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## **COPS OR ROBBERS? HOW GEORGIA'S DEFENSE OF HABITATION STATUTE APPLIES TO NO-KNOCK RAIDS BY POLICE**

**Dimitri Epstein\***

### **INTRODUCTION**

Late in the fall of 2006, the city of Atlanta exploded in outrage when Kathryn Johnston, a ninety-two-year old woman, died in a shoot-out with a police narcotics team.<sup>1</sup> The police used a “no-knock” search warrant to break into Johnston’s home unannounced.<sup>2</sup> Unfortunately for everyone involved, Ms. Johnston kept an old revolver for self defense—not a bad strategy in a neighborhood with a thriving drug trade and where another elderly woman was recently raped.<sup>3</sup> Probably thinking she was being robbed, Johnston managed to fire once before the police overwhelmed her with a “volley of thirty-nine” shots, five or six of which proved fatal.<sup>4</sup> The raid and its aftermath appalled the nation, especially when a federal investigation exposed the lies and corruption leading to the incident.<sup>5</sup> But buried beneath all the blatant misconduct lies an interesting legal question. Assuming that the no-knock warrant was valid, did Ms. Johnston

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\* J.D. Candidate, 2010, Georgia State University College of Law. Thanks to Professor Russell Covey, Mr. Doug Ramseur, and the Law Review editors for their valuable suggestions and insight. Any deficiencies are the author’s own.

1. Steve Visser, *Court Focuses on Botched Raid, Death*, ATLANTA J.-CONST., May 5, 2008, at B1, available at 2008 WLNR 8347479; see also Patrik Jonsson, *After Atlanta Raid Tragedy, New Scrutiny of Police Tactics: Police Are Reviewing Their Use of “No-Knock” Warrants After an Octogenarian Was Killed After Officers Burst into Her Home*, CHRISTIAN SCI. MONITOR, Nov. 29, 2006, at 3, available at 2006 WLNR 20583600.

2. Jonsson, *supra* note 1. A no-knock warrant allows the police to enter a suspect’s home without knocking or otherwise announcing themselves. See discussion *infra* Part I.A.

3. Brenda Goodman, *Police Kill Woman, 92, in Shootout at Her Home*, N.Y. TIMES, Nov. 23, 2006, available at <http://www.nytimes.com/2006/11/23/us/23atlanta.html>.

4. Walter Putnam, *Newsmaker—Prison Time for Botched Raid*, MEMPHIS COM. APPEAL (Tenn.), May 23, 2008, at A2, available at 2008 WLNR 9804037.

5. Bill Rankin, *Plea in Botched Raid Ends Feds’ Case*, ATLANTA J.-CONST., Oct. 31, 2008, at C1, available at 2008 WLNR 20770526. The police lied to the judge to obtain a no-knock warrant and then planted drugs in Johnston’s house to justify the raid. Visser, *supra* note 1; see also Bill Torpy, *Senseless Killing Still Casts Shadow on Police*, ATLANTA J.-CONST., Nov. 9, 2008, at D3, available at 2008 WLNR 21418601.

have a right to shoot at the police officers who broke through her door looking for drugs? Would she have been guilty of murder and possibly sentenced to death if her shot had actually hit and killed a police officer?

Although the law is far from clear, in reality “when it’s a cop who gets shot, the private citizen nearly always winds up in jail.”<sup>6</sup> Take the story of Cory Maye, for example. Late one night in 2001, Maye “awoke to a furious pounding on his front door.”<sup>7</sup> Afraid for his and his daughter’s safety, Maye rushed to the bedroom where his daughter slept, retrieved a gun he kept for self-defense, and lay down on the floor hoping the intruders would go away.<sup>8</sup> When a figure burst through the bedroom door, Maye fired three times out of fright.<sup>9</sup> Unfortunately for Maye, the intruders turned out to be police executing a no-knock warrant, and one of Maye’s bullets hit an officer in the stomach, killing him.<sup>10</sup> Maye was convicted of capital murder, sentenced to death, and put on death row in a Mississippi prison.<sup>11</sup>

In another case, an Arkansas SWAT team stormed the house of Tracy Ingle, who, thinking that robbers were invading his home, waved a non-functioning pistol at the officers.<sup>12</sup> The police responded with an overwhelming hail of gunfire.<sup>13</sup> Ingle was shot five times, with one bullet destroying his femur and leaving his leg “dangling from his body, connected only by a bloody mess of meat, skin[,] and

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6. Statement by Radley Balko quoted by David Koon, *Shot in the Dark*, ARK. TIMES, Apr. 24, 2008, at 10, available at 2008 WLNR 9499620.

7. Radley Balko, *Railroaded onto Death Row?*, FOXNEWS.COM, Feb. 15, 2006, para. 4, <http://www.foxnews.com/story/0,2933,184992,00.html>.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*; see also Radley Balko, *Drug War Casualties Left Behind*, ATLANTA J.-CONST., Oct. 6, 2006, available at 2006 WLNR 17303525. Cory Maye was taken off death row after being given a hearing on a post-trial motion, but was re-sentenced to life imprisonment without parole. *Id.*; *Region Briefs: Man Re-Sentenced for Police Killing*, SUN HERALD (Biloxi, Miss.), Nov. 4, 2007, at A16, available at 2007 WLNR 21819106. In November 2009, the Mississippi Court of Appeals granted Maye a new trial based on a change-of-venue error. *Maye v. State*, No. 2007-KA-02147-COA, 2009 WL 3823287, at \*8 (Miss. Ct. App. Nov. 17, 2009); *Retrial Ordered in Officer’s Killing*, CLARION-LEDGER (Jackson, Miss.), Nov. 18, 2009, at B1, available at 2009 WLNR 23254398.

