

# REAL JUSTICE FOR BREONNA: RE-ENVISIONING KNOCK-AND-ANNOUNCE

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## I. INTRODUCTION

If there is one place where a person should feel safe it is in her home.<sup>1</sup> Under the law, our homes can be forever altered and even desecrated legally by the stroke of a pen on a search warrant. A search warrant is a court order that authorizes the police to search in a particular place. It is a powerful tool that allows “police to enter, to snoop, and sometimes destroy.”<sup>2</sup> Breonna Taylor and her family learned this the hard way.<sup>3</sup>

At least five bullets struck Breonna Taylor before she died in her home on March 13, 2020.<sup>4</sup> She was shot by police officers who were serving a search warrant.<sup>5</sup> After her death, an influx of protests and calls for “Justice

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1. See Craig Hemmens & Chris Mathias, *United States v. Banks: The “Knock-and-Announce” Rule Returns to the Supreme Court*, 41 IDAHO L. REV. 1, 4 (2004) (recognizing the common law concept of the home as one’s castle).

2. Njeri Rutledge & Geoffrey S. Corn, *Grand Jury Made Right Call in Breonna Taylor Case*, USA TODAY (Sept. 24, 2020, 5:12 PM), <https://www.usatoday.com/story/opinion/2020/09/24/breonna-taylor-grand-jury-indicted-one-officer-wanton-endangerment-column/3515532001/>.

3. See Richard A. Opiel, Jr. et al., *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Jan. 6, 2021), <http://www.nytimes.com/article/breonna-taylor-police.html>.

4. Christina Carrega & Sabina Ghebremedhin, *Timeline: Inside the Investigation of Breonna Taylor’s Killing and Its Aftermath*, ABC NEWS (Nov. 17, 2020, 11:31 AM), <https://abcnews.go.com/US/timeline-inside-investigation-breonna-taylors-killing-aftermath/story?id=71217247> (citing eight bullets killing Ms. Taylor); cf. Tessa Duvall & Darcy Costello, *Breonna Taylor Was Briefly Alive After Police Shot Her. But No One Tried to Treat Her*, COURIER J. (Jan. 29, 2021, 10:58 AM), <https://www.courier-journal.com/story/news/crime/2020/07/17/breonna-taylor-lay-untouched-20-minutes-after-being-shot-records/5389881002/> (citing five bullets killing Ms. Taylor).

5. Carrega & Ghebremedhin, *supra* note 4.

for Breonna” ensued.<sup>6</sup> Sadly, the public failed to realize Taylor’s senseless death was predictable given the current state of the law. In fact, instances of civilians—and even police officers—being killed during warrant executions have become more common.<sup>7</sup> In Taylor’s case, police officers were serving a no-knock search warrant, which gave them the lawful authority<sup>8</sup> to enter by force without knocking or warning.<sup>9</sup> The police have stated that, although they had a no-knock warrant, they did in fact knock-and-announce their presence before breaching the door to Ms. Taylor’s home.<sup>10</sup> For those in criminal justice, the only thing unique about Breonna Taylor’s tragic killing was the significant outcry it produced.<sup>11</sup> In response, the Louisville Metro Council in Kentucky passed Breonna’s Law, an ordinance banning no-knock

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6. Dylan Lovan, *Impatience Grows for Cops’ Arrests in Breonna Taylor’s Death*, AP NEWS (June 25, 2020), <https://apnews.com/article/bb0b2c8e4e10b35421fd70f5fc5fb9c6>.

7. For example, Alberto Sepulveda, an eleven-year-old child, was killed during a drug-related warrant execution, though no drugs were found. Associated Press, *SWAT Officer Cleared in Fatal Shooting of Boy, 11, During Modesto Raid*, L.A. TIMES (Feb. 23, 2001, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2001-feb-23-mn-29219-story.html>; see also Amanda M. Yeaples-Coleman, Comment, *Reviving the Knock and Announce Rule and Constructively Abolishing No-Knock Entries by Giving the People a Ground They Can Stand on*, 37 DAYTON L. REV. 381, 390-91 (2012). A suspect, Guy, awaits his trial for capital murder and other related charges over six years after he shot and killed SWAT team officer Charles Dinwiddie. The officers shattered Guy’s bedroom window in the middle of the night during a drug-related warrant execution that produced only “approximately one gram” of drugs. Kevin Sack, *Murder or Self-Defense if Officer Is Killed in Raid*, N.Y. TIMES (Mar. 18, 2017), <https://www.nytimes.com/interactive/2017/03/18/us/texas-no-knock-warrant-drugs.html>; see also Radley Balko, *No Drugs Found in Raid that Claimed the Life of Texas Police Officer*, WASH. POST (May 16, 2014, 9:13 AM), <https://www.washingtonpost.com/news/the-watch/wp/2014/05/16/no-drugs-found-in-raid-that-claimed-the-life-of-texas-police-officer/>; Emily Hilley-Sierzchula, *Six Years Pass Since KPD Detective’s Death, Capital Murder Case Remains in Limbo*, KILLEEN DAILY HERALD (May 11, 2020), [https://kdhnews.com/news/crime/six-years-pass-since-kpd-detective-s-death-capital-murder-case-remains-in-limbo/article\\_1753a966-93b5-11ea-94bb-8f4b8df4b569.html](https://kdhnews.com/news/crime/six-years-pass-since-kpd-detective-s-death-capital-murder-case-remains-in-limbo/article_1753a966-93b5-11ea-94bb-8f4b8df4b569.html). Todd Blair was shot within seconds of police entering while holding a golf club to defend himself during the execution of a no-knock warrant in a drug investigation. No drugs were found. Erin Alberty, *Police Video Shows How Drug Raid Turned Deadly*, SALT LAKE TRIB. (Dec. 24, 2010, 6:54 AM), <https://archive.sltrib.com/article.php?id=50932722&itype=cmsid>.

