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## CAN THE FOURTH AMENDMENT KEEP PEOPLE “SECURE IN THEIR PERSONS”?†

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In her Article, *Something Rots in Law Enforcement and It's the Search Warrant: The Breonna Taylor Case*,<sup>1</sup> Professor Blanche Bong Cook, a legal scholar and former prosecutor, digs deeply into the events leading to Breonna Taylor's death at the hands of the Louisville Metro Police Department (“LMPD”). Cook shows that the central factual premise for searching Taylor's apartment for her ex-boyfriend's drugs—namely, that the ex-boyfriend received packages there—was almost certainly a lie;<sup>2</sup> that even with that lie, the judge should not have found probable cause to believe that drugs would be found in Taylor's apartment;<sup>3</sup> that the judge also had no legitimate grounds to authorize the police to force their way into Taylor's residence without first knocking and announcing themselves;<sup>4</sup> and that the subsequent police account of the circumstances of their invasion of Taylor's residence was almost certainly another lie, facilitated both by their failure to wear cameras or to turn them on at the time of the search, and by the later opportunity—conventionally afforded the police—to get their lies straight before answering questions.<sup>5</sup>

This is the unusual case of police misconduct where some measure of accountability followed. In September 2020, the City of Louisville agreed to compensate Taylor's family and to make policing reforms, albeit without acknowledging wrongdoing.<sup>6</sup> And in August 2022, a federal grand jury indicted

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<sup>1</sup> Blanche Bong Cook, *Something Rots in Law Enforcement and It's the Search Warrant: The Breonna Taylor Case*, 102 B.U. L. REV. 1 (2022).

<sup>2</sup> Cook, *supra* note 1, at 17-18, 25-29.

<sup>3</sup> *Id.* at 29-44.

<sup>4</sup> *Id.* at 50-52.

<sup>5</sup> *Id.* at 52-54, 62-66.

<sup>6</sup> Andrew Wolfson, Darcy Costello & Tessa Duvall, *Louisville Agrees to \$12 Million Settlement, Police Reforms in Breonna Taylor Lawsuit*, COURIER J. (Jan. 24, 2021, 4:14 PM), <https://www.courier-journal.com/story/news/local/breonna-taylor/2020/09/15/breonna-taylor-shooting-city-louisville-settles-family/5792731002/> [https://perma.cc/78U6-2HVG].

four of the police officers who had a role in the killing.<sup>7</sup> But if the results had not been so tragic, resulting in so much public outrage, the police misconduct would probably have been ignored. If Taylor had survived, she would not have filed a suppression motion in a criminal case because there would have been no case against her: the police search found no evidence that she did anything wrong.<sup>8</sup> She would not have brought a civil rights action after the police invaded her apartment because qualified immunity would almost certainly have protected the police from liability.<sup>9</sup> It seems unlikely that the state Attorney General would have taken action,<sup>10</sup> or that the police department would itself have disciplined the officers involved or revisited its practices.

Cook levels some blame for Taylor’s death on the U.S. Supreme Court,<sup>11</sup> which gives with one hand while taking with the other: while its Fourth Amendment opinions recognize the sanctity of the home, the Court has also eliminated incentives for the police to comply with the constitutional restrictions when homes are searched. Cook takes special aim at *Hudson v. Michigan*,<sup>12</sup> which held the exclusionary rule inapplicable when police violate the ordinary requirement to knock and announce themselves before forcing their way into a home.<sup>13</sup> One might add that the Court has eviscerated the Fourth Amendment remedies in many more ways than one. Even when, as in Taylor’s case, an inattentive or indifferent judge issues a warrant unsupported by probable cause, the police can ordinarily assume that if they happen to discover evidence, it will be admissible under the so-called “good-faith exception” to the exclusionary

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<sup>7</sup> Press Release, U.S. Dep’t of Just., Current and Former Louisville, Kentucky Police Officers Charged with Federal Crimes Related to Death of Breonna Taylor (Aug. 4, 2022) (available at <https://www.justice.gov/opa/pr/current-and-former-louisville-kentucky-police-officers-charged-federal-crimes-related-death> [<https://perma.cc/J4NM-88GZ>]). Previously, the state charged one of the officers, Brett Hankison, with wantonly endangering Taylor’s neighbors by shooting blindly into the building; he was tried and acquitted in March 2022. Steve Almasy, Aaron Cooper & Eric Levenson, *Ex-officer Brett Hankison Was Found Not Guilty of Endangering Breonna Taylor’s Neighbors in a Botched Raid*, CNN (Mar. 4, 2022, 8:41 AM), <https://www.cnn.com/2022/03/03/us/brett-hankison-trial-closing/index.html> [<https://perma.cc/QGE9-MPMF>].