12. See Koon, *supra* note 6.

13. *Id.*

tendon.”<sup>14</sup> Though Ingle did not hurt any of the officers, he was charged with, among other things, two felony counts of aggravated assault.<sup>15</sup>

The two cases outlined above are not isolated incidents.<sup>16</sup> Radley Balko, a policy analyst for the Cato Institute, has profiled more than 130 cases of flawed (but not necessarily illegal) police raids that have resulted in serious humiliation, injury, or death to innocent bystanders, non-violent offenders, and officers.<sup>17</sup> Moreover, according to criminologist Peter Kraska, the number of no-knock raids across the country jumped from 3,000 in 1981 to more than 50,000 in 2006.<sup>18</sup> With the deterioration of the “knock-and-announce” requirement, as described below, such no-knock raids are bound to increase.<sup>19</sup>

At the same time, many states, including Georgia, have liberalized their self-defense statutes, providing private citizens with broad leeway in using deadly force to repel an attack, especially upon their homes.<sup>20</sup> In 2001, Georgia amended its defense of habitation statute to allow for broader immunity for someone who uses deadly force

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14. *Id.*

15. *Id.* In 2009, Ingle was convicted on all counts, including drug charges, and sentenced to eighteen years in prison. Associated Press, *Jury Convicts After No-Knock Police Search*, WXVT 15, Apr. 15, 2009, [http://www.wxvt.com/Global/story.asp?S=10191222&nav=menu1344\\_2](http://www.wxvt.com/Global/story.asp?S=10191222&nav=menu1344_2). For more information and discussion on topic, see Posting of Tiffney Forrester to Arkansas Blog, NLR Cops See Vindication Update, [http://www.arktimes.com/blogs/arkansasblog/2009/04/nlr\\_cops\\_see\\_vindication.aspx](http://www.arktimes.com/blogs/arkansasblog/2009/04/nlr_cops_see_vindication.aspx) (Apr. 16, 2009); see also Justice for Tracy, <http://www.justicefortracy.com> (last visited Feb. 6, 2010).

16. RADLEY BALKO, OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA 43 (Cato Institute 2006).

17. *Id.* at 43–82. Specifically, Balko profiles seventy-four cases where the police got the wrong address, *id.* at 43–63; fifteen cases where the police got the right address but innocent bystanders were killed or injured, *id.* at 63–68; nine cases of death or injury to police officers, *id.* at 68–71; twenty-three cases where police used their tactics “unnecessarily and recklessly” on non-violent offenders, *id.* at 71–79; and ten cases of similar police recklessness that “defy easy categorization,” *id.* at 79–82. For an interactive map of botched police raids, see Cato Institute, Botched Paramilitary Police Raids: An Epidemic of “Isolated Incidents,” <http://www.cato.org/raidmap> (last visited Feb. 6, 2010).

18. Jonsson, *supra* note 1; Harry R. Weber, *2 Officers Admit Crimes in Raid—Woman, 92, Slain in Botched ‘No-Knock,’* MEMPHIS COM. APPEAL (Tenn.), Apr. 27, 2007, at A7, available at 2007 WLNR 8005661.

19. Jonsson, *supra* note 1; see also discussion *supra* Part I.A.

20. P. Luevonda Ross, *The Transmogrification of Self-Defense by National Rifle Association-Inspired Statutes: From the Doctrine of Retreat to the Right to Stand Your Ground*, 35 S.U. L. REV. 1, 2, 18 (2007).

against a perceived intruder.<sup>21</sup> According to Balko, this trend toward private self-defense is “dangerously at odds with the concept of no-knock search warrants.”<sup>22</sup> As Justice Brennan acknowledged in *Ker v. California*, police “might be mistaken for prowlers and be shot down by a fearful householder.”<sup>23</sup>

Though botched police raids, such as Johnston’s, are certainly a problem, most officers are law-abiding professionals who would do their best to avoid hurting harmless civilians.<sup>24</sup> Yet with the decline of the knock-and-announce rule, it is easier than ever for police to legally enter a home unannounced.<sup>25</sup> This Note examines whether, under Georgia’s defense of habitation statute, a home dweller can lawfully shoot at, and possibly kill, police officers executing a legal no-knock raid. Part I provides a brief overview of the decaying knock-and-announce doctrine and introduces Georgia’s defense of habitation statute.<sup>26</sup> Part II first delves into the text of the statute to determine whether a no-knock entry by police must *actually* be unlawful or merely *appear to the occupant* as unlawful for the occupant to be justified in responding with deadly force.<sup>27</sup> This statutory analysis is followed by a discussion of relevant Georgia case law, both old and new, exploring how courts have dealt with deadly encounters between citizens and police.<sup>28</sup> Finally, Part III proposes that the defense of habitation statute should be interpreted in

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21. Robert Christian Rutlege, *Vigilant or Vigilante? Procedure and Rationale for Immunity in Defense of Habitation and Defense of Property Under the Official Code of Georgia Annotated §§ 16-3-23, -24, -24.1, and -24.2*, 59 MERCER L. REV. 629, 641–42 (2008); Derek E. Empie, *Defenses to Criminal Prosecution: Change Provisions Relating to the Use of Force in the Defense of Habitations or Residences; Provide for Related Matters*, 18 GA. ST. U. L. REV. 25, 25–29 (2001); see also *infra* Part II.A.3.

22. Koon, *supra* note 6; see also G. Todd Butler, Note, *Recipe for Disaster: Analyzing the Interplay Between the Castle Doctrine and the Knock-and-Announce Rule After Hudson v. Michigan*, 27 MISS. C. L. REV. 435, 451 (2008).

23. BALKO, *supra* note 16, at 31 (quoting *Ker v. California*, 374 U.S. 23, 58 (1963) (Brennan, J., dissenting)).

24. See *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006) (describing the rise in the professionalism of police forces).

