, *Weeks* was used as an interpretive guide for state constitutional provisions. Most of these decisions centered on an ethical analysis of judicial duty with respect to the vindication of constitutional guarantees. Conversely, state courts favoring an exclusionary rule reasoned that the exclusion of illegally obtained evidence was necessary to protect constitutional rights and to promote fairness in the administration of justice.[6]

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4. *Id.* at 393. The *Weeks* Court advanced a necessity rationale: the fourth amendment would be meaningless if the courts allow the admission of illegally seized evidence.

> 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 . . . might as well be stricken from the Constitution.

Id.

5. *Id.* at 392. The *Weeks* Court argued that it was the obligation of "all entrusted under our Federal system with the enforcement of the laws" to give effect to fourth amendment limitations. *Id.* "Illegal searches or seizures 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." *Id.* The judiciary has a duty to exclude illegally seized evidence. Courts would lose their integrity by allowing into evidence the results of improper searches. *Id.*

6. *See, e.g.*, People v. Cahan, 44 Cal. 2d 434, 447, 282 P.2d 905, 913 (1955) ("If the unconstitutional [sic] guarantees against unreasonable searches and seizures are to have significance they must be enforced, and if courts are to discharge their duty to support the state and federal constitutions they must be willing to aid in their enforcement."); Atz v. Andrews, 84 Fla. 43, 52, 94 So. 329, 332 (1922) (Judicial responsibility involves a duty not to "sanction law-breaking and constitutional violation in order to obtain testimony against another law-breaker."); People v. Brocamp, 307 Ill. 448, 453-54, 138 N.E. 728, 731-32 (1923) (Failure to exclude illegally obtained evidence reduces both the state and federal constitutional guarantees to a "mere nul-

The deterrence rationale for the exclusionary rule emerged in the 1948 decision, *Wolf v. Colorado*.[7] In *Wolf*, the United States Supreme Court refused to apply *Weeks* to state prosecutions. The Court held that the fourth amendment was enforceable against the states through the due process clause of the fourteenth amendment. However, the remedies for fourth amendment violations could differ in state and federal court.[8] The Court held that relevant evidence obtained by unreasonable search and seizure could be admitted in state prosecutions.

Writing for the majority, Justice Frankfurter justified the Court's decision not to apply the exclusionary rule to the states. Exclusion is a remedy that "serves only to protect those upon whose person or premises something incriminating has been found."[9] Thus, the state's failure to exclude the evidence did not offend "basic standards."[10] Justice Frankfurter acknowledged that "in practice the exclusion of evidence may be an effective way of deterring unreasonable searches . . . ."[11] However, he noted that the states could use other, equally effective methods to deter police misconduct.[12] Therefore, the

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lity" and "vain boastings." Thus, a judge has a positive obligation to inquire into the manner in which evidence was obtained.); Youman v. Commonwealth, 189 Ky. 152, 166, 224 S.W. 860, 866 (1920) (The court excluded evidence obtained in warrantless search because of the court's duty to protect "the citizen in the civil rights guaranteed to him by the Constitution."); State v. Owens, 302 Mo. 348, 376, 259 S.W. 100, 108 (1924) ("To admit the evidence is to approve [the] unlawful act [and] is for the State to become a party to the violation of its own Constitution.")

7. 338 U.S. 25 (1949).

8. *Id.* at 28.

9. *Id.* at 31.

10. *Id.*

11. *Id.* In contrast, Justice Rutledge's dissent viewed exclusion as constitutionally mandated. "[The] Fourth Amendment itself forbids the introduction of evidence illegally obtained . . . ." *Id.* at 48 (citing Olmstead v. United States, 277 U.S. 438, 462 (1928)). Justice Rutledge concluded that Congress and the Supreme Court, being subject to the fourth amendment, are powerless to permit admission of illegally obtained evidence in federal courts. Because the states are equally subject to the fourth amendment, exclusion is also mandated in state courts. *Id.*

12. *Id.* "The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country." *Id.* at 32-33.

Justice Murphy dismissed alternative state remedies as illusory. "The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause." *Id.* at 44 (Murphy, J., dissenting). Jurisdictions which utilize exclusion, Justice Murphy argued, succeeded in modifying police conduct. Therefore, exclusion was "an area in which judicial action has positive effect upon the breach of law . . . ." *Id.* at 46.

states were not required to exclude illegally obtained evidence.

Justice Frankfurter's analysis was rooted in his view of federalism. That view produced a strong "limiting influence on [the Supreme Court's] role in the criminal cases during the years before the Warren tenure."[13] Yale Kamisar, a critic of *Wolf*, observed that the Court had not expressed a deterrence rationale for the exclusionary rule during the thirty-five year interval between *Weeks* and *Wolf*.[14] Professor Kamisar traced the emergence of the deterrence rationale in *Wolf* to what he characterized as the seductive quality of the *Wolf* opinion. In Kamisar's opinion, Justice Frankfurter, motivated by his view of the federal system, drove a wedge between the protection of the fourth amendment and the exclusionary rule.[15] In *Weeks*, Justice Frankfurter inferred that the question of whether illegally obtained evidence should be excluded was dependent on whether exclusion of the evidence would deter future police misconduct. In Kamisar's opinion, the Supreme Court weakened the exclusionary rule by basing *Weeks* on the exclusionary rule's possible consequences as a deterrent.[16]

The deterrence rationale next played a prominent role in the

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13. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. FED'N 518, 526. According to Allen, *Wolf* was fueled by the Court's reluctance to interfere with the operation of basic state institutions. *Id.* at 526-27.

14. Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 598 (1982-1983) [hereinafter Kamisar, *Principled Basis*]. "[T]here is no suggestion in *Weeks* or in the search and seizure cases handed down over the next thirty-five years that the exclusionary rule's *survival* depends on proof that it is significantly influencing police behavior." *Id.* at 599-600.

15. *Id.* at 616 (arguing Justice Frankfurter's approach to the rule was not justified by history).

16. *Id.*

> [By] "inject[ing] the instrumental rationale of deterrence of police misconduct into [the Court's] discussion of the exclusionary rule," and "using the empirically-based, consequentialist rationale of deterrence as support for [the Court's] refusal to apply the exclusionary rule to the states," the *Wolf* opinion not only made the result reached in that case seem more palatable, but it planted the seeds of destruction for the exclusionary rule—in federal as well as state cases.