8. Lawful authority presumes that the information available to the public is accurate. Misleading information regarding the investigation and the grand jury makes that an open question. It is also questionable whether the warrant for Breonna Taylor should have ever been signed. Nonetheless, a warrant was signed by a judge. A related issue is the care judges must take in reviewing search warrants, but such a discussion is outside the scope of this article.

9. Rutledge & Corn, *supra* note 2.

10. Oppel, Jr. et al., *supra* note 3.

11. See, e.g., Lovan, *supra* note 6.

warrants.<sup>12</sup> Similar proposals have been introduced in other municipalities, state legislatures, and Congress.<sup>13</sup>

While banning no-knock warrants may seem like a logical response, I contend the tragedy of Breonna Taylor's story would not have been avoided by the judge's signing a traditional search warrant that required knocking and announcing. In fact, the officers involved claim they did not execute the warrant as a no-knock.<sup>14</sup> Ultimately, the distinction between a no-knock warrant and a traditional knock-and-announce warrant is becoming more academic. True, justice for Breonna Taylor and other Americans involves reexamining Fourth Amendment jurisprudence and the legitimate interests of the public in light of the militarization of police.

The current state of the law gives the police significant authority to forcibly enter a person's home without knocking whether the police have a no-knock warrant or not.<sup>15</sup> The exceptions and deference the court gives to police officers in the name of officer safety and evidence preservation swallowed the knock-and-announce rule while damaging individual liberties.

In this article, I contend that the distinction between a traditional search warrant and a no-knock warrant is purely academic. In practice, both warrants possess the capacity to lead to disastrous results. In Part II, I define traditional knock-and-announce search warrants and no-knock warrants by examining the historical development of each and the policy reasons for their adoption. I explain why the distinction between knock-and-announce and no-knock warrants is largely academic; consequently, targeting no-knock warrants to end botched warrant executions will be ineffectual. In Part III, I address how the War on Drugs and militarization of the police has led to excessive police deference from the courts. In Part IV, I propose solutions that could have helped prevent the tragedy of Breonna Taylor and so many others.

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12. LOUISVILLE COUNTY, KY., METRO CODE ORDINANCE § 39.176 (2020).

13. Ray Sanchez, *Laws Ending No-Knock Warrants After Breonna Taylor's Death Are 'A Big Deal' but Not Enough*, CNN (Oct. 10, 2020, 6:03 AM), <https://www.cnn.com/2020/10/10/us/no-knock-warrant-bans-breonna-taylor/index.html>.

14. Oppel, Jr. et al., *supra* note 3.

15. *See* discussion *infra* Part II.

## II. SEARCH WARRANTS

### A. *The Knock-and-Announce Rule*

Typically, police must obtain a search warrant to search one's home.<sup>16</sup> Most search warrants are based on the concept of knock-and-announce or the announcement rule.<sup>17</sup> The knock-and-announce rule actually predates the Constitution, and some states adopted it before the United States adopted the Constitution.<sup>18</sup> Knock-and-announce refers to the requirement that police must knock-and-announce their presence and wait a reasonable time before entering.<sup>19</sup> While most individuals and officers understand the knocking and announcing aspect, it is the waiting aspect that police officials frequently ignore.

In *Wilson v. Arkansas*, the Supreme Court held that the knock-and-announce rule was embedded in the Fourth Amendment.<sup>20</sup> The Court decided the reasonableness of a search depended on the manner of entry; consequently, knocking and announcing was considered part of the Reasonableness Clause of the Amendment.<sup>21</sup> There are several policy reasons in support of the knock-and-announce rule, but one of the most important reasons is the right of privacy.<sup>22</sup>

In *Hudson v. Michigan*, the Supreme Court noted, “[T]he knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance.”<sup>23</sup> Knock-and-announce also protects the safety of the stakeholders involved in a warrant execution. First, it protects the officer who may be mistaken for an intruder and attacked in self-

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16. U.S. CONST. amend. IV. The Fourth Amendment provides the basis for lawful arrests and searches. It states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” *Id.*

17. See Brian Dolan, Note, *To Knock or Not to Knock? No-Knock Warrants and Confrontational Policing*, 93 ST. JOHN'S L. REV. 201, 206 (2019).

18. See Robin L. Gentry, Note, *Why Knock? The Door Will Inevitably Open: An Analysis of People v. Stevens and the Michigan Supreme Court's Departure from Fourth Amendment Protection*, 46 WAYNE L. REV. 1659, 1661-62 & n.19 (2000).

19. See Dolan, *supra* note 17, at 206.

20. 514 U.S. 927, 934 (1995).

21. *Id.* The Court also found that the rule was not absolute and exceptions to the knock-and-announce rule were also part of the Fourth Amendment to protect “countervailing law enforcement interests.” *Id.*

22. See *Hudson v. Michigan*, 547 U.S. 586, 594 (2006).

23. *Id.*

defense.<sup>24</sup> Officer safety is an important and legitimate interest; concurrently, officers are not the only stakeholders in a warrant. Knock-and-announce also protects the privacy and safety of the target of the investigation, as well as innocent family members, friends, and neighbors.<sup>25</sup> It also provides the opportunity to avoid property damage and for the occupants to comply.<sup>26</sup> In theory, it can also offer an opportunity for the occupants to point out mistakes in the warrant, such as a wrong address.<sup>27</sup> In practice, informing police of the wrong address has not stopped them from entering and searching. For example, as Anjanette Young, a Black woman in Chicago, was forced to stand naked with guns pointing at her as the police proceeded to search her home, she repeatedly told the police, “You’ve got the wrong house.”<sup>28</sup>

The policy goals behind the knock-and-announce rule are laudable, but police officers do not closely follow them. After recognizing that knock-and-announce was part of the Fourth Amendment, the Supreme Court began to dismantle it by immediately suggesting exceptions to the rule.<sup>29</sup> Although the Court has stated a desire to balance “legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries[,]”<sup>30</sup> in practice, its decisions have been excessively deferential to the interests of law enforcement.<sup>31</sup> Contemporary

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24. *See id.*; *see also* Hemmens & Mathias, *supra* note 1, at 7.

