Warrant Nullification

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L. Joe Dunman*

ABSTRACT

Police officers execute thousands of search warrants in the United States every year, often looking for drugs in people's homes. Many search warrants are executed by militarized "dynamic entry" teams who violently conduct raids late at night with little or no warning, guns drawn. These raids have killed and injured hundreds of people nationwide—not just suspects but also officers and bystanders. Protests erupt in response, the community divides, and trust in institutions crumbles.

Legislative and executive policy can reduce the violence of search warrant executions, but could there also be a judicial option? This Article explores one such option: nullification. Like other actors in the criminal justice system, judges can nullify the law, selectively turning off the punitive and violent machine of criminal justice by refusing to ratify militarized law enforcement action.

Judges have the power to reduce the violence and disorder caused by militarized police raids by simply denying search warrant applications even if there is probable cause to approve them. This Article defines this judicial power of warrant nullification, assesses the violent toll of search warrants, and proposes three pragmatic (as opposed to political or partisan) bases for radical judicial action: judicial independence, harm reduction, and community stability.

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I. INTRODUCTION

"The first lesson, simple as it is, is that whatever court we are in, whatever we are doing, whether we are on a trial court or an appellate court, at the end of our task some human being is going to be affected. Some human life is going to be changed in some way by what we do . . . ."

—Justice David Souter

Police officers execute thousands of search warrants in the United States every year, often looking for drugs in people's homes. Many search warrants are executed by militarized “dynamic entry” teams who violently conduct raids late at night with little or no warning, guns drawn. These raids have killed and injured hundreds of people nationwide—not just suspects but also officers and bystanders. The aftermath of these raids can also be violent (especially when they “go wrong” due to police malfeasance, recklessness, or negligence) as protesters take to the streets, often peacefully but sometimes not. Riot police and counter-protesters then respond with more violence. The community divides along political or racial grounds, and trust in institutions crumbles.

Legislative and executive policy can reduce the violence of search warrant executions and their aftermath, but could there also be a judicial option? This Article suggests one such option: nullification. Like other actors in the criminal justice system, such as juries and prosecutors, judges can nullify the law, selectively turning off the punitive and violent machine of criminal justice by refusing to ratify militarized law enforcement action.

Judges have the power to reduce the violence and disorder caused by militarized police raids by simply denying search warrant applications even when there is probable cause to approve them. This Article defines this judicial power of warrant nullification, assesses the violent toll of search warrants, and seeks a pragmatic (as opposed to political or partisan) basis for radical judicial action. It proposes three justifications: judicial independence, harm reduction, and community stability.

Part II of this Article describes the three chief actors in American criminal law (juries, prosecutors, and judges) and explores the basic scope of their nullification powers. Part III describes the sources and scope of judicial power to nullify search warrants. There are three main sources of this power: immunity, discretion, and job security. Part IV assesses the violent toll of search warrants
WARRANT NULLIFICATION in the United States. Part V offers three pragmatic justifications for search warrant nullification. The first is judicial independence. The second is harm reduction. Finally, concern for community stability can justify search warrant rejections.

Violent police raids cause chaos not just for the residents of the home being raided but also in society as a whole, because violent police searches fuel protests, reactionary counter-violence, and distrust in institutions. The practical consequences of search warrants are now often so severe that pragmatic judges may find nullification a reasonable method to preserve peace and order in the larger community when the "rule of law" itself causes chaos. In other words, nullification may be justified when the law enforcement methods used to catch criminals are worse, on balance, than the crimes themselves.

II. NULLIFICATION IN CRIMINAL LAW

In the American criminal justice system, there are three actors who "apply the law": the jury, the prosecutor, and the judge. In a criminal trial, the prosecutor applies the law by pursuing the conviction of a defendant under the prevailing criminal code. The prosecutor convicts the defendant by proving guilt beyond a reasonable doubt within the constraints of that code and of procedural and evidentiary rules. The judge applies the law by granting or denying procedural motions, sustaining or overruling evidentiary objections, and giving instructions to the jurors for their deliberation. The jury then applies the law by determining whether the prosecutor has carried their burden and proven guilt—as defined by the judge's instructions—and by rendering a verdict. To protect their independence, each of these three actors is given wide discretion and immunity from negative consequences.

Just as this combination of discretion and immunity gives each actor great power to apply the law, it also gives them great power to nullify the law through action or inaction. To nullify something is to strip it of force or validity, make it void, and make it of no consequence. To nullify the law is to effectively turn it off. Through nullification, each of these actors can render the prevailing criminal code a mere "form of words" if they so choose, even if the law should apply to the case or process before them. Consider how nullification works for each of these actors.

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2 Defendants are not actors because they do not apply the law. The law is applied to them.


4 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (noting that the government's attempt to use copies of materials seized unlawfully against criminal defendants effectively rendered the Fourth Amendment meaningless).
A. Jury Nullification

The jury is the most notorious nullifying actor in criminal law. A jury nullifies criminal law when it acquits a defendant “even when its findings as to the facts, if literally applied to the law as stated by the judge, would have resulted in a conviction.” Though the prosecution may prove guilt beyond a reasonable doubt, a nullifying jury may still acquit and set the criminal free. This disregard for the law is criminally unpunishable and procedurally non-reversible.

Jury nullification is a collective act that can be motivated by political ideology, values, or, more generally, conscience. Depending on whom you ask, though, jury nullification is either an invaluable democratic safeguard against tyranny or such a threat to the rule of law that no one should utter its name in court.

In 1852, American political philosopher Lysander Spooner wrote that a jury, as they deliberate on a defendant’s guilt, should also “judge whether there really be any such law.” The jury, in its role as the “palladium of liberty,” must also judge “the existence” and “the justice” of the law under which the defendant had been charged. Spooner thought the jury should function as a super-legislature of sorts. Nearly half a century later, foundational legal realist Roscoe Pound wrote that jury nullification (or “jury lawlessness,” as he put it) “is the great corrective of law in its actual administration.” Nullification, Pound argued, was an important obstacle to “the will of the state at large imposed on a reluctant community” and to “the will of a majority imposed on a vigorous and determined minority.” Today, advocacy organizations like the Fully Informed Jury Association tell prospective jurors that they “have the right to vote [their] conscience, even if it means setting aside the law to conscientiously acquit someone who has technically broken the law.”

Courts and legislatures, on the other hand, generally despise jury nullification. According to some judges, a jury that nullifies is a threat to the very rule

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5 An exhaustive exploration of the history and literature of jury nullification is not necessary for this Article, but interested readers are highly encouraged to see Teresa L. Conway, Carol L. Mutz, & Joann M. Ross, Jury Nullification: A Selective, Annotated Bibliography, 39 VAL. U. L. REV. 393 (2004).


7 United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972) (noting that nullification is “an unreviewable and unreversible [sic] power in the jury, to acquit in disregard of the instructions on the law given by the trial judge”).

8 LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 10 (1852).

9 Id.


11 Id.

of law, and jurors willing to nullify must be rooted out for lack of impartiality.\textsuperscript{13} Some state laws make even the suggestion of nullification criminal “tampering,” an illegal effort to coerce a jury’s verdict.\textsuperscript{14}

First, the judges. Since just before the turn of the twentieth century, federal and state judges have repeatedly rejected the idea that jurors have any right to nullify.\textsuperscript{15} Although, practically speaking, a jury has “the raw power to set an accused free for any reason or no reason,” courts insist that their primary duty is to apply the law as instructed.\textsuperscript{16} From this perspective, nullification is something the jury can do but should not feel entitled to do. Judge Learned Hand wrote for the Second Circuit in \textit{Seiden v. United States}, that, although nullification is within the power of the jury, “it is not within their right; they are as much bound by the law as a court.”\textsuperscript{17} Seventy years later, Judge Richard Posner echoed this sentiment for the Seventh Circuit in his familiar pragmatic terms: “Jury nullification is a fact, because the government cannot appeal an acquittal; it is not a right, either of the jury or of the defendant.”\textsuperscript{18} It is “unreasonable” and “lawless” to exercise the power of nullification, Posner warned.\textsuperscript{19} A year later, Judge Jose Cabranes of the Second Circuit wrote in \textit{United States v. Thomas} that “[w]e categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent.”\textsuperscript{20} A court can dismiss any potential juror who intends

\begin{itemize}
\item \textsuperscript{13} State v. McClanahan, 510 P.2d 153, 158 (Kan. 1973).
\item \textsuperscript{14} COLO. REV. STAT. ANN. \S 18-8-609 (West 1989).
\item \textsuperscript{15} \textit{See, e.g.}, Berra v. United States, 351 U.S. 131, 134 (1956) (“The role of the jury in a federal criminal case is to decide only the issues of fact, taking the law as given by the court.”); Hepner v. United States, 213 U.S. 103, 114 (1909) (“Even in technical criminal cases it is the duty of the jury to accept the law as declared by the court.”); \textit{Sparf v. United States}, 156 U.S. 51, 101 (1895) (“Public and private safety alike would be in peril if... juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves.”).
\item \textsuperscript{16} \textit{United States v. Sepulveda}, 15 F.3d 1161, 1190 (1st Cir. 1993) (emphasis added); \textit{see also} United States v. Avery, 717 F.2d 1020, 1027 (6th Cir. 1983) (“Although jurors may indeed have the power to ignore the law, their duty is to apply the law as interpreted by the court and they should be so instructed.”).
\item \textsuperscript{17} 16 F.2d 197, 198 (2d Cir. 1926)
\item \textsuperscript{18} \textit{United States v. Perez}, 86 F.3d 735, 736 (7th Cir. 1996); \textit{see also} \textit{Medley v. Commonwealth}, 704 S.W.2d 190, 191 (Ky. 1985) (“The right to disbelieve the evidence does not equate to the right to disregard the law.”); \textit{but see} \textit{United States v. Leach}, 632 F.2d 1337, 1341 n.12 (5th Cir. Unit A 1980) (“Jury nullification—the right of a jury to acquit for whatever reasons even though the evidence supports a conviction—is an important part of the jury trial system guaranteed by the Constitution.”) (emphasis added).
\item \textsuperscript{19} \textit{Perez}, 86 F.3d at 736.
\item \textsuperscript{20} 116 F.3d 606, 614 (2d Cir. 1997).
\end{itemize}
to nullify.\textsuperscript{21} So strong is the judicial sentiment against jury nullification, many judges have even taken to law reviews and symposiums to disparage it further.\textsuperscript{22}

Perhaps the strongest judicial rejection of jury nullification comes from Judge Simon Sobeloff of the Fourth Circuit in the case of \textit{United States v. Moylan}:

To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic.\textsuperscript{23}

Meanwhile, Congress and state legislatures have passed prohibitions on jury tampering that arguably curtail even the mention of jury nullification by its advocates. The federal government\textsuperscript{24} and some states make jury tampering a felony. In Colorado, for example, it is a "class 5 felony" to communicate "directly or indirectly" with a juror in an effort to influence a juror’s vote in a case.\textsuperscript{25} Other states, like Michigan, consider the same general behavior to be a misdemeanor.\textsuperscript{26} So, under the language of these laws, a person telling a juror directly, "you should nullify the law in this case" would likely be a crime, but so too might be yelling, "jurors should nullify in that case" as they pass by outside.

