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Reimagining Criminal Justice: What Good Has Come From the 'Good' Faith Exception?

Yasamin Elahi-Shirazi

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"By repeatedly justifying officer misconduct on the basis of the good faith exception the U.S. Supreme Court has negated an essential purpose of the exclusionary rule: preventing the justice system from acting as an accomplice unconstitutional activity," says Yasamin Elahi-Shirazi, a Juris Doctorate candidate at Golden Gate University.

By **Alaina Lancaster** (https://www.law.com/therecorder/author/profile/Alaina-Lancaster/) | February 22, 2021 at 07:17 PM

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The Recorder has collaborated with students enrolled in Reimagining Criminal Justice, a seminar at Golden Gate University School of Law, to publish this series of student writings. This next generation of lawyers explore a broad range of topics touching on criminal and racial justice, and provide their perspectives and voices on myriad proposals for building a better, more just, system.

In 1949, Justice Frank Murphy dissented in the case of ***Wolf v. Colorado (https://supreme.justia.com/cases/federal/us/338/25/)***, passionately defending the exclusionary rule. He warned that "only by exclusion [of evidence] can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only [then] can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police." In the wake of Breonna Taylor's death, his prophetic words resonate in the streets as the chanting of BLM protesters echo "No justice! No peace! Prosecute the police!"

By repeatedly justifying officer misconduct on the basis of the good faith exception, the U.S. Supreme Court has negated an essential purpose of the exclusionary rule: preventing the justice system from acting as an accomplice to unconstitutional activity. It is time to eliminate this exception.

On March 13, 2020, Breonna Taylor settled into bed with her boyfriend Kenneth Walker after she finished working **back-to-back (https://www.newyorker.com/culture/cultural-comment/the-empty-facts-of-the-breonna-taylor-decision)** shifts as an emergency room technician in Louisville, Kentucky. At around **12:30 a.m. (https://www.usatoday.com/story/news/nation/2020/05/15/minute-minute-account-breonna-taylor-fatal-shooting-louisville-police/5196867002/)**, the couple heard banging coming from their front door, they asked who was at the door. They heard no response. Suddenly, the front door "flies off its hinges" and armed men began to enter their apartment. Walker, **a licensed gun owner (https://www.usatoday.com/story/news/nation/2020/05/15/minute-minute-account-breonna-taylor-fatal-shooting-louisville-police/5196867002/)**, fired at the intruders, shooting one in the leg, to protect himself and Ms. Taylor from unknown intruders.

The intruders returned fire, with around **thirty rounds (https://www.bbc.com/news/world-us-canada-54210448)**, killing Taylor. Taylor was innocent and only 26 years old when she died. The intruders who killed her were actually police officers in plain clothing executing what investigations are revealing to have been an invalid search warrant in the middle of the night.

The facts of the case are **fiercely disputed (https://louisville-police.org/751/Breonna-Taylor-Investigation)**, because the officers who entered Taylor's apartment that night failed to wear body cameras. No one can truly know what transgressions took place in the killing of Breonna Taylor. What is known is that the affidavit used to secure the search warrant was based on an LMPD officer's **false testimony (https://www.whas11.com/article/news/investigations/breonna-taylor-case/breonna-taylor-joshua-jaynes-lmpd-investigation-files/417-a3d39c7a-d76e-431a-be49-f7ca088e5128)**, all five of the affidavits related to the

search that night were signed in **under 12 minutes (https://www.courier-journal.com/story/opinion/2020/07/01/breonna-taylor-police-shooting-judges-dont-rubber-stamp-warrants/3285195001/)** by a judge who didn't even print her name under her signature, the target of the search was **apprehended hours before (https://www.courier-journal.com/story/news/crime/2020/06/16/breonna-taylor-fact-check-7-rumors-wrong/5326938002/)** officers entered Taylor's apartment, and several other legally required procedures were violated.

