ARTICLES

SOMETHING ROTS IN LAW ENFORCEMENT AND IT'S THE SEARCH WARRANT: THE BREONNA TAYLOR CASE

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ABSTRACT

When police rammed the door of Breonna Taylor's home and shot her five times in a hail of thirty-two bullets, they lacked legal justification for being there. The affidavit supporting the warrant was perjurious, stale, vague, and lacking in particularity. The killing of Breonna Taylor, however, is not just a story about the illegality of the warrant. It is also about the legality of the circumstances that facilitated her killing. Police officers lying to obtain warrants and magistrates rubber-stamping facially defective warrants are the stories of individual failings. This Article examines a weightier structural problem: How the Supreme Court fashioned legal doctrine that created the conditions that led to Breonna Taylor's death.

This Article transcends the narrative of bad-apple cops. It is the first to present a structural framework for analyzing how Court rulings about the acquisition and execution of search warrants inequitably distribute premature death in marginalized communities. When the Court refused to apply the exclusionary rule to evidence obtained in violation of the knock-and-announce requirement, it incentivized police to ignore the rule. The result has been carelessness in the acquisition of warrants and callousness in their execution.

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When the Court gave police immunity for violating the rule, it sealed Breonna Taylor's fate. Police refusal to knock and announce and to engage in a substantial waiting period before ramming the door is untenable in an age of increased Stand Your Ground Laws and unbridled gun ownership. The proper protocols for police home invasion demand the Supreme Court's review.

The spectacle of Breonna Taylor's killing, along with so many others, inflicted a cultural trauma on the public, particularly marginalized communities. The illegal warrant that set Breonna Taylor's death in motion, therefore, demands a public vetting, preferably in an adversarial setting where one party does not monopolize both the facts and the narratives surrounding those facts. The repeated failure to hold police accountable for their killings will destroy the criminal justice system as we know it. The next Breonna Taylor is both foreseeable and preventable.

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> *I want you to know that I'm still proud to be a cop.*
>
> *. . . I know we did the legal, moral and ethical thing that night. It's sad how the good guys are demonized, and criminals are canonized.*
>
> —Sergeant Jonathan Mattingly, Louisville Metro Police Department, in an email to 1,000 of his colleagues, September 22, 2020.[1]

> *[T]his group of people, it is straight cashflow for them.*
>
> *. . . [T]hey get other people involved and it's usually females. It's usually baby mamas . . . or it's girlfriends that they can trust. They can trust them with their money and their stuff.*
>
> —Detective Joshua Jaynes, when asked why he targeted Breonna Taylor's home.[2]

INTRODUCTION

Shortly after midnight on March 13, 2020, seven Louisville Metro Police Department ("LMPD") officers raided the home of Breonna Taylor, armed and wearing full military gear.[3] During the execution of a search warrant, they used a battering ram to rip her door from its hinges and shot her five times in a hail of thirty-two bullets.[4] They found no drugs, guns, cash, or contraband.[5] Taylor

[1] E-mail from Jonathan Mattingly, Sergeant, Louisville Metro Police Dep't (Sept. 22, 2020, 2:09 AM), *reprinted in* Jonathan Bullington, *Wounded Officer in Breonna Taylor Case Emails Cops: 'I'm Proof They Do Not Care About You,'* COURIER J. (Louisville) (Sept. 23, 2020, 10:52 AM), https://www.courier-journal.com/story/news/local/breonna-taylor/2020/09/22/sgt-jonathan-mattingly-emails-officers-about-breonna-taylor-shooting/5865327002/.

[2] Interview by Jason Vance with Josh Jaynes, Detective, Louisville Metro Police Dep't 20-21 (May 19, 2020) [hereinafter Interview with Josh Jaynes], https://louisville-police.org/DocumentCenter/View/1808/PIU-20-019-Transcripts [https://perma.cc/X96Q-WGDQ].

[3] Tessa Duvall, *Breonna Taylor Shooting: A Minute-by-Minute Timeline of the Events That Led to Her Death*, COURIER J. (Louisville) (Sept. 25, 2020, 6:45 PM), https://www.courier-journal.com/story/news/local/breonna-taylor/2020/09/23/minute-by-minute-timeline-breonna-taylor-shooting/3467112001/; Tessa Duvall, *Breonna Taylor Shooting: A One-Year Timeline Shows How Her Death Changed Louisville*, COURIER J. (Louisville) (Mar. 13, 2021, 11:12 AM), https://www.courier-journal.com/in-depth/news/local/breonna-taylor/2021/03/04/breonna-taylor-shooting-timeline-details-year-since-her-death/4546097001/; Tessa Duvall, *Fact Check 2.0: Separating the Truth from the Lies in the Breonna Taylor Police Shooting*, COURIER J. (Louisville) (Mar. 17, 2021, 4:34 PM) [hereinafter Duvall, *Fact Check*], https://www.courier-journal.com/story/news/crime/2020/06/16/breonna-taylor-fact-check-7-rumors-wrong/5326938002/; Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), https://www.nytimes.com/article/breonna-taylor-police.html.

[4] Oppel Jr. et al., *supra* note 3.

was not a suspect in the drug investigation, which is why there was no arrest warrant for her.[6] She had no criminal history.[7] According to the search warrant affidavit, no one had witnessed her with or near drugs.[8] No one had seen drugs in her home.[9] There was no evidence that implicitly or explicitly stated that she trafficked drugs.[10]

Taylor, a twenty-six-year-old emergency room technician, had just completed a double shift and had retired for the evening.[11] There was no evidence that she was dangerous or a flight risk, which is why a SWAT team was not deployed.[12] Only one officer was charged in her killing, for stray bullets he wantonly and indiscriminately shot into another home.[13] It took almost a year to terminate any officer implicated in her killing.[14] LMPD Detective Joshua Jaynes, who acquired the search warrant, is fighting for reinstatement with back pay.[15] Although he made false statements to obtain the

[5] Radley Balko, Opinion, *Correcting the Misinformation About Breonna Taylor*, WASH. POST (Sept. 24, 2020), https://www.washingtonpost.com/opinions/2020/09/24/correcting-misinformation-about-breonna-taylor/.

[6] *See id.* ("The portion of the warrant affidavit that requested a no-knock raid was the exact same language used in the other four warrants. It stated that drug dealers are dangerous and might dispose of evidence if police knock and announce. It contained no particularized information as to why Taylor herself was dangerous or presented such a threat.").

[7] Radley Balko, Opinion, *The No-Knock Warrant for Breonna Taylor Was Illegal*, WASH. POST (June 3, 2020), https://www.washingtonpost.com/opinions/2020/06/03/no-knock-warrant-breonna-taylor-was-illegal/ (stating that the closest she came to one was a dismissed shoplifting charge from 2012).

[8] *See* Affidavit for Search Warrant paras. 1-14 (Mar. 12, 2020) (No. 20-1371) [hereinafter Affidavit for Search Warrant], https://reason.com/wp-content/uploads/2020/06/Breonna-Taylor-search-warrants.pdf [https://perma.cc/NQW5-6RCG] (failing to disclose in affidavit any such witnesses if they existed).

[9] *See id.* (failing to disclose in affidavit any such witnesses if they existed).

[10] *See id.* (failing to even implicate any such evidence if it existed).

[11] *See* ZZ Packer, Cultural Comment, *The Empty Facts of the Breonna Taylor Decision*, NEW YORKER (Sept. 27, 2020), https://www.newyorker.com/culture/cultural-comment/the-empty-facts-of-the-breonna-taylor-decision.

[12] *See* Balko, *supra* note 7.

[13] Ben Tobin, *What AG Said About Findings; Read Cameron's Speech on Grand Jury Decision*, COURIER J. (Louisville), Sept. 24, 2020, at B6.

[14] *See* Oppel Jr. et al., *supra* note 3.

[15] Jackelyn Jorgensen, *Former LMPD Detective Who Wrote Breonna Taylor Warrant Files Lawsuit to Get His Job Back*, WHAS11 (Sept. 20, 2021, 2:59 PM), https://www.whas11.com/article/news/local/joshua-jaynes-files-lawsuit-against-merit-board-to-get-job-back/417-de226d14-919d-4da7-909f-c12fcea82297 [https://perma.cc/4H76-DZPZ].

warrant, he insists that he did nothing wrong.[16] John Mattingly, one of three LMPD officers who shot Taylor while executing the warrant, has since retired with a full pension and a book deal based on his participation in Taylor's killing.[17]

As a threshold matter, the legal justification for police presence in Taylor's home is highly contested. The search warrant that authorized their home invasion was perjurious, stale, vague, and lacking in particularity.[18] When Jaynes obtained the warrant, he swore under oath that he had "verified" through a United States Postal Inspector that Jamarcus Glover, one of the targets of a drug investigation, had been receiving packages at Taylor's home.[19] After Taylor's death, the Postal Inspector flatly rejected Jaynes's claim, stating that no packages were being delivered to Taylor's home.[20] LMPD's own internal investigation concluded that LMPD was repeatedly told that "no packages, 'suspicious or otherwise,' [were] delivered to Taylor's home."[21] To explain his affidavit, Jaynes claimed that Mattingly told him that Glover was receiving packages at Taylor's home but that the Postal Inspector

[16] Tessa Duvall & Ayana Archie, *Live Updates: LMPD Investigator Who Looked into Cop Who Got Breonna Taylor Warrant Takes Stand*, COURIER J. (Louisville) (June 3, 2021, 3:34 PM), https://www.courier-journal.com/story/news/local/breonna-taylor/2021/06/03/ex-louisville-cop-joshua-jaynes-pushes-get-job-back-live-updates/7511197002/.

[17] Tessa Duvall, *Louisville Police Officer Shot in Breonna Taylor Raid Retires from LMPD*, COURIER J. (Louisville) (June 2, 2021, 1:32 PM), https://www.courier-journal.com/story/news/local/breonna-taylor/2021/06/02/louisville-cop-shot-breonna-taylor-raid-leaves-lmpd/7507269002/ ("Mattingly is eligible to retire with a full pension."); Elizabeth A. Harris & Alexandra Alter, *Controversial Title Presents Tightrope Act for a Publisher*, N.Y. TIMES, Apr. 17, 2021, at B5 (indicating that Post Hill Press still intends to publish Mattingly's book even though Simon & Schuster refuses to distribute it).

[18] *See infra* Part II.

[19] Affidavit for Search Warrant, *supra* note 8, para. 9; Travis Ragsdale, *Attorney for LMPD Detective Says Breonna Taylor Search Warrant 'Reeks' of Probable Cause*, WDRB (Oct. 13, 2020), https://www.wdrb.com/in-depth/attorney-for-lmpd-detective-says-breonna-taylor-search-warrant-reeks-of-probable-cause/article_52ed7f36-0d65-11eb-912a-cfc617ea0187.html [https://perma.cc/FF4G-5T9W].

[20] *See* Jason Riley, Marcus Green & Travis Ragsdale, *Louisville Postal Inspector: No 'Packages of Interest' at Slain EMT Breonna Taylor's Home*, WDRB (Sept. 29, 2020), https://www.wdrb.com/in-depth/louisville-postal-inspector-no-packages-of-interest-at-slain-emt-breonna-taylor-s-home/article_f25bbc06-96e4-11ea-9371-97b341bd2866.html [https://perma.cc/AR8B-BE65].

[21] Ragsdale, *supra* note 19.

had not designated any as suspicious.[22] Mattingly denies making that statement.[23]

A confluence of the War on Drugs, the subsequent militarization of policing, and the Supreme Court's gradual erosion of Fourth Amendment protections facilitated Taylor's death.[24] Under the Court's watch, dynamic and forcible-entry methods have become law enforcement's favored tool, when executing search warrants, particularly in neighborhoods branded as "high crime areas," where there is a perceived increased risk of flight, destruction of evidence, or injury.[25] These entry methods occur disproportionately in low-income communities.[26] No-knock raids or dynamic entries occur when police barge onto property without notifying the occupants and ram the door off the hinges

[22] *See* Tyler Emery, *Attorney for LMPD Det. Jaynes Says There's 'Overwhelming Evidence' for Search Warrant of Breonna Taylor's Home*, WHAS11 (Oct. 15, 2020, 12:02 AM), https://www.whas11.com/article/news/investigations/breonna-taylor-case/attorney-for-lmpd-det-jaynes-says-theres-overwhelming-evidence-for-search-warrant-of-breonna-taylors-home/417-870bf644-0436-4adc-86f3-0cff4275f35f [https://perma.cc/X5Q3-7MB9] ("Jaynes said Mattingly told him in February that Glover was receiving mail packages at Taylor's home, but he said they were not designated as 'suspicious' by the Postal Inspector."); Phylicia Ashley, *Breonna Taylor: New Videos, Audio Recordings, Documents Reveal More from March 13th Shooting*, WAVE3 NEWS (Dec. 10, 2020, 1:14 AM), https://www.wave3.com/2020/12/09/breonna-taylor-new-videos-audio-recordings-documents-reveal-more-march-th-shooting/ [https://perma.cc/8FW3-9A2H] (noting Jaynes's assertion that a witness observed the conversation where Mattingly "told Jaynes there were suspected packages going to Taylor's home").

[23] *See* Tessa Duvall, *Did He Lie or Didn't He? Ex-Cop Who Got Breonna Taylor Warrant Fights for His Job Back*, COURIER J. (Louisville) (June 3, 2021, 5:24 PM), https://www.courier-journal.com/story/news/local/breonna-taylor/2021/06/03/fired-louisville-cop-who-got-breonna-taylor-search-warrant-fights-his-job-back/7504721002/ ("Mattingly, who did not testify Thursday and recently retired from LMPD, has said he told Jaynes [that] Glover *wasn't* getting packages at Taylor's apartment." (emphasis added)).

[24] *See* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 149-55 (2017) (describing general sequence of decisions that lead to police violence against Black people); *see also* Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 250 (2010) ("The *Whren* opinion assures police officers that courts examining the validity of a search must ignore the officers' racially biased motivations in effectuating a search." (citing Whren v. United States, 517 U.S. 806, 810-13 (1996))).

[25] Butler, *supra* note 24, at 254 ("The police have more power in high-crime neighborhoods than in low-crime neighborhoods."); *see also* Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing "High-Crime Areas*,*"* 63 HASTINGS L.J. 179, 183 (2011) (noting "high crime areas" are relevant consideration of courts when reviewing police officers' reasonable suspicions); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 100 (1999) ("Whether persons are subjected to stops turns to a substantial extent on where they live.").

[26] *See* Kevin Sack, *Door-Busting Drug Raids Leave Trail of Blood*, N.Y. TIMES, Mar. 19, 2017, at 1.

while yelling "Police!"[27] Although the Court has mandated particularized evidence in search warrant applications to avoid disasters like Taylor's killing, LMPD and the magistrate that issued the warrant disregarded those requirements, and Taylor is dead.[28]

The killing of Breonna Taylor, however, is not just a story about the illegality of the warrant. It is also about the legality of circumstances that facilitated her killing. Jaynes's lying, Mattingly's failure to intervene, and the magistrate's rubber-stamping a facially defective warrant are the stories of individual failings. A weightier contributing factor is the Supreme Court. The Court created the conditions that led to Breonna Taylor's death.[29] In *Hudson v. Michigan*,[30] after centuries of fealty to the castle doctrine and constitutional devotion to the sanctity of the home, the Court took a dramatic turn and held that the exclusionary rule did not apply to evidence obtained in violation of the knock-and-announce requirement.[31] That requirement gives startled residents a moment to come to their senses before the police invade and before the residents resort to self-defense.[32] *Hudson* freed the police to ignore the knock-and-announce rule and to engage in dynamic entries unconstrained by the Fourth Amendment.[33] Refusing to apply the exclusionary rule incentivizes carelessness in the acquisition of the warrant and callousness in its execution, a trickle-down effect throughout the system.[34] When police know that evidence obtained in violation of the Constitution will not be suppressed, they become less vigilant about investigations, surveillance, verification of information, and the exercise of caution when executing warrants.[35] All of these factors sealed Taylor's fate.

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[27] *See* Authority of Federal Judges and Magistrates to Issue "No-Knock" Warrants, 26 Op. O.L.C. 44, 44 (2002) (defining no-knock warrants).

[28] *See infra* notes 268-98 and accompanying text.

[29] *See generally* Osagie K. Obasogie, *More than Bias: How Law Produces Police Violence*, 100 B.U. L. REV. 771, 775-814 (2020) (discussing Supreme Court precedent that has led to police's increase of "use-of-force" tactics).

[30] 547 U.S. 586 (2006).

[31] *See id.* at 594 ("Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.").

[32] *See id.* (describing functions of knock-and-announce rules).

[33] *See id.* at 609 (Breyer, J., dissenting) ("As in *Mapp*, some government officers will find it easier, or believe it less risky, to proceed with what they consider a necessary search immediately and without the requisite constitutional (say, warrant or knock-and-announce) compliance." (citing Mapp v. Ohio, 367 U.S. 643 (1961))).

[34] *See id.* (stressing fact that exclusionary rule provides safeguard such that officers will respect Fourth Amendment requirements); Balko, *supra* note 7 (discussing fear that ruling in *Hudson* would eventually lead to police "ignor[ing] the knock-and-announce rule entirely").

[35] Balko, *supra* note 7 (concluding this change in police behavior would "mean that more people—both cops and civilians—would die").

In *Hudson*, a five-to-four decision authored by Justice Antonin Scalia, the Court jettisoned Fourth Amendment precedents and applied a questionable reinterpretation of its problematic cost-benefit approach to Fourth Amendment analysis.[36] There, the Court raised the evil specter of the boogeyman to tip the scales. According to the Court, the danger of releasing dangerous criminals (crack cocaine dealers) into society greatly outweighed less onerous alternatives to disincentivizing police violence, namely civil rights claims and increased police professionalism.[37] The Court's sanguine faith in better policing is of no comfort to Tamika Palmer, Breonna Taylor's mother, and the families of the thousands of other victims the police kill yearly.

As it weighed the societal interests at stake in *Hudson*, the Court specifically foresaw that unannounced entries had the potential to provoke violence from a startled resident acting in self-defense—the very tragedy that befell Taylor.[38] The Court, however, elected to prioritize drug prosecutions over the Fourth Amendment right to be safe and secure in the home. In this way, the Court's doctrinal approach and embrace of a cost-benefit analysis "allow[ed] ostensibly 'neutral' legal rules" to "predictably lead to avoidable death[]."[39]

Many scholars have examined how legal doctrine is a contributing factor to death and injury in the police use-of-force context.[40] This Article examines how legal doctrine creates the conditions that lead to death in the warrant acquisition and execution process. More pointedly, it transcends the narrative of bad-apple cops and instead presents a structural framework for analyzing how Supreme Court rulings about the acquisition and execution of search warrants inequitably distributes premature death in marginalized communities.[41] The story of Breonna Taylor is more than a tale of police and judges acting outside the confines of the law. Rather, the rule of law is itself the source of her death.[42] *Hudson* opted to place broad discretion in the hands of the police untethered from the Fourth Amendment, leaving the public unprotected.[43] This is untenable in an age of increased Stand Your Ground

[36] *See Hudson*, 547 U.S. at 594-95 (opining that the costs of permitting a no-knock entry are small compared to "the jackpot" of evidence suppression, resulting often in "a get-out-of-jail-free card").

[37] *See id.* at 594.

[38] *Id.* ("[U]nannounced entry may provoke violence in supposed self-defense by the surprised resident.").

[39] Obasogie, *supra* note 29, at 771, 774.

[40] *See, e.g.*, *id.* at 774 (citing Paul Butler, Devon Carbado, and Tracey Maclin as three such scholars).

[41] *See, e.g.*, Carbado, *supra* note 24, at 149-55 (discussing the ways practical application of police tools results in disproportionate impact on communities of color).

[42] *Id.* at 151-55.

[43] *See supra* notes 30-39 and accompanying text.

laws[44] and unbridled gun ownership.[45] Both the knock-and-announce rule and the length of the waiting period before dynamic entries demand the Court's review.

The absence of justification for the warrant, the callousness with which it was executed, the subsequent attempts to cover up police excess while demonizing Taylor, and the Supreme Court's distribution of premature death have eradicated the threadbare credibility of criminal justice, particularly in marginalized communities that endure oversurveillance, overcriminalization, death, and destruction.[46] The killing of Breonna Taylor was part of an all-too-common absurdist nightmare of Black people murdered through state-sanctioned violence as they go about common activities in their daily lives: walking to a candy store (Trayvon Martin),[47] playing with a toy gun in a park (Tamir Rice),[48] sitting on a couch at home eating ice cream (Botham Jean),[49]

[44] *See Stand Your Ground Laws Are a License to Kill*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND: EVERYTOWN RSCH. & POL'Y (Sept. 8, 2021), https://everytownresearch.org/report/stand-your-ground-laws-are-a-license-to-kill/ [https://perma.cc/85UN-SV2H] ("A recent study comparing the five years before states began enacting these laws (2000–2004) to the 13-year period following their enactment (2005–2017), found justifiable firearm homicide rates increased by 55 percent in states that enacted Stand Your Ground, while these rates increased by 20 percent in states that did not have such laws.").

[45] *See* Lisa Dunn, *How Many People in the U.S. Own Guns?*, WAMU (Sept. 18, 2020), https://wamu.org/story/20/09/18/how-many-people-in-the-u-s-own-guns/ [https://perma.cc/T6BW-V6P3] (reporting that "[a]bout 40% of Americans say they or someone in their household owns a gun").

[46] In 2020, 35% of Americans said they agreed that the police use the right amount of force in every situation—this is a decrease from 2016, when 45% of respondents agreed with that statement. *See Majority 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/ [https://perma.cc/C2BA-KCSU]. The percentage of respondents who believe police treat racial and ethnic groups equally dropped from 47% in 2016 to 34% in 2020, and the share of those who thought the justice system was doing a good job of holding officers accountable when misconduct occurs fell from 44% in 2016 to 31% in 2020. *Id.*

[47] In February 2012, George Zimmerman, a self-appointed watchman, shot and killed unarmed teenager Trayvon Martin. *See* Ursula Perano, *Deaths Without Consequences*, AXIOS (May 30, 2020), https://www.axios.com/police-killings-black-lives-8fbd7c70-486a-4231-824f-fbd9faa4a817.html [https://perma.cc/X256-LEQ4].

[48] In November 2014, Officer Timothy Loehmann shot and killed twelve-year-old Tamir Rice while he was playing with a toy gun in a park. *See id.*; Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. TIMES (July 12, 2016, 3:45 PM), https://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html.

[49] In September 2018, Officer Amber Guyger shot and killed Botham Jean while he was sitting unarmed in his home. *See* Marina Trahan Martinez, Sarah Mervosh & John Eligon, *Ex-Officer Is Guilty of Murder in Neighbor's Death*, N.Y. TIMES, Oct. 2, 2019, at A11; *see also* Perano, *supra* note 47.

selling loose cigarettes (Eric Garner),[50] walking in the street when there are no sidewalks (Michael Brown),[51] sleeping at home (Breonna Taylor),[52] and countless other innocuous activities.[53]

Law enforcement's repeated murders of Black people and the machinations police have used to cover up their excess have thoroughly undermined the legitimacy of the criminal justice system, leaving scholars to label it the "criminal legal process" and activists to demand abolition.[54] This Article serves the public function of bridging the gap between the siloed halls of academe and public-sector demands for systemic change that include a radical reimagining and reconstituting of policing. Public outcry in response to police killings of Black people demands transparency, accountability, and candor. "The criminal law's purpose is not simply to deter criminal activity but [also] to impart expressive messages about what our democratic society perceives as moral."[55] As Lisa Kern Griffin argues, "[a]lthough morality is but one source

[50] In July 2014, Officer Daniel Pantaleo strangled Eric Garner to death in New York City. Funke & Susman, *supra* note 48; Perano, *supra* note 47.

[51] In August 2014, just a month after Eric Garner's murder, Officer Darren Wilson shot and killed Michael Brown in Ferguson, Missouri, after Wilson ordered Brown to stop walking in the street. *See* Funke & Susman, *supra* note 48; Perano, *supra* note 47.

[52] In March 2020, Breonna Taylor was lying in bed when police battered down her door and shot and killed her in her home. *See* Oppel Jr. et al., *supra* note 3.

[53] In March 2018, Officers Jared Robinet and Terrence Mercadal fired twenty shots at Stephon Clark, hitting him seven times, while he held a cellphone in his grandmother's backyard. Perano, *supra* note 47. In July 2016, Officer Jeronimo Yanez shot and killed Philando Castile during a traffic stop after Castile disclosed he was legally carrying a gun and reached for something in his car. *Id.* In April 2015, Officer Michael Slager shot and killed Walter Scott in North Charleston, South Carolina, after pulling Scott's car over. Funke & Susman, *supra* note 48. The list of unarmed Black people killed by police brutality goes on. *See, e.g.*, *Say Their Name*, GONZ. UNIV. (website removed; archived at https://perma.cc/ZV5H-7BAH on Dec. 6, 2021, 3:10 AM).

[54] Paul Butler uses the term "criminal process" instead, to highlight the lack of justice in the process. *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 11 (2017) ("The Chokehold is 'the system' for black men."); *see also* Jalila Jefferson-Bullock & Jelani Jefferson Exum, *That Is Enough Punishment: Situating Defunding the Police Within Antiracist Sentencing Reform*, 48 FORDHAM URB. L.J. 625, 627 (2021) (describing mass movement responding to unjust systems); Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 6 (2019) (discussing changes in language to reflect the reality of the carceral state).

[55] Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1232 n.185 (2016) (citing Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515, 1549 (2009)).

of the criminal law's credibility, it functions best when it imposes requirements perceived as just and punishes those deemed deserving."[56]

The deliberate failure to obtain any criminal charges or an indictment against the white officers who killed Michael Brown, Tamir Rice, and Breonna Taylor, all Black Youths, achieved the same task as the killings themselves—"the vilification of [Black people], the valorization of [white police officers], and the reassurance of white heteropatriarchal preeminence, vindication, safety, and security."[57] The existence of dual systems of process, whereby police receive process and the Black people the police kill receive none, has highlighted the perennial precarity of the marginalized. This grossly unequal distribution of process will ultimately lead to its demise.[58]

This Article has six parts. Parts I through III establish the illegality of the search warrant for Taylor's home. These Parts lay bare highly questionable police conduct in both the acquisition and execution of the warrant that set Taylor's killing in motion. These opening Parts also examine how the Supreme Court erected legal doctrines that led to Taylor's death, specifically through its refusal to apply the exclusionary rule to forced entries. The Court's refusal disincentivizes police from exercising essential caution. Part IV discusses the systemic problems in policing that Taylor's killing exposed, including lying in search warrant affidavits, lack of judicial oversight in the warrant-issuing process, assembly-line processing of warrants, and the fatal dangerousness of dynamic entries, all of which are disproportionately inflicted on persons of color. Part V examines how the spectacle of Taylor's killing inflicted a cultural trauma on the public, particularly marginalized communities, which demands a public reckoning. Part VI recommends several remedies for mitigating police excess in the acquisition and execution of search warrants.

[56] Griffin, *supra* note 55, at 1549; *see also* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 217 (2012) (arguing "[a] criminal law with liability and punishment rules that conflict with a community's shared intuitions of justice will undermine its moral credibility").

[57] Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 UMKC L. REV. 567, 568 (2017); *see also* Roberts, *supra* note 54, at 27 (describing killing Black Americans as part of maintaining social order protected by police).

[58] A recent Gallup poll found that 56% of white Americans have confidence in the police; for Black Americans, the statistic is 19%. Jeffrey M. Jones, *Black, White Adults' Confidence Diverges Most on Police*, GALLUP (Aug. 12, 2020), https://news.gallup.com/poll/317114/black-white-adults-confidence-diverges-police.aspx [https://perma.cc/6TJT-PMSK].

