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Murray v. United States: The Bell Tolls for the Search Warrant Requirement

CRAIG M. BRADLEY*

In Murray v. United States, the Court continued its solomonic approach to the fourth amendment, attempting to divide the baby between the conflicting needs of law enforcement and privacy and being left with a predictable result—half a baby. In this case, the Court continued to claim, at least implicitly, that there is a search warrant requirement and that the exclusionary rule is designed to deter violations of that requirement. Nevertheless, in an opinion that followed, quite logically, from two earlier precedents, the Court found a way to admit all of the evidence found in the course of law enforcement officials’ illegal break-in of a warehouse.

I do not necessarily condemn the result in this case, which may have been due to a good faith miscalculation of exigent circumstances by the authorities, because, as I will discuss, abolishing the warrant requirement may be an appropriate way to deal with the problems of the fourth amendment.

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2. Interestingly, Justice Scalia, the author of the Murray opinion, recently made a similar observation concerning Justice O'Connor's concurring opinion in the juvenile death penalty case, Thompson v. Oklahoma, 108 S. Ct. 2697 (1988):

   The concurrence's approach is a solomonic solution to the problem of how to prevent execution in the present case while at the same time not holding that the execution of those under 16 when they commit murder is categorically unconstitutional. Solomon, however, was not subject to the constitutional constraints of the judicial department of a national government in a federal, democratic system.

   Id. at 2721 (Scalia, J., dissenting).


4. Actually, the Court remanded the case to the district court for a finding as to whether the subsequent search, pursuant to a warrant, was independent of the original, illegal search. Murray, 108 S. Ct. at 2536. Given the First Circuit Court of Appeals' holding that "we can be absolutely certain that the warrantless entry in no way contributed in the slightest either to the issuance of the warrant or to the discovery of the evidence during the lawful search pursuant to the warrant," id. (quoting United States v. Moscatiello, 771 F.2d 589, 603-04 (1st Cir. 1985)), the result in the district court seems foreordained.

5. The government conceded, arguendo, that exigent circumstances were not present. Brief for the United States at 14-15 n.3, Murray v. United States, 108 S. Ct. 2529 (1988) (No. 86-995) [hereinafter Brief for the United States]. However, this was only because this issue had not been decided by the courts below and was too fact-specific to merit consideration by the Supreme Court. Id. The court of appeals, while "not reach[ing] the government's claim of exigency," did state that it was "loath to conclude that exigent circumstances existed." Moscatiello, 771 F.2d at 602.
amendment. Rather, what concerns me is the hypocrisy of claiming that there is a warrant requirement and then not enforcing it, the confusion that such a result will sow among police, judges, and citizenry alike, and the police misconduct that this decision, serving as a precedent, is likely to lead to in the future.

The facts of Murray are relatively simple. Drug Enforcement Agency agents were conducting a surveillance of a Boston warehouse based on information from three previously reliable informants. The agents concluded that narcotics were being distributed from the warehouse, and they stopped two vehicles after they exited the warehouse and searched them, on probable cause. Marijuana was found in the vehicles. Then, without even discussing obtaining a warrant, and despite the fact that the courthouse was no further away than the warehouse, the agents returned to the warehouse and demanded entrance. When these demands went unanswered, the agents forced the door open, entered, and observed numerous bales of marijuana (but no people). They closed up the warehouse without disturbing the bales, and, while some agents went for a warrant, others maintained the surveillance of the warehouse. The warrant application did not mention the entry, but was based on information obtained from the informants, the surveillance, and the vehicle searches. After the warrant was issued, the agents returned to the warehouse and seized 270 bales of marijuana.

The Supreme Court, along with the court of appeals, assumed that the initial entry was unlawful. Nevertheless, the Court held that the evidence could be admissible under the “independent source” doctrine—the source being the warrant—and remanded the case to the district court for a “determination of whether the warrant authorized search was an independent source of the challenged evidence.” That is, whether the “discovery

6. See infra text accompanying notes 75-84.
7. This information appears in the court of appeals’ opinion. Moscatiello, 771 F.2d at 596-97.
8. Id. at 598. “[T]he surveillance evidence provided convincing indicia of drug trafficking.”
9. Id. at 595
11. See id. at 2537 (Marshall, J., dissenting).
14. Id.
15. Id.
16. Id.
17. Id. at 2536. As discussed earlier, see supra note 4, there is little doubt what the result will be on remand. The case had previously been remanded for reconsideration in light of Henderson v. United States, 476 U.S. 321 (1986), to consider whether there had been a violation of the Speedy Trial Act, 18 U.S.C. §§ 3161-74 (1983 & Supp. V 1987). Murray v. United States, 476 U.S. 1138 (1986). The court of appeals held that there had not been such a violation. United States v. Carter, 803 F.2d 20 (1st Cir. 1987).
of the contraband in plain view was *totally irrelevant* to the later securing of [the] warrant."

The Supreme Court’s route to this conclusion began with a famous passage from Justice Holmes’ opinion in *Silverthorne Lumber Co. v. United States*:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired [sic] shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . . .

No one would disagree with the application of this “independent source doctrine” to certain cases. Suppose, immediately after an illegal arrest and without warnings, A confesses to narcotics sales and further admits that a notebook that details these sales is at home. As the detectives head for A’s home, Mrs. A, knowing nothing of these events but angry with her husband, hands the notebook over to a policeman patrolling near her house. Clearly, while A’s confession must be suppressed, it should not operate to shield A from admission of the notebook against him under these circumstances.

The notebook was discovered by means wholly independent of any illegality, and suppressing it would serve no deterrent purpose not already adequately served by suppression of the confession.

In the recent case of *Segura v. United States*, the Court dealt with a more problematic application of the independent source doctrine. In *Segura*, the police, after arresting one defendant in the hallway of an apartment building and dispatching an officer for a search warrant for an apartment in the building, illegally entered the apartment and arrested its occupants. They remained for nineteen hours awaiting the arrival of the warrant and then searched pursuant to the warrant, finding narcotics. The Court held that “police officers’ illegal entry upon private premises did not require suppression of evidence subsequently discovered at those premises when executing a search warrant obtained on the basis of information wholly

18. *Murray*, 108 S. Ct. at 2536 (quoting Moscatiello, 771 F.2d at 603-04) (emphasis added). The Supreme Court elaborated that the warrant search could not be “genuinely independent . . . if the agents’ decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.” *Id.* at 2535-36.
19. 251 U.S. 385 (1920).
23. 468 U.S. 796.
unconnected with the initial entry.'"24 Unlike the confession example above, however, in Segura, as in Murray, the seizure of the evidence was accomplished by the same group of officers who made the initial illegal entry. Thus, though the information on which the subsequent warrant was based was, in both cases, "wholly unconnected" to the illegal entry, the parties who seized the incriminating information were not. Therefore, the seizure of the evidence was not "wholly independent" of the illegality in the same sense that it is in the classic independent source case.25 As the Segura dissent pointed out, that case "provide[s] . . . an affirmative incentive to engage in unconstitutional violations of the privacy of the home."26

Still, in Segura, the lower court had suppressed evidence seen by the police in plain view during their initial entry, though that issue was not before the Supreme Court.27 Thus, the only issue before the Court was whether evidence not seen during the initial entry was admissible. This result was mentioned approvingly by the two-Justice plurality as a deterrent to such illegal entries28 but disparaged by the dissent.29 In Murray, the Court, quite logically, concluded that this distinction made no sense and adopted the view that "evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality" was admissible.30 The question arises whether once the police are illegally inside, a distinction should be drawn between evidence that is "seen" and "not seen"? A contrary result simply would have encouraged the police to claim that they "saw nothing" during the initial entry. Moreover, as Justice Stevens pointed out, dissenting in Segura,

24. So the Court summarized Segura in Murray, 108 S. Ct. at 2534 n.2.
25. Two courts of appeals have held that the inevitable discovery doctrine (and, by implication, the independent source doctrine) should be applied only when the evidence is, or would have been, discovered by a separate investigation that was already under way when the illegality occurred (as in Nix v. Williams, 467 U.S. 431; United States v. Cherry, 759 F.2d 1196, 1204 (5th Cir. 1985); United States v. Satterfield, 743 F.2d 827, 845 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985). Another has held that even when one agent had been dispatched to get a warrant before the illegal break-in, the evidence must be suppressed. United States v. Griffin, 502 F.2d 959 (6th Cir. 1974).
26. Segura, 468 U.S. at 817 (Stevens, J., dissenting).
27. Id. at 803.
28. Id. at 812. "[O]fficers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case." Id.
29. Id. at 831 (Stevens, J., dissenting). Justice Stevens continued:
   I would not draw a distinction between the prewarrant evidence and the post-warrant evidence. The warrant embraced both categories equally and if there had been no unlawful entry, there is no more reason to believe that the evidence in plain view would have remained in the apartment and would have been obtained when the warrant was executed than the evidence that was concealed. The warrant provided an "independent" justification for seizing all the evidence in the apartment . . .
Id.
the evidence seen during the initial entry was nevertheless seized by virtue of the subsequent “independent” warrant just as much as the evidence that was not seen.\(^{31}\) Still, by ruling that nothing found during the illegal search was subject to suppression, the Court in *Murray eliminated any disincentive for the police to commit such illegal searches*.\(^{32}\)

The other case relied on by the Court in *Murray* was *Nix v. Williams*,\(^{33}\) decided the same year as *Segura*. *Nix* was the sequel to *Brewer v. Williams*,\(^{34}\) in which the Court suppressed statements made by the defendant in response to the “Christian burial speech” in violation of his right to counsel. In addition to the statements themselves, Williams led the police to the body of his murder victim. In *Nix*, the Court held that the body could be used in evidence because it would have inevitably been discovered by an independent search being carried out across the Iowa countryside by two hundred volunteers.\(^{35}\)