<sup>8</sup> Cook, *supra* note 1, at 4-5.

<sup>9</sup> See *infra* note 15.

<sup>10</sup> As it was, the state brought charges against only one of the police officers; a public protest in Louisville followed. Rukmini Callimachi et al., *Fired Officer Is Indicted in Breonna Taylor Case; Protesters Wanted Stronger Charges*, N.Y. TIMES, Sept. 23, 2020.

<sup>11</sup> Cook, *supra* note 1, at 7 (“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.”).

<sup>12</sup> 547 U.S. 586 (2006).

<sup>13</sup> *Id.* at 589; see also Cook, *supra* note 1, at 8, 55-60, 81.

rule.<sup>14</sup> Other Supreme Court decisions limit who has standing to challenge illegal searches,<sup>15</sup> so that if evidence were discovered illegally in Breonna Taylor's apartment, her ex-boyfriend, who was not present, could not challenge the unlawful entry or search. Of course, police would have little reason to fear a lawsuit, given the Court's exaltation of police officers' qualified immunity from civil liability.<sup>16</sup>

Cook is right that the remedies for Fourth Amendment violations are inadequate, neither deterring wrongful searches and seizures nor compensating for them. But the larger story she tells also illustrates that in the Court's hands, the right itself has been interpreted too ungenerously. The problem is not just with the Fourth Amendment right to be secure in one's home, which Cook targets.

The Fourth Amendment also promises people "[t]he right . . . to be secure in their persons . . . against unreasonable searches and seizures."<sup>17</sup> The Court's decisions, even if complied with, would not make people of color "secure in their persons." Noting that "[b]eing killed by police is a leading cause of death among young men of color,"<sup>18</sup> Cook recounts a history of police violence that inflicts a cultural trauma on the Black community.<sup>19</sup> This history makes it reasonable for people of color to fear any encounter with the police, and certainly one involving a stop, arrest, or search. That is why Black children are customarily given "The Talk" about what to do when stopped by the police.<sup>20</sup>

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<sup>14</sup> See, e.g., *United States v. Leon*, 468 U.S. 897, 913 (1984). Cook maintains that Taylor's case was the unusual one where the search warrant application was so woefully deficient that the police could not have relied in good faith on the warrant. Cook, *supra* note 1, at 45-47.

<sup>15</sup> See, e.g., *Minnesota v. Carter*, 525 U.S. 83, 91 (1998) (holding that a temporary guest in an apartment does not have standing to challenge a search of the apartment).

<sup>16</sup> The Court has produced a long line of decisions recognizing that police and other law enforcement officers are immune from civil liability for alleged Fourth Amendment violations, especially those involving excessive force, except in extremely limited circumstances. See generally, e.g., *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (upholding officers' qualified immunity in excessive force case); *Mullenix v. Luna*, 577 U.S. 7 (2015) (upholding officer's qualified immunity for shooting fleeing fugitive); *Plumhoff v. Rickard*, 572 U.S. 765 (2014) (upholding officers' qualified immunity for shooting driver of fleeing car); *Scott v. Harris*, 550 U.S. 372 (2007) (holding deputy immune from liability for excessive use of force in forcing driver off road during chase); Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. PA. L. REV. 407 (2022) (tracing development of qualified immunity doctrine in cases where police allegedly violated the Fourth Amendment by using excessive force).

<sup>17</sup> U.S. CONST. amend. IV.

<sup>18</sup> Cook, *supra* note 1, at 73.

<sup>19</sup> *Id.* at 66-78.

