2022

The Corrosive Effect of Inevitable Discovery on the Fourth Amendment

Tonja Jacobi

Elliot Louthen

UNIVERSITY *of* PENNSYLVANIA
LAW REVIEW

Founded 1852

Formerly
AMERICAN LAW REGISTER

VOL. 171 DECEMBER 2022 NO. 1

ARTICLE

THE CORROSIVE EFFECT OF INEVITABLE DISCOVERY ON THE FOURTH AMENDMENT

TONJA JACOBI† & ELLIOT LOUTHEN††

The Supreme Court has only once, almost four decades ago, addressed the doctrine of inevitable discovery, when it established the exception in Nix v. Williams. *Inevitable discovery encapsulates the notion of no harm, no foul—if law enforcement would have discovered unlawfully obtained evidence regardless of a constitutional violation, then the resulting evidence need not be excluded.* Nix *laid out two simple dictates: the eponymous requirement of inevitability and a corresponding evidentiary*

† Professor of Law and Sam Nunn Chair in Ethics and Professionalism, Emory Law School; Tonja.Jacobi@emory.edu.

†† Judicial Law Clerk, United States Court of Appeals for the Seventh Circuit; J.D., Northwestern University Pritzker School of Law, 2021.

burden requiring the prosecution to prove by a preponderance of the evidence that law enforcement inevitably would have discovered the evidence without the violation. Such analysis requires counterfactual speculation, imagining a world but-for the unlawful police action, and so permits judges tremendous discretion. In the absence of further Supreme Court guidance, federal circuit courts have fashioned highly varying doctrinal tests to implement the doctrine.

This Article identifies some tests which constitute legitimate experimentation—permissible variation attempting to faithfully operationalize the dictates of Nix*—but shows that other tests have devolved to the point of blatant manipulation, including some which prescribe a laxer "reasonable probability" standard, in defiance of the titular requirement of inevitability. Inevitable discovery is often combined with inventory searches, which permit suspicionless searching under the guise of bureaucratic process. Inventory searches apply automatically in numerous circumstances and consequently, under the laxer definitions of inevitability, evidence found in violation of the Fourth Amendment is almost always "inevitably discovered." Likewise, "hypothetical search warrants" enormously expand the reach of inevitable discovery, admitting evidence when police fail to seek independent judicial approval before searching, on the theory that they could have and would have obtained proper judicial sign-off in a counterfactual world. The result of these doctrinal combinations is an unraveling of the substantive protections in other criminal procedure domains: the doctrinal minutiae of exceptions such as search incident to arrest become meaningless when evidence found is routinely admitted through inevitable discovery.*

For the Fourth Amendment to provide any substantial protection, this colossal loophole must be closed. We outline a range of potential reforms, identify which reforms must have highest priority, and provide a new framework by which inevitable discovery could be reoriented to avoid the hollowing out of the Fourth Amendment's protections.

INTRODUCTION

The inevitable discovery doctrine has flown under the radar of both the Supreme Court and scholars alike, evading scrutiny while serving as an unconstrained backstop for police misconduct. The Court has only addressed the doctrine head-on once, nearly forty years ago in *Nix v. Williams*,[1] when it formally recognized the doctrine and provided an open-ended framework to guide its application. This framework consisted of just two dictates—a command of inevitability, and a preponderance of the evidence burden—though the opinion was shrouded in other language that lower courts have looked to for guidance in implementing these minimalist dictates in the decades since.[2] Scholars, meanwhile, have tended to focus on the substantive boundaries of various exceptions to the warrant and probable cause requirement.[3] But in a criminal proceeding, what ultimately matters to defendants is not where their constitutional rights begin and end, but rather

1 467 U.S. 431 (1984).

2 *Id.* at 449; *see also* discussion *infra* Section I.A.

3 For instance, a Westlaw search for journal article titles containing "*Nix v. Williams*" produces only four results (and a search for titles involving "inevitable discovery" produces forty-three results). In contrast, a Westlaw search for titles containing "*Arizona v. Gant*" produces thirty-four results (and a search for titles containing "search incident to arrest" produces seventy-three results). This is despite *Arizona v. Gant* being fifteen years younger than *Nix* and one of numerous search incident to arrest cases, whereas *Nix* is the only Supreme Court case addressing inevitable discovery and, as we show in Section II.B, *infra*, that the impact of *Gant* is likely negligible due to how the circuit courts are interpreting *Nix*.

the more pragmatic question of whether or not evidence is actually admitted.[4] And inevitable discovery is critical to that latter issue.

Inevitable discovery is usually viewed as a minor addendum to the exclusionary rule,[5] yet it has evolved into a massive loophole. With *Nix* providing such loose and vague constraints, lower courts have developed their own tests to implement the doctrine. This has led to experimentation among doctrinal elements, such as whether and to what extent to assess impeachable historical facts, independent active pursuit, and deterrence considerations.[6] Some of this experimentation has constituted genuine judicial efforts to ensure that the doctrine remains faithful to its origins—ensuring that it only applies when the counterfactual discovery would truly have been inevitable. But without further Supreme Court guidance, some interpretations are so malleable as to constitute defiance of the Supreme Court, turning inevitable discovery into a far more permissive doctrine than that approved in *Nix*.[7] Despite the firmness of the two *Nix* dictates,[8] at least three federal circuit courts have adopted "reasonable probability" standards in lieu of the titular "inevitability" requirement, giving judges in those jurisdictions tremendous latitude when applying this exception.[9] Such blatant manipulation has unmoored the doctrine from its foundations.

This unmooring is not just problematic from the internal standpoint of inevitable discovery doctrine. The counterfactual speculation inherent in inevitable discovery lends itself to eroding basic Fourth Amendment principles. One of inevitable discovery's more alarming expansions is through the concept of "hypothetical search warrants." Many courts consider, when law enforcement has failed to obtain a warrant prior to searching and seizing, or even when law enforcement has obtained an invalid search warrant, that officers could nonetheless have obtained a hypothetical valid warrant. Often, this application hinges almost exclusively on a showing of probable cause, contrary to the constitutional requirement that both probable cause *and a*

4 *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 38 (1997) (describing how suppression hearings are "designed to facilitate fast-track pretrial litigation that can then set the stage for either dismissal or a plea agreement").

5 *Cf.* Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J.L. & PUB. POL'Y 457, 462 (1997) ("[T]here are many situations with a seventy-percent likelihood that the government would have found the evidence. But unless that likelihood is ninety-nine percent, judges tend to say that the government can never use that evidence.").

6 *See infra* Section I.B.

7 *See infra* Section I.C.

8 As aptly summarized by the Second Circuit, a difference exists "between proving by a preponderance that something *would have happened* and proving by a preponderance that something *would inevitably have happened*." United States v. Cabassa, 62 F.3d 470, 474 (2d Cir. 1995) (emphasis added).

9 *See infra* Section I.C.

warrant be obtained prior to any search or seizure.[10] In this way, many circuits flip the requirement of ex ante review into an ex post presumption of constitutionality. [11]

Another mechanism through which inevitable discovery has been expanded to the point of approaching inevitable admission is by operating in conjunction with Fourth Amendment doctrines that serve as exceptions to the warrant and probable cause requirement. Foremost of these interactions is the tandem of inevitable discovery and inventory searches. The inventory search exception is another area of law that has received little scholarly attention,[12] likely because it appears mundane and bureaucratic: inventory searches permit logging a person's possessions as part of a standard process, such as booking an arrested person[13] or impounding a vehicle.[14] But the very ordinariness of this doctrine creates a massive loophole when combined with inevitable discovery. The automatic and pervasive nature of inventory searches occurring in response to most arrests means that discovery of evidence—whether on a person or within their car—follows just as automatically. Accordingly, the rules defining when a constitutional violation has occurred become redundant when the evidence would be inevitably discovered upon undertaking the inventory search.

The upshot of these interactions is that an overly permissive inevitable discovery doctrine threatens to undermine other areas of criminal procedure where the Court has carefully crafted limits on law enforcement.[15] An overly myopic focus on the substance of specific criminal procedure exceptions has led scholars and the Court alike to miss the forest for the trees.[16]

This Article examines how the inevitable discovery doctrine operates today, focusing on its application over the last fifteen years at the U.S. Courts

---

10 *See* Katz v. United States, 389 U.S. 347, 357 (1967) ("Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . .'" (citation omitted)).

11 *See e.g.*, United States v. Jackson, 596 F.3d 236 (5th Cir. 2010) (concluding the inevitable discovery doctrine applied because officers had probable cause to obtain a search warrant); *see also* discussion *infra* Section II.A.

12 For instance, a Westlaw search for journal titles containing "*South Dakota v. Opperman*," the primary case on the topic, produces zero results and a search for journal titles containing "*inventory search*" produces only twenty-one results.

13 *See* Maryland v. King, 569 U.S. 435, 465 (2013) (concluding that a valid arrest permits "the minor intrusion of a brief swab of his cheeks")

14 *See* South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976) (holding that an inventory of the contents of a car, when undertaken following standard police procedure, is reasonable).

15 *See infra* Part II.

16 *See* Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 258 (2019) (noting that criminal procedure legal scholarship "often reproduce[s] existing hierarchies and pathologies").

of Appeals.[17] We focus on the federal level, as the doctrinal inconsistency there is proof enough that it is time for the Supreme Court to intervene,[18] but we note that state court inevitable discovery tests merit further attention and also underscore the need for reform.[19] We chart a path for how the Court can do so.[20]

This Article proceeds in three Parts. Part I describes the doctrine's history and lays the foundation for our analysis by surveying how inevitable discovery operates among the federal circuits today. Part II examines how the doctrine's routine application frequently undermines other areas of Fourth Amendment law, particularly the warrant requirement and search incident to arrest doctrine. It shows how the notion of hypothetical warrants and the inventory search exception escalate the constitutional hollowing effect of inevitable discovery. Part III concludes by contemplating what future Supreme Court intervention could and should look like based on our analysis.

I. THE VARIABLE STATE OF THE DOCTRINE

The operationalization of inevitable discovery is more complicated than many realize. Section A overviews the backdrop of *Nix* and the doctrine's historical development. The subsequent Sections then explore how lower courts have implemented *Nix*'s dictates in the years since. We divide Sections B and C using a taxonomy of "experimentation" versus "manipulation" to describe the various circuits' approaches, demonstrating how we can rigorously differentiate between legitimate and illegitimate attempts to operationalize *Nix*'s dictates.

A. Nix *and the Dictates*

Inevitable discovery is a corollary to the independent source exception to the exclusionary rule.[21] Whereas the latter governs evidence that *was in fact*

---

17 As Professor Bill Stuntz observed, "[t]he most fundamental structural feature of rights in the criminal process is that appellate courts define them." Stuntz, *supra* note 4, at 53.

18 Of course, state courts have helped shape federal exclusionary rule jurisprudence as well. Consider, for example, that the Utah Supreme Court's decision in *State v. Strieff*—the precursor to the U.S. Supreme Court's seminal *Utah v. Strieff* decision—was premised on inevitable discovery. 357 P.3d 532, 536, 539 (Utah 2015), *cert. granted*, 136 S. Ct. 27 (2015). For an insightful analysis on the interaction between state and federal courts in developing constitutional criminal procedure, see JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 67–83 (2018).

19 For example, a Kansas state court predicated inevitable discovery on an officer watching a rap video of the defendant, seeing a cell phone number flashed, inputting that number into a database, and then using the sixty-six percent likelihood of a match as a basis to obtain a search warrant. State v. Carr, 406 P.3d 403, 413 (Kan. Ct. App. 2017).

20 *See infra* Part III.

21 Nix v. Williams, 467 U.S. 431, 458 (1984) (Brennan, J., dissenting).

lawfully discovered independent of a constitutional violation, the former governs evidence that *would have been* lawfully discovered if the violation had never occurred. The independent source doctrine requires less speculation to implement, as no counterfactual analysis is required.[22] Likely because of its more straightforward application, independent source arose as one of the earliest exceptions to the exclusionary rule, posited by Justice Holmes in *Silverthorne Lumber Co. v. United States* in 1920.[23] Over the following decades, courts adopted and developed the independent source doctrine, paving the way for the counterfactual application inherent in inevitable discovery.[24]

Scholars point to a 1943 decision by Judge Learned Hand as the first clear application of inevitable discovery.[25] In *Somer v. United States*, two policemen with the "Alcohol Tax Unit" unlawfully entered defendant's home, and his wife shared that defendant was delivering "stuff" but would soon return.[26] The officers waited outside and twenty minutes later, Somer returned with two jugs of alcohol that police immediately seized.[27] In a three paragraph opinion, the Second Circuit considered whether the unlawful search of the home and the ensuing conversation with Somer's wife necessarily led to police discovering the alcohol at issue.[28] Judge Hand wrote that if further inquiry on remand could show that the evidence would have been obtained "quite independently" of the unlawful search, the seizure of the alcohol could be admitted as lawful.[29] Though not yet bearing its name, inevitable discovery was born.

The doctrine expanded in the decades following *Somer*, albeit without the imprimatur of the Supreme Court's blessing.[30] Indeed, the Court refrained

---

22 *See* Robert M. Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 AM. J. CRIM. L. 79, 80 (1992) ("In the independent source situation, it can be said that the fruit not only grows from the poisonous tree, but also grows from another, non-poisonous tree.").

23 *See* 251 U.S. 385, 392 (1920) ("If knowledge of [facts illegally obtained] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.").

24 *See* Donald Gee, Note, *The Independent Source Exception to the Exclusionary Rule: The Burger Court's Attempted Common-Sense Approach and Resulting Cure-All to Fourth Amendment Violations*, 28 HOWARD L.J. 1005, 1022–32 (1985) (overviewing the historical development of the independent source doctrine).

25 Somer v. United States, 138 F.2d 790 (2d Cir. 1943); *see* Bloom, *supra* note 22, at 82 (describing *Somer* as the "genesis" of the doctrine); Harold S. Novikoff, Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88, 90 (1974) (same).

26 *Somer*, 138 F.2d at 791.

27 *Id.*

28 *Id.* at 791–92.

29 *Id.* at 792.

30 *See generally* Novikoff, *supra* note 25, at 103 (describing the doctrine as having "gained widespread acceptance" by 1974).

from recognizing the doctrine despite numerous opportunities to do so.[31] In a 1973 dissent of a denial of certiorari, Justice White wrote that "it is a significant constitutional question whether the 'independent source' exception to inadmissibility of fruits encompasses a hypothetical as well as an actual independent source."[32] By the time the Supreme Court eventually gave the doctrine a formal framework and meaningful guidelines for implementation in 1984,[33] inevitable discovery had already been widely adopted in the lower federal circuits.[34]

The facts of *Nix* were tragic and known to the Justices.[35] The same case had already reached the Court seven years earlier in *Brewer v. Williams*.[36] Robert Williams had escaped from a mental hospital and law enforcement believed he had murdered a ten-year-old girl after a witness saw him carrying a large bundle to his car.[37] Williams surrendered himself to Davenport police on his lawyer's advice, where he was to be transported back to Des Moines.[38] Both Des Moines and Davenport police officials had agreed with Williams's counsel to not question Williams during transport.[39] Yet, en route to Des Moines, one of the officers gave the now infamous "Christian burial speech"—a psychological ploy in which the officers, knowing Williams was deeply religious, addressed him as Reverend and intimated that Williams should help locate the child's body so she could receive a proper Christian burial before snow covered it.[40] This prompted Williams to direct the officers to the body, and he was indicted for first-degree murder.[41]

In *Brewer v. Williams*, the Court considered whether the officers violated Williams's Sixth Amendment rights by eliciting incriminating statements during the car ride.[42] A divided Court held that the adversarial proceeding

---

31 *See* Novikoff, *supra* note 25, at 91 n.22 (collecting inevitable discovery cases for which the Supreme Court denied certiorari).

32 Fitzpatrick v. New York, 414 U.S. 1050, 1051 (1973) (White & Douglas, JJ., dissenting from denial of certiorari) (citation omitted).

33 *See* Stephen J. Kaczynski, Nix v. Williams *and the Inevitable Discovery Exception to the Exclusionary Rule*, ARMY LAW., Sept. 1984, at 1, 9 (observing that *Nix* "afforded the doctrine a far greater play then [sic] had been suggested by many of the courts that had theretofore adopted it").

34 *See* Nix v. Williams, 467 U.S. 431, 440 (1984) (crediting the Iowa Supreme Court for correctly observing that the "vast majority" of courts already recognized inevitable discovery as an exception to the exclusionary rule).

35 For a comprehensive review of the *Nix* facts and the procedural posture, see Tom N. McInnis, Nix v. Williams *and the Inevitable Discovery Exception: Creation of a Legal Safety Net*, 28 ST. LOUIS U. PUB. L. REV. 397, 399-417 (2009).

36 430 U.S. 387 (1977).

37 *Nix*, 467 U.S. at 452 (Stevens, J., concurring); *id.* at 434-35 (majority opinion).

38 *Id.* at 452.

39 *Id.* at 453.

40 *Brewer*, 430 U.S. at 392–93.

41 *Nix*, 467 U.S. at 436.

42 *Brewer*, 430 U.S. at 405–06.

had begun prior to the transport, meaning Williams was entitled to counsel, and the Christian burial speech amounted to deliberate solicitation of statements without counsel present.[43]

The *Brewer* Court included a footnote for the state court on remand that foreshadowed *Nix*. The majority left open the possibility 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."[44] When Iowa retried Williams, the prosecution duly introduced an inevitable discovery theory based on the argument that a search that was already underway when the body was found.[45] After finding some of the victim's clothing at a rest stop, a two-hundred-person search effort had been dispatched to find the body.[46] This effort was called off once Williams had led officers to the victim's location, at which point one of the search teams was "essentially within the area to be searched," 2.5 miles away from the body.[47]

The Iowa Supreme Court agreed with this theory and affirmed Williams's second conviction, despite the Sixth Amendment violation.[48] The court used a two-pronged inevitable discovery test:

> First, use of the doctrine should be permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question. Second, the State must prove that the evidence would have been found without the unlawful activity and how that discovery would have occurred.[49]

The U.S. Supreme Court denied Williams's direct appeal,[50] but the case reached the Court again via a writ of habeas corpus attacking the prosecution's use of inevitable discovery after the Eighth Circuit reversed the federal district court's denial and ordered the writ be issued.[51] Having scoured the factual record, the circuit court held that the prosecution had not met its burden under the first prong: establishing a lack of bad faith.[52] The Supreme

---

43 *Id.*; *Nix*, 467 U.S. at 454–55 (Stevens, J., concurring) ("The 'Christian burial speech' was nothing less than an attempt to substitute an *ex parte*, inquisitorial process for the clash of adversaries commanded by the Constitution.").

44 *Brewer*, 430 U.S. at 406 n.12.

45 *Nix*, 467 U.S. at 437–38.

46 The group had divided into teams of four to six, searching assigned sections along I-80. *Id.* at 434-35, 449.

47 *Id.* at 436.

48 *Id.* at 438.

49 State v. Williams, 285 N.W.2d 248, 258 (Iowa 1979) (citing 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4 (1st ed. 1978)).

50 Williams v. Iowa, 446 U.S. 921 (1980).

51 *Nix*, 467 U.S. at 439; *see also* Williams v. Nix, 700 F.2d 1164 (8th Cir. 1983).

52 For example, the Eighth Circuit pointed out that the detective who had given the "Christian burial speech" did not even testify at the retrial. *Williams*, 700 F.2d at 1166, 1171 n.9.

Court thus faced the issue it had previously footnoted, of whether to admit the body despite the Sixth Amendment violation, on a theory of inevitable discovery.

Examining the factual record to construct the appropriate counterfactual, the Supreme Court majority concluded that although "it would have taken an additional three to five hours to discover the body if the search had continued, the body was found near a culvert, one of the kinds of places the teams had been specifically directed to search."[53] So it was "clear that the search parties were approaching the actual location of the body, and . . . 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."[54] Although the application of inevitable discovery was reasonably straightforward in this case, the contours of the Court's doctrinal test—the first official framework from which lower courts would model their tests—proved far more opaque.

In what has since become one of the most cited sentences of the opinion, the Court offered a barebones test for when to apply the doctrine: "If the prosecution can establish by a *preponderance of the evidence* that the information *ultimately or inevitably* would have been discovered by lawful means[,] . . . then the deterrence rationale has so little basis that the evidence should be received."[55] This framework thus offered two dictates as guidance for lower courts: the requirement of *inevitability* and the *preponderance evidentiary burden*.[56]

The first dictate of inevitability is unsurprising given the doctrine's purpose "to block setting aside convictions that would have been obtained without police misconduct."[57] In common English, inevitability requires that something is "certain to happen" and "unable to be avoided."[58] It mandates certitude that something will occur, as compared to, for example, "possibility"

---

53 *Nix*, 467 U.S. at 449 (citation omitted).

54 *Id.* at 449-450. *But see* McInnis, *supra* note 35, at 444 (deducing based on the recorded search party activity that the likelihood of the body being found was far less inevitable than the *Nix* court implied).

55 *Nix*, 467 U.S. at 444 (emphases added).

56 *Cf.* United States v. Heath, 455 F.3d 52, 58 n.6 (2d Cir. 2006) ("This requirement of certitude should not be confused with the government's burden of proof . . . .").

57 *Nix*, 467 U.S. at 443 n.4.

58 *Inevitability*, CAMBRIDGE ENGLISH DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/inevitability [https://perma.cc/6LFE-BBFD]; *see also inevitability*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/inevitability [https://perma.cc/TL79-H8TZ] ("incapable of being avoided or evaded"); *inevitable*, COLLINS, https://www.collinsdictionary.com/us/dictionary/english/inevitability [https://perma.cc/TZ98-EYA5] ("certain to happen and cannot be prevented or avoided").

or even "probability," which rest on various degrees of likelihood. Critically, every member of the Court agreed with this dictate.[59]

The second dictate is less straightforward. If inevitability is the "what" of the doctrine, the evidentiary burden is the corresponding operational "how we know." As is often the case with procedure, how to operationalize this inevitability requirement proved far more contentious within the *Nix* Court.