Id. (quoting Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981) (footnotes omitted)). Kamisar also traces the emergence of deterrence to the earlier case of *United States v. Wallace & Tiernan Co.*, 336 U.S. 793 (1949). Kamisar, *Principled Basis*, *supra* note 14, at 598-99 n.210. In Kamisar's view, the Court was speaking to the exploitation of illegality, i.e., "fruit of the poisonous tree," rather than the primary rationale for exclusion expressed in *Weeks*. *Id.* at 604.

1961 landmark decision of *Mapp v. Ohio*.[17] The Supreme Court in *Mapp* overruled *Wolf* and extended application of the exclusionary rule to the states. Writing for the majority, Justice Clark stated that "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' "[18] States allowing admission of illegally obtained evidence encouraged disobedience of the Constitution they are bound to uphold.[19] Citing the experience of several states, Justice Clark dismissed any other remedy as "worthless and futile."[20] Justice Clark made passing reference to notions of due process and judicial integrity, but deterrence was clearly at center stage.

The Supreme Court has shifted its emphasis further in cases decided subsequent to *Mapp*. In 1965, the Court observed, "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action."[21] "Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action."[22] In 1974, Justice Powell noted: "[T]he rule's prime purpose is to deter future unlawful police conduct . . . . [T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ."[23] The Court reiterated the deterrence rationale in 1976 by observing, if "the exclusionary rule does not result in

17. 367 U.S. 643 (1961).

18. *Id.* at 656 (quoting Elkins v. United States, 364 U.S. 206 (1960)). *Elkins* contains a deterrence rationale, but also relies on judicial integrity as a basis for exclusion. *Elkins*, 364 U.S. at 222-23.

19. *Elkins*, 364 U.S. at 223.

20. *Mapp*, 367 U.S. at 652. However, Yale Kamisar argues that Justice Clark was trying to secure maximum approval for the decision to overrule *Wolf*. Thus, Justice Clark made as strong a case as possible by including deterrence, judicial integrity, and due process as reasons for excluding the evidence. According to Kamisar, subsequent Supreme Court cases have misread *Mapp*. Kamisar, *Principled Basis*, *supra* note 14, at 621-24.

21. Linkletter v. Walker, 381 U.S. 618, 636 (1965).

22. *Id.* at 636-37.

23. United States v. Calandra, 414 U.S. 338, 347-48 (1974). In *Calandra*, Justice Powell cited *Elkins* in support of the deterrent effect of the exclusionary rule. *Id.* at 347. *Elkins* also grounded deterrence on a judicial integrity basis. *Elkins*, 364 U.S. at 222-23.

appreciable deterrence, then, clearly, its use . . . is unwarranted."[24] This statement "indicates that the 'judicial integrity' consideration has been collapsed into the consideration of 'deterrence.' This interpretation completes the transformation of the exclusionary rule from a doctrine derived, albeit inadequately, from constitutional principle, to a rule based on the judges' assessment of the rule as a deterrent."[25]

Before the *Wolf* decision in 1948, the Supreme Court used the existence of the fourth amendment and concerns for judicial integrity to exclude illegally obtained evidence. Subsequent to *Wolf*, the Supreme Court applied the exclusionary rule only when it would deter police misconduct. This shift in rationale occurred concurrently with the development of the inevitable discovery exception in state and federal courts. Given this change in analysis, early decisions approving the inevitable discovery exception discussed the deterrence effect almost exclusively.

The Inevitable Discovery Exception

After developing the exclusionary rule in *Weeks v. United States*,[26] the United States Supreme Court began to promulgate exceptions. Illegally obtained evidence is still admissible in court if it fits within one of the exceptions to the exclusionary rule.

Silverthorne Lumber Co. v. United States[27] marked the creation of the independent source doctrine. The independent source exception allows courts to admit derivative evidence that would otherwise be suppressed. The Supreme Court initially extended the reach of the exclusionary rule to derivative evidence; evidence obtained from the use or exploitation of unlawfully obtained evidence was generally determined to be inadmissible.[28] However, derivative evidence, in some instances, was not "sacred and inaccessible."[29] Thus, the government's ability to demonstrate an independent source for

24. United States v. Janis, 428 U.S. 433, 454 (1976).

25. Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. Crim. L. & Criminology 141, 148 (1978) [hereinafter Sunderland, *Exclusionary Rule*].

26. 232 U.S. 383 (1914).

27. 251 U.S. 385 (1920).

28. *Id.* at 392.

29. *Id.*

derivative evidence would allow its admission.[30]

The Supreme Court added a further dimension to the exclusion question in *Wong Sun v. United States*.[31] *Wong Sun* reaffirmed and expanded *Silverthorne*. The Court held that some evidence, though illegally obtained, was far enough removed from the constitutional violation to be purged of the taint. Not all evidence, the Court noted, "is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police."[32] The more important question is " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' "[33] The independent source and the fruit of the poisonous tree exceptions, as well as the deterrence rationale, played a central role in the development of the inevitable discovery exception.

The inevitable discovery exception gained acceptance in state and federal courts before the Supreme Court considered the doctrine in 1984.[34] State and federal courts that accepted the inevitable discovery exception relied on language contained in *Wong Sun* and *Silverthorne*. The inevitable discovery exception, to these courts, was invariably the means used to support admission of evidence obtained in conjunction with police misconduct.[35] One might view the deterrence rationale

30. *Id.*

31. 371 U.S. 471 (1963).

32. *Id.* at 487-88 (quoting J. MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

33. *Id.* at 488.

34. The inevitable discovery exception was also the subject of scholarly discussion before being recognized by the Supreme Court. Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88 (1974) (preceded Supreme Court acceptance of the inevitable discovery exception). The author discussed whether the inevitable discovery exception should apply when an investigation was prompted as a result of illegally-secured information:

> If the illegality was critical in initiating or determining the direction and form of the investigation, regardless of the legal sufficiency of the untainted evidence, the defendant's rights were clearly impaired because of the misconduct and the resultant evidence must be excluded. But if in the absence of the illegality an investigation would have occurred and proceeded in a manner that would inevitably have led to discovery of the questioned evidence, the police derived no actual benefit from that misconduct, no substantial infringement of the defendant's constitutional rights took place, and the evidence can justifiably be admitted.