25. See discussion *infra* Part I.A.

26. See *infra* Part I.

27. See *infra* Part II.A.

28. See *infra* Part II.B–C.

favor of the occupant, granting immunity to one who mistakenly, but reasonably, shoots at police officers during a legal no-knock entry.<sup>29</sup>

## I. BACKGROUND: THE NEED TO KNOCK AND DEFENSE OF HABITATION

The knock-and-announce requirement, written into the Georgia Code under section 17-5-27,<sup>30</sup> has been significantly watered down, paving the way for an increase in no-knock entries.<sup>31</sup> But Georgia's defense of habitation statute may still provide plenty of protection to frightened home dwellers.<sup>32</sup>

### A. *The Knock-and-Announce Rule: Fact or Fiction?*

The knock-and-announce rule, as the name suggests, requires officers to knock and announce themselves before breaking into someone's home to execute a search or arrest warrant.<sup>33</sup> It is not difficult to see why such a requirement makes sense.<sup>34</sup> In *Hudson v. Michigan*, Justice Scalia laid out the basic interests protected by the knock-and-announce rule.<sup>35</sup> First and foremost is human life—"an unannounced entry may provoke violence in supposed self-defense by the surprised resident."<sup>36</sup> The second interest is to protect property, such as the door itself, from damage by the police.<sup>37</sup> After

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29. See *infra* Part III.

30. The statute provides, in part:

All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant if, *after verbal notice or an attempt in good faith to give verbal notice* by the officer directed to execute the same of his authority and purpose . . . .

GA. CODE ANN. § 17-5-27 (2008) (emphasis added).

31. BALKO, *supra* note 16, at 5; see also Mark Josephson, Supreme Court Review, *Fourth Amendment—Must Police Knock and Announce Themselves Before Kicking in the Door of a House?*, 86 J. CRIM. L. & CRIMINOLOGY 1229, 1262–63 (1996). See generally Brian S. Uholik, Comment, *Who Cares If It's Open?: Hudson v. Michigan and the United States Supreme Court's Evisceration of the Knock and Announce Rule*, 112 PENN ST. L. REV. 261, 277–79, 291 (2007).

32. See GA. CODE ANN. § 16-3-23 (2007); see also discussion *infra* Part II.A.

33. 18 U.S.C. § 3109 (2006); GA. CODE ANN. § 17-5-27 (2008).

34. See generally *Hudson v. Michigan*, 547 U.S. 586, 593–94 (2006) (describing the reasons behind the knock-and-announce requirement).

35. *Id.* at 594 (holding that concealment of incriminating evidence is not an interest protected by the knock-and-announce requirement).

36. *Id.*

37. *Id.*

all, the police should give residents a chance to comply with the law and peacefully let the officers inside their homes.<sup>38</sup> Finally, knocking and announcing protects people's privacy and dignity by allowing them to collect themselves—by putting on their clothes, for example—before answering the door.<sup>39</sup>

Given the importance of the interests protected by the knock-and-announce requirement, one should not be surprised that the rule is an “ancient one,”<sup>40</sup> long entrenched in the Anglo-American legal tradition.<sup>41</sup> The principle was first judicially recognized in Britain in 1603<sup>42</sup> and has been part of American common law since the founding of the nation.<sup>43</sup> The federal government codified the rule in 1917, and a majority of states, including Georgia, have done so as well.<sup>44</sup> Moreover, the Supreme Court recognized the knock-and-announce principle as a “command” of the Fourth Amendment.<sup>45</sup> The long history and prevalence of the knock-and-announce doctrine should illustrate how much society values it.<sup>46</sup> Although the common law did not require announcement in all circumstances,<sup>47</sup> it may nonetheless be surprising to learn just how easily the police can burst into a home unannounced.<sup>48</sup>

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38. *Id.*

39. *Id.*

40. *Hudson*, 547 U.S. at 589.

41. *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (citing *Miller v. United States*, 357 U.S. 301, 313 (1958)).

42. Josephson, *supra* note 31, at 1235 (citing *Semayne's Case*, (1603) 77 Eng. Rep. 194, 195–96 (K.B.)). In *Wilson v. Arkansas*, Justice Thomas suggests that the rule may actually go back much further, originating from a statute enacted in 1275. *Wilson*, 514 U.S. at 932 n.2.

43. Josephson, *supra* note 31, at 1237–38.

44. *Id.* at 1239. The federal knock-and-announce requirement is codified in 18 U.S.C. § 3109 (2006); Georgia's may be found in GA. CODE ANN. § 17-5-27 (2008).

45. *Hudson*, 547 U.S. at 589 (citing *Wilson*, 514 U.S. at 934). The court in *Wilson* held that the knock-and-announce principle is “an element of the reasonableness inquiry under the Fourth Amendment.” *Wilson*, 514 U.S. at 934. The court also noted that the announcement requirement is not a “rigid rule . . . that ignores countervailing law enforcement interests.” *Id.*

46. *E.g.*, Uholik, *supra* note 31, at 292.

47. *Wilson*, 514 U.S. at 935.

48. *See Hudson*, 547 U.S. at 589–90 (holding that even if the police violated the knock-and-announce requirement, evidence gathered in the subsequent search is admissible in court); *see also* Josephson, *supra* note 31, at 1262–63. *See generally* Uholik, *supra* note 31, at 291.

To illustrate, in *Hudson v. Michigan*, Justice Scalia, speaking for the Court, succinctly described the flexibility and vagueness of the knock-and-announce requirement:

[There are] many situations in which it is not necessary to knock and announce. It is not necessary when ‘circumstances presen[t] a threat of physical violence,’ or if there is ‘reason to believe that evidence would likely be destroyed if advance notice was given,’<sup>49</sup> or if knocking and announcing would be ‘futile.’<sup>50</sup> We require only that police ‘have a reasonable suspicion . . . under the particular circumstances’ that one of these grounds for failing to knock and announce exists, and we have acknowledged that ‘[t]his showing is not high.’<sup>51</sup>

The Court in *Hudson* held that even if police unlawfully fail to announce themselves, the evidence seized in the ensuing search need not be suppressed at trial because evidence concealment is not one of the interests protected by the knock-and-announce rule.<sup>52</sup> Thus, the Court “destroy[ed] the strongest legal incentive to comply with the Constitution’s knock-and-announce requirement.”<sup>53</sup>

In Georgia, the knock-and-announce statute mandates that an officer give “verbal notice or an attempt in good faith to give verbal notice” before breaking down the door.<sup>54</sup> However, “a warrant can authorize a ‘no-knock’ entry where police . . . demonstrate ‘a reasonable suspicion that knocking and announcing their presence . . . would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of the evidence.’”<sup>55</sup> In line with *Hudson*, this showing is “not high”:<sup>56</sup>

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49. *Hudson*, 547 U.S. at 589 (alteration in original) (quoting *Wilson*, 514 U.S. at 936).