The majority ruled that a preponderance of the evidence standard applied, the same standard used by the Iowa Supreme Court.[60] In dissent, Justices Brennan and Marshall called for the more stringent clear and convincing evidentiary burden.[61] The majority justified the lower burden by explaining the state already had the "difficult task of proving guilt," meaning a more stringent standard would be unfair to the prosecution.[62] Accordingly, the Court determined that any evidence admitted under the inevitable discovery exception should be subject to the normal burden of proof at suppression hearings, since "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."[63] In this way, the lower preponderance standard was justified by the certainty that inevitability already demands, thereby crafting a deliberate calibration between these dictates. Importantly, no one on the Court advocated for a laxer evidentiary requirement than preponderance; the disagreement between the Justices rested on whether the test should be more, not less, stringent.[64]

In what could have been a third potential dictate, both sides also agreed on the vital, deterrent purpose of the exclusionary rule to curb "disregard" for constitutional protections.[65] The *Nix* Court repeatedly referenced and alluded to deterrence throughout the majority opinion, using it to undergird the entire analysis. Recall, the Court explicitly justified its test by holding that satisfying both dictates meant "the deterrence rationale has so little basis that the evidence should be received."[66] The Court then implicitly relied on deterrence in overruling the Iowa court's bad faith element: adhering to such

---

59 *Cf. Nix*, 467 U.S. at 459 (Brennan, J., dissenting).

60 *Id.* at 444 n.5.

61 *Id.* at 458-60 (Brennan, J., dissenting). The dissent explained how inevitable discovery "necessarily implicates a hypothetical finding," so a heightened burden of proof would ensure the doctrine is "narrowly confined to circumstances that are functionally equivalent to an independent source." *Id.* at 459.

62 *Id.* at 444 n.5 (majority opinion).

63 *Id.*

64 *See id.* at 459-60 (Brennan, J., dissenting) (calling for a more stringent requirement of clear and convincing evidence).

65 Mapp v. Ohio, 367 U.S. 643, 656 (1961).

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

a requirement "would put the police in a *worse* position than they would have been in if no unlawful conduct had transpired,"[67] since the evidence would have been discovered anyway. Thus, the Court rejected a bad faith prong, concluding "the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce."[68]

Deterrence, then, was clearly central to crafting the doctrine, but the Court was less clear in *how* it intended deterrence to be considered within the doctrinal framework—in particular, whether deterrence should be an express consideration, like the two primary dictates. Although the aforementioned references to deterrence could be read as signaling that deterrence is in some fashion critical to the analysis, language within the majority's good faith analysis also signaled the subordinate import of deterrence. For example, the majority pointed to alternative disincentives to unlawful action wholly external from inevitable discovery, such as "departmental discipline and civil liability," as a means of promoting deterrence.[69] Contemporaneous commentary also suggests this was how the role of deterrence in the analytical framework was read at the time: the Supreme Court "refus[ed] to require courts to do a case by case assessment of the need to deter (as demonstrated by the purposefulness and flagrance of the police misconduct) before applying the inevitable discovery doctrine."[70]

Nonetheless, deterrence was central to almost every stage of the Court's analysis and undergirded the majority's formulation of the doctrinal test when it concluded that satisfying both dictates meant deterrence did not support suppressing the evidence.[71] For that reason, deterrence is best read as inherent in the doctrine, but not a separate dictate. As aptly summarized by Justice Stevens, an inevitable discovery doctrine that does not weigh deterrence at all "would undermine the constitutional guarantee itself."[72]

With these two express dictates—inevitability and preponderance of the evidence—and an additional seemingly central consideration of deterrence, the *Nix* decision provided the first national standard for lower courts. Yet, this framework was barebones. The Court mandated inevitability and the preponderance evidentiary burden, but it did not spell out any further how lower courts should operationalize the test. For example, the Court did not clarify whether independent active pursuit, such as the search party in *Nix*, is

---

67 *Id.* at 445.

68 *Id.* at 446.

69 *Id.*

70 Steven P. Grossman, *The Doctrine of Inevitable Discovery: A Plea for Reasonable Limitations*, 92 DICK. L. REV. 313, 331 (1988).

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

72 *Id.* at 456 (Stevens, J., concurring).

necessary to satisfy the inevitability requirement. Nor did the Court clarify whether inevitable discovery could be used to admit evidence when police intentionally avoided the search warrant process.[73]

The potential drawbacks of the minimalist nature of the test were immediately apparent, even before subsequent lower court interpretations. The *Harvard Law Review* summary of the Term described *Nix* as "produc[ing] an imprecise formulation of the exception that fails to address even the most basic problems raised by its application and thus invites confusion among lower courts and unjustifiable invocation of the exception by prosecutors."[74] Soon thereafter, lower courts began to struggle in interpreting its bare contours. One year after *Nix*, the Eleventh Circuit observed that the Supreme Court was "silent as to what constitutes an 'inevitable' discovery under the doctrine."[75] Within four years, another scholar complained that the predicted confusion had transpired: "The open ended approach taken by the Supreme Court in *Williams II* has understandably led to nonuniform application of the inevitable discovery doctrine by different jurisdictions."[76] The next two Sections show that in the subsequent thirty-seven years, little has improved—lower courts have indeed struggled, leading to the doctrine's (at times untenable) expansion.

Dicta in the Supreme Court's 2006 decision *Hudson v. Michigan*[77] provides the only other arguable source of guidance for lower courts. In that case, police obtained and executed a warrant to search Hudson's home.[78] However, rather than adhering to knock-and-announce rules, the officers almost immediately entered and discovered the evidence at issue.[79] The petition for certiorari framed the issue as whether inevitable discovery creates a per se exception to the exclusionary rule for evidence seized after a knock-and-announce violation.[80] But the *Hudson* majority chose not to frame the decision in those terms, instead holding that knock-and-announce violations were categorically exempted from the exclusionary rule.[81]

This conclusion by the majority rested on an independent source rather than inevitable discovery. Only Justice Breyer's dissent addressed inevitable discovery, opining that the majority's decision "reflects a misunderstanding

---

73 *See* Grossman, *supra* note 70, at 344-50 (describing lower courts grappling with warrant avoidance).

74 *The Supreme Court, 1983 Term—Leading Cases*, 98 HARV. L. REV. 87, 118-19 (1984).

75 United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984).

76 *See* Grossman, *supra* note 70, at 342.

77 547 U.S. 586 (2006).

78 *Id.* at 588.

79 *Id.*

80 Petition for Writ of Certiorari, Hudson v. Michigan, 547 U.S. 586 (2006) (No. 04-1360).

81 *Hudson*, 547 U.S. at 594 ("Since the interests that were violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.") (emphasis omitted).

of what 'inevitable discovery' means."[82] Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, interpreted the doctrine to "refer[] to discovery that did occur or that would have occurred (1) *despite* (not simply *in the absence of*) the unlawful behavior and (2) *independently* of that unlawful behavior."[83] Accordingly, the dissent argued the majority erred in decoupling the illegal entry from the discovery.[84] The majority, conversely, concluded that "the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence," meaning the entry did not bear at all on the evidence admission.[85]

Because but-for causality and inevitable discovery are two sides of the same coin—to say police would have lawfully obtained challenged evidence despite the constitutional violation implies the constitutional violation was not the but-for cause of its discovery—*Hudson* has prompted discussion questioning the decision's impact on inevitable discovery's contours.[86] For example, some commentators have debated the impact of *Hudson* on independent active pursuit analysis[87]—an element some circuits have adopted in their doctrinal tests.[88] But on the whole, these discussions have remained academic: lower courts have not drawn inevitable discovery doctrinal implications from *Hudson*.[89]

Fifteen years later, the Supreme Court has yet to weigh in again, even tangentially, on inevitable discovery. This lack of guidance—especially given the imprecise formulation of *Nix*—has left the lower courts to approximate its boundaries. The Courts of Appeals have developed their own tests to

---

82 *Id.* at 618 (Breyer, J., dissenting).

83 *Id.* at 616.

84 *Id.* at 618.

85 *Id.* at 592 (majority opinion).

86 *See, e.g.*, David A. Stuart, *A Sign-Post Without Any Sense of Direction: The Supreme Court's Dance Around the Inevitable Discovery Doctrine and the Exclusionary Rule in* Hudson v. Michigan, 27 PACE L. REV. 503, 506 (2007) (discussing the *Hudson* decision's "important and potentially long-ranging implications" for the inevitable discovery doctrine); Albert W. Alschuler, *The Exclusionary Rule and Causation:* Hudson v. Michigan *and Its Ancestors*, 93 IOWA L. REV. 1741, 1809 (2008) ("Although the *Hudson* Court spoke of but-for causation rather than inevitable discovery, the two formulations are clones."). *But see* Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 347 (2013) (categorizing *Hudson* separately within the exclusionary rule exceptions).

87 For contrasting analyses of the *Hudson* decision's implication on inevitable discovery, compare Reginald R. Lewis, Comment, *A Common Sense Understanding of Inevitable Discovery: Why* Nix v. Williams *Does Not Require Active Pursuit in the Application of the Inevitable Discovery Doctrine*, 85 MISS. L.J. 1691, 1720 (2017), with Sarah DeLoach, Comment, *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, 83 MISS. L.J. 1179, 1195 (2014).

88 *See infra* subsection I.B.2.

89 *See* DeLoach, *supra* note 87, at 1197 (contending that lower courts have not drawn on *Hudson* to resolve the circuit split on inevitable discovery).

operationalize the doctrine, many of which adopted elements that borrow from language in *Nix* to supplement the two dictates of inevitability and the preponderance evidentiary burden. Yet, in the wake of Supreme Court inaction, some courts have gradually run afoul of these dictates, distorting the doctrine beyond its intended purpose. The following Sections analyze these various interpretations, discerning two broad categories: experimentation and manipulation.

B. *Lower Court Experimentation*

Lower courts have grappled with the vagueness of *Nix* by fashioning their own doctrinal tests, composed of various elements—some overlapping, others unique. In this Section, we analyze tests that constitute "experimentation"—approaches that, while potentially controversial, are at least justifiable as a matter of vertical stare decisis. These approaches do not run afoul of *Nix*'s two ironclad dictates of 1) inevitability; and 2) the evidentiary burden of proving inevitability.

There are three major elements that some circuit courts have required: that inevitability be proven with "impeachable historical facts"; an "independent active pursuit" to demonstrate inevitability (though these circuits have frequently hollowed this element of its substance); and an element expressly weighing deterrence and the prophylactic nature of the Fourth Amendment writ large. We review each of these in turn.

1. Impeachable Historical Facts

Some circuits' inevitable discovery tests contain an element requiring impeachable historical facts. This element stems from a footnote in *Nix* where the Court explained why it was choosing to impose the preponderance evidentiary burden: "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."[90] This language places an important limit on potentially quite permissive speculation by the courts of what police may or may not have done, which *could* have led to discovery of evidence.

Some lower courts have accordingly incorporated this language into their own tests. For example, the Second Circuit often quotes this *Nix* passage in its test, adding that this "focus on demonstrated historical facts keeps speculation to a minimum, by requiring the 'district court to determine, viewing affairs as they existed at the instant before the unlawful search

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

occurred, what *would have happened* had the unlawful search never occurred.'"[91] The Third and Sixth Circuits also regularly invoke this call for impeachable historical facts as a way to limit judicial speculation.[92] But most circuits' tests place no special emphasis on impeachable facts. The contrast between the circuits that explicitly note this element and others omitting it demonstrates importantly differing approaches to effectuating *Nix*'s dictates.

The Second Circuit's application of this element in *United States v. Stokes* illustrates its significance.[93] Police were investigating a homicide and had identified Stokes as a potential suspect.[94] After tracking Stokes to a motel, the investigation team made the strategic decision to not obtain an arrest warrant because, under New York law, law enforcement officers cannot question a suspect without counsel present once an arrest warrant issues.[95] The officers entered Stokes's room without his permission and found a gun in plain view, which led to federal weapons charges.[96] Stokes moved to suppress the gun and related evidence found as unlawfully obtained, but the district court rejected his motion.[97] The judge relied on inevitable discovery, premising inevitability on one of two contingencies: either Stokes would have left with the evidence and law enforcement would have stopped him, or Stokes would have left without the evidence, and the cleaning staff would have found the contraband.[98]

On appeal, the Second Circuit expanded on the impeachable historical facts requirement, explaining that evidence should not be admitted unless a court "can find, with a high level of confidence, that each of the contingencies necessary to the legal discovery of the contested evidence would be resolved in the government's favor."[99] The panel reversed the district court, writing that the lower court had "failed to account for all of the demonstrated historical facts in the record, and in doing so, failed adequately to consider other plausible contingencies," such as whether a second registered guest who

---

91 United States v. Stokes, 733 F.3d 438, 444 (2d Cir. 2013) (citation omitted); *see also* United States v. Heath, 455 F.3d 52, 64 (2d Cir. 2006) (Cabranes, J., concurring) ("Courts require these detailed showings of 'each of the contingencies' involved precisely because they do not wish to encourage officers to 'obviate' or 'nullif[y]' the Fourth Amendment's warrant requirement by baldly asserting that they inevitably would have had the probable cause needed to obtain a warrant." (alteration in original) (citation omitted)).

92 *See, e.g.*, United States v. Bradley, 959 F.3d 551, 557 (3d Cir. 2020); United States v. Cooper, 24 F.4th 1086, 1094 (6th Cir. 2022). Cases from other circuits will occasionally cite this language as well, though it is far less consistent than the Second, Third, and Sixth Circuits.

93 733 F.3d 438 (2d Cir. 2013).

94 *Id.* at 440.

95 *Id.* at 441.

96 *Id.* at 441-42.

97 *Id.* at 442.

98 *Id.* at 446.

99 *Id.* at 444.

had access to the motel room might have taken the guns.[100] Similarly, the district court failed to consider the possibility that the motel employees might have found the guns but chosen not to report anything, instead "appropriat[ing] the valuable property for their own purposes."[101] The court concluded that such possibilities complicate predicating inevitable discovery on the actions of third parties because such analyses are "inherently speculative," consisting of historical facts that cannot be readily verified.[102]

Conversely, the Fourth Circuit's application of inevitable discovery in *United States v. Bullette* demonstrates how inevitability can expand when no emphasis is placed on historical impeachable facts.[103] In that case, law enforcement officers arrived on a rural property late at night and observed evidence suggesting that it was a clandestine drug manufacturing site.[104] The agents conducted a safety sweep, found the area vacant, and then searched three parked vehicles next to the purported drug lab, finding incriminating evidence inside one of them.[105] The officers did not obtain a warrant to search the cars.[106] Instead, they justified the search on three bases: first, that it was standard practice to impound and inventory vehicles when no one was present to claim them; second, that they had safety concerns about potential explosive materials in the vehicles; and third, that the officers wanted to identify the vehicles' registered owners.[107]

The Fourth Circuit justified the search under inevitable discovery in tandem with an inventory search.[108] Because the Pontiac had no visible license plate or registration and no owner was present, the court credited agent testimony that it was reasonable to impound and therefore inventory the car.[109] So the illegally obtained evidence would have been legally discovered during that inventory search.[110] But this conclusion is problematic from the standpoint of relying on impeachable facts, as the court expressly eschewed any requirement of a written inventory policy,[111] as is normally required.[112]

---

100 *Id.* at 446.

101 *Id.* at 447.

102 *Id.*

103 854 F.3d 261 (4th Cir. 2017).

104 *Id.* at 263.

105 *Id.* at 263-64.

106 *Id.* at 264.

107 *Id.*

108 *Id.* at 265.

109 *Id.* at 266.

110 *Id.*

111 *Id.* ("The government need not provide a written inventory policy to prove that a law enforcement agency conducts its inventory searches according to routine and standard procedures . . . .").

112 *See* South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976) (hinging the lawfulness of an inventory of the contents of a car on following standard police procedure).

Despite the lack of any standardized criteria for conducting inventory searches that the defendant could use as a reference point for impeachment, the court allowed the agent testimony to singularly serve as the basis of inevitability.[113] We discuss in detail below how pliable inevitable discovery becomes when combined with inventory searches, particularly when the likelihood of such searches occurring turns on the testimony of the officer who committed the constitutional violation in the first place, as here.[114] For now, it is enough to note that the term "impeachable facts" largely loses its meaning when such conditionality applies, rendering them negligibly impeachable and arguably not "facts" in the ordinary sense.[115]

As evidenced above, doctrinal tests that include an element emphasizing impeachable historical facts can better constrain judicial conjecture. Even if one disagrees with the ultimate conclusion in *Stokes*, there is no question the Second Circuit's reliance on this element led to a more robust counterfactual analysis than that of the district court in that case, or the Fourth Circuit's analysis in *Bullette*. Perhaps for this reason, and because the Supreme Court stressed the need to avoid speculation in *Nix*, no circuits have expressly disclaimed this element. Nevertheless, many tests quietly omit it, leaving these circuits to rely on other elements to ensure the doctrine is only employed in truly inevitable scenarios—elements which sometimes strain under that additional pressure, as the following Sections show.

2. Independent Active Pursuit

Another element analyzed in *Nix* but not specified as a requirement is the existence of a wholly separate police investigation at the time when the evidence was discovered illegally—i.e., an independent active pursuit.[116] This inquiry buttresses the likelihood that the discovery would have in fact been both inevitable and untainted and some circuits have explicitly embraced it as a requirement. For example, the Eighth Circuit's test requires that "the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation."[117] The Fifth and

---

113 *Bullette*, 854 F.3d at 267.

114 *See infra* subsection III.A.1.

115 Commentators typically describe "facts of the case" as "the who / what / where / why questions that should ultimately go to a jury or fact finder." Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1256 (2012); Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) (facts concern "what the parties did, what the circumstances were, what the background conditions were").

116 Courts also refer to this as requirement as an "active alternative pursuit." *See generally* Lewis, *supra* note 87, at 1701-05 (overviewing the different approaches to this element).

117 United States v. McManaman, 673 F.3d 841, 846 (8th Cir. 2012).

Eleventh Circuits also employ this element in their doctrinal tests.[118] But most circuits do not include this prong in their tests, and at least three circuits—the First, Seventh, and Ninth—have gone so far as to expressly reject the requirement.[119]

Whether an independent active pursuit is required by *Nix* is arguable. Scholars and jurists—including both Justices Kennedy and Breyer, prior to their elevation to the Supreme Court[120]—have contended that a close reading of *Nix* suggests that this element is not mandatory.[121] But one can also argue that this element is essential to the logic of *Nix*. Justice Brennan in dissent explained that he agreed with the majority that "unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered in the same condition by an *independent line of investigation* that was already being pursued when the constitutional violation occurred."[122] This suggests that the Supreme Court was in agreement that, at the very least, such a requirement reinforces a conclusion of inevitability by ensuring the investigation that would have provided the counterfactual discovery was not tainted.

The Eighth Circuit's decision in *United States v. Allen* illustrates an application of this requirement.[123] As Allen was leaving a hotel, police arrested him on counterfeiting charges and searched the contents of his

---

118 *See, e.g.*, United States v. Jackson, 596 F.3d 236, 241 (5th Cir. 2010) (requiring the government to show active pursuit of a substantial alternative line of investigation); United States v. Watkins, 13 F.4th 1202, 1211 (11th Cir. 2021) (explaining that the other requirement the government must meet is "that the lawful means which made discovery inevitable were being actively pursued prior to the occurrence of the illegal conduct.").

119 *See, e.g.*, United States v. D'Andrea, 648 F.3d 1, 12 (1st Cir. 2011) ("In this Circuit, there is no requirement that the independent line of investigation . . . be already underway at the time of the illegal discovery."); United States v. Rivera, 817 F.3d 339, 346 (7th Cir. 2016) (Hamilton, J., concurring) (stating that Seventh Circuit has rejected the active pursuit requirement); United States v. Boatwright, 822 F.2d 862, 864 (9th Cir. 1987) ("The existence of two independent investigations at the time of discovery is not . . . a necessary predicate to the inevitable discovery exception.").

120 Then-Ninth Circuit Judge Kennedy authored *United States v. Boatwright*, 822 F.2d 862, 864 (9th Cir. 1987) (concluding that *Nix* does not require independent active pursuit), and then-First Circuit Judge Breyer participated in *United States v. Silvestri*, 787 F.2d 736, 745 (1st Cir. 1986) (concluding that a "bright-line rule" requiring independent active pursuit would go "too far").

121 *See, e.g.*, William C. Heffeman, *Forward: The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 857-58 (2000) (labeling *Nix* as a "pernicious decision" because it did not require an independent investigation to be underway); *see generally* Stephen E. Hessler, *Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 MICH. L. REV. 238, 261–65, 273–74 (2000) (describing these cases and the alternative active pursuit requirement in general).

122 Nix v. Williams, 467 U.S. 431, 459 (1984) (emphasis added); *see also* R. Bradley Lamberth, Note, *The Inevitable Discovery Doctrine: Procedural Safeguards to Ensure Inevitability*, 40 BAYLOR L. REV. 129, 146 (1988) ("The significance of the active pursuit requirement is evidenced by the fact that the concurring and dissenting opinions in *Williams* agreed with the majority on the criticalness of the ongoing investigation.").

123 713 F.3d 382 (8th Cir. 2013).

luggage cart nearby.[124] Because the officers had already secured Allen in the patrol car, they could not rely on a search incident to arrest exemption.[125] The Eighth Circuit nevertheless justified the search under inevitable discovery, concluding the evidence would have been found in a subsequent lawful inventory search.[126] As to the second prong of its test requiring independent active pursuit, the court held it satisfied because one of the officers had already started preparing a search warrant application before heading to the arrest scene, meaning there was an "active pursuit of a substantial, alternative line of investigation."[127]

Although this element theoretically provides assurance that discovery will in fact be inevitable, the circuits that require this element have found ways to gut it of that protective function.[128] This requirement notionally adds to the prosecution's burden by calling for proof of a lawful investigation wholly external from the tainted investigation—a burden that ostensibly cannot be circumscribed through the counterfactual deference judges might otherwise give to the state. Yet in application, courts have limited the impact of this element by doing just that.[129]

For example, the Eleventh Circuit has stretched this prong to mean it does not require a premeditated alternative search at all. In *United States v. Johnson*, a police officer observed a truck turn without signaling; he ran the plates and discovered the vehicle registration belonged to someone deceased.[130] After his truck was pulled over, the driver, Johnson, admitted to the officer that his license was suspended.[131] The officer issued a traffic citation but did not arrest Johnson at this stage; he then illegally searched the truck.[132]

---

124 *Id.* at 385.

125 *See* Arizona v. Gant, 556 U.S. 332, 351 (2009) (circumscribing the search incident to arrest exception once the arrestee can no longer access the area searched).

