KEEPING THE FAITH WITH THE INDEPENDENT SOURCE FOUNDATIONS OF INEVITABLE DISCOVERY: WHY COURTS SHOULD FOLLOW JUSTICE BREYER'S ACTIVE AND INDEPENDENT PURSUIT APPROACH FROM *HUDSON V. MICHIGAN*

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INTRODUCTION

Police officers pull over a vehicle and discover that the driver is operating the vehicle without a license. The officers arrest the driver and place him in the back of the police cruiser. They proceed to rifle through the car. Their haphazard search unearths a gun. Then, they call the impound lot for a tow truck. Should the gun be admitted as evidence against the driver, who turns out to be a convicted felon, because the police claim the impound lot would have discovered the gun in a routine inventory search anyway?

The answer in this case should be no. Although the inventory search at the impound lot might be wholly independent of the officers' illegal search, the officers had not called the impound lot at the time of their search. They cannot prove without undue speculation that they would have pursued a legal, independent source of the evidence. The officers' inability to show a hypothetical independent source should result in the exclusion of the gun, or the deterrent effect of the exclusionary rule will be undercut and Fourth Amendment rights compromised. Thus active and independent pursuit of a legal evidentiary source is crucial to inevitable discovery, and the gun should not be admissible under the exception.[1]

Applied correctly, the inevitable discovery exception enables courts to admit evidence that the exclusionary rule would otherwise bar because the evidence would have been obtained from an independent source.[2] Conversely, inevitable discovery should suppress unlawfully recovered evidence whose legal, independent source the officers did not attempt to pursue. Otherwise, unlawfully obtained evidence would be admissible without sufficient certainty that officers would have pursued a legal source.

Lower courts, however, do not all agree to apply the exception in this way and have not agreed for decades.[3] The Supreme Court has provided little guidance on the exception's contours since the Court first recognized the exception in *Nix v. Williams*.[4] In that case, unlawfully obtained evidence was admissible because the

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[1] *See* United States v. Khoury, 901 F.2d 948 (11th Cir. 1990). In this case, an officer seized the driver defendant's notebook from the locked trunk of his car and performed a cursory glance through the notebook to determine whether it had any evidentiary value, followed by a more detailed look beyond the parameters of a permissible inventory search that unveiled evidence against the defendant. *Id.* at 957-58. The Eleventh Circuit held that the officer made no attempt to lawfully obtain the evidence at the time that he performed the second search of the notebook, making the inevitable discovery exception inapplicable. *Id.* at 959-60. Other exceptions for conducting a warrantless vehicle search were not applicable in *Khoury*. The search incident to arrest is only lawful when the arrested driver is within reaching distance of the vehicle, threatening the safety of the officers, or when the police have a reasonable belief that the vehicle contains evidence of the offense of arrest. Arizona v. Gant, 556 U.S. 332, 344 (2009). At that point, an inventory search is a legitimate exception to the warrant requirement when "conducted according to standardized routine in furtherance of the legitimate goals of the inventory," and not for the purpose of "investigation." *Khoury*, 901 F.2d at 958-59. *See* South Dakota v. Opperman, 428 U.S. 364, 370 n.5 (1976); Illinois v. Lafayette, 462 U.S. 640, 643 (1983).

[2] 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4(a), at 333 (5th ed. 2012). See *infra* Part I.B. for a discussion of the exclusionary rule. See *infra* Part I.C. for a discussion of the inevitable discovery exception and its foundational case, *Nix v. Williams*, 467 U.S. 431 (1984).

[3] *Nix*, 467 U.S. at 444 n.5. See *infra* Part I.D. for a discussion of the inevitable discovery circuit split.

[4] *Nix*, 467 U.S. 431.

evidence would have been discovered independent of the police violation that led to the evidence, and the search team that would have discovered the evidence was already in pursuit of it.[5] The facts of the case speak clearly where the *Nix* Court did not: a hypothetical independent source satisfies the requirements of inevitable discovery.[6]

A more recent Supreme Court case, *Hudson v. Michigan*, could have resolved the decades-old inevitable discovery split of authority.[7] Instead, Justice Breyer's dissent against the majority's inevitable discovery dictum remained faithful to *Nix*, while the majority sidestepped an inevitable discovery analysis all together.[8] Writing for the majority, Justice Scalia held that the knock-and-announce violation by the police was too attenuated to justify the exclusion of the evidence discovered in Hudson's apartment.[9] The majority surmised in dictum that the officers' knock-and-announce violation "was not the but-for cause of obtaining the evidence" because the officers would have executed their valid warrant and found the evidence moments later.[10] Justice Breyer, joined by three justices, rejected the majority's dictum as an invitation for widespread Fourth Amendment violations.[11] The majority's circular logic deviated from the Court's original articulation of the inevitable discovery exception in *Nix v. Williams* requiring active and independent pursuit of the evidentiary source.[12] An analysis faithful to that opinion would have barred the unlawfully recovered evidence in *Hudson*.[13] Surprisingly, lower courts have not drawn on Justice Breyer's opinion in *Hudson* to resolve the split.

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[5] *Id.* at 444, 449-50.

[6] See *infra* Part II for a discussion of how a hypothetical independent source satisfies the requirements of the inevitable discovery exception under *Nix v. Williams*.

[7] Hudson v. Michigan, 547 U.S. 586 (2006). See *infra* Part I.E. for a more in-depth discussion of *Hudson v. Michigan*.

[8] *Hudson*, 547 U.S. 586.

[9] *Id.* at 592.

[10] *Id.* Justice Scalia dismisses Justice Breyer's argument for active and independent pursuit in one fleeting paragraph of dictum. *Id.*

[11] *Id.* at 605 (Breyer, J., dissenting).

[12] *Id.* at 617.

[13] *Id.* at 605.

Justice Breyer's analysis is correct. Lower courts should interpret *Nix v. Williams* to require a hypothetical independent source. This Comment proposes a newly crafted approach to active and independent pursuit that requires the usual but-for causation analysis rooted in the independent source doctrine to determine the hypothetical independence of the evidentiary source.[14] The test then borrows from the Model Penal Code's provision for actus reus of attempt to guide courts in their analysis of active pursuit. Active pursuit is satisfied when the government shows a substantial step strongly corroborative of the government's intent to pursue the independent source of the evidence. This Comment's novel test for active and independent pursuit protects against police violations of the Fourth Amendment, while allowing the state to retain evidence for prosecution when the officers actually pursue a truly independent source. The test also prevents courts' use of speculative facts on open-ended policy analyses in applying the inevitable discovery exception.

Part I of this Comment consists of a brief discussion of the exclusionary rule and the independent source doctrine. This part also discusses *Hudson v. Michigan* and the groundwork for the inevitable discovery exception to the exclusionary rule in *Nix v. Williams*. Part II argues Justice Breyer's opinion in *Hudson* requires that inevitable discovery have a hypothetical source independent of the Fourth Amendment violation and active pursuit of that independent source. Justice Breyer's active and independent pursuit approach to inevitable discovery satisfies that requirement. Part III demonstrates that the active and independent pursuit approach provides crucial protections necessary to deter police violations of the Fourth Amendment. Part IV discusses this Comment's innovative approach to the inevitable discovery exception.

[14] See *infra* Part IV for this Comment's newly crafted approach to the inevitable discovery exception.

I. THE FOUNDATION OF THE HYPOTHETICAL INDEPENDENT SOURCE RULE

A. The Exclusionary Rule

The exclusionary rule, a judicially created prophylactic rule,[15] is rooted in the protections against unreasonable search and seizure prescribed by the Fourth Amendment of the United States Constitution.[16] Courts exclude evidence obtained in an unlawful search or seizure unless the evidence falls into a specific exception to the rule.[17] The exclusionary rule is essential to the protections of the privacy interest at the heart of the Fourth Amendment. In *Boyd v. United States*, the Court held that the principles laid out in their opinion "apply to all invasions on the part of the government . . . of the sanctity of a man's home and the privacies of life."[18] The Court continued, "It is not the breaking of his doors,

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[15] United States v. Calandra, 414 U.S. 338, 348 (1974) ("[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.").

[16] U.S. CONST. amend. IV. The Fourth Amendment reads:

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

Id. See 1 LAFAVE, *supra* note 2, § 1.1(a) (discussing the history and development of the exclusionary rule alongside the Fourth Amendment of the U.S. Constitution).

[17] *See* Boyd v. United States, 116 U.S. 616 (1886); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 264 (1998) (discussing justifications for excluding evidence at the rule's inception and today).

[18] *Boyd*, 116 U.S. at 630 (citing Entick v. Carrington, (1765) 95 Eng. Rep. 807). A large basis of the Court's holding was Lord Camden's judgment, "one of the landmarks of English liberty." *Id.* at 626. In that case, Lord Camden recognized that

> [t]he great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass.