I. THE SEARCH WARRANT

Warrants obtained through intentional or reckless misrepresentations are invalid under the Fourth Amendment.[59] Taylor's killing exposed systemic problems in law enforcement that have fueled a public outcry for answers, explanations, transparency, reform, reparations, and a reconstitution of policing. Even if Jaynes and Mattingly can concoct a narrative of innocence or semantic evasion, or if a fact finder should find Jaynes's lies to be innocent mistakes that lacked intentionality or willfulness, Taylor's death highlights the callous manner in which police conduct business.[60] Whether Jaynes's statement stands or is excised, the evidence that was used to justify the intrusion into Taylor's home fell below constitutional requirements.

A. *Background*

After LMPD killed Taylor, prosecutors offered several plea agreements to Jamarcus Glover, the actual target of the drug investigation, that were predicated on implicating Taylor in his drug dealing.[61] In July 2020, the attorneys for Taylor's family reported that prosecutors offered Glover a plea agreement that listed Taylor as a co-defendant.[62] Prosecutors responded that the plea offer was a draft, although the Taylor family's attorney states that this

[59] *See, e.g.*, Franks v. Delaware, 438 U.S. 154, 155-56 (1978) ("[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment . . . requires that a hearing be held at the defendant's request."); *see also* Herring v. United States, 555 U.S. 135, 142 (2009) (citing United States v. Leon, 468 U.S. 897, 922 (1984)) ("When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' on the subsequently invalidated search warrant."); *Leon*, 468 U.S. at 923 ("Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.").

[60] *See 2 Officers Shot in Louisville Protests Over Breonna Taylor Charging Decision*, N.Y. TIMES (Apr. 16, 2021), https://www.nytimes.com/2020/09/23/us/breonna-taylor-decision-verdict.html (describing nationwide protests in wake of grand jury declining to charge police officers who shot and killed Breonna Taylor).

[61] Janelle Griffith & Laura Strickler, *Breonna Taylor's Ex Was Offered a Plea Deal to Say She Was Part of an 'Organized Crime Syndicate*,*'* NBC NEWS (Sept. 2, 2020, 3:37 PM), https://www.nbcnews.com/news/us-news/breonna-taylor-s-ex-was-offered-plea-deal-say-she-n1239021 [https://perma.cc/9226-2FXQ] (noting draft plea sheets included Taylor's name to "implicate her in an 'organized crime syndicate'").

[62] *See id.*

explanation is dubious.[63] Despite the pressure from law enforcement to claim otherwise, Glover has consistently stated that Taylor had no dealings with drugs.[64]

On September 23, 2020, Kentucky Attorney General Daniel Cameron announced that the grand jury had declined to indict the officers who shot Taylor on any charges related to her death.[65] Instead, one officer was charged with wanton endangerment for shooting bullets into a nearby apartment.[66] Cameron refused to appoint a special prosecutor and instead retained Taylor's case himself.[67] During his press conference, Cameron made several statements that elicited calls for police reform (if not abolition): that the executing officers had announced themselves before they entered Taylor's apartment; that Kenneth Walker, Taylor's partner, had shot Mattingly; that Mattingly was not involved in obtaining the warrant; and that the grand jury had found that the officers were justified in their use of force.[68]

B. *The Affidavit*

The focus of the LMPD investigation that led to Taylor's killing involved two men, Jamarcus Glover and Adrian Walker (not related to Kenneth Walker,

[63] *See* Amina Elahi, *Did Prosecutors Offer Jamarcus Glover a Plea Deal That Incriminated Breonna Taylor?*, 89.3 WFPL (Aug. 31, 2020), https://wfpl.org/did-prosecutors-offer-jamarcus-glover-a-plea-deal-that-incriminated-breonna-taylor/ [https://perma.cc/ED7B-FJMX] (quoting Taylor family's attorney stating prosecutor's "press release creates even more questions").

[64] *See* Balko, *supra* note 5 ("Glover has . . . publicly said that Taylor had no involvement in his drug dealing." (citation omitted)); Andrew Wolfson, Darcy Costello & Tessa Duvall, *Judge Concerned LMPD Detective Lied to Get Taylor Search Warrant; Records Show Police Were Told No 'Suspicious' Packages Sent to Home*, COURIER J. (Louisville), Oct. 2, 2020, at A6 (describing Glover's assertion that Taylor was not involved in drug dealing).

[65] Tobin, *supra* note 13; Kendall Karson, *Kentucky AG Daniel Cameron Pitches President Trump as 'Best for This Country' Amid Racial Strife*, ABC NEWS (Aug. 28, 2020, 9:44 AM), https://abcnews.go.com/Politics/kentucky-ag-daniel-cameron-pitches-president-trump-best/story?id=72621580 [https://perma.cc/F3XB-MWDT]; Morgan Watkins, *President Trump Calls AG Daniel Cameron a "Star" on Handling of Breonna Taylor Decision*, COURIER J. (Louisville) (Sept. 23, 2020, 8:11 PM), https://www.courier-journal.com/story/news/local/breonna-taylor/2020/09/23/donald-trump-praises-daniel-cameron-wake-breonna-taylor-decision/3511197001/.

[66] Tobin, *supra* note 13.

[67] *See* Tessa Duvall, *A Council Refused to Appoint a Special Prosecutor in Breonna Taylor Case. An Outcry Ensued*, COURIER J. (Louisville) (Dec. 4, 2020, 1:17 PM), https://www.courier-journal.com/story/news/local/breonna-taylor/2020/12/04/breonna-taylor-kentucky-group-declines-appoint-special-prosecutor/3812184001/.

[68] *Watch Live: Kentucky AG Holds Press Conference After Breonna Taylor Grand Jury Decision*, HILL (Sept. 30, 2020, 12:57 PM), https://thehill.com/video/in-the-news/517810-watch-live-kentucky-ag-holds-press-conference-following-breonna-taylor, *transcribed in* Tobin, *supra* note 13.

Taylor's partner).[69] At one point, Taylor had dated Glover, but she had ended their relationship before LMPD secured the search warrant.[70] LMPD was investigating Glover and Walker for suspected drug dealing out of a house that was ten miles away from Taylor's home.[71]

On March 12, 2020, LMPD Detective Joshua Jaynes applied for and received a search warrant for Taylor's residence[72] along with four other warrants. The other warrants did not mention Taylor.[73] Because this Article focuses on the absence of probable cause in the affidavit that supported the search warrant for Taylor's home, it is reproduced here in its entirety:

> 1.) On 01/02/2020, Affiant had LMPD tech unit place a "pole camera" at the intersection of S. 24th Street and Elliott Avenue. Within an hour of surveillance, Affiant witnessed approximately 15-20 vehicles go to and from 2424 Elliott Avenue within a short period of time which is indicative of trafficking in narcotics.[74]
>
> 2.) On 01/2/2020, Detectives observed Adrian O. Walker, DOB:06/02/1992, in operation of the above listed red 2017 Dodge Charger go to and from 2424 Elliott Avenue for a short period of time. Mr. Walker drove W/B [West Bound] on Elliott Avenue at a high rate of speed to which a traffic stop was conducted shortly after. Detectives could smell a strong odor of marijuana coming from the listed vehicle. A small amount of marijuana was located inside the vehicle along with a large undetermined amount of US currency located in the center console of the listed vehicle.

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[69] Phillip M. Bailey, Darcy Costello & Tessa Duvall, *Ex: Breonna Taylor Had No Drug Ties; Glover Denies She Held Money for Him*, COURIER J. (Louisville), Aug. 28, 2020, at A12; Darcy Costello, *Man Linked to Drug Investigation That Led Police to Breonna Taylor's Door Is Fatally Shot*, COURIER J. (Louisville) (Nov. 20, 2020, 5:30 PM), https://www.courier-journal.com/story/news/local/breonna-taylor/2020/11/20/breonna-taylor-suspect-drug-investigation-led-taylor-shot/6359459002/.

[70] *See* Bailey et al., *supra* note 69 ("Glover said in the interview Wednesday how he and Taylor dated for about 2 ½ years before breaking up in 2018.").

[71] Duvall, *Fact Check*, *supra* note 3; *see also* Oppel Jr. et al., *supra* note 3 (describing a judge's approval of a search warrant for Taylor's home despite the fact the alleged drug dealing took place "far from Ms. Taylor's home").

[72] Oppel Jr. et al., *supra* note 3.

[73] *See* Tessa Duvall & Ben Tobin, *Louisville Detective Who Obtained No-Knock Search Warrant for Breonna Taylor Reassigned*, COURIER J. (Louisville) (Aug. 30, 2020, 3:13 PM), https://www.courier-journal.com/story/news/local/2020/06/10/breonna-taylor-louisville-detective-joshua-jaynes-no-knock-warrant-reassigned/5333604002/ (implying that Taylor was not mentioned in any of the other four warrants by explaining that "Taylor was named on the warrant for her apartment, [but] Jamarcus Glover and Adrian Walker . . . were named on all five warrants").

[74] The Elliot address was the "trap house" or drug house operated by Jamarcus Glover and ten miles away from Taylor's residence. *See* Oppel Jr. et al., *supra* note 3.

3.) *Adrian Walker* has a pending court case for COMP [Complicit] Convicted Felon in Possession of a Firearm, Drug Paraphernalia — Buy/Possess, ENH [Enhanced] Trafficking in Marijuana (less than 8oz) 1st Offense, COMP Trafficking in a Controlled Substance 1st Degree, 1st Offense (>=4GMS Cocaine) (19-F-013851).

4.) On 01/08/2020, at approximately 1336 hours, Detectives observed Jamarcus Glover operating the above listed red 2017 Dodge Charger with Adrian Walker as a passenger. Detectives observed on the pole camera Jamarcus Glover exit the vehicle, walk over to the property line of 2425 and 2427 Elliott Avenue (near there is a chain- link fence that ends with an amount of large rocks appearing to be disturbed). Jamarcus Glover is seen on a zoomed camera dropping a large, blue cylinder-shaped object near the rocks and then appears to be covering it up to avoid detection.

5.) *Jamarcus Glover* has the following pending court cases: Convicted Felon in Possession of a Firearm, Convicted Felon in Possession of a Handgun, Receiving Stolen Property (Firearm), Drug Paraphernalia – Buy/Possess, Trafficking in a Controlled Substance 1st Degree, 1st Offense (<4GMS Cocaine) (20-F-000098), COMP Possession of a Controlled Substance 1st Degree, 1st Offense (Heroin), COMP Possession of a Controlled Substance 1st Degree, 1st Offense (Cocaine), Tampering With Physical Evidence, COMP Trafficking in Marijuana (less than 8oz) 1st Offense (19-CR-001583-003), COMP Trafficking in a Controlled Substance 1st Degree, 1st Offense (<4GMS Cocaine), COMP Tampering With Physical Evidence (19-CR-002323).

6.) Affiant has conducted surveillance multiple times on site near the physical location of 2424 Elliott Avenue and through the pole camera. Affiant has witnessed on occasion subjects running from 2424 Elliott Avenue to the rock pile near the property line of 2425 and 2427 Elliott Avenue where Jamarcus Glover dropped the suspected narcotics and then the subjects then run back into 2424 Elliott Avenue. Affiant believes through my 10 years of narcotics related detective work and experience that Jamarcus Glover and Adrian Walker are the sources of narcotics for the "trap house" (where drugs are sold) at 2424 Elliott Avenue. When the narcotics being dealt from 2424 Elliott Avenue are low (pedestrian and vehicular traffic is minimal), Mr. Walker and/or Mr. J. Glover show up operating the red 2017 Dodge Charger and appear to "re-up" the drug house at 2424 Elliott Avenue. Mr. Walker and/or Mr. J. Glover are seen either entering/exiting 2424 Elliott Ave. or going to drop suspected narcotics at the rock pile near the property line of 2425 and 2427 Elliott Avenue. Once they leave the area, normal pedestrian and vehicular traffic resumes.

7.) Affiant has observed the listed red 2017 Dodge Charger make frequent trips from 2424 Elliott Avenue to 3003 Springfield Drive. Both Mr. Glover and Mr. Walker have been known to operate the listed vehicle.

> 8.) On 01/16/2020, during the afternoon hours, Affiant witnessed Jamarcus Glover operating the listed red 2017 Dodge Charger. Mr. J. Glover pulled up and parked in front of 3003 Springfield Drive. Affiant then observed Mr. J. Glover walk directly into apartment #4. After a short period of time, Mr. J. Glover was seen exiting the apartment with a suspected USPS package in his right hand. Mr. Glover then got into the red 2017 Dodge Charger and drove straight to 2605 W. Muhammed Ali Blvd. which is a known drug house.
>
> 9.) Affiant verified through a US Postal Inspector that Jamarcus Glover has been receiving packages at 3003 Springfield Drive #4.[75] Affiant knows through training and experience that it is not uncommon for drug traffickers to receive mail packages at different locations to avoid detection from law enforcement. Affiant believes through training and experience, that Mr. J. Glover may be keeping narcotics and/or proceeds from the sale of narcotics at 3003 Springfield Drive #4 for safe keeping.
>
> 10.) Affiant has observed the above listed white 2016 Chevrolet Impala park in front of 2424 Elliott Avenue on different occasions. This vehicle is registered to Breonna Taylor.
>
> 12.) Affiant has verified through multiple computer databases that Breonna Taylor lives at [redacted]
>
> 13.) Affiant verified through multiple computer databases that as of 02/20/2020, Jamarcus [redacted] Drive #4 as his current home address.
>
> 14.) Mr. J. Glover and Mr. Walker are acquaintances and have been seen going to and from 2424 Elliott Avenue. Additionally, the red 2017 Dodge Charger has been driven by these individuals mentioned within this affidavit. Affiant has witnessed during physical surveillance the suspected drug traffickers sharing the red 2017 Dodge Charger numerous times to transport and store their suspected narcotics.[76]

C. *The Affidavit Was Obtained with Intentional Misrepresentations*

The search warrant that authorized an intrusion into Taylor's home was based on a lie. In paragraph nine of his affidavit, Jaynes swore that he had "verified" through a United States Postal Inspector that Glover had been receiving packages at Taylor's home.[77] After Taylor was killed, the Postal

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[75] The Springfield Drive address is the home of Breonna Taylor. *See* Crystal Bonvillian, *Breonna Taylor: Debunking 6 Myths and Bits of Misinformation About Deadly Police Shooting*, WHIO TV (Sept. 25, 2020, 8:24 PM), https://www.whio.com/news/trending/breonna-taylor-debunking-6-myths-bits-misinformation-about-deadly-police-shooting/2RTM6XRS2JG55FI5RLILAS5LJM/ [https://perma.cc/HNP9-6MRU].

[76] Affidavit for Search Warrant, *supra* note 8, paras. 1-14.

[77] See *id.* para. 9.

Inspector refuted Jaynes's claim.[78] He stated that another law enforcement agency had asked whether Taylor was receiving suspicious packages and that his office had confirmed that she was not.[79] Jaynes has admitted that he did not speak directly to the Postal Inspector but that instead Mattingly had made an inquiry to the Shively Police Department ("SPD"), who spoke with the Postal Inspector, and that Mattingly had told him that Glover was receiving packages at Taylor's home.[80] Mattingly denies making this statement.[81] Jaynes's lie was no small matter. Judge Mary Shaw, who issued the search warrant, relied on Jaynes's affidavit to justify the invasion of Taylor's home. Since Taylor's death, Judge Shaw has stated that Jaynes "may have lied" to obtain the warrant.[82]

D. *The Affidavit Is a Product of the War on Drugs*

Public outrage about increased incidences of crime during the War on Drugs and a consensus about the face of crime and what constitutes criminality prompted the Supreme Court to fashion doctrine that concentrated power and discretion in the hands of the police while gradually eroding Fourth Amendment protections, particularly the protection of the body and the

[78] *See* Duvall, *supra* note 23.

[79] Riley et al., *supra* note 20 ("Tony Gooden said a different law enforcement agency asked his office in January to investigate whether Taylor's home was receiving any potentially suspicious mail. After looking into the request, he said, the local office concluded that it wasn't.").

[80] *See* Duvall, *supra* note 23 (noting Jaynes asserts he asked Mattingly to "look into whether Glover was getting packages delivered to the apartment"); SPECIAL INVESTIGATIONS DIV., PUB. INTEGRITY UNIT, LOUISVILLE METRO POLICE DEP'T, FILE NO. 20-019, INVESTIGATIVE REPORT 155 (2020) [hereinafter INVESTIGATIVE REPORT], https://louisville-police.org/DocumentCenter/View/1818/PIU-20-019-Investigative-Reports [https://perma.cc/2DKL-5A2V] (stating that Mattingly contacted Detective Mike Kuzma of SPD, who contacted Postal Inspector Charlie Klein "to inquire about the package history to the listed address").

[81] Duvall, *supra* note 23.

[82] Wolfson et al., *supra* note 64.

home.[83] Courts, including the Supreme Court, have consistently lowered the requirements of proof necessary to justify police encounters, privacy intrusions, and the use of force.[84] In doing so, courts have shielded police from

[83] Implicit bias research has quantitatively captured the nanosecond and ubiquitous associations of Black people and criminality. As Professor Jennifer Eberhardt explains, "[O]ne of the strongest stereotypes in American society associates blacks with criminality." JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO 6 (2019); *see also, e.g.*, Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1313-14 (2021) (describing effect that implicit bias and race has on pretrial detention); Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 888-89 (2004) (describing study that found "[w]hen officers were given no information other than a face and when they were explicitly directed to make judgments of criminality, race played a significant role in how those judgments were made"); Mary Beth Oliver, *African American Men as "Criminal and Dangerous": Implications of Media Portrayals of Crime on the "Criminalization" of African American Men*, 7 J. AFR. AM. STUD. 3, 4 (2003) ("Research and public opinion polls of people's attitudes and beliefs about crime reveal that whites express greater fear of crime when in the presence (or assumed presence) of African Americans . . . ."). Lest we are inclined to think that associating Black people with criminality is limited to thoughts alone, Devon Carbado meticulously establishes that during the War on Drugs the Supreme Court used the Fourth Amendment to make African Americans more vulnerable to police encounters that facilitate death. *See* Carbado, *supra* note 24, at 129 ("Over the past four decades, the Supreme Court has interpreted the Fourth Amendment to enable and sometimes expressly legalize racial profiling. . . . [T]he Court's legalization of racial profiling exposes African Americans not only to the violence of ongoing police surveillance and contact but also to the violence of serious bodily injury and death.").

[84] *See* Carbado, *supra* note 24 at 137-38 (documenting how the Court has decided Fourth Amendment cases so that African Americans become vulnerable to police discretion, which accelerates encounters with police and subsequent increases in force, which can ultimately end in death as part of doctrinal design); *see also* Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCIS. 16793, 16793-98 (2019) (presenting study results regarding the connection between police use of force and different social groups); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1193-212 (2017) (describing characteristics of what makes seizures reasonable).

accountability and facilitated policing cultures of recklessness that have led to death, destruction, and injury.[85]

The "central value of the Fourth Amendment" shields homes from unreasonable searches and seizures.[86] During the War on Drugs, however, the Supreme Court scaled back Fourth Amendment protections in the interest of

[85] *See* Carbado, *supra* note 24, at 127 ("This 'front-end' police contact—which Fourth Amendment law enables—is often that predicate to 'back end' police violence . . . ."); *see also* Edwards et al., *supra* note 84, at 16793-98; Ristroph, *supra* note 84, at 1188. "Michel Foucault described the evolution of punishment in the Western world away from torture to the modern prison." BUTLER, *supra* note 54, 107. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1979) (discussing torture in Part One, punishment in Part Two, and discipline, including carceral discipline, in Part Three). Foucault argued that torture, which I discuss as "spectacle," *see infra* Section V.B, "blurred the line between investigation and punishment." BUTLER, *supra* note 54, at 107. Angela Y. Davis makes a similar argument stating, "[Practices of torture] emanate from techniques of punishment deeply embedded in the history of the institution of prison." ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 49 (2005); *see also* Carbado, *supra* note 24, at 128 ("Davis's point about torture killings applies to police killings. By and large, Americans tend to think of police killings of African Americans as aberrant and extraordinary, failing to see their connections to the routine, to the everyday, and to the ordinary."). By way of example, take the class case of *Illinois v. Wardlow*, where the Supreme Court held that headlong flight in areas of high crime constituted reasonable suspicion and contributed to a justification for a stop and frisk. 528 U.S. 119, 124-26 (2000). I have argued that *Wardlow* is an example of how the Court makes "high crime areas," which translates to areas occupied by Black people, legible (a kind of branding) for increased police surveillance and therefore state-sanctioned control. *See* Cook, *supra* note 57, at 610-11 n.199.

[86] Georgia v. Randolph, 547 U.S. 103, 115 (2006); *see also* Kyllo v. United States, 533 U.S. 27, 40 (2001) (noting that "the Fourth Amendment draws 'a firm line at the entrance to the house'" (quoting Payton v. New York, 445 U.S. 573, 590 (1980))); Wilson v. Layne, 526 U.S. 603, 610 (1999) ("Our decisions have applied these basic principles of the Fourth Amendment to situations, like the one in this case, in which police enter a home under the authority of an arrest warrant in order to take into custody the suspect named in the warrant."); United States v. U.S. District Court (*Keith*), 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . .").

concentrating power and discretion in the hands of law enforcement.[87] The courts have sacrificed accuracy, safety, and a fairer distribution of process for more streamlined and efficient criminal administrative practices.[88] During the decades of the War on Drugs, the Supreme Court has given law enforcement the weapons necessary to declare war on certain communities, namely areas demarcated or branded as "high crime areas," where the "characteristics" of a neighborhood continued the long historical treatment of making the bodies inside those places vulnerable to and legible for detection, surveillance, policing, and control.[89] This form of disciplining and policing empowered law enforcement to inflict humiliation on vulnerable bodies as a form of taming and racialized social control that feeds back as "law and order."[90]

II. INSUFFICIENCY OF THE AFFIDAVIT

LMPD will never file criminal charges against Breonna Taylor for two reasons: (1) It did not find evidence to justify charges against her, and (2) LMPD killed her. As a result, there will not be a suppression hearing to challenge the validity of the search warrant. Nevertheless, Taylor's death demands a public vetting of the warrant and the manner of its execution. This Part explores the constitutional validity of the warrant to expose problematic police conduct in the warrant application process. Because Jaynes provided material falsities in his affidavit and because the affidavit provided less than probable cause, he set in motion an unconstitutional search that ultimately led to Taylor's death.

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[87] *See* Ristroph, *supra* note 84, at 1191 (arguing that "Fourth Amendment suspicion standards have been adopted, and lowered, with open acknowledgment of the burdens these standards will impose on persons of color"); s*ee also* Utah v. Strieff, 136 S. Ct. 2056, 2064 (2016) (limiting scope of the Fourth Amendment's exclusionary rule); Herring v. United States, 555 U.S. 135, 147-48 (2009) (holding that good-faith exception applies where an officer makes arrest based on incorrect warrant information); Whren v. United States, 517 U.S. 806, 813 (1996) (ignoring racial profiling by holding that "[s]ubjective intentions" that may be racially discriminatory "play no role in ordinary, probable-cause Fourth Amendment analysis"); Tennessee v. Garner, 471 U.S. 1, 9-20 (1985) (justifying use of force based on officer perceptions); Terry v. Ohio, 392 U.S. 1, 27 (1968) (lowering standard that would justify police encounters to reasonable suspicion); BUTLER, *supra* note 54, at 57 ("In a series of cases, the conservatives on the Court have given the police unprecedented power, with everybody understanding that these powers will mainly be used against African Americans and Latinos."); Carbado, *supra* note 24, at 129 ("[T]he legalization of racial profiling facilitates the precarious line between stopping black people and killing black people.").

[88] *See Strieff*, 136 S. Ct. at 2068-71 (Sotomayor, J., dissenting) (discussing police officers' lack of incentive to comply with the Fourth Amendment and distribute encounters equally).

[89] *See, e.g.*, *Wardlow*, 528 U.S. at 124-25.

[90] *See* BUTLER, *supra* note 54, at 17-18; s*ee also* Roberts, *supra* note 54, at 18 ("Torture has been accepted as a technique of racialized carceral control.").

A. *It Would Not Survive a* Franks *Hearing*

In *Franks v. Delaware*,[91] the United States Supreme Court established the following test to determine whether a defendant would receive a hearing in support of a claim that the affidavit supporting a search warrant contained material misrepresentations:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.[92]

The standard of proof in a *Franks* proceeding is a preponderance of the evidence.[93] The challenging party must prove both that the contested statements are in fact false and that their inclusion in the affidavit amounted to perjury or reckless disregard for the truth.[94] The prosecution may, however, counter with facts outside the affidavit that tend to prove the truthfulness of the facts contained in the affidavit.[95] When the *Franks* defect involves statements in an affidavit that demonstrate reckless disregard for the truth or information

[91] 438 U.S. 154 (1978).

[92] *Id.* at 171-72 (footnote omitted).

[93] *Id.* at 155-56. The same preponderance of the evidence standard applies in Kentucky. Gibson v. Commonwealth, No. 2014-SC-000158-MR, 2015 WL 9243583, at *2-3 (Ky. Dec. 17, 2015) (confirming *Franks* test applies in Kentucky).

[94] *See* Commonwealth v. Smith, 898 S.W.2d 496, 503 (Ky. Ct. App. 1995) (interpreting *Franks* decision).

[95] 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.4(d) (6th ed.), Westlaw (database updated Sept. 2020).

that the affiant knows to be false, that information must be excised and the affidavit must be judged based on the remaining information.[96]

In the Taylor case, the affiant and the misrepresentation in the affidavit did not involve a third party, a confidential informant, a "snitch," or a private citizen. The affiant was a sworn law enforcement officer, a veteran with "10 years of narcotics related detective" experience.[97] Moreover, Jaynes stated that the misrepresentation he used to form the basis of probable cause was from a federal officer, a United States Postal Inspector.[98]

It is critical to read each sentence and paragraph of Jaynes's affidavit in its full context.[99] Jaynes's misrepresentation occurs in paragraph nine of his affidavit, where he attempted to convince the magistrate that there was probable cause to believe that illegal narcotics were in Taylor's home.[100] More specifically, Jaynes alleged that the criminal conduct (drug dealing) was ongoing.[101] In this paragraph, Jaynes sought to persuade the magistrate that Glover was receiving drugs through the mail at Taylor's home.[102] Drug traffickers regularly have drug packages delivered to third parties because they believe that the third party has not attracted the attention of surveilling police.[103] In paragraph nine, Jaynes made two false statements: (1) that he had "verified through a US Postal Inspector" and (2) that Glover had been receiving packages at Taylor's apartment.[104] But "Jaynes later admitted to LMPD investigators that neither he nor another LMPD officer verified that directly with a postal inspector."[105] In terminating Jaynes, LMPD Chief Yvette

[96] *See, e.g.*, *Franks*, 438 U.S. at 156; Hayes v. Commonwealth, 320 S.W.3d 93, 101 (Ky. 2010). Although the Kentucky remedy for a *Franks* violation is excision, other states require more robust and rigorous correctives. For example, the California Supreme Court has held that under the California Constitution, where a defendant demonstrates that an affiant has made deliberate and intentional false statements, regardless of materiality to the finding of probable cause, the defendant is entitled to have the warrant quashed and any evidence seized pursuant thereto suppressed. People v. Cook, 583 P.2d 130, 141 (Cal. 1978).

[97] Affidavit for Search Warrant, *supra* note 8, para. 6.

[98] *Id.* para. 9.

[99] Search warrant affidavits are to be judged on the totality of the circumstances, not line-by-line scrutiny. *See* Illinois v. Gates, 462 U.S. 213, 238 (1983) ("The task of the issuing magistrate is simply to make a practical, common-sense decision . . . given all the circumstances set forth in the affidavit . . . ."); *see also* United States v. Woosley, 361 F.3d 924, 926 (6th Cir. 2004) ("[P]robable cause determinations must be based on the totality of the circumstances . . . .").

[100] Affidavit for Search Warrant, *supra* note 8, para. 9.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*; Duvall & Tobin, *supra* note 73.