Id. at 102.

35. United States v. Romero, 692 F.2d 699, 704 (10th Cir. 1982) (holding that marijuana "clearly would have been discovered within a short time through a lawful

for exclusion and *Wong Sun*'s sufficiently distinguishable means test as disparate streams in post-*Mapp* decisions. However, these streams were destined to merge when *Nix v. Williams*[36] began its protracted odyssey through state and federal courts. At journey's end, it appeared that the Supreme Court was unconcerned with even willful violations of the Constitution. Deterrence of police misconduct would be the sole consideration when the Supreme Court considered the inevitable discovery exception.

Nix v. Williams

In *Nix v. Williams*,[37] the defendant was tried and convicted twice of first-degree murder in the Iowa state courts. The central issue in the first case, *Brewer v. Williams*,[38] was whether Williams' action in leading Des Moines police officers to the victim's body was admissible. Before surrendering to police in Davenport, Williams retained an attorney. Williams' lawyer contacted the Des Moines police and agreed to surrender his client. Although the matter is not free from dispute, it appears that the police agreed not to interrogate Williams while he was being transported from Davenport to Des Moines. Before

investigation already underway"); United States v. Bienvenue, 632 F.2d 910, 914 (1st Cir. 1980) (holding that scope of investigation lent "credence to the Government's contention that the travel agency records would have been inevitably discovered during routine police investigation"); United States v. Brookins, 614 F.2d 1037, 1046 (5th Cir. 1980) (holding "leads possessed and being pursued by the police prior to the occurrence of the illegality would have inevitably led to the discovery of [the prosecution's primary witness]"); United States v. Schmidt, 573 F.2d 1057, 1065 n.9 (9th Cir. 1978) (admitting evidence because investigation underway would have "almost certainly" led to its discovery); United States *ex rel.* Owens v. Twomey, 508 F.2d 858, 866-67 (7th Cir. 1974) (holding that fingerprint identification would have been discovered inevitably); Virgin Islands v. Gereau, 502 F.2d 914, 928 (3d Cir. 1974) (admitting weapon on inevitable discovery basis due to the massive nature of the investigation); United States v. Seohnlein, 423 F.2d 1051, 1053 (4th Cir.) (admitting confession given to FBI because the evidence was not tainted by unlawful conduct of local police), *cert. denied*, 399 U.S. 913 (1970); Wayne v. United States, 318 F.2d 205, 209 (D.C. Cir. 1963) (holding that "sooner or later" police would have obtained the body by lawful means); People v. Fitzpatrick, 32 N.Y.2d 499, 506, 300 N.E.2d 139, 141, 346 N.Y.S.2d 793, 797 (admitting gun "where the normal course of police investigation would . . . have inevitably led to such evidence"), *cert. denied*, 414 U.S. 1033 (1973); Oregon v. Miller, 67 Or. App. 637, 647 n.9, 680 P.2d 676, 683 n.9 (1984) (holding victim's body and evidence resulting from it would have been discovered inevitably due to normal practice of the hotel).

36. 467 U.S. 431 (1984).

37. *Id.*

38. 430 U.S. 387 (1977).

leaving Davenport, Williams was arraigned on the murder charge. Thus, before the ride with police from Davenport to Des Moines, two constitutionally significant events took place: Williams was arraigned and had retained counsel. Thus, the judicial, as opposed to the investigative, process was clearly underway.

Shortly after leaving Davenport, the police captain made the now famous "Christian burial speech." He told Williams:

> "I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. 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, that you yourself have only been there once, 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 on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."[39]

After hearing the speech, Williams led officers to the body. Williams was not interrogated further nor did he confess to the actual killing. Williams, not surprisingly, was convicted in the Iowa courts. The federal district court granted habeas relief, which was affirmed by the Eighth Circuit.[40] The state appealed this decision and the Supreme Court granted certiorari in 1975.[41]

The Supreme Court, in affirming the lower federal court's decision, determined the Christian burial speech was tantamount to interrogation.[42] Since Williams had been arraigned and was represented by counsel, the interrogation violated his

39. *Id.* at 392-93.

40. Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa), *aff'd*, 509 F.2d 227 (8th Cir. 1974).

41. Brewer v. Williams, 423 U.S. 1031 (1975).

42. *Brewer v. Williams*, 430 U.S. at 400.

sixth and fourteenth amendment right to counsel.[43]

More significantly for the purposes of this Article, the Court made the following cryptic statement in a footnote:

> 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.[44]

Williams was duly retried. The trial court admitted evidence of the condition of the victim's body, postmortem chemical and medical tests, and photographic evidence of her clothing. The court, in admitting the evidence, found by a preponderance of the evidence that, due to a massive systematic search, the scene would have been discovered in a short time even absent the proscribed interrogation.[45]

In affirming Williams' second conviction, the Iowa Supreme Court recognized the inevitable discovery exception as an exception to the exclusionary rule. The Iowa court adopted the doctrine and its requirement of good faith by police coupled with a demonstration that the evidence would have been discovered by lawful means. The prosecution would need to prove both tests by a preponderance of the evidence.[46]

As to good faith, the Iowa Supreme Court observed:

> The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.[47]

The court then found that the evidence would, in fact, have been found by the lawful activity of the search party. To the Iowa court, legal uncertainty was the equivalent of prima facie good faith.

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43. *Id.* at 401.
44. *Id.* at 407 n.12.
45. State v. Williams, 285 N.W.2d 248, 262 (Iowa 1979).
46. *Id.* at 260.
47. *Id.* at 260-61.