126 *Allen*, 713 F.3d at 387-88.

127 *Id.* at 388.

128 And some judges in these circuits have expressly questioned its future relevance. *See, e.g.*, United States v. Jackson, 596 F.3d 236, 242 (5th Cir. 2010) ("[W]e have indicated that the 'active-pursuit element' may no longer be necessary to invoke the inevitable discovery rule."); United States v. Thomas, 524 F.3d 855, 862 (8th Cir. 2008) (Colloton, J., concurring) (describing this element as "underinclusive").

129 *See, e.g.*, United States v. McManaman, 673 F.3d 841, 845 (8th Cir. 2012) (finding the "alternative line of investigation" prong satisfied because officers were "engaged in ascertaining" the defendant's involvement with drugs); United States v. Jackson, 596 F.3d 236, 242 (5th Cir. 2010) (concluding that an ongoing grand jury investigation satisfied the active pursuit element).

130 777 F.3d 1270, 1272 (11th Cir. 2015), *overruled by* United States v. Watkins, 10 F.4th 1179 (11th Cir. 2021). Although *Watkins* has since overruled the Eleventh Circuit's "reasonable probability" requirement, *Watkins* did not touch the "active pursuit" requirement in *Johnson*. *See infra* notes 193-197 and accompanying text (discussing *Watkins*).

131 *Id.* at 1272.

132 *Id.* at 1273.

The officer found a shotgun in the backseat and arrested Johnson.[133] Although the officer could have arrested Johnson for the license suspension, he had not done so, meaning the search could not be justified as a search incident to arrest.[134] The officer nonetheless maintained that he had intended to arrest Johnson prior to finding the firearm, but the court only had the officer's word that he had planned to arrest Johnson even before finding the incriminating evidence—testimony that seemingly contradicted the officer's action of issuing a traffic citation.[135]

The Eleventh Circuit affirmed the district court's suppression denial on the basis of inevitable discovery.[136] As to the independent active pursuit prong, the court discussed how it could be satisfied so long as law enforcement would have discovered the tainted evidence "by virtue of ordinary investigations of evidence or leads already in their possession."[137] This flexibility allowed the court to conclude that an alternative pursuit emerged at the moment the officer decided to pull over the truck, despite no other officer ever assisting with the stop.[138] In other words, the prosecution did not need to offer an *actual alternative* investigation, but instead simply theorize a *hypothetical alternative* investigation that could have begun sometime in the future.

This analysis provides one illustration for how even what we classify as permitted doctrinal experimentation can undermine Supreme Court doctrine, since the Court was quite explicit that the search incident warrant exception cannot be asserted where there is no arrest because "the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all."[139] Yet, for better or worse, this version of the independent active pursuit requirement has become the norm in the remaining circuits that require it.[140] Consequently, this element

133 *Id.*

134 *See* Knowles v. Iowa, 525 U.S. 113, 119 (1998) (refusing to permit a search incident to arrest when there is no arrest and only a citation issued).

135 To this point, the district court originally found the officer did not intend to arrest Johnson and suppressed the evidence. *Johnson*, 777 F.3d at 1273. The district court later reversed this finding on a motion for reconsideration. *Id.*

136 *Id.* at 1272.

137 *Id.* at 1274.

138 *Id.* at 1275.

139 *Knowles*, 525 U.S. at 119; Sibron v. New York, 392 U.S. 40, 63 (1968) ("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification.")

140 *See, e.g.*, United States v. Watkins, 981 F.3d 1224, 1233 (11th Cir. 2020) (concluding that the active pursuit element was satisfied because officers thought about talking to lead suspect); United States v. Baez, 983 F.3d 1029, 1038-39 (8th Cir. 2020) (discussing the Eighth Circuit's inconsistent treatment of its independent active pursuit requirement); United States v. Salinas, 543 F. App'x 458, 467 (5th Cir. 2013) (concluding there was an independent active pursuit based on the agents executing a valid search warrant that was tainted by the illegally obtained evidence).

has been made largely meaningless, and the difference between the circuits that apply it and the circuits that do not is relatively minimal. For this reason, the Court's failure to revisit the doctrine in the decades since *Nix* has allowed various circuits to take different approaches and, at times, mask their speculative inquiries under the false guise of stringent requirements.[141]

3. Deterrence and Prophylaxis

A third element that some circuits expressly incorporate is deterrence—the prophylactic effect of admitting the tainted evidence. As discussed in Section I.A.,[142] *Nix* arguably grounded the doctrine's entire existence in this ideal: if evidence would have been inevitably discovered, then it is not meaningfully "the product of illegal governmental activity."[143] Many circuits therefore weigh deterrence, albeit to different degrees. For example, the First Circuit explicitly embraces a deterrence analysis, with the third prong of its test asking whether "application of the doctrine in a particular case will not sully the prophylaxis of the Fourth Amendment."[144] Other circuits, including the Third, Sixth, and Seventh, frequently rely on the deterrence rationale mentioned in *Nix*, although only in passing.[145]

An example of robust consideration can be seen in the Third Circuit's analysis in *United States v. Stabile*, in which the contested evidence was an illegally obtained hard drive containing evidence of child pornography.[146] Law enforcement had lawfully seized multiple hard drives based on suspected financial crimes.[147] The government obtained and lawfully executed a state search warrant based on those financial crimes, a search of which exposed file names and a pornographic video of a minor.[148] This prompted the agents to seek a secondary federal warrant to lawfully search the exposed files.[149] However, the federal warrant mistakenly called for searching the wrong hard drive, thereby tainting the subsequent search of the hard drive containing the pornographic material.[150]

---

141 *See, e.g.*, *infra* notes 250-259 and accompanying text.

142 *See supra* notes 65–68 and accompanying text.

143 Nix v. Williams, 467 U.S. 431, 444 (1984).

144 United States v. Crespo-Ríos, 645 F.3d 37, 42 (1st Cir. 2011).

145 *See, e.g.*, United States v. Stabile, 633 F.3d 219, 245 (3d Cir. 2011) (quoting from *Nix* that inevitable discovery applies when the "the deterrence rationale" has "little basis"); United States v. Quinney, 583 F.3d 891, 893 (6th Cir. 2009) (same); United States v. Cartwright, 630 F.3d 610, 613 (7th Cir. 2010) (same).

146 *Stabile*, 633 F.3d at 226-46.

147 *Id.* at 226.

148 *Id.* at 227.

149 *Id.*

150 *Id.* at 228.

The Third Circuit nonetheless affirmed the admission of the unlawfully obtained evidence on the basis of inevitable discovery. Dispositive for the court's analysis of the deterrence prong was "the very fact that the Government attempted to secure state and federal search warrants at every step of the search [such] that there would be little deterrence benefit in punishing the Government."[151] Thus, applying inevitable discovery would not undermine police incentives to obtain search warrants ex ante.

Contrasting the Third Circuit's approach is the First Circuit's comparatively meek application illustrated in *United States v. Crespo-Ríos*, where the government appealed the suppression of unlawfully obtained digital images pertaining to child rape pornography charges.[152] The First Circuit reversed the district court based on inevitable discovery, where the doctrinal test contained a third and final prong asking whether application of the doctrine would "sully the prophylaxis of the Fourth Amendment."[153] Whereas the First Circuit's analysis of its first two prongs was robust,[154] its analysis of the prophylaxis prong sharply differed. In two short conclusory sentences, the court acknowledged the relationship between "the social costs of the exclusionary rule" and deterrence before simply concluding that "application of the doctrine here will not 'provide an incentive for police misconduct or significantly weaken [F]ourth [A]mendment protection.'"[155] Although much of the court's analysis about the mechanics of digital searches could also have supported its conclusion that exclusion would not incentivize police misconduct, the court's reluctance to draw on its earlier discussion signaled a sidelining of the prophylactic consideration.[156]

Deterrence can and should play a critical role in justifying application of the doctrine,[157] as *Nix* made clear. This element is particularly important in cases where inevitable discovery rests on the hypothetical application of a search warrant because giving law enforcement the benefit of a warrant when they did not actually obtain one can create perverse incentives, as we detail

---

151 *Id.* at 246.

152 United States v. Crespo-Ríos, 645 F.3d 37, 39 (1st Cir. 2011).

153 *Id.* at 42. The First Circuit's three-part test as articulated in *Crespo-Ríos* consisted of: "(i) the lawful means of its discovery are independent and would necessarily have been employed, (ii) discovery by that means is in fact inevitable, and (iii) application of the doctrine in a particular case will not sully the prophylaxis of the Fourth Amendment." *Id.* at 42.

154 The court engaged in a lengthy discussion of how law enforcement conducts digital media searches such that it would have inevitably found the images at issue with a proper search warrant. *Id.* at 42-44.

155 *Id.* at 44 (quoting United States v. Silvestri, 787 F.2d 736, 744 (1st Cir. 1986)).

156 For a useful contrast within the First Circuit, see United States v. Hughes, 640 F.3d 428, 441 (1st Cir. 2011) (discussing whether application of inevitable discovery would undercut deterrence).

157 *See infra* note 445 and accompanying text (discussing the future of the deterrence element).

below.[158] But in many cases, like *Crespo-Ríos*, deterrence is invoked and then summarily dismissed or ignored, meaning it often functions similarly to the active pursuit element: it constrains the doctrine in name only.

* * *

Although each of these elements may seemingly heighten the threshold for a finding of inevitable discovery, robust application can in fact reinforce a conclusion that evidence should be admitted, as illustrated by *Stokes* and *Stabile*. The value in each of these elements is not in increasing the likelihood of any particular outcome but rather in giving structure, substance, and coherence to the doctrine. Inevitable discovery is not meant to be a black hole in the jurisprudence, permitting judges to employ it at their unconstrained discretion. Rather, it should operate as a course correction, as an exception to the exclusionary rule. Ensuring the efficacy of this function, however, requires elements tying the doctrine to this purpose.

The inclusion of these elements in a court's test, however, does not serve that role unless the elements are rigorously applied. Superficially invoking these elements without giving them substantive meaning can, in fact, be worse than omitting them altogether. In these cases, it misleadingly provides an aura of legitimacy when the doctrinal application ends up being reflexively permissive to police conduct.

Yet, as the following Section demonstrates, there is a worse alternative that some courts have taken: defying *Nix* and its two core dictates.

C. *Lower Court Manipulation*

Lower courts have also formulated their doctrinal tests in ways that manipulate, and at times directly contravene, the Supreme Court's dictates of inevitability and preponderance of the evidence. The foremost criterion of inevitability is the definitional requirement that the evidence "ultimately or inevitably would have been discovered by lawful means."[159] Closely following, the very same sentence from *Nix* also demands that the prosecution prove this inevitability "by a preponderance of the evidence."[160] But curiously, not every circuit follows these two foundational commands.

Whereas experimentation's variability can be theoretically justified and arguably develops the doctrine—since *Nix* is sufficiently "open textured" to make each of the three elements described in the previous Section

158 *See infra* Section II.A.

159 Nix v. Williams, 467 U.S. 431, 444 (1984).

160 *Id.*

optional[161]—the manipulation described herein cannot be defended. Inevitability and the evidentiary burden are vital to both the *Nix* holding and the logic of the doctrine itself. Any distortion of these two commands constitutes impermissible manipulation of Supreme Court precedent, not experimentation, giving judges broad latitude to admit unconstitutionally obtained evidence. The Supreme Court needs to correct such lower court disobedience.[162]

1. Reasonable Probability Supplanting Inevitability

Courts have manipulated the doctrine most significantly by replacing the inevitably requirement. In other words, courts have avoided or reversed the Supreme Court's mandate that only evidence, the discovery of which is truly *inevitable*, will be admitted under the doctrine. While most circuits follow *Nix* and flatly insist upon inevitability, other circuits have diluted this dictate.[163] This appears, for example, in the first prong of the Fifth Circuit's test, which requires that the prosecution "demonstrate[] by a preponderance of the evidence that (1) *there is a reasonable probability* that the contested evidence would have been discovered by lawful means . . . ."[164] The Eighth Circuit's test contains identical language as well, requiring only a "reasonable probability" of lawful discovery.[165] By replacing "inevitably" with "reasonable probability," not only do these tests introduce an entirely different, and significantly lower, requisite likelihood, but they also inherently contradict the doctrine's namesake. This is not simply a matter of verbiage: the lower courts are essentially transforming "inevitable discovery" into "reasonably likely discovery"—a mutated doctrine that is far more permissive to the state and also more opaque in its application.[166] Accordingly, by anchoring their tests on reasonable probability, these circuits not only ratchet down

161 *See* H. L. A. HART, THE CONCEPT OF LAW 125-35 (3d ed. 2014) (claiming the law is an "open texture").

162 *See infra* subsection III.B.1.

163 Of note, the Eleventh Circuit also used this "reasonable probability" standard up until one year ago when it issued an en banc opinion in United States v. Watkins, 10 F.4th 1179, 1180 (11th Cir. 2021). The en banc court formally overruled this incorrect standard and aligned the circuit's test with the standard set forth in Nix. *Id.* at 1182. But even still, it is not clear that the Eleventh Circuit has actually construed Nix correctly. *See infra* notes 193-197 and accompanying text.

164 United States v. Jackson, 596 F.3d 236, 241 (5th Cir. 2010) (emphasis added).

165 *See* United States v. McManaman, 673 F.3d 841, 846 (8th Cir. 2012) ("We have held that this inevitable discovery exception applies when the government proves 'by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct . . . .'" (quoting United States v. Conner, 127 F.3d 663, 667 (8th Cir. 1997))).

166 The Fifth Circuit, for example, has even expressly admitted that the "inevitable discovery test in this circuit is more favorable to the Government than the test in other circuits." United States v. Zavala, 541 F.3d 562, 579 n.7 (5th Cir. 2008).

individuals' constitutional rights but also create ambiguity around the boundaries of those rights.

Consider the Second Circuit's decision in *United States v. Heath*.[167] Judge Calabresi surveyed the doctrinal landscape of other circuits' tests before "expressly eschew[ing] the 'reasonable probability' framework that some of our sister circuits have used to analyze 'inevitable discovery' cases."[168] He insisted that the government should not "prevail under the inevitable discovery doctrine merely by establishing that *it is more probable than not* that the disputed evidence would have been obtained without the constitutional violation."[169] Rather, inevitability demands "substantial certainty with respect to each of the contingencies involved in the causal chain of inevitability."[170]

In a similar vein, at least two judges on the Eighth Circuit believe the reasonable probability framework distorts the doctrine. In *United States v. Thomas*, police officers illegally searched Thomas' back pocket to take his train ticket after he had denied them consent.[171] The officers were looking for a murder suspect and believed Thomas resembled the suspect's photo.[172] But Thomas had not offered any form of identification.[173] This last detail was critical to the Eighth Circuit's inevitable discovery holding.[174] Ultimately, the court concluded that the lack of identification gave the officers cause to continue their *Terry* stop and ultimately learn Thomas's identity, since they could not let a potential murder suspect go without first confirming Thomas' identity.[175] Accordingly, "the discovery of the evidence on the ticket—the name 'Thomas, C.'—was inevitable."[176]

Judge Colloton wrote a concurring opinion, joined by Judge Benton, that did not opine on any factual aspects of the case. Rather, he wrote that the Eighth Circuit's "present articulation of the inevitable discovery doctrine is inconsistent with Supreme Court precedent and warrants consideration at an appropriate time by the en banc court."[177] Reasonable probability, in the concurring judges' opinion, suggested "something less than more likely than

---

167 455 F.3d 52 (2d Cir. 2006).

168 *Id.* at 60.

169 *Id.* at 58 (emphasis added).

170 *Id.* at 60. The Second Circuit ultimately concluded that "illegally-obtained evidence will be admissible under the inevitable discovery exception to the exclusionary rule only where a court can find, with a high level of confidence, that each of the contingencies necessary to the legal discovery of the contested evidence would be resolved in the government's favor." *Id.*

171 524 F.3d 855 (8th Cir. 2008).

172 *Id.* at 857.

173 *Id.*

174 *Id.* at 859.

175 *Id.* at 859.

176 *Id.*

177 *Id.* at 860 (Colloton, J., concurring).

not."[178] Accordingly, this prong of the test was not only overinclusive, as it admitted evidence that ought to be suppressed, but it also was "inconsistent with *Nix* and should be eliminated . . . ."[179] Reasonable probability diluted the Supreme Court's dictate, thereby "open[ing] the possibility that police will be in a *better* position as a result of police error or misconduct."[180] Yet twelve years later, the Eighth Circuit has yet to heed Judge Colloton's call to amend its test.[181]

The impact of this diluted reasonable probability standard can be observed in the Eighth Circuit's *United States v. Munoz* opinion.[182] A Nebraska state trooper had pulled over Munoz for speeding, placed him in his cruiser for driving without a license, and wrote him a citation with the intention of letting him go.[183] But before Munoz left the cruiser, the officer referenced the drug smuggling issues in the region and requested to search Munoz's car; both Munoz and his passenger consented.[184] The trooper searched the car and, beyond the implied scope of the search, unlawfully opened a backpack where he found a handgun, a digital scale, and a small quantity of methamphetamine, at which point he was recorded saying "bingo."[185] He then searched the front console as well and found two small glass pipes that he believed were "crack pipes," though they contained no residue of any kind.[186]

The panel faced the issue of whether the unlawfully found evidence could be admitted through inevitable discovery and used the Eighth Circuit's two-pronged test consisting of 1) a reasonable probability the evidence would have been discovered lawfully; and 2) the independent active pursuit requirement.[187] The court's analysis of the first prong reasoned that "[t]he fact that Trooper Jackson searched the console after searching the backpack proves, beyond a reasonable probability, that he would have eventually

178 *Id.* at 861 (internal quotation marks omitted).

179 *Id.* at 861-62.

180 *Id.* at 861.

181 *Cf.* United States v. Baez, 983 F.3d 1029, 1039 (8th Cir. 2020) (recognizing the "uncertainty in [Eighth Circuit] caselaw regarding the inevitable-discovery doctrine").

182 590 F.3d 916 (8th Cir. 2010).

183 *Id.* at 919.

184 The passenger's consent was critical as well because she had signed the car's rental agreement. *Id.* at 919-20.

185 *Id.* at 920.

186 United States v. Munoz, No. 08-CR-3069, 2008 WL 5069822, at *2 (D. Neb. Nov. 21, 2008), *aff'd*, 590 F.3d 916 (8th Cir. 2010).

187 *Munoz*, 590 F.3d at 923. Though not the focus here, the court also concluded that the second prong was satisfied because the passenger's "valid consent was an actual other investigative method of searching the Pontiac." *Id.* at 924. In other words, the court did not actually consider whether there was an alternative investigation at the moment of the Fourth Amendment violation, but instead allowed prior consent to fulfill the requirement.

searched the console."[188] This less stringent analysis proved critical, as the court did not grapple with what might have happened in the counterfactual where the searches occurred in the reverse order. The court did not consider whether the console search would have happened in the first place but for the unlawful evidence in the backpack, nor did it consider whether two glass pipes without residue would have had the same significance but for the drugs already found.[189] In contrast, the court supported its reasonable probability holding by crediting the trooper's testimony that "[h]e immediately recognized the glass pipes in the console as 'crack pipes.'"[190] Although it is not clear the court would necessarily have held differently had it used the more demanding inevitability standard, the court undermined the integrity of the doctrine by not even examining the likelihood of the proper counterfactual.

These brief examples illustrate the following: that the reasonable probability test is meaningfully different from the inevitability requirement set forth by the Supreme Court in *Nix*; that numerous judges have recognized that the two are incompatible; and that the difference has a substantive impact on case outcomes. Not only do the various forms of this lowered threshold test contradict the interpretation of other circuits—and so constitute a circuit split of the type to justify Supreme Court review[191]—but the lower standard is also contrary to Supreme Court precedent, and so should be reviewed as a matter of enforcing vertical stare decisis.

2. Disregarding the Evidentiary Burden

The second key dictate from *Nix* is the preponderance evidentiary burden. This language may sound contradictory with inevitability,[192] but the preponderance standard is the requisite level of proof that evidence would be inevitably found. It is in fact essential to giving meaning to the first dictate of inevitability. Nevertheless, some courts also manipulate the evidentiary burden by conflating or weakening this second dictate, thereby increasing the

188 *Id.* at 923.

189 *Id.*

190 *Id.* at 923.

191 *See, e.g.*, H.W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE U.S. SUPREME COURT 264 (1991) (describing the factors going into the cert review process, including the existence of a circuit split).

192 One court has aptly summed up this "wrinkle in the doctrine" as "the paradox of applying the preponderance of the evidence standard in the context of inevitable discovery." United States v. Heath, 455 F.3d 52, 58 n.6 (2d Cir. 2006); *see also* United States v. Cabassa, 62 F.3d 470, 474 (2d Cir. 1995) (acknowledging the "semantic problems in using the preponderance of the evidence standard to prove inevitability").

risk of misapplying the doctrine when the prosecution has not sufficiently proven inevitability.

Conflation is unsurprisingly most problematic, as it produces a doctrinal test that overtly contravenes *Nix* by distorting its two dictates. The Eleventh Circuit stands out in this regard, as its decisions in *United States v. Watkins* illustrate.[193] After previously applying a "reasonable probability" standard, the en banc court in *Watkins* corrected course and adopted a preponderance standard.[194] However, on remand of that case, the Eleventh Circuit immediately distorted the preponderance evidentiary burden in application by using it as the likelihood requirement (i.e., the first dictate), rather than as the evidentiary burden for inevitability.[195] The same judge authored both the course-correcting en banc opinion and the decision on remand, which would lead one to think that the decision on remand would have finally adhered to *Nix*. But it does not appear to be so.

On remand, the court wrote:

> The standard is not whether the evidence in fact "would have" been discovered, but whether the preponderance of the evidence indicates it would have been—whether it more likely than not would have been . . . . Instead of certainty, what the law requires in ultimate discovery determinations is only that it be more likely than not the evidence would have been discovered without the constitutional violation.[196]

This suggests that although the Eleventh Circuit finally overruled the manipulative reasonable probability standard, it might have been in name only, and now the two dictates of *Nix* have been conflated.[197] As a result, it is still not clear whether inevitability is actually required in that circuit.