[105] Eleanor Klibanoff & Graham Ambrose, *LMPD Investigative File Sheds Light on Breonna Taylor Warrant*, WFPL (Oct. 7, 2020), https://wfpl.org/kycir-lmpd-investigative-documents-shed-light-on-warrant-that-left-breonna-taylor-dead/ [https://perma.cc/Q8AD-VWTP].

Gentry stated that Jaynes had "'failed to inform the judge that [he] had no contact with the' [P]ostal [I]nspector."[106] Gentry added, "Your sworn information was not only inaccurate, it was not truthful."[107] After hearing Jaynes's testimony, assessing his demeanor, and judging his credibility, the LMPD Review Board upheld his termination for lying in the affidavit.[108]

Jaynes's lack of candor exemplifies how police can undermine the search warrant application process. When a magistrate receives an affidavit, they have few checks on the affiant's veracity or the truth of the underlying evidence.[109] The process of obtaining a warrant from a magistrate is not open to public scrutiny.[110] It does not take place in an adversarial setting where an adversary tests the truth of the underlying evidence.[111] Instead, it is strictly a private affair; only the judge, the affiant, and possibly a prosecutor are present. The targeted suspects are not entitled to be present and are not given notice. As a result, veracity in search warrants is of singular importance.[112] Jaynes's representation that he had "verified" information was intended to assure the magistrate of the accuracy of his underlying claim that he had personally verified with the Postal Inspector that Glover had packages that contained drugs delivered to Taylor's home.[113] Jaynes's knowledge that he had not verified anything with the Postal Inspector makes it impossible for him to claim truthfully that his statement was a negligent oversight.[114] His falsehood about that issue can only be attributed to intentionality or recklessness. The affidavit uses the noun "[a]ffiant" (himself), not the name of a second or third party, as the actor who "verified through a US Postal Inspector that Jamarcus Glover has been receiving packages" at Taylor's address.[115]

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[106] David K. Li, *2 Louisville Police Officers Fired Over Roles in Fatal Shooting of Breonna Taylor*, NBC NEWS (Jan. 6, 2021, 6:14 PM), https://www.nbcnews.com/news/us-news/2-louisville-police-officers-fired-over-roles-fatal-shooting-breonna-n1252751 [https://perma.cc/W9E6-5NYS].

[107] *Id.*

[108] Jason Riley, *Louisville Police Merit Board Upholds Firing of Joshua Jaynes for Lying in Breonna Taylor Warrant*, WDRB (July 1, 2021), https://www.wdrb.com/in-depth/louisville-police-merit-board-upholds-firing-of-joshua-jaynes-for-lying-in-breonna-taylor-warrant/article_bdbfd56c-d9bf-11eb-94d3-9b8851d7acab.html [https://perma.cc/6LBR-9A53].

[109] *See* LAFAVE, *supra* note 95, § 4.4(a) ("[T]he warrant is issued in an *ex parte* hearing where the magistrate's only check on the affiant's veracity is a search for internal inconsistency in his statement." (quoting Steven M. Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825, 835 (1971))).

[110] *See id.* (describing ex parte nature of warrant hearings).

[111] *Id.*

[112] *Id.*

[113] Affidavit for Search Warrant, *supra* note 8, para. 9.

[114] *Cf.* Franks v. Delaware, 438 U.S. 154, 171 (1978) (discussing how "negligence or innocent mistake are insufficient" in establishing falsity of affidavit).

[115] Affidavit for Search Warrant, *supra* note 8, para. 9.

Jaynes's falsities inject a new element into the analysis, the doctrine that a witness's knowingly false statement in one part of his testimony undermines the whole. This principle is encapsulated in the common law maxim "*falsus in uno, falsus in omnibus*."[116] Jaynes's misrepresentation about his "verification" undermines his credibility in the remainder of the affidavit.

Jaynes's second misrepresentation—that Glover was receiving packages at Taylor's residence—has far graver consequences. LMPD's internal investigation concluded that Jaynes's affidavit lacked truth, was misleading, and should be reviewed for criminal actions.[117] This is not a case where an affiant has acted reasonably under the circumstances—for example, where the affiant receives information from a third-party cooperator who provides a misrepresentation without the officer's knowledge.[118] In Taylor's case, an officer from another police department, Detective Mike Kuzma of SPD, told Mattingly that "there was no parcel history at the location."[119] Kuzma relayed to his colleague, Timothy Salyer, that he (Kuzma) had told Mattingly no packages had been delivered to Taylor's residence.[120] Both United States Postal Inspector Charlie Klein and Kuzma clearly stated that no packages had been delivered to Taylor.[121] Each man also clearly communicated that exact information to the next person in the series, e.g., Klein to Kuzma, then Kuzma to Mattingly.[122] Both Klein and Kuzma stated that they could not make any representations about packages delivered to Taylor's home.[123]

The available evidence demonstrates that there is a highly material issue of fact between Jaynes's claim that Mattingly had told him "that Glover was receiving Amazon and mail packages" at Taylor's address[124] and Mattingly's flat denial that he had done so.[125] Unfortunately, we will never know the facts as they would have been reported to an investigating officer immediately after

[116] *See* Sebree v. Rogers, 102 S.W. 841, 842 (Ky. 1907) ("[I]f a witness is impeached in one particular, it is then within the province of the trial court (or jury) to disregard his testimony on that account on other points."); *see also, e.g.*, Florez v. Groom Dev. Co., 348 P.2d 200, 205 (Cal. 1959); Nelson v. Black 275 P.2d 473, 473 (Cal. 1954); *In re* Estate of Friedman, 172 P. 140, 143 (Cal. 1918); People v. Soto, 59 Cal. 367, 369-70 (1881). One court argued that "[n]o reason appears why it should not apply to sworn statements in an affidavit for a warrant and as well as in trial testimony." People v. Cook, 583 P.2d 130, 140 (Cal. 1978).

[117] INVESTIGATIVE REPORT, *supra* note 80, at 229.

[118] LAFAVE, *supra* note 95, § 4.4(b).

[119] INVESTIGATIVE REPORT, *supra* note 80, at 152.

[120] *Id.* at 154.

[121] *Id.*

[122] *Id.* at 152, 154.

[123] *Id.* at 153 ("He also stated he could not say if the address received packages . . . .").

[124] *Id.* at 149.

[125] *See* Ashley, *supra* note 22 (quoting Mattingly's attorney as saying that Mattingly "never advised Officer Jaynes that packages for Jamarcus Glover had been delivered at Breonna Taylor's apartment").

Taylor was gunned down. By the time these questions were asked, both Jaynes and Mattingly had substantial time to consult with counsel, coordinate their stories with other officers and with the evidence, and concoct narratives of innocence and semantic evasion to explain the discrepancies.[126]

In addition to these structural impediments to the truth-seeking function, several problems remain with Jaynes's misrepresentations. First, several pieces of evidence confirm the falsity of his claims. Both Kuzma and Salyer have stated that there was no package history at Taylor's home and that they clearly conveyed that information to Mattingly.[127] Mattingly later confirmed with Kuzma and Salyer that he relayed the information to Jaynes.[128] Second, after LMPD killed Taylor, Jaynes engaged in conduct indicative of deceit. On April 10, 2020, when Jaynes understood that it was time to cover his tracks, he texted the following message to Salyer from an unknown number: "Hey brother, it's Josh Jaynes, your neighbor at LMPD Narc. Seeing if you or Kuzma could look at an individual or address to see if a guy was getting mail."[129] Salyer replied that the address had not received packages in months and that the Postal Inspector would be notified if any new packages were delivered.[130] Salyer also told Jaynes that the postal carrier was the only person who would know if Glover had received mail at Taylor's home.[131] Kuzma told Jaynes that a parcel history for a specific address does not indicate who sent the parcel and that, in any case, there was no parcel history at Taylor's home.[132] When Jaynes was confronted about the texts he sent after Taylor's death to cover his tracks, he said that he had asked Mattingly to confirm what he had told him months earlier, before he obtained the warrant, and that he had reached out to Salyer directly because Mattingly could not remember.[133] At

[126] *See id.* (noting Mattingly's denial in October, seven months after Taylor's death).

[127] INVESTIGATIVE REPORT, *supra* note 80, at 152, 154.

[128] *Id.* at 152 (reporting Kuzma claims that "Mattingly told . . . Detective Jaynes there was no parcel history to the address"); *id.* at 155 (reporting Salyer claims that "Mattingly stated he told Detective Jaynes there was no package history at the address").

[129] Klibanoff & Ambrose, *supra* note 105.

[130] INVESTIGATIVE REPORT, *supra* note 80, at 154-55.

[131] *Id.* at 155.

[132] *Id.* at 153.

[133] Klibanoff & Ambrose, *supra* note 105. In remarking on Jaynes's behavior and the victim-blaming investigation tactics by LMPD after they killed Taylor, Attorney Lonita Baker, who represented the Taylor family and is a former state prosecutor, stated that LMPD's Public Integrity Unit attempted to justify the actions of LMPD officers on the night of the raid instead of investigating them:

that point, Jaynes knew that both Salyer and Kuzma could testify against the information he provided in the warrant. Jaynes's knowledge that his statements were false also explains why he sought to evade detection by using an unknown number from a new, potentially untraceable phone, when he contacted Salyer.[134]

LMPD's internal investigation concluded that Jaynes misled the magistrate.[135] LMPD found that Mattingly told Jaynes that "Glover was NOT receiving suspicious packages" at Taylor's residence.[136] Moreover, LMPD "learned throughout the investigation [that] the inspector's office was only asked to check for parcels that were flagged as suspicious[,] not for any other type of parcel."[137] Thus, Jaynes's statement that he had "verified through a US Postal Inspector that Jamarcus Glover has been receiving packages at 3003 Springfield Drive #4" does not align with any of the evidence.[138] LMPD's internal investigation concluded that "the affidavit is misleading" and "should be reviewed for criminal actions."[139]

Jaynes not only made an affirmative misrepresentation; he also sought to mislead the magistrate by failing to tell her that Taylor had no package history and by depriving her of dispositive information necessary for a probable cause determination. If Jaynes had written "no suspicious packages" in the search warrant, there would have been no search warrant. This material omission is more than a failure to inform: It is a deliberate (or at least reckless) attempt to mislead.[140] In *United States v. Jacobs*,[141] the Eighth Circuit recognized that the affiant had an affirmative duty to inform the magistrate of information that

> "It's disturbing that anyone would attempt to justify that a warrant premised on lies is justified," Baker said. "Det. Jaynes knows, just as anyone with any criminal law experience knows, that observing someone at a location and nothing further does not constitute probable cause. It's even more absurd that Jaynes would ask people to believe he was still investigating the Springfield address as a connection to Glover over two months after Breonna's murder since it was still closed off for investigative purposes. That follow-up call was nothing more than an attempt to cover-up his own criminal action of perjury, which led to the murder of Breonna Taylor."

Phylicia Ashley, *Joshua Jaynes: Detective's Attorney Acknowledges Breonna Taylor Search Warrant Was 'Inaccurate*,*'* FOX19 NOW (Oct. 15, 2020, 6:05 PM), https://www.fox19.com/2020/10/16/joshua-jaynes-detectives-attorney-acknowledges-breonna-taylor-search-warrant-was-inaccurate/.

[134] *See* Klibanoff & Ambrose, *supra* note 105 (recounting Salyer's receipt of a text from Jaynes from an unknown number).

[135] INVESTIGATIVE REPORT, *supra* note 80, at 229.

[136] *Id.*

[137] *Id.*

[138] Affidavit for Search Warrant, *supra* note 8, para. 9.

[139] INVESTIGATIVE REPORT, *supra* note 80, at 229.

[140] *See* United States v. Jacobs, 986 F.2d 1231, 1234 (8th Cir. 1993) (applying doctrine against false statements in affidavits for search warrants "to cover material that has been deliberately or recklessly omitted").

[141] 986 F.2d 1231 (8th Cir. 1993).

undermined the sufficiency of the probable cause determination when the omission of such information would be deliberate or reckless.[142] In *Jacobs*, the affiant informed the magistrate that a drug-sniffing dog ("K9") had shown interest in a suspected narcotics package but failed to state that a second K9 had not alerted to the same package.[143] The Eighth Circuit found that the officer omitted the information with the intent to mislead or with reckless disregard for the truth.[144] The court noted that "the failure to include the information and a reckless disregard for its consequences may be inferred from the fact that the information was omitted."[145] It concluded that "[a]ny reasonable person would have known that this was the kind of thing the judge would wish to know."[146]

In Taylor's case, the failure to inform the magistrate that there were no suspicious packages enticed the magistrate to infer that Taylor was receiving narcotics through the mail for Glover and that this activity was ongoing. Had Jaynes written the affidavit to accurately state the facts before him, it would have read something like: "Glover was seen taking a package out of Taylor's home, placing it in his car, and then going into a known 'trap house' without

[142] *See id.* at 1235; *see also* Bailey v. City of Howell, 643 F. App'x 589, 597 (6th Cir. 2016) (citing *Jacobs*, 986 F.2d at 1235) (stating reckless omission may be inferred upon defendant's showing that omitted material would clearly go against finding probable cause); United States v. Davis, 226 F.3d 346, 351 (5th Cir. 2000) (noting that factual misrepresentations or omissions in the affidavit must be dispositive, meaning that without falsehood or omission there would not be probable cause); United States v. Tomblin, 46 F.3d 1369, 1377 (5th Cir. 1995) (citing United States v. Stanert, 762 F.2d 775, 780 (9th Cir. 1985)) (noting that the Fifth Circuit extended the *Franks* exception to omissions in the affidavit); United States v. Reivich, 793 F.2d 957, 961 (8th Cir. 1986) (holding that search warrant would be defective if police misled judge by intentionally or recklessly omitting facts that, were they included, would have led the judge not to find probable cause); United States v. Bogen, No. 2:16-cr-00040, 2017 WL 497756, at *4 (E.D. La. Feb. 7, 2017) (acknowledging an exception to the good-faith exception where a search warrant affiant gives knowingly or recklessly false information); Gerth v. State, 51 N.E.3d 368, 374 (Ind. Ct. App. 2016) (finding that "[a] probable cause affidavit must include all 'material facts' known to law enforcement, which includes facts that 'cast doubt on the existence of probable cause'" (quoting Ware v. State, 859 N.E.2d 708, 718 (Ind. Ct. App. 2007))); State v. Alexander, 784 N.E.2d 1225, 1235 (Ohio Ct. App. 2003) ("The omission of material information is viewed in the same light as the inclusion of false information, so that the failure to inform the court that a drug-sniffing dog failed to alert on an item constitutes misleading information as prohibited by *Franks*.").

[143] *Jacobs*, 986 F.2d at 1233.

[144] *Id.* at 1234-35 (citing *Reivich*, 793 F.2d at 961; United States v. Lueth, 807 F.2d 719, 726 (8th Cir. 1986)).

[145] *Id.* at 1235 (citing *Reivich*, 793 F.2d at 961).

[146] *Id.*; *see also* United States v. Davis, 430 F.3d 345, 358 (6th Cir. 2005) (evaluating the sufficiency of a search warrant affidavit by considering "a material fact omitted from the affidavit by the affiant"); Commonwealth v. Smith, 898 S.W.2d 496, 504 (Ky. Ct. App. 1995) (finding omission of information to be at least "reckless disregard of whether the affidavit was made misleading" by the omission).

the package. According to the Postal Inspector, no suspicious packages were delivered to Taylor's home."[147] Such an application on its face would not support a finding of probable cause. Jaynes's claim that Mattingly told him that Glover was receiving Amazon packages and mail packages at Taylor's address does not hold up.[148] LMPD's own investigation says as much.[149] There would be so little corroborative weight to the evidence remaining in the affidavit, after the misrepresentations were removed, that a *Franks* hearing would have clearly been warranted.

B. *It Did Not Meet the Standard of Probable Cause*

Even if Jaynes's affidavit were to survive a *Franks* challenge and the perjured testimony were not excised, the affidavit lacks the necessary evidence an issuing magistrate would need to determine that illegal narcotics were in Taylor's home. The information Jaynes gave does not amount to probable cause: Taylor's car (with no identified occupants) traveled between Taylor's home and a "trap house" (with no associated date); the car (with no identified occupants) was observed outside the trap house (with no associated date); Glover came out of Taylor's home, allegedly with a package from USPS (which we know is not true) and went to the trap house (with no further mention of the package); and Glover used Taylor's address as his own (with no specific information about the source of the evidence).[150] The paltry evidence in Jaynes's affidavit simply did not rise to the standard needed to establish probable cause to invade Taylor's sanctuary.

The "chief evil" the Fourth Amendment deters is the physical invasion of the home.[151] The Fourth Amendment states that a search warrant may be issued only upon a showing of probable cause.[152] Indeed, "the right of a [citizen] to retreat into [one's] home and there be free from unreasonable governmental

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[147] *See supra* text accompanying notes 104-34.

[148] *See* INVESTIGATIVE REPORT, *supra* note 80, at 149.

[149] *See supra* text accompanying notes 136-39.

[150] *See* Affidavit for Search Warrant, *supra* note 8, paras. 6-10.

[151] United States v. U.S. District Court (*Keith*), 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . ."); *see* Payton v. New York, 445 U.S. 573, 576, 585 (1980) (quoting *Keith*, 407 U.S. at 313) (holding that the Fourth Amendment "prohibits [state] police from making a warrantless and nonconsensual entry into a suspect's home . . . to make a routine felony arrest"); Thacker v. City of Columbus, 328 F.3d 244, 252 (6th Cir. 2003) (quoting *Payton*, 445 U.S. at 585) (reiterating home invasion's status as the Fourth Amendment's "chief evil").

[152] U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); *see also* KY. CONST. § 10 ("[N]o warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.").

intrusion" is the core of the Amendment.[153] Central to the requirement of probable cause is a preoccupation with protecting citizens from the whims of police[154]:

> The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of "probable cause" before a magistrate was required. The Virginia Declaration of Rights, adopted June 12, 1776, rebelled against that practice . . . .
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> . . . .
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> That philosophy later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest. And that principle has survived to this day. . . . It was against this background that two scholars recently wrote, "Arrest on mere suspicion collides violently with the basic human right of liberty."[155]

Probable cause is fundamental to search warrant protections. It is intended to guarantee a substantial probability that a home invasion is justified by the discovery of evidence. "Probable cause exists when there is a 'fair

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[153] Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

[154] LAFAVE, *supra* note 95, § 3.1.

[155] Henry v. United States, 361 U.S. 98, 100-01 (1959) (footnotes and citations omitted) (first quoting Conner v. Commonwealth, 3 Binn. 38, 39 (Pa. 1810); and then quoting James E. Hogan & Joseph M. Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 22 (1958)). In *Illinois v. Gates*, the Court defined probable cause as "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." 462 U.S. 213, 232 (1983). The Court has never provided clear guidance about how much evidence constitutes probable cause (e.g., 30%, 60%, 80%). *See id.* at 235 (declining to "fix some general, numerically precise degree of certainty corresponding to 'probable cause' [because it] may not be helpful"). Some courts have said that probable cause is more than a mere hunch but less than proof beyond a reasonable doubt. *See, e.g.*, Whitaker v. Estelle, 509 F.2d 194, 196 (5th Cir. 1975) (defining probable cause to require "sufficient facts to support a genuine probability, though not necessarily a certainty or a conclusion beyond a reasonable doubt," not just "a hunch or mere speculation"). Unfortunately, this has limited usefulness because a mere hunch may not be much more than zero and proof beyond a reasonable doubt is much closer to 100%. Probable cause is less than a preponderance of the evidence. *See* United States v. Juwa, 508 F.3d 694, 701 (2d Cir. 2007) ("[P]robable cause is a lower standard than preponderance of the evidence; it 'requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.'" (quoting United States v. Bakhtiari, 913 F.2d 1053, 1062 (2d Cir. 1990))).

probability' . . . that contraband or evidence of a crime will be found in a particular place."[156] In sum, a magistrate needs "reasonable grounds for belief" that evidence will be found in order to justify the issuance of a search warrant.[157] When an affidavit is the basis for a probable cause determination, the "affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause . . . ."[158] Search warrant affidavits are to be judged on the totality of the circumstances, not on the basis of line-by-line scrutiny.[159]

In Taylor's case, there may have been enough evidence to establish that Glover was a drug dealer, but there was no evidence that Taylor was a drug dealer and insufficient evidence to support the possibility that drugs were in her home. The meager evidence Jaynes provided to support his claim that Glover was a drug dealer was not enough to support a search of Glover's home, let alone Taylor's. The Fourth Amendment does not allow an inference that drugs are in a location simply because a drug dealer frequents the location, lives there, or receives mail there.[160] Moreover, the probable cause in the other warrants presented to the magistrate cannot be read into the search warrant for Taylor's home. The probable cause determination for Jaynes's affidavit is limited to the four corners of the affidavit.[161]

During his interview with LMPD's Public Integrity Unit ("PIU"), Jaynes declared that he targeted Taylor's home because, "[t]his group of people, it is straight cashflow for them . . . . [T]hey get other people involved and it's usually females. It's usually baby mamas . . . or it's girlfriends that they can trust. They can trust them with their money and their stuff."[162] Jaynes's statement reflects a culture of disregard for humanity, a disregard for the rule

[156] United States v. Davidson, 936 F.2d 856, 859 (6th Cir. 1991) (quoting United States v. Loggins, 777 F.2d 336, 338 (6th Cir. 1985) (per curiam)).

[157] United States v. Bennett, 905 F.2d 931, 934 (6th Cir. 1990).

[158] *See Gates*, 462 U.S. at 239.

[159] *Id.* at 245 n.14; *see also* United States v. Woosley, 361 F.3d 924, 926 (6th Cir. 2004).

[160] As an example of the quantum of evidence necessary to secure a search warrant for a package, consider *United States v. Bogen*, No. 2:16-cr-00040, 2017 WL 497756, at *5 (E.D. La. Feb. 7, 2017), where the successful affidavits stated that "the packages were mailed with Express Mail, that drug dealers frequently use Express Mail, that the packages were sent from a fictitious address to an address with fictitious recipients, the signature requirement was waived, and that drug-detecting dogs who were trained to alert to drugs alerted to the presence of drugs in the packages." *See also* United States v. Daniel, 982 F.2d 146, 151-52 (5th Cir. 1993) (finding that an affidavit that explained why a package was suspicious by pointing to its suspicious source city and the alert of a trained drug-detecting dog "clearly constitutes a substantial basis for issuing a warrant"); State v. Thein, 977 P.2d 582, 584, 588-89 (Wash. 1999) (holding "a reasonable nexus is not established as a matter of law" when warrant was issued for drug dealer's home with almost no evidence relating drug dealing activities to residence).

[161] *See* United States v. Coffee, 434 F.3d 887, 892 (6th Cir. 2006) (citing United States v. Frazier, 423 F.3d 526, 531 (6th Cir. 2005)).

[162] Interview with Josh Jaynes, *supra* note 2, at 387-88.

of law, and the exemplification of the politics of disgust.[163] Jaynes's "baby mamas" arguments are an ideological justification for murder and have no place in law. His statements further reflect that neither facts nor evidence are driving the train in the affidavit, but rather, vicious and demeaning stereotypes about how "these people" behave. Simply, his affidavit lacked any evidence that connected Taylor to drug trafficking[164]

While Jaynes may argue that the issuing magistrate is entitled to draw reasonable inferences that evidence is likely to be kept where drug dealers live,[165] the Sixth Circuit has specifically rejected that argument where there is insufficient evidence that the suspect is actually a drug dealer.[166] In *United States v. McPhearson*,[167] the defendant was not a known drug dealer.[168] "[H]is prior convictions were for property crimes, and the warrant on which the police

[163] Ange-Marie Hancock, coined the term "the politics of disgust" to unpack interlocking systems of race, gender, and class oppression that materialize as stereotypes about Black women. These stereotypes undergird disciplinary and punitive measures that further justify intrusions into Black women's intimate spaces, particularly the home. ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN 3 (2004); *see also* Ange-Marie Hancock, *Contemporary Welfare Reform and the Public Identity of the "Welfare Queen,"* 10 RACE GENDER & CLASS 31, 36-38 (2003) (discussing the intersectional harm caused by use of oxymoron "welfare queen"). Citing Hancock, Priscilla Ocen argues that the politics of disgust is a form of hatred and ideological justification for police excess. It is indicative of police culture's pathologizing Black women, which animates the lack of security and privacy that Black women have in their homes. UC Berkeley Sch. of L., *Professors Devon Carbado and Priscilla Ocen: Police Violence and Black Women*, YOUTUBE, at 31:10-1:01:44 (Apr. 6, 2018), https://www.youtube.com/watch?v=66830_oEgaM [https://perma.cc/PT4K-Y34X]. Controlling images like "welfare queen" and "baby mama," are projected onto the bodies of Black women to justify home invasions and murder. In this way, "home" for Black women becomes an unprotected space of vulnerability to all violence, particularly state-sanctioned violence. Thus, where the Fourth Amendment should act as a bulwark against governmental intrusion, it becomes a vehicle for justified invasion and death. *Id.* at 35:28-36:38 (highlighting Black women who have had their privacy invaded such as Dollree Mapp, who had to take her landmark case to the Supreme Court to vindicate her Fourth Amendment rights).

[164] Interview with Josh Jaynes, *supra* note 2, at 386-88 (referring to an amorphous group as "these people" nine times over the course of three responses to questions).

[165] This position has been explicitly adopted by the Seventh Circuit. United States v. McClellan, 165 F.3d 535, 546 (7th Cir. 1999) (quoting United States v. Reddrick, 90 F.3d 1276, 1281 (7th Cir. 1996)) ("[I]n issuing a search warrant, a magistrate is entitled to draw reasonable inferences about where the evidence is likely to be kept . . . *and* . . . *in the case of drug dealers*[,] *evidence is likely to be found where the dealers live*.").

[166] *See* United States v. McPhearson, 469 F.3d 518, 524-25 (6th Cir. 2006) (finding the inference that an individual is likely to have drugs stored in his home is drawn permissibly where "independently corroborated fact[s show] that the defendants were known drug dealers at the time the police sought to search their homes").

[167] *McPhearson*, 469 F.3d 518.

[168] *Id.* at 524-25 (citing *McClellan*, 165 F.3d at 546).

arrested him was for simple assault."[169] The court held that "[i]n the absence of any facts connecting McPhearson to drug trafficking, the affidavit . . . [could not] support the inference that evidence of wrongdoing would be found in McPhearson's home because drugs were found on his person."[170] In Taylor's case, the magistrate would be doubly disallowed from drawing such an inference—not only is it disallowed because there was no evidence Taylor was a drug dealer, but there was also no evidence a known drug dealer was living in Taylor's home.

C. *It Was Stale*

Glover picked up a package from Taylor's home on January 16, 2020, roughly two months before officers executed the warrant and killed Taylor.[171] Glover used Taylor's address as his own as of February 20, roughly a month before the execution.[172] Except for these incidents, Jaynes's observations that pertain to Taylor lack dates.[173]

In *United States v. Spikes*,[174] the Sixth Circuit adopted the following four-prong staleness test:

> [(1)] the character of the crime (chance encounter in the night or ongoing conspiracy?), [(2)] the criminal (nomadic or entrenched?), [(3)] the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), [and (4)] the place to be searched (mere criminal forum of convenience or secure operational base?), *etc.*[175]

In the context of drug crimes, information for search warrant affidavits goes stale very quickly because drugs are usually sold and consumed promptly.[176]

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[169] *Id.* at 525.

[170] *Id.* (finding further that the magistrate "lacked a substantial basis for concluding that probable cause existed for issuing the warrant"); *see also* United States v. Abernathy, 843 F.3d 243, 252-54 (6th Cir. 2016) (quoting *McPhearson*, 469 F.3d at 524-25) (applying *McPhearson* among, other cases, to find no probable cause for a home search after marijuana was found in defendant's trash).