Williams sought habeas relief a second time in the federal courts. The district court denied relief[48] and Williams appealed to the Eighth Circuit Court of Appeals. Contrary to the Iowa Supreme Court, the Eighth Circuit found that legal uncertainty did not necessarily constitute good faith. To the Eighth Circuit, the detective's actions were not "the actions of a man who believed he was doing the right thing, only to be confounded later on by a close vote on a question of law."[49] The officer's actions were seen, instead, as a design to obtain incriminating evidence by mental coercion.[50]

Iowa obtained certiorari[51] and the Supreme Court was set to answer the question it left unanswered in *Brewer v. Williams*.[52] The question was answered by the Supreme Court's opinion in *Nix v. Williams*,[53] authored by Chief Justice Warren Burger.[54]

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

49. Williams v. Nix, 700 F.2d 1164, 1173 (8th Cir. 1983), *rev'd*, 467 U.S. 431 (1984).

50. Professor Phillip E. Johnson took issue with the attack of the Eighth Circuit and noted, "The Court of Appeals opinion is particularly vulnerable on this subject . . . ." Johnson, *The Return of the "Christian Burial Speech" Case*, 32 EMORY L.J. 349, 369 (1983) [hereinafter Johnson, *Christian Burial*]. This view was shared by three judges dissenting from the Eighth Circuit's denial of a motion for rehearing en banc. Judge Fagg, writing for the dissenters, observed as to all previous proceedings in the second round, "I cannot satisfy myself that the issue of the officer's good or bad faith has *ever* been the subject of an evidentiary hearing. . . . [O]ur panel is not in a position comfortably to find as a matter of law that [the detective] acted in bad faith . . . ." *Williams v. Nix*, 700 F.2d at 1176 (Fagg, J., dissenting). Professor Johnson further noted:

> [I]t is equally plain that [the detective] meant to learn where the body was hidden through means that he thought, however mistakenly, to be constitutional. If he had been truly reckless of constitutional standards, he would not have been so careful to restrict himself to the indirect means he in fact employed. Not only did he carefully refrain from "questioning," but he seems to have made no effort to persuade Williams to confess to the killing. Perhaps it is fair to say that he took a crabbed and legalistic approach to the word "interrogation," but then so did the four Supreme Court Justices who agreed with him, and the six Justices who voted to affirm a conviction on similar facts in *Rhode Island v. Innis*. Were they all acting in bad faith?

Johnson, *Christian Burial*, *supra*, at 368 (footnote omitted). In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Supreme Court held that a conversation between two police officers about the danger that a hidden shotgun might be found by a child was not the equivalent of interrogation under the *Miranda* rule although it appears to have been intended for the benefit of the listening suspect who then revealed where he had left the gun.

51. Nix v. Williams, 461 U.S. 956 (1983).

52. 430 U.S. 387 (1977).

53. 467 U.S. 431 (1984).

54. Chief Justice Burger was the author of *Wayne v. United States*, 318 F.2d 205, 209 (D.C. Cir. 1963), one of the earliest inevitable discovery cases.

Chief Justice Burger began his analysis by reaffirming the continuing validity of the fruit of the poisonous tree doctrine set forth in *Wong Sun v. United States*.[55] He noted that deterrence is the core rationale for the "drastic and socially costly" remedy of exclusion.[56] The derivative evidence question then becomes one of not putting the prosecution "in a *worse* position simply because of some earlier police error or misconduct."[57] The Chief Justice likened the inevitable discovery exception to the independent source doctrine which was, in his view, a functionally similar doctrine. Adoption of the inevitable discovery exception would be wholly consistent with the core rationale of the independent source doctrine.[58]

Chief Justice Burger noted that, to exclude derivative evidence that inevitably would have been discovered, would put the prosecution in a worse position. Therefore, no deterrent purpose would be served by exclusion.

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.[59]

The Chief Justice disagreed that good faith be required for use of the doctrine. As indicated previously, both the Iowa Supreme Court and the Eighth Circuit viewed a good faith requirement as a necessary prerequisite. Chief Justice Burger, however, thought a good faith requirement "would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity."[60] A good faith requirement was also rejected because

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

55. 371 U.S. 471 (1963).
56. *Nix v. Williams*, 467 U.S. at 442.
57. *Id.* at 443.
58. *Id.* at 443-44.
59. *Id.* at 444 (footnote omitted).
60. *Id.* at 445.

> avoid engaging in any questionable practice. In that situation, there will be little to gain from taking any dubious "shortcuts" to obtain the evidence.[61]

The Chief Justice argued, "Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice."[62]

The inevitable discovery exception as finally defined by the Supreme Court in *Nix v. Williams* reflects the shift to a deterrence rationale for the exclusionary rule that has developed since *Wolf*. Chief Justice Burger's analysis and rejection of a good faith requirement is cast in terms of its deterrent impact. The Court appears unconcerned with the gravity, willfulness, or purposefulness of constitutional violations by law enforcement authorities.

The dissenters, Justice Brennan and Justice Marshall, accepted the majority position holding that the inevitable discovery exception was constitutional. Their reservations, however, concerned the low burden of proof imposed on the prosecution as a predicate for use of the doctrine in trial courts. Justices Brennan and Marshall argued that a clear and convincing standard, rather than a preponderance of the evidence standard, was appropriate. The higher standard was necessary and appropriate because of the hypothetical nature of the doctrine. The inevitable discovery exception, they argued, "differs in one key respect from its next of kin: specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed."[63]

The present deterrence rationale for the exclusionary rule provides the only justification for the inevitable discovery exception as formulated in *Nix v. Williams*. To the Court, the only question is whether a given action (police violation) will be discouraged; if not, then the rule is not applicable. In the Court's view, no deterrent purpose is served by the exclusion of illegally obtained evidence that would have been discovered with-

61. *Id.* at 445-46 (citation omitted).
62. *Id.* at 447.
63. *Id.* at 459 (Brennan, J., dissenting).

out the wrongful activity.[64] The Court's reasoning is flawed because it fails to answer a much more fundamental question: What is the constitutional source of the exclusionary rule? The answer to that issue may call into question the continuing validity of both the deterrence rationale and the justification for the inevitable discovery exception.

From a historical and analytical standpoint, exclusion was conceived as more than a deterrent. The early cases viewed exclusion as flowing from both the state and federal constitutions. Exclusion is not merely a judicially created non-constitutional evidentiary concept. Exclusion is inherent in both judicial review and due process considerations.