Fortunately, this sort of conflation is not the norm. The more common evidentiary manipulation is in how courts inaptly implement the dictate: misapplication when considering multiple counterfactual contingencies to reach the inevitability conclusion. Applying a preponderance standard to each causal step is not the same as applying a preponderance standard to inevitability writ large because "even if each event in a series is individually more likely than not to happen, it still may be less than probable that the final

---

193 10 F.4th 1179 (11th Cir. 2021) (en banc).

194 *Id.* at 1181.

195 United States v. Watkins, 13 F.4th 1202, 1212, 1215 (11th Cir. 2021).

196 *Id.* at 1212 (citation omitted).

197 To this point, consider the critical nuance laid out in *United States v. Cabassa*, where the Second Circuit pointed out the difference "between proving by a preponderance that something would have happened and proving by a preponderance that something would inevitably have happened." 62 F.3d 470, 474 (2d Cir. 1995).

event will occur."[198] This should be obvious to anyone who understands basic statistics: if *X* is 55% likely to occur and *Y* is also 55% likely to occur, each is individually probable, but the chances of *X* and *Y* both occurring is only 30.25% (or the 55% probability of *X* multiplied by the 55% probability of *Y*). And yet, courts often aggregate series of contingencies—each contingency a close call when viewed in isolation—into generalized assessments to streamline the determination of whether the government has met the evidentiary burden.[199] Instead, those contingencies could, and should, be analyzed both separately and cumulatively to ensure the ultimate conclusion of inevitability is appropriate, or alternatively, to ascertain where further factfinding might be necessary.[200] To do otherwise allows for shortcut, and potentially slipshod, decisionmaking.

The Seventh Circuit's decision in *United States v. Eymann* exemplifies this tension.[201] Based on a tip, law enforcement suspected Eymann and Lyons of transporting marijuana in their small Cessna plane back from California.[202] After the codefendants landed at a rural airport, five officers followed them back to a hotel and stopped them to investigate.[203] Eymann admitted that he had a small, personal-use amount of marijuana.[204] Eymann's admission prompted the officers to call for a drug detection dog, which arrived twenty minutes later and found the small amount (2.5 grams) in the defendant's luggage.[205] The officers then arrested both defendants, seized the plane key from Lyons, and drove back to the airport.[206] The drug detection dog provided a positive alert on the plane, wherein they found sixty-five pounds of marijuana.[207]

The majority and dissent quarreled over inevitable discovery. The officers arguably did not have probable cause to arrest Lyons, as the quantity of marijuana discovered on Eymann was so small that it could not constitute

198 United States v. Vilar, 729 F.3d 62, 84 (2d Cir. 2013).

199 Ideally all "discretionary decisions of police officers qualify as 'one of the contingencies' necessary to establish inevitable discovery." United States v. Heath, 455 F.3d 52, 61 n.8 (2nd Cir. 2006).

200 *Cf.* United States v. Bradley, 959 F.3d 551, 558 (3d Cir. 2020) (remanding because "more information on police procedures . . . [was] needed before making a final determination on inevitable discovery"); United States v. Alston, 941 F.3d 132, 139 (4th Cir. 2019) (discussing how inevitability "requires adequate 'evidentiary support'" and that "a question too close to decide on the evidentiary record may require remand").

201 962 F.3d 273 (7th Cir. 2020).

202 *Id.* at 278-79.

203 *Id.* at 279-80.

204 Lyons, meanwhile, had fainted at the start of the encounter, so the officers placed him in the front seat of one of their cars with air conditioning. *Id.* at 280.

205 *Id.*

206 *Id.*

207 *Id.* at 281.

shared ownership,[208] and displaying nervousness when confronted by police was not out of the ordinary.[209] The panel therefore had to analyze whether the critical marijuana evidence discovered after the unlawful arrest and seizure of the plane keys could be admitted via inevitable discovery. Although both the majority and dissent acknowledged the preponderance standard, their applications of that evidentiary burden differed based on the development of the factual record.[210]

A primary point of disagreement for the panel was the drug detection dog's training and reliability—to this point, the defendants' state court charges had been dismissed because of the dog's lapse in certification.[211] Furthermore, the dog's handler had testified at the federal suppression hearing that "he would not have automatically deployed a drug-sniffing dog to the plane," which contradicted the testimony of other officers, thereby casting doubt over the likelihood of the search being inevitable.[212] Given the preponderance burden, the dissent concluded the best course was to remand the case for further factual findings to ensure the evidence "*would* have been discovered, as events actually unfolded, not hypothetically *might* have been discovered under a different and idealized set of circumstances."[213] Conversely, the majority believed the prosecution had met its evidentiary burden in proving the dog would have eventually searched the plane and discovered the critical evidence.[214]

Eymann illustrates how failure to properly weigh the preponderance standard can only skew in favor of prosecutorial interests. This contrasts with

---

208 *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979) ("[M]ere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."); Maryland v. Pringle, 540 U.S. 366, 373 (2003) (differentiating *Ybarra* because the commercial quantity of drugs was enough to justify an inference of joint ownership).

209 *See* United States v. Eymann, 962 F.3d 273, 287 (7th Cir. 2020) ("[M]ost people, when confronted by a police officer, are likely to act nervous, avoid eye contact, and even potentially shift their bodies as if to move away from the area." (quoting United States v. Williams, 731 F.3d 678, 687 (7th Cir. 2013))). The district court also relied on the disputed existence of a box being unloaded from the plane, as well as a discrepancy in the amount of cash Lyons said he had on him, to hold that there was probable cause to arrest Lyons. *Id.*

210 *Compare Eymann*, 962 F.3d at 288 n.2 ("The dissent believes that further development of this issue is needed in the district court. With respect, we see no critical gaps in the record that require filling." (citation omitted)), *with id.* at 299 (Hamilton, J., dissenting) ("The better course here would be to remand these cases to the district court for factual findings in the first instance, including thorough explorations of the dog's availability and reliability and whether the police could have lawfully searched the airplane without a warrant."). This disagreement likely stemmed in part from the district court never addressing inevitable discovery because it held there was probable cause for the arrest. *Id.* at 288 (majority opinion).

211 *Id.* at 281.

212 *Id.* at 297 (Hamilton, J., dissenting).

213 *Id.*

214 *Id.* at 290 (majority opinion).

the elements discussed in various forms of experimentation, which can aid either the prosecution or the defense when applied rigorously. Given that disregarding the preponderance standard is in direct violation of a core Supreme Court mandate in *Nix*, the decision of some circuit courts to nevertheless do so raises the question of whether that choice is driven by ideological, pro-prosecution preferences, rather than constituting a genuine attempt to interpret Supreme Court precedent.

* * *

The *Nix* Court deliberately calibrated two dictates of inevitability and the evidentiary burden. Recall the preponderance standard—laxer compared to the only other considered alternative, the clear and convincing burden—was explicitly justified by inevitability being a high threshold. When courts manipulate the doctrine by lowering the threshold for inevitability or preponderance, they undermine this careful calibration.

The Supreme Court's silence since *Nix* has enabled both experimentation and manipulation among the lower courts. Such distortion plainly necessitates Supreme Court intervention. But even within the realm of lower court experimentation, the wide breadth of interpretations among the circuits has reached a point where some have pushed their tests to inevitability's edges. Although omitting or weakening one of the optional elements that the *Nix* Court described—impeachable historical facts, independent active pursuit, and deterrence—may be permissible, omitting or weakening all three effectively guts the notion of inevitability. Accordingly, although experimentation is generally permissible, even experimentation across multiple elements can undermine the doctrine's mandate of assessing inevitability, and so is akin to manipulation. Both these trends indicate the need for the Supreme Court to clarify the doctrine.[215] The lack of guidance by the Court has enabled an erosion of constitutional protections, as we show next.

II. THE DOCTRINE IN ACTION: UNRAVELLING FOURTH AMENDMENT PROTECTIONS

The foundation of Fourth Amendment jurisprudence is that searches and seizures are presumed unreasonable unless prior authorization is obtained via warrant.[216] The Constitution specifies that all unreasonable searches and

215 *See infra* subsection III.B.2.

216 *See* Katz v. United States, 389 U.S. 347, 357 (1967) ("'Over and again this Court has emphasized' . . . that searches conducted outside the judicial process, without prior approval by

seizures are prohibited,[217] but rather than undertaking a reasonableness assessment in each case, the Court has built its jurisprudence around the claim that requiring a warrant and probable cause substitutes for reasonableness analysis.[218] By equating the warrant requirement with reasonableness, the Court has created a more efficient jurisprudence than case-by-case reasonableness analysis. But this approach makes the warrant and probable cause requirement even more vital if the Fourth Amendment is to provide meaningful protection. The Court has also developed a second route to de facto reasonableness through a variety of exceptions to the warrant and probable cause requirement.[219] When an exception applies, it is the limits on the exception that give meaning to the Fourth Amendment. This Part shows that inevitable discovery undermines both of those two bastions of Fourth Amendment protection: the warrant and probable cause requirement, and the limits on exceptions to that requirement.

As to the primary warrant route, inevitable discovery subverts this requirement, as it permits the admission of evidence even when police intentionally abstain from seeking a warrant by allowing the state to invoke a *hypothetically issued* search warrant to justify unlawful action. Problematically, this justification alters policing incentives. When a hypothetical warrant can backstop illegally discovered evidence through inevitable discovery, law enforcement is disincentivized from securing judicial sign-off ex ante. This, in turn, undermines the foundational goal of Fourth Amendment jurisprudence to encourage police to seek warrants prior to any search or seizure.[220]

As to the secondary exceptions route, inevitable discovery distorts those exceptions by effectively making their limits meaningless in many circumstances. Inevitable discovery allows the state to exploit exceptions even where their requirements have not been met—by creating a presumption that police, eventually, would have satisfied an alternative exception's

judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (citations omitted)).

217 U.S. CONST. amend. IV.

218 *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.").

219 Johnson v. United States, 333 U.S. 10, 14-15 (1948) ("There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with.").

220 *See* Katz v. United States, 389 U.S. 347, 357 (1967) ("Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police.'" (quoting Agnello v. United States, 269 U.S. 20, 33 (1925) and Wong Sun v. United States, 371 U.S. 471, 481-82 (1963))).

requirements. A particularly significant area of application, by sheer fact of the volume of cases, arises in the context of automobile searches, for which the Court has carefully crafted four exceptions to the warrant requirement. Inevitable discovery effectively discards many of the limits constraining those automobile exceptions by creating a loophole via counterfactual hypothetical inventory searches that law enforcement can invoke ex post. In particular, the interaction between inevitable discovery and the inventory search exception all but creates an assumption that warrantless vehicle searches are permitted.

The following two Sections examine inevitable discovery's relationship to each of these Fourth Amendment foundations in turn.

A. *Hypothetical Search Warrants*

The Supreme Court's mantra in Fourth Amendment law has historically been: when in doubt, get a warrant.[221] But once inevitable discovery is factored in, the Court has a new, unstated version of its philosophy: when in doubt, get a warrant, but if not, no worries, just claim you could have obtained one if you had tried.

A valid search warrant requires probable cause.[222] Ordinarily, law enforcement makes an initial probable cause determination while in the field and then confirms their determination by seeking a warrant from a judge.[223] This process ensures that law enforcement's probable cause inferences have the endorsement of a "neutral and detached magistrate," a more steadfast form of protection than relying on the assessment of "zealous officers" who are engaged in the "competitive enterprise" of investigation.[224] The two central pillars of Fourth Amendment protection, then, are first, that review is provided by a neutral party, not part of the executive, and second, that review be conducted prior to any search or seizure, unless some exception applies that renders ex ante review impractical.[225]

Inevitable discovery can throw this balance into disarray by compromising both of these elements. Even when law enforcement fails to comply with some element of the warrant process at the outset, inevitable discovery gives the state an opportunity to argue it *could have* and *would have* obtained proper

---

221 *See supra* notes 218 and 220 accompanying text; *see also* Riley v. California, 573 U.S. 373, 403 (2014) (describing the proper procedure as "simple—get a warrant").

222 Courts define probable cause as meaning a "fair probability that contraband or evidence of a crime will be found in a particular place." *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 238 (1983).

223 Johnson v. United States, 333 U.S. 10, 13-14 (1948).

224 *Id.*

225 Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325-26 (1979) (explaining how without "a warrant authorized by a neutral and detached judicial officer," searches would be "reminiscent of the general warrant . . . of the 18th century against which the Fourth Amendment was intended to protect").

judicial sign-off. In this way, the state can admit otherwise illegally obtained evidence through a *hypothetical search warrant* in the counterfactual world that inevitable discovery affords, thus giving the state a second bite at the apple.[226]

The Fifth Circuit's decision in *United States v. Jackson* provides a paradigmatic example of inevitable discovery's hypothetical search warrant.[227] After a federal grand jury indicted Jackson for drug conspiracy charges, law enforcement went to Jackson's home with a federal arrest warrant and state search warrant in hand.[228] Officers entered the home, arrested Jackson, and discovered a bag of marijuana after observing Jackson place something under the couch where he was sitting.[229] The officers then continued searching the rest of the residence and outdoor area surrounding the home, the latter revealing chemicals and manufacturing equipment.[230] Jackson argued that the state search warrant relied on incorrect and incomplete information to the effect that the warrant was "bare bones," meaning the good-faith exception could not salvage law enforcement's reliance on it.[231] But rather than grapple with the good-faith argument, the Fifth Circuit instead applied inevitable discovery and relied on a hypothetical federal search warrant in lieu of the faulty state search warrant.[232]

The panel first explained that the marijuana under the couch was admissible pursuant to a search incident to arrest since the arrest warrant still gave the officers lawful authority to arrest Jackson and the drugs were within reach.[233] This determination led the panel to infer that "once the officers found the marijuana, probable cause existed to obtain a search warrant," thereby implying the marijuana alone might have been sufficient to apply inevitable discovery.[234] But the court did not stop there: it further concluded that the materials found outside the home were admissible pursuant to the plain view exception, such that they also could be "used as evidence of probable cause in support of a warrant."[235] Having identified this probable cause, the court concluded that it had "little doubt that the officers nonetheless could have secured a [federal] search warrant and conducted the

226 One might think of inevitable discovery in this context as delaying judicial review of the probable cause determination from *before* the search to *after* the search with the benefit of hindsight.

227 596 F.3d 236 (5th Cir. 2010).

228 *Id.* at 238-39.

229 *Id.* at 239.

230 *Id.*

231 See *id.*; *see also* Brief for the United States at 24, *Jackson*, 596 F.3d 236 (No. 07-30981).

232 *Jackson*, 596 F.3d at 242.

233 *Id.* at 241.

234 *Id.*

235 *Id.* at 242. Notably, the Fifth Circuit did not consider the fact that once the officers had arrested Jackson, they no longer had authority to continue searching around the outside of the house for the plain view exception to trigger in the first place. Nor did the court consider how its decision would affect future incentives for seeking warrants—i.e., deterrence.

search that yielded the disputed evidence."[236] Inevitable discovery therefore applied.[237]

We analyze the strengths and weaknesses of these determinations after introducing a useful taxonomy that Judge Posner laid out for analyzing when inevitable discovery analysis should be undertaken in such cases. Judge Posner identified three plausible judicial approaches for hypothetical search warrant arguments, each of which bears differently on police incentives to seek out warrants in the future.[238] First, a court could *always* apply inevitable discovery when presented with a scenario where police had probable cause to obtain a warrant, "for if they would have obtained one had they asked, why should a defendant benefit from their failure to ask?"[239] Second, on the other end of the spectrum, a court could *never* apply inevitable discovery in such a situation so as to avoid creating a perverse incentive for the police to avoid the bother of seeking ex ante approval, as they are required to do.[240] Third, an intermediate approach exists where inevitable discovery could *sometimes* apply, which empowers judges to seek a balance between over- and under-deterring police.[241]

The first per se approach of always applying inevitable discovery when police have probable cause to obtain a hypothetical warrant is untenable to Judge Posner: such an approach would obviate the requirement that police obtain a warrant prior to acting because police would no longer seek warrants "to avoid the risk that the application would be denied."[242] Instead, police could always justify searches after the fact by invoking a hypothetical warrant, thereby subverting the warrant requirement's prophylactic protections. Although this approach has conditional approval from at least one sitting federal appellate judge,[243] no court has yet to adopt it. Yet, it is worth articulating because the same incentive problem arises, albeit to a lesser extent, when permitting inevitable discovery some of the time, as most courts do.

The second per se approach—never applying inevitable discovery to hypothetical search warrants—has been adopted by the Ninth Circuit because

---

236 *Id.*

237 *Id.*

238 *See* United States v. Tejada, 524 F.3d 809, 813 (7th Cir. 2008).

239 *Id.*

240 *Id.*

241 *Id.*

242 *Id.*

243 After describing this approach as "limiting the exclusionary rule to searches conducted without probable cause," Judge Easterbrook wrote, "[p]erhaps that would be a good development . . . . [b]ut whether to trim the exclusionary rule in this fashion is a decision for the Supreme Court rather than a court of appeals." United States v. Elder, 466 F.3d 1090, 1091 (7th Cir. 2006).

of this adverse impact on police incentives.[244] As discussed in *United States v. Lundin*, admitting evidence pursuant to hypothetical search warrants "encourage[s] officers never to bother to obtain a warrant."[245] Moreover, a prohibition on hypothetical warrants has the benefit of simple administrability because it eliminates the need for any counterfactual speculation. This approach, however, is not without its shortcomings. It arguably overprotects Fourth Amendment rights by foreclosing the admission of evidence even when law enforcement is on the verge of obtaining a warrant and backed by overwhelming probable cause, meaning the requisite counterfactual speculation is minimal. This arguably contradicts the *Nix* decision. Accordingly, most federal courts have declined to adopt this rule.

The third approach of applying inevitable discovery on a case-by-case basis is most widely followed. Its attractiveness lies in its flexibility. By empowering judges to assess hypothetical search warrants individually, this approach has the benefit of avoiding the over-inclusivity of a per se rule while still allowing judges to weigh any potential impact on police incentives. The catch, then, is developing frameworks that comply with the dictates from *Nix*: applying inevitable discovery only when it is truly inevitable, as measured by a preponderance of the evidence, such that a judge would have issued the hypothetical search warrant.

The downside of this approach is that it necessarily demands judgment and interpretation, introducing the potential for subjectivity and inconsistency. This is a particularly acute problem given the lack of Supreme Court precedent and oversight. As discussed above, a central pillar of modern Fourth Amendment jurisprudence is deterrence of police misconduct.[246] Yet hypothetical search warrants threaten the core of our constitutional protections by potentially disincentivizing police from seeking out warrants. Thus, any inevitable discovery test that fails to consider police incentives—i.e., deterrence—is particularly prone to admit evidence that effectively encourages future unlawful police behavior.

Further complicating this intermediate approach is that hypothetical search warrants require counterfactual speculation not only about whether police officers would have sought a warrant, but also about the actions of third

---

244 *See, e.g.*, United States v. Young, 573 F.3d 711, 723 (9th Cir. 2009) ("[O]ur court has stated in no uncertain terms that 'to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment.'" (quoting United States v. Echegoyen, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986))); United States v. Baires-Reyes, 750 F. App'x 548, 550 (9th Cir. 2018) ("[T]he inevitable discovery exception does not apply when officers have probable cause to apply for a warrant but simply fail to do so." (internal quotation marks omitted)).

245 817 F.3d 1151, 1162 (9th Cir. 2016).

246 *See supra* subsection I.B.3.

parties including the defendant, potential confederates, and even the magistrates who consider those hypothetical warrant applications. A series of inferences must be made to reach the conclusion that a hypothetical search warrant can serve as the predicate for inevitable discovery: Was the probable cause sufficient? If not, could it have been by the time such a hypothetical search warrant was sought? How soon after the discovery of probable cause would police have sought a warrant? Would the warrant have sufficiently satisfied both place and content particularity? These questions can appear straightforward, especially when they involve judges speculating about the actions of similarly situated counterparts as opposed to unfamiliar actors.[247] But a hypothetical search warrant requires establishing both that the state could have, and would have, obtained the warrant. This is a conclusion that should only rarely be simple in application.

Within this middle ground, most circuits treat hypothetical search warrants like any other inevitable discovery scenario and apply their standard doctrinal test. This has led to highly varied and even contradictory approaches under the doctrine of inevitable discovery, as discussed in Part I.[248] Even more concerning, the amount of experimentation and manipulation in some lower court approaches has risen to such a level that, while ostensibly fitting in Judge Posner's third category, it actually borders on the first category in application. Lower courts can hide their disobedience to *Nix* under the guise of a case-by-case approach, which compounds the strengths and weaknesses of the circuits' respective tests because hypothetical warrants amplify incentive issues and necessitate attenuated conjecture.

The Fifth Circuit's decision in *United States v. Jackson* illustrates the dichotomy between this test's facial simplicity and its underlying complexity.[249] In *Jackson*, the three-judge panel applied the Fifth Circuit's usual inevitable discovery test, which requires (a) the reasonable probability element, and (b) the largely meaningless element of active pursuit.[250] Recall in *Jackson*, law enforcement had relied on a faulty state search warrant.[251] Nevertheless, the disputed evidence was admitted under an inevitable discovery theory of a hypothetical federal search warrant premised on probable cause consisting of a single bag of marijuana under the couch and methamphetamine manufacturing equipment found outside the home.[252]

---

247 *See supra* notes 99-102 and accompanying text (discussing third-party actors in *United States v. Stokes*).

248 *See supra* Part I.

249 596 F.3d 236 (5th Cir. 2010).

250 *Id.* at 241-42.

251 *Id.* at 242.

252 *Id.* at 241-42.

The court, however, failed to base its analysis on a counterfactual world absent the illegal action. As Jackson aptly argued, if law enforcement had arrived at Jackson's home only with the federal arrest warrant—the appropriate counterfactual given the state search warrant's presumed deficiency—there would have been no grounds to continue searching outside the house after having arrested Jackson.[253] And without the methamphetamine evidence found outside, the police would not have had sufficient probable cause to obtain the hypothetical search warrant. In essence, the court employed circular logic to premise the hypothetical search warrant in part on evidence that should have only arisen if that warrant had already been granted.