These incremental mistakes and small breaches of protocol were exactly the types of shortcuts and misconduct that the exclusionary rule was meant to deter and ensure that law enforcement would resist "ends justify the means" thinking. The Fourth Amendment protects suspected criminals and those who are innocent, like Breonna Taylor. So how did we get here? What has become of the exclusionary rule's prophylactic power to deter constitutional violations by police? The good faith exception.

The Fourth Amendment protects the right of the people against unreasonable searches, seizures, and warrantless conduct by government actors, such as police officers. The court has added safeguards to this amendment, with the seminal cases of ***U.S. v. Weeks (https://supreme.justia.com/cases/federal/us/232/383/)*** and ***Mapp v. Ohio (https://supreme.justia.com/cases/federal/us/367/643/)***. The court created the exclusionary rule, which excludes evidence obtained in violation of the Fourth Amendment from criminal trials. Initially designed as a multifaceted legal mechanism to uphold judicial integrity, deter police misconduct and serve as a remedy for those who are victims of constitutional violations. The deterrent value was meant to help protect the public at large, especially those who are innocent of any wrongdoing, like Taylor, from being subject to such illegal searches and the deadly consequences they may present.

Twenty years after the court laid out the many justifications for the exclusionary in ***Mapp v. Ohio (https://supreme.justia.com/cases/federal/us/367/643/)***, it slowly began eroding the rules powerful purpose. Beginning with ***U.S. v. Leon (https://supreme.justia.com/cases/federal/us/468/897/)***, where the court stated that the rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved," citing, ***U.S. v. Calandra (https://supreme.justia.com/cases/federal/us/414/338/)***. Later, in *Herring v. U.S.*, the court also reasoned that "the exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable deterrence.'" Again, in ***Davis v. U.S. (https://supreme.justia.com/cases/federal/us/564/229/)***, the court declared that "[t]he sole purpose of the exclusionary rule was to deter deliberate or reckless disregard for Fourth Amendment rights."

These are the among the many cases that exemplify the ways in which the court has undermined and limited the scope of the exclusionary, and we bear witness to the consequences of these decisions today.

The issue of the exclusionary rule only comes up in cases in which police have obtained incriminating evidence against a person the government seeks to convict. This likely accounts for the court's willingness to carve out broad exceptions to ensure that "the criminal does not go free because the constable as blundered[.]" as

Justice Benjamin Cardozo stated in 1926. However, the killing of Taylor reveals the tremendous consequences these exceptions have for all people—the guilty and the innocent.

Even accepting the deterrence rationale as the basis for the exclusionary rule, the court has stretched this exception and justification to its absolute limit and effectively rendered null it's the original purposes of the rule. This is evidenced by the investigation into the search warrants that led to the death of Taylor, which reveal that law enforcement is not sufficiently deterred. Rather, law enforcement, and others in the criminal justice system, have instead internalized the importance of invoking the mantra "I acted in good faith" to ensure that incriminating evidence will not be excluded. However, this mindset about how to skirt the commands of the Constitution has life and death consequences, as well.

The exception to the exclusionary rule weighs the social costs of letting a guilty person go free in light of probative evidence, against the benefit of deterring systemic, intentional, and flagrant police misconduct. The language in the good faith exception has been used to employ a myriad of new exceptions undermining the exclusionary rule. Police practices involving warrants have been greatly impacted because officers can now search and seize as they please and rely on these good faith loopholes to act with impunity.

The good faith exception works similarly to an excuse used by first graders: The dog ate my homework. The outcome of allowing the student to continuously use that excuse is that the student will never learn the lessons the homework is meant to teach. By allowing the officer to use the good faith exception, just like the first grader, he will also never learn how and why he must conduct his police work constitutionally. However, unlike the first grader, when courts fail to hold police officers accountable for their wrongdoing the outcome can be deadly.