The *Murray* Court correctly pointed out that *Nix* “assume[d] the validity of the independent source doctrine as applied to evidence initially acquired unlawfully.”\(^{36}\) This is true, but it misses the point. No one disputes that there should be an independent source doctrine when the evidence is in fact found by a “wholly independent” source,\(^{37}\) as it would have been had the Iowa search party found the body first in *Nix*. The problem in *Murray* is that, unlike the Iowa search party, the investigators who “found” the evidence “legally” (i.e., pursuant to the search warrant) were not “wholly independent” but were the very same officers who had committed the original fourth amendment violation. Thus *Nix* casts no light on the issue posed in *Murray*: Whether the term “independent source” means that the party (source) that finds the evidence must be independent of the party that committed the violation (as in *Nix*)\(^{38}\) or whether it is sufficient that despite the fact that the same party that committed the violation also found the evidence, knowledge of the evidence in question came from a source independent of the constitutional violation (as in *Segura* and *Murray*). A middle ground, advanced by the dissent in *Murray*, would apply the independent source doctrine even when the same party that committed the violation finds the evidence if there is a “historically verifiable fact dem-

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33. 467 U.S. 431.
37. *See id.* “When the seizure of the evidence at issue is ‘wholly independent of’ the constitutional violation, then exclusion arguably will have no effect on a law enforcement officer’s incentive to commit an unlawful search.” *Id.* at 2537 (Marshall, J., dissenting).
38. That is, as in the hypothetical *Nix* case where the Iowa search party had found the body.
onstrating that the subsequent search pursuant to a warrant was wholly unaffected by the prior illegal search—e.g., that they had already sought the warrant before entering the premises . . . ."39 (as in Segura but not in Murray).40

Without directly confronting the different meanings that could be accorded to the term "independent source," the Court relied on the following passage from Nix to choose the broader meaning of that exception to the exclusionary rule:

[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred . . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been absent any error or violation.41

This statement was true in Nix, and it made sense in terms of the deterrent purpose of the exclusionary rule. The police were sufficiently deterred from violating defendants' right to counsel by excluding the statements obtained by that violation. It was not necessary to also exclude the body which would have been inevitably discovered by the search party. That would have added insult to injury.42 In Murray, by contrast, there was no sanction for the constitutional violation. Consequently, there is no deterrence as to future violations.

It makes no sense to state, as a general limitation on the operation of the exclusionary rule, that it should operate only to put the police in "the same, not a worse position than they would have been in if no police error or misconduct had occurred."43 This can be an accurate statement of the result of exclusion, as where police, with no probable cause, enter a house and seize evidence. Because they would never have obtained this evidence but for the violation, exclusion simply puts them back where they would have been prior to the violation.44 Frequently, however, the operation of

39. This is the majority's summary of the dissent's position in Murray, 108 S. Ct. at 2534 n.2.
40. In Segura, the decision to go for a search warrant was made before the illegal entry to the apartment. 468 U.S. at 800. In Murray, despite the government's assertion that "the agents intended from the start to get a warrant," Brief for the United States, supra note 5, at 44, the record suggests that there was no discussion of such a course. Joint Appendix, supra note 12, at 52. See also Murray, 108 S. Ct. at 2537 (Marshall, J., dissenting).
41. 467 U.S. at 443.
43. Id. at 136 (quoting Nix, 467 U.S. at 443) (emphasis in original).
44. Actually, even in this case they are "worse" off since, perhaps, prior to the search they could have developed probable cause and obtained a warrant. After the evidence is excluded at trial or on appeal, this option is obviously no longer open.
the exclusionary rule does put the police in a worse position. Suppose the police neglect to give full *Miranda* warnings to a defendant and he confesses; even if the defendant admits that he would have confessed if fully informed of his rights, the confession must be suppressed.\(^4\) Every time the Court strikes down a search warrant, a confession, or an identification procedure where the police could have done a better job, exclusion puts the police in a worse position than they would have been had they followed the rules because they can never go back and re-search, re-warn or re-identify the defendant. The frequent impact of the exclusionary rule is that evidence which could have been legally obtained is excluded due to police error. As the Court held in *Silverthorne*, in a passage ignored by the *Murray* Court, "the rights of a [defendant] against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way."\(^5\) That is, the defendant's rights are protected even if exclusion puts the police in a worse position than they would have been but for the error.

The only difference between the government's position in *Murray* and in many other cases where the Court has put the authorities in a "worse" position through the operation of the exclusionary rule is that in *Murray* the agents obtained a warrant after the violation. Thus the government argues, in effect, "suppress the evidence seized during the violation (i.e., nothing) but don't suppress evidence later seized legally pursuant to the 'independent' warrant."\(^6\) This case is, therefore, different from *Katz v. United States*,\(^7\) put forward by petitioners,\(^8\) where the Court rejected the government's claim that the defendant's illegally overheard (i.e., "seized") telephone conversations should be admissible if a subsequent warrant were obtained. In *Katz*, the government sought to use the warrant to cleanse the taint from illegally seized evidence. In *Murray*, the government, in effect, concedes the inadmissibility of that evidence (if there were any), but argues that the evidence seized pursuant to the warrant is not a fruit of the poisonous tree.\(^9\)


\(^{46}\) 251 U.S. at 392. See also *Elkins v. United States*, 364 U.S. 206, 217 (1960), which held that the exclusionary rule's purpose is "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.*

\(^{47}\) The government repeatedly emphasized that the evidence was "seen but not seized during an illegal search." Brief for the United States, *supra* note 5, at 25; see also *id.* at 14.