Id. at 627. Consequently, the *Boyd* Court found that this question whether the compulsion to produce private papers without a search warrant or probable cause "affect[ed] the very essence of constitutional liberty and security." *Id.* at 630.

and the rummaging of his drawers, that constitutes the essence of the offense[,] but . . . the invasion of his indefeasible right of personal security, personal liberty, and private property."[19]

Thus, courts began applying what the Supreme Court announced in *Weeks v. United States* as the exclusionary rule.[20] In that case, the government seized Weeks' personal "books, letters, money, papers, notes, evidences of indebtedness, stock, certificates, insurance policies, deeds, abstracts, and other muniments of title, bonds, candies, clothes, and other property" from his private residence, which was found to be a violation of the Fourth Amendment.[21] The Court barred the items from evidence because of the officers' unreasonable seizure.[22]

Mapp v. Ohio extended the exclusionary rule to the states and gave several justifications for the exclusionary rule.[23] Among the Court's reasons for excluding evidence were protecting the rights guaranteed by the Fourth Amendment, judicial integrity, deterrence, and the protection of due process standards.[24] The exclusionary rule protects individual rights under the Fourth Amendment where "constitutional provisions for the security of person and property should be liberally construed."[25] To that end, the exclusionary rule deters officer misconduct, that is, "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[26] This justification has served as the major reason that courts have employed the exclusionary rule since *Mapp*, but the rationale has

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19 *Id.*

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

21 *Id.* at 387. The prosecution wanted to use, of the many items they seized from the defendant's residence, lottery tickets and letters referring to his involvement in the lottery. *Id.*

22 *Id.* at 398.

23 *See* Mapp v. Ohio, 367 U.S. 643, 654-61 (1961). *Mapp* overruled *Wolf v. Colorado*, in which the Court expressly declined to incorporate the exclusionary rule from *Weeks* into the Fourteenth Amendment, although *Weeks* had incorporated the Fourth Amendment. Wolf v. Colorado, 338 U.S. 25, 33 (1949).

24 *Mapp*, 367 U.S. at 646-50.

25 *Id.* at 647 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)) ("[T]he essence of the offence . . . is the invasion of [a man's] indefeasible right of personal security, personal liberty and private property." (quoting *Boyd*, 116 U.S. at 630)).

26 *Id.* at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

come under major attack in recent years for its cost-benefit balancing test.[27] Furthermore, the exclusionary rule helps to provide defendants with a fair trial according to law.[28] The exclusionary rule also maintains judicial integrity because it prevents the government from taking shortcuts that effectively communicate to the public that shortcuts around the law are acceptable.[29] Ironically, officers who behave unlawfully to fight crime show little respect for the law themselves. They work against themselves by violating laws founded on the same Constitution that they encourage and compel others to follow. Even when "justice is served" in this way, the injustice that occurs along the way is a "Band-Aid" fix to a long-term issue.

Many scholars also recognize additional benefits from the application of the exclusionary rule in the *Mapp* opinion. One of these justifications is that the rule is not merely a short-term method of deterrence for police, but a way to involve courts' guidance in police searches and seizures over a long period of time.[30] This kind of involvement leads to "habit formation" in police departments, resulting in more lawful searches and seizures.[31] Furthermore, the exclusionary rule evens the playing field between the prosecution and defendant by returning both parties to the positions in which they would have been had the

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[27] United States v. Calandra, 414 U.S. 338, 349 (1974) ("[The balancing test weighs] the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context."); *see also* Norton, *supra* note 17, at 284-85.

[28] *Mapp*, 367 U.S. at 648 ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." (quoting Weeks v. United States, 232 U.S. 383, 393 (1914)) (internal quotation marks omitted)).

[29] *Id.* at 659 ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.").

[30] Albert W. Alschuler, *The Exclusionary Rule and Causation:* Hudson v. Michigan *and Its Ancestors*, 93 IOWA L. REV. 1741, 1752 (2008) (arguing that, in fact, police officers are willing to receive courts' guidance).

[31] *Id.*

unlawful search and seizure not occurred.[32] When the exclusionary rule is applied to this effect, neither the police officers nor the defendants are "better nor worse" off than where they started because the evidence recovered unlawfully is barred from trial.[33]

B. Fruit of the Poisonous Tree and Independent Source Doctrine

Supporting the exclusionary rule is the fruit of the poisonous tree doctrine, which prohibits the "fruit" that was indirectly recovered as a result of illegal conduct, (the "poisonous tree"), from entering court.[34] *Silverthorne Lumber Co. v. United States* provided that the "essence" of a rule banning the illegal recovery of evidence "is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[35]

In the same breath, *Silverthorne Lumber Co.* established an alternative doctrine to determine whether evidence should be admitted in court.[36] Where the information "is gained from an independent source" it may be admissible, "but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."[37] The question becomes "whether . . . the evidence to which instant objection is made has been come at by

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[32] Norton, *supra* note 17, at 266; *see also Mapp*, 367 U.S. at 660 ("Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.").

[33] Norton, *supra* note 17, at 266.

[34] *Id.* at 297-98; *see also* Robert M. Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 AM. J. CRIM. L. 79, 80 (1992) (discussing the independent source doctrine). LaFave refers to the "fruits" of illegal searches as secondary evidence, while evidence directly resulting from illegal police conduct is primary evidence. *Id.* at 80 n.7.

[35] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). The term "fruit of the poisonous tree" was coined nearly twenty years later, in *Nardone v. United States*, 308 U.S. 338, 341 (1939).

[36] *Silverthorne Lumber Co.*, 251 U.S. at 392 ("Of course this does not mean that the facts thus obtained become sacred and inaccessible.").

[37] *Id.*

exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[38]

C. The Inevitable Discovery Exception in Nix v. Williams

"Great cases, like hard cases, make bad law."[39]

The independent source doctrine requires a separate, legal source of evidence, and the inevitable discovery exception, similarly, requires a *hypothetical* independent source.[40] The hypothetical independent source was introduced in a discussion of a source's independence: "[I]t is a significant constitutional question whether the 'independent source' exception to inadmissibility of fruits . . . encompasses a hypothetical as well as an actual independent source."[41] The hypothetical independent source allows the government to attempt to prove, by a preponderance of the evidence, that the evidence would have been recovered by legal means regardless of the constitutional violation.[42]

The Supreme Court elaborated upon the independent source and fruit of the poisonous tree doctrines in its recognition of the inevitable discovery exception to the exclusionary rule in *Nix v. Williams*.[43] After turning himself in for a crime, the defendant in *Nix* accompanied two officers on the two-hour drive back to the police department.[44] The officers forbade the defendant's attorney from riding with them but promised they would not interrogate the defendant during the drive.[45] During the drive, however, the officers prompted the defendant to ultimately lead them to crucial

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[38] Wong Sun v. United States, 371 U.S. 471, 488 (1963) (internal quotation marks omitted); *see also* Murray v. United States, 487 U.S. 533, 539 (1988) (holding an independent evidentiary source was required for evidence to be admissible).

[39] N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting); *see also* Winterbottom v. Wright, (1842) 152 Eng. Rep. 402, 406 ("Hard cases, it has been frequently observed, are apt to introduce bad law.").

[40] Bloom, *supra* note 34, at 81.

[41] Fitzpatrick v. New York, 414 U.S. 1050, 1051 (1973) (White, J., dissenting) (citation omitted) (quoting *Wong Sun*, 371 U.S. at 487-88).

[42] Nix v. Williams, 467 U.S. 431, 444-45 (1984).

[43] *Id.* at 440-43.

[44] *Id.* at 435.

[45] *Id.*

evidence.[46] In the defendant's first trial, the Supreme Court found that the defendant's right to counsel was violated.[47] Consequently, the Court excluded the evidence because the officers violated the defendant's right to counsel.[48] But in the second trial, the Supreme Court admitted the evidence because a systematic search team was only two miles from its location when it was illegally recovered.[49]

Citing *Silverthorne Lumber Co.* and *Wong Sun v. United States*, the *Nix* Court applied analysis similar to the independent source doctrine.[50] The independent source doctrine operated, ultimately, to deter police misconduct and keep the prosecution on even ground with the defense.[51] The *Nix* facts were devoid of an actual independent source to satisfy the independent source exception, but the inevitable discovery exception would allow evidence from a hypothetical independent source.[52] The "functional similarity" between the two exceptions "is wholly consistent with and justifies our adoption of the . . . inevitable discovery exception to the exclusionary rule."[53]

Other courts have recognized the overlap of the inevitable discovery exception and the independent source doctrine as well. *United States v. Johnson*, for example, called the two "Siamese twin[s]."[54] The Fifth Circuit has called them "two sides of the same

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[46] *Id.* at 435-36.

[47] *Id.* at 437.

[48] *Id.*; *see also* Brewer v. Williams, 430 U.S. 387, 404-06 (1977).

[49] *Nix*, 467 U.S. at 435-36. In Williams' first of two trials, *Brewer v. Williams*, all of the evidence was excluded as a result of the officers' violation of the Sixth Amendment right to counsel. *Brewer*, 430 U.S. at 405-06. Justice Stewart hinted in a footnote, however, that "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." *Id.* at 406 n.12. This footnote formed the basis for inevitable discovery in *Nix v. Williams*.

[50] *Nix*, 467 U.S. at 441-43; s*ee also* 6 LAFAVE, *supra* note 2, § 11.4(a), at 343.

[51] *Nix*, 467 U.S. at 444.

[52] The hypothetical scenario in the Introduction exhibited a hypothetical independent source: the routine inventory search at the impound lot. The inventory search is completely independent of the officers' illegal search of the car. *See supra* Introduction.

[53] *Nix*, 467 U.S. at 444.