[171] Affidavit for Search Warrant, *supra* note 8, para. 8; Riley et al., *supra* note 20 (noting January 16 as date when Glover was observed by police picking up a package from Taylor's house).

[172] Affidavit for Search Warrant, *supra* note 8, para. 13.

[173] *See id.* paras. 8-13.

[174] 158 F.3d 913 (6th Cir. 1998).

[175] *Id.* at 923 (quoting Andresen v. State, 331 A.2d 78, 106 (Md. Ct. Spec. App. 1975)); *see also* United States v. Hammond, 351 F.3d 765, 771-72 (6th Cir. 2003) (citing United States v. Greene, 250 F.3d 471, 480-81 (6th Cir. 2001)) (applying *Spikes* factors to find that tip was not stale, although the tip on its own was still insufficient for establishing probable cause).

[176] United States v. Frechette, 583 F.3d 374, 378 (6th Cir. 2009) (contrasting prompt consumption of drugs with child pornography, which "can have an infinite life span"), *cited with approval in* United States v. Bell, 504 F. Supp. 3d 640, 649 (W.D. Ky. 2020) (applying factors from *Frechette*).

While some courts have uniformly rejected a bright-line rule regarding staleness,[177] others have also rejected evidence as stale that exceeded as little as forty-eight hours in cases involving drug possession[178] and older than several weeks in cases involving drug trafficking.[179]

The Sixth Circuit has rejected undated evidence. In *United States v. Hython*,[180] the Sixth Circuit rejected the use of an undated cocaine transaction

[177] *E.g.*, United States v. Sutton, 742 F.3d 770, 774 (7th Cir. 2014) ("[T]here is no bright line rule for determining staleness."); United States v. Wagner, 989 F.2d 69, 75 (2d Cir. 1993) ("[T]here is no bright line rule for staleness . . . .").

[178] United States. v. Leaster, 35 F. App'x 402, 409-11 (6th Cir. 2002) (finding that confidential informant's allegations that he saw cocaine in defendant's home forty-eight hours before a search warrant execution were "arguably" stale, but ultimately upholding search based on good-faith exception); *see also* United States v. Fairchild, 774 F. Supp. 1544, 1552-53 (W.D. Wis. 1990) (holding that informant's claim that he had seen methamphetamine at defendant's apartment within previous thirty-six hours was stale because affidavit "failed to present any evidence as to the quantity, location, storage or use of the drug or other circumstances which would have allowed the judge to make an informed decision as to the probability that the methamphetamine would be found at the apartment when the warrant was issued").

[179] United States v. Helton, 314 F.3d 812, 822 (6th Cir. 2003) (noting that, despite relatively long duration of storage of drug money as evidence, two-month delay between seeing money in defendant's home and making search warrant affidavit insufficient for probable cause); *see also* United States v. Payne, 181 F.3d 781, 790 (6th Cir. 1999) (holding month-old tip to be stale because drugs are not objects that are likely to be kept and because tip from confidential informant contained no indication of ongoing activity); *Wagner*, 989 F.2d at 74-75 (holding that affidavit stating that informant had purchased marijuana from defendant six weeks before search warrant was issued was stale); United States v. Bender, 423 F. Supp. 3d 473, 479 (M.D. Tenn. 2019) (holding that marijuana odor that was twenty days old was stale evidence); United States v. Myles, 307 F. Supp. 3d 676, 681-82 (E.D. Mich. 2018) (holding that photographs on defendant's Instagram page showing defendant with drugs that were taken several months prior to execution of warrant and informant's observation of defendant selling heroin seven months before execution of search were stale pieces of information); United States v. Fritts, No. 16-cr-20554, 2016 WL 7178739, at *4 (E.D. Mich. Dec. 9, 2016) (holding that domestic abuse report that was two months old was in danger of being stale when used to determine defendant's residence, especially because "there is a likelihood that the living arrangements would have changed after the dispute"); United States v. Williams, No. 10-cr-00008, 2010 WL 1796578, at *3 (E.D. Ky. May 4, 2010) (holding that marijuana seeds, stems, and torn plastic bag in garbage that included items that appeared to be three weeks old were too stale to support probable cause for cocaine-related offenses); *Fairchild*, 774 F. Supp. at 1552-53 (holding that informant's claim that he had seen methamphetamine at defendant's apartment within previous thirty-six hours was not sufficient to support probability that drug would be found at apartment when warrant was issued).

[180] 443 F.3d 480 (6th Cir. 2006).

to support the validity of a no-knock warrant.[181] In finding the undated drug transaction stale, the court stated, "the sale of drugs out of a residence—is not inherently ongoing. Rather, it exists upon a continuum ranging from an individual who effectuates the occasional sale from his or her personal holdings of drugs to known acquaintances, to an organized group operating an established and notorious drug den."[182] The court further found that the affidavit lacked evidence that the search involved a secure operational base for an ongoing drug enterprise; rather, the evidence consisted solely of one undated controlled buy.[183]

Jaynes may have established evidence of ongoing drug distribution involving Glover, but the evidence he submitted that connected Taylor to those activities was paltry and insufficient. No one saw Taylor handling drugs or in the vicinity of any drugs.[184] No one saw drugs on Taylor's premises.[185] The absence of such evidence cannot support an inference that drugs were in Taylor's home, let alone an inference that Taylor's home was an operational base for an ongoing drug conspiracy. Jaynes failed to provide detailed or contextual evidence that would implicate Taylor in an ongoing criminal enterprise or a single transaction; thus, there was no evidence that would extend the staleness inquiry and lend flexibility to the analysis. If the courts have found that first- or third-hand accounts of drug possession go stale in forty-eight hours or a few months, then it is certain that courts cannot assess the freshness of the evidence where no one has seen drugs at all, much less determine how entrenched the criminal enterprise is.

In Jaynes's affidavit, no date is associated with his observations concerning Taylor's car or the Dodge that Glover drove.[186] The magistrate had no way of knowing when these observations were made. Were they made two years earlier? Five? Furthermore, Glover was not part of a marijuana grow

[181] *Id.* at 485, 488-89 (affirming district court holding that warrant authorizing search was "invalid due to staleness" when supporting evidence was "undated" and no additional evidence "ground[ed] the undated [evidence] within a finite period of investigation"); *see also Frechette*, 583 F.3d at 378 ("[I]nformation of an unknown and undetermined vintage relaying the location of mobile, easily concealed, readily consumable, and highly incriminating narcotics could quickly go stale in the absence of information indicating an ongoing and continuing narcotics operation." (quoting United States v. Kennedy, 427 F.3d 1136, 1142 (8th Cir. 2005) (alteration in original))).

[182] *Hython*, 443 F.3d at 485.

[183] *Id.* at 486 ("[T]he investigation consisted solely of one modified controlled buy . . . . More importantly, the affidavit offers no clue as to when this single controlled buy took place.").

[184] *See* Affidavit for Search Warrant, *supra* note 8, paras. 8-13 (lacking any assertions that Taylor handled or was in vicinity of drugs).

[185] *See id.* (revealing that *only* stated connection between Taylor and suspected drug activity was that car registered to Taylor's name was seen parked in front of suspected drug house).

[186] *Id.* paras. 2, 7-8, 10, 14.

investigation or criminal activity that was permanent or sedentary in nature. Instead, he participated in hand-to-hand transactions involving narcotics.[187] The absence of dates for all incidents of alleged drug trafficking provides no way to assess the freshness of the evidence, and the two pieces of evidence with dates are stale.

D. *It Lacked an Evidentiary Nexus that Connected Taylor to Drug Activity*

The Sixth Circuit has required more nexus evidence than Jaynes supplied between the suspected activity and Taylor's home.[188] In *United States v. Carpenter*,[189] the Sixth Circuit held that because the Fourth Amendment requires a search warrant to describe with particularity the place to be searched and the persons or things to be seized, the affidavit must demonstrate a "nexus between the place to be searched and the evidence sought."[190] In order to satisfy probable cause, the evidence in the affidavit must establish a "connection between the residence and the evidence of criminal activity [that] must be specific and concrete, not 'vague' or 'generalized.'"[191] "If the affidavit does not present sufficient facts demonstrating why the police officer expects to find evidence in the residence rather than in some other place, a judge may not find probable cause to issue a search warrant."[192] Determining "whether an

[187] *See id.* para. 4 (describing Glover's alleged drug trafficking activity as dropping cylindrical objects (suspected drugs) for pick-up by customers).

[188] Instead of adopting a per se rule that authorizes search warrants for a drug dealer's home based solely on evidence that the defendant is in fact a drug dealer, the Sixth Circuit has required a "plus" factor, additional evidence forming a nexus between the place to be searched and the evidence sought. *See* United States v. Miggins, 302 F.3d 384, 393 (6th Cir. 2002) (two roommates arrested after receiving delivery of cocaine package lived together at residence searched and were previously involved in drug trafficking); United States v. Jones, 159 F.3d 969 (6th Cir. 1998) (confidential informant had been on premises, but outside the searched house, seventy-two hours preceding the affidavit and had there witnessed the defendant in possession of cocaine for distribution); United States v. Caicedo, 85 F.3d 1184, 1193 (6th Cir. 1996) (defendant lied about his address to arresting officers); United States v. Davidson, 936 F.2d 856, 857-60 (6th Cir. 1991) (officers witnessed coconspirators entering and exiting the defendant's residence in the course of conspiracy); United States v. Martin, 920 F.2d 393, 399 (6th Cir. 1990) ("[O]ne of the narcotics sales took place very near the residence and the confidential informant had been inside the residence and provided some information as to what was kept there."); United States v. Newton, 389 F.3d 631, 641-42 (6th Cir. 2004) (requiring some tangible connection between the suspect and the alleged criminal activity).

[189] 360 F.3d 591 (6th Cir. 2004).

[190] *Id.* at 594 (quoting United States v. Van Shutters, 163 F.3d 331, 336-37 (6th Cir. 1998)); *see also* United States v. Brown, 828 F.3d 375, 382 (6th Cir. 2016) (citing *Carpenter*, 360 F.3d at 594).

[191] *Brown*, 828 F.3d at 382 (citing *Carpenter*, 360 F.3d at 595).

[192] *Id.* (citing *Carpenter*, 360 F.3d at 595).

affidavit establishes a proper nexus [involves] a fact-intensive" inquiry that requires an examination of the totality of the circumstances.[193]

Although courts have struggled with determining the quantum of evidence necessary to establish a nexus between alleged criminal activity and the place to be searched, the Sixth Circuit has specifically addressed the nexus requirement in the context of drug trafficking.[194] It has held that "if the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity, or the evidence of this connection is unreliable, it cannot be inferred that drugs will be found in the defendant's home—even if the defendant is a known drug dealer."[195] The Sixth Circuit is clear:

> [A] defendant's status as a drug dealer, standing alone, does [not] give[] rise to a fair probability that drugs will be found in his home. Where . . . the warrant affidavit is based almost exclusively on the uncorroborated testimony of unproven confidential informants (none of whom witnessed illegal activity on the premises of the proposed search), the allegation that the defendant is a drug dealer, without more, is insufficient to tie the alleged criminal activity to the defendant's residence.[196]

[193] *Id.* (citing Illinois v. Gates, 462 U.S. 213, 238 (1983); United States v. Brown, 732 F.3d 569, 573 (6th Cir. 2013)).

[194] *Id.* at 381-82 ("The Fourth Amendment concern with protection from unreasonable intrusion in the home has resulted in a wide river of cases . . . . One recurring fact pattern involving nexus requirements in searches related to drug trafficking is presented here.").

[195] *Id.* at 384.

[196] United States v. Frazier, 423 F.3d 526, 533 (6th Cir. 2005). To be clear, where there is *evidence* that the defendant is a drug dealer, the Sixth Circuit has allowed an inference that drugs will be stored in the defendant's home. *See* United States v. Miggins, 302 F.3d 384, 393 (6th Cir. 2002) (finding probable cause where roommates engaged in drug trafficking together would have "narcotics and equipment used in the distribution of narcotics" in their home); United States v. Davidson, 936 F.2d 856, 859 (6th Cir. 1991) (holding that police had probable cause for issuance of a search warrant since "the affidavit . . . reveal[ed] a substantial basis for concluding that a search of [the defendant's] apartment 'would uncover evidence of wrongdoing'" (quoting *Gates*, 462 U.S. at 236)).

The court requires some reliable evidence that connects the known drug dealer's ongoing criminal activity to the residence.[197] That is, the court has required facts showing that a residence has been used in drug trafficking, such as an informant who has observed drug deals or drug paraphernalia in or around the residence.[198]

Several cases illustrate how Jaynes's affidavit was too vague, generalized, and insubstantial to establish a proper nexus between narcotics trafficking and

For cases in other circuits with similar holdings, see *United States v. Feliz*, 182 F.3d 82, 87-88 (1st Cir. 1999) (finding that it was reasonable to suppose drug dealer stored evidence of dealing at home, even though no drug trafficking was observed to occur there); *United States v. McClellan*, 165 F.3d 535, 546 (7th Cir. 1999) ("[I]n issuing a search warrant, a magistrate is entitled to draw reasonable inferences about where the evidence is likely to be kept . . . *and* . . . *in the case of drug dealers evidence is likely to be found where the dealers live.*" (quoting United States v. Reddrick, 90 F.3d 1276, 1281 (7th Cir. 1996))); *United States v. Henson*, 123 F.3d 1226, 1239 (9th Cir. 1997) ("*In the case of drug dealers, evidence is likely to be found where the dealers live.*" (quoting United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986))); *United States v. Luloff*, 15 F.3d 763, 768 (8th Cir. 1994) (ruling that observations of drug trafficking occurring away from dealer's residence, coupled with officer's statement in his affidavit that drug dealers often store evidence of drug dealing in their residences, provided probable cause for search of dealer's house); *United States v. Thomas*, 989 F.2d 1252, 1255 (D.C. Cir. 1993) (per curiam) (concluding that observations of drug trafficking away from dealer's residence can provide probable cause to search dealer's house); and *United States v. Williams*, 974 F.2d 480, 482 (4th Cir. 1992) (per curiam) (finding that affidavit establishing that known drug dealer resided in motel was sufficient to show probable cause to search motel room for drug paraphernalia).

[197] *See, e.g.*, United States v. Jones, 159 F.3d 969, 974-75 (6th Cir. 1998).

[198] *Compare id.* at 974-75 (finding probable cause to issue warrant where confidential informant purchased drugs from defendant, was at defendant's residence during monitored drug transactions, and observed defendant in possession of cocaine), United States v. Ellison, 632 F.3d 347, 349 (6th Cir. 2011) (finding inference proper because reliable confidential informant had "observed someone come out of [the defendant's] residence, engage in a drug transaction, and then return into the residence"), *and* United States v. Berry, 565 F.3d 332, 339 (6th Cir. 2009) ("Although a defendant's status as a drug dealer, standing alone, does not give rise to a fair probability that drugs will be found in defendant's home, . . . there is support for the proposition that status as a drug dealer plus observation of drug activity near defendant's home is sufficient to establish probable cause to search the home.") (internal citation omitted), *with Frazier*, 423 F.3d at 532 (finding inference improper because affidavit failed to establish the informants' reliability and informants had not "witnessed [the defendant] dealing drugs from his [new] residence," only from his old residence). The court has also found probable cause in cases involving drug dealers who are "major players in a large, ongoing drug trafficking operation." *See Brown*, 828 F.3d at 383 n.12 (citing United States v. Kenny, 505 F.3d 458, 461-62 (6th Cir. 2007) (finding probable cause where defendant, who was operating methamphetamine lab, was identified as the "cook" for a large drug operation by informant whose information regarding drug operation was corroborated by independent evidence)); *Miggins*, 302 F.3d at 388; United States v. Gunter, 551 F.3d 472, 476-77 (6th Cir. 2009) (finding probable cause where numerous conversations were recorded between informant and defendant regarding distribution of large quantities of cocaine).

Taylor's home. In *Carpenter*, law enforcement presented an affidavit that stated only that an officer had observed numerous marijuana plants growing near the residence and a road that connected the residence to the plants.[199] Although the affidavit set forth some semblance of a connection between the marijuana plants and the residence, the court held that the information that plants growing outside a residence were connected to that residence by a road was "too vague, generalized, and insubstantial to establish probable cause."[200]

Similarly, in *McPhearson*, the Sixth Circuit held that an affidavit failed to "establish the requisite nexus between the place to be searched and the evidence to be sought" in a case where crack cocaine was found in the pocket of a defendant who lived at the address when he was arrested on a non-drug offense.[201] The court dismissed the claim that "an individual arrested outside his residence with drugs in his pocket is likely to have stored drugs and related paraphernalia in that same residence" because there was no additional evidence that the defendant was or had been involved in drug crimes.[202]

The court also found the nexus insufficient where an informant identified the defendant's residence as the site of a drug operation, but law enforcement failed to establish the informant's reliability.[203] In *United States v. Higgins*,[204] police stopped a vehicle and found narcotics, including cocaine base and powdered cocaine.[205] The driver and his passengers stated that they had received the drugs from the defendant in his apartment.[206] Officers corroborated that the defendant lived at the address and obtained a search warrant stating that a confidential informant, whose name they revealed, reported that he had obtained the drugs from the defendant's apartment.[207] The court found no probable cause, explaining that the affidavit did not "assert that the informant had been inside [the defendant's] apartment, that he had ever seen drugs or other evidence inside [the defendant's] apartment, or that he had seen any evidence of a crime other than the one that occurred when [the defendant] allegedly sold him drugs."[208] The court concluded that "[w]ithout such an assertion, the affidavit fails to establish the necessary 'nexus between the place to be searched and the evidence sought.'"[209] Moreover, the rejected affidavit relied on an unproven tipster and provided no evidence that the tipster

[199] United States v. Carpenter, 360 F.3d 591, 594 (6th Cir. 2004).
[200] *Id.* at 595.
[201] United States v. McPhearson, 469 F.3d 518, 524-25 (6th Cir. 2006).
[202] *Id.* (citation omitted).
[203] *See* United States v. Higgins, 557 F.3d 381, 390 (6th Cir. 2009).
[204] *Higgins*, 557 F.3d 381.
[205] *Id.* at 385.
[206] *Id.*
[207] *Id.*
[208] *Id.* at 390.
[209] *Id.* (quoting United States v. Van Shutters, 163 F.3d 331, 336-37 (6th Cir. 1998)).

had observed narcotics or evidence of illegal drug sales associated with the defendant's residence.[210]

Citing *Higgins* as controlling, in *United States v. McClain*,[211] the court rejected an affidavit in which police failed to state that an informant had been inside the defendant's girlfriend's home, had seen drugs inside it, or had seen evidence of a crime:

> The affidavit in this case contains no "substantial independent police corroboration" of the claims made by the unidentified informant; therefore, those claims must be disregarded, and the affidavit establishes nothing more than the fact that [the defendant] was a known drug dealer who had been seen going in and out of his girlfriend's apartment. This, under *Brown*, is insufficient to establish probable cause that evidence of narcotics trafficking would be found in the apartment.[212]

Similarly, in *United States v. Newton*,[213] the defendant was part of a large drug ring involving controlled deliveries and reliable informants.[214] However, the court rejected the search warrant for the home of the defendant's fiancée because police had attempted to establish a nexus with evidence that the car the defendant was driving when he was arrested belonged to his fiancée, and that she had ties to two other addresses where the defendant dealt drugs.[215]

Jaynes's affidavit was far sparser than those in *Higgins*, *McClain*, or *Newton*.[216] It lacked any first-, second-, or third-hand evidence about what was in Taylor's home. No one had been inside Taylor's home, and no one had seen narcotics in it or evidence of any crime.[217] There is a complete absence of an evidentiary nexus between Taylor's home and drug dealing in the affidavit. Regardless, if any inference could be drawn about Glover's drug dealing and, therefore, a search of his home, there was little to no evidence that Glover was living at Taylor's residence, which would allow for a search of Taylor's home based on Glover's status as a drug dealer.

Jaynes may well defend his affidavit by arguing that what matters for establishing probable cause is not whether a particular piece of evidence proves something but whether the evidence establishes "the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians,

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[210] *Id.* ("[T]his affidavit does not assert that the informant had been inside [defendant's] apartment, [or] that he had ever seen drugs or other evidence inside [defendant's] apartment . . . .").

[211] No. 3:16-cr-00054, 2017 WL 1375196 (W.D. Ky. Apr. 13, 2017).

[212] *Id.* at *8.

[213] 210 F. Supp. 2d 900 (E.D. Mich. 2002).

[214] *Id.* at 901-03.

[215] *Id.* at 905 ("There is simply a lack of 'evidentiary nexus' between this address and criminal activity." (citing United States v. Schultz, 14 F.3d 1093, 1097 (6th Cir. 1994))).

[216] *See* Affidavit for Search Warrant, *supra* note 8, paras. 8-13.

[217] *Id.* (failing to mention anything that was occurring *inside* Taylor's home).

act.'"[218] The evidence in Jaynes's affidavit, however, failed to provide the particularity necessary to establish a fair probability that Taylor's home held evidence of drug dealing:

> (1) Jaynes observed a red Dodge Charger (not people) that targets of the investigation used (none of which were Taylor) make trips between Taylor's home and a known trap house.[219] The affidavit fails to state who got in the car, who came out of the car, whether anyone got of the car and went into Taylor's home, or when this happened.[220]
>
> (2) On January 16, 2020, Jaynes saw Glover go into Taylor's home, emerge "with a suspected USPS package in his right hand," and drive to a trap house.[221] The affidavit fails to state what was in the package, whether Glover took the package to the trap house, or whether Glover took anything out of the package and took that into the trap house.[222]
>
> (3) Jaynes stated that he had "verified through a US Postal Inspector" that Glover had been "receiving packages" at Taylor's home.[223] This statement is a lie.[224]
>
> (4) Jaynes observed Taylor's Impala parked outside a trap house "on different occasions."[225] He did not name any person who was in or near Taylor's car.[226]

None of these statements in isolation or together establish any nexus between Taylor's home and drugs. Jaynes did not state who occupied the Dodge or the Impala because Jaynes had tracking devices on both cars, as opposed to direct surveillance. The lack of direct surveillance would explain why his affidavit fails to state who got out of the car, who went into the car, who operated the cars, or where the occupants of the cars went.[227] Apart from one incident, Jaynes gave no information about anyone carrying anything into the cars, Taylor's home, or the trap houses. His claims that the Dodge traveled between two places and that Taylor's car was parked outside a trap house allow for highly limited inferences, certainly none that would establish the

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[218] Florida v. Harris, 568 U.S. 237, 244 (2013) (alteration in original) (quoting Illinois v. Gates, 462 U.S. 213, 231, 238 (1983)).

[219] *See* Affidavit for Search Warrant, *supra* note 8, paras. 7, 14.

[220] *See id.*

[221] *Id.* para. 9.

[222] *See id.*

[223] *Id.*

[224] *See* Duvall, *Fact Check*, *supra* note 3.

[225] Affidavit for Search Warrant, *supra* note 8, para. 10.

[226] *See id.*

[227] Darcy Costello, *Jamarcus Glover, A Key Figure in Breonna Taylor Case, Arrested on Warrants*, COURIER J. (Louisville) (Aug. 27, 2020, 4:51 PM), https://www.courier-journal.com/story/news/local/breonna-taylor/2020/08/27/jamarcus-glover-breonna-taylor-case-booked-jail/3444810001/.

presence of narcotics at Taylor's home. Except for January 16, Jaynes states that he saw the Dodge make frequent trips to Taylor's home, but Jaynes fails to state how many trips, or more importantly, when these trips occurred, whether they were in the last week, month, or year.[228] There was a pole camera outside the trap house but none outside Taylor's home.[229] If Taylor or Glover emerged from Taylor's car and went into the trap house, that information should have been in the affidavit. If Taylor, Glover, or anyone else emerged from Taylor's home with packages and proceeded to the trap house, that information should have been in the affidavit. If anyone made any interception of packages and discovered narcotics, that information should have been in the affidavit. If any officer made a traffic stop to determine if there was anything incriminating in the car, that information should have been in the affidavit. If any person made any accusation about narcotics in Taylor's home or packages containing narcotics being delivered to her home, that information should have been in the affidavit. The absence of this information and the absence of those claims might lead to the conclusion that such information did not exist.

Jaynes claimed that his viewing Glover take a package, on one occasion, from Taylor's home justified an inference that there were narcotics in Taylor's home.[230] Carrying a package out of a residence, however, is insufficient evidence to infer that narcotics were in the home. Jaynes failed to describe the package as to size, shape, and color, and why he concluded it contained drugs. This single observation was made almost two months before the search warrant was obtained.[231] Consequently, it was too vague and stale. Assuming arguendo that Glover carried one package out of Taylor's home establishes nothing about what remained in Taylor's home. Glover carrying one package out of Taylor's home two months before LMPD executed a warrant did not render the continued presence of narcotics probable at Taylor's home. As far as the affidavit describes, no one saw what was in Glover's package; no one performed a traffic stop and attempted a consent search to find out what was in the package; no "snitch" or confidential informant offered any information about the contents of the package or Taylor's home; and no one attempted to intercept packages to Taylor's home through the mail or to do a K9 alert because no packages were going to Taylor's home. Law enforcement made no effort to install a pole camera outside Taylor's building to monitor traffic in and out of her home, Glover's egress and ingress in and out of her home, or the movement of packages in and out of her home. In fact, we can infer that Glover did not emerge from the car and go into the trap house *with* the package, because that information would have been in the affidavit. Nothing in the affidavit states that Glover took anything out of the package or took the

[228] Affidavit for Search Warrant, *supra* note 8, para. 7.

[229] *Id.* paras. 1, 7.

[230] *See* Interview with Josh Jaynes, *supra* note 2, at 388-95.

[231] Affidavit for Search Warrant, *supra* note 8, para. 9 (observing Glover's entry into Taylor's home on January 16, 2020, but signing affidavit on March 12, 2020).

package itself into the trap house.[232] Similarly, no information in the affidavit states that Taylor was operating her car in or around the trap house.[233] In fact, we do not know who was operating Taylor's car because the warrant does not include that information.

To satisfy probable cause, the evidence in the affidavit must establish a connection between the residence and criminal activity, and it must be specific and concrete, not vague or generalized.[234] In Taylor's case, Jaynes made a perjured statement that Glover had been receiving several parcels in the mail at Taylor's home.[235] The affidavit lacked any evidence that the packages contained drugs, and it lacked specific information about what kind of drugs or what quantity of drugs the packages contained.[236] The affidavit provided no evidence that Glover, let alone Taylor, had been found in possession of drugs.[237] The search warrant stated, in essence, that Glover was a drug dealer and that he had received packages at Taylor's home. That statement adds nothing to the probable cause determination. The Supreme Court rejected this paltry level of evidence in *Richards v. Wisconsin*[238]: "[I]n each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular [situation] justified" the Fourth Amendment intrusion.[239] In *Zurcher v. Stanford Daily*,[240] the Court had previously articulated, "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."[241] The information that an individual was a suspected drug trafficker did not give the police carte blanche to search Glover's home, let alone Taylor's.[242]

Based on Jaynes's affidavit, Judge Shaw had no way of knowing what the relationship was between Taylor and Glover, what the packages the affidavit

[232] *See id.* para. 9.

[233] *Id.* para. 10.

[234] *See supra* notes 150-70 and accompanying text.

[235] *See* Duvall, *Fact Check*, *supra* note 3.

[236] *See* Affidavit for Search Warrant, *supra* note 8, paras. 3, 5, 9 (mentioning only narcotics related offenses for which Glover and Walker were being charged with at time of affidavit, but not presence of drugs in package Glover carried out of Taylor's home on January 16, 2020).

[237] *See id.*

[238] 520 U.S. 385 (1997).

[239] *Id.* at 394.

[240] 436 U.S. 547 (1978).

[241] *Id.* at 556.