An alternative argument nevertheless remained an option: that the bag of marijuana alone could serve as probable cause for the hypothetical warrant, since it was discovered pursuant to the search incident to arrest exception.[254] The United States pointed this out in its brief, yet their argument was bare-bones and conclusory, as the prosecution did not offer any further support that the agents would have sought the warrant.[255] The court similarly failed to explain its counterfactual speculation beyond whether sufficient probable cause existed—i.e., the analysis stopped at whether the police *could have* sought the warrant, failing to address whether they indeed *would have*. Instead, the Fifth Circuit pieced together these missing details *sub silentio* within its reasonable probability analysis.[256] Like the government's brief, the court simply assumed the necessary chain of events would have occurred without querying whether there were any confounding factors. For example, the court did not consider whether there might be any adverse effect on the likelihood of successfully obtaining a warrant when it would have been sought

253 *Id.* at 242.

254 After having originally discussed the manufacturing equipment evidence as part of its probable cause determination, the court observed this counterargument but dismissed it without actually addressing its merits, thereby effectively relying on the manufacturing evidence only to further the ultimate inevitable discovery conclusion. *Id.*

255 The United States simply argued that "[o]nce the officers found the marijuana under the couch, they could have sought and obtained a warrant on the basis of that evidence, since that would have supplied probable cause that other areas of Jackson's residence, particularly the locked safe located in the same room, contained drugs or drug paraphernalia." Brief for the United States at 36, *Jackson*, 596 F.3d 236 (No. 07-30981).

256 *See Jackson*, 596 F.3d at 242 ("[T]he officers did not seek a search warrant based on the evidence which could have been seized pursuant to the arrest warrant because they already had a state search warrant. But, had they had reason to question the validity of the state search warrant or had there been no state search warrant, we have little doubt that the officers nonetheless could have secured a search warrant and conducted the search that yielded the disputed evidence.").

by the same officers who had already supplied an allegedly deficient affidavit.[257]

The second prong of the Fifth Circuit's test, the active pursuit element, did not help guide the panel's speculation either. The court curtly dismissed the active pursuit requirement by first questioning its "continuing vitality" and then summarily concluding that, as applied to the specifics of this case, an "ongoing grand jury investigation . . . would clearly satisfy it."[258] The court also did not contemplate any potential impact on future police incentives to proactively seek lawful search warrants. In sum, rather than weighing those incentives, or analyzing whether it was truly inevitable that law enforcement would have obtained the lawful search warrant, the panel only grappled with whether sufficient probable cause existed. The court equated having adequate probable cause with satisfying the warrant requirement, by presuming the former constituted all of the elements of the hypothetical search warrant, and thus inevitable discovery.

Not all circuits' tests offer such ineffectual constraints in the context of hypothetical search warrants.[259] Tests that already include elements weighing deterrence better handle these warrant arguments by expressly considering the impact on police incentives, thereby safeguarding the heart of Fourth Amendment protection. This need not be an ideological divide between the circuits either, as deterrence elements do not always cut in favor of defendants. Rather, examining the impact on incentives can also strengthen a determination of inevitability by substantiating the court's counterfactual speculation.[260]

Compare, for instance, the Fifth Circuit's *Jackson* decision with the Third Circuit's *Stabile* decision. Recall from Part I, law enforcement in *Stabile* relied on a faulty federal search warrant in obtaining key pornography evidence.[261] Nonetheless, the Third Circuit admitted the evidence under a hypothetical search warrant theory.[262] First, in contrast to *Jackson*, the *Stabile* court

---

257 Notably, the affiant of the initial search warrant had previously misled a judge about a search warrant affidavit and the affiant did not disclose that detail when seeking the state search warrant of Jackson's residence. *See* Brief for Appellant at 9, *Jackson*, 596 F.3d 236 (No. 07-30981).

258 *Jackson*, 596 F.3d at 242.

259 *See, e.g.*, United States v. Quinney, 583 F.3d 891, 894 (6th Cir. 2009) (rejecting inevitable discovery because it would "obviate the warrant requirement").

260 *See, e.g.*, United States v. Figueredo-Diaz, 718 F.3d 568, 577-78 (6th Cir. 2013) (assessing police incentives before applying inevitable discovery).

261 *See* United States v. Stabile, 633 F.3d 219, 245 (3d Cir. 2011) ("[T]he first federal search warrant was invalid because it mistakenly authorized a search of the 40 GB hard drive rather than the 120 GB hard drive. The second federal search warrant was invalid because it relied on evidence obtained from the unlawful search of the 40 GB hard drive.").

262 *See supra* notes 146–151 and accompanying text; *Stabile*, 633 F.3d at 245-46 ("A lawful search of the 120 GB hard drive would have led to the videos of child pornography . . . . These videos, in turn, would have provided probable cause to obtain federal search warrants to search Stabile's five

expressly observed that it was "viewing affairs as they existed at the instant before the unlawful search" when assessing whether sufficient probable cause existed.[263] Since a lawful search had already yielded "lurid file names and at least one video of child pornography," the court concluded sufficient probable cause existed for the warrant.[264] The decision then combined its consideration of whether law enforcement would in fact have sought the warrant with its consideration of deterrence. Because the officers had "attempted to secure state and federal search warrants at every step" of the search process, the court concluded that the hypothetical search warrant would have been sought by the police, would have been issued by a magistrate, and would not have provided a disincentive to seeking future warrants.[265] The deterrence prong of the Third Circuit's test thus proved meaningful to protecting against the dangers underlying hypothetical search warrants.

Whereas most circuits apply their standard tests to this issue, the Tenth Circuit has developed an element specifically designed for hypothetical search warrants, further illustrating the wide range of middle ground approaches.[266] The Tenth Circuit adds a four-factor balancing test to mitigate the special incentive and inevitability challenges inherent in a hypothetical warrant scenario. This four-factor test considers: (1) the extent to which the warrant process has been completed; (2) the strength of the probable cause showing; (3) whether a warrant was eventually obtained, even after a violation; and (4) "evidence that law enforcement agents 'jumped the gun' because they lacked confidence in their showing of probable cause and wanted to force the issue by creating a fait accompli."[267] Note that this balancing test directly flows from *Nix*: the first three factors effectively weigh inevitability, and the first and fourth factors contemplate deterrence.

The Tenth Circuit's decision in *United States v. Christy* usefully demonstrates the pertinence of this deterrence analysis.[268] The defendant and a sixteen-year-old girl, K.Y., had exchanged sexually explicit emails and photos after meeting on a dating website.[269] Believing the minor's father was abusive, Christy picked K.Y. up from her home in California and brought her

remaining hard drives for evidence of child pornography, including the illegally searched 40 GB hard drive.").

263 *Id.* at 246 (internal quotation marks omitted).

264 *Id.*

265 *Id.*

266 *See, e.g.*, United States v. Christy, 739 F.3d 534, 541 (10th Cir. 2014) (describing the *Souza* factors, which contemplate "how likely it is that a warrant would have been issued and that evidence would have been found pursuant to that warrant" (quoting United States v. Souza, 223 F.3d 1197, 1204 (10th Cir. 2000) (internal quotation marks omitted))).

267 *Id.* (citing *Souza*, 223 F.3d at 1204).

268 *Christy*, 739 F.3d at 537-44.

269 *Id.* at 537.

to his home in New Mexico.[270] The minor's parents reported her missing, and federal agents traced her phone records.[271] Law enforcement went to Christy's residence to conduct a welfare check on the minor.[272] The officers forced entry, arrested Christy, and found pornographic materials.[273] But only later on, after taking Christy's statements in custody, did the officers obtain and execute a search warrant, which led to further child rape pornography evidence.[274]

Christy moved to suppress the evidence obtained from the warrantless search of his home.[275] After the district court denied suppression on a hypothetical search warrant theory,[276] the Tenth Circuit applied its four-factor test. Christy conceded the third factor because a warrant was ultimately obtained, and the prosecution conceded that the first factor was not present, since the officers had made no effort to obtain a warrant before the illegal search.[277] Christy pressed on the government's concession by arguing that the first factor was a necessary condition to apply inevitable discovery—at least a minimal effort toward obtaining a warrant should underlie a hypothetical search warrant.[278] The panel rejected this argument, concluding that the first factor merely aided in determining whether a warrant would eventually have been procured.[279] The court reasoned it could not be a necessary condition because of how it might shape incentives, where police could "easily initiate the warrant process with no intention of seeing it through, knowing they have satisfied a prerequisite to inevitable discovery, and conduct a search before the warrant is issued or denied."[280]

The Tenth Circuit also concluded that the second and fourth factors weighed in favor of the government. As to the second factor, the panel credited the district court's determination that sufficient probable cause existed because the officers knew that K.Y. was a minor and that she and Christy had exchanged sexually explicit pictures.[281] As to the fourth factor, the panel again credited the district court's conclusion that the agents had not

---

270 *Id.*

271 *Id.* at 537-38.

272 *Id.* at 538.

273 *Id.*

274 *Id.*

275 *Id.*

276 Notably, however, the district court initially granted Christy's suppression motion. Only upon a motion for reconsideration by the government did the district court reverse course, holding the illegally seized evidence was admissible under inevitable discovery. *Id.* at 538-39.

277 *Id.* at 542.

278 *See id.* (arguing that the officers in this case took no steps to obtain a warrant before the allegedly illegal search).

279 *Id.* at 542-43.

280 *Id.* at 543 n.5.

281 *Id.* at 542.

"jumped the gun."[282] But rather than weighing this factor in the context of future police incentives, the court instead considered the past incentives of law enforcement in the case at hand, finding that "no evidence support[ed] the theory that the deputies forced entry for that reason."[283]

The Tenth Circuit's hypothetical warrant-balancing test is imperfect. For instance, there is an inherent tension in the court's dual conclusions that agents could simultaneously identify a dangerous situation—meaning they had not "jumped the gun" for the purposes of the fourth factor—and that the search could not be justified under exigent circumstances. However, adding the deterrence element ultimately furthers *Nix*'s aim of neither under- nor over-deterring police. Additionally, by analyzing the likelihood of a hypothetical warrant actually being issued, this test furthers *Nix*'s goal that the doctrine be applied only to a finding of inevitability. Accordingly, it is best categorized as doctrinal experimentation, akin to those elements discussed in Part I.

Finally, among all the circuits that apply the middle ground case-by-case approach to hypothetical search warrants, the Tenth Circuit's test is the exception in that it recognizes the unique concerns raised by hypothetical warrants. Every other circuit, save the Ninth Circuit's per se rule, simply applies its standard inevitable discovery test to hypothetical warrants despite the inherent logical difficulties and the danger of hypothetical warrants.[284] This practice effectively undercuts the ex ante warrant requirement.

B. *Interaction with Inventory Searches*

Although warrants serve as the primary operational route of Fourth Amendment jurisprudence, the Court has also crafted numerous exceptions to this foundational requirement.[285] The crux of this exceptions-based framework is that when an exception applies, it is the exception's contours that define the substance of the Fourth Amendment. And yet, the combination of inevitable discovery and inventory searches makes those substantive inquiries lose much of their bite.

---

282 *Id.*

283 *Id.*

284 The Seventh Circuit's *Tejada* decision purportedly adopted a requirement of "sureness" in the context of hypothetical search warrants, but at bottom, that requirement is no different than the Seventh Circuit's usual requirement of inevitability. *Compare* United States v. Tejada, 524 F.3d 809, 813 (7th Cir. 2008) ("A requirement of sureness—of some approach to certainty—preserves the incentive of police to seek warrants where warrants are required without punishing harmless mistakes excessively."), *with* United States v. Marrocco, 578 F.3d 627, 640 n.24 (7th Cir. 2009) (discussing *Tejada* and the Seventh Circuit's test in comparison to other circuits' tests)

285 *See* Katz v. United States, 389 U.S. 347, 357 n.19 (1967) (specifying some of the "established and well-delineated exceptions" to the warrant and probable cause requirement).

There is extensive academic and judicial attention given to the significance of changing the contours of the numerous warrant or probable cause exceptions.[286] By contrast, academic debates have largely sidelined the inventory search doctrine.[287] This may be because the inventory search exception deals with the mundane, quotidian issue of the bureaucratic process for conducting routine searches, most of which all look the same. But, in fact, the inventory search exception is of great consequence. The exception is widely applied, as inventories occur every time anyone is processed after arrest and every time a car is impounded. Additionally, the exception works in conjunction with inevitable discovery to effectively make much of the detail of all of those other exceptions largely irrelevant. Accordingly, by focusing on the seemingly meaty exceptions that deal directly with what police can and cannot do when searching, seizing, or arresting a person, the literature is missing how much of that becomes irrelevant due to a largely ignored and seemingly insignificant exception: inventory searches.

Inventory searches are systematically imposed on every booked person and each car towed. Accordingly, the searches arguably constitute lawful dragnets.[288] As the name suggests, these searches consist of inventorying the contents on a person or in an automobile; they occur either immediately before incarcerating an arrestee, or as applied to automobiles, prior to impoundment. The purpose underlying these searches is twofold: first, to safeguard others from dangerous objects, and second, to make an accurate accounting of personal items to prevent both real and false claims of stolen property.[289]

---

286 For a couple recent examples, see generally Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 TEX. L. REV. 447 (2021) and Matthew Tokson, *The Aftermath of* Carpenter*: An Empirical Study of Fourth Amendment Law, 2018-2021*, 135 HARV. L. REV. 1790 (2022).

287 The scant attention it has received in the last twenty years has primarily come from student comments. *See generally* Jennifer Kirby-McLemore, Comment, *Finishing What* Gant *Started: Protecting Motorists' Privacy Rights by Restricting Vehicle Impoundments and Inventory Searches*, 84 MISS. L.J. 179 (2014); Megan Pauline Marinos, Note, *Breaking and Entering or Community Caretaking? A Solution to the Overbroad Expansion of the Inventory Search*, 22 GEO. MASON U. C.R.L.J. 249 (2012); Chad Carr, Comment, *To Impound or Not to Impound: Why Courts Need to Define Legitimate Impoundment Purposes to Restore Fourth Amendment Privacy Rights to Motorists*, 33 HAMLINE L. REV. 95 (2010); Nicholas B. Stampfli, Comment, *After Thirty Years, Is It Time To Change The Vehicle Inventory Search Doctrine?*, 30 SEATTLE U. L. REV. 1031 (2007).

288 *See* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 303 (2011) ("In substance, inventory searches are a special type of dragnet search . . . ."). Ordinarily, dragnets are anathema to the Fourth Amendment's proscription against general warrants. *See, e.g.*, Maryland v. King, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting) ("Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime.").

289 *See* Colorado v. Bertine, 479 U.S. 367, 373 (1986) (discussing the governmental interests underlying the inventory search exception).

The Court has emphasized that an essential feature of inventory searches is constraint of officer discretion, as law enforcement must follow "standardized criteria" in conducting these searches.[290] Yet, in circular fashion, the Court has simultaneously deferred to law enforcement to preestablish these standardized protocols.[291] Inventory searches are thus administrative and ostensibly rigid, but that rigidity is self-defined.

These characteristics interact with inevitable discovery in a problematic manner. When officers engage in an unconstitutional search or seizure, inevitable discovery can apply if an inventory search necessarily would have followed the violation and revealed the evidence or information. For example, if an officer exceeds the bounds of a search incident to arrest, inevitable discovery can apply in conjunction with the subsequent inventory search (or if an inventory search could have been done) where the arrestee search at the stationhouse or the automobile search prior to impoundment provides the lawful basis to excuse the violation as inconsequential.

Two traits of inventory searches make the exception especially amenable to the counterfactual speculation necessary to apply inevitable discovery: regularity and standardization. Officers will routinely search an arrestee prior to incarceration, and similarly, officers almost always search impounded vehicles to inventory the contents.[292] Police officers are incentivized to conduct these searches regularly, as inventories both provide an opportunity to find additional evidence and reduce safety risks.[293] Additionally, how police

---

290 *Id.* at 374 n.6.

291 *Cf. id.* at 376 n.7 (describing the police directives). Indeed, Justice Marshall's dissent argues that deferring to the police's own criteria undermines "clear prohibitions on unfettered police discretion," as evidenced by the fact that the record in the case directly contradicted the court's claim to be constraining such discretion. *Id.* at 378 (Marshall, J., dissenting). The officer in the case testified "that the decision not to 'park and lock' [the defendant's] vehicle was his 'own individual discretionary decision.'" *Id.* (internal citations omitted). As such, "application of these supposedly standardized 'criteria' upon which the Court so heavily relies would have yielded a different result in this case." *Id.*

292 *See* John M. Wray, Note, *The Inventory Search and the Arrestee's Privacy Expectation*, 59 IND. L.J. 321, 321 (1984) (describing arrestee inventories as "standard procedure"); 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.4(a) (6th ed. 2020) (describing vehicle inventories by police officers as "common practice" for vehicles that they have taken into custody or are about to impound).

293 Indeed, safety and "preservation" of evidence are the two key justifications for the exception. As the Court stated in *South Dakota v. Opperman*,

> In the interests of public safety and as part of what the Court has called "community caretaking functions," automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities.

428 U.S. 364, 368-69 (1976) (citation omitted).

officers conduct these searches is typically standardized—preestablished administrative procedures guide the search so that officers thoroughly account for all personal property, thereby limiting officer discretion. This lack of variation makes the doctrine seem mechanical, and this is likely another reason that the literature has largely ignored this exception. Yet, because inventory searches occur with near certain regularity and standardization, inventory searches shape the application of Fourth Amendment law far more than their banality suggests. Further, in deferring to law enforcement to establish inventory protocols, courts effectively empower police to define the limits of the inventory search exception. This means that the Court has enabled police to create their own rules that are then enshrined as the purported contours of the exception.

This doctrinal deference stands in stark contrast to the Court's attitude towards other Fourth Amendment exceptions. For example, in *Riley v. California*, the Court considered the rise in digital searches incident to arrest.[294] The Court stressed that deference to law enforcement protocols might sound like a "good idea, but the Founders did not fight a revolution to gain the right to government agency protocols."[295] And there is good reason for courts to have skepticism of police officers defining the limits of their own power: the purpose of the Fourth Amendment is to place *external* constraints on state power to search and seize, not to leave such constraints to the internal judgment of those "engaged in the often competitive enterprise of ferreting out crime."[296]

This self-defining feature distinguishes inventory searches from other exceptions. Moreover, this judicial deference not only enables the inventory search doctrine to develop in the mold preferred by police officers, but it also empowers law enforcement to determine the extent of *other* Fourth Amendment exceptions. In certain cases, this stands in direct conflict with existing precedent. The following two subsections explore this interaction, first in the context of arrestee booking searches and then in the context of automobile searches.

---

294 573 U.S. 373 (2014).

295 *Id.* at 398. Ironically, some student commentators have already suggested that inevitable discovery might very well undermine *Riley*. *See, e.g.*, Parker Jenkins, Comment, *OMG—Not Something to LOL About: The Unintended Results of Disallowing Warrantless Searches of Cell Phones Incident to a Lawful Arrest*, 31 BYU J. PUB. L. 437, 467 (2017); Erica L. Danielsen, Note, *Cell Phone Searches After* Riley*: Establishing Probable Cause and Applying Search Warrant Exceptions*, 36 PACE L. REV. 970, 993-94 (2016).

296 Johnson v. United States, 333 U.S. 10, 14 (1948).

1. Booking Searches

The status of arrestee inventory searches as an exception to the warrant and probable cause requirement derives from the exception relating to searches incident to arrest. The latter exception permits police to immediately search someone upon arrest to ensure officer safety and prevent evidence destruction.[297] Following that logic, the inventory search is essentially "an incidental administrative step following arrest and preceding incarceration."[298] It is thus equally lawful to also search the arrestee at the stationhouse.

The inventory search, however, permits more intrusion than this analogy implies. A search incident to arrest is limited in two respects: (1) geographically, to the person and the area within their immediate control, and (2) temporally, to the moment and location of the arrest itself.[299] Inventory searches, in contrast, do not share those restrictions. Although the geographic scope largely overlaps, given both searches primarily target the person, stationhouse inventory searches can include items that were not within the arrestee's immediate control, such as luggage or personal items that were out of reach at the time of arrest but brought with the arrestee by the police officers to the stationhouse.[300] Inventory searches are also not limited temporally in the same way, as they can be conducted at any point in time following the arrest so long as they are permitted by inventory procedure.[301] Combined with inevitable discovery, the less limited nature of inventory searches effectively removes the geographic and temporal restrictions purportedly constraining the search incident to arrest doctrine, such that even when an arresting officer conducts a search incident to arrest that exceeds its lawful bounds, the interaction of the previous two doctrines provides lawful cover.

---

297 *See* United States v. Robinson, 414 U.S. 218, 235 (1973) ("The authority to search the person incident to a lawful custodial arrest [is] based upon the need to disarm and to discover evidence . . . .").

298 Illinois v. Lafayette, 462 U.S. 640, 644 (1983). To this point, the caselaw prior to the formal adoption of inventory search doctrine authorized stationhouse searches under the search incident to arrest doctrine. *See, e.g.*, United States v. DeLeo, 422 F.2d 487, 491-92 (1st Cir. 1970); United States v. Miles, 413 F.2d 34, 41 (3d Cir. 1969).

299 *See* Marissa Perry, Note, *Search Incident to Probable Cause?: The Intersection of* Rawlings *and* Knowles, 115 MICH. L. REV. 109, 110–11 (2016) (describing the limitations of the search incident to arrest exception). Arrestee inventory searches almost universally occur at the stationhouse, but as we will explore in the automobile context, *see* discussion *infra* subsection II.B.2, there is no formal limitation on where inventory searches must occur other than what police procedure prescribes.

300 *See* Wray, *supra* note 292, at 322-23 (explaining how police act as "bailees" for arrestee inventory searches where all items are examined and then surrendered back upon release).

301 The reasoning behind this expanded privacy intrusion includes both an immediate concern for officer safety and deterrence against false claims of theft and theft itself. *Lafayette*, 462 U.S. at 646-47.

United States v. Peterson illustrates this effect.[302] Police arrested Peterson on two outstanding misdemeanor warrants when he was walking in King County, Washington.[303] After securing Peterson in a patrol car, the officers found a handgun in the backpack that Peterson had left on the ground per police orders.[304] Peterson then repeatedly resisted arrest throughout the transport to the station, and he was ultimately charged as a felon in possession of a firearm.[305] In adjudicating the admissibility of the handgun, the district court held that the backpack search could not be justified as a search incident to arrest because Peterson was secured in the patrol car and had no way of accessing the backpack that was fifteen to twenty feet away.[306] Nevertheless, the district court denied Peterson's motion to suppress the gun on the grounds that it would have been inevitably discovered at the inventory search during the booking process.[307]

The Ninth Circuit affirmed and, in doing so, shed light on how the interaction between inventory searches and inevitable discovery affords law enforcement great flexibility.[308] The court acknowledged that the misdemeanor warrants alone could not justify the inventory search; under Washington state law, arrestees capable of posting bail do not face incarceration, and Peterson had presented sufficient evidence of his ability to post his bail bond.[309] So in a counterfactual world, absent the firearm discovery and premised solely on the misdemeanor warrants, Peterson would have avoided the arrestee inventory search.