The precise scope of these prohibitions has recently been tested. In Colorado, police arrested two nullification advocates outside the state courthouse in Denver for violating the state law against jury tampering.\textsuperscript{27} They were handing out pamphlets about jury nullification to anyone who identified themselves as jurors reporting for duty.\textsuperscript{28} The trial court dismissed the charges.\textsuperscript{29} On appeal, the

\textsuperscript{21}Id.
\textsuperscript{22}Lawrence W. Crispo, Jill M. Slansky, & Geanene M. Yriatre, \textit{Jury Nullification: Law Versus Anarchy}, 31 LOY. L.A. L. REV. 1, 52 (1997) ("Voir dire must guard against nullification so that passion, mercy, bias, or prejudice does not determine the outcome of trials."); John Bissell, \textit{Comments on Jury Nullification}, 7 CORNELL J.L. & PUB. POL’Y 51, 55 (1997) ("No jury or juror has the right to purposefully disregard the court’s instructions on the law applicable to a case."); Rebecca Love Kourlis, \textit{Not Jury Nullification; Not a Call for Ethical Reform; But Rather a Case for Judicial Control}, 67 U. COLO. L. REV. 1109, 1109 (1996) ("I find jury nullification akin to anarchy . . . . It is intolerable in an ordered society.").
\textsuperscript{23}417 F.2d 1002, 1009 (4th Cir. 1969).
\textsuperscript{24}18 U.S.C.A. § 1503 (West 2021).
\textsuperscript{25}COLO. REV. STAT. ANN. § 18-8-609(1)-(2) (West 1989).
\textsuperscript{26}MICH. COMP. LAWS ANN. § 750.120a(1) (West 2021).
\textsuperscript{27}People v. Iannicelli, 449 P.3d 387, 389 (Colo. 2019).
\textsuperscript{28}Id.
\textsuperscript{29}Id. at 390.
Colorado Supreme Court affirmed the dismissal because the state law prohibits influencing a juror’s decision “in a case,” and the men did not ask any of the passing jurors if they were serving in any particular cases, just whether they were reporting for jury duty in general.\(^{30}\)

Roughly the same situation occurred in Michigan. Police arrested defendant Keith Wood for handing out jury nullification pamphlets in front of a state courthouse.\(^{31}\) Unlike his counterparts in Colorado, however, a jury actually convicted Wood for violating the state jury tampering law.\(^ {32}\) The Supreme Court of Michigan reversed his conviction, however, because, similar to Colorado’s, the Michigan jury tampering statute prohibits attempts to influence a juror “in any case,” and Wood did not single out jurors assigned to any specific cases for his literature distribution.\(^{33}\)

Though the defendants in both of those cases were let off the hook, neither state’s supreme court struck down their respective jury tampering statutes as unconstitutional, nor did they categorically exclude nullification advocacy from the statutory purview. Had any of the pamphleteers targeted jurors in specific cases, they very well could have been convicted.

While dozens of scholars and judges have endlessly theorized and debated jury nullification, nullification by the two more powerful actors in American criminal law—the prosecutor and the judge—has received somewhat less attention.

**B. Prosecutorial Nullification**

Of the three actors in American criminal law, prosecutors are the most powerful.\(^ {34}\) Judges guide the trial process and juries determine guilt or innocence, but due to the outsized frequency of plea bargaining and an ongoing legislative impulse to criminalize more and more behavior, “[t]he fate of most of those accused of crime is determined by prosecutors.”\(^ {35}\) Prosecutors decide who to charge and how, who to bargain with and how, and, in some jurisdictions, whether to investigate in the first place.\(^ {36}\) They exercise this great power with absolute immunity from lawsuits for tort damages and civil rights violations.\(^ {37}\)

30 Id. at 397.
32 Id. at 498.
33 Id. at 503.
36 Id. at 1524–25.
Just as they can decide to charge a suspect with a crime, prosecutors can also decide not to charge a suspect, even if the law is clear and the evidence of guilt is overwhelming, and, in most cases, this is simply seen as an exercise of the wide discretion prosecutors enjoy. However, a prosecutor can nullify the law when they have "sufficient evidence to secure a conviction . . . but declines prosecution because of a disagreement with that law or because of the belief that application of that law . . . would be unwise or unfair." In other words, prosecutors nullify when the law conflicts with their conscience.

Distinguishing between discretion and nullification is not always easy, if possible at all, in many cases. As Roger Fairfax, Jr. explains, because prosecutors have the "ability to exercise unreviewable discretion," "it may be the case that the role played by the public prosecutor makes prosecutorial nullification simply a part of the prosecutor’s ‘job description.’" Perhaps the only meaningful way to separate simple acts of discretion from outright nullification is to assess the underlying motivation. Nullification is generally the exercise of a prosecutor’s personal politics or values, as opposed to their discretion, which is limited to pragmatic choices in individual cases based on the quality of evidence, allocation of resources, public relations impact, concurrent proceedings in other jurisdictions, etcetera. Regardless, no matter how an individual decision not to prosecute is labeled, prosecutors can and sometimes do nullify the law.

There are some contemporary examples of prosecutorial nullification. In 2018, Philadelphia District Attorney Larry Krasner announced that his staff would no longer pursue criminal charges for marijuana possession, though state law still criminalizes it. Elsewhere, in St. Louis County, Missouri, prosecutor Wesley Bell stated that his office would no longer criminally prosecute failure to pay child support cases, even though it remains a crime under state law. In addition, following a massive outbreak of anti-police-brutality protests across the United States in 2020, Oregon’s Multnomah County District Attorney Mike

39 Id. at 1252.
40 Not all prosecutors can exercise their conscience. Chief prosecutors, who set office policy, may exercise their conscience while subordinates must follow their orders.
41 Fairfax Jr., supra note 38, at 1267.
Schmidt declared that his office would no longer prosecute misdemeanor offenses including disorderly conduct and interference with a police officer. While Schmidt's decision had a pragmatic angle (mitigating a dramatically increased caseload) all of these examples are categorical changes in policy better attributed to "progressive" values or conscience than to case-by-case review.

To say that prosecutors enjoy great power of discretion or nullification is not to say that they operate without any accountability. Unlike jurors, prosecutors work under electoral and institutional pressures of various sorts. For example, chief state prosecutors are usually elected, and thus must answer to voters should they act contrary to the public will. Others, especially lower in the office hierarchy, must conform to supervisor expectations and department policy to maintain their employment. Moreover, city or county prosecutors who choose to nullify certain laws may face jurisdictional backlash from state legislatures and police agencies. In Pennsylvania, for example, lawmakers passed a bill in 2019 giving the state attorney general the power to pursue gun crimes left unenforced by local Philadelphia prosecutors. In Oregon in 2020, U.S. Marshals deputized Oregon State Police ("OSP") officers to circumvent a local prosecutor's decision not to prosecute anti-police demonstrators who resist arrest. Deputizing the OSP troopers gave federal prosecutors jurisdiction to charge tougher federal crimes if demonstrators refuse to submit peacefully.


46 Fairfax, Jr., supra note 38, at 1268.

47 Id. at 1272.

48 Id. at 1271.


51 Id.; see also 18 U.S.C.A. § 111 (West 2021) (providing that assaulting or resisting a federal officer with physical force is a felony with a maximum sentence of eight years).
The last actor with the power to nullify American criminal law is perhaps the last one anyone suspects: the judge, the esteemed and venerated icon of the rule of law.

C. Judicial Nullification

American judges, collectively, have been vocally hostile toward jury nullification for more than a century. They regularly deride the practice as lawless, sanction lawyers who advocate for nullification during trial, and refuse requests to instruct jurors that they have the power to return a verdict “in the teeth of both law and facts.”

Yet, judges are quite capable of nullification themselves, and they probably nullify the law quite often, consciously or not. The literature identifies at least two ways that judges exercise their power of nullification: through the instructions they give to juries and in the sentences they give to convicted defendants.

For example, judges nullify the law when they give instructions to trial juries. Their instructions are often so archaic or complex that they are effectively indecipherable to lay jurors, a practice Michael Saks calls “nullification by non-instruction.” Judges do this, Saks says, for several reasons. First, judges can exert control over juries through the quality of instructions they give them. Where a judge believes the law would impede their own desired outcome, they can give impossible instructions. If, on the other hand, the judge believes following the law will lead the jury to reach their preferred outcome, the instructions given will be clearer. Second, judges nullify the law in order to reinforce the adversarial process by deferring to lawyers’ more comprehensible (but perhaps less accurate) instructions given in closing arguments. Third, judges may give unclear instructions to blunt “[u]njust laws or unjust applications.” This version is most similar to traditional jury nullification. Fourth, counterintuitively, judges may give unclear instructions in order to minimize legal complexity. According to Saks, “the more parsed and precise the law is, the more complex it becomes, and the more incomprehensible to judges and lawyers.” This all sounds manipulative and dangerous to the rule of law, but Saks argues that it poses no threat to the greater system. Despite constant calls for clearer jury instructions by

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54 Id. at 1282.
55 Id. at 1290.
56 Id.
57 Id. at 1291–92.
58 Id. at 1292.
59 Id. at 1294.
60 Id.
judges, lawyers, and laypeople alike, judicial nullification through non-instruction “usually has no great ill effects” because “most judges agree most of the time with the jury’s verdict.”

Sentencing a guilty defendant is the second opportunity for judicial nullification, according to Bruce Antkowiak. He argues that “[j]ust as a judge’s certainty about the culpability of a defendant should inform the sentencing decision, a judge’s doubts about the correctness of the guilty verdict should be openly considered and weighed as a factor arguing for a diminished penalty.”

Juries often make mistakes in criminal cases. After all, DNA testing has exonerated a great number of convicted felons. Antkowiak also notes that the “beyond a reasonable doubt” standard is “more an exhortation than a legal standard,” and in no way guarantees that fallible human jurors will reach a factually accurate verdict.

“No system, no matter how well intended, can exist for long if it systematically calls upon persons to exercise discretion without cognizance of moral issues or with disregard for matters of fundamental fairness,” writes Antkowiak. Therefore, judges have a historical, moral, and practical obligation to intervene when the jury makes mistakes or the legislature becomes too punitive. Courts and professional organizations have long called on judges to make sentencing decisions “appropriate to the offense and the offender.” Judges would not be doing their duty if they did not take these obligations seriously when sentencing the guilty, even if doing so feels like they are imposing their will instead of the law.

These two forms of judicial nullification – instructions and sentencing – center on the judge’s relationship with the jury, both before the verdict and after. But what about the judicial role before a criminal case even begins? Judicial officers remain the great gatekeepers of lawful searches and arrests under the Fourth Amendment. They grant or deny warrant applications submitted by law enforcement. In this role, they may also exercise a nullifying prerogative. They

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61 Id. at 1295.
63 Id. at 556–57.
64 Id. at 565.
65 Id. at 567.
66 Id.
67 Id. at 579.
68 Sentence-nullifying trial judges should beware, however, that their rulings are subject to appellate review. In United States v. Schrank, U.S. District Judge Sheryl Lipman defied federal guidelines and sentenced a child pornography consumer to 12 months of home incarceration. 768 F. App’x 512, 514 (6th Cir. 2019). The Sixth Circuit reversed her and remanded for a new sentence. Id. at 515. Judge Lipman then defied the Sixth Circuit, issuing the same sentence again. United States v. Schrank, 975 F.3d 534, 535 (6th Cir. 2020). Unsurprisingly, the Sixth Circuit reversed again—this time with stern language—and remanded the case to a different district judge. Id. at 535–36 (6th Cir. 2020).
can choose to enable a heavily militarized and publicly polarizing law enforce-
ment apparatus, or, by denying warrants wholesale, achieve alternative jurispru-
dential goals explored in Part V.