50. *Id.* at 589–90 (quoting *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997)).

51. *Id.* at 590 (alteration in original) (quoting *Richards*, 520 U.S. at 394).

52. *Id.* at 594.

53. *Id.* at 605 (Breyer, J., dissenting).

54. GA. CODE ANN. § 17-5-27 (2008).

55. *Jackson v. State*, 634 S.E.2d 846, 848 (Ga. Ct. App. 2006) (quoting *State v. Williams*, 621 S.E.2d 581, 583 (Ga. Ct. App. 2005)).

56. *Poole v. State*, 596 S.E.2d 420, 424 (Ga. Ct. App. 2004) (quoting *Hudson*, 547 U.S. at 590).



To establish reasonable grounds [for a no-knock warrant], the officer does not have to show specific information that would lead officers to conclude that they *would* be harmed if they announced their authority and purpose; it is sufficient if the information . . . would lead to the reasonable conclusion that the officers *could* be harmed . . . .<sup>57</sup>

For example, in *Hunter v. State*, a no-knock warrant was authorized where an informant told officers that automatic weapons may be found in the house.<sup>58</sup> In *State v. Cochran*, a no-knock warrant was authorized based on an informant's assertion that Cochran carried firearms and "will not go down without a fight."<sup>59</sup> Moreover, even absent a no-knock warrant, an unannounced entry would still be justified by the presence of exigent circumstances, defined as "reasonable grounds to believe that forewarning would either greatly increase [officers'] peril or lead to the immediate destruction of the evidence."<sup>60</sup> Thus, police *violations* of the knock-and-announce principle are only part of the danger because it is relatively easy for officers to legally dispense with this requirement.<sup>61</sup>

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57. *Cook v. State*, 565 S.E.2d 896, 898 (Ga. Ct. App. 2002); *see also State v. Cochran*, 620 S.E.2d 444, 447 (Ga. Ct. App. 2005).

58. *Hunter v. State*, 400 S.E.2d 641, 644 (Ga. Ct. App. 1990).

59. *Cochran*, 620 S.E.2d at 447. *But see Poole*, 596 S.E.2d at 423–24 (finding no exigent circumstances justifying a no-knock entry where police decided to break into the house unannounced after a person inside the residence looked out the window and went back inside).

60. *Poole*, 596 S.E.2d at 422 (quoting *State v. Smith*, 467 S.E.2d 221, 222 (Ga. Ct. App. 1996)); *see also Martin v. State*, 302 S.E.2d 614, 615 (Ga. Ct. App. 1983); *Scully v. State*, 178 S.E.2d 720, 722 (Ga. Ct. App. 1970).

61. BALKO, *supra* note 16, at 5, 30, 31. Balko argues that the knock-and-announce requirement is "commonly either circumvented through court-sanctioned loop-holes, ignored completely with little consequence, or only ceremoniously observed, with a knock and announcement unlikely to be noticed by anyone inside." *Id.* at 5. In 2008, Georgia Senate passed a bill that would have made it tougher for police to get no-knock search warrants. Jim Galloway & Bob Kemper, *Political Insider*, ATLANTA J.-CONST., Mar. 11, 2008, available at 2008 WLNR 5381369. However, the bill never made it past the House and into law. *See* SB 259, as passed Senate, 2008 Ga. Gen. Assem., available at [http://www.legis.ga.gov/legis/2007\\_08/fulltext/sb259.htm](http://www.legis.ga.gov/legis/2007_08/fulltext/sb259.htm). It is unclear how such legislation would affect warrantless no-knock entries made due to "exigent circumstances." *See supra* text accompanying note 60.

*B. Defending Your Home in Georgia*

The Georgia defense of habitation statute, found in section 16-3-23 of the Georgia Code, allows persons to use deadly force in defending their homes against intruders:<sup>62</sup>

A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to prevent or terminate such other's unlawful entry into or attack upon a habitation; however, such person is justified in the use of force which is intended or likely to cause death or great bodily harm only if:

(1) The entry is made or attempted in a violent and tumultuous manner and he or she reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person dwelling or being therein and that such force is necessary to prevent the assault or offer of personal violence;

(2) That force is used against another person who is not a member of the family or household and who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using such force knew or had reason to believe that an unlawful and forcible entry occurred; or

(3) The person using such force reasonably believes that the entry is made or attempted for the purpose of committing a felony therein and that such force is necessary to prevent the commission of the felony.<sup>63</sup>

Whoever uses deadly force under this statute is immune from prosecution.<sup>64</sup> So is defense of habitation the only way to justify killing an intruder?

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62. GA. CODE ANN. § 16-3-23 (2007).

63. *Id.* Subsection (2) of the statute, referred to as the "Make My Day Bill," was added in 2001. Empie, *supra* note 21, at 25, 28–29. For discussion of the amendment, see *infra* Part II.A.3.