[54] United States v. Johnson, 380 F.3d 1013, 1017 (7th Cir. 2004).

coin."[55] The inevitable discovery exception has also been described as "an extrapolation"[56] and "a variation" of the independent source doctrine.[57]

The *Nix* Court found it crucial that the analysis was devoid of speculation but rather was based on the facts presented in the case.[58] The analysis extended only to the parameters created by the facts. The Court failed to articulate an applicable test for future cases with different facts—facts that did not include a search team clearly independent of the unlawful conduct and clearly en route in active pursuit of the evidence. Thus, lower courts have struggled to apply the inevitable discovery exception consistently.

D. The Inevitable Discovery Circuit Split

The application of the inevitable discovery exception varies across the circuit courts.[59] Lower courts use but-for causation rooted in the independent source doctrine to determine an evidentiary source's independence.[60] One major circuit split, however, is on the question of "active pursuit" in the application of the inevitable discovery exception, which speaks to whether officers were actually in pursuit of an independent source of evidence that was, in reality, obtained illegally. The Eighth,

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[55] United States v. Grosenheider, 200 F.3d 321, 328 n.8 (5th Cir. 2000).

[56] Murray v. United States, 487 U.S. 533, 539 (1988).

[57] 6 LAFAVE, *supra* note 2, § 11.4(a), at 339.

[58] *Nix*, 467 U.S. at 444 n.5.

[59] *See* Stephen E. Hessler, *Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 MICH. L. REV. 238, 245 nn.38-39 (2000) (finding the Second, Fifth, Eighth, and Eleventh Circuits employing active pursuit and the First, Sixth, Ninth, Tenth, and Third Circuits rejecting it); Eugene L. Shapiro, *Active Pursuit, Inevitable Discovery, and the Federal Circuits: The Search for Manageable Limitations Upon an Expansive Doctrine*, 39 GONZ. L. REV. 295, 316 nn.178-82 (2004).

[60] That is, but-for the officers' search in violation of the Fourth Amendment, would the evidence have been discovered? See *infra* Part I.E. for a discussion of Justice Scalia's hint suggesting illegally obtained evidence should be admitted under the inevitable discovery exception based solely on but-for causation.

Second, Eleventh, and Fifth Circuits have employed active pursuit in applying the inevitable discovery exception.[61]

In the Eleventh Circuit case *United States v. Virden*, police officers placed the defendant in handcuffs in the back of a police car without arresting him and, absent consent and probable cause, drove his car to the location of a canine unit.[62] There, the officers found drugs in the trunk of the defendant's vehicle.[63] The evidence recovered with the drug-sniffing dog was excluded from trial because the officers showed no hypothetical independent source from which they could have recovered the evidence that was recovered from their illegal search.[64] If the court admitted the evidence by applying any analysis other than active and independent pursuit, the exception would "effectively eviscerate the exclusionary rule."[65] This, the court argued, was "because in most illegal search situations the government could have obtained a valid search warrant had they waited."[66] Moreover, the government could have "obtained the evidence through some lawful means had they taken another course of action."[67]

The Second Circuit requires active pursuit in order to avoid as much as possible the courts' speculation on the facts in the application of inevitable discovery.[68] In *United States v. Eng*, the government unlawfully searched a safe in the defendant's business when he was arrested on narcotics and money laundering charges.[69] As a result of the unlawful search, the government obtained some records that they successfully submitted as evidence of tax evasion in trial, along with several other documents that were subpoenaed months after the unlawful

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[61] *See, e.g.*, United States v. Virden, 488 F.3d 1317, 1323 (11th Cir. 2007); United States v. Conner, 127 F.3d 663, 667 (8th Cir. 1997); United States v. Eng, 971 F.2d 854, 861 (2d Cir. 1992); United States v. Drosten, 819 F.2d 1067, 1070 (11th Cir. 1987); United States v. Pimentel, 810 F.2d 366, 369 (2d Cir. 1987); United States v. Cherry, 759 F.2d 1196, 1204-05 (5th Cir. 1985).

[62] *Virden*, 488 U.S. at 1321-22.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 1322.

[66] *Id.*

[67] *Id.* at 1322-23.

[68] *See* United States v. Eng, 971 F.2d 854, 861 (2d Cir. 1992).

[69] *Id.* at 856.

search.[70] With "the need to prevent the inevitable discovery exception from swallowing the exclusionary rule" in mind, the Second Circuit remanded the case for the government to illustrate that the evidence discovered illegally in the defendant's safe would have been legally discovered by the subpoenas.[71] This "objective analysis" required the state to show that the investigation was "active and ongoing" and that the officers would have obtained the evidence had the investigators' illegal search never happened.[72]

The Fifth and Eighth Circuits have questioned the applicability of a bright-line active pursuit requirement. The Fifth Circuit held in *United States v. Cherry*[73] that active pursuit was required for inevitable discovery to allow in excluded evidence, but since has asked whether the requirement was "superfluous."[74] The Eighth Circuit has found active pursuit difficult to apply where no officers were physically in motion towards an evidentiary source.[75] Still, both circuits seek to limit the abuse that inevitable discovery based on simple but-for causation would allow.[76]

The following circuits have expressly rejected an active pursuit prong of inevitable discovery: the Tenth, First, Fourth, Sixth, Seventh, and Ninth Circuits.[77] The Third Circuit has cited

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[70] *Id.* at 858-59.

[71] *Id.* at 860-62.

[72] *Id.* at 862.

[73] United States v. Cherry, 759 F.2d 1196, 1205 (5th Cir. 1985).

[74] United States v. Salinas, No. 12-40245, 2013 WL 5788772, at *6 (5th Cir. Oct. 29, 2013) ("[W]e have suggested that the second element of the inevitable discovery rule may be superfluous."); United States v. Lamas, 930 F.2d 1099, 1104 (5th Cir. 1991) ("Whether this active-pursuit element from *Cherry* is still necessary to implicate the inevitable-discovery rule must await the case that turns on that question.").

[75] *See* United States v. Chandler, 197 F.3d 1198, 1201 (8th Cir. 1999) ("[T]he inevitable discovery doctrine applies, not because the government was actively pursuing a substantial alternative line of investigation, which is the typical inevitable discovery situation, but because the law enforcement agency's legitimate interests as employer would have inevitably led it to discover the contraband before Chandler, a suspended employee, could remove it from the workplace." (footnote omitted)).

[76] *See* United States v. Conner, 127 F.3d 663, 667-68 (8th Cir. 1997); *Cherry*, 759 F.2d at 1204-05.

[77] *See, e.g.*, United States v. Langford, 314 F.3d 892, 895 (7th Cir. 2002) ("Armed with a valid search warrant, the police . . . would have discovered the defendant's gun even if they had given him enough time to answer their knock before they broke the front door down."); United States v. Larsen, 127 F.3d 984, 986-87 (10th Cir. 1997); United States v. Kennedy, 61 F.3d 494, 499 (6th Cir. 1995); United States v. Ford, 22

reasoning of the Sixth and Tenth Circuits but has not explicitly rejected the active pursuit prong.[78]

The Seventh Circuit held that evidence was admissible under the inevitable discovery exception because the police officers arrived at the defendant's apartment with a valid warrant, even if they did not abide by the knock-and-announce rule.[79] Judge Posner turned the hypothetical independent source doctrine on its head, arguing, "The fruits of an unlawful search are not excludable if it is clear that the police would have discovered those fruits had they obeyed the law. That is the 'inevitable discovery' rule . . . , without it the exclusionary remedy would overdeter [sic]; and it is fully applicable here."[80]

Some of the circuits that have expressly rejected an active pursuit requirement have further complicated the split by citing policy arguments in line with the purpose of the active pursuit prong in addition to their analysis of the evidentiary source's independence.[81] Opinions cite considerations such as eviscerating the warrant requirement, the police's ability to apply for and receive a warrant, and deterring officer abuse.[82] In *United States v. Quinney*, for example, the Sixth Circuit declined to apply the inevitable discovery exception and suppressed evidence obtained in officers' seizure of the defendant's printer without a warrant or consent based on statements the defendant gave to the officers before being read his *Miranda* rights.[83] Still, courts applying free-floating policy arguments results in unpredictability in the court system. The District of Columbia Circuit Court is the only circuit court that has declined to comment on the split.[84]

F.3d 374, 377-78 (1st Cir. 1994); United States v. Thomas, 955 F.2d 207, 210 (4th Cir. 1992); United States v. Boatwright, 822 F.2d 862, 864 (9th Cir. 1987).

[78] United States v. Vasquez De Reyes, 149 F.3d 192, 195 (3d Cir. 1998).

[79] *Langford*, 314 F.3d at 894-95.

[80] *Id.* at 895 (error in original).

[81] *E.g.*, United States v. Young, 573 F.3d 711, 722-23 (9th Cir. 2009) (holding the inevitable discovery exception inapplicable where the officer could only show "circular logic" to prove he could have received a warrant for his unlawful search had he applied for one).

[82] *See, e.g.*, *Langford*, 314 F.3d at 894-95.

[83] United States v. Quinney, 583 F.3d 891, 893-95 (6th Cir. 2009).