\(^{48}\) 389 U.S. 347 (1967).


\(^{50}\) This argument may sound like that adopted by the Court in *Oregon v. Elstad*, 470 U.S. 298 (1985). There the defendant made an unwarned confession and later confessed a second time, **after receiving *Miranda* warnings. The Court suppressed the first confession, but, even assuming that the second confession was the fruit of the first, admitted the second confession. *Elstad*, however, was based on the narrow holding that the *Miranda* violation was not "constitutional" in nature. *Murray* is different because the illegal entry was a constitutional violation and the seizure of the evidence was not a fruit of that violation. The two cases, however, share the characteristic of encouraging future police misconduct.
If the Court's decision had been based on this distinction, it would be somewhat more defensible. Consider a slightly different case: Suppose the police, looking for something smaller and less odorous than marijuana bales, such as cocaine, illegally entered a darkened warehouse, ascertained that no one was present, saw and smelled nothing, and then returned later with a warrant and found boxes full of cocaine. Here the evidence would not have been "found" or "acquired" in any sense during the illegal search and, since not a fruit of the constitutional violation, could not be suppressed under the traditional view of the exclusionary rule.\(^5\)

The Court could have likened this hypothetical case to *Murray*, holding that the violation of the defendant's rights is the same in both cases—the illegal search of the warehouse. The mere fortuity that the police happened to see something in *Murray* is not a logical basis for distinguishing *Murray* from the hypothetical, and since the evidence would quite clearly be admissible in the hypothetical, it must be admissible in *Murray*. Such logic may well have underlain the Court's decision in *Murray*. But, while I agree that there is no logical distinction between the hypothetical case and *Murray*, this recognition leads me to a different result: The purpose of the exclusionary rule, as the Court has frequently held, is deterrence of police misconduct.\(^5\) In both *Murray* and the hypothetical, there is police misconduct that can be deterred by exclusion. Therefore, exclusion is mandated in both cases *whether or not the illegal behavior actually produced the evidence*. If the Court is going to take a pragmatic view of the exclusionary rule, applying it only in those cases where it will have a meaningful deterrent effect, then it must take the bitter with the sweet. When exclusion would have such an impact, then exclusion is mandated, regardless of the absence of a causal relationship between the illegality and the discovery of the evidence. *Anything found on the violated premises during the course of the investigation must be excluded* if the exclusionary rule is to be effective. Any other result will make it too easy for the police to avoid the exclusionary impact. The holding in *Murray* will encourage future police to break into houses, see if there is anything there, and then go for a warrant. The "warrant requirement," as a protection of the citizenry against unauthorized police intrusions, is thus rendered nugatory.

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51. See, e.g., 4 W. LAFAVE, SEARCH AND SEIZURE § 11.4(a) at 374 (2d ed. 1987): "[I]f not even the 'but for' test can be met, then clearly the evidence is not fruit of the prior Fourth Amendment violation. So stated, the 'independent source' limitation upon the taint doctrine is unquestionably sound." Thus, in *Segura*, 468 U.S. at 796, all Justices agreed that had the police not occupied the apartment for 18 hours but merely entered, seen some contraband and left, only the contraband seen would have been excludable; other contraband, found during the execution of the search warrant, would have been admissible. See, e.g., id. at 835-36 (Stevens, J., dissenting).

52. See, e.g., *Nix*, 467 U.S. at 443.
In *Murray*, the Court goes even further by stating that even if the agents had *seized* the marijuana, it would have been admissible. Again, this is logical because once the warehouse door has been breached illegally, it makes little difference whether the evidence is not seen (the hypothetical), seen but not seized (*Murray*), or actually seized (the *Murray* dictum). As discussed above, I agree that this case is indistinguishable from *Murray* and my hypothetical, but this recognition leads me to the opposite result—exclusion in all three cases.

While the Court's reasoning may be logical, a little logic is a dangerous thing. By a series of logical thrusts, the Court guts not only the warrant requirement but the fruit of the poisonous tree doctrine as well. Now, apparently, illegally-seized evidence can be cleansed of all taint by the simple expedient of obtaining a warrant after the fact, so long as that warrant is not based on the illegally obtained evidence.

The pertinent question to ask about whether the exclusionary rule should be applied in a questionable case is not whether its operation would put the police in a worse position or whether the evidence would have been found "but for" the violation, but whether the operation of the rule would serve to deter the infraction in question. The Court often has recognized this point, refusing, for example, to apply the rule to searches conducted in good faith reliance on a search warrant because "the rule can have no substantial deterrent effect" in such a case. Even agreeing with the Court that the exclusionary rule should only be applied when its deterrent impact outweighs the cost, if it is to be applied in any case, it should have been applied in *Murray*. As it is, there is *no sanction* attached to the illegal entry.