64. GA. CODE ANN. § 16-3-24.2 (2007); *Fair v. State*, 664 S.E.2d 227, 230 (Ga. 2008) (citing *Boggs v. State*, 581 S.E.2d 722, 723 (Ga. Ct. App. 2003)) (holding that immunity is determined as a matter of law before the start of the trial). Section 16-3-24.2 provides:

Actually, two other similar statutes may grant immunity to occupants who use deadly force against intruders.<sup>65</sup> Section 16-3-24 addresses the defense of property other than habitation,<sup>66</sup> and section 16-3-21 addresses general self-defense.<sup>67</sup> However, the defense of habitation statute, section 16-3-23, provides broader protection than the other immunity statutes.<sup>68</sup> This is partly because subsection (2) of section 16-3-23 “may not require the defender of habitation to have an objectively reasonable belief” that the use of force is necessary.<sup>69</sup> Moreover, the defense of habitation statute may justify the use of deadly force “even if that amount of force was not necessarily required to repel [an] attack.”<sup>70</sup> Thus, in any case where a defendant is accused of shooting a police officer during a raid, it is crucial to plead defense of habitation under section 16-3-23.<sup>71</sup>

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A person who uses threats or force in accordance with Code Section 16-3-21, 16-3-23, 16-3-23.1, or 16-3-24 shall be immune from criminal prosecution therefor unless in the use of deadly force, such person utilizes a weapon the carrying or possession of which is unlawful by such person under Part 2 or 3 of Article 4 of Chapter 11 of this title.

65. GA. CODE ANN. § 16-3-21, -24, -24.2 (2007); Rutlege, *supra* note 21, at 630–33.

66. Section 16-3-24(b) provides:

The use of force which is intended or likely to cause death or great bodily harm to prevent trespass on or other tortious or criminal interference with real property other than a habitation or personal property is not justified unless the person using such force reasonably believes that it is necessary to prevent the commission of a forcible felony.

67. Section 16-3-21(a) provides:

A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself or herself or a third person against such other's imminent use of unlawful force; however, except as provided in Code Section 16-3-23, a person is justified in using force which is intended or likely to cause death or great bodily harm only if he or she reasonably believes that such force is necessary to prevent death or great bodily injury to himself or herself or a third person or to prevent the commission of a forcible felony.

68. Rutlege, *supra* note 21, at 631.

69. *Id.*

70. *Benham v. State*, 591 S.E.2d 824, 826 (Ga. 2004). Compare GA. CODE ANN. § 16-3-23 (2007), with § 16-3-21. But see *Patel v. State*, 620 S.E.2d 343, 348 (Ga. 2005) (Carley, J., concurring) (“*Benham* should be cautiously and sensibly limited to its actual holding by the express terms of [section] 16-3-23 . . .”).

71. See *Benham*, 591 S.E.2d at 826 (finding ineffective assistance of counsel for failing to plead immunity under the defense of habitation statute). All the immunity statutes described above allow the defendant to avoid trial altogether, thereby conferring “a far greater right than any encompassed by an affirmative defense.” *Bunn v. State*, 667 S.E.2d 605, 608 (Ga. 2008). To avoid trial, the defendant must prove immunity by a preponderance of the evidence. *Id.* Failing that, the defendant may still assert an affirmative defense at trial based on the immunity statutes. *Id.* In that case, the prosecution must disprove the defense beyond a reasonable doubt. *Id.*

## II. ANALYSIS: EXPLORING THE STATUTE AND SURROUNDING CASE LAW

The main paragraph of section 16-3-23 states that persons may use deadly force if they reasonably believe that it is necessary to prevent an “*unlawful entry* into or attack upon a habitation.”<sup>72</sup> The first issue in applying the statute is to determine whether the entry or attack on a habitation must actually be unlawful, or if instead the occupant must only reasonably believe that the entry or attack is unlawful.<sup>73</sup> After all, if the entry must actually be unlawful, then a home occupant who shoots an officer during a raid would not be able to plead defense of habitation as long as the officer had a warrant and otherwise complied with the law.<sup>74</sup> Second, it is helpful to see how Georgia courts have historically dealt with deadly confrontations between police and citizens, and whether officers enjoyed any special protection under the law.<sup>75</sup> Finally, this Part will explore some Georgia cases that have actually applied the defense of habitation statute to police-civilian encounters.<sup>76</sup>

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72. GA. CODE ANN. § 16-3-23 (2007) (emphasis added).

73. Many no-knock raids that result in unnecessary deaths are lawfully (though not necessarily prudently) carried out by police. *See* BALKO, *supra* note 16, at 71–79. For an example of a recent Georgia case, *see Fair v. State*, 664 S.E.2d 227, 233–37 (Ga. 2008) (finding that the warrant, manner of entry, and search of the house were valid where the defendants shot and killed an officer thinking they were being attacked). In his treatise on Georgia criminal offenses and defenses, Robert Cleary states that “[f]or the defense of habitation to be applicable, it is essential that the entry defended against be unlawful.” ROBERT E. CLEARY, JR., D17 KURTZ CRIMINAL OFFENSES AND DEFENSES IN GEORGIA, at IV (2008). However, the cases Cleary cites for this proposition are not so clear-cut. *See id.* at n.34. The two most relevant cases cited are *Leach v. State*, 239 S.E.2d 177 (Ga. Ct. App. 1977) and *Washington v. State*, 263 S.E.2d 152 (Ga. 1980). CLEARY, *supra*, at nn.35–36. These two cases are discussed in detail *infra* Part II.C.

74. *See, e.g., State v. Gardiner*, 814 P.2d 568, 576 (Utah 1991). The court in *Gardiner* concluded, in dicta, that “the legislature intended [the defense of habitation statute] to exclude peace officers acting in the course of their duties.” *Id.* The court actually held that the defense of habitation statute did not apply because the place allegedly defended was not a habitation. *Id.* at 575. Utah’s defense of habitation statute is similar to Georgia’s. *Compare* UTAH CODE ANN. § 76-2-405 (2004), *with* GA. CODE ANN. § 16-3-23 (2007).

75. *See* discussion *infra* Part II.B.

76. *See* discussion *infra* Part II.C.