The next section describes the expansive power judges enjoy as warrant issuers. Because they enjoy great immunity, wide discretion, and limited ac-
countability, judges have extensive power to nullify law search warrants.

III. JUDICIAL POWER TO NULLIFY WARRANTS

Power is the strongest where accountability is the weakest. Judges enjoy great power to grant or deny warrant applications because they can be held ac-
countable in only a few uncertain ways. Judges are immune from most suits, are
given wide discretion and great deference under both procedural rules and sepa-
ration of powers principles, and enjoy incredible job security.

A. Civil Immunity

The immunity extended to jurors makes jury nullification possible. "If
the members of a jury cannot themselves be charged with misfeasance when they
acquit someone who is clearly guilty, they obviously have the power to choose
to do so." For prosecutors, a combination of discretion and immunity gives
them vast power to nullify as well.

Similarly, judges have both wide discretion and immunity from suit for
decisions they make in their judicial capacity. Judges enjoy absolute tort im-
munity for any acts done within their official jurisdiction. "A judge will not be
deprived of immunity because the action [they] took was in error, was done ma-
licularly, or was in excess of [their] authority; rather, [they] will be subject to
liability only when [they have] acted in the 'clear absence of all jurisdiction.'”
As the Supreme Court has repeatedly held, “a judicial officer, in exercising the
authority vested in [them], [should] be free to act upon [their] own convictions,
without apprehension of personal consequences to himself.”

70 See Burns v. Reed, 500 U.S. 478, 492 (1991) (noting that prosecutorial immunity even ex-
tends to "appearance in court in support of an application for a search warrant and the presentation
of evidence at that hearing.

72 Judges are not fully immunized from criminal prosecution, however. See Ex parte Virginia,
100 U.S. 339, 348–349 (1879).
351 (1871)).
74 Id. at 355. (quoting Bradley, 80 U.S. at 347).
This principle applies to search warrant rejections in two ways. First, nullifying warrants is an act (or refusal to act) out of "conviction," as the Supreme Court has put it.\textsuperscript{75} Second, there are no possible civil consequences for exercising this conviction. If prosecutors are immune from civil suit for their role in search warrant application hearings, certainly judges are as well.\textsuperscript{76} Also, this immunity protects prosecutors and judges from suit by the people targeted by search warrants, not by the people who execute them. Police officers are acting as government agents, not individuals, and they would have no cause of action for which to sue. There is simply no civil wrong or basis for standing. Rejecting a search warrant application is not a justiciable harm that American tort law recognizes.

What about injunctions? The Supreme Court in \textit{Pulliam v. Allen} held that plaintiffs may seek injunctive relief from unconstitutional judicial orders under 42 U.S.C. § 1983 and, if successful, may win attorney fees under 42 U.S.C. § 1988.\textsuperscript{77} In \textit{Pulliam}, a lower court enjoined a state magistrate from imposing bail on suspects charged with non-jailable offenses.\textsuperscript{78} The imposition of bail violated the due process and equal protection rights of the suspects.\textsuperscript{79} However, rejecting a search warrant application interferes with no individual constitutional right or interest.\textsuperscript{80}

Therefore, when it comes to the search warrant application process, judicial immunity is total, for practical reasons as well as doctrinal ones. Refusing to issue a search warrant gives rise to no causes of action in tort, contract, or civil rights, so a judge need not rely on common law principles of immunity at all to avoid adverse legal consequences for nullification.

\section*{B. Discretion and Deference}

The scope of judicial discretion is determined by the strength of review to which it is subject. The more deferential the review, the greater the discretion. How much discretion do judicial officers have when deciding whether to approve a warrant application?\textsuperscript{81} The answer depends on whether the judge is granting or denying the warrant application. Judges who issue warrants enjoy great discretion. Judges who reject warrants may enjoy \textit{total} discretion.

\textsuperscript{75} Id.

\textsuperscript{76} Burns, 500 U.S. at 492. The author could find no case challenging judicial immunity in this context.


\textsuperscript{78} Id. at 524–25.

\textsuperscript{79} Id.

\textsuperscript{80} The police, as government actors, do not have a constitutional basis for suit under § 1983. That law allows suits against them, not by them, unless they are suing as citizens whose rights have been violated. See 42 U.S.C.A. § 1983 (West 2021).

\textsuperscript{81} "Discretion" in this context is the extent of deference warrant-issuing judges get in suppression hearings and appellate review.
There are several reasons why. First, judicial officers are constrained by specific federal and state rules of criminal procedure, but the rules only go so far. Second, judicial officers may consider the “totality of the circumstances” when determining probable cause, which gives them great latitude. Third, though the standard of review in both suppression hearings and on appeal is highly deferential for warrant issuance, warrant rejection receives no review at all.

The Federal Rules of Criminal Procedure and all its state law counterparts include provisions on who should issue search warrants and how. The basic process is as follows. A law enforcement officer submits a warrant application to the judicial officer (sometimes called a “magistrate”). The application must contain a sworn affidavit with information sufficient to establish probable cause for the search, such as an informant’s tip, first-hand observation by the officer, physical evidence found elsewhere, etc. The application must also state where the search will be conducted and who or what will be the subject of the search. The judicial officer then reviews the application for probable cause and either issues a warrant or rejects the application.

The wording of each jurisdiction’s procedural rules varies, however. The federal rules and the rules of some states use words like “must” or “shall” to suggest that judicial officers are compelled to issue a warrant as long as the application establishes sufficient probable cause. On the other hand, the rules of other states say that judges “may” issue warrants if sufficient grounds exist. Still, other states offer only basic rules with no clear command to issuing judges one way or the other. 82

82 For example, Federal Rule of Criminal Procedure 41(d)(1), “Obtaining a Warrant,” states that a magistrate judge “must issue the warrant if there is probable cause to search for and seize a person or property.” FED. R. CRIM. P. 41(d)(1) (emphasis added). Similarly, California Penal Code section 1528 says that as long as a magistrate is “satisfied of the existence of the grounds of the application” or if probable cause exists “to believe their existence,” the magistrate “must issue a search warrant.” CAL. PENAL CODE § 1528 (West 2021). As another example, Colorado’s rule is nearly identical to California’s rule. COLO. R. CRIM. P. 41(d)(1) (West 2021) (“If the judge is satisfied that grounds for the application exist, or that there is probable cause to believe that such grounds exist, he shall issue a search warrant . . .”) (emphasis added). Other states differ. Texas, for instance, has warrant rules with more discretionary language. Texas’s rules only use the word “may.” TEX. CODE CRIM. PROC. ANN. art. 18.02 (West 2021) (“(a) A search warrant may be issued to search for and seize: (1) property acquired by theft or in any other manner which makes its acquisition a penal offense; (2) property specially designed, made, or adapted for or commonly used in the commission of an offense . . . .”) (emphasis added). The same goes for New York. N.Y. CRIM. PROC. § 690.40(2) (McKinney 2021) (“If the court is satisfied [that the application requirements are met], it may grant the application and issue a search warrant directing a search of the said place, premises, vehicle or person and a seizure of the described property or the described person.”) (emphasis added); see also GA. CODE ANN. § 17-5-21(a) (West 2021) (“Upon the written complaint of any certified peace officer of this state . . . charged with the duty of enforcing the criminal laws . . . under oath or affirmation . . . sufficient to show probable cause . . . any judicial officer . . . may issue a search warrant for the seizure . . . .”) (emphasis added) (listed here as a representative sample); 725 ILL. COMP. STAT. ANN. 5/108-3 (West 2021) (“[U]pon the written complaint of any person under oath . . . which states facts sufficient to show probable cause and which particularly describes the place or person, or both, to be searched and the things to be seized, any
Regardless of the wording, no rule of criminal procedure strips a judicial officer of their warrant-issuing discretion because all search warrants require probable cause. Finding probable cause is the judge’s job, and any decision they make is subject to the gentlest review, if any. The Supreme Court noted in United States v. Leon that because “[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and . . . the preference for warrants is most appropriately effectuated by according ‘great deference’ to a magistrate’s determination.”83

The “fluid concept” of probable cause turns on “the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.”84 Further, “probable cause does not demand the certainty we associate with formal trials.”85 When ascertaining whether probable cause exists, a judge must make “factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”86

That does not mean that a judge’s determination of probable cause and approval of a search warrant are totally insulated from judicial review, however. Under the Fourth and Fourteenth Amendments, a criminal defendant may challenge the constitutionality of a search warrant for lack of sufficient probable cause and move to suppress evidence acquired with an invalid warrant.87

Reviewing courts assess whether probable cause existed to justify the issuance of a particular warrant under a “totality-of-the-circumstances” approach adopted by the Supreme Court in Illinois v. Gates.88 “[A]fter-the-fact scrutiny by courts of the sufficiency of [probable cause] should not take the form of de novo review.”89 To determine whether a search warrant was validly issued, a reviewing court may conduct “a balanced assessment of the relative weights of all the

judge may issue a search warrant.”) (emphasis added); OHIO R. CRIM. P. 41(A)(1) (West 2021) (“A search warrant authorized by this rule may be issued by a judge of a court of record to search and seize property located within the court’s territorial jurisdiction.”) (emphasis added). Finally, other states’ rules follow a style more similar to the Fourth Amendment: a general statement of principle. Pennsylvania’s rules, for example, establish the basic conditions for warrant issuance without directly stating whether a warrant shall or may be issued should the conditions be met. PA. R. CRIM. P. 203(B) (West 2021) (“No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority in person or using advanced communication technology.”).

85 Id. at 246.
86 Id. at 231 (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)).
88 462 U.S. at 230–34.
89 Id. at 236.
various indicia of reliability (or unreliability)” in the application but should not step into the shoes of the warrant-issuing judge to determine if probable cause existed as a matter of law. A reviewing court should merely decide whether “the evidence viewed as a whole provided a ‘substantial basis’ for the Magistrate’s finding of probable cause,” not whether probable cause actually existed. Some federal and state courts have taken this deference a step further. Using a variety of approaches, these courts go so far as to sever parts of search warrants that are too general or unsupported by probable cause from other parts that are sufficiently based and particular. This allows the use of some evidence despite the suppression of other evidence from the same search. So even when confronted with a warrant that has serious deficiencies, reviewing courts will still give a partial pass to the police and the issuing judge, much to the detriment of the criminal defendant who suffered an otherwise unconstitutional search.

