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Knock, Knock - What's Invevitably There? - An Analysis of the Applicability of the Doctrine of Inevitable Discovery to Knock and Announce Violations

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[Lady Macbeth] Go get some water,
And wash this filthy witness from your hand.
Why did you bring these daggers from the place?
They must lie there. Go carry them; and smear
The sleepy grooms with blood.
[Macbeth] I'll go no more.
I am afraid to think what I have done;
Look on't again I dare not.
[Lady Macbeth] Infirm of purpose!
Give me the daggers. The sleeping and the dead
Are but as pictures; 'tis the eye of childhood
That fears a painted devil. If he do bleed,
I'll gild the faces of the grooms withal;
For it must seem their guilt.
[Knock, knock]
[Macbeth] Whence is that knocking?
How is't with me, when every noise appals me?
What hands are here? ha! they pluck out mine eyes.
Will all great Neptune's ocean wash this blood
Clean from my hand? No, this my hand will rather
The multitudinous seas incarnadine,
Making the green one red.
[Lady Macbeth] My hands are of your colour; but I shame
To wear a heart so white.
[Knock, knock] I hear a knocking
At the south entry. Retire we to our chamber.
A little water clears us of this deed;
How easy is it then! Your constancy
Hath left you unattended.[1]

I. INTRODUCTION

Because every man's house is his castle and fortress, the English common law required a representative of the Crown to announce his presence and state his purpose before executing a civil writ.[2] Yet, with the knock on the door, offenders

1. WILLIAM SHAKESPEARE, THE TRAGEDY OF MACBETH, act 2, sc. 2.
2. Semayne's Case, 77 Eng. Rep. 194, 195-96 (K.B. 1603).
The house of everyone is to him as his castle and fortress, as well as for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills one per infortun', without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and

such as the Macbeths are put on notice that they are in imminent danger of being discovered with incriminating evidence on their persons. Had the people at the gate been officers of the Crown, rather than Macduff and Lennox,[3] one might question the wisdom in requiring that they knock on the door before entering. Arguably, it unnecessarily warned the perpetrators of the presence of the law, thereby allowing them to literally wash the blood off their hands.

The knock and announce requirement has been justified as necessary for the protection of the searching officers from being mistakenly identified as burglars.[4] In addition, the requirement protects the privacy of the subject of the search,[5] allowing him a moment to put his personal effects in order before the officers' entry.[6] The knock and announce requirement is codified in Title 18 of the United States Code,[7] and is considered a part of the reasonableness inquiry under the Fourth Amendment.[8] Evidence obtained directly or indirectly as a result of an unreasonable search or seizure is generally not admissible at trial under the exclusionary rule.[9] But if the evidence would inevitably have been discovered through an independent line of investigation, it is not subjected to this exclusion.[10] The federal circuit courts are split on whether the alternative investigation must have been initiated and actively pursued at the time of the initial discovery or seizure.[11]

Recent state court decisions disagree on whether the exclusionary rule is applicable to knock and announce violations, and whether illegally seized evidence should nevertheless be admissible under the doctrine of inevitable discovery.[12] The

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> his house, it is not felony, and he shall lose nothing, and therewith agree 3 E. 3. Coron. 303, & 305. & 26 Ass. pl. 23. So it is held in 21 H. 7. 39. every one may assemble his friends and neighbours to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence: and the reason of all this is, because *domus sua cuique est tutissimum refugium.*

Id.

3. SHAKESPEARE, *supra* note 1, act 2, sc. 3.

4. Craig Hemmens, *I Hear You Knocking: The Supreme Court Revisits the Knock and Announce Rule*, 66 UMKC L. REV. 559, 565 (1998).

5. *Id.* But putting one's "personal effects in order" does not include the destruction of incriminating evidence.

6. United States v. Kane, 637 F.2d 974, 977 (3d Cir. 1981).

7. 18 U.S.C.A. § 3109 (West 2000).

8. *See* Wilson v. Arkansas, 514 U.S. 927, 934 (1995) (observing, that "[g]iven the longstanding common-law endorsement of the practice of announcement, . . . [there is] little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure").

9. *See generally* Weeks v. United States, 232 U.S. 383, 398 (1914) (requiring the return of personal effects seized after a violation of the Fourth Amendment, thus precluding those effects from being admitted into evidence against the accused).

10. Nix v. Williams, 467 U.S. 431, 444 (1984) (adopting the inevitable discovery exception to the exclusionary rule).

11. *See* discussion *infra* Part II.D.3.

12. *Compare* Lee v. State, 774 F.2d 1183, 1192 (Md. Ct. Spec. App. 2001), *with* People v. Vasquez, 602 N.W.2d 376, 378-79 (Mich. 1999), *and* People v. Stevens, 597 N.W.2d 53, 62 (Mich. 1999), *cert. denied sub nom* Stevens v. Michigan, 528 U.S. 1164 (2000).

first section of this paper provides a background on the Fourth Amendment, the knock and announce requirement in federal courts, and the exclusionary rule and its exceptions. The following section analyzes whether the exclusionary rule is an appropriate remedy for knock and announce violations, and whether the doctrine of inevitable discovery bars the exclusion of evidence seized after such a violation. This study asserts that the exclusionary rule should be applied to violations of the knock and announce procedure because, unless justified by exigent circumstances, its omission renders the entire search or seizure unreasonable under the Fourth Amendment. Furthermore, the doctrine of inevitable discovery should not be applicable to knock and announce violations, because otherwise the searching officer can willfully omit the knock-announce procedure knowing any evidence discovered will be admitted nonetheless. Thus, the exclusionary rule will in effect be eliminated as a remedy for the constitutional violation, which ultimately will undermine the privacy protection offered by the Fourth Amendment.

II. BACKGROUND

A. *The Fourth Amendment and the Preference for Obtaining Warrants*

The federal government is a government of limited powers, and it may not infringe upon areas of control reserved to the states or upon certain fundamental rights vested in the individual citizen.[13] A right of the citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" is enumerated in the Fourth Amendment.[14] A search or seizure is reasonable under the Fourth Amendment if, prior to its execution, the agent of government can articulate a justification for the search based on the facts known to him at that time.[15] Depending on the scope and invasiveness of the search, either a reasonable suspicion[16] or probable cause[17] must support the intrusion. The U.S. Supreme Court has expressed a preference for obtaining a warrant, whenever practicable, before executing a search or seizure.[18] The search or seizure must be preceded by a

13. U.S. CONST. amend. X.

14. U.S. CONST. amend. IV.

15. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 149 (1925).

16. Terry v. Ohio, 392 U.S. 1, 27 (1968) (holding that a reasonable suspicion that the suspect is armed is sufficient to warrant a pat down for the presence of a weapon). A reasonable suspicion does not require the officer to "be absolutely certain that the individual is armed"; the standard is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." In addition, "due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.*

17. Wong Sun v. United States, 371 U.S. 471, 479 (1963). Probable cause does not require evidence sufficient to convict, but merely "evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed." *Id.* (quoting *Carroll*, 267 U.S. at 162).

18. Aguilar v. Texas, 378 U.S. 108, 110-11 (1964) (noting that "'the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers who may happen to make arrests'" (quoting United States v. Lefkowitz, 285 U.S. 452, 464 (1932))).

probable cause determination made by a neutral and detached magistrate,[19] and must be based upon an oath or affirmation made under penalty of perjury.[20] To further limit the intrusion into an individual's zone of privacy, the Fourth Amendment demands the warrant shall "particularly describe[] the place to be searched, and the persons or [items] to be seized."[21]

Although the Fourth Amendment favors antecedent judicial approval of searches or seizures "whenever practicable,"[22] the vast majority of searches and seizures are made without first obtaining a warrant.[23] Such warrantless searches are frequently upheld because the Supreme Court has recognized a limited set of circumstances in which the failure to obtain a warrant is excused.[24] As a general exception, a warrant is never required in the presence of exigent circumstances such as an imminent danger that the suspect will escape or that evidence will be removed or destroyed.[25] A warrant is not required for the making of an arrest in a public place, providing the arresting officer has probable cause to believe the suspect is a felon.[26] A warrant is, in addition, not required for the search of a vehicle[27] or a container within a vehicle.[28] Furthermore, a police officer does not need a warrant to conduct a "protective sweep" of the premises incident to a lawful arrest,[29] nor to conduct a search pursuant to a routine police procedure such as an inventory of an impounded vehicle.[30] In addition, a suspect's person and possessions may be searched during an in-station inventory following arrest.[31]

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19. Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971).