[84] *See* United States v. Goree, 365 F.3d 1086, 1089 n.2 (D.C. Cir. 2004) ("[W]e defer a ruling on the more novel inevitable discovery claim unless and until it becomes

	Active Pursuit Required	Active Pursuit Expressly Rejected	Active Pursuit Implicitly Rejected
Circuits	2d, 5th, 8th, 11th	1st, 4th, 6th, 7th, 9th, 10th	3d

The Inevitable Discovery Exception Circuit Split Chart (*Current as of March 2013)

E. The Persuasive Authority in Hudson v. Michigan

1. Justice Scalia's Perfunctory Dictum on Inevitable Discovery

In *Hudson v. Michigan*, police officers burst into the defendant's home and arrested him for possessing both drugs and a firearm as a felon.[85] Prior to entering Hudson's residence, the police officers failed to announce their presence and wait a reasonable amount of time as required by the knock-and-announce rule.[86]

Writing for the majority, Justice Scalia evaded the question of inevitable discovery with an attenuation analysis.[87] Under this analysis, the illegally recovered evidence must be causally connected to the police violation to warrant suppression, and in this case, it was not sufficiently connected.[88] Justice Scalia named it a simple "preliminary misstep" before the officers obtained the

necessary to resolve this case."); *see also* Crews v. United States, 389 A.2d 277, 293 & n.22, 294 (D.C. Cir. 1978), *rev'd*, 445 U.S. 463 (1980). Prior to *Nix*, the D.C. Circuit was hesitant to apply the inevitable discovery rule "based on speculation about routine investigatory procedures," among other scenarios, because it "relieves the pressure to act constitutionally." *Id. Nix* addressed the "ambiguity" and "subjectivity" feared by the Second Circuit court because the inevitable discovery exception is devoid of speculation where the search team actively pursued an independent source. *Id.* at 294; Nix v. Williams, 467 U.S. 431, 435, 444 n.5 (1984).

85 Hudson v. Michigan, 547 U.S. 586, 588 (2006).

86 *Id.*; *see also* Wilson v. Arkansas, 514 U.S. 927, 936 (1995) (holding that police officers must knock and announce before entering a residence).

87 *Hudson*, 547 U.S. at 591-94.

88 *Id.* at 591-92.

evidence.[89] Therefore, the majority opinion found that suppression of the evidence was not justified.[90]

Despite the holding based on an attenuation analysis, the majority continued in dictum with a but-for causation analysis of the police violation on the recovery of the evidence.[91] Justice Scalia called the failure to knock and announce an "illegal *manner* of entry [that] was *not* a but-for cause of obtaining the evidence" in Hudson's apartment because the officers would have found the evidence moments later anyway.[92] Professor Albert Alschuler agreed, "Because the police undoubtedly would have obtained the challenged evidence if they had knocked . . . , their failure to knock was not a but-for cause of their seizure."[93] The police violation of the Fourth Amendment, therefore, would not suffer the penalty of excluded evidence.

While the inevitable discovery question was not resolved in the holding, the fleeting dictum evinces considerable room for further detail and disagreement. That disagreement gives circuit courts good reason to consider Justice Breyer's dissent against the majority's dictum.

2. Justice Breyer's Carefully Reasoned Call for Active and Independent Pursuit

Justice Breyer attacked the majority's dictum as an invitation for widespread Fourth Amendment violations and a departure from the Court's original articulation of the inevitable discovery exception in *Nix v. Williams*.[94] An analysis that preserved the privacy rights protected by the Fourth Amendment and satisfied the Court's first recognition of the inevitable discovery exception would have barred the evidence in *Hudson*. Yet, Justice Scalia's attenuation holding eviscerates the

[89] *Id.* at 592.
[90] *Id.*
[91] *Id.* at 591.
[92] *Id.* at 592; Alschuler, *supra* note 30, at 1744. Professor Alschuler agreed with Justice Scalia that "the failure to knock and announce in *Hudson* was not a but-for cause of the police seizure," opposite LaFave's conclusion that it was "dead wrong." *Id.* (quoting 6 LAFAVE, *supra* note 2, § 11.4(a), at 330, 351).
[93] Alschuler, *supra* note 30, at 1745.
[94] *Hudson*, 547 U.S. at 605 (Breyer, J., dissenting).

protections of the exclusionary rule by excusing a police violation without any showing that the police would have pursued the evidence legally.[95] Lower courts have not drawn on Justice Breyer's *Hudson* opinion against Justice Scalia's dictum to resolve the circuit split.

Justice Breyer's analysis illustrated that lower courts should interpret *Nix v. Williams* to require active pursuit of a hypothetical independent source of evidence. Justice Scalia's analysis scrapped the enumerated justifications for the exclusion of evidence as a result of constitutional violations from Supreme Court cases *Boyd v. United States* and *Mapp v. Ohio*.[96] Justice Breyer's opinion recognized these justifications as foundational to the exclusionary rule, and therefore applicable to the inevitable discovery exception.[97]

The independence of a source means little if officers can obtain evidence illegally and have it admitted in court without showing any pursuit of the legal source.[98] Breyer proposed that the question is not what "would have taken place if the police behavior in question had (contrary to fact) been lawful . . . [but what] did occur or . . . would have occurred (1) *despite* . . . the unlawful behavior and (2) *independently* of that unlawful behavior."[99] The focus of Justice Breyer's analysis went beyond but-for causation of the evidentiary source's independence: whether the pursuit was "set in motion" when the illegality occurred.[100] Justice Breyer's hypothetical contrasts with Justice Scalia's counterfactual; Breyer asked what the officers would have found had they not entered the apartment at all, rather than if they had entered fifteen seconds later than they did in reality.[101]

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[95] *Id.* at 608-09.

[96] *Id.* at 606, 611-12 (citing Mapp v. Ohio, 367 U.S. 643, 652 (1961) and Boyd v. United States, 116 U.S. 616, 630 (1886)).

[97] *Id.* at 606.

[98] *Id.* at 616 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

[99] *Id.*

[100] *Id.* at 618.

[101] *Id.*

F. Lower Courts Have Not Drawn on Hudson*'s Persuasive Authority*

Surprisingly, lower courts have not drawn on Justice Breyer's opinion in *Hudson v. Michigan* to resolve the split on the inevitable discovery exception, despite its careful reasoning and solid foundation in precedent. Courts instead have applied *Hudson* in a checkered fashion, either failing to look beyond its knock-and-announce holding or applying Justice Scalia's dictum with sweeping policy arguments.[102] Justice Breyer's dissent against the dictum, however, protects against the Fourth Amendment violations and unpredictability in the court system.

In the Ninth Circuit case *United States v. Ankeny*, the majority applied *Hudson*'s holding to admit information recovered in a warrantless search of the defendant's home with excessive force.[103] The heated dissent excoriated the court's holding for extending *Hudson* too far: "[T]he unlawful search itself . . . led directly to the discovery of the evidence at issue," and therefore should have been inadmissible.[104]

Meanwhile, the Eleventh Circuit extended the inevitable discovery exception to excuse the government's unreasonable search and seizure based on Justice Scalia's opinion: "Suppression of evidence . . . has always been our last resort, not our first

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[102] *See, e.g.*, United States v. Acosta, 502 F.3d 54, 56 (2d Cir. 2007); United States v. Bruno, 487 F.3d 304, 305-07 (5th Cir. 2007); United States v. Southerland, 466 F.3d 1083, 1084-86 (D.C. Cir. 2006).

[103] United States v. Ankeny, 502 F.3d 829, 836 (9th Cir. 2007) ("The Supreme Court made it clear that, because the knock-and-announce rule protects interests that 'have nothing to do with the seizure of . . . evidence, the exclusionary rule is inapplicable' to knock-and-announce violations." (quoting *Hudson*, 547 U.S. at 594)).

[104] *Id.* at 843 (Reinhardt, J., dissenting). Judge Reinhardt stated,

> These decisions reflect the important rights that are at stake, as we consider whether suppression is the appropriate remedy for the unlawful violent search that occurred of Ankeny's private home. Although the majority purports not to extend the holding of *Hudson*, its opinion does extend *Hudson*, far beyond the "specific context of the knock-and-announce requirement." . . . I would hold that in Ankeny's case the unconstitutional search is "sufficiently related to the later discovery of the evidence to justify suppression."

Id. (quoting *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring)).

impulse."[105] Thus, the officers' illegal "protective sweep" producing evidence against the defendant did not justify its exclusion from trial.[106] While the Eleventh Circuit has required the prosecution to show active pursuit of a legal, independent source of evidence, its decision has also often hinged on free-floating policy arguments, an indication of inevitable discovery's hazy contours.[107]

This Comment proposes to resolve these inconsistencies by drawing on Justice Breyer's dissent to formulate a test that keeps courts from applying the inevitable discovery exception when they find "no basis to conclude that applying the exclusionary rule . . . would deter police misconduct" rather than because the inevitable discovery exception properly admitted evidence.[108] This test incentivizes the circuits to apply inevitable discovery consistently and clearly.

II. *NIX* GOT IT RIGHT: THE INEVITABLE DISCOVERY EXCEPTION REQUIRES A HYPOTHETICAL INDEPENDENT SOURCE

Based on its foundation in the independent source and fruit of the poisonous tree doctrines, the inevitable discovery exception functions as the hypothetical version of the independent source rule. Therefore, the inevitable discovery exception requires a truly independent source of evidence distinct from the police conduct violating the Fourth Amendment. This Comment explains this in detail below.