<sup>20</sup> See Angela Onwuachi-Willig & Anthony V. Alfieri, *(Re)Framing Race in Civil Rights Lawyering*, 130 YALE L.J. 2052, 2058 (2021) (reviewing HENRY LOUIS GATES, JR., *STONY*

Can anyone believe that people of color confronted by the police will feel secure in their persons as long as the police stay within the confines of the Fourth Amendment case law—for example, that people of color will not fear for their safety as long as the use of special weapons and tactics (“SWAT”) teams and other militarized police action abides by the Court’s decisions? Suppose that the LMPD officers, this time having a valid warrant in hand, announced themselves moments before breaking down Taylor’s door. The police would probably have set off precisely the same explosion of violence: someone inside Taylor’s apartment fires a gun kept for self-defense, as may predictably occur after the Court held in *District of Columbia v. Heller*<sup>21</sup> that individuals have a Second Amendment right to bear arms.<sup>22</sup> Then responding to the danger that the police created, the police fire back.

One does not have to be a critical race theorist—and I am not—to think that the Fourth Amendment, by its terms, must be read to take into account the history of racially motivated police violence against people of color. Accounting for this history, a robust Fourth Amendment jurisprudence would protect the right of all members of the political community, including people of color, to be “secure in their persons” by restraining the police so that police conducting searches and seizures would not unreasonably put people in fear for their personal safety. Doing this work reasonably means reducing risks and threats of physical harm, not escalating them. For example, even if the LMPD officers had grounds to search Taylor’s apartment for drugs, it would have been unreasonable to do so at night, when the police could have known she was home and likely in bed, rather than earlier in the day when she was at work.

The public should breathe life into the Fourth Amendment by insisting that states acknowledge and respect “[t]he right of the people to be secure in their persons” as a collective right of all the people all of the time, not just as a right for individuals occasionally to invoke in court.<sup>23</sup> The Court’s constitutional

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THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW (2019)) (describing “The Talk” as “an intergenerational script of advice and warnings by black parents and nonblack parents of black children that is designed to prepare black kids for surviving the police stops they will encounter in our racist society”).

<sup>21</sup> 554 U.S. 570 (2008).

<sup>22</sup> *Id.* at 635.

<sup>23</sup> In referring to the Fourth Amendment as a collective right, I do not mean to suggest that it would be reasonable to limit individuals’ Fourth Amendment rights to protect the public’s collective security. By way of comparison, see Thomas K. Clancy, *The Fourth Amendment as a Collective Right*, 43 TEX. TECH L. REV. 255, 256 (2010). On the contrary, I argue for an expansive (if not wholly judicially unenforceable) reading of the right—one that restrains unreasonable police conduct that threatens the personal security of members of the political community collectively, not just the personal security of any particular individual. I am also not arguing here that the concept of the Fourth Amendment as a collective right would justify one person in seeking a remedy for the violation of another’s rights. By way of comparison, see Donald L. Doernberg, “*The Right of the People*”: *Reconciling Collective and Individual*

jurisprudence rarely offers a way to hold police accountable for practices that make broad swaths of the population, and particularly people of color, feel personally insecure—for example, baseless and pretextual stops of pedestrians and drivers, or the use of military weaponry and other excessive force in making arrests and conducting searches. Recurring reports of racially motivated policing that people find traumatic are surely just the tip of the iceberg.<sup>24</sup> There is a constitutional imperative for states to restrain police conduct that unreasonably erodes people’s collective, as well as individual, sense of security.

Concern for people’s collective security may justify a broader interpretation of individuals’ enforceable rights under the Fourth Amendment.<sup>25</sup> But when talking about policing, it is fair to call out unreasonably threatening police practices as Fourth Amendment violations, regardless of whether the Supreme Court acknowledges individual rights and remedies. Not all constitutional rights are individual and not all are justiciable. The Constitution may establish nonjusticiable collective rights (as the Second Amendment was thought to do pre-*Heller*) no less than judicially enforceable individual rights. The Fourth Amendment *does* establish individual rights, but it may also establish a more demanding right of the people collectively, which the public should insist be respected.