20. U.S. CONST. amend. IV.

21. *Id.*

22. Terry v. Ohio, 392 U.S. 1, 20 (1968).

23. *See generally* Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1038 (2001).

24. *See* Katz v. United States, 389 U.S. 347, 357 (1967) (stating that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-defeated exceptions") (footnote omitted).

25. Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971).

26. United States v. Watson, 423 U.S. 411, 418-19 (1976) (relying on the "common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest").

27. California v. Carney, 471 U.S. 386 (1985) (holding that the constitutionally protected privacy interest in an automobile is significantly less than in a home or an office). In addition, the mobility of vehicles such as boats and automobiles warrants a lesser degree of protection. *Id.*

28. California v. Acevedo, 500 U.S. 565, 579-80 (1991) (quoting United States v. Ross, 456 U.S. 798, 824 (1982)).

29. Chimel v. California, 395 U.S. 752, 763 (1969) (authorizing the "search of the arrestee's person and the area 'within his immediate control,'" i.e. "the area from within which he might gain possession of a weapon or destructible evidence"); *see also* Maryland v. Buie, 494 U.S. 325, 334-35 (1990) (extending the "protective sweep" to areas immediately adjoining the place of arrest wherefrom an attack by third persons could be launched).

30. Colorado v. Bertine, 479 U.S. 367, 375-76 (1987). However, warrantless searches of impounded vehicles are upheld only if conducted in good faith and pursuant to standardized criteria. *Id.*

31. Illinois v. Lafayette, 462 U.S. 640, 646 (1983) (upholding reasonable administrative searches aimed at preventing theft by and false claims against the stationhouse employees, and preserving the security of the stationhouse).

B. The Knock and Announce Requirement

Consistent with the old adage that every man's home is his castle and fortress, a warrant is generally required for the entry into a dwelling.[32] A warrantless entry into the home of another is *per se* unreasonable under the Fourth Amendment and can be justified only by the presence of exigent circumstances.[33] Indeed, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. . . ."[34] As an additional layer of privacy protection offered the occupants of a dwelling, the common law recognized a requirement for the agent of government to knock and announce his or her identity and purpose before forcing his way into a home.[35] This knock and announce requirement was codified in 1917, expressly conditioning a federal agent's right to forcibly enter a home to execute a warrant upon the preceding announcement of his authority and purpose.[36]

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32. Payton v. New York, 445 U.S. 573, 590 (1980). *Payton* distinguished the common law rule for felony arrests in public places because of the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Id.* at 601. *See also* Miller v. United States, 357 U.S. 301, 307 (1958) (quoting Pitt's address to the House of Commons in March 1763, stating

> [t]he poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

Id.

33. *Payton*, 445 U.S. at 589-90; *see also* Johnson v. United States, 333 U.S. 10, 14-15 (1948) ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.").

34. United States v. United States Dist. Court, 407 U.S. 297, 313 (1972).

35. Semayne's Case, 77 Eng. Rep. 194, 195-96 (K.B. 1603) (articulating the earliest known requirement for knock and announce).

> In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors; and that appears well by the stat. of Westm. 1. c. 17. (which is but an affirmance of the common law) as hereafter appears, for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it, and that appears by the book in 18 E. 2. Execut. 252. where it is said, that the K.'s officer who comes to do execution, may open the doors which are shut, and break them, if he cannot have the keys; which proves, that he ought first to demand them. . . .

Id. See also Read v. Case, 4 Conn. 166 (1822) (the first known American case to adopt the knock and announce rule).

36. 18 U.S.C.A. § 3109 (West 2000).

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Prior to 1995, knock and announce violations were analyzed under the common law,[37] or under section 3109,[38] rather than being subject to constitutional scrutiny. As early as 1963, the Supreme Court in *Ker v. California* had suggested that the manner in which warrants were executed should be measured by the reasonableness standard of the Fourth Amendment.[39] Nevertheless, five years after deciding *Ker*, the Court revisited the knock and announce principle but resorted to interpretation of section 3109 rather than constitutional analysis.[40] Faced with growing confusion among lower courts as to the proper legal foundation for the requirement, the Supreme Court granted certiorari in *Wilson v. Arkansas* to resolve the issue of whether the knock-announce principle was part of the Fourth Amendment reasonableness inquiry.[41]

1. Wilson v. Arkansas

In *Wilson*, police officers entered the petitioner's apartment with a valid search warrant, and discovered drugs and related paraphernalia, as well as the petitioner flushing marijuana down the toilet.[42] The petitioner was arrested on charges of possession and delivery of controlled substances, and sought to suppress the evidence on grounds that the police failed to knock and announce before entering her apartment.[43] The motion was denied, and the petitioner was convicted.[44] A unanimous Supreme Court reversed and remanded the conviction,[45] holding that under some circumstances an officer's failure to knock and announce might be unreasonable under the Fourth Amendment.[46] However, the court noted that in spite of its constitutional endorsement, the requirement is not inflexible and the presence of exigent circumstances may justify its omission.[47]

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37. *See, e.g.*, Miller v. United States, 357 U.S. 301, 305-06 (1958) (applying a District of Columbia law requiring the police to announce their purpose before breaking the curtilage).

38. Sabbath v. United States, 391 U.S. 585 (1968) (holding that the knock and announce procedure is required under section 3109 unless the officers have a substantial basis for their belief that notice and announcement would be unnecessary due to the existence of exigent circumstances).

39. Ker v. California, 374 U.S. 23, 39 (1963) (holding that in order to determine whether a search was conducted incident to a lawful arrest, the court must determine whether "the method of entering the home" to conduct the arrest offends "federal constitutional standards of reasonableness and therefore vitiate[s] the legality of [the] accompanying search").

40. *Sabbath*, 391 U.S. at 588-91.

41. 514 U.S. 927, 930 (1995).

42. *Id.* at 929.

43. *Id.* at 930.

44. *Id.*

45. *Id.*

46. *Id.* at 934. The Court found that, "[g]iven the longstanding common-law endorsement of the practice of announcement," there was "little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure." *Id.*

47. *Id.* at 934-35. The Court explicitly declined to consider the factors that may justify omission of the knock-announce requirement, leaving that determination to the lower courts. *Id.* at 936.

2. Richards v. Wisconsin

Two years after deciding *Wilson*, the Supreme Court had to reconsider the flexibility of the reasonableness inquiry and decide whether there were circumstances in which a no-knock entry could always be justified.[48] The Wisconsin Supreme Court allowed law enforcement officers to omit the knock and announce requirement during felony drug investigations.[49] According to the Wisconsin Supreme Court, it was reasonable to dispense with the knock and announce requirement because of the inherent danger to the officers involved, and the likelihood evidence would be destroyed.[50] A unanimous U.S. Supreme Court disagreed on two grounds.[51] First, the stated dangers of a felony drug investigation constituted "considerable overgeneralization[s]" and failed to take into account the situations in which such dangers were so minimal so as to be outweighed by the individual privacy interests involved.[52] Second, the court found that a crime-specific exception could easily be created for other categories of investigations, eventually rendering the knock and announce requirement entirely meaningless.[53] Thus, whether exigent circumstances warrant a no-knock entry must be determined on a case-by-case basis, and the Fourth Amendment does not permit the codification of a blanket exception to the rule that would insulate the determination from judicial review.[54] Rather, a no-knock entry may be justified by the agent's "reasonable suspicion that knocking and announcing their presence, under the . . . circumstances, would be dangerous or futile, or . . . would inhibit the effective investigation of the crime. . . ."[55]

3. U.S. v. Ramirez

Richards implicitly sanctioned the use of no-knock warrants, if sufficient cause for the issuance of such a warrant "can be demonstrated ahead of time."[56]

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48. Richards v. Wisconsin, 520 U.S. 385, 391-92 (1997).