25. *See* Hemmens & Mathias, *supra* note 1, at 8.

26. *Hudson*, 547 U.S. at 594; *Dolan*, *supra* note 17; Hemmens & Mathias, *supra* note 1, at 8.

27. *Dolan*, *supra* note 17, at 206; *see, e.g.*, Rosemary Sobol, *Chicago Police Release Additional Videos from Botched Raid on Anjanette Young’s Home*, CHI. TRIB. (Dec. 30, 2020, 9:03 PM), <https://www.chicagotribune.com/news/breaking/ct-new-footage-anjanette-young-raid-20201231-zoiriuugnvejbb67je3khegely-story.html>.

28. Dave Savini, *Anjanette Young Sues Chicago Police, City of Chicago in State Court Botched Raid Where She Was Handcuffed Naked*, CBS CHI. (Feb. 19, 2021, 10:25 PM), <https://chicago.cbslocal.com/2021/02/19/anjanette-young-sues-chicago-police-city-of-chicago-in-state-court-for-botched-raid-where-she-was-handcuffed-naked/>.

29. *See, e.g.*, *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995) (deferring to the lower courts the “task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment”); *see also* *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (finding that a no-knock entry is lawful when there is reasonable suspicion of danger or futility).

30. *Richards*, 520 U.S. at 394.

31. *See generally* Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment “Search and Seizure” Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933 (2010) (reviewing the history of Fourth Amendment jurisprudence and taking a legal realism approach that the ideological composition of the Court has determined the course of Fourth Amendment interpretation). As Professor Davies explained, the Court has sought to free law enforcement from “constitutional constraints by restricting the coverage of Fourth Amendment protections, by weakening or even eviscerating the substance of search and seizure standards, and by largely eliminating the consequences of unconstitutional intrusions.” *Id.* at 939.

warrant execution is problematic under the knock-and-announce rule because of the excessively short waiting period before entry, and the Court's decision to excuse violations from the exclusionary rule.<sup>32</sup>

### 1. A Reasonable Time Period

Determining what should be the primary distinction between a traditional warrant, where officers knock and announce, and the no-knock warrant has become largely academic. In a relatively short span of time, the Supreme Court, in subsequent decisions, made the knock-and-announce rule that it recognized in *Wilson* inconsequential.<sup>33</sup> One of the most destructive cases to the rule was *United States v. Banks*.<sup>34</sup> In *Banks*, the police executed a search warrant in a drug investigation.<sup>35</sup> The target was in the shower when police were knocking and did not hear them, but he did hear the loud noise from the door being breached.<sup>36</sup> With respect to the issue of whether the police violated the knock-and-announce rule by failing to wait a reasonable time, the Court held the fifteen to twenty seconds the officers waited was not unreasonable.<sup>37</sup> Central to the Court's reasoning was that exigency could occur after the announcement, and in the case of *Banks*, the possibility that the drugs could be destroyed.<sup>38</sup> There was, however, nothing to support that the drugs were in danger of destruction or that the time of fifteen to twenty seconds was more than a "guess."<sup>39</sup>

The *Banks* decision was a victory for law enforcement advocates but devastating for individual liberties.<sup>40</sup> By holding that waiting mere seconds was reasonable, the Court ultimately made no-knocks indistinguishable from the knock-and-announce rule. The shortened time frame of fifteen to twenty seconds may be appropriate during a daytime search or for searching a motel room, but searches of homes conducted at night or in the early hours of the morning make it impossible for individuals to stir themselves from a deep sleep, get dressed, and answer the door in fifteen to twenty seconds. The Court expressly rejected focusing on the time an occupant would need to

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32. See discussion *infra* Part II.A.2.

33. See Yeaples-Coleman, *supra* note 7, at 387 (noting in just three rulings the Supreme Court made knock-and-announce "unenforceable and, at least in practice, non-existent").

34. See 540 U.S. 31 (2003).

35. *Id.* at 33.

36. *Id.*

37. *Id.* at 38.

38. *Id.* at 38-40.

39. See *id.* at 40.

40. See Davies, *supra* note 31, at 934 (arguing that the conservative Supreme Court has "reduced Fourth Amendment doctrine to little more than a rhetorical apparition").

open the door and instead focused on the potential for exigency when drugs are involved.<sup>41</sup> Arguably, the potential that evidence may be destroyed is always possible in drug cases.<sup>42</sup> In practice, it is far too simple to equate drugs with danger and evidence destruction, making exigency presumed. As a policy matter, courts, legislatures, and police departments must decide if the amount of drugs that can be destroyed in fifteen to twenty seconds really justifies the risk to human life.<sup>43</sup>

*Banks* embraced the concept of the quick-knock warrant, which is when the police, under a traditional search warrant, knock on a door, announce themselves, and forcefully enter into a suspect's home—in rapid succession.<sup>44</sup> The Court recognized a reasonable suspicion of exigency can occur immediately after knocking because of the chance of evidence destruction, so exigency can be created by knocking.<sup>45</sup> As the Council on Criminal Justice noted, allowing “quick-knock warrants[] blurs the legal line between no-knock warrants and standard knock warrants and suffers from serious enforceability problems.”<sup>46</sup> Not only is fifteen seconds unreasonable, officers have testified to not bothering to wait the fifteen seconds.<sup>47</sup> Since the Court also decided that the exclusionary rule does not apply to announcement rule violations, there is very little to encourage compliance.