In sum, judges who issue warrants are subject to highly deferential review that usually benefits law enforcement. Meanwhile, judges who reject applications for warrants have it even easier—they are subject to no review at all! A search warrant must be issued before it can be challenged, and a search must occur before there is a party with standing to challenge its lawfulness. A refusal to issue a warrant simply does not create a justiciable issue at all. While “[a] warrant is not a judicial opinion,” a rejection of a warrant application is often literally nothing whatsoever. Often the only people who know about a warrant rejection are the judge and the applying police officer, because the rejection occurs outside any case and before anyone becomes an actual defendant.

If a judge declines to issue a search warrant, there can be no subsequent challenge to the judge’s probable cause calculus because no party has suffered a

90 Id. at 234.
93 For a thorough summary of how the Supreme Court’s warrant review doctrine benefits issuing judges and law enforcement, see State v. Johnson, 56 A.3d 830, 845 (Md. Ct. Spec. App. 2012) (“Reduce fifty years of rhetoric to a nutshell and what it says is that the reviewing judge should approach the warrant with a smile.”).
94 Goldstein, supra note 83, at 1179 (“[T]he pre-warrant review proceeding is very different from the usual conception of a judicial hearing. It is ex parte in nature. The only ‘witness’ is the police applicant who submits to the magistrate a written affidavit in support of his application. There is no defendant, no defense counsel, no counsel representing the premises to be searched, and no one to contest the allegations of the police—except the magistrate.”).
95 United States v. Torres, 751 F.2d 875, 886 (7th Cir. 1984).
96 In Louisville, Kentucky, for example, “[t]he courts don’t maintain a database of search warrant requests, and in turn, there’s no record of search warrant requests that are rejected by a judge.” Jacob Ryan, Search Warrants Under Scrutiny as Police Killings Spark Reforms, WFPL (July 8, 2020), https://wfpl.org/search-warrants-under-scrutiny-as-police-killings-spark-reforms/.
justiciable harm. If a judge rejects a search warrant application, but the police conduct a search anyway, the defendant may challenge the search in criminal court by seeking exclusion of any evidence found and in civil court by suing the officers for civil rights violations. Either approach would scrutinize the actions of the police, not the judge. In a suppression hearing or civil rights claim, the police or prosecutor cannot argue that a warrantless search would have been lawful but for the judge’s refusal to issue a warrant.

The police simply have no procedural method or cause of action to challenge the judge from their position as government agents. Even petitions for writs of mandamus, sought to compel courts to act, are reserved for parties to existing cases, not for law enforcement agents trying to build a case.97 Warrant rejections are therefore effectively immune from challenge.

C. Job Security

There are methods for holding judges accountable for their actions other than suppression hearings, appellate review, or civil liability. Judges can be voted out of office, recalled, disqualified, impeached, or sanctioned by judicial disciplinary bodies. Can any of those methods curtail judicial power to nullify search warrants? Probably not reliably.

The voting public can hold elected judges accountable. However, electoral accountability is not predictable or consistent. There is no rigid formula where certain acts on the bench result in a loss at the ballot box next time around. Judges who frequently misbehave are sometimes re-elected.98 Meanwhile, voters can reject incumbent judges who have broken no rules. In 2010, three members of the Iowa Supreme Court lost bitter re-election fights just one year after joining the court’s unanimous ruling legalizing same-sex marriage statewide.99 Whether a judge is re-elected depends on many factors, from local connections and personal reputation, to general public support for their adjudicative record, or to simple name recognition. As a method of accountability, elections are unreliable.

Eight states allow judicial recall elections, giving voters the chance to remove judges from the bench before their regular terms have ended.100 The most

98 Matthew Glowicki, Louisville Judge Reprimanded over Facebook Post About Murder Defendant, Courier J. (June 13 2018), https://www.courier-journal.com/story/news/crime/2018/06/13/louisville-judge-reprimanded-facebook-post-defendant/696189002/ ("It’s the second such reprimand for the district court judge[] who... was elected to the bench in 2010 and secured re-election in 2014. . . . McLaughlin was ranked lowest in general satisfaction in 2014 and 2016 Louisville Bar Association evaluations of district court judges, as voted by attorneys in Jefferson County.").
recent judicial recall election was held in California in 2018, when Santa Clara County Judge Aaron Persky was removed from the bench by voters after sentencing Brock Turner to merely six months in jail (of a possible fourteen years) for conviction on three counts of sexual assault. Prior to Persky's recall, no recall of a judge had even made it to a state ballot since 1982 in Wisconsin, and no judge had been successfully recalled since 1977, also in Wisconsin. Thus, recall, in the few places where it is available, has historically posed little judicial accountability.

Appointed judges can be impeached. Federal judges, under Article III, are subject to impeachment by the House and Senate. However, Congress has impeached only 15 out of nearly 4,000 federal judges, convicting and removing eight, the most recent in 2010.

Most states allow impeachment for both appointed and elected judges, but these cases are also rare. Since 1994, only one state judge has been impeached and removed from office, Pennsylvania Supreme Court Justice Rolf Larsen. Failed attempts at impeachment have occurred more recently. For example, in 2018, the West Virginia House of Delegates voted to impeach every justice on the state supreme court for wasteful spending and breaking payroll rules. One justice retired, the state senate exonerated another, and the other two dodged a vote when an acting version of the Supreme Court ruled that the legislature broke its own rules in the impeachment process.

Recall and impeachment are highly unlikely outcomes for any judge, regardless of whether they nullify search warrants. What about internal discipline

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105 Methods of Judicial Selection: Removal of Judges, supra note 100.


by judicial commissions and appellate courts enforcing judicial codes of conduct?

In every jurisdiction, federal or state, judges must comply with codes of conduct that regulate their temperament, impartiality, and obedience to the law. Judges who violate these codes can be subject to disciplinary action by judicial conduct commissions and superior courts. Violation of codes of judicial conduct can result in reprimands, suspensions, and dismissal (whether a judge is elected or appointed). Yet, no code may actually prohibit the blanket rejection of warrant applications, and warrant rejection may not trigger any disciplinary review.

For example, the Judicial Conduct and Disability Act, the Rules for Judicial-Conduct and Judicial-Disability Proceedings, and the Code of Conduct for United States Judges govern the conduct of federal judges. Each federal court of appeals circuit maintains its own judicial council, comprised of judges from the circuit and its subordinate districts, that enforces the judicial conduct rules. State supreme courts or judicial commissions enforce similar rules of judicial conduct against state judges. Most state judicial codes are based on the ABA Model Rules. The rules, both federal and state, “are designed to inform judges on standards of behavior required to ensure that the public has confidence in the judiciary’s impartial administration of justice.” The rules warn against impropriety and bias and require judges to recuse whenever their personal relationships or pecuniary interests may become involved in a case.

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115 Kastenberg, supra note 113, at 1511.
before them.\textsuperscript{116} The rules also demand faithfulness to the law, warning judges not to be "swayed by . . . public clamor."\textsuperscript{117}

Judicial discipline is initiated by a complaint of some sort, filed by anyone who believes a judge has violated some rule of judicial conduct. The most common complaints against federal judges are "abuse of judicial power," meaning "erroneous, delayed, or unsupported decisions," and "favoritism or bias" for or against a litigant or attorney who appears before them.\textsuperscript{118} Most federal complaints are dismissed, and very few federal judges are ever disciplined.\textsuperscript{119}

By contrast, state disciplinary committees and supreme courts remove judges from office relatively often. From 1980 through 2019, approximately 450 state court judges were removed because of judicial disciplinary violations, roughly 11 per year.\textsuperscript{120} Far more judges are scolded. In 2019 alone, 86 state judges received some kind of lesser discipline for bad behavior, mostly for inappropriate comments and relationships.\textsuperscript{121} That said, the vast majority of judges who face investigation and disciplinary action return to service.\textsuperscript{122}


\textsuperscript{117} Code of Conduct of U.S. Judges Canon 3(A); see also Model Code of Jud. Conduct Canon 2.4 (Am. Bar Ass’n 2020).


\textsuperscript{119} Id. at 9.


\textsuperscript{122} Michael Berens & John Shiffman, Thousands of U.S. Judges Who Broke Laws or Oaths Remained on the Bench, Reuters Investigates (June 30, 2020), https://www.reuters.com/investigates/special-report/usa-judges-misconduct/ ("Reuters identified and reviewed 1,509 cases . . . in which judges resigned, retired or were publicly disciplined following accusations of misconduct. In addition, reporters identified another 3,613 cases . . . in which states disciplined wayward judges but kept hidden from the public key details of their offenses – including the identities of the judges themselves. All told, 9 of every 10 judges were allowed to return to the bench after they were sanctioned for misconduct.").
Because the warrant application process is secret, and because in some courts no records of rejected warrants are kept, it may be difficult to build a record on which to base some form of accountability, be it electoral or disciplinary, for a warrant-nullifying judge. It seems unlikely that voters would become aware of warrant rejections, that a legislative body would be motivated to impeach over them, or that a disciplinary commission would have grounds to punish for them.

Perhaps a local Fraternal Order of Police chapter could go public, accusing a judge of forestalling important police work by repeatedly rejecting warrants, potentially hurting them in the eyes of authoritarian voters. Alternatively, a police officer could file a judicial disciplinary complaint against a judge who rejected their search warrant application. On what grounds?

No judicial conduct rule specifically compels a judge to issue a search warrant even if other judges, in their discretion, might find probable cause to support it. Judicial conduct rules do, however, demand impartiality and prohibit bias. Rules of judicial conduct require judges to recuse themselves if they

123 See, e.g., N.J. CT. R. 3:5-4 (West 2021) (requiring all search warrants to be issued “with all practicable secrecy”); NEB. REV. STAT. ANN. § 29-817 (West 2021) (same); OR. REV. STAT. ANN. § 133.555(4) (West 2021) (“Until the warrant is executed, the proceedings upon application for a search warrant shall be conducted with secrecy . . . .”); WIS. STAT. ANN. § 968.21 (West 2021) (same); State v. Spriggs, 770 N.E.2d 638, 642 (Ohio Ct. Com. Pl. Del. Cnty. 2000) (“An effective search warrant process requires secrecy, confidentiality, and exclusion of the person or persons under investigation.”).

124 Jacob Ryan, Search Warrants Under Scrutiny as Police Killings Spark Reforms, KY. CTR. FOR INVESTIGATIVE REPORTING (July 8, 2020), https://kycir.org/2020/07/08/search-warrants-under-scrutin-as-police-killings-spark-reforms/ (noting that judges in Louisville, Kentucky, do not keep records of rejected warrant applications). But see N.Y. CRIM. PROC. LAW § 690.36(3) (requiring transcripts of oral search warrant applications to be filed with the court clerk regardless of whether a warrant is ultimately issued).

125 The author could find no federal or state rule of criminal procedure that requires judges to explain their rejection of a warrant application in a formal opinion, written or otherwise.