Professor Lane Sunderland approaches the exclusionary rule from a historical perspective.[65] He begins his analysis by focusing on the *Weeks v. United States* opinion. To Sunderland, *Weeks* stands for the fundamental proposition that "all bodies entrusted with enforcement of the law including the judiciary, must enforce [the] law as written."[66] From this premise, Sunderland examines both the fourth and fifth amendment. To Sunderland, the very words of that clause, whatever technical, procedural, or substantive meaning may be attached to them, surely mean at least this: the only condition under which one may be deprived of life, liberty, or property is if the deprivation is in accordance with due process of law. When analyzing both constitutional amendments, Sunderland argues:

> [T]he primary consideration is that of obeying the commands of the Constitution in any proceeding depriving an individual of life, liberty or property—a requirement the due process clause makes explicit and mandatory. . . . Why the exclusionary rule? Simply because the due process clause requires it, independently of the efficacy of the rule as a deterrent, or independently of the comparative efficacy of alternative remedies. Exclusion is a Constitutional right emanating from the due process clause.[67]

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64. *Id.* at 444.

65. *See* Sunderland, *Exclusionary Rule*, *supra* note 25, at 141-42.

66. *Id.* at 143.

67. *Id.* at 150. In another article defending the due process basis of exclusion, Sunderland traced the history of due process from its seminal source, the Magna Carta, which forbade penalties except by " 'lawful judgment of his peers or by the law of the land.' " Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & CRIMINOLOGY 343, 370-72 (1980) (quoting section 29 of the Magna Carta) (footnote omitted). Sunderland, paraphrased the due process requirement "to say that

Professor Yale Kamisar, an avid defender of the exclusionary rule, characterized the rule as simply another form of judicial review. As first expressed in *Marbury v. Madison*,[68] the courts, in his view, have a duty not to ignore violations of constitutional commands. Therefore, the exclusionary rule is judicial review of executive action and is necessary to ensure that the fourth amendment actually prohibits unreasonable searches and seizures. The exclusionary rule is, therefore, a " 'defensive use of Constitutional review.' "[69]

Viewed in this context, commentators maintain that courts are compelled to invoke the doctrine of judicial review to vindicate personal constitutional rights violated by unlawful governmental actions.[70] The courts' failure to do so renders them derelict in their duty to review executive conduct, and to exclude evidence where appropriate. The remedy of exclusion is inseparable from the right to be free from unreasonable search and seizure.[71]

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any deprivation of life, liberty, or property must be in accordance with the law of the land, or, at the very least, according to the commands of the authoritative legal declaration of the American law of the land, the Constitution." *Id.* at 372. Indeed, elementary principles of judicial construction in this light require the instrument to be read and construed as a whole. The judicial goal should be to give effect to all clauses. If a judge in determining testamentary intent looks at the whole instrument, should not the same judge read the fourth amendment's prohibition of unreasonable searches and seizures together with the fifth amendment's guarantee that no citizen shall be deprived of life, liberty or property without due process of law? When read together, the amendments provide a self-evident constitutional basis for the exclusionary rule. *Id.* at 375. Due process requires that the judiciary review actions of the executive branch to ensure that the executive branch obeys the law.

68. 5 U.S. (1 Cranch) 137 (1803).

69. Kamisar, *Principled Basis*, *supra* note 14, at 592 (quoting Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1). Kamisar further argued: "The Bill of Rights, especially the fourth amendment, 'reflects experience with police excesses.' " *Id.* at 593 (quoting Davis v. United States, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting)). A basic purpose of the Bill of Rights, especially the fourth amendment, is " 'subordinat[ing] police action to legal restraints.' " *Id.* at 593 (quoting United States v. Rabinowitz, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting)). " '[I]n enforcing the fourth amendment, courts *must* police the police.' " *Id.* (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 371 (1974)).

70. Critics argue that concern about the judicial use of the fruits of fourth amendment violations is built into the amendment itself. *See, e.g.*, Schrock & Welsh, *Up From* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 306 (1974). The Court's decision to admit or not admit the evidentiary transaction "deliberately exposes the court, as a direct addressee of the fourth amendment, to concerns about the Constitutionality of its *own* participation in the transaction . . . ." *Id.* A fourth amendment rationale places the right to exclude directly into the hands of the defendant, protecting his search and seizure rights. *Id.* at 271-72.

71. *See id.* at 342. "Correctly understood, the exclusionary rule in search and

The deterrence rationale simply fails to answer these arguments in support of a constitutionally-rooted exclusionary rule. Indeed, the Supreme Court's slide into the deterrence rationale has been accomplished with almost no examination of constitutional arguments. Rather, the Court, almost by fiat, has enthroned the deterrence rationale to the exclusion of any other basis. Deterrence is unconcerned with the defendant's personal rights. Instead, the deterrence rationale views the defendant as an accidental beneficiary of a court's supervision of the police. Deterrence is, by definition, a utilitarian ethic. As the progeny of deterrence theory, the inevitable discovery exception is also necessarily unconcerned with ethical considerations or constitutional values that lie beyond the pragmatic.

The Need for a Good Faith Requirement for the Inevitable Discovery Exception

Refinement of the inevitable discovery exception to the exclusionary rule is mandated by the imperative judicial duty to uphold the Constitution as the supreme law of the land. Adding a good faith requirement would protect constitutional rights and address problems with the inevitable discovery exceptions presently formulated. The inevitable discovery exception should include a good faith requirement for two reasons. First, a good faith requirement would curtail constitutional abuse now possible through the inevitable discovery exception's hypothetical nature and the low standard of proof currently required. Second, a good faith requirement would exclude evidence obtained via willful violations, but would not punish officers acting honestly.