## 2. The Exclusionary Rule

Repercussions for violating a traditional knock-and-announce warrant are virtually nonexistent. In *Hudson v. Michigan*, the Supreme Court decided the exclusionary rule does not apply to knock-and-announce violations.<sup>48</sup> Under the exclusionary rule, the police may not use evidence they obtain

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41. *Banks*, 540 U.S. at 40; *see also* Davies, *supra* note 31, at 1027.

42. The Court declined to make a blanket exception to knock-and-announce in felony drug cases. *Richards v. Wisconsin*, 520 U.S. 385, 388 (1997).

43. *See* Yeaples-Coleman, *supra* note 7, at 394.

44. DATA FOR PROGRESS & JUST. COLLABORATIVE INST., END NO-KNOCK RAIDS 2 (June 2020), <https://theappeal.org/the-lab/report/end-no-knock-raids/>.

45. *Banks*, 540 U.S. at 38.

46. COUNCIL ON CRIM. JUST., NO-KNOCK WARRANTS AND POLICE RAIDS 2 (Jan. 2021), [https://assets.foleon.com/eu-west-2/uploads-7e3kk3/41697/pdf\\_-\\_no\\_knock\\_warrants.afc61934d317.pdf](https://assets.foleon.com/eu-west-2/uploads-7e3kk3/41697/pdf_-_no_knock_warrants.afc61934d317.pdf).

47. *See* Radly Balko, *A South Carolina Anti-Drug Police Unit Admitted It Conducts Illegal No-Knock Raids*, WASH. POST (May 31, 2018, 4:26 PM), <https://www.washingtonpost.com/news/the-watch/wp/2018/05/31/a-south-carolina-anti-drug-police-unit-admitted-it-conducts-illegal-no-knock-raids/> (quoting deposition of officer in botched raid that the task force “almost always forcibly entered without knocking and announcing or simultaneously with announcing”).

48. 547 U.S. 586, 594 (2006).

unlawfully.<sup>49</sup> Although the exclusionary rule is controversial, it has been effective in curbing unlawful police behavior and is described as “the only effective deterrent to police misconduct.”<sup>50</sup> The Supreme Court was arguably more focused on what they have described as the high social costs of letting the guilty go free rather than deterring police misconduct.<sup>51</sup>

In balancing deterrence with social costs, one cost the Court seems to have neglected in its exclusionary rule considerations is the historical and contemporary relevance of systemic racism and policing. Breonna Taylor and many of the victims of violent warrant executions have been minorities. One study found that sixty-one percent of citizens impacted by SWAT drug searches were minorities.<sup>52</sup> Despite the lack of comprehensive data, evidence suggests that no-knock warrants “are used disproportionately against people of color.”<sup>53</sup> Aggressive policing towards communities of color impacted earlier interpretations of the Fourth Amendment, especially the Warren Court.<sup>54</sup> During that period, the Court appreciated that minority groups would be subjected to “arbitrary and unfair treatment at the hands of the criminal justice system” without standards.<sup>55</sup> As Professor Carol Steiker explained, Fourth Amendment jurisprudence has been impacted by the problems of racism. She states that:

Just as the racist outrages of the 1930s and 1940s formed the backdrop for Justice Jackson’s influential insistence on warrants and evidentiary exclusion, the civil rights movement of the 1950s and 1960s informed the Warren Court’s fortification of the warrant requirement and extension of the exclusionary rule to the states.<sup>56</sup>

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49. *Id.* at 590.

50. Eric J. Miller, *Reasonably Radical: Terry’s Attack on Race-Based Policing*, 54 IDAHO L. REV. 479, 480 (2018); see also *Hudson*, 547 U.S. at 591 (discussing the “substantial social costs” from the exclusionary rule); Chiraag Bains, “A Few Bad Apples”: How the Narrative of Isolated Misconduct Distorts Civil Rights Doctrine, 93 IND. L.J. 29, 35 (2018) (arguing that the Court’s exclusionary rule decisions are impacted by whether they view “police misconduct as exceptional or widespread”).

51. The Court has stated that the exclusionary rule has drawbacks, like some guilty people being set free on a technicality. See *Davis v. United States*, 564 U.S. 229, 236-37 (2011). One flaw in this approach is that search warrant targets have not been found guilty of anything.

52. ACLU, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 5 (2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

53. Dolan, *supra* note 17, at 226.

54. See Craig M. Bradley, *The Middle Class Fourth Amendment*, 6 BUFF. CRIM. L. REV. 1123, 1126 (2003).

55. *Id.*

56. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 843 (1994).

The Court's shift away from direct and indirect concerns about minority rights impacted how it dealt with police intrusions. The results of such intrusions, one of which was the exclusionary rule, have been historically a part of Fourth Amendment jurisprudence.<sup>57</sup> Professor Thomas Davies argues that "the majority [of] justices have pursued a multi-prong campaign to free police of constitutional constraints by restricting the coverage of Fourth Amendment protections, by weakening or even eviscerating the substance of search and seizure standards, and by largely eliminating the consequences of unconstitutional intrusions."<sup>58</sup> The majority's opinion in *Hudson* illustrates this point, and the opinion's impact is substantial.

The danger *Hudson* posed was not lost on the Justices. Justice Breyer, in his dissent, acknowledged *Hudson*'s potential to destroy the value of the knock-and-announce rule.<sup>59</sup> The Supreme Court reasoned that other mechanisms existed to curtail officer abuses of power, including police professionalism and training,<sup>60</sup> internal discipline, and civil lawsuits under 8 U.S.C. § 1983 actions.<sup>61</sup> The Court's decision illustrates that the balancing of legitimate interests has been replaced by deference towards the needs of law enforcement.<sup>62</sup> All of the important policy goals behind knock-and-announce related to the right to privacy and human dignity<sup>63</sup> appear to be a "fictional nullity."<sup>64</sup> By its decision, the Court extinguished police incentive to comply with knock-and-announce.<sup>65</sup> Professor Davies noted, "The

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57. Davies, *supra* note 31, at 938-39.