126 All codes of judicial conduct require a judge to “comply with,” “uphold and apply,” or otherwise be “faithful” to the law. See generally CODE OF CONDUCT OF U.S. JUDGES Canons 2(A) & 3(A)(1); TEX. CODE OF JUD. CONDUCT Canon 3(B)(2); DEL. JUDGES’ CODE OF JUD. CONDUCT Canon 3(A)(1); N.H. SUP. CT. R. 38(C), JUD. CODE OF CONDUCT Canons 1.1 & 2.2(A); MODEL RULES OF JUD. CONDUCT Canons 1.1 & 2.2 (AM. BAR Ass’n 2020). Primarily, this rule of compliance and/or faithfulness has been enforced against judges who commit criminal offenses. Less often, the rule has been used to punish judges who “disregard[] binding precedent or mandatory procedures for conducting court proceedings,” and almost never “for making erroneous legal rulings, absent improper motive, ill will, or malice.” Leslie W. Abramson, Canon 2 of the Code of Judicial Conduct, 79 MARQ. L. REV. 949, 960–62 (1996). Some judges have been disciplined for “ignoring probable cause requirements,” but only when they unconstitutionally issued warrants that lacked probable cause. Keith Swisher, The Judicial Ethics of Criminal Law Adjudication, 41 ARIZ. STATE L.J. 755, 772–73 (2009).

127 Abramson, supra note 126, at 962–67.
cannot be impartial or if they have a conflict of interest. Arguably, a judge who would refuse to issue warrants as a matter of conscience or principle would be exhibiting personal bias, and thus should recuse. Recusal in this context, however, would have the same practical effect as rejecting the warrants: the police would still be unable to get a warrant from that judge. Not that recusal is necessarily required to avoid discipline, at any rate, because refusing to step aside would neither trigger appellate review (no case yet exists and no potentially biased judicial order has been issued) nor trigger disciplinary action for lack of impartiality (no party to a case has received unfair treatment). Nevertheless, when in doubt, recusal-as-nullification is an option.

Accordingly, judicial power to nullify search warrants is practically unchecked. Judges already enjoy vast immunity from civil suit but would not need it when rejecting search warrants because no cause of action would arise. The extensive discretion judges enjoy when assessing probable cause in warrant applications is subject only to highly deferential review, while the act of rejecting a warrant is subject to no review at all because there must be a warrant for there to be review. Finally, the various political modes of holding judges accountable in their employment are mostly unreliable or rarely exercised. The only common method of accountability, administrative discipline, turns on judicial codes of conduct that would not, at least it seems to this author, effectively punish the rejection of warrant applications, even as a matter of conscience.

So what is wrong with warrants, anyway? Part IV describes the vast toll of search warrants, including deaths and injuries, civil disorder, and widespread distrust of the police and the criminal justice system.

IV. THE TOLL OF SEARCH WARRANTS

A search warrant is “the most drastic instrument which can be placed in the hands of an officer.” A search warrant gives the full machinery of law enforcement permission to enter a person’s home. Police conduct raids with heavily armed and armored teams, under cover of darkness, with little or no announcement before bashing in the door. These raids take a tremendous toll, killing and injuring suspects, bystanders, and officers who conduct them.

Police obtain warrants in different ways in different jurisdictions, but the state courts of Louisville, Jefferson County, Kentucky offer a typical example of the process. First, a police officer fills out the Kentucky Affidavit for a Search Warrant form, identifying themselves and listing all factual allegations against


the target of the search. The form is two pages long and has boxes for listing the address of the premises to be searched, or the location of the vehicles or persons to be searched, as well as the specific property or contraband being searched for. On the second page, the officer must add the basis for the search—either personal observation or a tip—and describe the results of their own independent investigation. The officer must then swear to have "reasonable and probable cause to believe . . . grounds exist for issuance of a Search Warrant" and sign their name. The signature must also be notarized by a "Judge or Official authorized to administer oaths." Once the form is completed, the police officer submits it to a judge for approval. Even though the trial courts in Jefferson County (District and Circuit) designate one judge to be "on duty" every day, local practice is for police officers to contact "whoever is available" among 30 total judges. When reviewing an application, judges are only supposed to consider the information on the Affidavit form and not base their decision on any separate conversation with the applying officer. Not that it is possible to determine whether they do or not, however, because conversations between officers and judges during the application process are not recorded in any way.

If the judge approves the application, they issue a search warrant and put a record of it on file “once a case begins crawling through the criminal justice system.” If the judge rejects an application, however, no record is kept. "The courts don’t maintain a database of search warrant requests."
Notably, the Affidavit form has no place to describe how the search warrant will be executed and police are not obligated to tell the judge. With a search warrant in hand, the police may now raid the home of a suspect with whatever tactical methods they determine to be most effective. Left entirely up to the police are the number of executing officers, the types of weapons they will carry, the time of day they will appear on site, and the level of force they will deploy.

Across the country in recent years, increasingly militarized police have killed and injured thousands of American citizens. Police frequently serve search warrants by means of heavily armed and armored SWAT and other tactical teams. Other jurisdictions allow police in plain clothes to raid homes. These “dynamic entry” teams (as they are known among police officers) execute search warrants using great force, battering rams, assault rifles, flash bang grenades, and other dangerous weapons to distract, disorient, and subdue anyone present on site. To achieve maximum surprise, police execute search warrants at night and without warning. So-called “no-knock” searches (with warrants or without) are common after the U.S. Supreme Court ruled that evidence seized during searches that lacked appropriate warning would no longer be excluded from evidence.

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140 How to execute a search warrant is left to police discretion, which is wide. “[T]he Fourth Amendment does not require officers to use the best technique available as long as their method is reasonable under the circumstances.” Dickerson v. McClellan, 101 F.3d 1151, 1160 (6th Cir. 1996) (citing Collins v. Nagle, 892 F.2d 489, 493 (6th Cir. 1989)).

141 Subject to the limitations on the warrant itself: what property may be seized, what places must be searched, etc.


144 UTAH COMM’N ON CRIM. AND JUV. JUST., 2014 LAW ENFORCEMENT TRANSPARENCY ANNUAL REPORT (2014), http://libertasutah.org/drop/sb185_2014.pdf (recording 559 incidents of SWAT or tactical team deployment, 96% of which served search warrants, 83% of which were for drug crimes); Radley Balko, 4.5 SWAT Raids Per Day, REASON (Mar. 1, 2010, 4:30 PM), https://reason.com/2010/03/01/45-swat-raids-per-day/ (94% of the 804 SWAT team deployments in Maryland during six month period of 2009 were for warrant service); Hannah Grabenstein, 2014 Little Rock Police Memo: SWAT Team Served All Warrants, ASSOCIATED PRESS (Feb. 26, 2019), https://apnews.com/article/f60085790b2d491ae75108e20bd168c.


The use of violent, “dynamic entry” teams to execute search warrants has been common over the past decade. Between 2010 and 2014, 90% of the 8,249 SWAT deployments by police in Maryland were to serve search warrants. In Little Rock, Arkansas, SWAT teams demolished doors and used flash-bang grenades in 90% of all search warrant raids between 2011 and 2013. In 2015, the website Vox estimated that police were conducting 20,000 “no-knock” raids nationwide per year, usually while executing search warrants for drugs. However, despite all that effort, many raids come up empty-handed. According to a study of 818 SWAT deployments nationwide, 294 drug raids (36%) found no evidence of drugs. Much worse is the record of the Chicago Police Department, which conducted 4,921 drug-related search warrants from 2016 to 2019, but confiscated drugs in only 221 cases (less than 5%).

Police now routinely execute search warrants in ways that are inherently dangerous to officers, as the police themselves acknowledge. Surprise home searches sometimes spark violent resistance from the residents. Commenting on a late-night raid during which four officers were wounded before killing two drug suspects, Houston Police Chief Art Acevedo described the situation at the raided home as a “fatal funnel” where the police attempted to enter through the narrow front door while under fire. “The tactical advantage really is in the hands of the suspect,” Acevedo admitted, without explaining why officers would knowingly create and rush into a highly dangerous situation when other options for serving warrants are available.

Ultimately, the body count is high no matter how search warrants are served, whether by SWAT teams or otherwise. From 2010 through 2016, at least 81 civilians and 13 officers died during SWAT raids, including 31 civilians and eight officers during the execution of no-knock warrants.
500 drug-related SWAT raids between 2011 and 2012, police killed seven people and injured 46.\textsuperscript{156} By another estimate, 73 police officers (SWAT and non-SWAT) were killed nationwide serving warrants between 2009 and 2019.\textsuperscript{157} Researcher Radley Balko estimates that late-night police drug raids (SWAT-executed or otherwise) kill 30–40 people per year, eight to ten of which are “completely innocent” persons.\textsuperscript{158} In total, police in the United States have killed approximately 1,000 people annually from 2015 to 2020, many in drug-related searches.\textsuperscript{159} Of the roughly 6,000 people killed, 250 were women, including 48 black women.\textsuperscript{160} The total number of people killed and injured during police raids since the drug war began in 1971 is unknown but is likely in the five figures.

Police raiding people’s homes in the middle of the night without warning is dangerous for two reasons. First, police make serious mistakes and execute the raids dangerously. As just one example, an in-depth \textit{New York Times} investigation exposed how Louisville Metro Police violently botched a late-night raid of the home of Breonna Taylor, shooting more than 30 bullets in all directions.\textsuperscript{161} The police killed Taylor and her death sparked a months-long protest movement.\textsuperscript{162}

Second, Americans are incredibly well-armed. According to one study, there are nearly 400 million privately owned firearms in the United States, more than one gun per person.\textsuperscript{163} In 2017, Gallup estimated that nearly half of American households own at least one gun.\textsuperscript{164} Handguns are in such “common use” as home-defense weapons that they now enjoy constitutional protection partially on that basis.\textsuperscript{165} And, despite already leading the world in private gun ownership by

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\item[156] ACLU, \textit{supra} note 151.
\item[157] Lozano, \textit{supra} note 153.
\item[159] \textit{Fatal Force, supra} note 143.
\item[162] \textit{Id.}
\item[164] \textit{Id.}
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far, Americans keep buying new guns. In 2018 alone, Americans bought an estimated 12.6 million guns through federally licensed dealers.\(^{166}\) Police come heavily armed because suspects are heavily armed. This “tragic conflict inherent in the U.S. legal system” regularly pits militarized police against lawfully armed suspects and bystanders, with deadly results.\(^{167}\)

Many search warrants in the United States are issued as part of the ongoing “war on drugs” being waged both by the federal government and a decreasing number of states. If public use and perception of drugs are benchmarks for success, however, drug prohibition has been a dismal failure. The use of drugs seems to be on the rise. Between 1992 and 2014, the number of Americans self-reporting illegal drug use increased from 6% to just over 10%.\(^{168}\) According to the CDC, that number rose to 11.7% by 2018.\(^{169}\)

Meanwhile, public support for the drug war is dropping dramatically. According to the Pew Research Center, 54% of Americans supported legalization of marijuana, and 76% opposed jail time as punishment for possession of small amounts in 2014.\(^{170}\) By 2019, the number of Americans supporting full marijuana legalization had risen to 67%, with only 8% still favoring a total ban.\(^{171}\) In early 2020, 11 states and the District of Columbia had legalized recreational use while 26 additional states had legalized it for medicinal use.\(^{172}\) After the elec-


tions in November of that year, the number of states that had fully legalized marihuana use increased to 15.\footnote{Map of State Marijuana Laws, MARIJUANA POL’Y PROJECT, https://www.mpp.org/issues/legalization/map-of-state-marijuana-laws/ (last visited Oct. 10, 2021).} Oregon has gone so far as to decriminalize all drugs, reducing possession of heroin and cocaine to mere violations.\footnote{Allen Kim, Oregon Becomes the First State to Decriminalize Small Amounts of Heroin and Other Street Drugs, CNN (Nov. 9, 2020, 8:13 AM), https://www.cnn.com/2020/11/09/politics/oregon-decriminalize-drugs-trnd/index.html.}