49. State v. Richards, 549 N.W.2d 218, 227 (Wis. 1996).

50. *Id.* at 225.

51. *Richards v. Wisconsin*, 520 U.S. at 393-94.

52. *Id.* at 393. The Court suggested that the "search could be conducted at a time when the only individuals present . . . have no connection with the drug activity and thus will be unlikely to threaten officers or destroy evidence." *Id.* Further, "the police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy quickly." *Id.*

53. *Id.* at 393-94.

54. *Id.* at 394.

55. *Id.* Notably, Richard's conviction was upheld because the police had a reasonable suspicion to believe that he might have destroyed the evidence "if given further opportunity to do so." *Id.* at 395.

56. *Id.* at 396 n.7

> The practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time. But . . . a magistrate's decision not to authorize a no-knock entry should not be interpreted to remove the officers'

The Supreme Court next had to decide whether the need to use force when entering a house pursuant to such a warrant must also be demonstrated and authorized.[57] Hernan Ramirez was suspected of housing an escaped felon described as armed and dangerous.[58] A no-knock warrant was issued, and police entered his house in the early hours of the morning.[59] In doing so, they broke a single window of the garage.[60] Even though the escaped convict was not found, Ramirez was arrested on gun possession charges.[61] He sought to suppress the seizure of the gun, arguing that there were insufficient exigent circumstances to warrant the destruction of property.[62] According to the Ninth Circuit, because the Fourth Amendment governs the manner in which a warrant is executed, the destruction of property during a no-knock entry requires a higher standard of proof than the "reasonable suspicion" standard enumerated in *Richards*.[63] The Supreme Court disagreed, finding neither *Wilson* nor *Richards* compelled such a conclusion.[64] The existence of a "reasonable suspicion" in no way depends on whether property must be destroyed in order for the police to enter.[65] However, measured by the reasonableness standard, "[e]xcessive [and/]or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful. . . ."[66] In the instant case, though, the breaking of the single window of the Ramirez residence was deemed reasonable.[67]

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authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed.

Id.

57. United States v. Ramirez, 523 U.S. 65, 70-71 (1998).

58. *Id.* at 68.

59. *Id.* at 68-69.

60. *Id.* at 69. The police had been told by a confidential informant that the garage might contain a stash of guns and drugs. *Id.* at 68-69.

61. *Id.* at 69. Ramirez was a convicted felon. *Id.*

62. *Id.* at 69-70. The Ninth Circuit, in affirming the suppression of the evidence obtained after the forced entry, found that whereas a mild exigency is sufficient to justify a no-knock entry that can be accomplished without the destruction of property, "[m]ore specific inferences of exigency are necessary" when property is destroyed. United States v. Ramirez, 91 F.3d 1297, 1301 (9th Cir. 1996) (quoting United States v. Becker, 23 F.3d 1537, 1541 (9th Cir. 1994) (alteration in original)).

63. *Ramirez*, 91 F.3d at 1301, *overruled by Ramirez*, 523 U.S. at 69-70.

64. *Ramirez*, 523 U.S. at 70-71.

65. *Id.* at 71.

66. *Id.*

67. *Id.* at 71-72. The Court found it reasonable to break the window in order to discourage the refugee, or any other occupant of the house, from rushing to the weapons that allegedly were kept there. *Id.*

C. *The Exclusionary Rule*

1. *The* Weeks *Doctrine*

In *Weeks v. United States*, the petitioner was arrested and charged with use of the mails for the purpose of transporting lottery tickets and related paraphernalia.[68] Subsequent to his arrest, state and U.S. law enforcement officers entered his apartment without a warrant and seized papers and other personal effects, some of which were admitted into evidence at his trial.[69] The petitioner moved the court for the return of his property, alleging that the warrantless seizure was unreasonable under the Fourth Amendment and, consequently, the district attorney wrongfully held the papers.[70] The Supreme Court agreed that the seizure was unreasonable under the Fourth Amendment, and because of the constitutional violation, the papers were wrongfully obtained.[71] Therefore, consistent with common law precedents, the papers and other effects should have been returned to the petitioner and not admitted into evidence.[72]

2. *Incorporation*

By its express language, the *Weeks* decision was restricted to the papers illegally seized by the federal officers.[73] According to the Court, Fourth Amendment protection was limited to actions taken under a claim of federal authority.[74] This view was repudiated thirty-five years later in *Wolf v. Colorado*,[75] where the Supreme Court found that the rights guaranteed by the Fourth Amendment are basic to a free society, and as such are "implicit in the concept of ordered liberty."[76] Consequently, the Fourth Amendment guarantees apply to the several states through incorporation into the Due Process Clause of the Fourteenth Amendment.[77]

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68. Weeks v. United States, 232 U.S. 383, 386 (1914).
69. *Id* at 386-88.
70. *Id.* at 388-89.
71. *Id.* at 398.
72. *Id.*
73. *Id.*
74. *Id.*
75. 338 U.S. 25 (1949), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).
76. *Id.* at 27-28 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
77. *Id.* According to the Court,

> [t]he knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

Id. at 28.

However, the *Wolf* Court declined to extend due process protection to the exclusionary remedy.[78] At the time *Wolf* was decided, the majority of states had rejected the *Weeks* doctrine.[79] In addition, the Court noted that none of the jurisdictions within the United Kingdom or the British Commonwealth adhered to a rule similar to *Weeks* even after having decided similar questions.[80] Thus, because most of the English-speaking world did not find the exclusionary remedy vital to protect the fundamental interests at stake, the Supreme Court declined to treat the *Weeks* doctrine as an essential ingredient to the Fourth Amendment rights falling within the Due Process Clause of the Fourteenth Amendment.[81]

The Supreme Court overruled *Wolf's* narrow view of the applicability of the exclusionary rule in 1961, when deciding *Mapp v. Ohio*.[82] In *Mapp*, the Court observed that the rule of exclusion enunciated in *Weeks* was not simply a limitation on the admissibility of evidence seized in violation of a constitutional right; it was of itself a rule of constitutional origin.[83] Thus, although the Fourth Amendment does not expressly limit the use of evidence obtained in violation of its tenets, it implicitly prohibits the use of any evidence so procured.[84] Because the exclusionary rule is judicially inferred from the rights guaranteed by the Fourth Amendment, it is consequently encompassed within the boundaries of the Fourteenth Amendment.[85] In addition, the Court maintained that due process protection of the substantive right to be free from unreasonable searches and seizures was rendered valueless by the failure to include the most important constitutional privilege—the exclusion of evidence seized in violation of the substantive right.[86] According to the Court, this failure was "to grant the right but in reality to withhold its privilege and enjoyment."[87]

3. Purposes Behind the Exclusionary Rule

According to the *Wolf* court, the exclusionary rule was not a necessary ingredient of Fourth Amendment protection in part because private causes of action

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78. *Id.* at 28-33.

79. *Id.* at 29. The Court found that whereas sixteen states adhered to the *Weeks* decision, thirty states had rejected it. *Id.*

80. *Id.* at 30. These included England, Scotland, Canada, Australia and India. *Id.* at app. A at 39.

81. *Id.* at 31-33. The Court concluded that even though exclusion may be an effective remedy, "it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective." *Id.* at 31.

82. 367 U.S. 643, 654-55 (1961).

83. *Id.* at 649.

84. *Id.* (citing Olmstead v. United States, 277 U.S. 438, 462 (1928)).

85. *Id.* at 655-58. The Court noted that it was aware of no similar restraint "conditioning the enforcement of any other basic constitutional right." The Court enforced against "the states the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including . . . the right not to be convicted by use of a coerced confession. . . ." *Id.* at 656.

86. *Id.* at 655-56.