58. *Id.* at 939.

59. 547 U.S. 586, 605 (2006) (Breyer, J., dissenting) (stating that the opinion "weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection").

60. *Id.* at 598-99 (majority opinion). *But see* Yuri R. Linetsky, *What the Police Don't Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M. L. REV. 1, 16-19 (2018) (arguing legal training by police is woefully inadequate and comparing training hours for new officers with training requirements for barbers); Dolan, *supra* note 17, at 230 (arguing the exclusionary rule is far superior to curbing police violations than civil lawsuits and internal discipline).

61. *Hudson*, 547 U.S. at 598. *But see* *Betton v. Knowles*, No.: 4-15-CV-04638, 2018 WL 4404073, at \*4 (D. S.C. May 21, 2018). During a deposition for a botched search warrant, one officer disputed that knocking and announcing was required, saying, "It's not the law to knock and announce. You know, it's just not. It's the officer's discretion, each dictate determines itself." *Id.*

62. Hemmens & Mathias, *supra* note 1, at 3 (noting that the Supreme Court's "pattern of deference to law enforcement interests" has resulted in police agencies "push[ing] the envelope"); *see also* Eang L. Ngov, *Police Ignorance and Mistake of Law Under the Fourth Amendment*, 14 STAN. J. C.R. & C.L. 165, 167-68 (2018).

63. *Hudson*, 547 U.S. at 594.

64. Davies, *supra* note 31, at 1029 ("As the Supreme Court recognized as far back as *Marbury v. Madison*, a right without a remedy is a fictional nullity.").

65. *Hudson*, 547 U.S. at 605 (Breyer, J., dissenting).

conservative majority on the Court seems to have concluded that crime is a real problem, but the potential for police and government oppression is not. Thus, they have wagered that legal constraints on police are now unnecessary and law enforcement can be trusted to be a benign force.<sup>66</sup> The risks of excessive deference towards the police are particularly troubling in no-knock warrants.

## B. *No-knock Warrants and Exigency*

### 1. No-Knock Warrants

A no-knock warrant allows the police to lawfully execute a search warrant without first knocking and announcing.<sup>67</sup> No-knock warrants are issued in a number of jurisdictions as an opportunity to get pre-approval on exigency.<sup>68</sup> If the police have reasonable suspicion that knocking and announcing would be futile, endanger safety, or result in destruction of evidence, a court may issue a no-knock warrant.<sup>69</sup> No-knock warrants are particularly disturbing because they tend to involve a dynamic and violent entry.<sup>70</sup> No-knock warrants were and continue to be an important tool in the War on Drugs.<sup>71</sup>

It is impossible to separate no-knock warrants from the issue of race due to the disproportionate use of no-knocks against minorities and the predictable consequence that “minority communities bear the brunt of the death and property destruction associated with no-knock raids.”<sup>72</sup> Requesting a no-knock warrant is left up to the discretion of the police officer, and there are no standards related to when to request a no-knock warrant. Discretion on warrant execution is problematic for, just as racial discrimination is an issue in this country, policing is not immune from racial bias.<sup>73</sup> The standard of reasonable suspicion to obtain a no-knock is lower than the probable cause standard required to get a search warrant. Reasonable suspicion can be satisfied by unsupported generalizations. If police use “race as a proxy for criminality,”<sup>74</sup> then requesting a no-knock

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66. Davies, *supra* note 31, at 1038.

67. Dolan, *supra* note 17, at 205.

68. *Id.* at 213-15.

69. *See* Wilson v. Arkansas, 514 U.S. 927, 936 (1995); *Hudson*, 547 U.S. at 589-90.

70. *See* discussion *infra* Part III.

71. Dolan, *supra* note 17, at 226; *see* discussion *infra* Part III.

72. Dolan, *supra* note 17, at 226.

73. *See* Steiker, *supra* note 56, at 840.

74. *Id.*

warrant for Breonna Taylor, a young EMT worker with no criminal record, makes sense.

In Breonna Taylor's search warrant affidavit, the officer based his request for a no-knock entry "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 have a history of fleeing from law enforcement."<sup>75</sup> Not only did Breonna Taylor not have a criminal record, she also owned no surveillance cameras, and there was no evidence of her ever being a drug trafficker.<sup>76</sup> None of this information was contained in the affidavit for the warrant.<sup>77</sup> Presumably, the magistrate found the vague generalizations sufficient for reasonable suspicion to issue a no-knock warrant.<sup>78</sup>

Similar to knock-and-announce warrants, no-knock warrants are supported by some important policy goals that are primarily related to law enforcement. The primary goal articulated in support of no-knock warrants is officer safety and preservation of evidence.<sup>79</sup> No-knock warrants pose inherent safety concerns because of the element of surprise. Reform that focuses only on eliminating no-knock warrants will be ineffective in reducing botched executions and violations of civil liberties. The combined impact of *Banks* and *Hudson* has rendered the knock-and-announce rule impotent.<sup>80</sup> Real reform requires that the Court revisit the reasonable time requirement and its decision to not apply the exclusionary rule in light of the increased violence involved in search warrant executions. Even without no-knock warrants, similar negative results would occur with knock-and-announce

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75. Search Warrant, In re Search of St. Anthony Gardens, 3003 Springfield Drive #4, Louisville, KY, 141 (Ky. Dist. Ct. Jefferson Cnty. Mar. 12, 2020) (emphasis added) [hereinafter St. Anthony Gardens Search Warrant], <http://www.louisville-police.org/DocumentCenter/View/1802/PIU-20-019-Court-Search-Warrant-Subpoena-Consent#page=141>.

76. See Matthew Brown & Tessa Duvall, *Fact Check: Louisville Police Had A 'No-Knock' Warrant for Breonna Taylor's Apartment*, USA TODAY (Jun. 30, 2020, 5:54PM), <https://www.usatoday.com/story/news/factcheck/2020/06/30/fact-check-police-had-no-knock-warrant-breonna-taylor-apartment/3235029001/>.