In *Nix v. Williams*,[72] the Supreme Court held that, when evidence is obtained in violation of a defendant's rights, that evidence may still be admitted at the defendant's trial if the prosecution can prove that the evidence inevitably would have been discovered by some other means. A hypothetical basis is all that *Nix v. Williams* requires. Instead of examining established facts, the judge must speculate as to whether the police

seizure cases is rather the expression of the right to a fair *prosecution*, which means, at a minimum, constitutional behavior throughout the whole course of governmental conduct, which in turn means, for example, observance of the fourth amendment by the executive and review of executive conduct in light of that amendment at trial." *Id.*

72. 467 U.S. 431, 444 (1984).

would have discovered the evidence had they not violated the defendant's rights. The prosecution only need present a possible fact scenario to illustrate that the evidence could have been discovered by legal means. The hypothetical nature of the inevitable discovery exception is fraught with potential for abuse.[73]

The low standard of proof required for the inevitable discovery exception in *Nix v. Williams* makes serious constitutional errors even more probable. Although two justices argued that a clear and convincing standard should apply,[74] the majority held that the prosecution need only prove inevitable discovery by a preponderance of the evidence.[75] The hypothetical nature of the inevitable discovery exception, combined with the low standard of proof required, highlights the need for a good faith requirement.[76] Willful violations of the Constitution are no barrier to the admission of derivative evidence if the prose-

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73. Prior to *Nix v. Williams*, a commentator expressed concern with the lack of inquiry into the nature of police misconduct. The writer was concerned with the hypothetical nature of the exception and distinguished it from the independent source doctrine. His primary concern was that:

> [I]t is very difficult to hypothesize what the police response would be to a given situation because "it is extremely rare to find a normal, lawful police procedure which is regularly followed and inevitably would have produced the same exact information." Just as there is a danger that sophisticated legal argument will be used to show a causal connection between the initial illegal conduct and the discovery of derivative evidence, the same "sophisticated argument" aided by hindsight can be used to show what the police would have done in a given situation.

Note, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137, 155 (1976) (footnotes omitted). Therefore, the writer argued,

> There are only a few situations where the courts can apply the inevitable discovery limitation consistently with the deterrence goals of the exclusionary rule. When evidence would have been revealed to the police by operation of law or by clearly defined police procedures which are regularly followed, and the police officers have not acted in bad faith to accelerate the discovery, the doctrine can be applied satisfactorily.

Id. at 160 (footnotes omitted).

74. *See* Nix v. Williams, 467 U.S. 431, 459 (1984) (Brennan, J., dissenting).

75. *See id.* at 444.

76. A commentator argued that the majority's

> paradoxical statement that whether evidence would have been found "involves no speculative elements" and can easily be based on the facts which had already occurred . . . . [P]recisely because of a constitutional violation, courts will never know if the police investigatory procedures actually would have discovered the evidence. This inherently speculative nature of the inevitable discovery inquiry demands a higher standard of proof.

Comment, Nix v. Williams: *An Analysis of the Preponderance Standard for the Inevitable Discovery Exception*, 70 IOWA L. REV. 1369, 1379 (1985) (footnotes omitted).

cution can demonstrate, by only a preponderance of the evidence, that discovery is hypothetically inevitable.[77] The potential for abuse is great, especially when the doctrine is applied to a situation involving reckless or intentional violations of constitutional protections. The inevitable discovery exception as formulated does not satisfy the judiciary's duty to protect constitutional rights.

Based on the foregoing, before the doctrine is invoked, courts should require the prosecution to demonstrate by a preponderance of the evidence that law enforcement officers acted with an objective good faith belief that their actions were lawful. Imposition of a good faith requirement would permit the present evidentiary standard to be retained. If a court found that police were acting in good faith, no violence would be done to due process considerations, then the other test—whether the evidence would ultimately have been discovered—can be safely invoked on a preponderance of the evidence basis.

Critics of the exclusionary rule criticize what is perceived as its meat-axe approach. As Chief Justice Burger noted in *Nix v. Williams*, honest mistakes by law enforcement officers have been treated in the same way as flagrant violations of the fourth amendment.[78] One commentator stated: "The disparity in particular cases between the error committed by the police officer and the windfall given by the [exclusionary] rule to the criminal is an affront to popular ideas of justice."[79] The inevi-

77. One writer argued that the doctrine should be limited to derivative evidence and not be applied to primary evidence. Forbes, *The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment*, 55 FORDHAM U.L. REV. 1221 (1987). Since the Supreme Court has excluded primary evidence coming from an independent source, the premise is that the inevitable discovery exception should also exclude primary evidence. Moreover, due to the speculative nature of the inevitable discovery exception, courts should be even more reluctant to allow use of such primary evidence. *Id.* at 1235-37. This argument against extending the inevitable discovery exception to primary evidence relies on the Court's precedent. "It is further supported by the fact that if the inevitable discovery exception is extended to primary evidence, there is potential for using the inevitable discovery exception to obviate the warrant requirement . . . ." *Id.* at 1237.

78. *Nix v. Williams*, 467 U.S. at 445 (comparing bad faith and good faith). In *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388 (1971) (Burger, C., dissenting), Burger argued that "society has at least as much right to expect rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition." *Id.* at 419.

79. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1036 (1974). Judge Malcolm Wilkey offers eleven additional flaws in the exclusionary rule: (1) only

table discovery exception should be flexible enough to permit evidence to be admitted when officers make honest mistakes.

Application of the inevitable discovery exception is justified when officers make honest mistakes because they do not understand criminal constitutional law. This area of law is both complex and dynamic. In many instances, the strength of common law is its ability to adapt principles to changing conditions in society. In criminal law, such dynamism creates uncertainty for even the most conscientious officer. One commentator noted "the undeniable fact that our courts, from the Supreme Court of the United States on down, have created such an arcane and incomprehensible body of law . . . that the policeman on the street simply can't know whether his actions are legally permissible or not."[80] "A police officer will not be deterred from an illegal search if he does not know it is illegal."[81] The complex body of the law that governs searches, seizures, and confessions is continually adjusted by courts. Law enforcement personnel are unfairly required to anticipate changes in application of the exclusionary rule or face exclusion of evidence obtained in good faith.

Addition of a good faith requirement to the inevitable discovery exception will exclude evidence obtained through willful constitutional violations, but will not punish officers acting honestly. Due to the complexities of criminal constitutional law, the question should be whether the law enforcement officials made a good faith attempt to comply with the law.[82] If the

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the guilty benefit, while innocent victims of illegal searches have neither protection nor remedy; (2) the exclusionary rule vitiates internal discipline in law enforcement agencies; (3) the rule is an unnecessary and intolerable burden on the court system; (4) the rule forces the judiciary to perform the executive function of disciplining the police; (5) the misplaced burden deprives innocent defendants of due process; (6) the rule encourages perjury by the police; (7) the rule makes hypocrites out of judges; (8) the high cost of the rule causes the courts to expand the scope of search and seizure for all citizens; (9) the rule is applied with no sense of proportion to the crime of the accused; (10) the rule is applied with no sense of proportion to the misconduct of the officer; and (11) the rule diminishes respect for the judicial process, lawyers and laymen alike. Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. TEX. L.J. 530, 532-33 (1982).