87. *Id.* at 656.

against the offending officers were available.[88] Violations of the Fourth Amendment may thus be redressed through suits in tort and under the Civil Rights Acts, and unconstitutional conduct may be further deterred and punished through departmental disciplinary actions against the individual officer.[89] In the years following *Wolf*, however, many states reevaluated their use of the exclusionary rule because the alternative remedies did not efficiently deter the violations of individual liberties.[90] For instance, the California Supreme Court, in adopting the *Weeks* doctrine, found that it was compelled to do so

> because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.
>
> Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court.[91]

In the years before *Mapp*, the U.S. Supreme Court had also noted that the alternative remedies offered insufficient constitutional protection against unreasonable state action.[92] Thus, the *Mapp* Court's decision to make the *Weeks* doctrine a rule of constitutional origin was in part based on the failure of other remedies to provide meaningful protection to the constitutional interests at stake.[93]

Consistent with its constitutional origin, the exclusionary rule is not applied as a penalty for the constitutional violation, but rather as a deterrent and incentive for the agents of government to abstain from future unconstitutional acts.[94] Thus,

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88. Wolf v. Colorado, 338 U.S. 25, 30 & n.1, 31 & n.2 (1949). In addition, the Court noted that one factor warranting a distinction between federal and local law enforcement with respect to sanctions was that "[t]he 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 . . . [against] remote authority pervasively exerted throughout the country." *Id.* at 32-33.

89. *See, e.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971).

90. *Mapp*, 367 U.S. at 651.

91. People v. Cahan, 282 P.2d 905, 911-13 (Cal. 1955).

92. *See, e.g.*, Irvine v. California, 347 U.S. 128, 137 (1954) (noting that the innocent party to an unreasonable search was unlikely to complain, and an accused, absent the exclusion of evidence, has nothing to gain from disclosing the illegality at trial).

93. *Mapp*, 367 U.S. at 651-53. The Court cited California's failure to compel compliance with the constitutional provisions, and the fact that more than half the states had adopted a rule similar to *Weeks* at that time. *Id.* The Court concluded that whatever factual considerations supported the *Wolf* court in excluding the *Weeks* exclusionary rule when recognizing the enforceability of the Fourth Amendment against the states in 1949 could not be deemed controlling anymore. *Id.*

94. Brown v. Illinois, 422 U.S. 590, 599-600 (1975).

exclusion of illegally seized evidence "compel[s] respect for the constitutional guaranty . . . by removing the incentive to disregard it."[95] In furtherance of its deterrent purpose, the exclusionary rule is only applied where its remedial objectives are most efficiently served and outweigh the societal costs of its invocation.[96] Hence, "'the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons.'"[97]

In addition to its deterrent purpose, it has been suggested that the rule also serves a vital function as an "imperative of judicial integrity."[98] For example, by securing the conviction of a criminal with evidence illegally seized, the government enforces the criminal statute by violating a constitutional right. Therefore, the exclusion of illegally obtained evidence will ensure that the judicial branch does not make itself an accomplice to, nor expressly or implicitly sanction an officer's willful disobedience of the law.[99] In the words of Justice Clark, "[t]he criminal goes free, if he must, but it is the law that sets him free."[100]

D. Exceptions to the Rule

1. Fruit of the Poisonous Tree Doctrine

In order to preserve society's interest in efficient crime prevention and prosecution, the exclusionary rule is only applied to evidence that was obtained through the exploitation of illegal police conduct.[101] In *Wong Sun v. United States*, federal narcotics agents arrested two persons—Toy and Yee—on suspicions they were involved in heroin dealing.[102] The arrests were neither supported by probable cause nor conducted pursuant to lawfully obtained warrants, and therefore they constituted unreasonable seizures under the Fourth Amendment.[103] Yee possessed some heroin, and Toy implicated Wong Sun as its source both verbally and in a

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

96. *See* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (noting that because of the significant costs associated with the exclusion of incriminating evidence, the exclusionary rule is only applicable to criminal trials, and not other proceedings such as grand jury investigations, United States v. Calandra, 414 U.S. 338, 343-46 (1974), civil tax proceedings, United States v. Janis, 428 U.S. 433, 453-54 (1976), or civil deportation proceedings, INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984)).

97. *Brown*, 422 U.S. at 600 (quoting *Calandra*, 414 U.S. at 348).

98. *Elkins*, 364 U.S. at 222 (citing Olmstead v. United States, 277 U.S. 438, 469, 471 (1928) (Holmes & Brandeis, JJ., dissenting)).

99. *Id.* at 222-23; *see also Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting) (stating that "[t]o declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.").

100. Mapp v. Ohio, 367 U.S. 643, 659 (1961).

101. *Calandra*, 414 U.S. at 347-48.

102. 371 U.S. 471, 473-75 (1963).

103. *Id.* at 477-84. Arrest warrants were issued on the date of Toy and Yee's arraignments, but no warrants were outstanding on the day of the actual arrests. *Id.* at 475 n.3.

written unsigned statement made voluntarily after his arrest.[104] After his arrest, Wong Sun was released on his own recognizance.[105] He later returned to the Narcotics Bureau and made a voluntary statement which he refused to sign, although he admitted to its accuracy.[106]

Petitioners Yee and Wong Sun sought to exclude Toy's verbal statement, the unsigned written statements and the seized heroin as fruits of the unlawful searches and seizures.[107] The Supreme Court found that Toy's statements were not admissible against Toy because they were tainted by his unlawful arrest.[108] Further, Wong Sun's statements were not admissible against Toy, as they constituted uncorroborated declarations by a partner-in-crime.[109] However, the taint of the unlawful seizure of Toy and Yee had no effect on the evidence against Wong Sun.[110] According to the Court, evidence is not "'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police."[111] Rather, the appropriate question is "whether, granting establishment of the primary illegality, the evidence . . . has been [obtained] by exploitation of that illegality or . . . by means sufficiently distinguishable to be purged of the primary taint."[112]

2. *Independent Source Doctrine*

Consistent with the notion that the exclusionary rule only requires suppression of evidence obtained from the exploitation of a police illegality,[113] evidence discovered through sources or means wholly independent from the illegality is also admissible.[114] In *Segura v. United States*, federal narcotics agents had probable

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104. *Id.* at 474-77.

105. *Id.* at 475.

106. *Id.* at 476-77. Wong Sun had difficulties understanding the statement in English, and had the substance of it recited in Chinese by an agent of the Narcotics Bureau. *Id.*

107. *Id.* at 477.

108. *Id.* at 479-91. The Court found that the information the officers had at their disposal when arresting Toy did not amount to probable cause, and no attempt to obtain a warrant was made. Thus, the incriminating statements made subsequent to the unlawful arrest were excluded as fruits of the poisonous tree. *Id.*

109. *Id.* at 488-91. The Court came to this conclusion by joining two converging lines of precedents. *Id.* at 488. First, "a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused." *Id.* at 488-89 (relying on Smith v. United States, 348 U.S. 147, 153 (1954); Opper v. United States, 348 U.S. 84, 89-90 (1954)). Second, "an out-of-court declaration made after arrest may not be used at trial against one of the declarant's partners in crime." *Id.* at 488 (relying on Fiswick v. United States, 329 U.S. 211, 217 (1946)).

110. *Id.* at 491-93. The evidence was excluded with respect to Toy because of its tainted relationship to his unlawful arrest, and not because of any government improprieties in its surrender by Yee. Thus, the seizure of the drugs "invaded no right of privacy of person or premises which would entitle Wong Sun to object" to its introduction. *Id.*

111. *Id.* at 487-88.

112. *Id.* at 488. In the case of Wong Sun, his voluntary return to the police station to make a statement rendered the connection between the confession and the unlawful arrest "so attenuated so as to dissipate the taint" of the illegality. *Id.* at 491 (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)).

113. *See* discussion *supra* Part II.D.1.