77. St. Anthony Gardens Search Warrant, *supra* note 75, at 135-41.

78. See, e.g., *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (justifying the use of a no-knock entry when there is reasonable suspicion of danger). The role of magistrates to better safeguard individual liberties by carefully construing the search warrants they sign is essential, yet outside the scope of this article.

79. See *id.*

80. See discussion *supra* Part II.

when occupants have seconds to respond or if exigency is raised by the police.

## 2. Exigency

Ultimately, a no-knock warrant is just *one* way the police can enter a person's home unannounced. The police are always authorized to enter without knocking under exigent circumstances, whether they have a traditional knock-and-announce search warrant or a no-knock. The exigent circumstances doctrine is an old doctrine that recognizes the need for officers to make split decisions. An example of exigency may be information that someone is being assaulted by hearing someone cry for help. There is no expectation for the police to follow rigid procedures in the face of an emergency. But what happens when the emergency begins to swallow the rule?<sup>81</sup> Arguably, every search warrant execution involves some degree of danger and the possibility of evidence destruction. While evidence destruction is a form of exigency and is a legitimate concern, it has overshadowed other legitimate concerns present in warrant executions. As long as an unsupported claim of exigency can allow the announcement rule to be circumvented, the distinction between knock-and-announce and no-knock warrants will remain illusory. This is compounded by the negative impact of *Banks*, accepting fifteen to twenty seconds as a reasonable time, and *Hudson's* decision that the exclusionary rule would not apply to violations of the knock-and-announce rule.

In practice, raising the issues of police safety and destruction of evidence results in giving the police substantial discretion to use force and violence when executing a search warrant.<sup>82</sup> An ACLU report and study concluded that there were no genuine threats to officer safety in most SWAT deployments for search warrants, and there is no empirical data to support a correlation between drug cases and danger to police.<sup>83</sup> Rather, officers would point to particular factors and try to equate those factors with violence. Those factors may include a belief that there is a weapon in the house— a fact that is true for half of American households— a prior criminal record, and whether the case involves drugs.<sup>84</sup> Too frequently drugs are equated with

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81. As Professor Davies concluded, “[T]he exceptions that have been announced regarding the supposed principles now apply so frequently to the routine situations in which police interact with the populace that the doctrinal ‘exceptions’ are the functional rules, and the instances when the supposed principles apply are now the genuine exceptions.” Davies, *supra* note 31, at 1036.

82. See ACLU, *supra* note 52, at 24.

83. *Id.* at 31; Dolan, *supra* note 17, at 204.

84. ACLU, *supra* note 52, at 4.

violence. Police safety is a legitimate and important interest, but violent warrant executions should be a response to genuine threats, not presumptions. Equally troubling is the frequent unsubstantiated claim that evidence destruction is at issue. Violently entering a home does not correlate to the police locating drugs or weapons.<sup>85</sup> Many investigations involving SWAT result in locating no drugs or small quantities.<sup>86</sup>

### III. THE MILITARIZATION OF POLICE AND NO-KNOCK AND KNOCK-AND-ANNOUNCE WARRANTS

When balancing the legitimate needs of law enforcement and crime prevention against the privacy needs of civilians, the Supreme Court usually favors law enforcement.<sup>87</sup> Both a no-knock and a traditional knock-and-announce warrant gives the police the right to enter and search. A warrant execution may include breaking both doors and windows, using flashbang grenades, and holding all occupants at gunpoint.<sup>88</sup> Some police do not wear uniforms during warrant executions or wear military gear, which also contributes to the confusion when an occupant's doors and windows are being broken.<sup>89</sup> The law is well settled that a search warrant gives the right to enter, but does that automatically include the right to terrorize? A violent search warrant execution is not only about privacy. The interests of civilians go beyond privacy and include safety, liberty, and even dignity. When the issue involves a violent warrant execution, the legitimate civilian interests must be rebalanced against the interest of crime prevention.

As law enforcement has increasingly become more militarized, the stakes are higher. Search warrant targets, neighbors, and family members are all in jeopardy when a search warrant is executed violently. The militarization of police has a devastating impact on all warrant executions because it increases the potential for violence. The idea of the government embracing violence to use against civilians—American citizens—exploded during the racialized War on Drugs.

In the late 1990s and early 2000s, the historical backdrop of when many of the most significant Supreme Court search warrant cases were decided, was during the War on Drugs.<sup>90</sup> Some scholars have concluded that the War

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85. *Id.*

86. *Id.* at 31, 33.

87. *See* discussion *supra* Part II.

88. Yeaples-Coleman, *supra* note 7, at 388-89.

89. *Id.* at 389.

90. As law professor and Assistant United States Attorney Michael Morse noted during the Southwestern Law School Symposium, drugs are an inanimate object. The war is on people.

on Drugs has resulted in “a major assault on Fourth Amendment protections.”<sup>91</sup>

A full criticism of the ongoing failed War on Drugs is beyond the scope of this article. Many have described it as a racist attempt to over-criminalize minorities suffering from addiction.<sup>92</sup> It has resulted in devastating incarceration rates within the minority community and disparate treatment in the punishment rates for defendants convicted of offenses related to crack cocaine instead of powder. Although the War on Drugs began with President Richard Nixon in the 1970s, it was President Ronald Reagan and the Anti-Drug Abuse Act of 1986,<sup>93</sup> along with President Bill Clinton and the Violent Crime Control and Law Enforcement Act of 1994,<sup>94</sup> which contributed to the explosion of Black men who were in prison for drug offenses.<sup>95</sup> The impact of the 1994 crime bill on mass incarceration is controversial and a political lightning rod. During the 2016 and 2020 presidential elections, Democratic presidential candidate Hillary Clinton and Joseph Biden were questioned and criticized for their positions on the bill.<sup>96</sup> At the time of its passage, it was supported by Republicans and Democrats, including Black leaders.<sup>97</sup> Probably one of the worst consequences from the War on Drugs is that it helped the police see ordinary citizens as enemy combatants. During