But the court did not limit its imaginings to those facts. Instead, it also "credited the arresting officer's testimony that he 'absolutely' would have booked Peterson on obstruction of law enforcement officers and resisting arrest charges,"[310] even though the law enforcement officers had not charged Peterson with those crimes at booking. Nevertheless, the court deferred to the officer who testified "it was standard practice to book arrestees only on

---

302 902 F.3d 1016 (9th Cir. 2018).

303 *Peterson*, 902 F.3d at 1018; Answering Brief of the United States at 3, *Peterson*, 902 F.3d 1016 (No. 17-30084) [hereinafter Answering Brief of the United States, *Peterson*].

304 *Peterson*, 902 F.3d at 1018; Answering Brief of the United States, *Peterson*, *supra* note 303, at 5-7.

305 *Peterson*, 902 F.3d at 1018.

306 *Id.* at 1019; Answering Brief of the United States, *Peterson*, *supra* note 303, at 10.

307 *Peterson*, 902 F.3d at 1018.

308 *Id.* at 1020.

309 *See id.* ("Revised Code of Washington section 10.31.030 provides that, when someone is arrested under the authority of a warrant, the arresting officer must provide the arrestee with notice of the charge and the amount of bail set by the warrant. An inventory search conducted before an arrestee is provided the information required by section 10.31.030 is unlawful." (citation omitted)).

310 *Id.*

felony charges when both felony and misdemeanor charges are available."[311] So the court deemed the proper counterfactual to be one where Peterson was booked for additional resisting arrest charges for which he could not have paid bail—a counterfactual solely predicated on officer testimony given with the benefit of hindsight.[312] Based on these assumptions, the court concluded that Peterson could not have avoided incarceration, and so his backpack would have been subject to an inventory search such that the firearm was admissible pursuant to inevitable discovery.[313]

Peterson illustrates both the allure and drawback of inevitable discovery premised on an inventory search. On the one hand, the court had little to speculate about the inventory search at issue. The prosecution presented ample evidence demonstrating the regularity and standardization of the inventory process, such as pointing to a specific provision of the King County jail's general policy manual that directed intake officers to "[s]creen all property upon receipt."[314] Peterson did not dispute the inventory process itself, but rather the counterfactual charges.[315] Accordingly, insofar as police violated the temporal and geographic limitations on a search incident to arrest in opening Peterson's backpack after he was secured in the patrol car rather than at the moment of his arrest, inevitable discovery rectified a seemingly harmless error.

On the other hand, the court's conclusion demonstrates that law enforcement policy effectively defined away the Fourth Amendment's substantive constraints. The court relied on the jail's *self-written* booking process, which detailed the process for screening "oversized items" like the backpack at issue, to justify applying inevitable discovery.[316] In doing so, the court effectively made redundant the judicially created doctrinal constraints on law enforcement relating to searches incident to arrest—constraints that

311 *Id.* On the practice of overcharging for the purpose of creating prosecutorial leverage, see Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701 (2014).

312 Peterson specifically pointed to the fact that the police booking form made no mention of the probable cause underlying a potential resisting arrest charge. *See* Defendant-Appellant's Reply Brief at 7, *Peterson*, 902 F.3d 1016 (No. 17-30084). Furthermore, the key officer testimony only referenced hypothetical resisting arrest charges at his *second* round of testimony. *Id.* at 1-2.

313 *See Peterson*, 902 F.3d at 1020 ("Peterson would have been taken into custody upon booking . . . . it is standard procedure to inventory a defendant's possessions at the time of booking if the King County jail will not accept the item and the arrestee will be taken into custody.").

314 *Id.* at 1019 n.1 ("[S]ection 5.05.001 of King County Jail's General Policy Manual states that intake officers at the county jail shall [s]creen all property upon receipt from the outside agencies and return oversized items like backpacks to the transporting officer for return to their department's safe keeping area." (internal quotation marks omitted)).

315 *Id.* at 1019-20.

316 *Id.* at 1019 n.1.

would have otherwise demarcated the backpack search as unconstitutional.[317] This not only reduced individual rights under the procedurally based inventory search exception, but it also wound back the protection of another more substantive exception: search incident to arrest.

Peterson also shows how the combination of inventory searches and inevitable discovery gives police an excuse to violate constitutional rights knowing that if their violation bears fruit, it can later be retrospectively justified.[318] Once the officers were armed with the knowledge that they *could* have charged Peterson with resisting arrest—one of the most ambiguous and widely charged crimes[319]—they were free to discard rules constraining their ability to search his backpack. If the officers found nothing of evidentiary value, Peterson could just as easily have been arrested only for the outstanding misdemeanor warrants or even immediately let go. The only difference between that counterfactual and the court's chosen counterfactual was officer testimony to the contrary. This gives police officers a court-induced incentive to lie about the procedure they would have followed, a problem that multiple judges have acknowledged.[320]

This interaction between inevitable discovery and arrestee inventory searches may appear to only hew to the benefit of prosecutors, but its relationship to criminal justice writ large is more complicated. In a world without inevitable discovery, police in a case like *Peterson* might actually be incentivized to bring additional charges so as to hedge against the possibility that some charges might be dropped due to evidence inadmissibility.

---

317 *See* Chimel v. California, 395 U.S. 752, 763 (1969) ("There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.").

318 *Cf.* State v. Snyder, 382 P.3d 109, 116 (Ariz. App. 2d Div. 2016) ("If we were to allow all warrantless searches to be justified by the argument that any evidence would ultimately have been discovered on booking at the jail, police officers would have a license to immediately and thoroughly search the person and effects of any individual arrested without a warrant for any minor but bookable offense in the hope of discovering evidence of a more serious crime.").

319 *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1734 (2019) (Ginsburg, J., concurring in part) (describing the "array of laws" like "breach of the peace" that can be justified post hoc); Arielle W. Tolman & David M. Shapiro, *From City Council to the Streets: Protesting Police Misconduct After* Lozman v. City of Riviera Beach, 13 CHARLESTON L. REV. 49, 62-66 (2018) (listing "common infractions that can serve as a pretext for a retaliatory arrest" such as unlawful assembly and disorderly conduct).

320 *See* Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 96-98 (1992) (finding that ninety-five percent of Chicago police officials believed that police officers change their testimony to avoid evidence exclusion and that judges and public defenders "believe that perjury hinders the deterrent effect of the exclusionary rule").

Inevitable discovery in a case like *Peterson* may also serve a second-order effect of *discouraging* police officers from overcharging an arrestee. Inevitable discovery therefore serves as a backstop to the state's primary charges, yet this backstopping function comes at the expense of potentially superfluous charging. Nonetheless, these speculative charging benefits can only be considered against the empirical reality that charge-stacking plagues the criminal justice system.[321] Ultimately, the interaction between inevitable discovery and inventory searches creates a complex web of policing incentives, exacerbated by courts having empowered police departments to define their own inventory search limitations.

2. Automobile Searches

Since first upholding the warrantless search of a car in 1925,[322] the Supreme Court has gradually reduced the public's reasonable expectations of privacy associated with automobiles through the development of four distinct exceptions that can justify a warrantless vehicle search: (1) the main automobile exception,[323] (2) *Terry* car frisks,[324] (3) searches incident to arrest,[325] and (4) inventory searches.[326] As a result of the breadth and variety of these exceptions, law enforcement rarely needs to pursue the standard warrant requirement to satisfy the Fourth Amendment when searching or seizing a vehicle today.[327] Although all these exceptions share the common trait of excusing police from having to obtain a warrant, each slightly differs in its prerequisites. For example, the main automobile exception requires probable cause, whereas a *Terry* frisk only requires that police "possess an articulable and objectively reasonable belief that the suspect is potentially dangerous."[328] Accordingly, as mentioned above, it is the limits on these exceptions that give the Fourth Amendment substantive meaning.

---

321 *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1313 n.31 (2018) (describing the extant scholarship on the ubiquity and motivating forces behind "charge-stacking").

322 Carroll v. United States, 267 U.S. 132 (1925).

323 *See* Collins v. Virginia, 138 S. Ct. 1663, 1669-70 (2018) (overviewing the doctrinal history of the exception); *see also* California v. Carney, 471 U.S. 386, 393-94 (1985) (holding that mobile homes may be searched without a warrant).

324 *See* Michigan v. Long, 463 U.S. 1032, 1051-52 (1983) (holding that officers do not need a warrant to search a vehicle during a *Terry* stop because the officer's safety may be at risk).

325 *See* Arizona v. Gant, 556 U.S. 332, 351 (2009) (holding that "[p]olice may search a vehicle incident to a recent occupant's arrest").

326 *See* South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976) (holding that a warrant is not required for inventory searches when a vehicle is impounded because such searches are "standard . . . procedures").

327 *See* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 502 (2011) (describing Fourth Amendment protection of vehicles today as "tepid").

328 *Long*, 463 U.S. at 1051.

Some recent Supreme Court cases have sought to reinvigorate individual rights in the automobile context.[329] For example, the Court's 2012 decision in *United States v. Jones* proscribed warrantless GPS tracking of automobiles,[330] and the Court's 2018 decision in *Collins v. Virginia* narrowed the reach of the automobile exception when it clashes with the home's protection.[331] Yet, just as inevitable discovery premised on arrestee inventory searches can whittle down ostensible Fourth Amendment constraints, here too, the interplay between automobile inventories and inevitable discovery threatens to undermine this expansion of individual rights.

To properly understand this impact, a tangent is first necessary to examine a different exception in the automobile context: automobile searches incident to arrest. As in *Jones* and *Collins*, the Court in 2009 expanded Fourth Amendment protection in *Arizona v. Gant* by reversing a major line of Supreme Court precedent guiding automobile searches incident to arrest.[332] Nevertheless, we show how the interplay with inevitable discovery and a quite separate automobile exception—inventory searches—renders the practical impact of *Gant* minimal[333] and demonstrates that focusing on constitutional protections in the jurisprudential silos of the Fourth Amendment exceptions as the Court defines them can prove illusory.[334]

a. *Automobile Searches Incident to Arrest*

Prior to *Gant*, officers had broad latitude to search automobiles incident to arrest because of the leeway afforded to them by a series of cases, most notably *New York v. Belton*.[335] The *Belton* Court drew from the non-automobile context and justified the exception on a "one lunge" rule, as derived from *Chimel v. California*. *Chimel* permitted officers to search "the area into which an arrestee might reach in order to grab a weapon or

329 *But see* Kansas v. Glover, 140 S. Ct. 1183, 1190 (2020) (holding that an officer had reasonable suspicion after learning that the registered owner of a car had a revoked license).

330 565 U.S. 400, 404 (2012) (holding that the installation of a GPS device on a suspect's car by the government constitutes a search).

331 138 S. Ct. 1663, 1673 (2018) (declining to extend the automobile exception to the curtilage of the home).

332 556 U.S. 332 (2009); *see also* Barbara E. Armacost, Arizona v. Gant*: Does it Matter?*, 2009 SUP. CT. REV. 275, 276-77 (2009).

333 *See generally* Scott R. Grubman, *Bark with No Bite: How the Inevitable Discovery Rule is Undermining the Supreme Court's Decision in* Arizona v. Gant, 101 J. CRIM. L. & CRIMINOLOGY 119 (2011).

334 *Cf.* Armacost, *supra* note 332, at 279 ("When the Supreme Court's opinion in *Gant* was handed down, defense attorneys and civil rights activists were cautiously optimistic."); Seth W. Stoughton, Note, *Modern Police Practices:* Arizona v. Gant*'s Illusory Restriction of Vehicle Searches Incident to Arrest*, 97 VA. L. REV. 1727, 1729 (2011) (describing how *Gant* "was widely viewed as vindicating [the] concerns" of pretextual searches).

335 453 U.S. 454 (1981).

evidentiary ite[m]" both to ensure officer safety and prevent evidence destruction.[336] *Belton* further presumed that the entire passenger compartment of the car—including any open or closed containers therein—fell within this searchable "one lunge" area.[337] Later, in *Thornton v. United States*, the Court expanded this rule to explicitly include both vehicle occupants and recent occupants.[338]

Before *Gant*, the exception was "widely understood" to permit these searches "even if there [was] no possibility the arrestee could gain access to the vehicle at the time of search."[339] As long as officers had probable cause to arrest either a driver or passenger, police could search the passenger compartment with little temporal limit on when that search need be conducted.[340] As a result of this permissiveness, it became harder to square the doctrinal underpinnings of the rule with the leeway *Belton* and *Thornton* afforded: officers could place an arrestee in the squad car, typically with their hands cuffed behind them, before conducting the search of the arrestee's purported "one lunge" range.[341]

The factual background of *Gant* illustrated this practical reality.[342] There, officers had received an anonymous tip about drug sales and investigated the suspected residence.[343] The defendant answered the door, identified himself, and told the officers that the home's owner would return later.[344] The officers left and conducted a records check that revealed Gant had an outstanding warrant for driving with a suspended license.[345] The officers returned to the house later in the evening and arrested two other individuals on the premises. Gant then pulled into the driveway, parked the car, shut the door, and walked up to an officer ten to twelve feet from the car.[346] The officer arrested Gant

336 *Id.* at 460 (alteration in original) (quoting Chimel v. California, 395 U.S. 752, 763 (1969)).

337 *Id.*

338 541 U.S. 615, 622 (2004) (determining that the exception's application ought not turn on whether the arrestee happened to be inside or outside the car when the officer began the arrest); *see also* New York v. Belton, 453 U.S. 454, 460 (1981) (concluding that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably" within the one lunge reach of recent a "recent occupant" of a vehicle).

339 Arizona v. Gant, 556 U.S. 332, 341 (2009).

340 *See, e.g.*, United States v. Hrasky, 453 F.3d 1099, 1099-1103 (8th Cir. 2006) (upholding an automobile search conducted one hour after arrestee was secured in patrol car as incident to arrest); United States v. Weaver, 433 F.3d 1104, 1106-07 (9th Cir. 2006) (upholding a search conducted ten to fifteen minutes after arrestee was placed in patrol car as incident to arrest).

341 *See Thornton*, 541 U.S. at 624 (O'Connor, J., concurring) (describing the "recent occupant" exception as a "police entitlement rather than as an exception justified by the twin rationales of *Chimel*").

342 *See Gant*, 556 U.S. at 335-36.

343 *Id.* at 335.

344 *Id.* at 335-36.

345 *Id.* at 336.

346 *Id.*

and, after waiting for backup, locked Gant in the backseat of the additional patrol car in handcuffs. The officers then searched Gant's car, finding a gun and a bag of cocaine.[347]

Gant moved to suppress the evidence, arguing that *Belton* could not justify the automobile search.[348] He claimed he posed no safety threat to the officers when secured in the patrol car, and argued that his traffic offense arrest meant there was no associated evidence to be found in the parked vehicle.[349] These were the twin rationales underlying *Chimel*,[350] but neither *Chimel* nor *Belton* required an as-applied analysis of these justifications. Rather, the *Belton* Court had adopted a per se rule of permitting such a search so long it accompanies a lawful arrest.[351] Indeed, when asked why the search was conducted in Mr. Gant's case, the officer said, "[b]ecause the law says we can do it."[352]

The *Gant* Court reversed this approach, tethering automobile arrest searches to as-applied safety and evidentiary considerations and permitting a search incident to arrest only "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[353] This conclusion effectively reversed the empirical presumption that occupants always posed a safety risk to officers sufficient to justify a search incident to arrest. Now only occupants who can actually access the passenger compartment pose a risk sufficient to merit a search incident to arrest. Moreover, "[b]ecause officers have many means of ensuring the safe arrest of vehicle occupants," the Court suggested that "it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains."[354]

By shifting to an ad hoc test that looks at whether individuals could actually access areas that police officers desired to search, *Gant* seemingly constituted a significant expansion of the protection of individuals' Fourth Amendment rights vis-à-vis automobiles. However, due to the automobile inventory search exception, this expansion largely proved illusory.

---

347 *Id.*

348 *Id.*

349 *Id.* at 336.

350 Chimel v. California, 395 U.S. 752, 763 (1969).

351 New York v. Belton, 453 U.S. 454, 460 (1981).

352 *Gant*, 556 U.S. at 337. Just two years later in *Davis v. United States*, the Supreme Court essentially acknowledged that the officer was correct in this statement: the law had said they could do it, and *Gant* simply changed what the law said. *See* 564 U.S. 229, 244 (2011) ("When this Court announced its decision in *Gant*, Davis' conviction had not yet become final on direct review. *Gant* therefore applies retroactively to this case.").

353 *Gant*, 556 U.S. at 343.

354 *Id.* at 343 n.4.

b. *Automobile Inventory Searches*

Whereas *Gant* exemplifies judicially imposed limits on the warrant exception in the automobile context, vehicle inventory searches exemplify an area where the Court has instead deferred to law enforcement to effectively establish the jurisprudential limits on police powers. In the seminal case, *South Dakota v. Opperman*, police officers impounded an illegally parked car and conducted an inventory search of the vehicle's contents, pursuant to a standardized form and procedure.[355] Officers found a bag of marijuana in the unlocked glove compartment, which became the basis to charge Opperman with possession.[356] The South Dakota Supreme Court reversed Opperman's conviction on the grounds that the inventory search had violated the Fourth Amendment, but the Supreme Court reversed, holding that warrantless searches of an arrestee's vehicle are always permissible when conducted as part of a "standard procedure" during impoundment.[357] As later summarized by the Court in *Colorado v. Bertine*, these searches "serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger."[358]

As in arrestee inventory searches, all the mechanics and details of the automobile inventory are left to law enforcement discretion. Police are not required to permit a driver to avoid impoundment by arranging for someone else to pick up the car, so long as the details of when such permission is granted or withheld are part of a reasonable "standard procedure."[359] Similarly, police departments not only have discretion, if permitted by department policy, to open luggage and bags found inside the vehicle,[360] but

355 428 U.S. 364, 366 (1976).

356 *Id.*

357 *Id.* at 366-67, 376. Notably, however, the *Opperman* Court conditioned the permissibility of a standard procedure on the procedure not being "pretext concealing an investigatory police motive." *Id.* at 376.

358 Colorado v. Bertine, 479 U.S. 367, 372 (1987).

359 *See, e.g.*, United States v. Coccia, 446 F.3d 233, 238 (1st Cir. 2006) ("[W]e do not understand *Bertine* to mean that an impoundment decision made without the existence of standard procedures is per se unconstitutional. Rather, we read *Bertine* to indicate that an impoundment decision made pursuant to standardized procedures will most likely, although not necessarily always, satisfy the Fourth Amendment."); United States v. Arrocha, 713 F.3d 1159, 1164 (8th Cir. 2013) ("Here, we agree with the district court that Officer King's decision to tow the SUV was a reasonable exercise of discretion that was sufficiently 'fettered' by standardized police procedures."); *see also* Kirby-McLemore, *supra* note 287, at 195–96 (describing various circuit court approaches to impoundment and inventory procedure).

360 *See, e.g.*, Florida v. Wells, 495 U.S. 1 (1990) ("[W]hile policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors."); United States v. Farley, 607 F.3d 1294, 1332–33 (11th Cir. 2010) ("When police take custody of a bag, suitcase, box, or any similar container, they may open it in order to itemize its contents pursuant to standard inventory procedures.").

also have generalized discretion under "standard procedure[s]," which can also include the opening of locked containers[361] and even inventory searches of vehicle engine compartments.[362] For instance, the New York City Police Department inventory protocol commands officers to search under floor mats, under the hood, and even "in the air vents where accessible."[363]

Police also control the timing of the inventory search. Law enforcement can set automobile inventory protocol to occur at any point before or after impoundment, meaning the inventory search itself can happen at the scene of the crime. Consider a Chicago Police Department procedure, which states: "All property which is seized, recovered, found, or otherwise taken into custody by Department members will be inventoried *as soon as it is practical to do so*."[364] Or consider the Indianapolis Police Department policy at issue in the Seventh Circuit's decision in *United States v. Cartwright*, which directed officers to conduct inventory searches *prior* to impoundment.[365] Under this policy, police officers lawfully conducted an inventory search in the immediate aftermath of an arrest that gave the officers grounds to impound the car, thereby blurring the line between an inventory and a search incident to arrest.[366] The practical effect of this flexibility is that it invests police with tremendous discretion—officers can conduct an inventory search, and if they find nothing of value, they can permit the driver to leave rather than follow through with the impoundment. Nevertheless, courts today are willing to look the other way, deferring to police regulations rather than devising rules themselves.[367]

---

361 *See, e.g.*, United States v. Kordosky, 921 F.2d 722, 724 (7th Cir. 1991) (explaining that an inventory search was permissible when "[t]he standard practice called for the opening of all locked compartments").

362 *See, e.g.*, United States v. Ball, 804 F.3d 1238, 1241 (8th Cir. 2015) ("The state police policy explicitly states, however, that one vehicle area that should be searched is the engine compartment, and we have previously held that as part of an inventory search it is reasonable to search the engine compartment."); United States v. Torres, 828 F.3d 1113, 1122 (9th Cir. 2016) ("Officer Donaldson's search of the air filter compartment in this case was justified by the need to 'protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands.'" (quoting Cady v. Dombrowski, 413 U.S. 433, 443 (1973))).

363 N.Y.C. POLICE DEP'T, PATROL GUIDE: INVENTORY SEARCHES OF AUTOMOBILES AND OTHER PROPERTY (2013), https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg218-13-inventory-search-of-vehicle-and-other-property.pdf [https://perma.cc/23VT-FR6R].

364 CHI. POLICE DEP'T, PROCESSING PROPERTY UNDER DEPARTMENT CONTROL (2015), https://directives.crimeisdown.com/directives/data/a7a57bf0-12cad953-0e212-cae6-74dcc8c2b7f0505a.html [https://perma.cc/N5R9-8NCS] (emphasis added).