80. Carrington, *Good Faith Mistakes and the Exclusionary Rule*, CRIM. JUST. ETHICS 35, 38 (Summer/Fall 1982).

81. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 740 (1972).

82. In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court promulgated a good faith exception to the exclusionary rule. The *Leon* Court held that evidence seized by officers in good faith reliance on a defective search warrant is admissible in

answer is yes, then due process is satisfied and the wrongfully seized evidence is admitted if it would have been discovered without wrongful conduct.[83] In the context of the inevitable discovery exception, good faith can accommodate the evolution of the law and insure that willful constitutional violations are not permitted, while still deterring police misconduct.[84]

Two cases involving radically different police activity illustrate the need for a good faith requirement. These cases illustrate how honest mistakes made by officers might be treated differently than flagrant abuse. In *Brewer v. Williams*,[85] the Supreme Court plowed new constitutional ground. The Supreme Court had not yet refined its concept of what constituted interrogation when the detective gave the Christian burial speech. Thus, the errant detective was an actor adrift in the changing currents of constitutional law. "[I]t is . . . plain that [the detective] meant to learn where the body was hidden through means he thought, however mistakenly, [were]

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court. *Id.* at 926. Good faith requires that the officer, in obtaining the warrant, not mislead the magistrate through information known to be false or in reckless disregard for the truth. *Id.* at 914 (citing Franks v. Delaware, 438 U.S. 154 (1978)).

The *Leon* Court reasoned that the exclusionary rule should not be used to punish essentially sound police practices. *Id.* at 916-24. All the actors in *Leon*, both judicial and law enforcement, were mistaken but blameless. *Leon*'s good faith analysis comports with the dynamic and complex nature of search and seizure law. It is also consistent with society's need for effective law enforcement.

83. Sunderland argues that the

> relevant question for this inquiry is whether or not the principled argument supporting the exclusionary rule presented above allows the admission of evidence obtained under circumstances of minor, technical or non-wilful violations. The answer is arguably yes. One may, in a manner consistent with the above arguments supporting the exclusionary rule, specify certain guidelines limiting application of the rule, guidelines supported by history, reason and case law.

Sunderland, *Exclusionary Rule*, *supra* note 25, at 150. Good faith would satisfy due process and confine the rule to deterrence of willful constitutional violations.

84. One critic argues that high levels of police misconduct "impact[ ] directly and significantly on the deterrent purpose of the exclusionary rule." Grossman, *The Doctrine of Inevitable Discovery: A Plea for Reasonable Limitations*, 92 DICK. L. REV. 313, 329 (1988). To Grossman, the rule best serves its purpose when applied to bad faith misconduct by police. He lays out two paradigms, one with, the other without, an exclusionary rule:

> The more purposeful the misconduct, the greater the need to deter and the more effective is the lesson for those contemplating future illegalities. Conversely, allowing the use of evidence which is discovered through a deliberate violation of the law communicates to the police the possibility, if not the likelihood, of benefiting from their own purposeful wrongdoing.

Id. at 333-34 (footnote omitted).

85. 430 U.S. 387 (1977).

constitutional."[86]

Where the law is unclear, as in *Brewer v. Williams*, deterrence cannot play a role. Evidence obtained in good faith, but in a manner that a court later determines violates the Constitution, is admitted under the inevitable discovery exception to the exclusionary rule. The additional good faith requirement ensures that the admission of the tainted evidence does not offend due process.

In contrast, *Rochin v. California*[87] involved a wholly different and more egregious set of facts. In *Rochin*, officers entered the defendant's home without probable cause. The officers arrested Rochin, took him to a hospital, and had his stomach pumped to obtain evidence. Justice Frankfurter, writing for the Supreme Court, found:

> [T]he proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of [Rochin's home], the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit . . . constitutional differentiation.[88]

Justice Frankfurter stated:

> Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings . . . ." Due process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are "so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . ."[89]

The police conduct in *Rochin* is intolerable and there exists no reasonable argument that the police did not recognize it as such. The inevitable discovery exception should not apply to circumstances involving willful constitutional violations such as

86. Johnson, *Christian Burial*, *supra* note 50, at 368.

87. 342 U.S. 165 (1952).

88. *Id.* at 172.

89. *Id.* at 169 (citing Malinski v. New York, 324 U.S. 401, 416 (1945); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

those in *Rochin*.[90] Where the boundaries are clear, as in *Rochin*, deterrence plays a legitimate role. Therefore, where an officer flagrantly or willfully violates a suspect's constitutional rights, due process requires exclusion of the evidence flowing from the constitutional violation. A court's duty in such a situation is clear. Fidelity to the Constitution demands that the judiciary refuse to admit the evidence under the inevitable discovery exception.

A good faith requirement is necessary to prevent use of the inevitable discovery exception in situations similar to *Rochin*. A recent Florida appellate decision demonstrates that the danger of *Rochin*-like volitions is not fanciful or speculative. In *Craig v. State*,[91] a capital murder case, the State of Florida apparently conceded that the defendant's confession was obtained as a result of: (1) an unlawful, forcible, and warrantless entry into his home; (2) an ineffective waiver of his right to remain silent; (3) actual threats and coercion; and (4) continued deceptive and unlawful sequestration of the defendant while his counsel was attempting to reach him.[92] Craig's confession contained the location of the bodies and valuable derivative evidence.[93] The Florida Supreme Court applied the inevitable discovery exception and upheld the admission of all the evidence based on law enforcement testimony that sink holes in the area "would have been closely examined" and a co-defendant's "limited authorization" to inform police the bodies had been disposed of in "deep water."[94] Noticeably absent from the discussion is any concern for the admittedly willful and illegal conduct of the police. In contrast to *Nix v. Williams*, the officers' actions in *Craig* were willful, systematic, and encompassed fourth, fifth, and sixth amendment violations.