Gradually decreasing support for the drug war has not stopped police efforts to crack down on drugs, however. In 2018, police officers still made nearly 700,000 arrests for marijuana-related offenses out of 1.65 million total drug busts.\footnote{Gramlich, supra note 172.} In the city of Chicago alone, police conducted nearly 5,000 drug-related searches between 2016 and 2019.\footnote{See Savini et al., supra note 152; Trevor Hughes, Illinois Poised to Legalize Marijuana Sales, Expunge Criminal Records for Pot Crimes, USA TODAY (June 12, 2019, 6:25 PM), https://www.usatoday.com/story/news/nation/2019/05/31/legal-marijuana-illinois-could-become-11-th-state-legalize-weed/1305090001/; Majoritv of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct, PEW RSCH. CTR. (July 9, 2020), https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/; Id.}

In just the past four years, public perception of police use of force has significantly worsened. In 2016, 45% of Americans felt that police around the country were doing a “good” or “excellent” job at “using the right amount of force for each situation.”\footnote{Id.} By 2020, that number dropped to 35%.\footnote{Id.} Also between 2016 and 2020, confidence in the police “holding officers accountable when misconduct occurs” dropped from 44% positive to 31% positive.\footnote{Renee Stepler, Key Findings on How Police View Their Jobs Amid Protests and Calls for Reform, PEW RSCH. CTR. (Jan. 11, 2017), https://www.pewresearch.org/fact-tank/2017/01/11/police-key-findings/; Id.} Moreover, while only 31% of police officers view the deaths of black people during encounters with police as “signs of a broader problem,” nearly 60% of the public view them this way.\footnote{Martin Kaste, Movement to Limit Police Raids Looks Beyond ‘No-Knock’ Warrants, NPR (Nov. 27, 2020), https://www.npr.org/2020/11/27/938524573/movement-to-limit-police-raids-looks-beyond-no-knock-warrants; Rich Morin, Roughly One-in-Five Police Frequently Feel Angry and Frustrated on the Job, PEW RSCH. CTR. (Mar. 9, 2017), https://www.pewresearch.org/fact-tank/2017/03/09/roughly-one-in-five-police-frequently-feel-angry-and-frustrated-on-the-job/.} These worsening opinions of police tactics are fueling a growing movement to restrict search warrants in general.

On the other side of the battering ram, more than half of police officers across the country report frequently feeling angry, frustrated, or both, on the job.\footnote{Roughly One-in-Five Police Frequently Feel Angry and Frustrated on the Job, PEW RSCH. CTR. (Mar. 9, 2017), https://www.pewresearch.org/fact-tank/2017/03/09/roughly-one-in-five-police-frequently-feel-angry-and-frustrated-on-the-job/.} Nearly a quarter of officers report feeling angry and frustrated, and of
those, many favor "an aggressive rather than courteous approach" in some parts of their city (77%) and "hard, physical tactics... [for] some people" (56%).

In sum, militarized police execute thousands of search warrants per year, many in pursuit of drugs, resulting in hundreds of deaths and an unknown number of serious injuries. Many raids find no drugs. Meanwhile, public use of drugs is up, public support for drug bans is down, and there is decreasing trust in police use of force. Police, for their part, are angry and frustrated. These are the practical consequences of the "rule of law" in America today.

The next section, Part V, explains how this state of affairs justifies a radical response from judges on three pragmatic grounds.

V. PRAGMATIC JUSTIFICATIONS

This Article offers three pragmatic justifications for search warrant nullification. The first is judicial independence from law enforcement. The second is harm reduction, both physical and constitutional. The third is community stability, i.e., reducing social upheaval and promoting social harmony.

A. Judicial Independence from Law Enforcement

The first pragmatic justification for search warrant nullification is judicial independence from law enforcement. The judicial branch has a duty to restrain executive power, not to enable it. The Supreme Court once astutely warned:

The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.\footnote{Id.}

For this reason, the Court ruled that only a "neutral and detached" magistrate who does "not serve merely as a rubber stamp for the police" should issue a search warrant.\footnote{McDonald v. United States, 335 U.S. 451, 455–56 (1948).} A search warrant should be "a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'"\footnote{United States v. Leon, 468 U.S. 897, 914 (1984) (citing Aguilar v. Texas, 378 U.S. 108, 111 (1964), abrogated in part by Illinois v. Gates, 462 U.S. 213, 238–39 (1983)).} Furthermore, a judge who fails to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application and who acts instead as an adjunct law enforcement officer cannot provide valid authorization"
for a search. A warrant approval "cannot be a mere ratification of the bare conclusions" of police.

The police do not work alone. Law enforcement often involves a close partnership between police officers and prosecutors, who are the most powerful actors in American criminal justice. This partnership takes many forms, from joint lobbying efforts in the guise of police unions and prosecutor associations, to personal friendships and romantic relationships. Police and prosecutors wield tremendous power on their own, but together they are especially potent. Thus, for judges, adhering to the Supreme Court's command to be a check on the headiness of executive power becomes all the more important.

In reality, American judges seem to have enthusiastically embraced the forbidden role as "adjunct law enforcement" over the past several decades. Four examples follow: a pro-police judicial doctrine, over-representation of prosecutors on the federal bench, emphasis on "law and order" in state judicial elections, and evidence that many judges approve search warrants with little more than a cursory review.

Judges function as de facto law enforcement by protecting police officers from civil liability. The judicially-created doctrine of qualified immunity regularly shields police officers from civil liability for excessively violent or outright criminal behavior if that behavior was not "clearly established" to be unconstitutional in a prior case. Consider several recent examples. First, the Eleventh Circuit admitted that police violated the Fourth Amendment when they blindly threw a flash bang grenade onto the bed of a sleeping suspect, but granted qualified immunity anyway, even though that precise violation had been "clearly established" in other circuits. Second, the Eighth Circuit granted immunity to an officer who body-slammed a small woman unconscious and broke her collarbone because they could find no prior case that "involved a suspect who ignored an officer's command and walked away." Third, the Ninth Circuit granted immunity to police officers whose theft of $225,000 from a suspect was "morally wrong" and "deeply disturbing" but was not a clear violation of the Fourth Amendment because no prior case had so held.

187 Id. (internal quotation marks omitted) (citing Lo-Ji. Sales, Inc. v. New York, 442 U.S. 319, 325 (1979)).
188 Id. at 915.
190 Dukes v. Deaton, 852 F.3d 1035, 1043 (11th Cir. 2017). In more recent case, the Eleventh Circuit ruled that a police officer's "action of intentionally firing at [a passive] dog and unintentionally shooting [a ten-year-old child] did not violate any clearly established Fourth Amendment rights." Corbitt v. Vickers, 929 F.3d 1304, 1315 (11th Cir. 2019).
192 Kelsay v. Ernst, 933 F.3d 975, 980 (8th Cir. 2019) (en banc).
193 Jessop v. City of Fresno, 936 F.3d 937, 942 (9th Cir. 2019).
Another example of judicial entanglement with law enforcement is the fact that many judges spent their pre-bench legal careers as law enforcement. Former prosecutors are overrepresented on the federal bench compared to other attorneys. A 2019 survey of 755 non-senior federal district and circuit judges found nearly 40% of them were former state or federal prosecutors.

State electoral politics is a third example of judicial entanglement with law enforcement. State judicial candidates across the country routinely run on campaign platforms more appropriate for sheriffs and prosecutors, boasting that they will “support law enforcement” and be “tough on crime.” They frequently attack their electoral opponents as “too lenient” and “soft on crime.” As just one recent example, a 2020 candidate for state trial court in Kentucky boasted on his campaign Facebook page that his “goal is to fight crime harder” and used the slogan “Protecting Family. Fighting Crime. Always!” Not to be outdone, his opponent heavily touted her four-year career as a prosecutor even though she quit in 2008 and spent the next 12 years in private family law practice. The war-on-drugs judge won.

Once in office, rubber-stamping warrant applications becomes standard operating procedure for judges all over the country. As just one example, a public records request revealed that state judges in Utah took an average of eight

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197 Id. at 331.


minutes to approve nearly 9,400 warrants during a one-year period beginning in early 2017. Judges approved more than half of all warrants in less than three minutes, and approved nearly 300 warrants in less than 30 seconds. Between 2016 and 2018, these judges rejected only 2% of all search warrant applications.

In the much-publicized case of Breonna Taylor, killed by Louisville Metro Police officers in a botched home search in March 2020, a Kentucky trial court judge allegedly approved five no-knock search warrants within 12 minutes, including one for Taylor’s apartment. On Taylor’s warrant, the judge’s signature was legible, unlike the signatures on more than two-thirds of the 231 search warrants approved in Louisville between January 2019 and September 2020. On those, it was impossible to tell which judge signed it.

Some judges do not bother reviewing warrants at all. In Georgia, a county magistrate judge was caught pre-signing blank warrant forms and distributing them to police officers. Kentucky judges have engaged in similar behavior, pre-signing blank search warrants and child removal orders.

This routine approval of search warrants, often without legitimate scrutiny and without any subsequent accountability, is even worse because police

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202 Id.
203 Id.
officers often lie to obtain them.\textsuperscript{208} Even though the Supreme Court has long held that false statements on warrant affidavits are grounds for suppression,\textsuperscript{209} police make false statements anyway, part of a general practice frequently called “testilying.”\textsuperscript{210} Consider several examples from just the past three years. In 2018, a police detective in Minnesota was fired (and 32 cases he worked on were dismissed) for submitting a falsified search warrant application.\textsuperscript{211} After a drug raid that killed two residents and injured four officers in 2019, the Houston Police Department admitted that the affidavit used to get the search warrant contained “material untruths and lies” concocted by the investigating officer.\textsuperscript{212} Six officers involved in that raid were later indicted, including the officer who lied to get the warrant, and 160 other drug convictions he helped obtain were dismissed.\textsuperscript{213} In July 2020, two Chicago Police Department gang unit officers were sentenced following a 2019 conviction for falsely obtaining search warrants “to search properties and seize cash and drugs” from unwitting victims.\textsuperscript{214} Finally, in August 2020, a federal judge concluded that a Trenton, New Jersey police officer

\textsuperscript{208} Not that it necessarily matters for suppression purposes. The U.S. Supreme Court has held that if a defendant can prove that an officer made a “false statement knowingly and intentionally, or with reckless disregard of the truth” in a search warrant application, the defendant can move for a hearing to determine whether that statement was necessary to the magistrate’s finding of probable cause. If it was, the warrant would be invalid and the evidence suppressed. If the reviewing court determines that probable cause could be found without the false statement, then the evidence should not be suppressed. Franks v. Delaware, 438 U.S. 154, 155–56 (1978). The defendant thus has two difficult challenges: rebutting the good faith presumption by proving the false statement was intentional or reckless, and proving the statement was the dispositive basis for probable cause.


engaged in “affirmative acts of deliberate deception” to obtain a search warrant in a case against 27 drug defendants.\textsuperscript{215}

This is just a shortlist of officers who were actually caught lying and were subjected to internal discipline, if not perjury charges.\textsuperscript{216} Many lie without consequence.\textsuperscript{217}

Judges are not police officers. Judges are “law enforcement” only in that they referee the adversarial system of criminal justice to ensure due process for the accused. Yet many judges act otherwise, as “tough on crime” enablers of militarized and aggressive police officers. Re-establishing judicial independence would be one justification for warrant nullification.