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53. The Court did not seem to focus clearly on what it was doing in this respect; first, it recognized that the marijuana had been "observed" but "not disturbed" during the initial entry, *Murray*, 108 S. Ct. at 2532, but then held that "reseizure of tangible evidence already seized" is permissible. *Id.* at 2535. The Court then noted that *Silverthorne* "referred specifically to evidence seized during an unlawful search." *Id.*

54. Or, as Joseph Wood Krutch once observed, "Logic is only the art of going wrong with confidence." *J. K. RUTCH*, THE MODERN TEMPER 228 (1929).

55. As Justice Stevens observed in *Segura*:

> [T]he questions do not depend merely on questions of causation; causation is a necessary but not a sufficient condition for exclusion. In addition, it must be shown that exclusion is required to remove the incentive for the police to engage in the unlawful conduct. When it is, exclusion is mandated if the Fourth Amendment is to be more than "a form of words."

*468 U.S.* at 830 (Stevens, J., dissenting).


57. *See, e.g.*, the Court's discussion in *Stone*, 428 U.S. at 486-88, 495. *But see* Leon, 468 U.S. at 928 (Brennan, J., dissenting).
and, consequently, no reason for police not to perform such entries in the future.\textsuperscript{58}

The Court disagrees. It claims that the police will not illegally enter because, if they do, they will have to "convinc[e] a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it."\textsuperscript{59} This is specious. The first point will pose no difficulty because the police need only relate to the trial court the very facts that they put in the warrant affidavit and then swear that none of these was derived from the illegal search. The second point also can be established easily, as it was in \textit{Murray}—simply don't tell the magistrate about the break-in.

Absent a clear rule that "evidence found on violated premises \textit{must always} be suppressed," trial courts will be loath to suppress bales of marijuana, kilos of cocaine, and murder weapons when police make a colorable showing of pre-existing probable cause. This is why the Court has always recognized the need for a clear search warrant requirement:

\begin{quote}
Omission of such [search warrant] authorization "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."\textsuperscript{60}
\end{quote}

While \textit{Murray} will encourage the police to find evidence without a warrant, the most serious problem caused by the decision affects the innocent rather than the guilty. The purpose of the warrant requirement is not to slow the police down in their pursuit of the guilty, but to require that the decision of a "neutral and detached magistrate" is interposed between the police's impulse to search and their action on that impulse.\textsuperscript{61}

\textsuperscript{58} It follows from this pragmatic reliance on deterrence that if the police can establish that they were not negligent, even if they broke the rules, exclusion should not be mandated since non-negligent behavior cannot be deterred. This is consistent with the "reasonableness" approach to fourth amendment law advanced \textit{infra} at text accompanying notes 78-84.

\textsuperscript{59} \textit{Murray}, 108 S. Ct. at 2534. Professor LaFave terms this statement of the risks attendant to a confirmatory search as "at best . . . questionable." 4 W. \textsc{LaFave}, \textit{supra} note 51, at Supp. 32 (2d ed. Supp. 1989).

\textsuperscript{60} \textsc{Katz}, 389 U.S. at 347, 358-59 (quoting \textit{Beck} v. \textit{Ohio}, 379 U.S. 89 (1964)).

\textsuperscript{61} As Justice Jackson's oft-quoted statement in \textit{Johnson v. United States}, 333 U.S. 10 (1948), makes clear:

\begin{quote}
The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. \textit{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 Amendment to a nullity . . . .}
\end{quote}

\textit{Id.} at 13-14 (emphasis added).
The reason for this interposition is, of course, to ensure that the search truly is justified by timely information amounting to probable cause, rather than by grudges, hunches or unsupported tips. That is, to ensure that, in at least a substantial majority of the cases, the party searched is in fact guilty.\textsuperscript{62} This is why the Court frequently has held that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are \textit{per se} unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."\textsuperscript{63} Obviously, the purpose of the exclusionary rule is to deter violations of this rule. When such warrantless searches are allowed to occur without any exclusionary sanction attaching, as in \textit{Murray}, it greatly increases the chance that the police will search the innocent.

Consider the position of the rational police officer. Assume that it is true, as the Court avers, that if he has ample probable cause and ample time, he will go ahead and get a warrant in order to avoid the additional explanations that a warrantless search will entail. But suppose, as is frequently the case, that his probable cause is shaky or nonexistent. \textit{Murray} positively encourages him to proceed with an illegal search. If he finds nothing, he simply shrugs his shoulders and walks away. If he finds evidence, he leaves his partner to watch over it, repairs to the magistrate, and reports that "an anonymous reliable informant who has given information on three occasions in the past that has led to convictions called to tell me that he had just seen bales of marijuana stored at a warehouse at 123 Elm Street." The warrant issues and the marijuana is seized. Before trial (assuming that the defense has found out about the illegal search), the officer admits it, chalks it up to a fear that the evidence would be lost if the warehouse were not immediately secured, apologizes for being wrong in this assessment, and introduces the warrant affidavit to demonstrate an independent source. The Court, in allowing such behavior, has missed the point of the warrant requirement and the exclusionary rule—that it "reduce[s] the Fourth Amendment to a nullity"\textsuperscript{65} to allow warrantless searches to go unpunished.\textsuperscript{66}


\textsuperscript{63} Mincey v. Arizona, 437 U.S. 385, 390 (1978). I have previously pointed out that these exceptions are neither few nor well delineated. See Bradley, \textit{Two Models of the Fourth Amendment}, 83 Mich. L. Rev. 1468, 1473-74 (1985). Nevertheless, none of the exceptions was applicable in \textit{Murray}.