An extrajudicial constitutional jurisprudence on the people’s collective right to be “secure in their persons . . . against unreasonable searches and seizures” does not depend on a radical interpretative approach. On the contrary, a Fourth Amendment jurisprudence saying that the police may not create an unreasonable risk or threat of physical harm to others would be true to the words of the Fourth Amendment. Freedom from the apprehension of harm to one’s person is precisely what the Fourth Amendment promises us as a people. And to the extent that one looks to common law understandings for guidance, they reinforce this expectation. The common law tort of assault was meant, in general, to protect people against threats to personal safety, even if nineteenth-century common law courts could not have contemplated precisely how the police would one day make people fear for their lives.

A public conversation about minority communities’ rights to be protected, not put in fear, by the police, might help loosen the Court’s grip on the meaning of the Fourth Amendment. It is important to move the conversation outside the Court because some or most of its current members envision the Fourth Amendment as less of an antimajoritarian right of vulnerable people to personal

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*Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 261 (2008), and David Gray, *Collective Standing Under the Fourth Amendment*, 55 AM. CRIM. L. REV. 77, 97-103 (2018).

<sup>24</sup> See, e.g., Kurt Streeter, *Trauma Brought By a Traffic Stop May Never Fade*, N.Y. TIMES, May 14, 2022, at B8 (recounting Georgia sheriff’s deputies’ stop of bus of mostly Black college lacrosse players in 2022 and the author’s similar experiences years earlier).

<sup>25</sup> See, e.g., David Gray, *Collective Rights and the Fourth Amendment After Carpenter*, 79 MD. L. REV. 66, 66-67 (2019); Richard H. McAdams, Note, *Tying Privacy in Knotts: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 VA. L. REV. 297, 340-41 (1985).

security and more of a landowner’s property right that protects against physical trespasses, much as the Takings Clause protects against outright confiscations. For example, with seemingly low regard for individuals’ interests in personal security, Justice Gorsuch joined a 5-4 decision holding that the parents of a fifteen-year-old Mexican child gunned down by a Border Patrol agent could not seek compensation,<sup>26</sup> and wrote a dissent asserting that the Fourth Amendment allowed officers to fire thirteen shots at a driver (who thought she was escaping carjackers), hitting her twice in the back, because she was still able to keep driving (trying to get herself to a hospital) and therefore she was never “seized.”<sup>27</sup> But on the other hand, in a case the Court decided not to review, Justice Gorsuch lamented that game wardens approaching a rural residence to ask the owners about illegal deer hunting may have stayed too long or strayed too far from the path to the front door to satisfy an earlier precedent.<sup>28</sup>

The Justices’ predispositions are unlikely to change any time soon, but legislative change is possible. The silver lining in Cook’s account is that in the aftermath of Taylor’s death, Louisville passed Breonna’s Law, and other jurisdictions proposed similar laws, to regulate how the police execute searches, including by banning no-knock warrants.<sup>29</sup> That is a measure of how recognizably awful the police conduct was in Breonna Taylor’s case. Cook advocates further reforms, not all requiring legislation, to redress the inadequacies of Fourth Amendment case law.<sup>30</sup> That may be an uphill battle, because Bill of Rights provisions such as the Fourth Amendment protect minority rights precisely because minorities lack equal power at the voting booth.<sup>31</sup> But it is a battle worth fighting, and perhaps it will be aided by a robust public understanding of the Fourth Amendment that differs from the current Court’s understanding—one that takes a more generous view of peoples’ right “to be secure in their persons . . . against unreasonable searches and seizures.”

<sup>26</sup> *Hernandez v. Mesa*, 140 S. Ct. 735, 740, 749-50 (2020).

<sup>27</sup> *Torres v. Madrid*, 141 S. Ct. 989, 1003 (2021) (Gorsuch, J., dissenting).

<sup>28</sup> *Bovatt v. Vermont*, 141 S. Ct. 22, 22-23 (2020) (Gorsuch, J., respecting the denial of certiorari).

<sup>29</sup> Cook, *supra* note 1, at 63-64.

<sup>30</sup> *Id.* at 78-85.

<sup>31</sup> Perhaps legislation is less challenging to achieve when it aims to restrain police conduct targeting everyone relatively equally. For example, most people carry cell phones and use computers and have a stake in keeping their data private, so one might expect legislation to adequately protect people from unreasonable searches of electronic data. But much of the police conduct threatening people’s individual and collective sense of security targets people with the least political clout.