[242] *See* United States v. Newton, 389 F.3d 631, 642 (6th Cir. 2004) (Moore, J., concurring in part and dissenting in part), *vacated*, 546 U.S. 801, 803 (2005) ("That an individual is suspected of drug trafficking should not give the police carte blanche to search her home and that this and most of the other courts of appeals have come close to so holding is unfortunate.").

mentioned contained, or that the Postal Inspector had concluded that there was nothing suspicious about those packages.[243] If she had spent more time reviewing Jaynes's affidavit, she might have thought to ask whether there could be an innocent explanation for the interactions between Taylor and Glover that had nothing to do with drugs.[244] Although Jaynes presented compelling evidence of drug dealing by Glover, the inferences about Taylor were largely driven by guilt by association, a notion courts have decisively rejected.[245]

E. *After-Acquired Evidence Does Not Apply*

Jaynes may argue that the affidavit must be judged on what it has, not on what it lacks. It is true that when determining whether an affidavit establishes probable cause, the court must "look only to the four corners of the affidavit; information known to the officer but not conveyed to the magistrate is irrelevant."[246] But that argument is a two-way street; Jaynes cannot use after-acquired evidence to buttress his affidavit. The probable cause determination is made on the sufficiency of the evidence contained within the four corners of the affidavit, not on any evidence beyond the four corners to substantiate his claim of innocence.

The May 1, 2020, police report disclosed that Glover had listed Taylor's apartment as his address for a Chase bank account in February and that he had listed Taylor's phone number as his own when he filed a complaint against a police officer that same month.[247] On March 13, 2020, during a taped phone call made roughly twelve hours after he was arrested, Glover told a girlfriend that Taylor was holding $8,000 dollars for him (although no money was found

[243] *See* Affidavit for Search Warrant, *supra* note 8, paras. 8-13.

[244] *See* Rukmini Callimachi, *The Untold Story of Breonna Taylor: Her Life Was Changing. Then the Police Came to Her Door*, N.Y. TIMES, Aug. 30, 2020, at A1 ("[T]he information the police had compiled to suggest that Ms. Taylor's apartment was used in the operation was thinner.").

[245] *E.g.*, Barber v. Rewerts, No. 1:19-cv-00498, 2021 WL 4295853, at *9-10 (W.D. Mich. June 9, 2021) ("Guilt by association has no place in the American criminal justice system."); *cf. Zurcher*, 436 U.S. at 555 ("[T]he premise of the District Court's holding appears to be that state entitlement to a search warrant depends on culpability of the owner or possessor of the place to be searched and on the State's right to arrest him. The cases are to the contrary.").

[246] United States v. Brooks, 594 F.3d 488, 492 (6th Cir. 2010) (citing United States v. Pinson, 321 F.3d 558, 565 (6th Cir. 2003)); *see also* Commonwealth v. Pride, 302 S.W.3d 43, 49 (Ky. 2010) ("We also review the four corners of the affidavit and not extrinsic evidence in analyzing the warrant-issuing judge's conclusion.").

[247] Darcy Costello & Tessa Duvall, *Why Were Police at Breonna Taylor's Home? Here's What an Investigative Summary Says*, USA TODAY (Sept. 24, 2020, 10:03 AM), https://www.usatoday.com/story/news/nation/2020/09/04/report-details-why-louisville-police-wanted-search-breanna-taylors-home/5706161002/.

at Taylor's apartment).[248] No other source has ever corroborated Glover's statement. In fact, on another recorded call, one of Glover's co-defendants said that another woman had been handling the conspiracy's money.[249] In an interview with the *Courier Journal*, Glover denied that Taylor had ever had anything to do with illicit drugs or money.[250] Glover has consistently stated that Taylor had nothing to do with drug dealing even when he was under immense pressure to do so and had every incentive to lie.[251] Glover told the *Courier Journal* that he had previously asked Taylor to have his packages, including shoes and clothing, delivered to her apartment because he was afraid someone would steal them if they were delivered to his home.[252] The last time Glover picked up a package from Taylor's home was January 16, 2020.[253] The above-referenced evidence, even if it were helpful in implicating Taylor in the drug trafficking, which it is not, is outside the affidavit and cannot support a probable cause determination.

F. *The* Leon *Good-Faith Exception Does Not Apply*

In *United States v. Leon*,[254] the Supreme Court established a test to determine when officers act in good faith and reasonably rely on a search warrant that is ultimately found to be invalid.[255] Even under the generously carved out good-faith exception under *Leon*, both Jaynes's and Mattingly's conduct fail. Under *Leon*, the test is whether a reasonably trained officer would have known that the warrant was illegal despite the magistrate's authorization.[256] The *Leon* good-faith exception bars the use of the exclusionary rule to exclude evidence where the officers objectively and reasonably relied on the warrant.[257] *Leon* identified four situations where the good-faith exception does not apply:

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[248] Andrew Wolfson, *Report Details Why Louisville Police Decided to Forcibly Search Taylor's Home*, COURIER J. (Louisville) (Aug. 25, 2020), https://www.courier-journal.com/story/news/local/breonna-taylor/2020/08/25/report-details-why-louisville-police-decided-to-forcibly-search-breonna-taylor-home/5593502002/ ("Glover . . . told a girlfriend that Taylor was holding $8,000 for him and that she had been 'handling all my money.' No money was found at [Taylor's] residence during the police search.").

[249] *Id.* ("Demarius Brown, who was arrested with Glover, told his sister that another woman, Alicia 'Kesha' Jones . . . had been given the group's money.").

[250] *See* Bailey et al., *supra* note 69.

[251] *Id.*

[252] *Id.*

[253] Affidavit for Search Warrant, *supra* note 8, para. 9.

[254] 468 U.S. 897 (1984).

[255] *Id.* at 922 n.23 (holding that "good-faith inquiry is confined to the . . . question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization").

[256] *Id.*

[257] *Id.* at 922-23.

> (1) when the warrant is issued on the basis of an affidavit that the affiant knows (or is reckless in not knowing) contains false information; (2) when the issuing magistrate abandons his neutral and detached role and serves as a rubber stamp for police activities; (3) when the affidavit is so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable; and, (4) when the warrant is so facially deficient that it cannot reasonably be presumed to be valid.[258]

As previously discussed, Jaynes secured the warrant through perjury.[259] The warrant for Taylor's home fails the "substantial basis" and "objectively reasonable" tests, both when the perjured testimony is included and when it is not.[260] When "viewed in light of 'all of the circumstances,' the fatal flaws in the affidavit"—the vague, stale, completely unrefreshed, thoroughly uncorroborated statements; the perjury; and the lack of any evidence connecting Taylor to drug activity—lead to an inevitable conclusion that "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."[261] The affidavit also fails the third *Leon* exception because the perjured testimony and the absence of probable cause render the warrant facially flawed.[262]

As to the remaining *Leon* exception, Judge Shaw failed to act as a barrier between the overzealous and perhaps perverse motives of LMPD.[263] Instead, she rubber-stamped a stack of warrants, perhaps in seamless harmony with the police and their union.[264] The face of Jaynes's affidavit failed to provide evidence that there was a fair probability that Taylor's home contained contraband. Jaynes's affidavit failed to establish probable cause and a warrant should not have been issued. Taylor's case is an example of the regularity with

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[258] United States v. Laughton, 409 F.3d 744, 748 (6th Cir. 2005) (citing *Leon*, 468 U.S. at 914-23); *Leon*, 468 U.S. at 923; *see also* United States v. Glover, 755 F.3d 811, 818-20 (7th Cir. 2014) (analyzing two of four situations when good-faith exception is inapplicable: (1) facial deficiency and (2) "deliberate or reckless disregard of truth").

[259] *See supra* Sections II.A-II.E.

[260] Illinois v. Gates, 462 U.S. 213, 239 (1983) (establishing "substantial basis" test); *Leon*, 468 U.S. at 922-23 (establishing "objectively reasonable" test).

[261] United States v. Thomas, 605 F.3d 300, 318 (6th Cir. 2010) (quoting *Leon*, 468 U.S. at 922 n.23); *see also* United States v. Weaver, 99 F.3d 1372, 1380-81 (6th Cir. 1996) (listing reasons why officer could not rely on warrant affidavit without corroboration efforts, including that officer lacked "firsthand information" and had "no personal observations").

[262] United States v. Boyce, 601 F. Supp. 947, 954-55 (D. Minn. 1985) (stating that *Leon* cannot be applied when an affidavit is insufficient on its face, regardless of the materiality of the statements to the probable cause determination (citing Franks v. Delaware, 438 U.S. 154, 155-56 (1978))); WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 7:5 (2d ed.), Westlaw (database updated Nov. 2021) (explaining "[u]se of material misstatements to establish probable cause").

[263] *See Leon*, 468 U.S. at 914-23.

[264] *See* Balko, *supra* note 5 (analyzing whether Judge Shaw rubber-stamped the warrant).

which judges grant no-knock warrants with less than the required evidence.[265] Both police and judges would think twice about less-than-viable search warrant applications if the exclusionary rule applied across the board to illegally obtained evidence regardless of the standing of the person whose Fourth Amendment rights were violated or the willfulness of police conduct. Rigorous judicial and administrative scrutiny of search warrants is a necessary check on police power. Perhaps, too, if judges had more accountability for issuing warrants, they would be better incentivized to take more care in scrutinizing the police.

III. NO-KNOCK WARRANTS

After centuries of fealty to key legal precedents upholding the sanctity of the home that served as a brake on police excess, the Court pivoted in *Hudson v. Michigan* when it undermined the exclusionary rule.[266] In *Hudson*, the Court refused to apply the exclusionary rule to evidence obtained in violation of the knock-and-announce requirements.[267] In doing so, the Court incentivized carelessness in the acquisition of search warrants and callousness in their execution, all of which contributed to Breonna Taylor's death. Section III.A of this Part lays the foundational legal history of knock-and-announce requirements. Section III.B argues that Jaynes utterly failed to provide particularized evidence to excuse the knock-and-announce requirement. In fact, Jaynes used boilerplate language that the Supreme Court specifically rejected. Section III.C explores the regularity with which police engage in dynamic entries, a practice that has proven extremely dangerous, particularly in marginalized communities. Section III.D argues that the Supreme Court created the conditions that led to Taylor's death.[268]

A. *The Legal History of No-Knock Warrants*

The Fourth Amendment embraces the Castle Doctrine and the knock-and-announce rules.[269] The Castle Doctrine, which dates back to English common law, holds that the home should be a place of peace and sanctuary.[270] Given the sanctity of the home, when police execute a search warrant, the default position is for the officer to give notice of his intention to conduct a search and show the search warrant to the person in control of the premises before using

[265] *See id.* (explicating how no particularized information regarding Taylor was mentioned in the affidavit, which is insufficient to grant no-knock warrant under Supreme Court precedent).

[266] Hudson v. Michigan, 547 U.S. 586, 592 (2006).

[267] *Id.*

[268] *See* Obasogie, *supra* note 29, at 773 (introducing "legal doctrine" as a "significant contributor to police violence").

[269] *See* Wilson v. Arkansas, 514 U.S. 927, 931 (1995).

[270] *See id.* (describing the common law doctrine as protecting the home as a "castle of defense and asylum" (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *288)).

force.[271] In *Wilson v. Arkansas*,[272] the Supreme Court said that "[a]n examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering."[273] The Court used common law history and the intent of the framers to solidify the requirement that law enforcement announce its presence:

> Although the common law generally protected a man's house as "his castle of defense and asylum," common-law courts long have held that "when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter." To this rule, however, common-law courts appended an important qualification:
>
> > But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . , for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it . . . .
>
> Several prominent founding-era commentators agreed on this basic principle. According to Sir Matthew Hale, the "constant practice" at common law was that "the officer may break open the door, if he be sure the offender is there, if after acquainting them of the business, and demanding the prisoner, he refuses to open the door." William Hawkins propounded a similar principle: "the law doth never allow" an officer to break open the door of a dwelling "but in cases of necessity," that is, unless he "first signify to those in the house the cause of his coming, and request them to give him admittance." Sir William Blackstone stated simply that the sheriff may "justify breaking open doors, if the possession be not quietly delivered."[274]

This examination of the preoccupations of the founders and other 17th and 18th century legal authorities clearly articulates the evil to be warded off:

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[271] *Id.* at 931-32; 8 LESLIE W. ABRAMSON, KY. PRAC. CRIM. PRAC. & PROC. § 18:85 (6th ed.), Westlaw (database updated Nov. 2021) ("In executing a search warrant, the officer should ordinarily give notice of the intentions to conduct a search and should exhibit the search warrant to the person in control of the premises or the object of the search.").

[272] *Wilson*, 514 U.S. 927.

[273] *Id.* at 931.

[274] *Id.* at 931-33 (alterations in original) (footnote omitted) (citation omitted) (first quoting BLACKSTONE, *supra* note 270, at *288; then quoting Semayne's Case (1603) 77 Eng. Rep. 194, 195 (KB); then quoting *id.* at 195-96; then quoting 1 MATTHEW HALE, PLEAS OF THE CROWN *582; then quoting 2 WILLIAM HAWKINS, PLEAS OF THE CROWN, ch. 14, § 1, p. 138 (London, His Majesty's Law Printers, 6th ed. 1787); and then quoting BLACKSTONE, *supra* note 270, at *412).

unannounced entry into one's home.[275] Taylor's death was exactly the outcome the knock-and-announce rule was meant to avoid by providing clear notice to the occupants of the home, who have no reason to suspect that the police will ram a door off its hinges in the dead of night.[276]

As such, under the Fourth Amendment, officers must knock and announce their presence and authority before entering a private residence.[277] Although particular "exigent circumstances" may excuse the warrant requirement, the "exigent circumstances" for the purpose of analyzing knock and announce are somewhat different than those for a warrant.[278] In order to justify an unannounced entry into a home, the police must reasonably suspect that knocking and announcing would be dangerous, futile, or would inhibit effective investigation.[279] While some facts may excuse the warrant requirement, those same facts might not excuse the knock-and-announce requirement.[280] Thus, courts must conduct an independent, case-by-case analysis to determine whether to excuse the knock-and-announce rule.[281]

The Supreme Court has specifically rejected the police practice at issue in Taylor's case. In *Richards*, the police claimed that exigent circumstances existed because drug dealers habitually destroy evidence, flee, or pose a threat to police.[282] The Court specifically rejected a "blanket exception to the knock-and-announce requirement for felony drug investigations," holding that "in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement."[283] The Court reiterated the importance of particularized and specific facts as a reason for dispensing with the requirement:

> If a *per se* exception were allowed for each category of criminal investigation that included a considerable—albeit hypothetical—risk of danger to officers or destruction of evidence, the knock-and-announce

[275] *See id.* at 931-33.

[276] *See id.* at 929, 937 (holding justification for officers executing warrant in middle of afternoon, to search and arrest convicted violent criminal, without knocking and announcing first, was insufficiently considered in state court).

[277] *Id.* at 936; United States v. Francis, 646 F.2d 251, 256 (6th Cir. 1981).

[278] *See, e.g.*, United States v. Bates, 84 F.3d 790, 795 (6th Cir. 1996) (outlining exigent circumstances that may excuse officers from complying with knock-and-announce rule).

[279] Richards v. Wisconsin, 520 U.S. 385, 394 (1997) ("In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime . . . .").

[280] *Cf. id.* (implying that warrant requirements might be excused under exigent circumstances, but privacy concerns are at forefront of knock-and-announce rule).

[281] *Id.* at 392-94.

[282] *Id.* at 392.

[283] *Id.* at 394, 396.

> element of the Fourth Amendment's reasonableness requirement would be meaningless.
>
> Thus, the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. . . .
>
> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.[284]

Accordingly, the mere possibility or suspicion that a suspect might dispose of evidence is insufficient to create an exigency that would excuse the knock-and-announce requirement.[285] Similarly, courts have rejected the contention that engaging in a petty drug transaction exempts the requirement.[286] The Sixth Circuit has specifically rejected "the notion that the 'culture' of violence associated with drug felonies could justify a blanket exception to the knock and announce rule."[287] Although "[t]his showing is not high, . . . police [are] required to make it whenever the reasonableness of a no-knock entry is [contested]."[288]

B. *Jaynes's Affidavit Failed to Satisfy the Threshold for a No-Knock Warrant*

Jaynes's affidavit failed to satisfy the low threshold to dispense with the knock-and-announce requirement. Jaynes did not supply particularized evidence linked to Taylor that would justify a no-knock warrant.[289] Instead, he used boilerplate language that law enforcement frequently uses in no-knock

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[284] *Id.* at 394.

[285] United States v. Bates, 84 F.3d 790, 796 (6th Cir. 1996); *see* Ingram v. City of Columbus, 185 F.3d 579, 589 (6th Cir. 1999).

[286] *Ingram*, 185 F.3d at 589 n.7.

[287] *Id.* (citing *Richards*, 520 U.S. at 392-94).

[288] *Richards*, 520 U.S. at 394-95.

[289] Affidavit for Search Warrant, *supra* note 8, paras. 1-14.

warrant applications.[290] Aside from boilerplate language about drug dealing, which the *Richards* Court specifically rejected, Jaynes failed to articulate any reason for believing that Taylor was dangerous, that she would destroy evidence or escape, or that announcing would be futile.[291] Taylor was not a drug dealer and Jaynes knew it.

When Jaynes presented the warrant for Taylor's home, he presented four other warrant applications, all tied to Glover's activities and all filled with the same language that failed to particularize Taylor. In all five affidavits, Jaynes used the same boilerplate language.[292] In the portion of the affidavit that justifies the disposal of the knock-and-announce requirement, Jaynes wrote:

> Affiant is requesting a No-Knock entry to the premises due to the nature of how these drug traffickers operate. These drug traffickers have a history of attempting to destroy evidence, have cameras on the location that compromise Detectives once an approach to the dwelling is made, and a have [sic] history of fleeing from law enforcement.[293]

None of this was true of Taylor. Nothing in the affidavit associates Taylor with drug distribution other than the perjured statement that she was accepting packages on behalf of Glover.[294] She was not rumored to be a drug dealer.[295] She had not participated in any drug exchange.[296] She had no criminal history.[297] There was no evidence that Taylor had ever fled from law enforcement.[298] There was no evidence that she was violent.[299] Therefore, the proffered justifications for a no-knock warrant were clearly not met.

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[290] *See* Balko, *supra* note 5 ("The portion of the warrant affidavit that requested a no-knock raid was the exact same language used in the other four warrants."); *see also* United States v. Weaver, 99 F.3d 1372, 1378 (6th Cir. 1996) ("The use of generalized boilerplate recitations designed to meet all law enforcement needs for illustrating certain types of criminal conduct engenders the risk that insufficient 'particularized facts' about the case or the suspect will be presented for a magistrate to determine probable cause." (citing *In re* Young, 716 F.2d 493, 500 (8th Cir. 1983))); *In re* Grand Jury Proceedings, 716 F.2d 493, 502 (8th Cir. 1983) ("But in the instant case the affidavit as a whole consists of nothing more than a stringing together of what appear to be vague and unsupported rumors, suspicions, and bare conclusions of others.").

[291] Affidavit for Search Warrant, *supra* note 8, paras. 8-13; *see Richards*, 520 U.S. at 394 ("[T]he fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case.").

[292] Balko, *supra* note 5.

[293] Affidavit for Search Warrant, *supra* note 8, para. 15.

[294] *See id.* para. 9.

[295] *See* Balko, *supra* note 5.

[296] *Id.*

[297] Balko, *supra* note 7 (noting shoplifting charge from 2012 that was dismissed).

[298] *Id.*

[299] *Id.*

In fact, law enforcement refused a SWAT team in executing the warrant against Taylor because she was such a low risk for flight or assault.[300] To assess the need for a SWAT team, LMPD completes a "risk matrix" before executing a warrant.[301] "A case has to meet a minimum score" to satisfy the risk analysis.[302] On the night LMPD killed Taylor, law enforcement used several SWAT to execute the warrants associated with Glover. This guaranteed the presence of ambulances and medical personnel. Taylor, however, was deemed not threatening enough to merit a SWAT team.[303] As one commentator pointed out, "[i]nstead, she was subjected to all of the most dangerous aspects of a SWAT raid, undertaken by officers in street clothes. There were no medics nearby. In fact, an ambulance on standby was told to *leave the scene* an hour before the raid."[304] After she was shot, the police let her lie on the floor unattended for twenty minutes before they rendered any aid.[305]

Jaynes might defend by arguing that he used the word "these" drug dealers in the warrant to state that this particular criminal organization was a flight risk, was likely to destroy evidence, or was dangerous.[306] The argument fails because Jaynes did not provide the particularity and specificity required to support such claims.[307] The only specific information Jaynes provided was the criminal history of Glover and the other suspects.[308] Jaynes provided no evidence that any suspect had fled from police, resisted arrest, or displayed assaultive behavior toward anyone.[309] Taylor had no criminal record, except for a 2012 shoplifting charge that was dismissed.[310] Her only connection to this investigation was the allegation that Glover received a package at her house one time, that Glover used her address, and that cars (with no mention of who was inside) traveled between her home and a drug house.[311] In all five search warrants, her name is mentioned only twice.

Law enforcement might also argue that the illegality of the no-knock warrant is irrelevant because the police claim that they knocked and announced repeatedly before they rammed the door.[312] That claim, however, is hotly

[300] *See* Balko, *supra* note 5 (noting LMPD assessment that Taylor did not "merit a SWAT team").

[301] *Id.*

[302] *Id.*

[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] Balko, *supra* note 7.

[307] *Id.*

[308] *Id.*

[309] Affidavit for Search Warrant, *supra* note 8, para. 15.

[310] Balko, *supra* note 7.

[311] Affidavit for Search Warrant, *supra* note 8, paras. 7-10.

[312] Balko, *supra* note 7.

contested.[313] A compelling video *The New York Times* produced, titled "How the Police Killed Breonna Taylor," shows that Taylor lived in a small apartment complex.[314] Sixteen of her neighbors, some of whom had their windows open, claim that they heard the gunfire but did not hear the police announce or knock.[315] Even if the police should claim that their return of fire was justified because they did not have to knock and announce as per the warrant, the warrant was illegal, lacked probable cause for the search, and lacked evidence to dispense with the knock-and-announce requirement.

LMPD officers who participated in the execution of the warrant at Taylor's home say that they knocked before they entered.[316] Why did they decide to knock when they had a no-knock warrant for her address? LMPD officers say that they knocked but did not announce because their "intent was to give her plenty of time to come to the door."[317] According to the officers, they banged again and then announced themselves.[318] This does not cohere with the statements of sixteen people who were in the building at the time.[319] Taylor's boyfriend, Kenneth Walker says that Taylor yelled, "Who is it?" twice but the police did not respond.[320] On March 12, 2021, Taylor was dangerous enough to justify a no-knock entry.[321] On March 13, 2021, she was not threatening enough to warrant SWAT or a no-knock.[322] Which of these is the lie?

Walker called 911 during the botched raid. He told the dispatcher, "I don't know what happened, somebody kicked in the door and shot my girlfriend."[323] It is improbable that Walker, who had no criminal record, would knowingly shoot at police, then call 911 and feign ignorance.[324] It is plausible that Walker,

[313] *Id.* ("Yet, according to Taylor's attorneys, 16 people in the densely populated neighborhood around Taylor say they heard the gunshots but never heard the police announce themselves."); Balko, *supra* note 5 (noting that only one witness heard police announce themselves).

[314] Malachy Browne, Anjali Singhvi, Natalie Reneau & Drew Jordan, *How the Police Killed Breonna Taylor*, N.Y. TIMES, at 11:37-12:13 (Dec. 28, 2020), https://www.nytimes.com/video/us/100000007348445/breonna-taylor-death-cops.html?action=click&module=RelatedLinks&pgtype=Article.

[315] Balko, *supra* note 7.

[316] Browne et al., *supra* note 314, at 5:10-6:30.

[317] *Id.* at 5:15-5:20.

[318] *Id.* at 5:32-5:37.

[319] Balko, *supra* note 7; *see also* Browne et al., *supra* note 314, at 5:20-6:09, 11:12-12:20.

[320] Browne et al., *supra* note 314, at 5:47-5:56.

[321] Affidavit for Search Warrant, *supra* note 8, para. 15.

[322] Browne et al., *supra* note 314, at 5:10-6:30.

[323] Minyvonne Burke, *Kenneth Walker, Police Can Both Claim Kentucky Law Protects Conduct the Night of Deadly Breonna Taylor Raid*, NBC NEWS (Sept. 25, 2020, 3:11 PM), https://www.nbcnews.com/news/us-news/kenneth-walker-police-can-both-claim-kentucky-law-protects-conduct-n1241010 [https://perma.cc/BPW9-J4DJ].

[324] *See* Balko, *supra* note 7.

along with sixteen neighbors, did not hear the police announce if they announced and rammed all in one motion. That would make the intrusion both factually and legally indistinguishable from a no-knock raid.[325]

C. *No-Knock Warrants Have Become Routine*

Unfortunately, LMPD is not the only police department violating *Richards*. In 2018, legal commentator Radley Balko reviewed more than 105 no-knock warrants served by the police department of Little Rock, Arkansas.[326] In ninety-seven of those warrants, police failed to provide the level of specificity necessary to satisfy *Richards* and dispense with the knock-and-announce requirements.[327] Despite that, judges signed those warrants.[328] As of the time of writing, not one Little Rock officer has been held accountable for illegal no-knock warrants.[329] Balko notes that "[o]ne of the judges who signed off on a large portion of those warrants is currently running for higher judicial office."[330] Although the detective who acquired many of those warrants "was caught lying in one" and there is "evidence that he lied in others," he "is still in charge of the city's drug investigations."[331] Lack of accountability indicates there is no incentive, at least in Little Rock, for police officers to stop pursuing no-knock warrants.

Unfortunately, there is yet another example of a case strikingly like Taylor's:

> [I]n 2015, a South Carolina drug team raided the home of Julian Betton, a 31-year-old black man, over a couple of low-level marijuana sales. After battering down Betton's door, the officers shot him nine times. Every officer on the task force claimed that members of the raid team knocked and announced multiple times before battering down the door. But footage from Betton's security camera showed they were lying. In depositions for Betton's lawsuit, one task force member testified, wrongly, "It's not the law to knock and announce. You know, it's just not." Another said that even when the drug unit wasn't given a no-knock

[325] *Id.*

[326] *Id.*

[327] *Id.*

[328] *Id.*

[329] Linda Satter, *2 Suits on No-Knock Raids by Little Rock Police Dropped for Now*, ARK. DEMOCRAT GAZETTE (Aug. 28, 2020, 7:35 AM), https://www.arkansasonline.com/news/2020/aug/28/2-no-knock-suits-dropped-for-now/ [https://perma.cc/GW6F-3D67]; Linda Satter, *Suit on Little Rock Police's No-Knock Raids Dismissed at Plaintiffs' Request*, ARK. DEMOCRAT GAZETTE (Nov. 12, 2020, 7:23 AM), https://www.arkansasonline.com/news/2020/nov/12/suit-on-lr-polices-no-knock-raids-dismissed-at/ [https://perma.cc/THT2-PXSG].

[330] Balko, *supra* note 7.

[331] *Id.*

warrant, they "almost always forcibly entered without knocking and announcing, or simultaneously with announcing."[332]

Across the country, police departments treat no-knock warrants as a routine occurrence in drug investigations,[333] rather than a unique tool to use in circumstances where they have "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."[334]

D. *The Slippery Slope to Ram-and-Announce Warrant Executions*

The Supreme Court created the conditions that led to Breonna Taylor's death. In 2003, the Supreme Court decided *United States v. Banks*[335] and held that waiting fifteen to twenty seconds before a forcible entry satisfied the Fourth Amendment.[336] Three years later, in *Hudson v. Michigan*, the Court gutted that waiting requirement by destroying the strongest legal incentive to comply—the application of the exclusionary rule.[337] In *Hudson*, the Court refused to apply the exclusionary rule to evidence obtained in violation of the knock-and-announce rule.[338] Justice Antonin Scalia, writing for the majority in a five-to-four decision, liberated the Court from the straight jacket of centuries of precedents and fealty to the sanctity of the home.[339] Setting centuries of precedent aside, Scalia concocted an unprecedented societal cost-benefit analysis that empowered him to achieve three things: (1) identify the "real" interest at stake, (2) reframe the issue before the Court, and (3) select the variables to be weighed in the balance and assign those variables meaning.[340] Dismissing the defendant's interest in protection from unannounced home intrusions, the Court unilaterally found that the defendant's real interest was preventing the state from seeing or taking evidence described in the warrant,

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[332] *Id.*

[333] *See id.*

[334] Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

[335] 540 U.S. 31 (2003).