114. Segura v. United States, 468 U.S. 796, 805 (1984).

cause to arrest Segura and others based on information from surveillance and other sources.[115] Due to a so-called "administrative delay," the officers had not obtained a search warrant for Segura's apartment at the time of his arrest.[116] However, incident to his arrest, the agents entered the apartment and conducted a limited security check of the premises.[117] The warrantless search revealed various drug paraphernalia in plain view.[118] The federal agents secured the premises for some nineteen hours while the search warrant was being prepared and issued.[119] The ensuing search resulted in the discovery of cocaine and evidence of drug transactions.[120] Segura sought to suppress all evidence, alleging it was tainted by the initial illegal entry into his apartment.[121] The U.S. Supreme Court disagreed, and held that evidence need not be excluded if discovered through a source wholly independent from the illegal entry and search.[122] Evidence so discovered may be introduced and proved regardless of the occurrence of illegal police conduct during the investigation.[123] Thus, because the search warrant was sought before, and on information wholly independent from, the illegal entry, the evidence was admissible.[124]

In 1988, the Supreme Court extended the independent source exception to an illegal search and seizure performed before a warrant had been applied for.[125] In *Murray v. United States*, federal law enforcement agents observed the petitioners leave a Boston warehouse in two vehicles.[126] After the vehicles were turned over to other drivers, they were stopped and searched and found to contain marijuana.[127] The federal agents returned to the warehouse, and upon entry discovered numerous bales of marijuana.[128] After leaving the premises, the agents applied for and obtained a search warrant for the warehouse, and upon entry, seized 270 bales of

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115. *Id.* at 799-800.

116. *Id.* at 800-01. Indeed, the search warrant application "was not presented to the Magistrate until 5 p.m." the following day—a nineteen hour delay from the time the agents initially entered the apartment. *Id.* at 801.

117. *Id.* at 800-01. It is undisputed that the entry into the apartment was illegal, as the agents entered without seeking or obtaining permission from the residents.

118. *Id.* at 801.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 805 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

123. *Id.* The Court noted that a seizure implicates different interests from a search. Thus, whereas a search implicates a privacy interest, a seizure merely implicates a possessory interest. *Id.* at 806. Under the circumstances, the seizure of the premises was reasonable because the officers had probable cause to believe the evidence would be removed or destroyed. *Id.* at 810. A warrantless search would have been unreasonable, but except for the protective sweep, the only search conducted was pursuant to the lawfully obtained warrant some nineteen hours after the initial entry. *Id.* at 814.

124. *Id.*

125. Murray v. United States, 487 U.S. 533 (1988).

126. *Id.* at 535.

127. *Id.*

128. *Id.* This initial entry was not pursuant to a warrant. *Id.*

marijuana.[129] In the affidavit in support of the application for a warrant, the agents did not use any information obtained during the illegal entry.[130] The petitioners moved to exclude the discovery and seizure of the marijuana, because they had been tainted by the illegal search.[131] The Supreme Court declined to suppress the evidence, however, because the second legal entry may not have been the result of the discoveries made during the initial illegal entry.[132] According to the Court, even if evidence is first discovered before a warrant has been applied for, it must not be excluded if subsequently "re-discovered " during a lawful search pursuant to such a warrant, if the decision to seek the warrant was not prompted by what had been discovered during the initial entry, and if no "information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant."[133] The independent source and fruit of the poisonous tree exceptions ensure that the prosecution is not put in a worse position, and the criminal defendant is not put in a better position, than the positions the parties would have occupied had the illegality never occurred.[134]

3. *Doctrine of Inevitable Discovery*

Evidence directly derived from the exploitation of an unconstitutional act is not excluded if it inevitably would have been discovered during the course of the criminal investigation.[135] In *Nix v. Williams*, the Supreme Court applied the inevitable discovery exception to the recovery of the body of a murder victim, the location of which was coerced from the suspect in violation of his Sixth Amendment right to counsel.[136] Based on the illegally obtained information, the body of the victim was discovered within two and one-half miles of an advancing search party.[137] The Court characterized this discovery as inevitable, when the area where the body was found demonstratively would have been searched within three

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129. *Id.* at 535-36.

130. *Id.* at 536.

131. *Id.*

132. *Id.* at 541. The case was remanded to the district court to determine whether the second search and seizure fell under the independent source exception. *Id.* at 542-44.

133. *Id.* at 542. The dissenting opinion, as characterized by the majority, argued that the evidence must be suppressed absent "some historically verifiable fact demonstrating that the subsequent search pursuant to a warrant was wholly unaffected by the prior illegal search," in practice, evidence establishing that the warrant had already been sought before the agents entered the premises. *Id.* at 540 n.2 (citing *id.* at 549 (Marshall, J., dissenting)). The Court declined this approach by noting that the applicability of the independent source exception to cases such as this would depend on the intent or mentality of the officers in conducting the warrantless search. In the case of the warehouse search, the district court had found that the officers conducted the initial search to guard against the possible destruction of evidence, and not "to see if there was anything worth getting a warrant for." *Id.*

134. *See, e.g., id.* at 542.

135. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 447-48 (1984).

136. *Id.* at 437, 449-50.

137. *Id.* at 449.

to five hours.[138] Furthermore, the body was concealed in a ditch next to a culvert, the kind of place the search party had been explicitly instructed to inspect.[139] Similar to the independent source doctrine, the doctrine of inevitable discovery is applied to prevent the prosecution from being subjected to a disadvantage because of the illegal police conduct.[140] However, its application requires substantive proof, by a preponderance of the evidence, as to the information's ultimate or inevitable discovery through lawful means.[141] According to the *Nix* court, it is irrelevant whether the police illegality was willful or occurred in bad faith, since "[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."[142]

In the aftermath of *Nix,* the circuits have differed as to whether, at the time of the illegality, an independent line of investigation must have been initiated and be actively pursued. A number of circuits including the Second,[143] Fifth,[144] Eighth,[145] Eleventh[146] and DC[147] Circuits interpret *Nix* to expressly require both a reasonable probability that the evidence would eventually have been discovered, and an actively pursued and independent line of investigation ongoing at the time of the constitutional violation. However, the Fifth Circuit recognizes certain circumstances where the active pursuit requirement may be dispensed with: for instance, where the

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138. *Id.* at 449-50.

139. *Id.* at 448-49.

140. *Id.* at 443-44. The Court noted, however, that the independent source doctrine was inapplicable in this case, because the discovery of the body was a direct result of the Sixth Amendment violation. *Id.* at 443.

141. *Id.* at 444.

142. *Id.* at 445. This argument of course ignores another possibility—that the police may know that they are likely to obtain a conviction regardless of whether the illegally obtained evidence is introduced. In *Nix,* the interrogating officers knew of both an eyewitness and physical evidence linking Williams to the girl's disappearance. *Id.* at 434. The officers might reasonably have inferred that a conviction could be obtained regardless of whether the physical evidence associated with her body was introduced.

143. *See, e.g.,* United States v. Eng, 971 F.2d 854, 859, 861 (2d Cir. 1992) (requiring a "direct causal relationship and reasonably close temporal relationship . . . between what was known and what had occurred prior to the government misconduct, and the allegedly inevitable discovery of the evidence").

144. *See, e.g.,* United States v. Cherry, 759 F.2d 1196, 1205-06 (5th Cir. 1985) (holding that the police must have been "actively pursuing a substantial alternate line of investigation"). It was insufficient that the agents "could have obtained a warrant" at the time of the illegal search, if they "made no efforts to do so. . . ." *Id.* at 1206.

145. *See, e.g.,* United States v. Hammons, 152 F.3d 1025, 1029 (8th Cir. 1998) (holding that the exception is not available unless the government is actively "pursuing a substantial, alternative line of investigation at the time" of the constitutional violation).

146. *See, e.g.,* United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984) (requiring that "the lawful means which made discovery inevitable were possessed by the police and were being actively pursued *prior* to the occurrence of the illegal conduct").