A. The Hypothetical Independent Source in Nix v. Williams

The facts in *Nix v. Williams* were perfect for establishing a clean and simple inevitable discovery exception.[109] What the facts did not provide, however, was a challenge prompting the Court to clearly define the requirements of the then-new exception to the exclusionary rule.

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105 United States v. Delancy, 502 F.3d 1297, 1314 (11th Cir. 2007) (quoting *Hudson*, 547 U.S. at 591).

106 *Id.*

107 *See id.*

108 *Id.*

109 *See supra* Part I.C.

An active and independent pursuit in the form of a search team was approaching the evidence at the same time other police officers were violating the defendant's right to counsel.[110] Thus, the *Nix* Court did not have to define when a hypothetical source of evidence was independent of the police violation, and it did not speculate as to when officers satisfy active pursuit of a legal source.[111] None of the facts in *Nix* anticipated *Hudson*'s inevitable discovery question whether the police who violated the defendant's rights might have complied with the Fourth Amendment and still found the evidence. *Nix* fulfilled Justice Holmes's observation, "great cases, like hard cases, make bad law."[112]

Justice Breyer is more faithful to the original recognition of inevitable discovery based on the facts in *Nix* than Justice Scalia's approach. Citing *Silverthorne Lumber Co. v. United States*, he points to the independent source doctrine, which does "not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been lawful."[113] The doctrine instead requires the discovery to have occurred "*despite* (not simply *in absence of*) the unlawful behavior and . . . *independently* of that unlawful behavior."[114] The *Nix* Court recognized that the independent source doctrine was not applicable because no actual independent source of the evidence was ultimately obtained.[115] Its close relative, the inevitable discovery exception, considered more of the story in *Nix* because it encompassed the search team as a hypothetical independent source and its progress towards the evidence as active pursuit.[116]

Justice Breyer's analysis in *Hudson v. Michigan* asserts that the *Nix* Court would require the hypothetical independent source and the active pursuit of that source of evidence for inevitable

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[110] *Hudson*, 547 U.S. at 617 (Breyer, J., dissenting) (citing Nix v. Williams, 467 U.S. 431, 449 (1984)).

[111] *Nix*, 467 U.S. at 449-50.

[112] N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

[113] *Hudson*, 547 U.S. at 616 (Breyer, J., dissenting) (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

[114] *Id.*

[115] *Nix*, 467 U.S. at 443 ("[The independent source doctrine], although closely related to the inevitable discovery doctrine, does not apply here.").

[116] *Id.* at 443-45.

discovery.[117] His analysis fits the facts of *Nix*, while the majority's dictum, where the failure to knock and announce was simply a "preliminary misstep," would effectively place the officers in *Nix* within the bounds of the inevitable discovery exception regardless of whether the search team was in the field, the search team had been formed, or the police had even been conceiving of the evidence ultimately obtained unlawfully.[118] Applying the majority's analysis, the officers who performed the illegal interrogation in violation of the defendant's right to counsel might claim that they would have done a legal interrogation and reach the same conclusion under the inevitable discovery exception.

Instead, Justice Breyer recognizes that *Nix*'s conception of inevitable discovery requires active pursuit because it gives the independent source heightened proof. Would the government have pursued the legal, independent source? The active pursuit requirement based on *Nix* answers that question.

B. Hypothetical Independent Source Requires Active and Independent Pursuit

Active and independent pursuit best satisfies the requirements of a hypothetical independent source. First introduced in *Fitzpatrick v. New York*, the hypothetical independent source arose from the application of the independent source doctrine to a hypothetical situation: "[W]hether the 'independent source' exception to inadmissibility of fruits . . . encompasses a hypothetical as well as an actual independent source."[119] *Fitzpatrick* only shortly preceded *Nix*, and the *Nix* case had been ongoing in courts since the Supreme Court's first hint at an inevitable discovery exception in *Brewer v. Williams* in 1977.[120] *Fitzpatrick*'s recognition of a hypothetical independent source and *Nix*'s articulation of inevitable discovery were not merely coincidental; inevitable discovery and hypothetical independent

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[117] *Hudson*, 547 U.S. at 616 (Breyer, J., dissenting).

[118] *Id.* at 592 (majority opinion).

[119] Fitzpatrick v. New York, 414 U.S. 1050, 1051 (1973) (White, J., dissenting) (citation omitted) (quoting Wong Sun v. United States, 371 U.S. 471, 487-88 (1963)).

[120] Brewer v. Williams, 430 U.S. 387, 406 n.12 (1977).

source were both on the minds of the Supreme Court.[121] Scholars and courts alike have since recognized that "a hypothetical independent source . . . serves as the foundation for the 'inevitable-discovery' rule."[122]

Justice Breyer asked, in determining what evidence is admissible under the inevitable discovery doctrine: "Was there *set in motion* an *independent* chain of events that would have inevitably led to the discovery and seizure of the evidence *despite*, and *independent* of, that behavior?"[123] Justice Breyer first recognized the independent chain of events as a requirement and italicized it for emphasis.[124] Second, also italicized, he required the chain of events not to be simply formulated in a plan, but "set in motion."[125] "Set in motion," as used in lower court cases, indicates an active pursuit of evidence by lawful means, which supports Justice Breyer's requirement that the government already have an active pursuit of the legal source of evidence.[126]

1. Pursuit Must Be Independent

The analysis of independence for the hypothetical independent source will not require a new mode of analysis. Barring an applicable exception, evidence must have an independent source to be admissible. Most courts applying inevitable discovery agree on this point. The illegal search must

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[121] *Fitzpatrick*, 414 U.S. 1050, which preceded the *Nix*, 467 U.S. 431, litigation by only four years, articulated the hypothetical incidence of the independent source doctrine such that future cases, as in *Nix*, might apply the hypothetical when the evidence warranted the exception.

[122] Luke M. Milligan, *The Source-Centric Framework to the Exclusionary Rule*, 28 CARDOZO L. REV. 2739, 2740 n.6 (2007).

[123] *Hudson*, 547 U.S. at 618 (Breyer, J., dissenting) (emphasis added) ("The answer here [in Hudson's case] is 'no.'").

[124] *Id.*

[125] *Id.*

[126] Circuit court opinions feature the phrase, "set in motion," in discussions of inevitable discovery and exclusion of evidence based on unlawful government conduct. *See, e.g.*, United States v. Terzado-Madruga, 897 F.2d 1099, 1114 (11th Cir. 1990); Gissendanner v. Wainwright, 482 F.2d 1293, 1297 (5th Cir. 1973). Nowhere in the *Nix* opinion does "set in motion" appear, but rather, *Nix*'s facts illustrate that "set in motion" was required for evidence to be admitted. *Nix*, 467 U.S. at 449-50.

not be a but-for cause of the obtained evidence; an independent source must exist.[127]

Consider the facts of *Murray v. United States* to demonstrate that the inevitable discovery exception, properly applied, requires a hypothetical independent source. In that case, a police officer obtained a valid warrant without the use of any evidence that an earlier, unlawful visit to the warehouse had unearthed.[128] The Supreme Court found that the independent source doctrine was satisfied because the officer's warrant was not based on any evidence tainted by the officers' first illegal survey of the warehouse.[129] The outcome rested on the Supreme Court's earlier holdings that an independent source must be utilized. Inevitable discovery, as a hypothetical version of the independent source rule, requires the same independence.

Justice Breyer distinguishes the holding in *Segura v. United States* from Justice Scalia's analysis as well.[130] The warrant in that case was "obtained independently without use of any information found during the illegal entry."[131] The evidence was admissible, not simply because the officers ultimately had a valid warrant, but because the government's warrant was based on a legal evidentiary source.[132]

The independent source analysis is transparent in most lower courts as well. In *United States v. Young*, the Ninth Circuit barred the application of the inevitable discovery exception where "[t]he only reason the police possession of the [evidence] was inevitable was because the officer . . . took a short cut" by not obtaining a warrant before his search and seizure to create a legal, independent source of the evidence.[133] The police officer,

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[127] *See* Fitzpatrick v. New York, 414 U.S. 1050, 1051 (1973) (White, J., dissenting).

[128] Murray v. United States, 487 U.S. 533, 535-36 (1988); *see also Hudson*, 547 U.S. at 617-18 (Breyer, J., dissenting).

[129] *Murray*, 487 U.S. at 539.

[130] *Hudson*, 547 U.S. at 600, 601 n.1.

[131] *Id.* at 617 (Breyer, J., dissenting) (citing Segura v. United States, 468 U.S. 796, 814 (1984)).