[336] *Id.* at 40.

[337] Hudson v. Michigan, 547 U.S. 586, 594 (2006) (holding that "the knock-and-announce rule has never protected . . . one's interest in preventing government from [seizing] evidence described in a warrant," and thus, "the exclusionary rule is inapplicable"); *id.* at 605 (Breyer, J., dissenting) ("[T]he Court destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement.").

[338] *Id.* at 594 (majority opinion).

[339] *See id.* at 589.

[340] *See id.* at 593-96 (holding that purpose of knock-and-announce requirement is to prevent provoking violence against police officers and prevent destruction of property, while purpose of exclusionary rule is to protect home from warrantless searches).

namely "crack" cocaine.[341] Having identified the "real" interest at stake, the Court raised the evil specter of the boogeyman to tip the scales. According to the Court, "the risk of releasing dangerous criminals into society" greatly outweighed less onerous alternatives to disincentivizing police excess.[342]

As it weighed the social interests at stake, the Court foresaw that unannounced entries had the potential to provoke violence from a startled resident acting in self-defense—the very tragedy that befell Breonna Taylor.[343] The Court stated, "One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident."[344] In disregard of this foreseeable danger, the Court reasoned that civil rights lawsuits and increased professionalism in policing would adequately deter police excess.[345] Despite the Court's sanguine outlook, it had so thoroughly fortified qualified immunity that even the state of Michigan, one of the parties to the proceeding, admitted that "damages may be virtually nonexistent."[346] The dissent also pointed out that "alternative State mechanisms for enforcing the Fourth Amendment[]," including the desire to avoid civil damages, "had prov[en] 'worthless and futile.'"[347] The Court's sanguine faith in improved police discipline and wide-ranging reforms in police education, training, and supervision is of no comfort to Tamika Palmer, Breonna Taylor's mother, or the thousands of other victims police kill yearly.

Osagie K. Obasogie makes several points that illustrate how *Hudson* facilitated Taylor's death. Using the work of Lauren Edelman, Obasogie developed a theoretical framework that exposes how seemingly neutral doctrinal approaches and legal rules that should constrain police excess actually facilitate the violence the Fourth Amendment should prevent[348]:

> (1) vague and ambiguous legal standards; (2) [police] organizations' development of symbolic policies that suggest compliance in response to new and ambiguous legal standards; and (3) a response by the courts that,

[341] *Id.* at 596 (noting that deterring police misconduct depends on strength of incentive to commit forbidden act and that "ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence").

[342] *See id.* at 595 ("The costs here are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and-announce violation would generate a constant flood of alleged failures to observe the rule . . . ."); Balko, *supra* note 7 ("[Taylor's] death was the entirely foreseeable consequence of a police department feeling free to callously and carelessly ignore the Fourth Amendment and the Supreme Court's decision to prioritize the integrity of drug prosecutions over the Fourth Amendment right of Americans to feel safe and secure in their homes.").

[343] *Hudson*, 547 U.S. at 594.

[344] *Id.*

[345] *Id.* at 599.

[346] *Id.* at 610 (Breyer, J., dissenting).

[347] *Id.* at 609 (quoting Mapp v. Ohio, 367 U.S. 643, 652 (1961)).

[348] *See* Obasogie, *supra* note 29, at 782.

> instead of creating their own independent standards, affirms the [police's] symbolic gestures as adherence to law.[349]

In *Hudson*, the Court abandoned precedent, opting instead for a vague and ambiguous cost-benefit analysis that allowed the Court to privilege the increased professionalism of the police over the Fourth Amendment safety and sanctity protections against forceful government intrusion.[350] Instead of creating rules consistent with the Fourth Amendment, the Court credited police efforts toward reform.[351] The reformist efforts of the police became the baseline of acceptable conduct under the Constitution. In this way, the police set the standards for their own conduct—the fox runs the henhouse. In essence, the Court proclaimed: We cannot let dangerous crack dealers escape necessary punishment when police are performing so well, and in the off chance that police misbehave, civil law will better regulate their behavior, not the Fourth Amendment. It should also be noted that Scalia's use of a cost-benefit analysis allowed the majority to draw from racial imaginaries, particularly stereotypes about crack cocaine dealers, when articulating the harm.

According to Obasogie, when the Court addressed police excess, it abdicated its role as the gatekeeper of the Fourth Amendment and instead created legal doctrine structured to elevate the police as "experts" about which applications of force, such as dynamic entries, violate the Fourth Amendment.[352] In *Hudson*, increased police professionalism trumped a closer adherence to the safety and security of the home.[353] Obasogie's theoretical framework exposes how *Hudson* created the conditions that led to Taylor's death. The Court's doctrinal approach and embrace of a cost-benefit analysis "allow[ed] ostensibly 'neutral' legal rules" and doctrinal approaches to predictably lead to avoidable deaths.[354] *Hudson* opened the door to an increase in the incidences and degrees of police violence, hastening the militarization of policing and the tragedy of Breonna Taylor.

Indeed, *Hudson* exemplifies the Court's ability to facilitate death by incentivizing callousness and recklessness in police culture—what Frank Rudy Cooper calls "deregulation of the police."[355] When the police know both that they can ignore the knock-and-announce requirements without risking suppression of the evidence and that qualified immunity erects a very high barrier to police accountability, they lack incentive to follow the entry

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[349] *Id.* (citation omitted).

[350] *Hudson*, 547 U.S. at 594-96.

[351] *Id.* at 599 ("There have been 'wide-ranging reforms in the education, training, and supervision of police officers.'" (quoting SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990, at 51 (1993))).

[352] Obasogie, *supra* note 29, at 783.

[353] *Hudson*, 547 U.S. at 594-96.

[354] *See* Obasogie, *supra* note 29, at 774.

[355] *See* Frank Rudy Cooper, *Intersectionality, Police Excessive Force, and Class*, 89 GEO. WASH. L. REV. 1452, 1491-95 (2021).

requirements.[356] *Hudson* blurred the line between no-knock and knock-and-announce entries because it eliminated suppression as a repercussion, consequently disincentivizing police caution, and thereby, increasing the risk of injury during execution of warrants.[357] *Hudson*, therefore, became part of the structural apparatus that disincentivizes police officers to exercise care.[358]

The Supreme Court's refusal to apply the exclusionary rule incentivizes police, prosecutors, and judges to ignore the knock-and-announce requirement entirely.[359] Immunizing law enforcement, including police and prosecutors, from material consequences and punishment for excess incentivizes callousness in the execution of warrants and carelessness in their acquisition.[360] Gutting the exclusionary rule causes a lower exercise of care in surveillance, investigation, verification, and the exercise of caution when executing warrants, all of which contributed to Taylor's death.[361] As Radley Balko argues, Taylor's death, like many others, was no unimaginable accident.[362] Rather, it was the foreseeable consequence of legal doctrine that "prioritize[s] the integrity of drug prosecutions over the Fourth Amendment right . . . to feel safe and secure in the[] home."[363] In this way, *Hudson* "predictably le[d] to avoidable deaths."[364]

Given the proliferation of injuries, deaths, Stand Your Ground laws, and unbridled gun ownership,[365] the application of the exclusionary rule to evidence obtained in violation of the knock-and-announce requirement and the amount of time that should elapse before police resort to ramming demand the Court's review. Furthermore, the practice of ram-and-announce begs for the continued use of police cameras, particularly when executing search warrants.

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[356] *See Hudson*, 547 U.S. at 609 (Breyer, J., dissenting).

[357] This blurred line can be observed in similar levels of violence in the execution of both kinds of warrants. Sack, *supra* note 26, at 17 (noting one study where "47 civilians and five officers died as a result of the execution of knock-and-announce searches, while 31 civilians and eight officers died in the execution [sic] no-knock warrants").

[358] Carbado, *supra* note 24, at 129 (discussing other Supreme Court precedents that act as structural barriers to effective and fair policing).

[359] *See* Balko, *supra* note 7 ("After the court's ruling in *Hudson*, those of us who worried about these tactics warned that without any real deterrent, police, judges and prosecutors would eventually ignore the knock-and-announce rule entirely.").

[360] *Id.*

[361] *Id.*

[362] *Id.*

[363] *Id.*

[364] *See* Obasogie, *supra* note 29, at 771.

[365] *See supra* notes 44-45; Sabrina Tavernise, *Gun Sales Surge in United States Torn by Distrust: A Domestic 'Arms Race*,*'* N.Y. TIMES, May 30, 2021, at A1 (reporting that while federal government does not track exact number of guns sold, over 400 million guns are estimated to be in circulation and data from 2020 suggest that 39% of American households own guns).

Where officers fail to engage their cameras, swift disciplinary action should follow to discourage the practices of ramming and announcing in one motion.

In a 2015 study, criminologist Brian Schaefer studied LMPD's rampant use of ram-and-announce.[366] Schaefer "accompanied [LMPD] on [seventy-three] raids in a city he called 'Bourbonville.' Sam Aguiar, an attorney for Taylor's family . . . confirmed that the city in the study is Louisville."[367] In each of the seventy-three search warrant entries Schaefer observed, LMPD rammed and announced in one motion with the first hit on the door.[368] As one detective explained, "As long as we announce our presence, we are good. We don't want to give them anytime [sic] to destroy evidence or grab a weapon, so we go fast and get through the door quick."[369] Schaefer observed that "[t]he distinction between . . . conducting a knock-and-announce raid versus a no-knock raid is minimal in practice."[370] Ironically, in cases involving evidence of actual danger, police broke from ram-and-announce protocol and announced their presence before ramming the door.[371]

In Taylor's case, the overwhelming evidence indicates that the police made no effort to identify themselves, much less show the search warrant.[372] Walker has stated that the "police beat on the door for 30 to 45 seconds without identifying themselves."[373] Assuming that such notice was given, the question remains: Exactly how much time must elapse before the police breached the door? What is a reasonable amount of time in the dead of night?

The LMPD's common practice of ram-and-announce might also explain the absence of police camera footage in the Taylor case. If the police rammed and announced in one motion, they would have run afoul of waiting-period requirements between announcing their presence and ramming the door. Unfortunately, the public will never know exactly what happened at Taylor's door on the night she was executed because all the officers involved have had time to collude with each other and their lawyers. Still, is fifteen seconds enough time to come to your senses, get dressed, and get to your door in the dead of night? The Court's review would be particularly meaningful here

[366] Brian Patrick Schaefer, Knocking on the Door: Police Decision Points in Executing Search Warrants 42 (May 2015) (Ph.D. dissertation, University of Louisville) (available at https://ir.library.louisville.edu/cgi/viewcontent.cgi?article=3029&context=etd).

[367] Balko, *supra* note 7.

[368] Schaefer, *supra* note 366, at 128.

[369] *Id.*

[370] *Id.* at 131.

[371] *See id.* at 129.

[372] Balko, *supra* note 7 (highlighting that Walker asserts police did not identify themselves and that eleven of Taylor's neighbors "heard the gunshots but never heard the police announce themselves").

[373] *Id.*; *see also* Browne et al., *supra* note 314, at 6:15-6:20 (narrating that police knocked and waited for around forty-five seconds).

because of the regularity with which police announce and ram the door, particularly in Stand Your Ground states.[374]

IV. THE LACK OF POLICE ACCOUNTABILITY

The killing of Breonna Taylor exposed systemic structural problems in policing, particularly the pervasive phenomenon of failing to hold police accountable for their excess. This Part exposes the structural impediments to truth seeking when the police are suspects, particularly in the Taylor case. This Part, therefore, provides additional evidence of the infliction of cultural trauma discussed in Part V.

A. *The Police Were Not Held Accountable for Their Actions*

As the Supreme Court has repeatedly indicated, truth is essential for justice.[375] An independent investigatory agency with prosecutorial power should investigate Jaynes and Mattingly. The search warrant that authorized the invasion of Taylor's home must have a full public vetting. More specifically, Jaynes's affidavit must be explained to the public, preferably in an adversarial setting where one narrative is not afforded full weight with no opportunity for cross-examination, as is so often the case with one-sided grand

[374] *See* Keturah Herron, *No-Knock Warrants and the 'Castle Doctrine*,*'* ACLU KY. (Dec. 18, 2020, 3:30 PM), https://www.aclu-ky.org/en/news/no-knock-warrants-and-castle-doctrine [https://perma.cc/TP7Y-JGM6] ("No-knock warrants and the Castle Doctrine blatantly contradict each other. Together, they create deadly situations for civilians and law enforcement.").

[375] For instance, in *Giglio v. United States*, the Court reiterated that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" 405 U.S. 150, 153 (1972); *see also, e.g.*, Kansas v. Ventris, 556 U.S. 586, 593 (2009) (noting "need to prevent perjury" as way "to assure the integrity of the trial process" (quoting Stone v. Powell, 428 U.S. 465, 488 (1976))); James v. Illinois, 493 U.S. 307, 311 (1990) ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system." (quoting United States v. Havens, 446 U.S. 620, 626 (1980))); Oregon v. Hass, 420 U.S. 714, 722 (1975) ("We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution."); Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 55 (2010) ("Because truth-distorting police lies are destructive of the core aims of a fair and effective criminal justice system, the exclusionary rule should be modified for cases hinging on police credibility.").

jury presentations involving police killings, like those of Michael Brown, Eric Garner, Tamir Rice, and Breonna Taylor.[376]

Taylor's killing severely undermined the credibility of law enforcement, leaving the citizenry in ever-increasing doubt that the police can ensure public safety and security.[377] The perjured statements in the affidavit and the absence of probable cause must be fully explained to the public. The complete results of the investigation should be provided in full detail so they can be scrutinized by political activists, scholars, experts, and the public. Given the results of local prosecutorial efforts and comments made by Kentucky Attorney General Cameron regarding charges recommended, the federal government has the least conflict of interest in the context of an independent probe.[378] However, the federal government must address factual findings local law enforcement made, which may include evidence obtained through harassment, intimidation, and deliberate efforts to make witnesses contradict their stories. Locally obtained narratives may have been concocted after bad actors have had time to collude with attorneys and coordinate their stories with one another and with

[376] *See* Roger A. Fairfax, Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397, 408-10 (2017) (noting that in grand jury proceedings, prosecutors have virtually "limitless ability to shape the presentation of the evidence" but function more as an advocate for police in police killing cases); Nicole Smith Futrell, *Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence*, 123 DICK. L. REV. 1, 25 (2018) ("[U]nlike the grand jury, petit juries receive the evidence through an adversarial trial process that is tested by defense counsel and presided over by a judge in a public proceeding. The grand jury operates with no judge, defense counsel, or public spectators." (footnotes omitted)).

[377] *See* Vida B. Johnson, *Prosecutors Who Police the Police Are Good People*, 87 FORDHAM L. REV. ONLINE 13, 16 (2018) ("The failure to police the police undermines the community's trust in law enforcement . . . .").

[378] Joe Sonka, *Breonna Taylor Grand Jurors File Petition to Impeach Attorney General Daniel Cameron*, COURIER J. (Louisville) (Jan. 23, 2021, 10:23 AM), https://www.courier-journal.com/get-access/?return=https%3A%2F%2Fwww.courier-journal.com%2Fstory%2Fnews%2Fpolitics%2F2021%2F01%2F22%2Fbreonna-taylor-grand-jurors-file-petition-to-impeach-daniel-cameron%2F6672043002%2F. Three grand jurors who heard the presentation of evidence against the officers who killed Taylor have filed a petition to impeach Attorney General Cameron. *Id.* They allege that "Cameron breached public trust and failed to comply with his duties by misrepresenting the findings of the grand jury in the Taylor case." *Id.* Specifically, the petition contends that Cameron told the public that "his office . . . walked the Grand Jury through 'every homicide offense,'" when in fact the prosecution did not mention homicide to the grand jury and only presented three wanton endangerment charges against one officer. *Id.* In addition, the petition alleges that Cameron "'misled the public' when he said the grand jury agreed that police were 'justified' in returning fire." *Id.* Further, in response to Cameron's public statements, a grand juror previously filed a motion seeking a declaration that members of the grand jury have the right to "speak freely about the case." *Id.* That motion "accused Cameron of using the grand jurors 'as a [political] shield [against] accountability . . .' for his prosecutorial decisions." *Id.*

other evidence. Moreover, the standards for a federal claim are exceptionally high.[379] Consequently, the results of a federal investigation are uncertain.

In addition to the Taylor affidavit, all of Jaynes's and Mattingly's affidavits and any affidavits in which they have participated should be thoroughly investigated. Whether the misrepresentations in Jaynes's affidavit were intentional or negligent, they contributed to Taylor's death. Attorney General Cameron's Search Warrant Task Force[380] could start its tenure with a review of Taylor's warrant and any warrants in which Jaynes or Mattingly had input. Such a gesture would assure the public that the review board is not an empty symbolic gesture meant to preempt and appease public outcry but is rather a genuine effort to make much-needed structural changes in policing and, most importantly, a small step toward reforming the normative principles of policing.

B. *No Video Record of the Botched Raid Exists*

On September 23, 2020, Cameron publicly stated none of the officers who executed the warrant on Taylor's home wore their body cameras or had them turned on.[381] To date, Cameron has not explained the absence of evidence from the officers' body cameras. The absence of a video record is a severe impediment to truth seeking that must be fully explained to the public. Had a video recording been available, the public could have been assured that the executing officers knocked and announced before invading Taylor's home. Video provides much-needed proof for suppression hearings and civil damages claims. Most importantly, video subjects the excessive use of force to the precious antiseptic light of day, providing the transparency the public needs to monitor and critique police excess.[382] In cases where officers fail to use their cameras, swift disciplinary action must follow. Body cameras also benefit

[379] Yvonne Elosiebo, *Implicit Bias and Equal Protection: A Paradigm Shift*, 42 N.Y.U. REV. L. & SOC. CHANGE 451, 462 (2018) ("The Supreme Court holds those claiming racial discrimination by a government entity to a very high standard.").

[380] Tessa Duvall, *Kentucky Warrant Task Force Created After Breonna Taylor's Death Finally Meets*, COURIER J. (Louisville) (May 24, 2021, 4:36 PM), https://www.courier-journal.com/story/news/local/breonna-taylor/2021/05/24/kentucky-search-warrant-task-force-breonna-taylor-death-daniel-cameron/5241029001/.

[381] Courtney Hayden, *5 Things We Learned About the Breonna Taylor Case from Daniel Cameron's Announcement*, 4WWL (Sept. 24, 2020, 5:03 AM), https://www.wwltv.com/article/news/investigations/breonna-taylor-daniel-cameron-investigation-what-we-know/417-8827a51f-b540-4619-99bf-8489658be660 [https://perma.cc/GLU7-RGZK]; *see also* NAACP LEGAL DEF. & EDUC. FUND, INC., JUSTICE DENIED: A CALL FOR A NEW GRAND JURY INVESTIGATION INTO THE KILLING OF BREONNA TAYLOR 7 (2020), https://www.naacpldf.org/wp-content/uploads/LDF_10272020_BreonnaTaylor-11.pdf [https://perma.cc/52XN-WPCB] (noting that, despite evidence indicating that officers present for Taylor's search warrant execution were wearing body cameras, prosecutors did not present body camera footage or explain its absence).

[382] Cook, *supra* note 57, at 614-15.

police by protecting them from false claims.[383] A recent Marist poll found that 90% of Americans think that body cameras for police do "more good than harm."[384]

As a result of nationwide political activism and uprisings surrounding Taylor's killing, the City of Louisville passed Breonna's Law, which banned no-knock warrants, required officers to activate their body cameras during the execution of a search warrant, and set a minimum time period that cameras must be operative before and after the execution of a warrant.[385] Despite decades of clarion calls for reform from both sides of the political spectrum about decreased militarization of the police, concern for civil liberties, and the disproportionate use of no-knock warrants in marginalized communities, it took nationwide political activism surrounding Taylor's killing for at least eighty-four similar proposals in no fewer than thirty-three states to "monitor, curtail, or ban no-knock warrants."[386] According to one study, roughly two-thirds of Americans support a federal ban on no-knock warrants, including 75% of Democrats and 52% of Republicans.[387] This is particularly salient where 44% of adults in the United States live in a household with a gun.[388] Despite widespread support, the Kentucky legislature passed a watered-down version of Breonna's Law that regulates no-knock warrants but does not ban them.[389] The banning or regulation of no-knock warrants is a bare minimum in

[383] Roseanna Sommers, *Will Putting Cameras on Police Reduce Polarization?*, 125 YALE L.J. 1304, 1310 (2016) ("[B]ody cameras offer hard facts that could potentially exonerate officers falsely accused of misconduct.").

[384] Marist Inst. for Pub. Op., *NPR/PBS NewsHour/Marist Poll: Race Relations in the United States*, MARISTPOLL (May 17, 2021), https://maristpoll.marist.edu/polls/npr-pbs-newshour-marist-poll-race-relations-in-the-united-states/ [https://perma.cc/6CL7-RCBE].

[385] Barbara Campbell, *No-Knock Warrants Banned in Louisville in Law Named for Breonna Taylor*, NPR (June 11, 2020, 9:40 PM), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/11/875466130/no-knock-warrants-banned-in-louisville-in-law-named-for-breonna-taylor [https://perma.cc/Z36D-CZ6B].

[386] P.R. Lockhart, *After Breonna Taylor's Death, Activists Fought to Ban Surprise Police Raids. One Year Later, They're Winning*, GUARDIAN (Mar. 26, 2021, 5:00 AM), https://www.theguardian.com/global-development/2021/mar/26/breonna-taylor-no-knock-warrant-bans-us-police-experts [https://perma.cc/F8EF-692G].

[387] Eli Yokley, *Both Democratic and GOP Voters Back Bans on Chokeholds, No-Knock Warrants*, MORNING CONSULT (June 24, 2020, 6:00 AM), https://morningconsult.com/2020/06/24/polling-policing-reform-chokehold-floyd/ [https://perma.cc/FUP6-RXYW].

[388] Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (May 11, 2021), https://www.pewresearch.org/fact-tank/2021/05/11/key-facts-about-americans-and-guns/ [https://perma.cc/RP6T-UW8T].

[389] *See* Rachel Treisman, *Kentucky Law Limits Use of No-Knock Warrants, a Year After Breonna Taylor's Killing*, NPR (Apr. 9, 2021, 3:19 PM), https://www.npr.org/2021/04/09/985804591/kentucky-law-limits-use-of-no-knock-warrants-a-year-after-breonna-taylors-killin [https://perma.cc/ZD6L-5H9P].

substantive structural transformation.[390] Additionally, mandatory video footage would enable police to review all warrant executions for compliance and targeted reform.

C. *The Police Had Time to Craft Narratives of Innocence*

Jaynes, Mattingly, and other officers involved in police excess investigations have had far too long to, as law professor Kenneth Lawson argues, "get their story straight."[391] As a result, the public may never know the truth about what happens during police excess. The amount of time police suspects have to get their story straight and the circumstances under which they provide statements (namely in the presence of, and after long consultation with, an attorney) present structural impediments to truth seeking and further corrupt the investigative process.[392] Unlike other criminal suspects, police suspects are often given a cooling-off period that provides substantial time and opportunity to confer with lawyers and to coordinate their stories with other officers and evidence.[393] This was likely true for both Jaynes and Mattingly given that the LMPD's collective bargaining agreement guarantees officers a

[390] Tessa Duvall & Darcy Costello, *In Cities and States Across the US, Breonna's Law Is Targeting Deadly No-Knock Warrants*, COURIER J. (Louisville) (Mar. 17, 2021, 4:22 PM), https://www.courier-journal.com/story/news/local/breonna-taylor/2021/03/12/spread-of-breonnas-law-across-us-has-become-policy-legacy/4642996001/ (quoting Peter Kraska, an Eastern Kentucky University professor and expert on police raids, who contends that banning no-knock warrants is the "minimum of what needs to happen").

[391] Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Can't We All Just Get Along*, 37 U. HAW. L. REV. 339, 362 (2015) (suggesting that police officers involved in shootings of unarmed Black victims often have "substantial time" to "get their story right"); *see also* Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 212 (2005) ("Delays in the investigation of possible officer misconduct are intolerable. There is a widespread impression that delays in investigations allow officers time to collude to create a consistent, exculpatory story.").

[392] Levine, *supra* note 55, at 1200, 1224-26 ("[P]olice suspects may be questioned only during the day; . . . they may be questioned only by a limited number of interrogators; . . . they must be given time to attend to their personal needs; . . . they may not be threatened, subjected to abusive language, or induced to confess through untrue promises of leniency; and . . . their choice to inculpate themselves must not be conditioned on losing their job or benefits.").

[393] *Id.* at 1236.

forty-eight hour written notice of a complaint alleging misconduct prior to interrogation.[394]

Time affords police suspects an opportunity to craft innocent narratives that justify excessive use of force,[395] like the omnipresent claim that he was "reach[ing] for his waistband," a perennial favorite police frequently deploy to cast the Black victim as the villain and to frame a murder as carefully calibrated with a justifiable and reasonable use of deadly force.[396] As Paul Butler argues, "the police will take advantage of all the extra due process they get . . . to concoct an alternative version of events."[397]

In addition to time, police suspects often have opportunity to calibrate their narratives "with other evidence, including dispatch recordings; video footage; dashboard camera and body camera recordings; forensics tests; autopsy reports that document bullet entries and exits; and other witnesses' accounts."[398] Typically, non-officer suspects do not have the evidence pending against them before their initial interview and do not have the luxury of having an attorney present during interrogation.[399] Non-officer suspects receive the evidence after

[394] COLLECTIVE BARGAINING AGREEMENT BY AND BETWEEN LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT AND RIVER CITY FRATERNAL ORDER OF POLICE LODGE #614, POLICE OFFICERS AND SERGEANTS, art. 17, § 3(A), at 25 (2020) [hereinafter LMPD COLLECTIVE BARGAINING AGREEMENT], https://louisvilleky.gov/human-resources/document/fop-police-offc-sgt-cba-10220-63021 [https://perma.cc/WK58-VAJ3]. These "cooling-off periods" are often mandated in law enforcement collective bargaining agreements. Levine, *supra* note 55, at 1236 (noting that many jurisdictions have Law Enforcement Officers' Bill of Rights which "contain a waiting period before an officer may be questioned"). For example, the Louisville Metro Police Department collective bargaining agreement contains an Officer Bill of Rights, which guarantees officers a cooling-off period. *See* LMPD COLLECTIVE BARGAINING AGREEMENT, *supra*, art. 17, § 3(A), at 25 (stating no officer "shall be subjected to interrogation in a departmental matter involving alleged misconduct on his or her part, until forty-eight (48) hours have expired from the time the request for interrogation is made to the accused officer, in writing"). That guarantee suggests that Jaynes and Mattingly were not immediately questioned following Taylor's killing.

[395] Lawson, *supra* note 391, at 362; *see also* Keenan & Walker, *supra* note 391, at 212 ("Delays in the investigation of possible officer misconduct are intolerable. There is a widespread impression that delays in investigations allow officers time to collude to create a consistent, exculpatory story.").

[396] *See* Cook, *supra* note 57, at 609 & n.194 ("A black man allegedly reaching for a gun is a perennial claim in many unarmed shooting cases.").