365 United States v. Cartwright, 630 F.3d 610, 614 (7th Cir. 2010).

366 *Id.*

367 *See* Colorado v. Bertine, 479 U.S. 367, 374 (1987) ("[R]easonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.").

We described in subsection II.B.1., in relation to arrestee searches, the incentive problems that could arise in leaving constraints on police power to be defined by police manuals written by police departments.[368] In *Florida v. Wells*, the Court recognized this problem of leaving assessments of the reasonableness of inventory procedure to the very actors whose conduct those procedures are meant to constrain.[369] In *Wells*, police impounded the vehicle of a drunk driver and conducted an inventory search.[370] The officers found a locked suitcase during the search and forced it open despite the lack of a formal policy pertaining to closed containers.[371]

The Court found this policy absence to be dispositive, holding the inventory search was insufficiently regulated to satisfy the Fourth Amendment. Critically, the Court premised its holding on requiring "standardized criteria or established routine" to ensure that inventory searches do not become "a ruse for a general rummaging in order to discover incriminating evidence."[372] The Court further emphasized that "[t]he individual police officer must not be allowed so much latitude that inventory searches are turned into a 'purposeful and general means of discovering evidence of crime.'"[373]

Yet the Court's emphasis on procedures does not seal off this possibility very comprehensively. Although individual officers may no longer have the incentive to make choices in the field that promote their own power and accommodate their desire to search citizens, the Court seems to assume that police departments do not have similar priorities when writing the rules that are meant to constrain those officers. The Court refused to take the next logical step, explaining that "in forbidding uncanalized discretion to police officers conducting inventory searches, there is no reason to insist that they be conducted in a totally mechanical 'all or nothing' fashion."[374] But in doing so, the Court avoided fully solving the problem it recognized and instead created space for lower courts to experiment with the inventory search doctrine, as we saw in relation to inevitable discovery.

The Court's attention to the problem of permitting the very subjects of regulation to write their own rules has proven short-lived. In the decades of inventory search caselaw since *Wells*, lower courts have exploited the ambiguity that the Court created over inventory searches by broadly

368 *See supra* notes 316–320 and accompanying text.
369 495 U.S. 1 (1990).
370 *Id.* at 2.
371 *Id.* at 2-3.
372 *Id.* at 4 (citation omitted).
373 *Id.* (quoting Colorado v. Bertine, 479 U.S. 367, 376 (1987)).
374 *Id.*

deferring to police procedure with no course correction provided by the Supreme Court.[375]

c. *The Interaction with Inevitable Discovery*

Just as with arrestee inventory searches, automobile inventories occur with near certain regularity and standardization that make for ideal traits when speculating about officer behavior in inevitable discovery's counterfactual world. The Eleventh Circuit's decision in *United States v. Johnson* exemplifies this interaction.[376]

As a reminder, in *Johnson*, Officer Gregory pulled over a truck for failing to signal a turn after the officer searched the license plate and discovered the registered owner had died.[377] Johnson exited the truck, walked over to the patrol car, and admitted to driving with a suspended license, at which point the officer issued a citation.[378] Gregory later testified that he planned on arresting Johnson for the infraction, but he did not perform the arrest at that moment.[379] Instead, he waited for backup to arrive who could stand with Johnson while Gregory walked twenty feet back to the truck, noticed an item wrapped in a cloth inside, removed the cloth, and discovered a sawed-off shotgun.[380] At this point, the two officers completed the arrest and proceeded to execute an official inventory search prior to impoundment.[381] The government did not claim that the initial search that uncovered the shotgun was legal, but instead argued that the shotgun could nevertheless be admitted through inevitable discovery.[382] Specifically, it argued that because the officer planned on arresting Johnson from the outset, the shotgun would eventually have been discovered during the subsequent automobile inventory as part of the impoundment process.[383] Accordingly, the illegal search would not have changed that course of events.

The Eleventh Circuit affirmed on the theory of inevitable discovery. The court first concluded that, notwithstanding the arresting officer's initial delay

375 The Court has rejected recent opportunities to constrain the doctrine. *See, e.g.*, Petition for Writ of Certiorari at i, 10-17, State v. Asboth, 898 N.W.2d 541 (Wis. 2017) (No. 17-781), *cert. denied*, Asboth v. Wisconsin, 138 S. Ct. 1284 (2018) (posing the question presented as whether "standardized criteria must guide police discretion to seize a vehicle without a warrant or probable cause").

376 777 F.3d 1270 (11th Cir. 2015), *overruled by* United States v. Watkins, 10 F.4th 1179 (11th Cir. 2021); *see also* Brief for the Appellant at 6, 16-17, *Johnson*, 777 F.3d 1270 (No. 13-15583-EE) [hereinafter Brief for the Appellant, *Johnson*].

377 *Johnson*, 777 F.3d at 1272.

378 *Id.* at 1272-73; Brief for the Appellant, *Johnson*, *supra* note 376, at 6.

379 *Johnson*, 777 F.3d at 1273.

380 *Id.*; Brief for the Appellant, *Johnson*, *supra* note 376, at 8-9.

381 *Johnson*, 777 F.3d at 1273.

382 *Id.*

383 *Id.* at 1272.

in arresting, he would have impounded the truck since "there was no one to whom he could have released it."[384] This meant that impoundment would have occurred regardless of the illegal search, so the accompanying inventory could serve as the counterfactual basis for inevitable discovery. The panel also deferred to the police department's impoundment policy, explaining that the requisite "'standard criteria' need not be detailed criteria," meaning the "officer's testimony, along with reasonable inferences from that testimony," provided sufficient standardization for the inventory.[385]

The opinion also demonstrated the hollowness of the Eleventh Circuit's active pursuit element. Johnson argued that this element was not satisfied since the officer had "not yet initiated procedures to have the truck impounded and searched" at the moment of the illegal search.[386] However, the court reasoned that an active pursuit requires the discovery of evidence "by virtue of ordinary investigations," and the arresting officer's "investigation into the ownership of the truck was the 'lawful means which made discovery inevitable.'"[387] The active pursuit of that ordinary investigation therefore would have lawfully led to the shotgun during the inventory search, thereby satisfying the Eleventh Circuit's requirement.

Beyond illustrating the typical interaction between an automobile inventory and inevitable discovery, *Johnson* also epitomizes how this type of interaction undermines the Court's carefully crafted search incident to arrest doctrine. Remember that the officer conducted the initial illegal search when Johnson was standing twenty feet away.[388] At this distance, the search could not be justified under the safety rationale of *Gant*, since Johnson could not physically reach into the vehicle. Additionally, the traffic violation was for driving with a suspended license—the very kind of infraction that the *Gant* Court warned would not provide a basis for searching based on relevant evidence.[389] Without this option, the prosecution nonetheless justified the

384 *Id.* at 1274.

385 *Id.* at 1277-78. Johnson also faced an uphill battle on this argument because he had not raised it at the trial level, so the Eleventh Circuit assessed it under plain error review. *Id.*

386 *Id.* at 1274.

387 *Id.* at 1274-75 (quoting Jefferson v. Fountain, 382 F.3d 1286, 1296 (11th Cir. 2004)).

388 Brief for the Appellant, *Johnson*, *supra* note 376, at 16.

389 *See Arizona v. Gant*, 556 U.S. 332, 343 n.4 (2009) ("Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains."). The *Gant* Court recognized police authority to search "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle,'" rather than the probable cause usually required to search a vehicle for evidence of criminality. *Id.* at 343 (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)); *cf.* California v. Acevedo, 500 U.S. 565, 580 (1991) (requiring probable cause to search a vehicle and the containers therein). However, the *Gant* Court qualified this permission by recognizing that, in many cases, arrests for traffic violations would provide "no reasonable basis to believe the vehicle contains relevant evidence." *Gant*, 556 U.S. at

exact type of search prohibited in *Gant* through the interaction between the automobile inventory search and inevitable discovery.[390] Consequently, inevitable discovery undermined the expanded Fourth Amendment protection that the *Gant* Court carefully prescribed in reshaping the search incident to arrest doctrine.

This outcome is not unique. *Johnson* is representative of many cases that rely on inevitable discovery in combination with the inventory search doctrine.[391] Moreover, the corrosive effect of inevitable discovery in these cases stretches back to the immediate aftermath of the *Gant* decision, as illustrated by scholarship published soon thereafter. For example, in 2011—just two years after *Gant*—Professor Justin Marceau explained that because of inevitable discovery, "there is neither an exclusionary-remedy incentive for officers to strictly comply with the new mandates of *Gant* nor an incentive—beyond creating colorful dicta—for judges to decide the precise scope of the *Gant* rule."[392] In a similar vein, Professor Scott Grubman commented that "the decision's effect is more theoretical and scholarly than practical" because "until the Court does something to limit the applicability of the inevitable discovery rule, police will have little incentive to comply with its holding . . . ."[393] Accordingly, *Johnson* and other similarly situated cases should have come as no surprise, since at least these scholars were anticipating that inevitable discovery would displace the Court's new protections in the automobile search incident to arrest doctrine,[394] even while they were being issued.[395] If the Court was serious in *Gant* in saying that allowing such

343. This is a significant limit, given the countless cases in which police pursue a suspicion by investigating a minor traffic incident. *See* Jordan B. Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 643 n.35 (2019) (cataloguing legal scholarship that, in part, examines the impact of *Whren v. United States* on racial profiling during routine traffic stops).

390 Brief for the Appellant, *Johnson*, *supra* note 376, at 16. The prosecutor told the district court judge, "I think there is an argument to be made that it was also a search incident to arrest. But we are more strongly relying on the inventory and inevitable discovery doctrine." *Id.*

391 *See, e.g.*, United States v. Metts, 748 F. App'x 785, 789-90 (10th Cir. 2018); United States v. Bullette, 854 F.3d 261, 266 (4th Cir. 2017); United States v. Pritchett, 749 F.3d 417, 437 (6th Cir. 2014); United States v. Bogle, 522 F. App'x 15, 21 (2d Cir. 2013); United States v. Stotler, 591 F.3d 935, 940-41 (7th Cir. 2010).

392 Justin F. Marceau, *The Fourth Amendment at A Three-Way Stop*, 62 ALA. L. REV. 687, 737 (2011).

393 Grubman, *supra* note 333, at 169-70.

394 This farsightedness was not widespread: other early commentary expressed skepticism that inventory searches would effectively replace searches incident to arrest because impoundment is a "time consuming" and "costly substitute[]." Armacost, *supra* note 332, at 304.

395 For example, the Seventh Circuit circumscribed *Gant* through inevitable discovery in a case where the defendant argued that the limitations of *Gant* applied subsequent to his arrest. *See* United States v. Cartwright, 630 F.3d 610, 616 (7th Cir. 2010) ("While Cartwright correctly points out that IMPD policy required Barleston to make such a[n inventory] list, Barleston's failure to do so does not undermine the proposition that the police would inevitably have found the gun through a lawful inventory search.").

searches would "require us to approve routine constitutional violations," and doing so would be contrary to "fidelity to Fourth Amendment principles," then it should not do the same under the guise of different doctrine either.[396]

Empirical research shows, however, that this is exactly what the Supreme Court has effectively permitted by failing to address the effect of inevitable discovery in undermining its own decision in *Gant*. A 2018 study explored the effect of *Gant* on the rates of different categories of police searches by examining millions of individual traffic stops in two states.[397] It found that vehicle searches incident to arrest drastically and immediately plummeted after the Court announced *Gant*—decreasing by roughly forty percent in Illinois and sixty percent in North Carolina *within just one week* of the Court's decision.[398] Conversely, every other alternative search category, such as consent and probable cause searches, held steady immediately following the decision, suggesting that the drop in searches incident to arrest was not a result of some exogenous change, such as fewer drivers suddenly being on the road due to a pandemic.[399] Only one alternative search category stood in stark contrast: in Illinois, a category labeled as "Other" that likely proxied inventory searches[400] *more than doubled* in the week following *Gant* and has maintained the same outsized pace in the years since. This occurred while searches incident to arrest were plummeting and all other types of searches were remaining constant.[401] These data points strongly suggest that inventory searches largely replaced searches incident to arrest as a justification for searches of automobiles during traffic stops.[402]

---

396 Arizona v. Gant, 556 U.S. 332, 338, 351 (2009).

397 *See* Ethan D. Boldt & Michael C. Gizzi, *The Implementation of Supreme Court Precedent: The Impact of* Arizona v. Gant *on Police Searches*, 6 J.L. & COURTS 355, 364-66 (2018).

398 *Id.* at 367-69.

399 *Id.* at 371-73.

400 *Id.* at 373-74 (explaining that "other" is a "catchall category" and "may incorporate inventory searches"). Other types of searches that could be included within this "other" category include searches based on active search warrants or a person's status as a parolee, but there is no reason that either of these two categories would be affected by the *Gant* ruling. *See id.* at 364-65 ("This strongly implies that 'other' is any search other than consent, custodial arrest, dog searches, probable cause, search incident to arrest, or reasonable suspicion."). Notably, the North Carolina data broke out warrant searches into its own category, and there was no difference as a result of *Gant*, which further increases the likelihood of this "other" category serving as a proxy for inventory searches. *Id.* at 371-72.

401 *Id.* at 371-72 ("The consent search series does not experience a structural change until 148 weeks later.").

402 *Id.* at 372-75 ("The analyses of other kinds of vehicle searches after *Gant* provide preliminary evidence that police look to alternative means to achieve their goals in the face of a limiting court precedent. The increase in the 'other' category of search in Illinois, while idiosyncratic, is stark. Those searches increased by 111% in the wake of the Court's ruling, indicative of police using other established exceptions to the warrant requirement to conduct searches and obtain incriminating evidence."). This is consistent with prior social science findings that police substitute tactics in this way in response to jurisprudential changes in their incentives. *See, e.g.*,

This trend is made particularly unsettling by the simultaneous growing judicial deference to inventory procedure based on custom, rather than written policy.[403] Recall that *Florida v. Wells* recognized the danger of leaving the reasonableness of inventory searches entirely to police discretion and accordingly sought to constrain that discretion by tightening inventory procedure to require "standardized criteria."[404] Yet, as exemplified by *Johnson*, a court was willing to stretch the requisite standardized procedure by premising it on officer testimony and "common sense" alone.[405]

Recall *United States v. Bullette*, in which officers entered a vacant rural property on the suspicion that it was a clandestine drug manufacturing site.[406] After sweeping the area and finding no one around, the officers proceeded to search three parked cars without a warrant and found incriminating evidence inside.[407] Later, at Bullette's suppression hearing, the government argued that the evidence should not be excluded, relying on a theory of inevitable discovery based on an automobile inventory search during impoundment.[408] The panel agreed, explaining that the prosecution "need not provide a written inventory policy to prove that a law enforcement agency conducts its inventory searches according to routine and standard procedures" so long as "the agent who conducted the search followed a practice . . . for all impounded vehicles."[409]

This raises the question: how is a court to determine whether law enforcement adhered to standard practice if such procedures are not written? In answering this question, the Fourth Circuit simply deferred to the searching officer who testified that standard DEA practice was to identify the

---

Comment, *Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 94-96 (1968) (showing that narcotics arrests after *Mapp* where drugs were found on the person—to which exclusion would apply—decreased significantly while arrests for drugs found in the hand or dropped to the ground—to which exclusion ordinarily would not apply—rose significantly); *see also* State v. Ingram, 914 N.W.2d 794, 814 n.3 (Iowa 2018) ("There is good reason to believe law enforcement may see warrantless inventory searches as an end run around usual warrant requirements."); *Inevitable Discovery Doctrine in an Inventory Search*, 38 LAW OFFICERS' BULL. No. 18 (2014) (available on Westlaw) (informing law enforcement that the interaction of inevitable discovery and inventory search doctrine can backstop an illegal search).

403 *See* Kirby-McLemore, *supra* note 287, at 192 n.83 (illustrating that the government need not proffer evidence of a written policy, but rather can rely on "informal agreements" amongst and between police officers).

404 Florida v. Wells, 495 U.S. 1, 4 (1990).

405 *See* United States v. Johnson, 777 F.3d 1270, 1278 (11th Cir. 2015) ("Johnson has pointed to no precedent . . . that holds that an officer's testimony, along with reasonable inferences from that testimony, is insufficient as a matter of law to establish that there were 'standardized criteria' for the decision to impound."), *overruled by* United States v. Watkins, 10 F.4th 1179 (11th Cir. 2021).

406 *See* 854 F.3d 261, 263 (4th Cir. 2017); *see also* discussion *supra* Section I.B.

407 *Bullette*, 854 F.3d at 263-64.

408 *Id.* at 264-65.

409 *Id.* at 266.

registered owner and impound cars that appeared to be abandoned—testimony that also justified the search of the closed glove compartment.[410] So, despite the government not presenting written evidence of a standardized inventory procedure and the fact that the cars were parked on private property, the court ultimately upheld the suppression denial.[411] The officer's testimony that "it was standard practice to impound the vehicle [when] there was 'no one there to claim' it" sufficed.[412]

In permitting courts to consider police practices that are not even clearly enough agreed upon to be written down, courts are further enabling police to craft the constitutional limits that are meant to constrain them. The limits of inventory searches effectively depend on police norms, putting them beyond public accountability.[413] In *Bullette*, for example, the officers could just as easily have sought a warrant before searching the car—and, to this point, the officers did in fact seek a warrant before searching the cell phone they found.[414] Yet the Fourth Circuit's deference to law enforcement custom both *incentivizes* officers to avoid obtaining a warrant in a similar situation in the future and *disincentivizes* officers from penning inventory procedure in writing, since compliance based on custom is far easier to justify than compliance based on written rules.

Professor Wayne LaFave presciently recognized this problem more than thirty years ago: "[O]nce it is accepted that the *Bertine* 'standardized procedures' can be established by police testimony about current practices rather than by proof of preexisting written policies, there are dangers aplenty."[415] Yet those dangers—i.e., the malleable limits of automobile inventory search doctrine—grow even more acute when inevitable discovery layers on top and threatens to further undermine those already feeble substantive limits. The problem with relying on custom, as opposed to written protocols, in defining the limits of inventory searches is that it not only entrenches police-created rules as constitutional limits, but it also incorporates police-created standards and norms as limits—or even police-

410 *Id.*

411 *Id.* at 267.

412 Brief for the United States at 17, *Bullette*, 854 F.3d 261 (No. 15-4408).

413 *Cf.* Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281, 1288 (2019) ("Instead of an independent judiciary determining the meaning of the Fourth Amendment and impressing it upon local police departments, local departments create meaning and symbolic adherence to ambiguous constitutional norms by developing use-of-force policies that reflect their own institutional and administrative preferences. In turn, federal courts defer to these policies as a reasonable iteration of police force.").

414 *Bullette*, 854 F.3d at 266 n.3.

415 Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 456 (1990).

created conveniences as constitutional limits—which means they are no limits at all.

III. NECESSARY DOCTRINAL REFORM

Part I described the state of the doctrine, and Part II illustrated how it frequently operates to undermine the Fourth Amendment's protections. Together, these Parts underscore why Supreme Court intervention is necessary. The question then becomes: what might that intervention look like? Here, we translate our doctrinal critiques into priorities for what the Court should address. Section A synthesizes recurrent themes that have arisen in the wake of the Court's silence since *Nix*. Section B offers a hierarchy of potential intervention through which the Court could address these issues.

A. *Recurring Issues with the Status Quo*

The most obvious issue that the Supreme Court must address is how lower courts have operationalized their inevitable discovery tests, both in the form of experimentation and manipulation—the latter clearly necessitating course correction. But derivative of all those tests are recurring issues that have proliferated across every circuit in the absence of Supreme Court guidance, which the Court should also acknowledge and address. The following two subsections discuss two of those issues—post hoc officer rationalization and crime severity. But note that more such difficulties could emerge if the Court continues to neglect this area of law.

1. Post Hoc Officer Rationalization

Without Supreme Court clarification, one problem that has consistently arisen among the lower courts is the malleable basis upon which they rest application of the doctrine. Many decisions hinge almost entirely, if not exclusively, on officer testimony recounting what the officer planned on doing or why the officer acted the way he or she did.[416] The problem is that such testimony is always post hoc, subject to unintentional revision, or worse, intentional coaching geared toward inevitable discovery's requirements.[417] When there are no objective facts to rebut such testimony—such as tangible evidence of an in-progress warrant application or a written impoundment

416 *See, e.g.*, United States v. Peterson, 902 F.3d 1016, 1020 (9th Cir. 2018); *Bullette*, 854 F.3d at 267; United States v. Johnson, 777 F.3d 1270, 1278 (11th Cir. 2015); United States v. Munoz, 590 F.3d 916, 923 (8th Cir. 2010).

417 For a discussion of the difficulties associated with using officer testimony, see Kerr, *supra* note 286, at 475-76 ("It can be difficult for a court to determine an officer's state of mind . . . . Trying to reconstruct a specific state of mind may be trying to create a clarity that never existed.").

procedure—the officer's version of history usually prevails, especially given the credibility courts confer on law enforcement officers.[418] This is despite the fact that testimony of officer intent is by definition contrary to what the officer actually did, since it is regarding counterfactuals.[419] This means that a doctrine that was originally intended to "focus[] on demonstrated historical facts capable of ready verification or impeachment" often turns on conjecture that is accepted as certitude.[420]

United States v. Peterson, discussed above in Section II.B, epitomizes this phenomenon.[421] Recall that in denying Peterson's motion to suppress, the court premised inevitable discovery on the theory that the gun found unlawfully in the backpack would have otherwise been discovered lawfully during the arrestee inventory search at the stationhouse.[422] But to reach this conclusion, the court singularly relied on the arresting officer's testimony that he "absolutely" would have booked Peterson on resisting arrest charges had he known that the felony gun charge was impermissible, despite the fact that the booking form that he filled out did not mention the probable cause underlying a potential resisting arrest charge.[423] No matter, the court deferred to the arresting officer's testimony that the omission of the resisting arrest charge in this instance was "standard practice," meaning Peterson necessarily would have been subject to an arrestee inventory search.[424]

The problem with this sort of deference is that it enabled the officers to disregard the limits on their ability to search Peterson and his belongings. Once the officers believed that Peterson could be subject to an inventory search, that inventory search could justify whatever they potentially found illegally. Moreover, even assuming a good faith effort to accurately reconstruct an officer's state of mind, such testimony is subject to the complexity of human nature and decision-making. Rarely will an officer's motivation for acting be neatly distilled ex post: "Trying to reconstruct a

---

418 *See generally* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017).