[132] *Id.*

[133] United States v. Young, 573 F.3d 711, 722 (9th Cir. 2009). The Ninth Circuit properly held that the inevitable discovery doctrine could not appropriately be applied; however, "the majority should have engaged in a more complete analysis of the doctrine and made its narrow applicability under such circumstances clear." Lauren

accompanied by hotel staff, seized the defendant's handgun from a backpack in his room while he was out.[134] On appeal, the government's "circular logic" did not persuade the Ninth Circuit. The inevitable discovery exception did not excuse the officer's illegal search and seizure where no hypothetical independent source could be identified.[135] The court recognized that the evidence did not come from an independent, lawful source, nor could it have.[136] The only way for the officer to lawfully obtain the evidence would have been to apply and wait for a search warrant.[137] The officer's decision not to do that could not be exacted from the defendant and the Fourth Amendment.[138]

Given his own examples and the expressed link between the two doctrines, Justice Breyer concluded, "[t]here simply is no 'independent source'" for the evidence recovered in *Hudson* because the government had no independent search team headed toward the evidence they recovered from the defendant with a separate warrant.[139]

Had *Nix* comprised different facts, the inevitable discovery exception might have taken a different form, or the Court may have had the opportunity to articulate the exception's requirements. Would the source still be independent of the violation if there had been evidence indicating the illegal interrogations influenced the formation of the search teams at the

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Young Epstein, Note, *Limits of the Inevitable Discovery Doctrine in* United States v. Young*: The Intersection of Private Security Guards, Hotel Guests and the Fourth Amendment*, 40 GOLDEN GATE U. L. REV. 331, 353 (2010) (referring to *Young*, 573 F.3d 711). The court's Fourth Amendment precedent required that the inevitable discovery doctrine be applied in line with policy concerns of the defendant's "reasonable expectation of privacy" and freedom from police abuse. *Young*, 573 F.3d at 723.

[134] *Young*, 573 F.3d at 715. The officer's sergeant had advised the officer not to search Young's room without first obtaining a warrant but said a staff person could enter the room. *Id.* The hotel staff person had previously searched the room when Young was out when hotel staff recognized that they had registered Young's key card to the incorrect room, and that guest reported missing items from his room. *Id.* at 714-15. The hotel person proceeded to unzip Young's backpack so that the handgun was in plain view of the officer, whereupon the officer seized the evidence. *Id.* at 715.

[135] *Id.* at 722.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 722-23.

[139] Hudson v. Michigan, 547 U.S. 586, 625 (2006) (Breyer, J., dissenting).

location of the search? The answer depends on how much the search teams depended on the illegal interrogation. If the evidence could not have been found but-for the illegality, the source is not independent. Courts, therefore, continue to require a determination of whether a source is "truly independent."[140]

2. Pursuit Must Be Active

Active pursuit is the second step after the but-for causation analysis for the independent source. The *Nix* Court required the government prove that the evidence would have been recovered from independent, lawful means by a preponderance of the evidence.[141] In other words, the government did not have to reach a clear-and-convincing burden of proof to establish that the search team would have found the evidence regardless of the unlawful conduct.[142] The *Nix* Court was not troubled by a lower standard because "inevitable discovery involves no speculative elements[,] but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings."[143] *Nix*'s perfect facts did not create any need for speculation by the Court, but the facts did meet an active pursuit standard.

The active pursuit prong requires the government to demonstrate whether the police officers attempted to obtain evidence from the independent source. This requirement indicates a higher burden of proof in practice than what the *Nix* court articulated, but it fits the facts of the case.[144] Had the search team in *Nix* not been en route to the evidence, it is less likely that the police would have pursued that legal source of evidence. Therefore, the *Nix* facts demonstrate that the inevitable discovery exception functioned when the level of proof was higher as established through the active pursuit component.

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[140] United States v. D'Andrea, 648 F.3d 1, 12 (1st Cir. 2011) (quoting United States v. Silvestri, 787 F.2d 736, 744 (1st Cir. 1986)).

[141] Nix v. Williams, 467 U.S. 431, 444 (1984) ("Anything less would reject logic, experience, and common sense."); *see also* Shapiro, *supra* note 59, at 309.

[142] *Nix*, 467 U.S. at 444 n.5.

[143] *Id.*

[144] *Id.* at 444.

Many lower courts recognize a formal active component to inevitable discovery in line with Justice Breyer's opinion. In the Second Circuit case *United States v. Eng*, the defendant's safe was unlawfully searched based on narcotic and money laundering charges, but the search revealed evidence of tax evasion as well.[145] When the defendant moved to suppress the evidence of tax evasion, the court considered first "the possibility that [the] government's . . . investigation was not sufficiently active or developed prior to [a] search of Eng's safe" to "determine . . . what *would have happened* had the unlawful search never occurred."[146] The active requirement, the *Eng* court pointed out, forced the analysis to focus on "'demonstrated historical facts' so as to keep speculation to an absolute minimum," as instructed by the *Nix* Court's facts and conclusion.[147] Thus, the court remanded the case and ordered the government to demonstrate how the tax evasion evidence would have inevitably been discovered despite and independent of the government's unlawful conduct.[148]

Likewise, the Fifth Circuit held even before *Nix* formally announced inevitable discovery that "there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and [therefore] the prosecution must demonstrate that the lawful means which made discovery inevitable were being actively pursued prior to the occurrence of the illegal conduct."[149] More recently, decisions from the Fifth Circuit reveal a desire for more guidance on the active pursuit requirement[150] but the court is still not willing to "risk the whittling down of the warrant requirement . . . by justifying the

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145 United States v. Eng, 971 F.2d 854, 857-58 (2d Cir. 1992).

146 *Id.* at 861.

147 *Id.* (citing *Nix*, 467 U.S. at 444 n.5).

148 *Id.* at 861-62.

149 Jefferson v. Fountain, 382 F.3d 1286, 1296 (11th Cir. 2004) (citing United States v. Brookins, 614 F.2d 1037, 1042 n.2 (5th Cir. 1980)) (finding that evidence from an illegal stop was correctly admitted after applying an active and independent pursuit analysis, and concluding that even if it was not admitted, the large amount of independently obtained evidence was sufficient for conviction).

150 *See* United States v. Salinas, No. 12-40245, 2013 WL 5788772, at *6 (5th Cir. Oct. 29, 2013).

admission of evidence under a broad inevitable-discovery exception."[151]

The *Nix* Court did not provide that guidance, but the facts demonstrate an active pursuit. Had the facts presented to the Court been different, courts may have more guidance on the exception. What if the search team was not yet in the field? If they were en route to the field with orders from the police and maps indicating their search, then would inevitable discovery apply? What if the search team was still at the police station receiving orders from the investigators regarding their impending search, would the inevitable discovery exception keep evidence in then? Where the analysis in the *Nix* opinion is silent, the facts are indispensable.[152]

III. THE HYPOTHETICAL INDEPENDENT SOURCE RULE WILL PROTECT PRIVACY AND DETER POLICE VIOLATIONS

The exclusionary rule prevents unreasonable search and seizure better than civil suits, internal police discipline, and municipality financial liability.[153] Active and independent pursuit protects the hypothetical independent source from becoming a loophole justifying the government's invasive conduct. Justice Breyer's arguments are deeply rooted in the policy concerns that prevent this unlawful conduct.[154] The courts, perched on an unstable precipice, run the risk of tumbling off their point into a larger hole of police violations should the inevitable discovery exception continue to be applied incorrectly.

Justices Breyer and Scalia's battling counterfactuals demonstrate the risk of lost justice and due process should courts continue to be able to apply free-floating policy and simple but-for causation analysis. Justice Breyer finds Justice Scalia's

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[151] United States v. Cherry, 759 F.2d 1196, 1205 (5th Cir. 1985) (quoting United States v. Alvarez-Porras, 643 F.2d 54, 64 (2d Cir. 1981)).

[152] *Nix*, 467 U.S. at 449-50 ("[I]t is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found.").

[153] Hudson v. Michigan, 547 U.S. 586, 596-99 (2006). Civil suits are costly and result in nominal fees, if any. *Id.*

[154] *Id.* at 608-09 (Breyer, J., dissenting).

counterfactual, in which the officers who acted in violation of the knock-and-announce rule enter Hudson's apartment ten to fifteen seconds after they did in reality, inapplicable to the facts.[155] Breyer argues that the hypothetical independent source doctrine requires a source independent of the conduct of the police violation of the Fourth Amendment, opposite Justice Scalia.[156] In Breyer's hypothetical, inevitable discovery is based upon the independent source doctrine, which requires an independent source for the evidence to be admissible.[157] Thus, the officers would not enter the apartment at all, because an "unreasonable search or seizure is . . . an illegal search or seizure" under the Fourth Amendment.[158] A truly independent source—such as a second team of officers headed toward the residence—is required.

A. Inevitable Discovery Must Be Narrow to Preserve Deterrence

Justice Breyer notes that his concern for citizens' rights protected by the Fourth Amendment date back at least fifty years to *Mapp v. Ohio*.[159] In that case, the Supreme Court observed that officers were not sufficiently deterred by existing methods from violating Fourth Amendment rights in federal courts.[160] When the exclusionary rule is full of holes as with Justice Scalia's suggested but-for causation analysis, officers may skip constitutionally required procedures to obtain evidence, such as the knock-and-announce rule in *Hudson* or the defendant's *Miranda* rights in *Nix*.[161]

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[155] *Id.* at 592, 596 (majority opinion) (dictum).

[156] *Id.* at 616-18 (Breyer, J., dissenting). *But see* Hessler, *supra* note 59, at 253 ("Although active pursuit was both present and relevant in *Nix*, nowhere in the opinion did the majority explicitly hold that it was necessary for the inevitable discovery exception to apply.").