### A. Letter and Spirit of the Law

The actual language of the statute is the most important factor in its interpretation.<sup>77</sup> In decoding section 16-3-23, this Note explores the wording of the text, cases that have interpreted the language, and legislative history.<sup>78</sup>

#### 1. Breaking Down the Text

First, it is important to look at the common-sense grammatical structure of the text.<sup>79</sup> Looking at the statute, one can ask *what* justifies the use of force? The answer is “reasonable belief that . . . .”<sup>80</sup> Logically, *reasonable belief* qualifies the rest of the sentence after the word *that*.<sup>81</sup> If so, then *reasonable belief* also qualifies *unlawful entry*, allowing a person to use force merely on reasonable belief that the entry is unlawful.<sup>82</sup> But even if *unlawful entry* is not qualified by reasonable belief, it is possible that the second clause, after the first semi-colon (“however, such person is justified in the use of [deadly] force . . . only if . . . .”<sup>83</sup>), is a completely separate statement explaining when someone can use *deadly force*—a statement that is unqualified by the previous clause dealing with the use of *non-deadly* physical force.<sup>84</sup> Although the addition of the word *only* to the second clause makes it more restrictive, the restriction

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77. LINDA D. JELLUM & DAVID CHARLES HRICK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 7, 8 (2006); *see also* NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2008) (discussing the plain meaning rule).

78. *See generally* SINGER & SINGER, *supra* note 77, § 45 (discussing criteria for statutory interpretation). There are other ways to interpret a statute, such as by reference to statutes on other subjects, *id.* § 53, or similar statutes of other states, *id.* § 52, but such broad and comprehensive analysis is beyond the purview of this note.

79. *See id.* § 47:1 (discussing textual construction of statutes). However, “[a] legislature is not compelled by any superior force to obey the rules of grammar and composition.” *Id.*

80. GA. CODE ANN. § 16-3-23 (2007).

81. Interview with Doug Ramseur, Senior Staff Attorney, Office of the Ga. Capital Defender, Atlanta, Ga. (Oct. 23, 2008) [hereinafter Ramseur Interview].

82. *Id.*

83. GA. CODE ANN. § 16-3-23 (2007) (emphasis added).

84. *Id.*; *see also* Ramseur Interview, *supra* note 81.

may come from other conditions, other than unlawfulness, that are described in subsections (1), (2), and (3).<sup>85</sup>

Next, it helps to look at some of the rules of statutory construction.<sup>86</sup> According to the rule of surplusage, “[i]t is a ‘cardinal principle . . . ’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”<sup>87</sup> Thus, in subsection (2), the word *unlawfully* was probably used for a purpose and must be contrasted with subsections (1) and (3), where the word *unlawful* was not used.<sup>88</sup> Moreover, “where the legislature has employed a term in one place and excluded it in another, it should not be implied where excluded.”<sup>89</sup> Thus, the word *unlawful* should not be implied in subsections (1) and (3), where it seems to have been left out purposefully.<sup>90</sup> If the legislature intended to require unlawful entry, it “knew how to do so.”<sup>91</sup> In the words of the Georgia Supreme Court, “[w]e must presume that [the legislature’s] failure to do so was a matter of considered choice.”<sup>92</sup>

Due to the ambiguity of the language, the rule of lenity may also apply.<sup>93</sup> The rule developed from an “instinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should.”<sup>94</sup> Thus, a court may interpret the statute in favor of the

85. See GA. CODE ANN. § 16-3-23(1-3) (2007); see also Ramsour Interview, *supra* note 81.

86. SINGER & SINGER, *supra* note 77, § 47:1 (describing the role of the actual text in statutory interpretation).

87. JELLUM & HRICK, *supra* note 77, at 147 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); see also SINGER & SINGER, *supra* note 77, § 46:6 (discussing how each word in a statute is given effect).

88. See generally SINGER & SINGER, *supra* note 77, § 46:6.

89. *Id.*

90. See generally *id.*

91. *Fair v. State*, 664 S.E.2d 227, 232 (Ga. 2008) (quoting *Inland Paperboard & Packaging v. Ga. Dep’t of Revenue*, 616 S.E.2d 873, 876 (Ga. Ct. App. 2005)). In all fairness, one can argue that, because subsection (2) was added after the rest of the statute, it is possible that the legislature, in enacting the original statute, intended the word “unlawful” in the first section to qualify “entry” in both original subsections. See generally *id.* (stating that the history of a statute belied the legislature’s intent to include or omit a provision). However, that would imply careless oversight on the legislature’s part in enacting subsection (2). See generally SINGER & SINGER, *supra* note 77, § 46:6.

92. *Fair*, 664 S.E.2d at 232 (quoting *Inland Paperboard & Packaging*, 616 S.E.2d at 876).

93. JELLUM & HRICK, *supra* note 77, at 386. The rule of lenity generally holds that a person should not be punished for a crime that “a reasonable person could not know was illegal.” *Id.*

94. *Dixon v. State*, 596 S.E.2d 147, 150 (Ga. 2004) (quoting *United States v. R.L.C.*, 503 U.S. 291, 305 (1992)); see also JELLUM & HRICK, *supra* note 77, at 386 (quoting *United States v. Gonzales*, 407

defendant and not require actual unlawful entry.<sup>95</sup> However, courts usually apply the rule of lenity only when all other sources of statutory interpretation have been exhausted.<sup>96</sup> One cannot be certain that a court will find sufficient ambiguity in the defense of habitation statute to resort to this rule.