In ***U.S. v. Leon (https://supreme.justia.com/cases/federal/us/468/897/)***, the court decided to admit unlawfully obtained evidence on the assumption that the officers who relied on a search warrant that was reviewed by a magistrate couldn't reasonably question its validity. The reasoning was that "[o]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law, and penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence" of future officer misconduct. The court did not seem concerned with the fact that the officer used testimony that lacked probable cause. They blamed the judge who, they reasoned, cannot be deterred from committing future errors by the exclusionary rule's threat of suppression.

The rational used in *Leon* laid the foundation for ***Herring v. U.S (https://supreme.justia.com/cases/federal/us/555/135/)***., which once again favored the officer by admitting the evidence he found based on an expired warrant. The court reiterated that the exclusionary rule can't be expected to deter clerical errors and outdated databases, ignoring the argument that they form a cohesive law enforcement team. In Justice Ruth Bader Ginsburg's dissent, she stated the importance of the incentives that the exclusionary rule creates highlighting yet another important purpose the multifaceted rule serves.

She stated, “It enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,” and it “assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.” Her point astutely brings to light the consequences of what can happen when law enforcement is repeatedly allowed to act without consequence. The case of Breonna Taylor is an example of the worst that can happen.

The **affidavit (https://www.whas11.com/article/news/investigations/breonna-taylor-case/breonna-taylor-joshua-jaynes-lmpd-investigation-files/417-a3d39c7a-d76e-431a-be49-f7ca088e5128)** used to obtain the “No-Knock” search warrant which resulted in the death of Breonna Taylor is now being scrutinized. The detective who applied for the warrant has admitted to using inaccurate testimony in order to establish sufficient probable cause. Of course, this was the exact type of misconduct that the exclusionary rule is meant to deter. The magistrate who signed the warrants in this case most likely would not have noticed the lack of probable cause, because she signed all five warrants in under 12 minutes and failed to even write out her name below her signature. Does this not call into question the court’s reasoning that they can’t expect the threat of suppression to deter a neutral judicial officer from misconduct?

Detective Josh Jaynes, the detective mentioned above, was interviewed by the Public Integrity Unity shortly after the death of Taylor. In the video from the interview he claims that the affidavit was based on information from other officers and not purely his own direct knowledge. A key point used to establish probable cause in Jaynes’ affidavit states that he verified through a U.S. Postal Inspector that the main suspect was receiving suspicious packages at Ms. Taylor’s apartment.

This has been refuted by the U.S. Postal Inspector, several other officers including those who helped to prepare the affidavit, and Jaynes himself. When he was questioned about the discrepancy, he states “I could have worded a little bit differently in there.” In the **full transcript (http://../3.%20Imm.%20&%20Social%20Justice/PIU%2020-019%20Transcripts%20copy.jpg)** from the interview (on pages 383 and 407) he specifically uses the language “I was acting in good faith” to defend his conduct.

No narcotics were found at Taylor’s home; she was innocent. Had Jaynes, Judge Mary Shaw, and the entire LMPD been more careful, fearing the exclusionary rule’s sanctions, Taylor would likely still be alive. Although her family is among the few who were able to get financial redress in the form of a **settlement, (https://mail.google.com/mail/u/0/#inbox)** the life taken from an innocent person can never be truly be vindicated.

Taylor’s death is not an outlier. Sixty-seven years after Justice Murphy’s cautionary dissent, Justice Sonia Sotomayor stresses a similar point in her dissent in ***Utah v. Strieff (https://casetext.com/case/utah-v-strieff)***, which reads like a poetic ode to the BLM movement. She states, “We must not pretend that the countless people who are routinely targeted by police are ‘isolated.’ They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this

atmosphere. They are the ones who recognize that unlawful police [acts] corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but."

To bring an end the systemic reign of police misconduct and killing, we must end the use of the good faith exception to the exclusionary rule.

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To review more documents from the Public Integrity Unit's investigation about Breonna Taylor's case please visit: ***https://louisville-police.org/751/Breonna-Taylor-Investigation (https://louisville-police.org/751/Breonna-Taylor-Investigation)****.*

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