[397] Paul Butler, Opinion, *The Police Officers' Bill of Rights Creates a Double Standard*, N.Y. TIMES (June 27, 2015, 9:13 PM), http://www.nytimes.com/roomfordebate/2015/04/29/baltimore-and-bolstering-a-police-officers-right-to-remain-silent/the-police-officers-bill-of-rights-creates-a-double-standard (describing alleged preferential treatment of officers in Freddie Gray case as "thwart[ing] transparency and accountability"); *see also* Levine, *supra* note 55, at 1258 (explaining that police suspects benefit from "informal favoritism" and "procedural advantages").

[398] Cook, *supra* note 57, at 593-94.

[399] *Id.* at 594.

they have been charged and after arraignment.[400] Moreover, ordinary "defendants are not entitled to exculpatory materials until at or near the time of trial."[401] Giving the police time to confer with attorneys and coordinate their stories with others and with the evidence is a structural advantage for police suspects and a structural impediment to the truth-seeking function of investigations. This is how police protect themselves from the confession-inducing techniques they impose on others.[402]

The cooling-off period as an impediment to truth seeking is just one example of the structural advantages police enjoy when accused of wrongdoing. This advantage is what Kate Levine calls "[t]he [s]ystemic [p]erils [c]reated by [a]dditional [i]nterrogation [p]rotections for [p]olice."[403] Both police and prosecutors represent "the same side of the adversarial wall"; they constitute a fraternity dedicated to protecting the thin blue line.[404] When law enforcement investigates itself, the inherent conflict of interest is reflected in the lack of integrity of the facts gathered and a fundamental lack of clarity about what happened.

All these factors contribute to a fundamental lack of trust in the criminal legal process. The process that enabled police to barge into Taylor's home at 1:00 a.m. with scant evidence of probable cause has allowed her killers to walk the streets freely since the time of her death and acquire book deals for having participated in her killing. No questions have been asked of Jaynes or Mattingly in an adversarial setting and their cooling-off period has given them a structural advantage. These advantages call into question the legitimacy of the facts and further undermine the legitimacy of the legal process.

V. POLICE VIOLENCE AND PEOPLE OF COLOR

The impact of the killing of Breonna Taylor on the public, particularly the precariat, must be understood in a larger historical context of law enforcement's power to inflict humiliation, injury, and torture on vulnerable bodies as a form of racialized taming and social control that feeds back as "law and order."[405] The ability of white heteropatriarchal power to put certain bodies "back into place"—that place being death, submission, entertainment, or spectacle—is an organizing principle of policing, the prison-industrial complex, and the license courts grant to law enforcement to inflict its will.[406]

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[400] *Id.*

[401] *Id.*

[402] Levine, *supra* note 55, at 1204.

[403] *Id.* at 1227.

[404] *See* Cook, *supra* note 57, at 592.

[405] *See* BUTLER, *supra* note 54, at 17-18; s*ee also* Roberts, *supra* note 54, at 18 ("Torture has been accepted as a technique of racialized carceral control.").

[406] Cooper, *supra* note 355, at 1491, 1510-11 (arguing that United States' neoliberal race-class structure incentivizes "[t]he Court's [d]eregulation of the [p]olice," increased incarceration, and "police abuse of poor black and brown people").

A. *Police Shootings and State-Sanctioned Violence*

LMPD gunned Taylor down during a global pandemic and her killing occurred alongside the high-profile murders of George Floyd and Ahmaud Arbery.[407] Detective Derek Chauvin lodged his knee in the soft part of Floyd's neck and strangled him for over nine minutes while smirking and staring directly into a camera as he was being filmed in broad daylight.[408] Self-appointed vigilantes and neighborhood watchmen, one of whom was a retired police officer, hunted Arbery down in a safari-style killing while he was jogging in a Georgia suburb.[409] For over ten weeks, Arbery's killers remained free.[410] Law enforcement, including one prosecutor's office, condoned Arbery's killers because they were protecting their neighborhoods.[411] Unlike the killings of Arbery and Floyd, the killing of Taylor was not recognized until several high-profile celebrities drew national attention to her death.[412] Had it not been for political activism and the national outcry, Taylor's death would have been memorialized in a fraudulent police report that was prepared after

[407] Richard Fausset, Tariro Mzezewa & Rick Rojas, *Three in Georgia Are Found Guilty in Arbery Murder*, N.Y. TIMES, Nov. 25, 2021, at A1 (discussing convictions in the murder of Ahmaud Arbery); Laurel Wamsley, *Derek Chauvin Found Guilty of George Floyd's Murder*, NPR (Apr. 20, 2021, 5:37 PM), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/987777911/court-says-jury-has-reached-verdict-in-derek-chauvins-murder-trial [https://perma.cc/MJ32-YPVR] (discussing conviction in murder of George Floyd).

[408] Wamsley, *supra* note 407 ("Floyd died after Chauvin pressed his knee on Floyd's neck for 9 minutes and 29 seconds as Floyd lay facedown, hands cuffed behind his back.").

[409] Richard Fausset, *A Year Later, Mourning the Killing of a Black Jogger in Georgia*, N.Y. TIMES, Mar. 1, 2021, at A12; Emily Green, *The Georgia Police Department That Led Arbery Shooting Case Has a Troubled Past*, NPR (May 13, 2020, 4:07 PM), https://www.npr.org/2020/05/13/855611553/a-troubled-past-of-the-police-department-that-led-the-arbery-case [https://perma.cc/LLP3-JYT5].

[410] Mindy Wadley, *Timeline in Shooting Death of Ahmaud Arbery, What You Should Know About Trial of Accused Killers*, FIRST COAST NEWS (Oct. 13, 2021, 10:38 AM), https://www.firstcoastnews.com/article/news/crime/ahmaud-arbery/ahmaud-arbery-death-timeline-accused-killers-travis-mcmichael-gregory-mcmichael-william-roddy-bryan/77-1ef4a227-fcd2-426c-b4da-b238a3c24fca (stating that Gregory and Travis McMichael were not arrested until May 7, 2020, even though they murdered Arbery on February 23, 2020).

[411] Letter from George E. Barnhill, Dist. Att'y, Waycross Jud. Cir., to Tom Jump, Captain, Glynn Cnty. Police Dep't 2-3 (Apr. 2, 2020), https://int.nyt.com/data/documenthelper/6916-george-barnhill-letter-to-glyn/b52fa09cdc974b970b79/optimized/full.pdf [https://perma.cc/QN8N-GWER] (asserting that Arbery's now-convicted murderers' actions of "following, in 'hot pursuit,'" was "perfectly legal," because "Arbery initiated the fight" and finding "insufficient probable cause to issue arrest warrants at this time").

[412] Oppel Jr. et al., *supra* note 3 (noting that, although Taylor was killed in March 2020, her case only began to garner national attention in May of that year, after which she became "the center of campaigns from celebrities and athletes").

her death that stated that she was not injured, and no force was used.[413] Additionally, Kenneth Walker would be languishing in prison for attempted murder of an officer.

Being Black is fatally dangerous in the United States.[414] Taylor's needless death was one of many during police raids.[415] In March 1994, Boston police barged into the wrong apartment and assaulted seventy-five-year-old Accelyne Williams, who died soon after from heart failure.[416] "No officers were charged."[417] In May 2010, Detroit police shot and killed seven-year-old Aiyana Stanley-Jones as she slept next to her grandmother.[418] Charges against the officer who killed Stanley-Jones were dropped and he remained on the force.[419] In May 2011, police gunned down twenty-six-year-old Iraqi war veteran Jose Guereña in a hail of seventy-one bullets in front of his wife and four-year-old daughter.[420] "Police claimed he was involved in a drug trafficking ring – allegations that were never substantiated – and no officers were disciplined . . . ."[421]

Black people have always had a higher risk of violence and death in encounters with police, but since the *Hudson* decision in 2006, that risk has escalated significantly. As late as 2015, research on policing showed a consistent trend of decreasing violence since the 1990s.[422] As of 2002, predictions that more training and greater administrative oversight could

[413] Audrey McNamara, *Louisville Police Release Breonna Taylor Incident Report – It Lists Her Injuries as "None,"* CBS NEWS (June 11, 2020, 1:12 PM), https://www.cbsnews.com/news/louisville-police-breonna-taylor-death-incident-report/ [https://perma.cc/RJA5-V99W].

[414] Edwards et al., *supra* note 84, at 16794 (finding that Black men and women in the United States are more likely to be killed by police than their white counterparts).

[415] *Id.* at 16793.

[416] Janet Kerlin, *Police Apologize for Minister's Death in Bungled Drug Raid*, ASSOCIATED PRESS (Mar. 26, 1994), https://apnews.com/article/79a1c2e81a57e24196ea859592c9a241.

[417] Jeffrey Miron & Erin Partin, *Breonna Taylor Is Another Victim of the War on Drugs*, CATO INST. (Sept. 24, 2020, 5:41 PM), https://www.cato.org/blog/breonna-taylor-another-victim-war-drugs [https://perma.cc/6QEA-S737] (discussing death of Accelyne Williams).

[418] *Id.* (discussing death of Aiyana Stanley-Jones).

[419] Rose Hackman, *'She Was Only a Baby': Last Charge Dropped in Police Raid That Killed Sleeping Detroit Child*, GUARDIAN (Jan. 31, 2015, 12:33 PM), https://www.theguardian.com/us-news/2015/jan/31/detroit-aiyana-stanley-jones-police-officer-cleared [https://perma.cc/TA86-GJFH].

[420] Miron & Partin, *supra* note 417.

[421] *Id.*

[422] Lauren-Brooke Eisen & Oliver Roeder, *America's Faulty Perception of Crime Rates*, BRENNAN CTR. FOR JUST. (Mar. 16, 2015), https://www.brennancenter.org/our-work/analysis-opinion/americas-faulty-perception-crime-rates [https://perma.cc/VW9A-RY7V] ("Violent crime has fallen by 51 percent since 1991 . . . .").

reduce the incidence of deadly encounters were supported by robust data.[423] The *Hudson* decision, however, removed restraints on police excess.[424] Now, police are targeting Blacks with impunity and are shooting first and asking questions later, even when there is no evidence to suggest that a person might be violent. Since 2015, police have killed over 5,600 people.[425] Of these people, 26% were Black, although Blacks account for just 13% of the population.[426] The disparity is even more pronounced among the unarmed; 36% of unarmed victims were Black.[427] Of all the people in the United States, Black men face the highest risk. Frank Edwards, Hedwig Lee, and Michael Esposito's study using lifetime risk data from 2013 to 2018 predicts that "1 in 1,000 black men and boys will be killed by police over the life course (96 . . . per 100,000)."[428] By comparison, the lifetime risk for white men is 59% less; only thirty-nine in 100,000 white men are likely to be killed by police, even though white people account for 76% of the population.[429] Black women also face an increased risk of death in police encounters. At least eighty-nine of the women police have killed since 2015 "were at their homes or at residences where they sometimes stayed."[430] Police killed twelve of the women during a search or arrest.[431] Edwards and colleagues' model predicts that among women in the United States, Black women and Indian/Native Alaskan women have the highest lifetime risk of police killing them.[432]

Despite the number of police killings, police are rarely penalized. In 2021, police killed more than 1,136 people.[433] "Officers were charged with a crime in only 11 of those cases"—that is, less than 1% of all killings by police.[434] Far from being an outlier, the low rate of legal accountability for officers has

[423] Michael D. White, *Identifying Situational Predictors of Police Shootings Using Multivariate Analysis*, 25 POLICING 726, 745-46 (2002) (concluding research confirms "the need for administrative policy and training to guide officers' approaches" to reducing likelihood of deadly police-citizen encounters).

[424] *See supra* notes 337-73 and accompanying text.

[425] Marisa Iati, Jennifer Jenkins & Sommer Brugal, *Nearly 250 Women Have Been Fatally Shot by Police Since 2015*, WASH. POST, Sept. 8, 2020, at A1, A12.

[426] Joe Fox, Adrian Blanco, Jennifer Jenkins, Julie Tate & Wesley Lowery, *What We've Learned About Police Shootings 5 Years After Ferguson*, WASH. POST (Aug. 9, 2019), https://www.washingtonpost.com/nation/2019/08/09/what-weve-learned-about-police-shootings-years-after-ferguson/?arc404=true.

[427] *Id.*

[428] Edwards et al., *supra* note 84, at 16794.

[429] *Id.* at 16795.

[430] Iati et al., *supra* note 425, at A12.

[431] *Id.*

[432] Edwards et al., *supra* note 84, at 16794 (graphing "[l]ifetime risk of being killed by police, per 100,000").

[433] *2021 Police Violence Report*, MAPPING POLICE VIOLENCE, https://policeviolencereport.org/ [https://perma.cc/KQ67-XZKK] (last visited Jan. 14, 2022).

[434] *Id.*

remained consistent for several years.[435] In 2017, police killed 1,147 people, and officers faced criminal charges in only thirteen of these cases, approximately "[o]ne percent of all killings by police."[436] This low rate of conviction follows similar trends in 2013 and 2015.[437]

During the War on Drugs, the United States became the most carceral nation in the whole of human history.[438] From 1980 to 2008, the number of incarcerated persons quadrupled from 500,000 to over 2.3 million.[439] Despite decades of lowering crime rates, the United States leads the world in incarceration; during the period from 1980 to 2008, the United States incarcerated 25% of the world's prisoners.[440] A disproportionate number of those prisoners were Black.[441] Blacks are more likely than whites to be arrested, indicted, convicted, and given higher sentences. Both black men and

[435] *National Trends*, MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/nationaltrends [https://perma.cc/MCA8-HSES] (last visited Jan. 14, 2022) (showing only a handful of convictions stemming from police killings over several years).

[436] *2017 Police Violence Report*, MAPPING POLICE VIOLENCE, https://policeviolencereport.org/2017/ [https://perma.cc/4FSE-MX7C] (last visited Jan. 14, 2022).

[437] *National Trends*, *supra* note 435.

[438] Cook, *supra* note 57, at 568.

[439] JENNIFER BRONSON & E. ANN CARSON, U.S. DOJ, PRISONERS IN 2017, at 3 (2019) (reporting 1,608,282 people confined in federal and state prisons in 2008); ZHEN ZENG, U.S. DOJ, JAIL INMATES IN 2017, at 2 (2019) (reporting 785,500 people held in jails on the last weekday in June 2008); U.S. DOJ, CORRECTIONAL POPULATIONS IN THE UNITED STATES 2 (1995) (showing 501,886 people in prison and jails in 1980).

[440] DRUG POL'Y ALL., THE DRUG WAR, MASS INCARCERATION AND RACE 1 (2018) ("With less than 5 percent of the world's population but nearly 25 percent of its incarcerated population, the United States imprisons more people than any other nation in the world . . . ." (citation omitted)). Between 1993 and 2019, FBI data indicated that violent crimes decreased by 49%. John Gramlich, *What the Data Says (and Doesn't Say) About Crime in the United States*, PEW RSCH. CTR. (Nov. 20, 2020), https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/ [https://perma.cc/425N-WW6Y]. U.S. Bureau of Justice Statistics data showed a decrease of 74% in the United States violent crime rate for the same period. *Id.* In 2018 alone, the violent crime rate fell by 3.9%. Jamiles Lartey & Weihua Li, *New FBI Data: Violent Crime Still Falling*, MARSHALL PROJECT (Sept. 30, 2019, 6:00 AM), https://www.themarshallproject.org/2019/09/30/new-fbi-data-violent-crime-still-falling [https://perma.cc/6M8V-XW8C].

[441] John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2020), https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/ [https://perma.cc/RH8X-S274] ("In 2018, black Americans represented 33% of the sentenced prison population, nearly triple their 12% share of the U.S. adult population.").

women are six times more likely to be incarcerated than white men and women and over twice as likely to be incarcerated as Latinx men and women.[442]

Empirical evidence demonstrates that rates of drug use among Black people are nearly identical to those of other races, particularly whites.[443] Yet while Blacks comprise 13% of the United States population, they account for 29% of drug arrests and 40% of imprisonments in state and federal facilities for drug violations.[444] As Paul Butler states, "African Americans are about 13 percent of people who do the crime, but about 60 percent of people who do the time."[445]

Like many police forces, LMPD selects its officers from white communities, not the Black and Brown neighborhoods they focus on.[446] In Louisville, Blacks make up 24% of the population but only 12.5% of the police force.[447] Of the force, 82% is white.[448] In the 2010s, Blacks accounted for just under 21% of the Louisville population but were involved in almost 50% of police incidents where force was used.[449] "Black drivers in Louisville are [60%] more likely to be stopped [than] white drivers."[450]

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[442] THE SENT'G PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 5 (2021), https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf [https://perma.cc/7FZ6-VQ9Q] (showing one in three Black men and one in eighteen Black women are likely to be imprisoned, as compared with one in seventeen white men and one in 111 white women, and with one in six Latinx men and one in forty-five Latinx women).

[443] *E.g.*, NAT'L INST. ON DRUG ABUSE, NAT'L INSTS. OF HEALTH, U.S. DEP'T OF HEALTH & HUM. SERVS., DRUG USE AMONG RACIAL/ETHNIC MINORITIES 33-34 (rev. Sept. 2003), https://archives.drugabuse.gov/sites/default/files/minorities03_1.pdf [https://perma.cc/N25X-FRLU].

[444] DRUG POL'Y ALL., *supra* note 440, at 1.

[445] BUTLER, *supra* note 54, at 122.

[446] *See* Cooper, *supra* note 355, at 1497-98 ("The police are primarily drawn from white communities, not the black and brown neighborhoods that they concentrate upon."); *see also* Lauren Leatherby & Richard A. Oppel Jr., *As Communities Diversify, Police Don't Keep Pace*, N.Y. TIMES, Oct. 1, 2020, at A16 ("[N]ew federal data show that rank-and-file officers in hundreds of police departments are considerably more white than the communities they serve."); U.S. COMM'N ON C.R., REVISITING *WHO IS GUARDING THE GUARDIANS?*: A REPORT ON POLICE PRACTICES AND CIVIL RIGHTS IN AMERICA 7-9 (2000) (noting that lack of diversity in police departments hampers ability of police departments to gain respect among communities and increases likelihood of tension and violence).

[447] Will Wright, *Breonna Taylor's Legacy Is Felt in a Year of Surging Activism*, N.Y. TIMES, Mar. 14, 2021, at A23.

[448] LOUISVILLE METRO POLICE DEP'T, LMPD DEMOGRAPHICS REPORT 1 (2021), https://louisville-police.org/Archive/ViewFile/Item/110 [https://perma.cc/UTD4-6RAG].

[449] Shaquille Lord, *'Been Saying This for a Long Time': LMPD Review Says Black Residents Treated 'Disproportionately,'* WLKY (Jan. 29, 2021, 11:09 PM), https://www.wlky.com/article/been-saying-this-for-a-long-time-lmpd-review-says-black-residents-treated-disproportionately/35369385 [https://perma.cc/YN3E-JGD3].

[450] *Id.*

The evidence of racial bias in policing is profound.[451] Numerous studies have documented the ubiquity of racial profiling in policing.[452] Legal scholars

[451] Radley Balko, Opinion, *There's Overwhelming Evidence that the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof ("[T]he evidence of racial bias in our criminal justice system isn't just convincing—it's overwhelming."). Police membership in white supremacist organizations has been well documented. *See, e.g.*, Mariel Padilla, *Police Officer Is Fired After K.K.K. Application Is Found in His House*, N.Y. TIMES, Sept. 15, 2019, at A22 (reporting that the officer's activity came to light only because of a tour by a realtor and that the officer had previously shot and killed an unarmed black man); Angela Helm, *Color Me Shocked: 2 Virginia Police Officers Fired for Ties to White Supremacist Orgs*, ROOT (Apr. 22, 2019, 10:30 AM), https://www.theroot.com/color-me-shocked-2-virginia-police-officers-fired-for-1834211339 [https://perma.cc/5XPJ-AW8Y] (reporting that two terminated officers were from separate departments and were affiliated with separate white supremacist organizations); Katie Shepherd, *Clark County Sheriff Deputy Fired After Wearing a Proud Boys Sweatshirt*, WILLAMETTE WEEK (July 20, 2018, 11:47 AM), https://www.wweek.com/news/courts/2018/07/20/clark-county-sheriff-deputy-fired-after-wearing-a-proud-boys-sweatshirt/ [https://perma.cc/CG7M-S4UE] (reporting that media unsurfaced a photograph of the officer, who promoted Proud Boy merchandise on social media); Michael Winter, *KKK Membership Sinks 2 Florida Cops*, USA TODAY (July 14, 2014, 6:23 PM), https://www.usatoday.com/story/news/nation/2014/07/14/florid-police-kkk/12645555/ (stating that two officers, one of whom was deputy police chief, were fired after the FBI exposed their membership in Ku Klux Klan); Peter Horton, *House Panel Examines White Supremacy in Law Enforcement*, JURIST (Oct. 1, 2020, 8:01 AM), https://www.jurist.org/news/2020/10/house-panel-examines-white-supremacy-in-law-enforcement/ [https://perma.cc/XT5L-ABVM] ("Vida Johnson, a professor at Georgetown University Law Center, gave testimony about her 2019 law review article . . . in which she compiled '178 instances of explicit racial bias by the members of the police in 48 states,' which she called 'just the tip of the iceberg.'" (quoting *Confronting Violent White Supremacy (Part IV): White Supremacy in Blue—the Infiltration of Local Police Departments: Hearing Before the H. Subcomm. on C.R. & C.L.*, 116th Cong. (2020) (statement of Vida B. Johnson, Professor, Georgetown L. Sch.)) (citing Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205 (2019))); *see also* Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457, 1461-62 (2018) (discussing instances of endemic racism in police departments and disparate treatment of Black Americans); Johnson, *supra*, at 210 (observing that over 100 scandals involving racist statements by police have emerged in over forty-nine states).

[452] Balko, *supra* note 451 (providing extensive list of incidents and evidence of widespread profiling in police departments across the country); BUTLER, *supra* note 54, at 52-53, 59-61 (providing statistics demonstrating racial profiling and arguing that Supreme Court precedent has afforded police the "super power to racially profile"); John Eligon, *There Were Changes, but for Black Drivers Life Is Much the Same*, N.Y. TIMES, Aug. 7, 2019, at A18 (describing how black drivers continue to be stopped at far higher rates than white drivers and noting that this disparity has actually grown in Ferguson, Missouri, despite recent changes to laws); Roberts, *supra* note 54, at 24-25 ("Numerous studies conducted throughout the nation demonstrate that police engage in rampant racial profiling.").

have traced how policing and the prison-industrial complex function as instruments of racialized social control and have done so since enslavement.[453] Police violence in marginalized communities is standard.[454] Being killed by police is a leading cause of death among young men of color.[455] As another example of documented structural racism in policing, five years after Darren Wilson killed Michael Brown in Ferguson, Missouri, police continue to stop black motorists "at much higher rates than white drivers,"[456] a racial disparity that has grown in Ferguson despite reforms, including a state law that "greatly reduced the number of traffic tickets, fines and arrest warrants issued."[457] Across the state, black motorists are still "nearly twice as likely as other motorists to be stopped" despite the attempt to reform policing through legislation.[458] "White drivers were stopped 6 percent less than would be expected" based on their share of the driving-age population.[459] In Ferguson, the number of black drivers who are stopped "has increased by five percentage points since 2013, while it has dropped by 11 percentage points for white drivers."[460]

Officers have openly publicized their racist viewpoints on numerous occasions on social media and have been caught making racist statements while on duty. In June 2021, a Warren, Michigan, police officer commented on Facebook, "Glad I wasn't born bl&@k. I would kill myself!"[461] In June 2020, three Wilmington, North Carolina, officers were caught on film making derogatory statements during a routine audit of an in-car camera.[462] On the recording, Officer Kevin Piner stated, "We are just gonna go out and start slaughtering them f——— N-words. I can't wait. God, I can't wait."[463] Two

[453] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 16-17 (rev. ed. 2012); BUTLER, *supra* note 54, at 52-53, 59-61; Roberts, *supra* note 54, at 24.

[454] Roberts, *supra* note 54, at 25.

[455] Edwards et al., *supra* note 84, at 16794.

[456] Eligon, *supra* note 452.

[457] *Id.*; *see* Act of July 9, 2015, S.B. 5, 2015 Mo. Laws 453 (modifying "distribution of traffic fines and court costs collected by municipal courts").

[458] Eligon, *supra* note 452.

[459] *Id.*

[460] *Id.*

[461] Frank Witsil, *Warren Police Investigating Officer Accused of Posting Racist Comments on Facebook*, DET. FREE PRESS (June 15, 2021, 4:58 PM), https://www.freep.com/story/news/2021/06/15/warren-police-racist-facebook-posts/7700854002/ [https://perma.cc/4JFM-4FQ7].

[462] Janelle Griffith & Dennis Romero, *Cops Fired over Violent, Racist Talk About Black People: We Are Going to 'Start Slaughtering Them,'* NBC NEWS (June 25, 2020, 12:28 PM), https://www.nbcnews.com/news/us-news/cops-fired-over-violent-racist-talk-about-black-people-we-n1232072 [https://perma.cc/87E9-YEP6].

[463] *Id.*

other officers chimed in with similarly shocking statements.[464] Another officer in Hamilton, Georgia, was caught using racial slurs and discussing his views on slavery on his body camera in January 2021.[465]

B. *Spectacle and Cultural Trauma*

The killing of Breonna Taylor was a spectacle that inflicted a cultural trauma on the public generally and on subaltern and marginalized communities particularly.[466] Because Taylor's killing inflicted public trauma, it demands a public reckoning: an answer to the national outcry against state-sanctioned racialized violence with impunity. Taylor's killing fits into a larger narrative about the historical use of policing to inflict humiliation, premature death, and racialized state-sanctioned terror on Blacks, perceived as dangerous, suspicious, and desperately in need of taming.[467] The failure to hold Taylor's killers accountable achieved the same task as her killing—the vilification of the victim, the over-valorization or hyper-valorization of her assailants, and the reassurance of white entitlement, "preeminence, vindication, safety, and security."[468] The unyielding narratives of innocence that cling to white bodies and the ceaseless demonization of Black bodies far outweigh any long-term commitment to systemic change, preferring instead symbolic feel-good gestures to assuage a guilty or pricked consciousness, but do absolutely nothing to exact material change or redistribute power.

Joy James argues that in the United States, white supremacy and racial tyranny rely on public spectacles involving black bodies such as mob violence, lynchings, and torture.[469] Lynchings and police shootings are rituals meant to

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[464] *Id.*

[465] *Cops' Racist Conversation Caught on Bodycam Video*, ABC NEWS, at 0:00-0:08, 1:28-1:44 (Jan. 30, 2021), https://abcnews.go.com/US/video/cops-racist-conversation-caught-bodycam-video-75584121 [https://perma.cc/756V-CLDJ].

[466] *See* Jefferson-Bullock & Jefferson Exum, *supra* note 54, at 636 ("U.S. policing, with its focus on racial profiling and racially biased enforcement strategies, regularly inflicts trauma on Black people and 'undermines effective policing.'" (quoting William M. Carter, Jr., *A Thirteenth Amendment Framework for Combatting Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 24 (2004))); Inger Burnett-Zeigler, *How the Breonna Taylor Decision Traumatizes Black Women*, CHI. TRIB., Oct. 5, 2020, at 17.

[467] *See generally* SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS (2015) (tracing historical connections between development of surveillance practices and the oppression of Black Americans); Carbado, *supra* note 24, at 129 (discussing how, empowered by misguided interpretations of Fourth Amendment, police disproportionately interact with Black people, exposing them "not only to the violence of ongoing police surveillance and contact[, and social control,] but also to the violence of serious bodily injury and death"); Edwards et al., *supra* note 84, at 16793 (finding that Black men and women, as well as other racial minorities, "face higher lifetime risk of being killed by police than do their white peers").

[468] *See* Cook, *supra* note 57, at 568.