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Michael Morse, Remarks at the Southwestern Law School Symposium: Widening the Lens of Justice: Unmasking the Layers of Racial and Social Inequality (Feb. 5, 2021); *see also*, Peachie Wimbush-Polk, *Doo-Wop Versuz Hip Hop*, in MEETING AT THE TABLE: AFRICAN-AMERICAN WOMEN WRITE ON RACE, CULTURE AND COMMUNITY 106, 110 (Tina McElroy Ansa & Wanda S. Lloyd eds., 2020) (“[The War on Drugs] was a war against people.”). The idea of the War on Drugs being against people, particularly Blacks, has been accepted by scholars. *See, e.g.*, Dolan, *supra* note 17, at 226 n.146; Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539, 1551-52 (2014).

91. Hemmens & Mathias, *supra* note 1, at 2-3; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60 (2020).

92. The implicit bias from the War on Drugs is particularly stark when comparing how individuals addicted to crack cocaine have been described and treated compared to individuals addicted to oxycontin. *See* ACLU, *supra* note 52, at 2 (“[T]he War on Drugs has destroyed millions of lives, unfairly impacted communities of color.”).

93. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

94. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

95. *A Brief History of the Drug War*, DRUG POL’Y ALL., <https://drugpolicy.org/issues/brief-history-drug-war> (last visited Feb. 16, 2021); *see also* Roseann B. Termini & Rachel-Malloy Good, *50 Years Post-Controlled Substances Act: The War on Drugs Rages on with Opioids at the Forefront*, 46 OHIO N.U. L. REV. 1, 6-7 (2020). *See generally* Todd S. Purdum, *The Crime-Bill Debate Shows How Short Americans’ Memories Are*, ATLANTIC (Sept. 12, 2019), <https://www.theatlantic.com/politics/archive/2019/09/joe-biden-crime-bill-and-americans-short-memory/597547/>.

96. Purdum, *supra* note 95.

97. *Id.*

President George W. Bush's administration, there were "about 40,000 paramilitary-style SWAT raids on Americans every year—mostly for nonviolent drug law offenses, often misdemeanors."<sup>98</sup>

The police have been described as militarized due to their access to military equipment and the increased use of SWAT teams. Police agencies have been able to build up a military arsenal because of "federal programs that use equipment transfers and funding to encourage aggressive enforcement of the War on Drugs."<sup>99</sup> Use of SWAT teams increased 538% between 1980 and 1995.<sup>100</sup> SWAT teams were originally formed to address extreme emergency situations involving hostages, active shooters, and terrorists.<sup>101</sup> Today, SWAT teams are routinely dispatched for search warrant executions, particularly no-knocks.<sup>102</sup> Unfortunately, data collection on search warrants and the use of SWAT teams for warrants is scant.<sup>103</sup> According to an ACLU study from 2011-2012, seventy-nine percent of SWAT deployments were for search warrant executions and sixty-two percent of those were for drugs.<sup>104</sup>

The routine use of SWAT teams for search warrant executions suggests that search warrant executions routinely include violence. A warrant execution by a SWAT team is inherently violent<sup>105</sup> and typically involves broken windows and doors, assault rifles, and grenades.<sup>106</sup> Deploying a SWAT team is consistent with the narrative that the element of surprise is essential to search warrant execution for officer safety. The theory is that if occupants of a home are suddenly confronted with officers with weapons drawn there is no time for the occupants to arm themselves to attack the officers or destroy evidence. The problem with that logic is that a violent confrontation can also escalate incidents that would otherwise be non-violent.

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98. DRUG POL'Y ALL., *supra* note 95; *see also* Termini & Good, *supra* note 95, at 7.

99. ACLU, *supra* note 52, at 16. The 1033 Program, which authorizes the transfer of military equipment to local and state police agencies from the Department of Defense, requires recipients to use the equipment "within one year of receipt." *Id.*

100. Yeaples-Coleman, *supra* note 7, at 388.

101. ACLU, *supra* note 52, at 41.

102. Dolan, *supra* note 17, at 211-12 (recognizing that SWAT teams and similar units are frequently used in search warrant executions, particularly no-knock warrants); ACLU, *supra* note 52, at 2 (noting the routine use of SWAT teams in drug investigations); Yeaples-Coleman, *supra* note 7, at 387-88 (noting use of SWAT teams increasing).

103. ACLU, *supra* note 52, at 4.

104. *Id.* at 31.

105. *Id.* at 3.

106. *Id.*

Once a judge signs a warrant, whether a knock-and-announce or no-knock, it is up to the discretion of the officers if SWAT or a similar paramilitary unit will be used to execute it.<sup>107</sup> Even when SWAT is not used, police may still use violent techniques. One of the most troubling is the use of flashbang grenades, which has evolved into standard practice.<sup>108</sup> The goal of the flashbang grenade is to cause the occupants to feel terrorized and disoriented.

Flashbang grenades are explosive devices that emit a deafening noise along with a bright light that causes temporary blindness.<sup>109</sup> Flashbang grenades were not developed for use on citizens but to be used by the military to stun and incapacitate combatants.<sup>110</sup> Flashbang grenades can cause fires, heart attacks, burns, permanent eye damage, and ear injuries,<sup>111</sup> having injured both officers and civilians. Several of the more tragic search warrant executions have involved flashbang grenades. For example, seven-year-old Aiyana Stanley-Jones was shot in the head by the police during a warrant execution.<sup>112</sup> Before breaching the door, a flashbang grenade was tossed in the home and burned Aiyana's blanket.<sup>113</sup> During her testimony, Aiyana's grandmother stated that she would not wish the grenade on anybody.<sup>114</sup> Photos of Aiyana's house show a number of toys in the lawn,<sup>115</sup> which highlights another horrific truth—violent warrant executions are being conducted irrespective of the presence of children or the elderly.