147. *See, e.g.,* United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558) in United States Currency, 955 F.2d 712, 720-21 (D.C. Cir. 1992) (holding that, for the inevitable discovery exception to apply, the subsequent inventory search (and thus discovery) "must in fact have been inevitable" and observing that the Supreme Court determined in *Nix* that "the deterrent effects of the exclusionary rule reach the point of diminishing returns when, unknown to the officers engaging in illegal conduct, a separate line of lawful investigation would have come upon the same evidence").

"independent source comes into being after the misconduct" has occurred.[148]

The active pursuit and ongoing investigation requirements are not articulated in the First,[149] Third,[150] Fourth,[151] Sixth, [152] Seventh,[153] Ninth[154] and Tenth[155] Circuits' inevitable discovery inquiries. These circuits require a determination of what events or evidence led to the conviction, and whether that evidence would inevitably have been discovered without the unlawful search.[156] In other words, "viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred"?[157]

As previously noted, the First Circuit recognizes circumstances under which the requirement for an independent line of investigation may be disregarded.[158] The test is thus flexible, and may require proof of an ongoing investigation if circumstances indicate its necessity.[159] In addition, in cases where the unlawful

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148. *Cherry*, 759 F.2d at 1206. The Fifth Circuit found that

> the interest in deterrence that gave rise to the . . . [requirement that an independent line of investigation must be actively pursued] is not so much implicated since the police at the time of the misconduct necessarily are not able to know that independent discovery of the evidence is inevitable and thus cannot rely on a broad application of the inevitable discovery rule to render admissible evidence actually obtained illegally.

Id. at 1205.

149. *See, e.g.*, United States v. Silvestri, 787 F.2d 736, 744-46 (1st Cir. 1986) (holding that the determination should be made on a case-by-case basis, and that there is no necessary requirement of an independent line of investigation "at the time the illegal search took place."). The First Circuit observed that, "[i]f the demands that the legal means of obtaining the evidence be both inevitable and independent are enforced, post hoc suggestions of alternate means" would be "unacceptable" "as a basis for application of the inevitable discovery exception." *Id.* at 746.

150. *See, e.g.*, United States v. Vasquez De Reyes, 149 F.3d 192, 195 (3rd Cir. 1998) (requiring that "the government establish[] that the police, following routine procedures, would inevitably have uncovered the evidence").

151. *See, e.g.*, United States v. Thomas, 955 F.2d 207, 210 (4th Cir. 1992) (rejecting the "alternate line of investigation" requirement).

152. *See, e.g.*, United States v. Kennedy, 61 F.3d 494, 499-500 (6th Cir. 1995) (holding "that an alternate, independent line of investigation is not required for the inevitable discovery exception to apply").

153. *See, e.g.*, United States v. Fialk, 5 F.3d 250, 253 (7th Cir. 1993) (holding that on review, the court "must determine what events or evidence led to [the] conviction, and then . . . decide whether that evidence would have been discovered without the unlawful search . . .").

154. *See, e.g.*, United States v. Merriweather, 777 F.2d 503, 506 (9th Cir. 1985) (finding it sufficient that "the second lawful search, which was carried out by agents ignorant of the existence and location of the [illegally discovered evidence], also resulted in discovery of the [contraband]"). The warrant for the second search was sought after the illegal entry, but was not based on any information from that search. In addition, the searching agents were not informed of the presence of the contraband, thus discovering it "independently." *Id.*

155. *See, e.g.*, United States v. Larsen, 127 F.3d 984, 986 (10th Cir. 1997) (holding that "the inevitable discovery exception applies whenever an independent investigation inevitably would have led to discovery of the evidence, whether or not the investigation was ongoing at the time of the illegal police conduct").

156. *See* cases cited *supra* notes 149-55.

157. United States v. Vasquez De Reyes, 149 F.3d 192, 195 (3rd Cir. 1998) (quoting *Kennedy*, 61 F.3d at 498).

158. *See supra* note 148 and accompanying text.

159. United States v. Silvestri, 787 F.2d 736, 746 (1st Cir. 1986).

search is nevertheless supported by a valid warrant,[160] the independent line of investigation requirement has been substituted for a three-part inquiry. This inquiry incorporates the justifications for the active pursuit requirement: whether the "legal means [are] truly independent; [whether] both the use of the legal means and the discovery by that means [are] truly inevitable; and [whether] . . . the application of the inevitable discovery exception either provide[s] an incentive for police misconduct or significantly weaken[s] Fourth Amendment protection."[161]

III. DISCUSSION

In *Wilson v. Arkansas*, the Supreme Court acknowledged, but refused to decide, the issue of whether evidence seized pursuant to a knock and announce violation may be "causally disconnected from the constitutional violation" itself, thereby rendering the exclusionary rule inapplicable.[162] This issue was also recognized, but not decided, by the Seventh Circuit in *United States v. Jones*,[163] by a California court of appeal in *People v. Hoag*,[164] and by a Florida court of appeals in *Richardson v. State*.[165] To date, the issue has been decided in two state courts, which reached fundamentally different conclusions.

A. State Court Decisions

1. People v. Stevens

In *People v. Stevens*, the Supreme Court of Michigan concluded that the exclusionary rule does not apply to evidence seized pursuant to a valid warrant after a knock and announce violation.[166] The court reasoned that "the 'knock and announce' statute does not control the execution of a valid search warrant; rather, it only delays entry."[167] The ensuing discovery was causally disconnected from the illegality, because it was made under the authority of the warrant and not because of the illegal means of gaining entry.[168] The court reasoned that discovery was

160. If the warrant is issued on information obtained independently of the constitutional violation, there is no longer any uncertainty as to whether the magistrate would have issued it. *Id.* at 745. Thus, the sole remaining concern is that of the deterrent purpose of the exclusionary rule. *Id.*

161. *Id.* at 744. The court noted that these factors had been voiced in other circuits as reasons for adopting an active pursuit requirement. *Id.*

162. Wilson v. Arkansas, 514 U.S. 927, 937 n.4 (1995).

163. United States v. Jones, 149 F.3d 715, 716-17 (7th Cir. 1998).

164. People v. Hoag, 100 Cal. Rptr. 2d 556, 561 (Cal. Ct. App. 2000). For an entertaining dialogue on the applicability of the inevitable discovery exception to knock and announce violations, see *id.* at 565-70 (Morrison, J., concurring) and *id.* at 576-82 (Sims, J., concurring and dissenting).

165. Richardson v. State, 787 So. 2d 906, 910 (Fla. Dist. Ct. App. 2001) (Altenbernd, J., concurring).

166. People v. Stevens, 597 N.W.2d 53, 64 (Mich. 1999), *cert. denied sub nom* Stevens v. Michigan, 528 U.S. 1164 (2000).

167. *Id.* at 63.

168. *Id.* at 64.

inevitable, since "an occupant would hardly be allowed to contend that, had the officers announced their presence and waited longer to enter, he would have had time to destroy the evidence."[169] Three months after deciding *People v. Stevens*, the Michigan Supreme Court reaffirmed its position in *People v. Vasquez*.[170] The court did not analyze whether a knock and announce violation had taken place, because "[e]ven if such a violation occurred, suppression of the evidence is not the appropriate remedy."[171] Meanwhile, the U.S. Supreme Court denied certiorari to review the constitutional issues raised by *People v. Stevens*.[172]

2. Lee v. State

A Maryland Court of Special Appeals reached the opposite conclusion in the case of *Lee v. State*.[173] In *Lee*, officers armed with a valid warrant disregarded the knock and announce procedure, entered the suspect's home and subsequently seized less than an ounce of cocaine hidden in a bedroom drawer.[174] The Maryland court found that knocking and announcing did more than delay entry into the house, it entirely change[d] the mode of entry."[175] Thus, even though the evidence would have been eventually discovered, a merely "predictive outcome" is insufficient to justify an unconstitutional method of entry.[176] The court noted that invocation of the inevitable discovery doctrine would constitute the kind of blanket exception to the knock and announce requirement considered unconstitutional in *Richards*.[177] Indeed, application of the doctrine would render the knock and announce requirement entirely meaningless.[178]

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169. *Id.* (quoting United States v. Jones, 149 F.3d 715, 717 (7th Cir. 1998)).