[469] *See* JOY JAMES, RESISTING STATE VIOLENCE: RADICALISM, GENDER, AND RACE IN U.S. CULTURE 24 (1996).

perfect the ability of those who have power to humiliate, torture, taunt, threaten, or otherwise oppress in order to gratify the assailant's pathological need for preeminence and security.[470] Elsewhere, I have written about how "[l]ynchings, gang rapes, police shootings, sex trafficking, and the half-hearted adjudications of these cases are all rituals of spectacle: [t]hey [instruct] the viewer to acknowledge and respect the perpetrator's entitlement and authority to inflict pain" and humiliation.[471]

The impulse toward spectacle is not limited to the ritual of lynchings. It is embedded in both policy and legal doctrine. All the unspoken yet shared convictions about who is dangerous, suspicious, and in need of taming become normative principles around which doctrine is created and ordered. As an example, Kate Levine argues that *Miranda v. Arizona*[472] favors the guilty and the sophisticated rich and disfavors the innocent and the unsophisticated poor.[473] Similarly, police shootings dramatize the absence of process for Black victims and the abundance of process for their white assailants. The contrasting consequences the Black Lives Matter protestors and the Capitol insurrectionists faced brings this point into sharp relief. The former were immediately arrested, charged, and convicted while many of the latter were free and uncharged seven months after the event.[474]

Court opinions skew in favor of greater police discretion, control, and power over the subaltern.[475] This facilitates increased police encounters that end in death, destruction, and injury.[476] Policies reflect the willingness of police to

[470] *See id.* at 24-33.

[471] Blanche Bong Cook, *Stop Traffic: Using Expert Witnesses to Disrupt Intersectional Vulnerability in Sex Trafficking Prosecutions*, 24 BERKELEY J. CRIM. L. 147, 153 (2019).

[472] 384 U.S. 436 (1966).

[473] Levine, *supra* note 55, at 1214-20.

[474] Rachel Chason & Samantha Schmidt, *Lafayette Square, Capitol Rallies Met Starkly Different Policing Responses*, WASH. POST (Jan. 14, 2021), https://www.washingtonpost.com/dc-md-va/interactive/2021/blm-protest-capitol-riot-police-comparison/ (comparing how overwhelmingly white, violent insurrectionists who stormed seat of American government faced paltry resistance from Capitol Police officers, while a racially diverse group of peaceful protestors rallying in Lafayette Square were abruptly assaulted with chemical agents, batons, and rubber bullets by phalanx of federal forces and soldiers).

[475] *See, e.g.*, Graham v. Connor, 490 U.S. 386, 396-97 (1989) (giving great deference to officers determining what actions are reasonable when interacting with the subaltern).

[476] *See* Carbado, *supra* note 24, at 149.

accept a few (Black) casualties as the cost of doing business, particularly when police are protecting the "thin blue line."[477]

Angela Onwuachi-Willig argues that the systemic killing of Black people subjects the public, particularly subalterns, to a cultural trauma "that leaves indelible marks upon their group consciousness, marking their memories forever and changing their future identity in fundamental and irrevocable ways."[478] Drawing on the work of Kai Erikson, Onwuachi-Willig argues that the murder of George Floyd inflicted a psychological trauma on the collective psyche of traumatized people of such brutal magnitude that it ruptured their ability to react effectively and left them in the state of a damaged social organism.[479] Repeated exposure to cultural trauma can impact the actual structure of DNA, "adding a potential biological link to the mix,"[480] such that cultural trauma "come[s] to reside in the flesh [of Black people] as forms of memory reactivated and articulated at moments of collective spectatorship."[481] Jalila Jefferson-Bullock and Jelani Jefferson Exum argue that "[d]ue to the United States' burdensome and overwhelming history of discrimination against minority groups, communities of color often experience shared trauma, transmitted collectively and intergenerationally over time. This is especially true for Black people in the United States, who endure routine, systemic oppression and 'chronic exposure to racism' daily."[482] Onwuachi-Willig also argues that the fundamental injury the murder of George Floyd inflicted necessitates "a narrative about a horribly destructive social process, and a

[477] Using racial threat theory, Jalila Jefferson-Bullock and Jelani Jefferson Exum demonstrate how "[l]ocal increases in racial minority populations are thought to pose threats to the political standing, economic power, and physical safety of white citizens, who respond by lobbying local government for increased social control." Jefferson-Bullock & Jefferson Exum, *supra* note 54, at 633 (alteration in original) (quoting Robert Vargas & Philip McHarris, *Race and State in City Police Spending Growth: 1980 to 2010*, 3 SOCIO. RACE & ETHNICITY 96, 96 (2017)).

[478] *See* Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOUS. L. REV. 817, 825 (2021) (quoting Jeffrey C. Alexander, *Toward a Theory of Cultural Trauma*, *in* CULTURAL TRAUMA AND COLLECTIVE IDENTITY 1 (2004)).

[479] *See id.* at 828 (quoting Kai Erikson, *Notes on Trauma and Community*, 48 AM. IMAGO 455, 460-61 (1991)); Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOCIO. THEORY 335, 336-38 (2016) (quoting Erikson, *supra*, at 460-61).

[480] Kindaka J. Sanders, *Defending the Spirit: The Right to Self-Defense Against Psychological Assault*, 19 NEV. L.J. 227, 244 (2018).

[481] *See* Onwuachi-Willig, *supra* note 479, at 335-36 (quoting Elizabeth Alexander, *"Can You Be BLACK and Look at This?": Reading the Rodney King Video(s)*, 7 PUB. CULTURE 77, 80 (1994)).

[482] Jefferson-Bullock & Jefferson Exum, *supra* note 54, at 637 (quoting Nicole Tuchinda, *The Imperative for Trauma-Responsive Special Education*, 95 N.Y.U. L. REV. 766, 796 (2020)).

demand for emotional, institutional, and symbolic reparation and reconstitution."[483]

The state-sanctioned murders of Black people are a threat to Black existence that will not be tolerated. Far from accepting Black death as the necessary cost of doing business, protestors are clear that if the police cannot do their jobs free of white supremacy, then the police must be dismantled and reconstituted to ensure equitable safety and security. Similarly, many scholars have argued that because white supremacy is so pervasive among police, the only alternative is abolition or at a minimum defunding.[484]

The cost-of-doing-business argument reflects a malodourous cost-benefit analysis that contrasts sharply with "society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice."[485] Police killings of Black people destroy any semblance of impartiality and erode beliefs that the legal system works in the interest of protection, fairness, and justice.[486] Failure to hold police accountable widens the increasing chasm between marginalized communities and law enforcement (including prosecutors). It renders the criminal legal process opaque, invisible, and skewed against the interests of vulnerable communities. Grossly unequal distributions of process will ultimately lead to its demise as the clarion calls for abolition grow ever louder and more

[483] *See* Onwuachi-Willig *supra* note 478, at 828-29 (quoting Alexander, *supra* note 478, at 11).

[484] *See, e.g.*, BUTLER, *supra* note 54, at 6 ("Police violence and selective enforcement are not so much flaws in American criminal justice as they are integral features of it."); *see also* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1839-45 (2020) ("Once we understand policing and incarceration to be an embodiment of the structural and racialized ordering at the heart of our system of laws, we must understand decarceration and depolicing as central to larger social justice struggles."); Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. DISCOURSE 200, 202 (2020) (finding that police power in United States today protects racial hierarchies embedded in Constitution); Alexis Hoag, *Abolition as the Solution: Redress for Victims of Excessive Police Force*, 48 FORDHAM URB. L.J. 721, 737 (2021) (acknowledging that "the current social order depends on policing, prosecution, and prisons to perpetuate racial and economic inequality"); Jefferson-Bullock & Jefferson Exum, *supra* note 54, at 628 ("Regardless of the ultimate design, the fundamental idea behind defunding the police is that the United States' system of policing is systemically racist and eradicating that racism requires dismantling."); Roberts, *supra* note 54, at 117-18 (lauding Chicago City Council in 2015 for refusing to seek criminal prosecution for officers involved in systemic violence against Black suspects in effort to suspend the cycle of prison-related punishment in the city and instead using alternative means to redress victims).

[485] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973).

[486] *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1386-87 (2003) (suggesting that law does not always seek truth as its foremost priority, thus diminishing public's perception of legal system).

certain.[487] Unpunished police criminality threatens to upend the criminal legal process and solidifies the call for abolition, leaving many to ask, "Why are we following the law when the police don't?" or, "Why should we follow the law when the police murder with impunity?"

The cultural trauma inflicted on Black people necessitates accountability from the police, elected officials, and judges. At a minimum, in the Taylor case, there must be a public vetting of the flawed affidavit and the execution of the warrant in an adversarial setting where law enforcement does not monopolize the facts and the narratives surrounding the facts.

VI. RESPONDING TO PUBLIC OUTCRY: SOLUTIONS TO POLICING PROBLEMS

Taylor's death exposed systemic problems in policing, including lying in search warrant affidavits, the lack of judicial oversight in the warrant issuing process, the assembly-line processing of warrants that is the legacy of the War on Drugs, and the fatal dangerousness of dynamic entries. All of these are disproportionately inflicted on persons of color. The deaths of Michael Brown, Tamir Rice, Eric Garner, and countless others have solidified the reality of the Black absurdist nightmare where merely being alive carries the risk of death at the hands of police who see their own actions as a contribution to law and order and as integral to preserving the thin blue line between civilization and

[487] *See generally* Akbar, *supra* note 484 (viewing abolition as necessary and effective police reform); V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453 (2019) (discussing society's evolution away from the need for police).

the jungle.[488] In these killings, Black victims are vilified, whiteness is valorized, and the apex position of white heteropatriarchy is vindicated. Systemic harms require systemic solutions. Structural harms require structural solutions. It is beyond the scope of this Article to reconcile the calls for abolition or a radical reconstituting of the police. This Part, however, lists several potential remedies that specifically address the problems with the acquisition and execution of the search warrant in Breonna Taylor's case.

A. *Create Multiple Layers of Independent Review of Police Conduct*

When I was a federal prosecutor, it was standard procedure for federal agents to present search warrant applications for my review before proceeding to the magistrate. After my review, my supervisor, a veteran prosecutor with forty years of experience, reviewed the warrant application again. This all happened after a frontline supervisor met with a multidisciplinary team of law enforcement to decide if the case was acceptable for federal prosecution. After that, the case was presented to a frontline prosecutor; that prosecutor prepared a prosecution memorandum, which highlighted any problems with suppression

[488] BUTLER, *supra* note 54, at 25 ("A surprisingly large number of Americans don't actually think of blacks as human beings. They think of us as apes, to be exact."); Frank Rudy Cooper, *Cop Fragility and Blue Lives Matter*, 2020 U. ILL. L. REV. 621, 634-35 (arguing that police believe themselves to be the "thin blue line" holding back barbarian hordes); Cooper, *supra* note 355, at 1497 ("The obvious implication of the thin blue line narrative is that law enforcement serves the function of separating black and brown people from whites."); *see also* JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA 6 (2015) (noting that Black men are most common victims of homicides); Joseph Serna, *More Racist Text Messages Uncovered Among San Francisco Police Officers*, L.A. TIMES (Apr. 27, 2016, 10:55 AM), https://www.latimes.com/local/lanow/la-me-ln-sfpd-racist-text-messages-20160426-story.html [https://perma.cc/JY7T-8AKH] (noting that Los Angeles police officers referred to Black people using the N-word, Latinx people as "beaners," and people of Middle Eastern descent as "rag heads"); John Del Signore, *NYPD Captain Routinely Called Black Suspects "Animals," Discrimination Lawsuit Alleges*, GOTHAMIST (Apr. 16, 2012, 6:35 PM), https://gothamist.com/news/nypd-captain-routinely-called-black-suspects-animals-discrimination-lawsuit-alleges [https://perma.cc/QAL5-LDH8]; Damali Keith, *Several Complaints of Racially Insensitive Posts by Houston Police Officers*, FOX 26 HOUS. (June 30, 2020), https://www.fox26houston.com/news/several-complaints-of-racially-insensitive-posts-by-houston-police-officers [https://perma.cc/W3ZW-EYP3]; Brian X. McCrone, *Police Union President Calls Black Lives Matter Protesters Outside Philadelphia Officer's House 'A Pack of Rabid Animals*,*'* NBC 10 PHILA. (Sept. 1, 2017, 11:29 AM), https://www.nbcphiladelphia.com/news/local/police-union-president-calls-black-lives-matter-protesters-outside-philadelphia-officers-house-a-pack-of-rabid-animals-report/26796/ [https://perma.cc/H6GJ-4NKF]. Officer Darren Wilson, who killed Michael Brown in Ferguson, Missouri, described Brown in nonhuman terms. *Darren Wilson: 'I Felt Like a 5-Year-Old Holding onto Hulk Hogan*,*'* CBS NEWS (Nov. 25, 2014, 11:01 AM), https://www.cbsnews.com/news/ferguson-decision-darren-wilson-said-he-felt-like-a-5-year-old-holding-onto-hulk-hogan/ [https://perma.cc/QGU7-23UT]. Wilson described Brown to a grand jury as "it," saying, "The only way I can describe it, it looks like a demon, that's how angry he looked." *Id.* Of his physical altercation with Brown, Wilson said, "I felt like a five-year-old holding on to Hulk Hogan . . . ." *Id.*

issues, problems of proof, and constitutional violations; and the prosecution memo moved up the hierarchy to a supervisor, a department head, and eventually, the United States Attorney for final approval. Local prosecutors and police could greatly benefit from a similar multilayered review process. Multiple layers of review screen for negligent surveillance, investigation, and verification. Multiple layers of review, particularly from experienced eyes that can detect constitutional violations, callousness, and suspicious evidence gathering, protects the public from police excess. Ideally, the review process should include someone invested in the integrity of the prosecutor's office who is removed from the competitive enterprise of ferreting out crime. Someone in the chain of command who reviews the warrant application should be accountable to the electorate and for providing much-needed transparency. Prosecutors bring familiarity with Fourth Amendment standards, which are often confusing and convoluted, and attention to privacy concerns. Moreover, prosecutors are held to professional responsibility standards that add another layer of accountability in the search warrant process. Given the increase of political activism surrounding police excess and increased public scrutiny, police and prosecutors should make data about police excess available for public review. The combination of transparency and multiple layers of search warrant review would significantly reduce the incidences of overzealousness that lead to death and injury.[489]

State attorneys general can also form search warrant review boards that would collect random samplings of search warrants, review them for compliance, and compare them to the data discussed in Section III.D of this Part to further ensure equity in surveillance, prosecutions, and convictions. The review board should include police, police chiefs, prosecutors, defense attorneys, academics, scholars, judges, legislators, and representatives of governmental bodies.[490] Such review boards would act as a necessary check on judges, whose election chances are often shaped by police unions.[491]

Reform-minded prosecutors and police chiefs have taken some steps in this direction. The top prosecutor in St. Louis, Kim Gardner, has stopped accepting new cases or search warrant applications from officers with a history of

[489] *Cf.* Balko, *supra* note 5 (noting Judge "Shaw took only 12 minutes to review the five warrants in the investigation" that were filled with lies).

[490] *E.g.*, Mark Maynard, *Task Force Panel on Search Warrants Meets for First Time*, SENTINEL ECHO (May 28, 2021), https://www.sentinel-echo.com/news/task-force-panel-on-search-warrants-meets-for-first-time/article_9bd21c04-bf3d-11eb-81c8-d7926118b166.html.

[491] Alex V. Hernandez, *The Judges Cops Want: These Candidates Have Been Endorsed by Chicago's Police Union*, IN THESE TIMES (Mar. 19, 2018), https://inthesetimes.com/article/chicago-police-union-fop-judicial-candidates-prosecutors-states-attorney [https://perma.cc/U545-CFFG] (reporting that many police union judicial endorsements "are for career prosecutors who largely side with police"); Noam Scheiber, Farah Stockman & J. David Goodman, *Fierce Protectors of Police Impede Efforts at Reform*, N.Y. TIMES, June 7, 2020, at A1.

misconduct or lying.[492] "In Philadelphia and Seattle, prosecutors are creating similar 'do not call' lists."[493] Chris Magnus, the police chief in Tucson, Arizona, has stated, "If I had my way, officers who lie wouldn't just be put on a list, they'd be fired, and also not allowed to work in any other jurisdiction as a police officer ever again."[494] Often, however, police-union contracts prevent termination of officers with a record of brutality and dishonesty.[495]

B. *Apply the Exclusionary Rule to Unconstitutional Warrants*

The exclusionary rule, which bars constitutionally violative evidence from trial, does not apply when police violate the knock-and-announce rule and when material falsehoods in search warrant affidavits cannot be connected to deliberate police misconduct.[496] Taylor's case vividly illustrates what can go wrong when police have little incentive to adhere to constitutional requirements when obtaining and executing search warrants. The absence of the exclusionary rule incentivizes officers to violate the knock-and-announce precautions and to engage in negligent conduct in both the acquisition and execution of search warrants. Any proposed solution to Taylor's massacre should reexamine the application of the exclusionary rule to constitutionally violative conduct and should lower the threshold of evidence necessary to demonstrate a breach of Fourth Amendment protections. It is imperative that evidence obtained through materially false statements in warrants be rejected regardless of the applicant's mens rea.

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[492] Christine Byers & Joel Currier, *St. Louis Prosecutor Says She Will No Longer Accept Cases From 28 City Police Officers*, ST. LOUIS POST-DISPATCH (Aug. 31, 2018), https://www.stltoday.com/news/local/crime-and-courts/st-louis-prosecutor-says-she-will-no-longer-accept-cases-from-28-city-police-officers/article_6d8def16-d08d-5e9a-80ba-f5f5446b7b6a.html [https://perma.cc/Z8EW-6A6L].

[493] *See* David Leonhardt, *When the Police Lie*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/06/08/briefing/minneapolis-coronavirus-new-york-your-monday-briefing.html; Avery Anapol, *Philadelphia DA Moves to Create Database of 'Problem' Cops*, HILL (June 5, 2018, 3:34 PM), https://thehill.com/homenews/state-watch/390827-philadelphia-da-moves-to-create-database-of-problem-cops [https://perma.cc/2YZN-GX64]; Eli Hager & Justin George, *One Way to Deal with Cops Who Lie? Blacklist Them, Some DAs Say*, MARSHALL PROJECT (Jan. 17, 2019, 6:00 AM), https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say [https://perma.cc/J8RV-MX4B].

[494] Hager & George, *supra* note 493.

[495] Reade Levinson, *Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline*, REUTERS (Jan. 13, 2017, 1:18 PM), https://www.reuters.com/investigates/special-report/usa-police-unions/ [https://perma.cc/65UE-WJ94] (explaining results of examining eighty-two police union contracts, which showed pattern of "making it difficult to fire officers with a history of abuses"). *See generally* Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017) (outlining failure of external legal mechanisms in producing organizational police accountability).

[496] *See* Hudson v. Michigan, 547 U.S. 586, 598-99 (2006).

C. *Require Higher Justification for No-Knock Entry*

Where police insist on a no-knock entry, a separate supporting affidavit with an enhanced threshold of evidence should be required. It should specifically establish evidence of dangerousness, injury, and/or flight risk in detail against a greater standard of scrutiny, such as probable cause. A separate affidavit and a higher evidentiary burden would focus the analysis of both the affiant officer and the issuing magistrate on the evidence. The combination of a separate affidavit and a greater evidentiary burden, more stringent application of the exclusionary rule, and disciplinary action for falsehoods would incentivize a more rigorous investigation and thereby eliminate the series of falsehoods that led officers to Taylor's home. In Taylor's case, the warrant application justifying intrusion into her home was lumped together with five warrants for other people.[497] The requirement of an additional affidavit might have slowed down the assembly-line pace of the warrant acquisition and perhaps focused the attention of both the affiant and the magistrate.[498]

Similarly, Federal Rule of Criminal Procedure 41 requires search warrants be served in the daytime, generally between 6:00 a.m. and 10:00 p.m., absent a significant showing to execute outside that time frame.[499] Perhaps some of the confusion and resulting gun fire surrounding the execution of the warrant for Taylor's home would have been mitigated if it had occurred during the daytime, particularly with a loudspeaker announcing the presence of the police to execute a search warrant. Such practices might curtail the confusion and, therefore, violence.

D. *Collect Data on Dynamic Entries and Make It Available to the Public*

Reliable data on dynamic entries does not exist. There is no central repository for gathering such data. In explaining the reasoning behind the absence of data, one state senator remarked, "[The police] don't want to be held accountable."[500] As part of necessary reform efforts, the Department of Justice should mandate that every law enforcement agency collect data regarding forced entries. Data should include all of the following information regarding the execution of the warrant: the method used to execute the warrant; whether and what type of force was used, such as battering rams; any injuries; any property damage; the type of crime investigated; the number of arrests; the number of detentions; the evidence found; and demographic information about the target suspects, including their race, gender, and income. Such information

[497] Duvall & Tobin, supra note 73.

[498] *See* Balko, *supra* note 5 (suggesting preventative measures such as banning forced entry raids, holding judges accountable for signing unconstitutional warrants, demanding that police officers wear body cameras during raids, and ensuring officers are punished if they fail to activate their cameras).

[499] FED. R. CRIM. P. 41.

[500] Sack, *supra* note 26, at 17.

should be made available to the public for critique and research. Thoroughly delineated data would allow for much-needed analysis and scrutiny of how a person's race, gender, and class inform the distinctiveness of their experiences with police excess.[501]

One study found that from 2010 to 2016, dynamic entries resulted in at least eighty-one civilian and thirteen law enforcement deaths and the maiming or wounding of scores of others.[502] Half of the civilians who were killed were members of minority groups.[503] This death count did not include deaths caused by officers who are not SWAT team members during no-knock entries, like the raid that killed Taylor.[504] In a study the American Civil Liberties Union recently conducted in twenty cities, "42 percent of those subjected to SWAT search warrant raids were black and 12 percent [were] Hispanic."[505] "[F]rom 2010 to 2015, an average of least [thirty] federal civil rights lawsuits were filed [each] year to protest residential search warrants executed with dynamic entries."[506]

A comprehensive database of dynamic entries and police use of force generally that includes demographic information about targets would enable both law enforcement and the public to scrutinize when force is authorized and under what circumstances.[507] Comprehensive nationwide data regarding dynamic entries might be used to curtail unnecessary and unjustifiable uses of force.[508] This assessment would establish rates of death and injury that might

[501] *See* Cook, *supra* note 57, at 623 ("With respect to implicit bias screenings, measurements of bias are no more arbitrary than LSATs or standardized testing."). *See generally* AFR. AM. POL'Y F., SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (2015), https://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/5edc95fba357687217b08fb8/1591514635487/SHNReportJuly2015.pdf [https://perma.cc/E97G-TWAN] (explaining importance of racial analysis of police violence).

[502] Sack, *supra* note 26, at 16.

[503] *Id.*

[504] *See id.* at 1, 16 (specifying use of SWAT teams in these searches).

[505] *Id.* at 16.

[506] *Id.*

[507] *See* Cook, *supra* note 57, at 623 ("In order to hide, obfuscate, and legitimize its operations, white heteropatriarchy enlists the institutional power of the police and the courts."); Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sept. 8, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/. Lowery quotes D. Brian Burghart, editor and publisher of *Reno News & Review* and creator of Fatal Encounters:

> One of the government's major jobs is to protect us. How can it protect us if it doesn't know what the best practices are? If it doesn't know if one local department is killing people at a higher rate than others? When it can't make decisions based on real numbers to come up with best practices?

Id.

[508] Cook, *supra* note 57, at 617-18 (explaining that police data will likely show trends of racialized violence and may spark systematic reform).

provide a more accurate cost-benefit analysis that states and the federal government could use to draft legislation, particularly in the area of excessive use of force. Furthermore, this publicly accessible information might pressure law enforcement to adopt new policies that would lead to more thorough surveillance, investigation, and verification that might reduce both mistakes and the unnecessary use of force.[509]

E. *Use Independent Review Boards to Monitor Judges*

Taylor's death raises numerous questions concerning judicial oversight in the warrant issuing process. Should the Judicial Conduct Commission investigate Judge Mary Shaw? Would increasing search warrant scrutiny lead to the perception that some magistrates are "hard on search warrants"? Would police unions rally against the re-election of magistrates who require more exacting warrant evidence? If a judge were perceived as less generous toward warrants, would police engage in forum shopping to find a less exacting magistrate?[510] Would random assignment of issuing magistrates curtail forum shopping?

In partial answer to these structural problems in the warrant issuing process, an independent nonprofit, like the Judicial Conduct Commission, should study and make available judges' report cards that voters can take into the voting booth. The card should compile complaints, investigations, findings, and sanctions against judges on the ballot. Several entities have proposed methodologies for judicial evaluation, including the American Bar Association ("ABA").[511] The ABA guidelines recommend various criteria for evaluating judges, including integrity, impartiality, communication, temperament, and administrative capacity.[512] For federal judiciary nominees, the ABA provides a rating of the nominee to the Senate Judiciary Committee, the administration, and the public using the three criteria of integrity, professional competence, and judicial temperament.[513] An entity should compile this information in an easily understandable pamphlet that voters can take to the polls.

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[509] *Id.* at 617 ("This assessment would create a baseline number or rate, from which states and the federal government might devise legislation to address excessive use of force.").

[510] Jacob Ryan, *Louisville Police Change Warrant Form, Improve Transparency*, 89.3 WFPL (Nov. 11, 2020), https://wfpl.org/louisville-police-change-warrant-form-improve-transparency/ [https://perma.cc/WY7G-75E9] (discussing statement of Angela Rea, president of Kentucky Association of Criminal Defense Lawyers, where she noted that "being able to readily identify which judge signs a warrant can help dispel—or prove—any concern that police are 'forum shopping' when seeking a search warrant").

[511] *See generally* AM. BAR ASS'N, BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (2005) (establishing guidelines to evaluate judicial performance).

[512] *Id.* at 3-5.

[513] AM. BAR ASS'N, STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1 (2020).

The University of Denver and former Supreme Court Justice Sandra Day O'Connor have also developed the O'Connor Judicial Selection Plan, a method for evaluating judges.[514] The plan requires publicly accessible evaluations before judicial retention elections.[515] The evaluation standards include impartiality, judicial temperament, administrative skills, and public outreach.[516]

CONCLUSION

The search warrant for Breonna Taylor's home was illegal, directly calling into question the legality of police presence at her home in the first instance. The killing of Breonna Taylor, however, transcends narratives about bad-apple cops and aberrant magistrates. Taylor's killing was an example of systemic, structural, state-sanctioned violence. Her tragedy is the result of history, policing, and doctrine. *Hudson v. Michigan* opened the floodgates to increased incidences and degrees of police violence, hastening the militarization of policing and the tragedy of Breonna Taylor. The Supreme Court's sanguine faith in police officers' power of self-redemption and self-correction is of no comfort to the thousands police kill. Dynamic entries demand the Court's review.

Breonna Taylor's killing inflicted trauma on communities already gutted by unyielding police violence and exhausted by the criminal-industrial complex. This examination has probed both the illegality of the search warrant and the legality of the circumstances that led to Breonna Taylor's death. It suggests some bare minimum reform efforts that might address the public outcry for accountability. Deliberate policy decisions facilitated the killing of Breonna Taylor, and policy reforms can prevent the next Breonna Taylor.

We can ban dynamic entries except in the narrowest of circumstances. We can fashion legal doctrine that disincentivizes callous and reckless police cultures and that eliminates the unequal distribution of death among the precariat. We can hold judges accountable for rubber-stamping search warrants devoid of the required evidence. We can demand that police officers activate their body cameras to regulate their conduct through public scrutiny and critique. We can insist on swift and severe punishment when police fail to activate their cameras. We can collect much more data on how police conduct business and use it to educate the public and to exact better policy. We can do a lot more to avoid deaths like Breonna Taylor's, if that is what we desire to do.

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[514] *See generally* SANDRA DAY O'CONNOR & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., THE O'CONNOR JUDICIAL SELECTION PLAN (2014) (strategizing to protect the quality, integrity, and impartiality of the judiciary).

[515] *See id.* at 8 ("Judicial performance evaluation plays a crucial role in providing voters with objective and broad-based information about the judge's performance . . . .").

[516] *Id.* at 7.