419 United States v. Cooper, 24 F.4th 1086, 1095 (6th Cir. 2022) ("Sometimes it is relatively easy to isolate the causal effects of the illegality . . . . But disentanglement is often not that easy, and it's particularly difficult—though not impossible—when the contested evidence is an oral statement.").

420 Nix v. Williams, 467 U.S. 431, 445 n.5 (1984).

421 *See* 902 F.3d 1016 (9th Cir. 2018); *see also supra* notes 302-313 and accompanying text.

422 *Peterson*, 902 F.3d at 1018-20. Police had arrested Peterson based on outstanding misdemeanor warrants, secured him in a patrol car, and then unlawfully searched his backpack and discovered a handgun. *Id.*

423 *Id.* at 1020; *see also* Defendant-Appellant's Reply Brief at 7, *Peterson*, 902 F.3d 1016 (No. 17-30084) ("[T]he Superform on which Mr. Peterson was booked contained no reference to obstruction or resisting . . . .").

424 *Peterson*, 902 F.3d at 1020.

specific state of mind may be trying to create a clarity that never existed."[425] It is because of this complexity that the Court has sought to avoid subjective tests in Fourth Amendment law, instead favoring the consistency afforded by objective tests.[426] Yet in the context of inevitable discovery, testimony about a single officer's state of mind frequently suffices for doctrinal application.

When officer testimony stands alone as the predicate for applying inevitable discovery, the doctrine effectively serves as a backstop for officers to ignore constitutional rights, equipped with the knowledge that their future testimony will nonetheless permit the fruit of an unlawful search. This is contrary to the overarching goal of the inevitable discovery doctrine to promote rather than undermine deterrence of police officer violations of the Constitution. This does not mean that officer testimony of intent ought to be prohibited, but it does mean that if a court is going to credit an officer testimony about standard practice, the prosecution must be expected to offer objective evidence substantiating that testimony.

2. Crime Severity

Another issue that has arisen from the doctrine's lack of clarity relates to its connection to the exclusionary rule. Typically, exclusion is the only means of vindicating defendants' constitutional rights,[427] and the remedy is all-or-nothing, not calibrated to the severity of the crime or the severity of the constitutional violation.[428] This places enormous pressure on the rule, especially when a defendant may in fact be guilty but the case hinges on the potential exclusion of a critical piece of evidence.

Scholars and judges alike have detailed the reality of this pressure point, which results in judicial resistance to the exclusionary rule precisely due to its "hard shove" nature.[429] For example, Judge Calabresi has explained how "judges are in the business of keeping people who are guilty *in* on

---

425 Kerr, *supra* note 286, at 476.

426 *Id.* at 449; *see also* Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 CARDOZO L. REV. 2161, 2225 (2016) (cataloguing the various tests in criminal procedure and the move toward favoring objective tests so as to avoid "burdening police with the task of anticipating the idiosyncrasies of every . . . person's subjective state of mind" (quoting J.D.B. v. North Carolina, 564 U.S. 261, 271 (2011))).

427 *See* Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 914 (2015) (describing the barriers to remedying violations of constitutional rights through Section 1983).

428 Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 650 (2013) ("[T]he exclusionary rule is dichotomous and disproportionate in its operation . . . .").

429 *Id.* at 627-28, 659; *see also* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 608 (2000) (describing how "hard shoves" can trigger "a self-reinforcing wave of resistance").

technicalities" because they hesitate at "the idea of dangerous criminals being released into society."[430] The exclusionary rule presents judges with two unsatisfactory, dichotomous options.

Faced with this dichotomy, courts frequently employ inevitable discovery as a pressure valve. It softens the exclusionary rule's rigidity, permitting a judge to simultaneously conclude that a defendant's constitutional rights were in fact violated, but exempting such a violation from the exclusionary rule's blunt outcome, thereby avoiding a world where the "criminal is to go free because the constable has blundered."[431] Inevitable discovery alleviates this systemic stress and shifts the critical decision point away from exclusion—a shift that parallels how inevitable discovery has the capacity to turn meaningful judicial discretion away from revitalized Fourth Amendment doctrines like searches incident to arrest and toward a doctrine like inventory searches. Failing to acknowledge this shift allows inevitable discovery to mask judicial discretion, concealing such discretion under the auspices that inevitable discovery, in effect, applies automatically.

Perhaps unsurprising, this pressure valve function has proven particularly alluring when the charged crime is more severe. Consider the pivotal evidence in especially egregious crimes, such as the body in a murder case,[432] or the digital files in a child rape pornography case.[433] When the potential suppression of that evidence is the case's lynchpin, inevitable discovery can serve as a stopgap.

Recent empirical research has confirmed the prevalence of this phenomenon. Studies have shown that when presented with hypothetical scenarios of varying crime severity, both laypeople and judges employ a sliding scale of justice; they are more likely to admit evidence under the inevitable discovery exception when the crime at issue is more severe.[434] This suggests that motivated cognition underlies application of inevitable discovery: "when the dictates of the law clash with their personal intuitions about the morally 'right' outcome in a case . . . [people] may experience a strong 'directional' goal to punish" and avoid excluding relevant evidence

---

430 Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2003).

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

432 *See, e.g.*, Nix v. Williams, 467 U.S. 431 (1984).

433 *See, e.g.*, United States v. McGill, 8 F.4th 617 (7th Cir. 2021); United States v. Crespo-Ríos, 645 F.3d 37 (1st Cir. 2011); United States v. Stabile, 633 F.3d 219 (3d Cir. 2011).

434 *See* Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1580 (2015) ("[Lay decisionmakers] who were more motivated to punish the defendant—those judging the heroin case as compared to the marijuana case—were more likely to construe lawful discovery of the evidence as inevitable . . . ."); Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 893 (2015) ("The judges responded as if there is a Fourth Amendment for marijuana that is different than the Fourth Amendment for heroin.").

through finding a conclusion of inevitability more often in relation to egregious crimes.[435] Professors Jeffrey Segal, Avani Mehta Sood, and Benjamin Woodson recently confirmed this phenomenon within the courtroom by analyzing more than 600 randomly selected federal appellate cases over a 14-year period.[436] Using maximum penalties as a proxy for crime severity, the study authors found that judges were in fact more likely to uphold evidence admission in cases involving more serious crimes, even when controlling for search intrusiveness and judicial ideology.[437]

As a doctrinal matter, crime severity plays no official role in Fourth Amendment analysis,[438] but as a descriptive matter, this research paints a different picture. Whether or not the Supreme Court chooses to formalize or curtail the effect of crime severity, either way it must clarify its role in the inevitable discovery doctrine.[439] If crime severity is to play a part in the doctrine, it should do so explicitly, not as a dirty secret whereby decisionmakers are permitted to engage in disingenuous reasoning, taking into account factors that are meant to be irrelevant to preserve the appearance of following the law.

B. *Reshaping the Doctrine*

Inevitable discovery has been left to the laboratories of the lower courts long enough, especially for a doctrine that so significantly impacts the rest of search and seizure law. If inevitable discovery is meant to be just a minor doctrine, the Court needs to cabin it. And if inevitable discovery is meant to be a major doctrine, the Court needs more than just one opinion in forty years providing direction to the lower courts. This Section offers a range of ways in which the Court could revisit the doctrine.

At minimum, the Court must curb blatant lower court manipulation. Additionally, it would also be helpful to address the lower courts' wide-ranging experimentation. The Court could give clearer guidelines for what constitutes permissible variation, thereby clarifying much of the ambiguity of

---

435 Jeffrey A. Segal, Avani Mehta Sood & Benjamin Woodson, *The "Murder Scene Exception"—Myth or Reality? Empirically Testing the Influence of Crime Severity in Federal Search-and-Seizure Cases*, 105 VA. L. REV. 543, 559 (2019).

436 *Id.*

437 *Id.* at 572-76.

438 *See* Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 1 (2011) ("Fourth Amendment doctrine ignores a key determinant of reasonableness, the crime under investigation."). This issue has not escaped the Court's attention either. *See* Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting) (contending that Fourth Amendment exceptions should "depend . . . upon the gravity of the offense").

439 *See* Segal et al., *supra* note 435, at 584.

Nix. Most ideally, the Court would proactively reshape the inevitable discovery doctrine by articulating a new framework. We propose one option, drawing from the Court's recent *Nieves v. Bartlett* decision, that would place a greater burden on the prosecution to affirmatively prove that the requisite counterfactual actually would have happened, rather than simply proposing what could have happened. Ultimately, any more detailed framework would be preferable to the unregulated doctrinal Wild West that currently exists in the absence of Supreme Court leadership.

1. Curbing Manipulation

At the very least, the Supreme Court must step in and overrule outright disobedience among the lower courts. A doctrine purportedly premised on "inevitability" is a far cry from the one that permits application based on "reasonable probability." And failure to appropriately use the preponderance evidentiary burden also undermines the deliberate calibration of the dictates in *Nix*. Such intervention is especially warranted given the unwillingness of the lower courts to correct themselves.[440] For example, despite multiple Eighth Circuit judges calling for en banc consideration to amend their test, the circuit has yet to heed their words more than twelve years later.[441]

At least two Courts of Appeals—the Fifth and Eighth Circuits—manipulate the core of the doctrine. Each expressly permits a diluted standard of inevitability when their tests ask whether there is a reasonable probability the evidence would have been discovered lawfully. Furthermore, though positive that the Eleventh Circuit has now abandoned a reasonable probability test, that court has now misconstrued the preponderance evidentiary burden by using it to reject the dictate of certainty.[442] Put simply, manipulation jeopardizes the integrity of the doctrine. Recall the Eighth Circuit's *United States v. Munoz* decision from Section I.C.[443] The laxer reasonable probability standard enabled the court to skip past grappling with the proper counterfactual series of events—for example, asking whether, but-for an illegal search revealing illicit drugs, an officer simply seeing empty glass pipes would be a certain enough indication of illegality to search anyway.[444]

---

440 *But see* United States v. Watkins, 10 F.4th 1179 (11th Cir. 2021) (en banc) (overruling prior precedent that required only a "reasonable probability" standard).

441 United States v. Thomas, 524 F.3d 855, 860 (8th Cir. 2008) (Colloton, J., concurring) ("[O]ur court's present articulation of the inevitable discovery doctrine is inconsistent with Supreme Court precedent and warrants reconsideration . . . by the en banc court.").

442 United States v. Watkins, 13 F.4th 1202, 1215 (11th Cir. 2021) ("Instead of certainty, what the law requires in ultimate discovery determinations is only that it be more likely than not the evidence would have been discovered without the constitutional violation.").

443 *See supra* notes 182–190 and accompanying text.

444 United States v. Munoz, 590 F.3d 916, 923 (8th Cir. 2010).

The Eighth Circuit's test enabled the panel to engage with the facts so lightly because reasonable probability demands less than inevitability. That is exactly why it is incumbent upon the Supreme Court to curb such distortion of the doctrine.

If the Court indeed wants to permit lower courts to skirt *Nix*'s two core dictates of inevitability and the preponderance evidentiary burden, it should do so explicitly, acknowledging that it is jettisoning the dictates. That in turn would signal to the other lower courts that their tests are overly restrictive. Inevitable discovery is too important of a doctrine to criminal procedure writ large to operate in the shadows.

2. Clarifying Permissible Variation

Although curbing doctrinal manipulation is most pressing, the years since *Nix* have left even obedient lower courts struggling to implement its dictates, and the current level of variation leads to unacceptable levels of inconsistency across the country. The Supreme Court needs to provide clearer boundaries, narrowing the spectrum of permissible doctrinal tests and mitigating the need for experimentation.

Foremost should be clarifying the role deterrence plays within inevitable discovery. Unlike the two formal dictates of *Nix*, deterrence expressly weighs the systemic impact of applying the doctrine. Failing to consider deterrence can incentivize unlawful police behavior—an outcome in direct tension with much of the Supreme Court's modern jurisprudence.[445] In particular, the Court should provide specific guidance on how to reconcile the goal of deterrence with the dangers presented by hypothetical warrants.

Such clarification need not be complicated. A meaningful deterrence element could simply ask whether applying inevitable discovery would skew law enforcement incentives based on the actions they took in the case at issue. The Third Circuit's analysis in *United States v. Stabile* is illustrative—the fact that law enforcement repeatedly and consistently attempted to comply with the warrant requirement suggested that applying inevitable discovery would not compromise future incentives.[446] The point here is not that this specific rule is the one that the Court must adopt, but instead that consideration of deterrence can work.

Independent active pursuit similarly needs clarification. Though admirable in its intention to limit doctrinal application to only those situations where there is evidence of an untainted separate investigation, this

---

445 *See* Erwin Chemerinsky, *The Roberts Court and Criminal Procedure at Age Five*, 43 TEX. TECH L. REV. 13, 24 (2010) (arguing the Roberts Court has singularly centered the exclusionary rule on its relationship to police deterrence).

446 633 F.3d 219, 245-46 (3d Cir. 2011); *see supra* notes 146-151 and accompanying text.

element is arguably overly restrictive, artificially constraining the doctrine beyond the dictates of *Nix*, such as when the evidence at issue is already in police possession when the illegal search occurs, such as a seized computer containing illicit digital evidence. For this reason, this element has already fallen out of favor in the few circuits that continue to include it in their tests.[447] One option would be to clarify that it is a nonessential element that is one indication of inevitability, but not a necessary requirement.

Finally, emphasizing the importance of impeachable historical facts could prove especially useful to constraining post hoc officer rationalization. For example, limiting inevitable discovery's interaction with inventory searches to only those inventories that are written, as opposed to those based on custom, would strengthen the likelihood that application actually meets the inevitability prong. This element also helps limit counterfactual speculation about third-party actors whose actions are not subject to in-court impeachment.[448]

The Court could accordingly specify that where third-party behavior is necessary to the analysis, doctrinal application is not to be based on officer testimony alone. Or, on a more macro scale, the Court could spell out that every contingency in a counterfactual scenario is to be vetted with impeachable historical facts, as opposed to allowing those contingencies to be lumped together.[449]

Following the specifics of these recommendations is not essential, but what is vital is that the Court act to clarify the doctrine, one way or another. Any intervention that addresses experimentation would prove more constructive to lower courts than the status quo.

3. Establishing a New Framework

Ideally, the Supreme Court would go further than just curbing manipulation and clarifying experimentation, establishing a comprehensive new framework to guide lower courts. Such a framework could and should still draw on the dictates from *Nix*, but adopting a new standard would enable the Court to adapt the doctrine to better fit its modern use. This subsection proposes one such reformulation of the doctrine. Once again, though, the point is not that the Court must adopt this particular solution; rather, this

447 *See supra* notes 128-137 and accompanying text.

448 *See* United States v. Cooper, 24 F.4th 1086, 1094 (6th Cir. 2022) ("The risk of intolerable speculation increases, however, when the government's theory of discovery relies on the irregular actions of third parties."); United States v. Stokes, 733 F.3d 438, 447 (2d Cir. 2013) (discussing how "the actions that might have been taken by third parties" are "inherently speculative").

449 *See supra* notes 198–200 and accompanying text discussing statistical inferential fallacies.

illustrates that reform addressing all of the many problems raised in the rest of this Article is practical.

One reason our proposal is practical is that it draws on a framework that the Court has already itself developed: the "atypical arrest" carveout in its recent *Nieves v. Bartlett* decision.[450] In *Nieves*, Officer Luis Nieves arrested Russell Bartlett during a festival.[451] Nieves was talking to some attendees when Bartlett told them to stop speaking with the police.[452] A short time later, Bartlett approached Nieves and another officer to stop them from speaking to a minor. This led to a physical confrontation, at which point the officers arrested Bartlett for disorderly conduct and Nieves allegedly said, "bet you wish you would have talked to me now."[453] Bartlett sued under Section 1983 for a violation of his First Amendment rights, claiming the arrest was retaliatory based on his intervention and comments to the officers.

The issue before the Court was whether a showing of probable cause to arrest is sufficient to defeat a claim that the arrest was made for purposes of retaliation against protected speech.[454] The majority answered in the affirmative: as a default rule, plaintiffs alleging retaliation must show that the officer did not have probable cause to arrest.[455] But the majority also included a carveout where plaintiffs could forgo proving the absence of probable cause if they could "present[] objective evidence" that they were arrested for conduct that does not typically lead to the arrest of "otherwise similarly situated individuals."[456] In short, the Court created an atypical-arrest exception for situations where its general principle fails to account for discriminatory discretion.[457]

Such a rule could similarly apply to inevitable discovery, which is similarly sound in theory but struggles to constrain discriminatory discretion. Some policing actions seem to provide a rational basis for inevitable discovery in hindsight, but in reality, that action is taken rarely or inconsistently, meaning the result would be far from inevitable. And just as a plaintiff in a retaliatory arrest claim bears the burden of proof, here too, the prosecution would have the burden of demonstrating that any basis for inevitable discovery is the product of routine policing—i.e., proving that law enforcement *consistently*

---

450 139 S. Ct. 1715 (2019).

451 *Id.* at 1720.

452 *Id.*

453 *Id.* at 1721.

454 *Id.* at 1724 ("[P]rotected speech is often a legitimate consideration when deciding whether to make an arrest.").

455 *Id.* at 1725.

456 *Id.* at 1727.

457 *See generally The Supreme Court, 2018 Term—Leading Cases*, 133 HARV. L. REV. 272 (2019).

treats similarly situated individuals in the same way that the prosecution claims officers *would have* acted.

Inevitable discovery's interaction with inventory searches helps illustrate this proposal. Although impounding and inventorying a car frequently serves as the predicate for inevitable discovery in the automobile context, impoundment is not the usual outcome of most minor traffic violations.[458] If the prosecution's counterfactual basis for inevitable discovery is an inventory search arising from impoundment after being pulled over for a minor violation, such as a missing taillight, the prosecution should have to prove that impoundment regularly follows such violations. And further, like *Nieves*, this burden could only be met with *objective* evidence, such as department-wide data on the frequency that vehicle impoundment occurs based on the kind of infraction that is to serve as the predicate.[459]

This new framework would help cure some of the problematic policing incentives that currently plague the doctrine. Currently, inevitable discovery empowers police to disregard constitutional limits on their authority once they know that they *could* arrest an individual and subject their belongings to an inventory search.[460] Consequently, officers have nothing to lose by conducting an illegal search in case they find probative evidence. If instead they do not find anything, they can let the person go—no harm, no foul. But by incorporating a *Nieves*-style rule, the police would no longer have the inventory search backstop if that were not the consistent outcome of such stops—law enforcement's disparate treatment of similarly situated individuals would bar the application of inevitable discovery.

Such a solution would help address the issues discussed in the prior subsection as well. It would lessen reliance on subjective officer rationalization, as such a framework would underscore the need for objective historical records on policy enforcement. It would also potentially help untangle the normative issues related to crime severity, as more serious crimes tend to involve more intensive allocations of law enforcement resources,[461] meaning prosecutors should be able to identify similar treatment as an inevitable discovery predicate. Additionally, this framework would enable localization of the doctrine, as the prosecution's relevant set of

---

458 For detail on one city's inconsistencies with when towing is permissible, see Elliott Ramos, *Chicago's Towing Program is Broken*, WBEZ (Apr. 1, 2019), http://interactive.wbez.org/brokentowing [https://perma.cc/6HAL-CF7B].

459 *Cf.* John S. Clayton, Note, *Policing the Press: Retaliatory Arrests of Newsgatherers After* Nieves v. Bartlett, 120 COLUM. L. REV. 2275, 2301 (2020) (contemplating what qualifies as "objective evidence" for the purposes of the atypical-arrest exception).

460 *See supra* notes 318-320 and accompanying text.

461 *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 571 n.282 (2011) (describing additional resources provided at the state level based on crime type and severity).

comparators would depend on the jurisdiction at issue. Such a framework would place a moderately greater burden on law enforcement to point to historically consistent behavior to prove inevitability.

Of course, this solution is not without its limits. It is not clear that this framework alone, without additional deterrence parameters, would necessarily solve the incentives problem that arises when courts permit hypothetical search warrants. Furthermore, defining what qualifies as similarly situated will raise different complications too.[462] And perhaps most problematic, the reality of racially discriminatory policing could create perversities for comparator purposes, as Black and Brown communities could have lesser constitutional protection since they are already policed more harshly.[463] But borrowing from the *Nieves* atypical-arrest framework at least offers a starting point for how to grapple more squarely with inevitable discovery's future operation.

CONCLUSION

Inevitable discovery has hidden from the limelight for too long. By myopically focusing on the requirements of the Fourth Amendment and its exceptions in isolation, rather than thinking about them interactively, scholars have missed this looming blackhole. This Article has attempted to lift inevitable discovery from its current status as a minor addendum within exclusionary rule remedies to where it rightfully belongs: a criminal procedure landmark that is worthy of scrutiny. In the process, we have developed a first-of-its-kind taxonomy of the doctrinal tests among the federal Courts of Appeals and also offered a range of ways in which the Supreme Court could address the experimentation and manipulation embedded within those tests.

The desperate need for this intervention is amplified by the fact that law enforcement is not an idle bystander. Instead, their tactics evolve with the law, meaning a doctrinal backstop for police misconduct like inevitable discovery can—and does—undermine jurisprudence that the Supreme Court

462 *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1741 (2019) (Sotomayor, J., dissenting) ("What exactly the Court means by 'objective evidence,' 'otherwise similarly situated,' and 'the same sort of protected speech' is far from clear."). Such difficulties also have long been the subject of employment discrimination caselaw and research. *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731-35 (2011) (describing how discrimination law's reliance on comparators creates "a crisis of methodological and conceptual dimensions").

463 *See* Steven J. Briggs & Kelsey A. Keimig, *The Impact of Police Deployment on Racial Disparities in Discretionary Searches*, 7 RACE & JUST. 256, 270 (2017) ("[S]tops involving Black drivers are more likely to include discretionary searches."); *The Supreme Court, 2018 Term*, *supra* note 457, at 278-79 (discussing how *Nieves* will likely "exacerbate patterns of economically and racially discriminatory policing").

carefully develops in other domains of criminal procedure. A doctrine that has such a large footprint and the capacity to unravel numerous pockets of Fourth Amendment law merits more than one Supreme Court decision clarifying its operational details, especially when lower courts have struggled in implementing that single decision's commands. It is time for the Court to speak again.

* * * * *