## 2. *Answers from the Bench*

The Georgia Supreme Court in *Hammock v. State*, armed with two rules of statutory construction, attempted to decipher the statute.<sup>97</sup> In *Hammock*, the defendant, seeking shelter from her husband, locked herself in the bedroom.<sup>98</sup> When the husband broke down the door and advanced on the defendant to “teach her a lesson,” she shot him in the chest, killing him.<sup>99</sup> The court reasoned that because subsections (1) and (3) of section 16-3-23 did not mention members of the same household, unlike subsection (2), then “the lack of limiting language in subsections (1) and (3) shows the legislature’s intent to allow these subsections to apply between co-inhabitants.”<sup>100</sup> The same can be said for the word “unlawful”: its absence in subsections (1) and (3) shows that the legislature did not intend for unlawfulness to be

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F.3d 118, 125 (2d Cir. 2005)). Note, however, that the question of *unlawfulness* does not address the conduct of the actor, but rather the status of the potential victim. *See* discussion *infra* Part III.A. So if the statute were to be interpreted as requiring actual unlawful entry, the guilt or innocence of the occupant would depend not on the actor’s subjective conduct, but on the status of the intruder. *See* discussion *infra* Part III.A.

95. *Fleet Fin., Inc. of Ga. v. Jones*, 430 S.E.2d 352, 355 (Ga. 1993) (“[A criminal statute] must be construed strictly against criminal liability and, if it is susceptible to more than one reasonable interpretation, the interpretation most favorable to the party facing criminal liability must be adopted.”); *see* JELLUM & HRICK, *supra* note 77, at 386.

96. *United States v. Staples*, 511 U.S. 600, 619 n.17 (1994) (“[The rule of lenity] ‘is reserved for cases where, after seizing every thing from which aid can be derived,’ the Court is ‘left with an ambiguous statute.’” (citations omitted)); JELLUM & HRICK, *supra* note 77, at 386.

97. *Hammock v. State*, 592 S.E.2d 415, 418 (Ga. 2004). The court applied two principles of statutory interpretation: “*expressio unius est exclusio alterius* (expression of one thing implies exclusion of another) and *expressum facit cessare tacitum* (if some things are expressly mentioned, the inference is stronger that those not mentioned were intended to be excluded).” *Id.*

98. *Id.* at 417.

99. *Id.*

100. *Id.* at 418–19. *See generally* JELLUM & HRICK, *supra* note 77, at 165–67; SINGER & SINGER, *supra* note 77, § 47:23 (discussing the principle of *expressio unius est exclusio alterius*).

relevant to these subsections.<sup>101</sup> But in a strange twist, the *Hammock* court held that defense of habitation did not apply because the bedroom was not a habitation—the defendant had no right to exclude her husband from the room.<sup>102</sup> Thus, the husband's breaking down the door was “not an unlawful entry into or attack upon Hammock's habitation.”<sup>103</sup> It is unclear whether Hammock knew if her husband's entry was lawful or not, or whether such knowledge figured into the court's decision.<sup>104</sup>

In *Robison v. State*, another interesting case interpreting the statute, the defendant came into his brother's house and attacked him with a meat cleaver, at which point the brother beat the defendant with a pool cue.<sup>105</sup> Convicted of aggravated assault, the defendant asserted that he was only trying to defend himself against the victim's “unjustified attack.”<sup>106</sup> The defendant argued that section 16-3-23 “forbade the victim from using deadly force because he is the victim's brother.”<sup>107</sup> The court disagreed, explaining that “subsection (2)[,] . . . which excludes family members from its scope, applies only to defense against one ‘who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence.’”<sup>108</sup> The court cited subsection (1), which does not exclude family members, and held that subsection (2) was inapplicable to this case.<sup>109</sup> The court's holding implies that, even though subsection (2) may be inapplicable against an intruder who enters *lawfully*, subsections (1) and (3) would still apply because, such as with family members, those subsections say nothing about unlawfulness of entry.<sup>110</sup>

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101. See *Hammock*, 592 S.E.2d at 418–19; see also JELLUM & HRICIK, *supra* note 77, at 165–67; SINGER & SINGER, *supra* note 77, § 47:23.

102. *Hammock*, 592 S.E.2d at 419.

103. *Id.*

104. See *id.*

105. *Robison v. State*, 625 S.E.2d 533, 535 (Ga. Ct. App. 2006).

106. *Id.*

107. *Id.* at 536.

108. *Id.* (quoting GA. CODE ANN. § 16-3-23(2) (2007)).

109. *Id.*

110. See *id.* at 536. But see *Fannin v. State*, 299 S.E.2d 72, 73 (Ga. Ct. App. 1983) (holding that defense of habitation applies because the “evidence . . . clearly shows that the deceased used coercion and threats to gain entry into the defendant's home”).



To take a lesson from history, an old Georgia case strongly suggests that the defendant's reasonable belief, rather than the lawfulness or unlawfulness of the victim's entry, is all that should matter.<sup>111</sup> In *McPherson v. State*, the defendant shot a man on his property because he thought the man was a burglar. It turned out, however, that the defendant's wife had allowed the man onto the property.<sup>112</sup> The court, in examining the defendant's conduct, reasoned that "[a] man cannot in general, be held accountable as a criminal for failing to govern himself by something of the existence of which he is ignorant."<sup>113</sup> Further, the court noted that if the defendant actually believed that the man was a burglar, and the circumstances justified such a belief, then the case would not have been "materially different from what it would have been, if [the man] had really been a burglar."<sup>114</sup> *McPherson* directly implies that if a homeowner shoots at a robber who turns out to be a police officer, a court should treat the situation no differently than if the victim had actually been a robber.

### 3. Lawmakers' Goal

Having analyzed the text, it is helpful to look at what the legislature intended to accomplish by enacting the statute, or at least a part thereof.<sup>115</sup> The Georgia legislature amended the defense of habitation statute in 2001 by adding subsection (2), suggesting a broader, occupant-oriented interpretation.<sup>116</sup> The "Make My Day Bill," as the proposed amendment was called, was designed to allow homeowners to "shoot first and ask questions later."<sup>117</sup> Thus, subsection (2) would "allow people to defend their home without having to stop and think whether deadly force toward an intruder would meet the prior two [(subsections (1) and (3))] reasonableness

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111. *McPherson v. State*, 22 Ga. 478 (1857), available at 1857 WL 1938.

112. *Id.* at \*2.

113. *Id.* at \*7.