The *Craig* court made a willing suspension of disbelief. Indeed, in *Craig*, a codefendant referred only to "deep water."[95] The record is silent as to how this cryptic reference could have inevitably (or even possibly) led to the specific location where

90. *See* Sunderland, *Exclusionary Rule*, *supra* note 25, at 150-52.
91. 510 So. 2d 857 (Fla. 1987).
92. *Id.* at 862.
93. *Id.* at 861.
94. *Id.* at 862-63.
95. *Id.* at 863.

the bodies were found.[96] Indeed, if discovery were inevitable, as the court concluded, law enforcement authorities had no need to resort to threats and intimidation. More importantly, if the codefendant's reference to "deep water" and normal investigative techniques were sufficient, the investigators did not need the defendant to direct them to the location.[97] Common sense indicates the police were at a dead end and knew it. Police threats and illegal activity produced the evidence. Nothing else could have.

Use of the inevitable discovery exception in such an intentionally coercive situation complies with neither the legitimate goal of deterrence nor due process of law. The addition of a good faith requirement to the inevitable discovery exception requires the prosecution to show that police action was not an intentional violation of a defendant's constitutional rights. Thus, a good faith requirement would still allow admission of evidence even though a defendant's constitutional rights were inadvertently, as opposed to intentionally, violated.

CONCLUSION

The courts' increasing reliance on a deterrence rationale with little or no discussion of constitutional issues is unfortunate. As the early cases approving exclusion as a remedy clearly indicate, deterrence was simply not an issue.[98] The failure by the judiciary to consider constitutional issues allows application of the inevitable discovery exception without adequate attention to other policy reasons mandating exclusion of evidence. The concern over the inevitable discovery exception is in reality only a segment of a much larger, more fundamental, debate. That debate concerns the exclusionary rule itself and, essentially, the constitutional basis for the rule. The shift to deterrence is unfortunate because it obscures or even ignores ethical considerations. As indicated, that dimension of the debate has been revived. This is not to say that ethics and pragmatism are mutually exclusive concepts. Both supporters and critics may have missed the very beneficial ef-

96. The area in question is located in Lake County, Florida, an area that is honeycombed with sink holes of varying depth as a result of phosphate mining.

97. *Craig*, 510 So. 2d at 861.

98. *See supra* note 6 and accompanying text.

fect that the exclusionary rule has on law enforcement agencies at both the state and federal levels.

Obscured by the smoke and raging battle, the exclusionary rule contributed to a quiet revolution in American law enforcement.[99] Stephen H. Sachs, speaking of Maryland law enforcement, points to "a virtual explosion in the amount and quantity of police training [and sophistication] in the last twenty years."[100] Sachs, a career prosecutor, points to the extensive upgrading of police training as a definite improvement in the system.[101]

Since the 1961 Supreme Court decision in *Mapp v. Ohio*,[102] prosecutors and police have been unable to rely on involuntary confessions and the fruits of illegal searches. Improving police training has also contributed to increased utilization of scientific technologies and new psychological theories to achieve convictions.[103]

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99. The increasing reliance on the exclusionary rule's ability to deter illegal police conduct as a justification for the rule raises the issue of whether the rule actually has such an effect on law enforcement officers. Critics have unleashed a barrage of statistical attacks and counter-attacks on the effectiveness of the exclusionary rule.

Professor Dillon Oaks' landmark study sought to measure the exclusionary rule's deterrent effect on police violations of constitutional rights. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 666 (1970). The study sought to measure the rule's effect on police behavior in New York, Chicago, Cincinnati, and the District of Columbia. Professor Oaks concluded that the exclusionary rule imposes excessive costs on the justice system. The rule "creates the occasion and incentive for large-scale lying by law enforcement officers." *Id.* at 755. The exclusionary rule "diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police." *Id.* Based on his study, Oaks argues, "As to search and seizure violations, the exclusionary rule should be replaced by an effective tort remedy against the offending officer or his employer." *Id.* at 756.

Supporters of the exclusionary rule marshalled their own statistical studies. One ardent supporter of the rule conducted a study in 1983. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585. Accepting that the exclusionary rule can be justified based on its deterrent effect, Nardulli concluded that the costs of the rule (lost arrests and convictions) results only in the release of a few marginal offenders. *Id.* at 606-07. This "minuscule" effect is more than outweighed by the rule's deterrent effect. *Id.* at 607. Another study which assessed available empirical evidence concluded that the exclusionary rule was a minor factor in explaining the disposition of felony arrests. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 677-86.

100. Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 CRIM. JUST. ETHICS 28, 31 (Summer/Fall 1982).

101. *Id.*

102. 367 U.S. 643 (1961).

103. Florida's case law illustrates this trend. *See, e.g.*, Troedel v. State, 462 So. 2d

Truly professional law enforcement inevitably improves the accuracy of trial results. Fair and accurate trials are fundamental to the integrity of the truth-seeking process. An accurate and just result in conformity with the law vindicates the Constitution and the legal system. From this standpoint, use of the inevitable discovery exception without a good faith requirement is a step backward. Use of the bare inevitable discovery exception will discourage further improvements in law enforcement training that has occurred in response to the exclusionary rule and has arguably improved the accuracy of trial results. Addition of a good faith requirement to the inevitable discovery exception will improve the integrity of the legal process.

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392 (Fla. 1984) (neutron trace evidence used to prove presence of gunshot residues); Andrews v. State, 533 So. 2d 841 (Fla. Dist. Ct. App. 1988) (DNA testing and comparison used to prove identity in rape case); Kruse v. State, 483 So. 2d 1383 (Fla. Dist. Ct. App. 1986) (post traumatic stress syndrome testimony used to corroborate testimony child victim of sexual abuse), *appeal dismissed*, 507 So. 2d 588 (Fla. 1987); Bradford v. State, 460 So. 2d 926 (Fla. Dist. Ct. App. 1984) (photographs of abrasion patterns on defendant's hands compared to models of victim's teeth), *review denied*, 467 So. 2d 999 (Fla. 1985); Worley v. State, 263 So. 2d 613 (Fla. Dist. Ct. App. 1972) (voice prints used to identify person who telephoned bomb threats); Coppolino v. State, 223 So. 2d 68 (Fla. Dist. Ct. App. 1968) (novel chemical test to determine presence of drug and cause of death), *cert. denied*, 399 U.S. 927 (1970). These cases, of course, do not reflect the more mundane, daily use of ballistics, fingerprints, hair comparisons, and toolmark identifications in criminal cases.