B. Physical and Constitutional Harm Reduction

The second pragmatic justification for search warrant nullification is harm reduction. Judges have tremendous power to protect some of the most intimate and important regions of human life by nullifying home search warrants.\textsuperscript{218} Searches of the home still require a warrant in nearly all situations; thus, judges who reject applications for such searches can mitigate the risks of physical and constitutional harm inflicted by over-aggressive police officers.

Home raids are physically dangerous. Aggressive, “dynamic entry” searches of a person’s home are increasingly common and especially injurious to both the residents and the officers conducting the searches for reasons explained above in Part IV. Americans own millions of guns and have a constitutionally protected right to defend their homes with them.\textsuperscript{219} Guns aside, late-night raids on homes cause surprise, panic, and death, even when residents do not fight back. Judges who reject search warrant applications can mitigate these risks by preventing the police from conducting the raids.

Home raids are also constitutionally dangerous, because “physical entry of the home is the chief evil against which the wording of the Fourth Amendment...
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is directed."\(^{220}\) It is the fundamental principle of the Fourth Amendment that "a man's house [is] his castle," shielded from unreasonable intrusion by government agents.\(^{221}\)

This "castle doctrine" is so fundamental to American law that it has been enshrined in many places beyond the federal constitution, such as in state self-defense statutes that shield homeowners from criminal and civil liability for inflicting harm upon intruders.\(^{222}\) Some states have laws allowing deadly force against home-intruding outsiders as long as there is a reasonable belief that deadly force is necessary to repel them.\(^{223}\) Other state laws presume that someone using deadly force to repel home intrusion had a reasonable belief that such force was necessary (even if they did not reasonably believe force was necessary).\(^{224}\) Kentucky extends this presumption to police raids, shielding those who use force to repel police officers from their homes if the officers failed to identify themselves before entering and the resident did not otherwise know who they were.\(^{225}\) Meanwhile, Indiana extends the castle doctrine to allow violence against police officers who enter a home unlawfully, announced or not.\(^{226}\) Regardless of their specific construction, state castle doctrine statutes place "the intruder beyond the protection of the law and suspend the state monopoly on violence"\(^{227}\)—sometimes even when the intruder is the state itself.

Government intrusion poses a profound threat to the sanctity of a person's home. For that reason, courts have strictly enforced the Fourth Amendment's warrant requirement for home searches.\(^{228}\) Rejecting applications for


\(^{223}\) See, e.g., 720 ILL. COMP. STAT. ANN. 5/7-2 (West 2021); MASS. GEN. LAWS ANN. ch. 278, § 8A (West 2021).

\(^{224}\) See, e.g., CAL. PENAL CODE § 198.5 (West 2021); FLA. STAT. ANN. § 776.013(2) (West 2021).

\(^{225}\) KY. REV. STAT. ANN. § 503.055(2)(d) (West 2021).

\(^{226}\) Compare IND. CODE ANN. § 35-41-3-2(i) (West 2021) ("A person is justified in using reasonable force against a public servant" to protect from the servant's use of "unlawful force," to "prevent or terminate the public servant's unlawful entry," or "unlawful trespass" on property), with 18 PA. STAT. AND CONS. STAT. ANN. § 505(b) (West 2021) ("The use of force is not justifiable...to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful.").


\(^{228}\) Payton v. New York, 445 U.S. 573, 573 (1980) (establishing that "an invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant" and "the Fourth
home searches thus is a powerful form of nullification because warrantless home searches are "presumptively unreasonable." In *Kyllo v. United States*, the Supreme Court declared "the right of a man to retreat into his own home and there be free from unreasonable intrusion" to be at "the very core" of the Fourth Amendment. A warrantless search of a home is unreasonable and hence unconstitutional except in very few situations. Without a warrant or a recognized exigency, "any physical invasion of the structure of the home, by even a fraction of an inch, [is] too much." Federal law even criminalizes warrantless searches of "private dwellings" by officers, agents, and employees of the United States.

In other words, without a warrant, police cannot "reasonably" search a home in most cases. Courts can suppress evidence found in warrantless home searches under the "exclusionary rule." Qualified immunity would rarely shield officers who knowingly conduct warrantless home searches because the right to be secure from unreasonable government intrusion into the home has long been "clearly established." Thus, warrant nullification can create a powerful deterrent to home invasions by police because raids would not produce usable evidence and would subject officers to greater liability. Fewer raids necessarily mean fewer people injured and killed in them.

### C. Community Stability

The third pragmatic justification for search warrant nullification is community stability. Judges are important stewards of the "rule of law" and public order, both of which can be promoted through nullification.

Like jury nullification and prosecutorial nullification, judicial nullification might be described as a conscious decision to quiet the law based on political preferences or personal values—the dreaded "judicial bias." It need not be mistaken, however, for a way to "legislate from the bench." While nullification sounds vaguely similar to the old boogeyman of "judicial activism," where a judge imposes their own political ideology on society by interpreting old laws in

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229 *Id.* at 586.
232 Bailey v. Swindell, 940 F.3d 1295, 1302 (11th Cir. 2019) (alteration in original) (quoting *Kyllo*, 533 U.S. at 37) (holding unconstitutional the warrantless tackling of a suspect by an officer through the front door of suspect's home).
233 A warrantless search is a federal misdemeanor under 18 U.S.C.A. § 2236 (West 2021).
235 *Bailey*, 940 F.3d at 1303.
new and unpopular ways, nullification need not be partisan. Rather, judicial nullification can be justified on more pragmatic, community-minded grounds.

This subsection will first confront the idea that judicial nullification would be “unrestrained” as proponents of judicial restraint might argue. Even the loudest voices for judicial restraint weave community concerns throughout their decision-making, thus a judge’s mindfulness of community needs is not outside the bounds of supposedly restrained judging. The subsection will then explain why community-minded warrant nullification can be pragmatic rather than “political.”

One counter-argument to nullification, especially as exercised by judges, is that nullification would jeopardize the institutional legitimacy of the courts, which are supposed to be neutral and impartial at all times. Chief Justice John Marshall wrote that “judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.” In dissent to the Supreme Court’s landmark decision of *West Virginia Board of Education v. Barnett*, Justice Felix Frankfurter wrote that a judge’s “purely personal attitude” should not be relevant to their decision-making, and that no judge could be “justified in writing [their] private notions of policy” into the law.

More recently, supposed judicial restraint advocate Justice Antonin Scalia repeatedly railed against what he saw as the improper imposition of his colleagues’ personal values onto the rest of the country. In his dissent to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, for example, Justice Scalia denounced judicial “value judgment,” “political choice,” and “personal predilection” as indicative of “[t]he emptiness of [the] ‘reasoned judgment’” that produced cases like his arch-nemesis opinion, *Roe v. Wade*. Justice Scalia also claimed to oppose the idea that judges should stand in for others in a way similar to representative legislators stating, “Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant.”

However, just because he belittled his colleagues’ value judgments as bogus and representative only of an elite, insular constituency does not mean Justice Scalia opposed community-minded judicial decision-making in practice,

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238 319 U.S. 624, 646-47 (1943) (Frankfurter, J., dissenting).
even on questions of constitutional interpretation, where he claimed to be a text-
tualist first and an originalist second.\textsuperscript{243} In fact, Justice Scalia argued that the Court should be deferential to democracy and "the longstanding traditions of American society."\textsuperscript{244} More than once, he paid tribute to legislative will by approvingly listing its traditional moral prohibitions.\textsuperscript{245} He even sometimes cited current political sentiment, not just "traditional" values, to bolster his constitutional arguments.\textsuperscript{246} To claim that Justice Scalia opposed either value-driven or community-mindful judging is to ignore Justice Scalia's actual judicial opinions.

Justice Scalia was not alone. Many allegedly "restrained" judges frequently weave social concerns into their decision-making and their written opinions, but they do so usually in one direction only: in support of ever-increasing law enforcement power. Conservative judicial opinions in cases of murder, rape, and other violent acts, for example, often begin with gruesome and graphic descriptions of the crimes, even when those details are irrelevant to the legal issue to be resolved, probably in order to appeal to a sense of collective outrage.

An example of this is Justice Clarence Thomas's concurrence to the denial of certiorari in \textit{Price v. Dunn}.\textsuperscript{247} Christopher Price was sentenced to death for murder in Alabama.\textsuperscript{248} The Supreme Court denied his last-minute attempt to avoid execution over a dissent by Justice Stephen Breyer.\textsuperscript{249} Even though his side prevailed, Justice Thomas still wrote separately (joined by Justices Samuel Alito and Neil Gorsuch) to "set the record straight" and scold Breyer and the three other dissenters who joined him for omitting "any discussion of the murder that warranted petitioner's sentence of death" from his procedurally focused opinion.\textsuperscript{250} Justice Thomas then carefully recounted the gruesome facts of the case, describing exactly how Price "brutally attacked" a minister with a sword and making sure to note that the victim "died a slow, lingering, and painful death."\textsuperscript{251} Even though these details were not dispositive to the legal question presented in

\begin{footnotes}
\item[244] \textit{Casey}, 505 U.S. at 980 (Scalia, J., concurring in part and dissenting in part).
\item[246] \textit{McCreary Cnty. v. Am. C.L. Union of Ky.}, 545 U.S. 844, 889 (2005) (Scalia, J., dissenting) ("[H]ow can the Court possibly assert that the 'First Amendment mandates governmental neutrality between . . . religion and nonreligion' . . . ? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the \textit{current sense of our society}. . . .") (emphasis added).
\item[249] \textit{Price}, 139 S. Ct. at 1533.
\item[250] \textit{Id.} at 1533–34.
\item[251] \textit{Id.} at 1534.
\end{footnotes}
the petition, Justice Thomas made sure to serve up the blood and guts regardless.\textsuperscript{252}

The most excessive example of Justice Thomas' blood-dripping jurisprudence is his concurrence to \textit{Glossip v. Gross}.\textsuperscript{253} Again criticizing Justice Breyer for sterilizing the details of capital punishment cases that have come before the Supreme Court, Justice Thomas wrote:

We owe victims more than this sort of pseudoscientific assessment of their lives. It is bad enough to tell a mother that her child's murder is not "worthy" of society's ultimate expression of moral condemnation. But to do so based on cardboard stereotypes or cold mathematical calculations is beyond my comprehension. In my decades on the Court, I have not seen a capital crime that could not be considered sufficiently "blameworthy" to merit a death sentence (even when genuine constitutional errors justified a vacatur of that sentence).\textsuperscript{254}

Justice Thomas then, over the next three pages of his opinion, meticulously describes the brutal factual details of 11 different capital cases.\textsuperscript{255} This shock-value jurisprudence channels (and perhaps seeks to stoke) public outrage and demand for fatal retribution in cases of violent crime.\textsuperscript{256} It is keenly community-minded. For what other reason would an appellate judge declare that "we owe" crime victims a graphic retelling of their violent demise when deciding questions of law? Neither the Constitution nor any criminal statutes impose such an obligation.