170. 602 N.W.2d 376, 378-79 (Mich. 1999).

171. *Id.* at 378.

172. Stevens v. Michigan, 528 U.S. 1164 (2000).

173. 774 A.2d 1183, 1192 (Md. Ct. Spec. App. 2001).

174. *Id.* at 1185-86.

> The task force leader testified that his decision on . . . using a battering ram without warning[] was influenced by the advice of an assistant state's attorney in Harford County. The . . . attorney told the task force leader that he need never to knock and announce when he has a belief that doing so would lead to the destruction of narcotics.

Id. at 1186.

175. *Id.* at 1191. The court also noted that "the consequences of [the] illegal entry touch all people inside a residence, regardless of their relationship to the person or item to be seized. . . ." *Id.*

176. *Id.* at 1192. This is consistent with the *Nix* Court's analysis regarding the officers' ability to calculate whether the evidence would eventually be discovered through lawful means. Nix v. Williams, 467 U.S. 431, 445-46 (1984). The inevitable discovery exception would otherwise be used to legitimize any illegal police activity, on the theory that the officers could have used lawful means to seize the evidence or contraband.

177. *See Lee*, 774 A.2d at 1192.

178. *Id.*

B. *The Exclusionary Rule Is an Appropriate Remedy for Knock and Announce Violations*

Because the exclusionary rule is invoked only to deter constitutional violations and not to punish misconduct or cure any pecuniary or physical injury suffered, its application is limited to instances where a constitutional right of an individual has been violated.[179] Its application is further limited to instances where its deterrent objective will be best served.[180] The common law principle of knocking and announcing "is an element of the reasonableness inquiry under the Fourth Amendment."[181] The requirement has traditionally been justified on at least four grounds: (a) preventing the homeowner from mistakenly identifying the officers as unauthorized intruders; (b) allowing homeowners to redirect officers who arrived at the wrong address; (c) reducing the destruction of property by providing the homeowner with the option of admitting the officers peacefully; and (d) helping "to protect an individual's right to privacy."[182] The mistaken identity justification itself provides a disincentive from entering a dwelling before announcing identity, and thus exclusion of seized evidence would not serve any additional deterrent purpose. Furthermore, the lawfulness of a no-knock entry does not depend on whether property is damaged in the course of the entry.[183] Therefore, the only remaining question is whether the deterrent purpose of the exclusionary rule is served by excluding evidence obtained in violation of an individual's privacy after a failure to knock and announce.

The Fourth Amendment guarantee of security in persons, houses, papers and effects is essentially a right to privacy against government intrusion.[184] This privacy right is afforded substantive due process protection under the Fourteenth Amendment.[185] A violation of the privacy interest protected by the knock and announce requirement may rise to a Fourth Amendment violation,[186] and this interest consequently comes within the penumbra of privacy rights protected by the Fourth Amendment.[187] Its violation should therefore be enforceable against the government "by the same sanction of exclusion as is used" to deter any Fourth Amendment violation.[188] However, neither the Fourth Amendment, nor the more limited right of privacy protected by the knock and announce procedure, offers an

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179. United States v. Calandra, 414 U.S. 338, 347-48 (1974).

180. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998).

181. Wilson v. Arkansas, 514 U.S. 927, 934 (1995).

182. Hemmens, *supra* note 4, at 565; *see also* United States v. Kane, 637 F.2d 974, 977 (3d Cir. 1981).

183. United States v. Ramirez, 523 U.S. 65, 70-71 (1998).

184. Mapp v. Ohio, 367 U.S. 643, 650 (1961); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

185. *Wolf*, 338 U.S. at 27-28.

186. *Wilson*, 514 U.S. at 934.

187. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (discussing individual privacy rights protected by the various provisions of the Bill of Rights).

188. *Mapp*, 367 U.S. at 655.

absolute protection against governmental intrusions.[189] The reasonableness inquiry recognizes legitimate law enforcement concerns in the execution of a search or seizure.[190] Nevertheless, absent exigent circumstances at the time of the execution of a warrant, or the antecedent showing of evidence sufficient to obtain a no-knock warrant, the omission of the knock and announce procedure is a constitutional violation.[191]

The Michigan Supreme Court suggested in *People v. Stevens* that there is no causal connection between the failure to knock and announce and the seizure of evidence after entry.[192] Because the seizure is made pursuant to a validly obtained warrant, and not as a result of the constitutional violation, the exclusionary rule is not the appropriate remedy.[193] But this argument disregards the fact that the knock and announce procedure is an integral part of the "reasonableness inquiry under the Fourth Amendment."[194] Whether for purposes of arresting a suspect or searching for incriminating evidence, "the Fourth Amendment has [historically been construed to] draw[] a firm line at the entrance to [a dwelling]. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[195] Thus, for purposes of protecting "the sanctity of the home," a reasonable search requires the imposition of a neutral and detached magistrate "between the zealous officer and the citizen."[196] But a search is not *per se* reasonable merely because it is carried out pursuant to a warrant; under *Wilson*, the manner of entry is an additional element that must be considered when assessing the reasonableness of the search.[197] Thus, notwithstanding the acquisition of a warrant, "an officer's unannounced entry into a [dwelling may] be unreasonable under the Fourth Amendment."[198] The Supreme Court prohibited the states from creating *per se* exceptions to the knock and announce requirement, because the manner in which the entry was conducted must always be subject to *post facto* judicial scrutiny.[199] Therefore, evidence is not excluded after a no-knock entry because it was seized as a result of the procedural violation; it is excluded because the entire search was unreasonable under the Fourth Amendment notwithstanding the procurement of a valid warrant.

In *Stevens*, the court further suggested that alternative remedies are available to cure the knock and announce omission—the offending officers may face

189. *Wilson*, 514 U.S. at 934-36.
190. *Id.*
191. Richards v. Wisconsin, 520 U.S. 385, 394-96 (1997).
192. People v. Stevens, 597 N.W.2d 53, 64 (Mich. 1999), *cert. denied*, 528 U.S. 1164 (2000).
193. *Id.*
194. *Wilson*, 514 U.S. at 934.
195. Payton v. New York, 455 U.S. 573, 589-90 (1980).
196. *Id.* at 601-02.
197. *Wilson*, 514 U.S. at 934.
198. *Id.*
199. Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

departmental sanctions and civil liability.[200] Of course, the individual seeking civil damages faces severe hardship; an action for trespass or property damage may not yield a substantial verdict, a jury may hesitate to award damages against an officer who reasonably believed he performed his sworn duty, and a jury may be equally hesitant to compensate a culpable plaintiff in spite of police misconduct.[201] In addition, neither departmental sanctions nor civil liability are aimed at deterring violations of constitutionally protected rights. As a consequence, courts have repeatedly found that those remedies are insufficient to protect the constitutional interests at stake.[202]

Finally, an analysis of the applicability of the exclusionary remedy must necessarily include the second justification for its existence—the imperative of judicial integrity. According to Justice Holmes, "no distinction can be [made] between the Government as [a] prosecutor and the Government as [a] judge.[203] A government of laws is imperiled if it fails to observe and abide by the law; violation of one law in order to secure a criminal conviction under another "breeds [a] contempt for the law" that may lead to "anarchy."[204] It is undisputed that the knock and announce requirement is the law—it is codified in Title 18 of the United States Code[205] and, more importantly, its adherence has been constitutionally mandated by judicial construction.[206] Thus, should the government allow the omission of the knock and announce principle in order to secure a conviction, it has done more than assist in the violation of the law—it has willfully disregarded "the charter of its own existence."[207] Judge (later Justice) Cardozo lamented that application of the exclusionary rule means "[t]he criminal is to go free because the constable has blundered."[208] But the alternative appears even less appealing—that the criminal is convicted only because the constable and judge did not abide by the Constitution they were sworn to uphold.