\textsuperscript{64} Johnson, 333 U.S. at 13-14.

\textsuperscript{65} Again, I recognize that allowing the "independent source" doctrine to apply in the case where the police illegally enter but find nothing encourages a similar type of prevarication. This is simply an antinomy that inheres in the exclusionary rule.
But the majority might argue that "there's not much that we can do about police lying. If police chose to lie, even before Murray and Segura, they could beat the system." This is only partially true.

Of course, it has always been the case that the police could make up the existence of "Old Reliable," the informant, and use his fictitious "tip" as the basis for a search warrant. The problem with this tactic is that, if the police are wrong and no evidence is found, they are forced to return to the magistrate empty-handed. This is embarrassing to the police department and would only have to happen a few times before the magistrates and defense attorneys would realize that the police were liars. After Murray, there is no such fear, because the fictitious "Old Reliable" will always be right! His "tip" will always lead to evidence because the police will have found it in advance.

It is generally difficult for the police to cover up an illegal search—the defendant will usually be aware of it. If the rule is that evidence found in such a search will never be admissible unless it would have been inevitably discovered by a wholly independent third party (as in Nix), the police, fearing the disclosure of the search, will not perform it. The Murray rule, by encouraging warrantless searches, is flatly inconsistent with the warrant requirement.

Even Justice Marshall's compromise position, that the evidence ought to be admissible if the police had applied for a warrant before the illegal search, is unacceptable because it is not a flat prohibition that the police must follow without question. It will lead to quibbles about timing, with the police swearing that the warrant application preceded the illegal search and the defendant insisting to the contrary, with predictable results.

The only rule that will work, if there is to be a warrant requirement, is "If you break the rules, you lose the evidence." The Court has not done the police any favors by muddying the fourth amendment waters in Murray. Now police are encouraged to conduct warrantless searches even when they have probable cause. The result may be that evidence is thrown out that would have been admitted, had the police gotten a warrant, because the trial court is not satisfied that the warrant was "genuinely independent" of the illegal search. Thus, despite the Court's heroic efforts on behalf of the

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66. "There is no way to determine the reliability of Old Reliable, the informer, unless he is produced at the trial and cross-examined." McCray v. Illinois, 386 U.S. 300, 316 (1967) (Douglas, J., dissenting).

67. Or that evidence derived from that search will only be admissible if actually found by a wholly independent third party.

68. See Murray, 108 S. Ct. at 2529.

69. Unless, as discussed, the evidence is, or would have been, found by a third party, acting legally. Also, evidence which is not found as a result of the illegal entry cannot be suppressed, even if it is later found by the same police who committed the constitutional violation.
police in this case, *Murray* will lead to two undesirable results: The police will conduct more warrantless searches and, in some of those cases, distrustful trial courts will exclude evidence that would have been admitted had there been a stringent warrant requirement.

Two final points must be made about *Murray*. The Court hinted—and the government conceded—that confirmatory searches (searching without a warrant to see if it is worth the trouble to get one), would not be allowed, noting that "there is no basis for pointing to the present case as an example of a 'search first, warrant later' mentality." However, assuming that the police could demonstrate pre-existing probable cause, and thus an "independent source" for evidence found pursuant to the warrant, it would seem to follow from the *Murray* holding that the evidence would be admissible regardless of the intent of the police when they conducted the warrantless search. The "independent source" is no less independent, assuming pre-existing probable cause, just because the police performed the initial illegal search in bad faith. The Court bolsters this view by rejecting the dissent's argument that the evidence should be inadmissible, at least when the police concede that had they found nothing during the warrantless search, they wouldn't have gone for the warrant. But as soon as the police do make this obvious admission, have they not conceded that, in some sense, the "discovery of the contraband in plain view" was not "totally irrelevant to the later securing of the warrant?" Isn't it inconsistent to allow the police to admit that "if the warehouse had been empty, we obviously wouldn't have gone for a warrant to search it," yet still insist that the warrant-authorized search must be "genuinely independent" of this illegal one? A fair summary of the majority's position is that the legal search must be independent of the illegal one, but the requisite "independence" is not impaired by the admitted fact that if the prior search produced nothing, the subsequent warrant-authorized search would never have been performed. Thus, after *Murray*, the police may not admit that the illegal search was "confirmatory," that is, designed to determine the presence of evidence in the place to be searched. Instead, they need only convince the court that

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70. Brief for the United States, supra note 5, at 11. "We assume for present purposes that evidence seized pursuant to a warrant following an illegal 'confirmatory search' must be suppressed." *Id.*


72. *See id.* at 2535 n.3.