It is unreasonable to believe that judges, even those who most frequently beat the drum of "restraint," can make decisions totally detached from their own values or the world around them.\textsuperscript{257} Judges are human beings who live and work among other human beings. Their job is to assist in the resolution of disputes between human beings and in the administration of laws made by human beings. They are not skin-draped computers or algorithms in robes. Arguably, their decision-making is \textit{always} community-minded—that is, rooted in a concern for the order and health of the communities in which they are members.


\textsuperscript{254} \textit{Id.} at 904.

\textsuperscript{255} \textit{Id.} at 905–07.

\textsuperscript{256} Justice Neil Gorsuch also seems to revel in the gruesome details of heinous crimes, and perhaps for the same socially conscious reasons. \textit{See} Bucklew v. Precythe, 139 S. Ct. 1112, 1119 (2019).

\textsuperscript{257} \textit{See} \textsc{Eric Segall}, \textit{Originalism as Faith} 4 (2018).
According to "popular constitutionalists" and other groups of restraint-minded theorists, deference to the two political branches of government is the appropriate method of judicial restraint. The whims of the legislature and the imperatives of the executive reflect the will of the people, thus, judges who want to adjudicate with "the people" in mind should defer to their authority.

According to David Pozen, "lurking" in this theory of political deference "is another possibility: that the judge ought to incorporate into [their] decision-making calculus the beliefs of the citizenry, to the extent [they] can perceive them, irrespective of what the legislature or executive has done." After all, legislative and executive acts are not always reflective of public consensus. Courtesy of gerrymandering, the high cost of political campaigns, the Electoral College, and other factors, the legislative and executive branches of the states and federal government are not necessarily representative of a majority of "the people."

Community-minded judges ought instead to broaden their social assessment and "draw upon public perceptions and the prevailing state political climate when resolving difficult disputes." Pozen calls this approach "majoritarian judicial review," where judges manipulate "interpretive outcomes to promote what the public appears to desire," rather than simply deferring to what the political branches demand. This approach is more concerned with the community’s views than the judge’s individual views.

Whatever we call this judicial approach, whether "community-minded," "socially-minded," "policy-minded," "majoritarian," or even "populist," it probably needs a limiting principle of some sort. Judge Richard Posner offers one in his book How Judges Think:

"[A]s long as the populist element in adjudication does not swell to the point where unpopular though innocent people are convicted of crimes, or other gross departures from legality occur, conforming judicial policies to democratic preferences can be
regarded as a good thing in a society that prides itself on being the world’s leading democracy.”

Search warrant nullification poses no risk of convicting unpopular though innocent people of crimes. It poses no risk of convicting anyone of crimes; thus, the first risk Judge Posner warns against does not apply. Would warrant nullification give rise to “gross departures from legality,” the other danger against which Judge Posner warns? Arguably not. Warrant nullification, in today’s political and legal climate, might actually reduce the overall chaos now occurring under the guise of “the rule of law.” The trauma, injuries, and deaths caused by militarized police searches pile upon whatever underlying criminality they are supposedly rooting out.

Obviously, warrant nullification may result in some people getting away with drug possession or other crimes, but a pragmatic judge may conclude that catching every criminal is not worth the harm caused by how they are caught. As the Supreme Court held in *Tennessee v. Garner*, “[i]t is not better that felony suspects die than that they escape.” Whatever social benefit is to be had by catching people with contraband can reasonably be weighed against the social harm caused by sending militarized police through their front door in the middle of the night with battering rams, assault rifles, and flash-bang grenades.

Judges have the power to ease tensions as conflicts over state violence once again flare-up on the streets of the United States. The criminal justice system, through the heavy hand of police officers and prosecutors, is counter-productively fueling protests, disorder, and civil disobedience nationwide. Distrust in law enforcement and the criminal justice system is growing. Moreover, these actions are sowing racial discord because this distrust is especially intense among Black Americans. Ironically, it is the judges, through nullification, who

265 Megan Brenan, *Amid Pandemic, Confidence in Key U.S. Institutions Surges*, *Gallup News* (Aug. 12, 2020), https://news.gallup.com/poll/317135/amid-pandemic-confidence-key-institutions-surges.aspx (Americans reporting a “great deal” or “quite a lot” of confidence in police dropped from 57% to 48% between June 2017 and June 2020, while the same level of support for the criminal justice system dropped from 27% to 24% during the same time span and was ten points lower than a high of 34% in May 2004).
266 See Liz Hamel et al., *KFF/The Undefeated Survey on Race and Health*, *Kaiser Fam. Found.* (Oct. 13, 2020), https://www.kff.org/report-section/kff-the-undefeated-survey-on-race-and-health-main-findings/ (Only 25% of black Americans trust the courts “to do what is right for them or their community” almost all or most of the time. Only 30% of black Americans feel this way about the police. Though support is greater among them, a majority of Hispanics and Whites also distrust the courts.); Laura Santhanam, *Two-Thirds of Black Americans Don’t Trust the Police to Treat Them Equally. Most White Americans Do*, *PBS News Hour* (June 5 2020, 12:00 PM),
may have some power to restore confidence in the rule of law by selectively
turning off its most aggressive manifestations.

Justice Harry Blackmun observed in *Georgia v. McCollum* that a crimi-
nal justice system detached from the community in which it operates—detached
from common sense and unconcerned with maintaining public harmony—is a
system that truly lacks legitimacy.267 "Public confidence in the integrity of the
judicial system is essential for preserving community peace in [cases] involving
race-related crimes."268 Indeed, "[i]n such cases, emotions in the affected com-
munity will inevitably be heated and volatile."269 In *McCollum*, Justice
Blackmun was specifically describing the social harm caused by discriminatory
jury selection, but this principle extends to all aspects of the criminal process,
including warrant issuance.

Would warrant nullification in this context, therefore, be an exercise of
political will, a judicial partiality borne from anti-racist or anti-authoritarian pol-
itics, perhaps? Or, would it be a flex of purely personal whim? Neither need be
the case. Like jury nullification, judicial nullification need not know any partic-
ular political ideology.270

"The core of legal pragmatism," Judge Posner explains, "is pragmatic
adjudication, and its core is heightened judicial concern for consequences"271 rather
than formalistic rule-following for its own sake.271 Furthermore, "sensible legal
pragmatism tells the judge to consider systemic, including institutional, conse-
quences as well as consequences of the decision at hand."272

Any judge guided in their decision-making by practical consequences
must take a hard look at search warrants. As explained in Part IV, the first "prac-
tical consequence" of many search warrants is a heavily armed team of police
officers storming through the doors and windows of a person’s home at night
without any kind of warning just to prevent someone from getting high.273 The
second practical consequence is that a resident, bystander, or an officer, may be
killed, injured, or seriously traumatized in the raid.274 In that case, the third prac-
tical consequence is that the community will hear about it and get angry, and may

https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-
treat-them-equally-most-white-americans-do.
268 Id.
269 Id.
271 Posner, supra note 262, at 238 (emphasis added).
272 Id.
273 Sack, supra note 148.
274 See Lind, supra note 150; Dave Savini, "You Have the Wrong Place:” Body Camera Video
Shows Moments Police Handcuff Innocent, Naked Woman During Wrong Raid, CBS Chi. (Dec.
17, 2020, 12:45 PM), https://chicago.cbslocal.com/2020/12/17/you-have-the-wrong-place-body-
express that anger in days, weeks, or months of disruptive anti-police protests, riots, or revenge attacks on officers.\textsuperscript{275} The fourth practical consequence may be reactionary violence against protesters by police, police supporters, and right-wing militias.\textsuperscript{276} The fifth practical consequence will be increased distrust and disobedience by everyone toward legitimate institutions, including police departments, mayoral offices, city councils, criminal courts, and government in general.\textsuperscript{277} The sixth practical consequence is long-term trauma and stress in the community as a whole.\textsuperscript{278}

Therefore, community-minded judicial pragmatists could conclude that the practical consequences of militarized police raids are just not worth whatever gains they claim to make, and thus decide to reject search warrant applications, even when there is probable cause, in order to increase social harmony and cohesion.\textsuperscript{279} Police executing search warrants as they do is creating turmoil for individuals and municipalities alike. Search warrant nullification would be one tool in the community-minded judge’s adjudicative toolbox to help restore public confidence in the criminal justice system.

This argument may seem like advocacy for biased adjudication, which most agree is a bad thing. John Bell wrote that “[w]here a judge openly supports one section of the community, his reputation for being willing to listen with equal attention to the views of all sections of the community will be impaired.”\textsuperscript{280} What this Article calls “community-minded” judging should not be misconstrued as “community-biased” judging, where a nullifying judge favors the interests of criminal suspects and social justice advocates over the interests of police and crime victims. However, a judge who nullifies search warrant applications out of concern for community health would be erring on the side of all citizens against...
the militarized tactics of government law enforcement, not one group of citizens over another. Innocent people and officers are killed in police raids, too, and bystanders have been injured (and businesses damaged) when anger over these deaths spills into the streets in the form of demonstrations or even riots.

Most judges already favor, at least implicitly, the communities and interests of people most like judges.281 "[J]udges are themselves often members of the dominant group and therefore have the luxury of seeing their perspectives mirrored and reinforced in major social and political institutions."282 Community-minded pragmatism simply expands that inherent favoritism to the interests of others in the community. Everyone has an interest in the security of their homes, their bodily health, and calm in their community, whether they are a criminal suspect or not. For these reasons, search warrant nullification need not be mistaken as partisan activism or political bias. It could be a pragmatic effort by judges to mitigate the deadly practical consequences of modern policing.

VI. CONCLUSION

Admittedly, rejecting all warrant applications as a matter of course is a radical leap few judges today would be willing to take. As Part II of this Article explained, judges are often the loudest critics of nullification by other criminal justice actors, and Part V showed how many judges enthusiastically embrace a role as police auxiliary. And though Part III showed how vast judicial discretion can be when it comes to issuing warrants, most judges probably feel that they are obligated by their oaths to issue warrants, at least when probable cause is obvious.

Yet, judges live in the same world as everyone else, a world where militarized police officers are killing, injuring, and traumatizing people in the name of law and order. Judges live in the same world where months-long protests and even riots disrupt cities across the country, where reactionary backlash leaves people dead in the streets, and where people are losing faith in legitimate institutions. Judges are not passive observers but active participants in making the world this way. They have the power to change it.

Search warrant nullification is one possible judicial response to the social problems created by our militarized law enforcement machine. It need not be a political response, but a pragmatic one, rooted in concerns for judicial independence, harm reduction, and community. Judges are not compelled—by law or by rules against impartiality—to enable police to pursue criminals in ways that may be disproportionate, unnecessary, or socially harmful. Just as jurors and prosecutors have the power to turn off the law when it works in unjust ways, so too do judges.

282 Id. at 20 n.90 (quoting MARTHA MINOW, MAKING ALL THE DIFFERENCE 62 (1990)).