For example, in May 2014, a SWAT team used a flashbang grenade for a low-level drug investigation. The grenade landed in a crib, resulting in third degree burns and a hole being blown in the face and chest of the nineteen-month-old infant.<sup>116</sup> Similar to SWAT deployments, the use of

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107. *See id.* at 24.

108. Joseph Rychlak, Note, "Good Time Had by All": Regulating Police Use of Flash-Bang Grenades in the Execution of Search Warrants, 88 MISS. L.J. 81, 85 (2019).

109. ACLU, *supra* note 52, at 21.

110. Rychlak, *supra* note 108, at 82.

111. *Id.* at 85-86.

112. ACLU, *supra* note 52, at 21, 40.

113. *Id.* at 21.

114. *See* Rose Hackman, 'She Was Only a Baby': Last Charge Dropped in Police Raid that Killed Sleeping Detroit Child, THE GUARDIAN (Jan. 31, 2015, 12:33 PM), <https://www.theguardian.com/us-news/2015/jan/31/detroit-aiyana-stanley-jones-police-officer-cleared>.

115. *See* Diane Bukowski, *Witness: Police Were Warned During Raid that Resulted in Death of Little Girl in Detroit*, FINAL CALL, [https://www.finalcall.com/artman/publish/National\\_News\\_2/article\\_9953.shtml](https://www.finalcall.com/artman/publish/National_News_2/article_9953.shtml) (Jun. 14, 2013, 8:43 AM).

116. ACLU, *supra* note 52, at 14.

flashbang grenades is not regulated and up to the discretion of law enforcement. The militarization of the police has had a devastating impact on all warrant executions.

#### IV. PROPOSED SOLUTIONS

Courts have always sought to balance Fourth Amendment privacy interests with the interests of law enforcement in effective crime prevention. With current police tactics and the significant loss of life, it is important for the Court to reexamine whether these searches in low-level drug cases are truly reasonable.

One of the most important tools for reform is information. There is no federal agency that tracks search warrants or search warrant executions, much less botched search warrants. Such data is also non-existent in many states. The federal government needs to begin collecting data on both police shootings and warrant executions—which tend to intersect—so additional creative approaches can be taken to address violent search warrant executions. Collecting data and reporting it to the federal government could be a condition of receiving funds for military-grade equipment used in domestic situations. Meanwhile, there are some obvious problems that can be addressed, even in the absence of data.

There are times when SWAT teams, flashbang grenades, and no-knock warrants are useful. For example, in a hostage situation the police should be able to articulate specific details to justify surprising the inhabitants. When people's lives are on the line, aggressive police tactics can be invaluable. However, the overuse of those tactics in low-level drug cases should no longer be tolerated. Currently there are no uniform guidelines or data related to when SWAT or a similar unit is used. Even when SWAT teams are not used, the use of plain-clothes police officers and paramilitary tools, like flashbang grenades, can also escalate things whether the warrant involved was a no-knock or not. Eliminating no-knocks in drug cases will only be meaningful if occupants are given an opportunity to comply in traditional knock-and-announce cases. The concern for evidence preservation in drug cases should not trump the concern for the lives of stakeholders.

I propose a sixty-second wait time as a reasonable time for officers to wait before forcing entry in a warrant execution at night. Allowing occupants an opportunity to get dressed, wake up, and open the door would eliminate many of the botched warrants and fulfil the policy goals of the knock-and-

announce rule as articulated by the Court in *Hudson*.<sup>117</sup> In the event of exigency, the police would still be allowed to use their judgment to dispense with knocking and announcing.<sup>118</sup> Although claiming exigency still threatens for the exception to nullify the rule, officers must have some discretion in order to perform their duties effectively. That discretion should not be unchecked, however. The exclusionary rule should be extended to knock-and-announce violations for this very reason.

## V. CONCLUSION

The killing of Breonna Taylor remains a tragedy, and the search for justice for her memory has been elusive<sup>119</sup> because the decision to storm into her home and return fire was lawful—if we focus on the letter of the law. Preventing another tragedy of a botched search warrant will entail a number of things. Positive changes would include collecting nationwide comprehensive data on search warrant executions, extending the waiting period to allow occupants to respond when the police knock, extending the exclusionary rule to knock-and-announce violations, and limiting the use of SWAT teams and flashbang grenades to extraordinary circumstances, such as hostage or terrorism situations.

Both no-knock and knock-and-announce warrants have the potential to be dangerous and violent in light of the militarization of the police. It is important for the Court to reexamine its balancing of interests in light of today's law enforcement practices. The police are not merely kicking in doors to gain entry. They are coming with SWAT teams, flashbang grenades, and other military equipment to combat low-level drug offenses.

The results of having a knock-and-announce rule that is indistinguishable from a no-knock have been deadly. Reform is needed to satisfy the policy objectives behind the knock-and-announce rule and to return it to its intended purpose.

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117. See, e.g., 547 U.S. 586, 589, 594 (2006) (“In other words, [a brief period of time] assures the opportunity to collect oneself before answering the door.”).

118. *Id.* at 623.

119. The City of Louisville reached a settlement with Breonna Taylor's family, the police officers involved in the warrant have been fired, and the city decided to ban the issuance of no-knock warrants. Andrew Wolfson et al., *Louisville Agrees to \$12 Million Settlement, Police Reforms in Breonna Taylor Lawsuit*, COURIER J. (Sept. 15, 2020, 7:30 AM), <https://www.courier-journal.com/story/news/local/breonna-taylor/2020/09/15/breonna-taylor-shooting-city-louisville-settles-family/5792731002/>.