To determine whether the warrant was independent of the illegal entry, one must ask whether it would have been sought even if what actually happened had not occurred—not whether it would have been sought if something else had happened. That is to say, what counts is whether the actual illegal search had any effect in producing a warrant, not whether some hypothetical illegal search would have aborted the warrant.

*Id.*

73. *Id.* at 2536 (quoting *Moscatiello*, 771 F.2d at 603-04).
they "meant well"—that they intended to act under some exception to the warrant requirement, such as exigent circumstances, but were wrong in their assessment of that exception. This leaves trial courts with the troublesome task of trying to probe the intent of the police rather than simply asking "Did you have a warrant or not?" If the Court had set out to make fourth amendment enforcement more difficult, it is hard to imagine a decision that would better serve that goal than Murray.

The second and most telling point is that now that Murray has been decided, the next, perfectly logical, step is to eliminate the warrant requirement altogether. Suppose a Murray-type situation arises in the future. The police, acting with probable cause, illegally enter a warehouse and find marijuana. This time they don't go for the warrant. Since they could have gotten the warrant and would have been able to legally seize the marijuana pursuant to that warrant, as Murray held, then it follows, ipso facto, that the evidence would have been inevitably discovered by an "independent source." Consequently, it is not necessary to go through the empty formality of getting a warrant to search a place that has already been searched.

Because this will be true in every case where the police could have gotten a warrant before the search, the warrant requirement will have been effectively abolished. There is no logical basis for drawing a line between Murray and this case, as Justice Scalia certainly will recognize when this case arises. Rather, the line should have been drawn at the warehouse door in Murray.

While I agree with the dissent in Murray that the decision "emasculates the Warrant Clause," I don't necessarily disagree with the result. This is

74. Professor LaFave agrees that after Murray, the decision whether or not to suppress evidence after an illegal search depends on "an important factual determination: what motivated the prior illegal entry and search." 4 W. LaFAve, supra note 51, § 11.4 at Supp. 29 (2d ed. Supp. 1989).

75. That is, what the Court said was an "independent source" in Murray. Murray, 108 S. Ct. at 2535-36. In Murray, the government presented the very odd argument that the "inevitable discovery" doctrine also required the admission of the evidence in that case. Brief for the United States, supra note 5, at 38-49. The argument is that since the evidence would have been inevitably discovered pursuant to the warrant, even if there had been no illegal search, it should be admissible. This argument adds nothing to the "independent source" argument. Because the marijuana was in fact discovered pursuant to the warrant, it makes no sense to say that it "would have been discovered as a result of the warrant." Id. at 39. Evidence is either in fact found by an independent source or, hypothetically, would have inevitably been discovered legally, but it can't be both. Something either "is" or "might be," but not both at once. The evidence here was, arguably, found through an independent source. Consequently, "inevitable discovery" is not a relevant argument here. Fortunately, the Court ignored this argument.

76. See, e.g., United States v. Jacobsen, 466 U.S. 109 (1984), holding that once a private party had breached the defendant's privacy (by searching a container), it was not a search for the government to reopen the container. "Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now non-private information." Id. at 117.

because, as I have previously observed,\textsuperscript{78} nothing in the amendment itself\textsuperscript{79} or, apparently, in the minds of its framers, requires a warrant as a prerequisite for a reasonable search; it only requires probable cause as a prerequisite for a warrant.\textsuperscript{80} I suggested that instead of claiming that there is a warrant requirement and then, as recently illustrated in \textit{Murray}, repeatedly finding ways to ignore it, the Court ought to adopt one of two models of the fourth amendment:

The two models, briefly, may be called the "no lines" and the "bright line" approaches. Model I, no lines, uses tort law as a guide in proposing that the hopeless quest of establishing detailed guidelines for police behavior in every possible situation be abandoned. It suggests that the Court adopt the following view of the fourth amendment: A search or seizure must be reasonable, considering all relevant factors on a case-by-case basis. If it is not, the evidence must be excluded. Factors to be considered include, but are not limited to, whether probable cause existed, whether a warrant was obtained, whether exigent circumstances existed, the nature of the intrusion, the quantum of evidence possessed by the police, and the seriousness of the offense under investigation. This model enjoys support from the history of the fourth amendment and is (roughly) the current practice in Germany and other European countries. Moreover, in most cases it reflects the result, though not the reasoning, of current Supreme Court cases.

The second model may be as shocking at first glance to "law and

\textsuperscript{78} See Bradley, \textit{supra} note 63. This argument is based on Telford Taylor's famous study of the fourth amendment in T. \textsc{Taylor}, \textit{Two Studies in Constitutional Interpretation} (1969).

\textsuperscript{79} The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers and effects shall not be violated and no warrants shall issue but upon probable cause . . . ." U.S. Const. amend. IV.

\textsuperscript{80} See Bradley, \textit{supra} note 63, at 1486.