[157] *Hudson*, 547 U.S. at 618 (Breyer, J., dissenting) ("Of course, had the police entered the house lawfully, they would have found the gun and drugs. But that fact is beside the point. The question is not what [the] police might have done had they not behaved unlawfully. The question is what they did do.").

[158] *Id.* at 608.

[159] *Id.* at 607-09 (citing Mapp v. Ohio, 367 U.S. 643, 651-55 (1961)).

[160] *Id.* at 607-08.

[161] *Id.* at 609-10; Nix v. Williams, 467 U.S. 431, 434-36 (1984).

Methods of deterrence against police violations have repeatedly proven insufficient.[162] Justice Scalia argues that excluding evidence for this knock-and-announce violation would "generate a . . . flood of alleged failures to observe the rule[s]."[163] Yet, Justice Kennedy acknowledges the existence of a "widespread pattern" of knock-and-announce violations in his concurrence.[164]

While Justice Scalia leans on a list of available deterrents to avoid suppression of evidence, Justice Breyer remains unconvinced that they are sufficient. Breyer cites *Hudson* and the government's failure to name one case in which more than nominal damages were awarded, which *Hudson*'s *amici* conceded would not be "an effective substitute for the exclusionary rule at this time."[165] Although civil lawsuits are more available than they were at the time of *Weeks* and *Mapp*, litigation is more expensive and likely to end in nominal damages or a settlement, if anything at all.[166]

Justice Breyer points out that the majority decision follows the already-rejected doctrine in *Wolf v. Colorado*[167] rather than the precedent set by *Mapp*.[168] Until *Hudson*, the majority had rejected the argument that the resulting "substantial social costs" outweighed the exclusionary rule's suppression of evidence.[169]

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162 *Hudson*, 547 U.S. at 610-11 (Breyer, J., dissenting).

163 *Id.* at 595 (majority opinion).

164 *Id.* at 604 (Kennedy, J., concurring).

165 *Id.* at 610 (Breyer, J., dissenting) (citing Brief for Criminal Justice Legal Foundation at 10, *Hudson*, 547 U.S.586 (No. 04–1360)).

166 *Id. But see* WALTER P. SIGNORELLI, THE CONSTABLE HAS BLUNDERED: THE EXCLUSIONARY RULE, CRIME, AND CORRUPTION 192-93 (2010). Signorelli argues that "[the] civil lawsuit is a more effective remedy than the exclusionary rule" because the exclusionary rule does not personally affect the police officer who unlawfully conducted the search or seizure, and the 42 U.S.C. §1983 suit does. *Id.* at 190-92. However, when a judgment is rendered against a violating police officer, the judgment comes from the municipality treasury and not the police officer. *Id.* at 192. Furthermore, the prosecution's inability to present evidence against the defendant because of the exclusionary rule should have the same effect on department discipline and training as civil suit does. *Id.* at 193.

167 Wolf v. Colorado, 338 U.S. 25 (1949).

168 *Hudson,* 547 U.S. at 611 (Breyer, J., dissenting) (citing Mapp v. Ohio, 367 U.S. 643, 643 (1961)) (where Fourth Amendment violations prompted the suppression of evidence).

169 *Id.* at 596 (majority opinion); *Id.* at 614 (Breyer, J., dissenting).

Mapp should be guiding the Court's decision, and courts should require adherence to the Fourth Amendment.[170]

B. Inevitable Discovery Policy is Rooted in The Exclusionary Rule: Protection of Privacy and The Home

Justice Breyer argues that the rights protected by the Fourth Amendment, including the protection of "the sanctity of a man's home and the privacies of life," are jeopardized without the correct application of the inevitable discovery doctrine.[171] The majority identifies "human life," "property," and "those elements of privacy and dignity that can be destroyed by a sudden entrance" as interests protected by the knock-and-announce rule.[172] This list wrongly excludes the guaranteed "sanctity of a man's home."[173]

As other scholars have pointed out, nothing is stopping a future court or police officer from wrongly applying the inevitable discovery exception and thereby "provid[ing] law enforcement officials with an incentive to ignore the warrant requirement. 'The police might seek the most expeditious method of obtaining the evidence without regard to its illegality, knowing that, as long as they could have obtained the evidence legally, their efforts will not result in its suppression.'"[174] Indeed, "a logical police officer will make a rational choice to violate the Constitution rather than first obtain[] a search or arrest warrant, because the 'evidence will be admissible regardless of whether it was the product of [an] unconstitutional arrest.'"[175]

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[170] *Mapp*, 367 U.S. 643; *see also* CAROLYN N. LONG, *MAPP V. OHIO*: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES 193-95 (2006). Long cites the ABA's 1988 study reporting "the exclusionary rule neither causes serious malfunctioning of the criminal justice system nor promotes crime" and encourages "police training . . . [and] professionalism in police departments across the country." *Id.* at 193-94. Long also warns against "state criminal procedure . . . becom[ing] as fragmented as it was prior to *Mapp*." *Id.* at 195.

[171] *Hudson*, 547 U.S. at 606 (Breyer, J., dissenting) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

[172] *Id.* at 620.

[173] *Id.* at 621 (quoting *Boyd*, 116 U.S. at 630).

[174] TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 329-30 (2013) (quoting Bloom, *supra* note 34, at 95).

[175] United States v. Roche-Martinez, 467 F.3d 591, 595 (7th Cir. 2006) (quoting New York v. Harris, 495 U.S. 14, 32 (1990) (Marshall, J., dissenting)).

The circuits that apply an additional policy factor in their inevitable discovery analysis tend to focus on preserving the integrity of the Fourth Amendment and achieving justice in their decisions.[176] In the Third Circuit's *United States v. Stabile*, for example, the inevitable discovery doctrine was applied such that "the deterrence rationale has so little basis that the evidence should be received."[177] Thus, when the prosecution can establish "that the police, following routine procedures, would inevitably have uncovered the evidence," the concern for deterrence is lifted.[178] However, the court's application of free-floating policy is unpredictable. It wrenches the decision from the hands of doctrine in the name of policy, when a rule that serves policy through its application would produce fairer results.

But-for causation analysis arguably resolves inevitable discovery, were it not for the train-sized hole in the exclusionary rule that would surely result.[179] The solution, then, is to apply a second step to properly exclude evidence when unlawful conduct warrants it. Thus, the active and independent pursuit test will admit evidence in the interest of crime control and serving justice, but will exclude evidence in the interest of the Fourth and Fifth Amendment protections.

IV. THE ACTIVE AND INDEPENDENT PURSUIT TEST

A. Courts Should Continue to Apply But-For Causation Analysis for Independent Source

Courts tend to find the independence of a source without issue because the question is not speculative in nature and is based on the well-established independent source and fruit of the poisonous tree doctrines. Independence is determined by the but-for causation analysis; that is, but-for the discoverer's illegal act,

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[176] *See supra* notes 81-83 and accompanying text.

[177] United States v. Stabile, 633 F.3d 219, 245 (3d Cir. 2011) (quoting United States v. Vasquez De Reyes, 149 F.3d 192, 195 (3d Cir. 1998)) (internal quotation mark omitted).

[178] *Id.* (quoting *Vasquez De Reyes*, 149 F.3d at 195) (internal quotation marks omitted).

[179] Alschuler, *supra* note 30, at 1811-12.

would the evidence have been discovered by some independent, lawful means?

Looking to the Supreme Court case *United States v. Murray*, Justice Breyer illustrated that a hypothetical independent source is simply an independent source with which the government did not follow through: "[t]he inevitable discovery exception rests upon the principle that the remedial purposes of the exclusionary rule are not served by suppressing evidence discovered through a 'later, lawful seizure' that is 'genuinely independent of an earlier, tainted one.'"[180]

Similarly, the Court in *Segura v. United States* found an independent source was present when the evidence was recovered from a "wholly unrelated" source from the illegal search.[181] *Segura* also employed "tainted" fruit of the poisonous tree and "derivative" descriptors to distinguish the admissible, independent evidence from evidence dependent on the unlawful entry.[182]

Lower courts follow the same trend in analyzing the independence of a source. Many lower courts tend to skip the analysis of independence, likely because of their familiarity with the fruit of the poisonous tree and independent source.[183] The hypothetical version of the independent source does not complicate the analysis because the hypothetical comes into play in its pursuit rather than its independence. It is in reality independent.

In the Eleventh Circuit case *United States v. Terzado-Madruga*, for example, "[t]he critical inquiry under the independent source doctrine is whether the challenged evidence was obtained from lawful sources and by lawful means independent of the police misconduct."[184] In that case, the court found that the defendant's identity was "already known to authorities prior to the [unlawful] taping."[185] The authorities had

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[180] *Hudson*, 547 U.S. at 616 (Breyer, J., dissenting) (quoting Murray v. United States, 487 U.S. 533, 542 (1988)).

[181] *Id.* at 617 (citing Segura v. United States, 468 U.S. 796, 814 (1994)).

[182] *Segura*, 468 U.S. at 814.

[183] *See, e.g.*, United States v. D'Andrea, 648 F.3d 1, 12 (1st Cir. 2011) ("[A]re the legal means truly independent[?]" (quoting United States v. Silvestri, 787 F.2d 736, 744 (1st Cir. 1986))).

[184] United States v. Terzado-Madruga, 897 F.2d 1099, 1115 (11th Cir. 1990).