C. The Inevitable Discovery Exception Is not Applicable to Knock and Announce Violations

It seems obvious that every coerced confession or unreasonable search or seizure puts the prosecution at a strategic disadvantage, because the illegal conduct forever taints the evidence and precludes its introduction against the accused. The inevitable discovery exception has evolved to ensure "the prosecution is not put in

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200. People v. Stevens, 597 N.W.2d 53, 61-62 (Mich. 1999).

201. *See* Wolf v. Colorado, 338 U.S. 25, 42-44 (1949) (Murphy, J., dissenting) (finding civil sanctions to be an "illusory" remedy).

202. Mapp v. Ohio, 367 U.S. 643, 651-52 (1961); Elkins v. United States, 364 U.S. 206, 217-21 (1960).

203. Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

204. *Id.* at 485 (Brandeis, J., dissenting).

205. 18 U.S.C.A. § 3109 (West 2000).

206. Wilson v. Arkansas, 514 U.S. 927, 934 (1995).

207. *Mapp*, 367 U.S. at 659.

208. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

a *worse* position," or the criminal defendant in a better position, because of the police misconduct.[209] Thus, the exclusionary rule is not applied if the prosecutor can show, "by a preponderance of the evidence that the [evidence or confession] . . . inevitably would have been discovered by lawful means. . . ."[210] Under those circumstances, "the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received."[211] The circuits are split on whether the alternative investigation must have been initiated and be actively pursued at the time of the initial discovery or seizure.[212]

Should the inevitable discovery exception require a separate line of investigation initiated at the time of the knock and announce violation, the analysis must simply focus on whether the alternative investigation would inevitably have led to the discovery of the evidence. An illuminating hypothetical is an entry pursuant to a valid search warrant where the knock and announce procedure is omitted and no exigent circumstances existed. If the illegal entry leads to plain-view seizure of evidence, such evidence may, for instance, inevitably have been discovered by a separate investigative team arriving two minutes later with a warrant for the arrest of the inhabitants of the dwelling. However, by no means can the initial entry be construed as a contemporaneous and alternative line of investigation; once the officers have crossed the threshold, that search and seizure is unreasonable under the Fourth Amendment and the evidence discovered thereafter is tainted by the illegal entry.

If, on the other hand, the exception merely requires the discovery of unlawfully obtained evidence be inevitable, the analysis must necessarily resolve the issue of whether, at the time just before the illegality occurred, the search or seizure would have been inevitable had the illegality never occurred. The *Stevens* court suggested that because the officers entered the house under color of a valid warrant, the evidence would inevitably have been discovered had the officers followed the knock and announce procedure before entering the home.[213] Relying on dicta from *U.S. v. Jones*, the court reasoned that the defendant could hardly contend he would have been able to destroy the evidence had the police delayed entry by adhering to proper procedures.[214] Such a conclusion is more than mere speculation, because the evidence seized was clearly present and discoverable.

However, the argument disregards the ultimate purpose behind the inevitable discovery exception. In order to ensure the prosecution was not disadvantaged by the illegality, the *Nix* Court required proof of "ultimate or inevitable discovery."[215] Only with this quantum of proof did the deterrence rationale behind the

209. Nix v. Williams, 467 U.S. 431, 443-44 (1984).

210. *Id.* at 444.

211. *Id.*

212. *See* discussion *supra* Part II.D.3.

213. People v. Stevens, 597 N.W.2d 53, 64 (Mich. 1999), *cert. denied*, 528 U.S. 1164 (2000).

214. *Id.*

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

exclusionary rule have "so little basis" so as to render the rule inapplicable.[216] But in order to establish "ultimate or inevitable discovery" the question cannot simply be whether the evidence would have been discovered had the officers acted differently; it must be whether the evidence would have been discovered had the illegal search never occurred. If the officers in possession of the issued warrant enter illegally, there can be no ultimate or inevitable discovery by lawful means. The only possible lawful search, pursuant to the warrant, was tainted by the illegal entry.

In addition, the *Nix* Court held that proof of whether the police acted in bad faith was not required, because at the time of the violation the offending agent would be unlikely to be able to determine whether the evidence will inevitably be discovered through lawful means.[217] The situation is of course different for the officer armed with a valid search warrant who chooses to depart from the knock and announce procedure. Under few circumstances can it be said that the officer is unable to realize the consequences of the contemplated act or the inevitable admission of any evidence discovered notwithstanding the unconstitutionality of the search.[218]

Finally, the First Circuit's test for inevitable discovery addresses two additional considerations associated with the application of inevitable discovery to any illegally obtained evidence—whether its invocation will "provide an incentive for police misconduct or significantly weaken [F]ourth [A]mendment protection."[219] In the context of knock and announce violations, its invocation will most likely do both. If all evidence obtained pursuant to a valid warrant is admissible notwithstanding non-compliance with the knock and announce procedure, this element of the Fourth Amendment reasonableness inquiry is superfluous. Consequently, the area of Fourth Amendment privacy protection relating to the manner in which a home may be entered will be severely diminished. In addition, the automatic application of the inevitable discovery exception will remove the strongest incentive for adhering to the knock and announce procedure; as the California Supreme Court observed, sanctions short of exclusion have been insufficient to deter constitutional violations.[220] In *Richards*, the U.S. Supreme Court concluded that a blanket exception to the knock and announce requirement based on the type of crime investigated could easily be expanded to the point where the "knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless."[221] It is consequently not constitutionally permissible to dispose of the knock and announce requirement altogether.

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216. *Id.*

217. *Id.* at 445.

218. Thus, as noted by Lady Macbeth, "[w]hat need we fear who knows it, when none can call our power to account?" SHAKESPEARE, *supra* note 1, act 5, sc. 1.

219. United States v. Silvestri, 787 F.2d 736, 744 (1st Cir. 1986).

220. People v. Cahan, 282 P.2d 905, 911-12 (Cal. 1955).

221. Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

IV. CONCLUSION

The knock and announce requirement is codified in Title 18 of the United States Code,[222] and its omission may constitute an unreasonable search or seizure under the Fourth Amendment.[223] The Michigan Supreme Court has held that the exclusionary rule is not the proper remedy for knock and announce violations, and any evidence seized after such a violation is admissible under the inevitable discovery exception to the exclusionary rule.[224] A Maryland court of appeals reached the opposite conclusion, and applied the exclusionary rule to evidence seized after a knock and announce violation.[225]

The exclusionary rule is the judicially created remedy for Fourth Amendment violations, and should be applied also to violations of the knock and announce procedure. Omission of this procedure, unless justified by exigent circumstances, renders the entire search or seizure unreasonable under the Fourth Amendment. The exclusionary rule serves to deter future unconstitutional conduct, and alternative remedies have been demonstratively unsuccessful in deterring such conduct.[226] By excluding unlawfully obtained evidence, the judiciary also ensures that it does not become an "accomplice" to the officer's "willful disobedience" of the law.[227]

The doctrine of inevitable discovery is not applicable to knock and announce violations. A number of jurisdictions require that the government prove inevitable discovery through an independent, ongoing and actively pursued line of investigation.[228] Even without this requirement, the ultimate purpose behind the inevitable discovery exception would not be served by its invocation.[229] The individual officer would not have any effective deterrent preventing the omission of the knock and announce procedure, and the consistent admission of evidence after such violations would severely limit Fourth Amendment protection.

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222. 18 U.S.C.A. § 3109 (West 2000).

223. Wilson v. Arkansas, 514 U.S. 927, 934 (1995).

224. People v. Stevens, 597 N.W.2d 53, 64 (Mich. 1999), *cert. denied*, 528 U.S. 1164 (2000); People v. Vasquez, 602 N.W.2d 376, 378-79 (Mich. 1999).

225. Lee v. State, 774 A.2d 1183, 1191-92 (Md. Ct. Spec. App. 2001).

226. Mapp v. Ohio, 367 U.S. 643, 651-52 (1961); Elkins v. United States, 364 U.S. 206, 217-21 (1960).

227. *Elkins*, 364 U.S. at 222-23.

228. *See* discussion *supra* Part II.D.3.

229. Nix v. Williams, 467 U.S. 431, 443-45 (1984).