\textsuperscript{81} [T]he warrant requirement, (as well as its myriad exceptions), as imposed by the Court, has "stood the fourth amendment on its head" from a historical standpoint." According to one authority on the history of the fourth amendment, the purpose of the requirement that warrants be based upon probable cause and specify the 'place to be searched, and the persons or things to be seized' was designed to limit the use of warrants, which had been widely abused, and not to imply that a warrant was a fundamental criterion of a reasonable search, as the Court now maintains.

\textit{Id.} (quoting T. \textsc{Taylor}, \textit{supra} note 78, at 23-24). Taylor added:

\textit{O}ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution in line with the stringent requirements applicable to common-law warrants for stolen goods . . . . They took for granted that arrested persons could be searched without a search warrant, and nothing gave them cause for worry about warrantless searches.

\textit{Id.} at 1480 n.93 (quoting T. \textsc{Taylor}, \textit{supra} note 78, at 43); see also Black, \textit{The Bill of Rights}, 35 N.Y.U. L. Rev. 865, 873 (1960).
order” advocates as the first model is to civil libertarians. It is, basically, that the Supreme Court should actually enforce the warrant doctrine to which it has paid lip service for so many years. That is, a warrant is always required for every search and seizure when it is practicable to obtain one. However, in order that this requirement be workable and not be swallowed by its exception, the warrant need not be in writing but rather may be phoned or radioed into a magistrate (where it will be tape recorded and the recording preserved) who will authorize or forbid the search orally. By making the procedure for obtaining a warrant less difficult (while only marginally reducing the safeguards it provides), the number of cases where “emergencies” justify an exception to the warrant requirement should be very small.81

With Murray, the Court clearly shows its preference for Model I—a reasonableness approach to fourth amendment law.92 Murray reeks of “reasonableness” analysis and cannot be reconciled with the proposition that a search warrant is, in any meaningful sense, required.

If the Court is going to scrap the warrant requirement, then it should do so openly, rather than leaving the police and the courts guessing as to whether or not a warrant will be required in a particular case and providing a myriad of ways to get around this “requirement.” While a “reasonableness” approach admittedly would give no guidance as to how to act in a particular case, this is better than false guidance. If the police are told to rely on their common sense, simply to behave “reasonably” under the circumstances,83 it seems likely that the results will be more satisfactory than currently are achieved. Thus, in Murray, because the Court apparently felt the authorities acted “reasonably,” it could have found no fourth

81. Bradley, supra note 63, at 1471.

Model I does not suggest that the police be required to consider a complicated list of factors before every search. Rather, the courts should simply ask “if the police officer acted decently . . . if he did what you would expect a good, careful, conscientious police officer to do under the circumstances . . . .” Id. at 1481 n.71 (quoting E. Griswold, SEARCH AND SEIZURE 58 (1975)).

82. See also Welsh v. Wisconsin, 466 U.S. 740 (1984), where the Court held that the warrantless entry of a home on exigent circumstances to arrest the defendant for civil, nonjailable traffic offenses was not appropriate, but that such an entry would have been permissible to arrest for a “major felon[y].” Id. at 752. Justice Rehnquist has long advocated such an approach: “[T]he constitutionality of a particular search [or seizure] is a question of reasonableness and depends on ‘a balance between the public interest and the individual’s right to personal security . . . .’” Mincey, 437 U.S. 385, 406 (1978) (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)) (Rehnquist, J., concurring in part and dissenting in part) (emphasis added). See also Florida v. Royer, 460 U.S. 491, 520 (1983) (Rehnquist, J. dissenting) (“Analyzed simply in terms of its ‘reasonableness’ as that term is used in the Fourth Amendment, the conduct of the investigating officers toward Royer would pass muster with virtually all thoughtful, civilized persons not overly steeped in the mysteries of this Court’s Fourth Amendment jurisprudence.”).

83. This model would not preclude obtaining warrants since, if the police got a warrant, they could take advantage of the “good faith exception” of Leon, 468 U.S. 897. In the context of no specific rules, this would simply mean that the trial court could judge their assessment of “reasonableness” less critically.
amendment violation. Then the Court would not have had to find exclusion inappropriate and distort the exclusionary rule as it did. Alternatively, the Court would serve both the police and the public much better than it has by first giving the police a clear rule: "Get a warrant whenever you can!" and then consistently enforcing that rule through the exclusionary sanction.84

84. Personally, I think that, while they wouldn't like it at first, the police (and defendants) would be even better off under Model II. "The police could get used to radioing for permission before conducting a search, just as they have gotten used to 'reading the rights' before questioning a suspect." Bradley, supra note 63, at 1493. By essentially settling the fourth amendment issue during the investigation, rather than the trial stage (because Leon will normally mean that all evidence seized pursuant to a warrant will be admissible), greater certainty would be achieved. While the police might lose a few suspects while they called in for a warrant, that loss is far exceeded by the number of cases lost on motions to suppress in the courts. See Bradley, Are the State Courts Enforcing the Fourth Amendment?, 77 GEO. L.J. 251 (1988).