[185] *Id.*

already legally discovered his identity by means completely separate from the illegal conduct.[186] The court's rationale—but-for the authorities' unlawfully obtaining evidence, they would have discovered it through lawful means anyway—is sound.

Thus, this Comment recommends that courts should continue to base their analysis on the independent source and fruit of the poisonous tree doctrines when determining whether a source is independent in their use of the but-for causation analysis. This analysis satisfies the hypothetical independent source of inevitable discovery.

B. Active Pursuit Strongly Corroborative of the Actor's Purpose: A New Approach

This Comment proposes a new approach for courts to apply: the active pursuit prong of the inevitable discovery exception. This test borrows from criminal law to clarify for courts to what extent pursuit must be "active."

To satisfy an attempt offense, the Model Penal Code requires "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor's] commission of the crime."[187] Furthermore, conduct constituting a substantial step must be "strongly corroborative of the actor's criminal purpose."[188] Because the Model Penal Code's "substantial step" has gained in popularity in recent revisions of state law, the application to active and independent pursuit should be a more natural one for today's courts.[189]

This test enables courts to determine whether an "active" pursuit is "strongly corroborative" of the government's "purpose" to obtain the evidence. If government actions are not "strongly corroborative" of its intent to retrieve evidence from an

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[186] *Id.*

[187] MODEL PENAL CODE § 5.01(1)(c) (1962). As noted in *United States v. Farhane*, "substantial-step analysis necessarily begins with a proper understanding of the crime being attempted." United States v. Farhane, 634 F.3d 127, 147 (2d Cir. 2011).

[188] MODEL PENAL CODE § 5.01(2).

[189] *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 11.4(e), at 226 n.67 (2d ed. 2003) (providing a list of state statutes incorporating the Model Penal Code "substantial step," and, generally, "strongly corroborative of . . . criminal purpose").

independent, lawful source, the evidence is inadmissible. The substantial step verifies that the officers were actually going to use a legal source of evidence.

The test makes answering the question, "When did this pursuit of evidence become active?" much easier.[190] The proximity approach, the other common formulation of the criminal attempt offense, does not resolve that question. Rather, it prolongs the suffering of courts, prosecution, and defense alike by again asking the question, "What act towards pursuit of an independent source of evidence was indispensable, or proximate, to the active pursuit?"[191] The question sounds similar to "When does an act qualify as active pursuit?" Whereas a "substantial step" that is "strongly corroborative" of the officers' intent to pursue an independent evidentiary source is simple, the proximity approach does not clarify the active pursuit prong. Moreover, while a proximity approach might require that the officers in *Nix*, for example, be within a certain distance of the evidence at the time of the violation, the substantial step approach allows for the prosecution to assert that the officers made a phone call to arrange a search team in the area of the evidence. The substantial step approach thus will be much easier to apply than a proximity approach.

Lower courts have come close to articulating the test before, but the language has never caught on. In *United States v. Cunningham*, the police officers "took substantial steps to obtain a warrant before the contested search occurred," which persuaded the court that the evidence would have inevitably been discovered.[192] This Comment proposes that the language stick in the lower courts this time.

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[190] *See* Alschuler, *supra* note 30, at 1812. Alschuler argues that active pursuit "requires courts to draw a yes-or-no line somewhere along a spectrum of investigative plans and activities and to specify the moment when an investigation begins," which before this Comment's test left courts without guidance. *Id.*

[191] *See* 2 LAFAVE, *supra* note 189, § 11.4(b).

[192] United States v. Cunningham, 413 F.3d 1199, 1204 (10th Cir. 2005).

C. The Active and Independent Pursuit Test Accomplishes Policy Goals and Prevents The Improper Application of The Inevitable Discovery Exception

Those in favor of the but-for causation analysis to apply the inevitable discovery exception provide potential counter-arguments to this Comment's proposed test. Justice Scalia articulated some of these in his dicta in *Hudson*.[193]

1. Active and Independent Pursuit Does Not Lead to Over-Suppression

The main argument against an active and independent pursuit analysis for inevitable discovery, that this application extends the exclusionary rule too far and at a greater social cost than necessary, is addressed by adhering to and protecting the guarantees of the Fourth Amendment.[194] Furthermore, arguments regarding the doctrinal instability of causation dating back centuries do not resolve the injustices of including and excluding evidence on courts' whims.[195]

The Seventh Circuit, for example, applied a but-for causation analysis to inevitable discovery such that the exception did not protect against opportunistic human conduct.[196] In that case, DEA agents recovered evidence in an unreasonable search and seizure.[197] The court allowed the evidence into trial under the inevitable discovery exception on the basis that the agents would

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[193] *See* Hudson v. Michigan, 547 U.S. 586, 591-99 (2006). *But see* Alschuler, *supra* note 30, at 1758. Alschuler argues that Breyer's opinion makes the but-for causation analysis into the "word game" that the *Silverthorne Lumber Co.* Court warned of: "Rumor has it that Justice Breyer recently attended a wedding at which the bride broke the rules of etiquette by wearing scarlet rather than white. Justice Breyer remarked, 'But for her improper dress, she would have been naked.'" *Id.*

[194] *Hudson*, 547 U.S. at 591 (dictum) ("[W]e . . . have held it to be applicable only . . . 'where its deterrence benefits outweigh its substantial social costs.'" (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998))).

[195] *See id.* at 592 (distinguishing "causation in the logical sense alone" in his reference to the attenuation analysis (quoting United States v. Ceccolini, 435 U.S. 268, 274 (1978)) (internal quotation marks omitted)).

[196] United States v. Tejada, 524 F.3d 809, 813-15 (7th Cir. 2008).

[197] *Id.* at 810-11.

have obtained a search warrant had they applied for one.[198] The agents conducted a thorough safety sweep despite knowing that no one else was in the apartment.[199] They opened a closed cabinet inside an entertainment center where they found a blue duffel bag, inside which they discovered a bag containing illegal drugs.[200] Rather than apply for a search warrant, the officers knew they could circumvent the warrant requirement by stating they could have gotten one had they applied for it.[201] If the court applied an active pursuit prong, they would find that, similar to the legal cause in tort law, the likelihood of the officers' pursuing the evidence legally was about zero. The officers' abuse is evident, and without a more defined test as set forth in this Comment, that abuse is likely to continue.

2. This Test Reduces Unpredictable Results of Court Discretion

Moreover, the courts should not be left to balance the importance of deterrence against police violations with social costs of excluding evidence. Both are crucial. Rather, the active and independent pursuit test should accomplish the pursuits of both sides by using inevitable discovery to exclude evidence when the Fourth Amendment has been irreparably violated, and admit evidence when a legal source was sought.

In *United States v. D'Andrea*, for example, the First Circuit considered:

> "[T]hree basic concerns" . . . in deciding whether to apply the inevitable discovery doctrine: "are the legal means truly independent; are both the use of the legal means and the discovery by that means truly inevitable; and does the application of the inevitable discovery exception either

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[198] *Id.* at 813 (concluding the officers "certainly, and not merely probably" would have gotten a warrant had they applied for one). Judge Posner based his conclusion on an earlier Seventh Circuit case, *United States v. Buchanan*, 910 F.2d 1571, 1573 (7th Cir. 1990). *See Tejada*, 524 F.3d at 813. Judge Posner called his analysis an "intermediate test" for inevitable discovery. *Id.*

[199] *Tejada*, 524 F.3d at 811.

[200] *Id.*

[201] *Id.*

> provide an incentive for police misconduct or significantly weaken fourth amendment protection?"[202]

These factors include active and independent pursuit. But the third factor enables free-floating policy concerns to determine whether evidence is admissible. The test applying inevitable discovery should address these policy concerns so that the court does not have to engage in this dance.

CONCLUSION

This Comment does not advocate strict adherence to the exclusionary rule for its own sake, but rather to require the government's strict adherence to the Fourth Amendment. Justice Breyer's opinion in *Hudson v. Michigan* should provide the resolution to the inevitable discovery circuit split by remaining faithful to the first Supreme Court articulation of the exception in *Nix v. Williams*.

The inevitable discovery exception, from its origins in *Nix* to its application in present-day circuit courts, is rooted in the independent source doctrine and requires a hypothetical independent source. Requiring the government's substantial step toward an independent source of evidence to admit evidence under the inevitable discovery exception preserves the protections of the Fourth Amendment, prevents police abuse of privacy and the sanctity of the home, and keeps courts from admitting evidence based on free-floating policy. Civil suits, inner departmental discipline, and municipality liability do not deter government violations with the same level of effectiveness.

Based on this doctrinal foundation and public policy concerns, the hypothetical independent source is best evaluated through active and independent pursuit, as Justice Breyer articulates in *Hudson*. Other applications of the inevitable discovery exception invite unpredictability in courts and reduce protections for defendants from unreasonable search and seizure. The new approach for active and independent pursuit crafted in

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[202] United States v. D'Andrea, 648 F.3d 1, 12 (1st Cir. 2011) (quoting United States v. Silvestri, 787 F.2d 736, 744 (1st Cir. 1986)).

this Comment will resolve these issues by employing the Model Penal Code's provision for actus reus of attempt. Applying this test allows courts to apply the inevitable discovery exception based on the historical facts of the case, rather than on speculation alone.

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