114. *Id.* at \*8.

115. See generally SINGER & SINGER, *supra* note 77, § 48.1 (describing the use of legislative history in statutory interpretation).

116. See *Empie*, *supra* note 21, at 25–29.

117. *Id.* at 25.

requirements.”<sup>118</sup> As Senator Eric Johnson, Senate District No. 1, said, the bill’s purpose is “to allow homeowners to protect themselves and their property when they know or *reasonably know* that someone has trespassed into their home.”<sup>119</sup> Yet if the entry must actually be unlawful, the occupant would be required to engage in a careful risk-benefit analysis before shooting at perceived intruders.<sup>120</sup> On one hand, if the occupant does not react soon enough, she risks being murdered or raped,<sup>121</sup> but if she acts too quickly, she risks being convicted of a major felony.<sup>122</sup> It seems, therefore, that the legislature wanted to enable home dwellers to act simply on reasonable belief in shooting at intruders, and interpreting the statute otherwise would conflict with legislative intent.<sup>123</sup>

### *B. Resisting Arrest in the Good Old Days*<sup>124</sup>

In interpreting the statute, it is helpful to look briefly at Georgia’s common law principles, especially in situations of conflict between citizens and police.<sup>125</sup> A number of Georgia cases have dealt with situations where a civilian used deadly force against police while

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118. *Id.* at 26.

119. *Id.* at 26–27 (emphasis added) (quoting Telephone Interview with Sen. Eric Johnson, Senate District No. 1 (Apr. 3, 2001)). This comment was made to stress that the bill was not intended to allow family members to shoot one another. *Id.* One may infer that the *unlawfulness* language in subsection (2) was designed specifically to prevent hostile family shoot-outs and not to impose external restrictions on the occupant’s reasonable belief that a robber has broken into the home. *See id.*

120. *See* BALKO, *supra* note 16, at 35–36.

121. *See* discussion *infra* Part III.B.

122. *See* discussion *infra* Part III.A.

123. *See* Empie, *supra* note 21, at 26.

124. For a thorough examination of the common law rule granting a citizen the right to forcefully resist an illegal arrest, see *State v. Gardiner*, 814 P.2d 568, 571–75 (Utah 1991).

125. *See generally* SINGER & SINGER 2B, *supra* note 77, § 50:2 (discussing application of statutes with reference to common law principles). The authors note that “common-law principles have frequently been invoked as the basis to insist on criminal intent as an element of crimes under statutes which failed specifically to require it.” *Id.*

resisting arrest.<sup>126</sup> Notably, courts do not necessarily give police any broader protection than ordinary citizens.<sup>127</sup>

In *Davis v. State*, a deputy officer came to the defendant's house to arrest him.<sup>128</sup> The deputy had a warrant but did not inform the defendant of the warrant or his intent to arrest.<sup>129</sup> The defendant resisted, ran "around his house" into the back door, and finally shot the officer after the latter "attempt[ed] to enter with a pistol in his hand."<sup>130</sup> The court held that the defendant had a right to resist the officer because he did not know of the officer's status or intent to arrest, "and if [the officer] had died from the wounds inflicted by the defendant . . . , it would not have been murder."<sup>131</sup>

One frequently cited holding comes from *Norton v. State*.<sup>132</sup> In *Norton*, the defendant police officer, after a pursuit, shot a man when the latter refused to hold up his hands and "brought his hand forward with something in it."<sup>133</sup> In part of its holding, the court elaborated on the right to resist arrest:

The mere fact of an unlawful arrest will not alone authorize the killing of the officer making it. But if . . . the officer is about to commit a felony upon the other party, or *so acts and makes such*

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126. See, e.g., *Mullis v. State*, 27 S.E.2d 91 (Ga. 1943); *Shafer v. State*, 20 S.E.2d 34 (Ga. 1942); *McBride v. State*, 199 S.E. 153 (Ga. 1938); *Paramore v. State*, 129 S.E. 772 (Ga. 1925); *Davis v. State*, 4 S.E. 318 (Ga. 1887). Although these cases are fairly old, none of them has been overruled.

127. See, e.g., *Walker v. State*, 169 S.E. 315, 317 (Ga. Ct. App. 1933) (holding that a citizen has a right to resist unlawful arrest "force with force . . . and if . . . he kills an officer or private citizen who joins in an attempt to effect illegal arrest . . . he is guilty of no offense").

128. *Davis v. State*, 4 S.E. 318, 318 (Ga. 1887).

129. *Id.*

130. *Id.* (reversing the lower court's conviction for "assault with intent to murder"). However, the court implied that if the defendant actually killed the officer, he would still be guilty of manslaughter, but not murder. See *id.*

131. *Id.* at 319. The court, in dictum, doubted whether the officer in question had the right to effect the arrest. *Id.* at 318.

132. *Norton v. State*, 74 S.E. 759, 760 (Ga. 1912). For other cases that cite the holding, see, for example, *Mullis v. State*, 27 S.E.2d 91, 98–99 (Ga. 1943), *Shafer v. State*, 20 S.E.2d 34, 39 (Ga. 1942), *McBride v. State*, 199 S.E. 153, 156 (Ga. 1938), and *Paramore v. State*, 129 S.E. 772, 777 (Ga. 1925).

133. *Norton*, 74 S.E. at 761. But see *Gresham v. State*, 27 S.E.2d 463, 464 (Ga. Ct. App. 1943) ("[I]f . . . the facts and circumstances surrounding the accused at the time he killed the deceased, were such only as would excite the fears of a reasonable man that *some bodily harm, less than a felony*, was imminent and impending, this would not be a defense to voluntary manslaughter . . ." (emphasis added)).

*a show of violence* as to excite in the person sought to be arrested the *fears of a reasonable man* that a felony is about to be committed upon him, and such person acts under the influence of those fears, and not in a spirit of revenge, he may protect himself, although it may be necessary to slay the officer for that purpose.<sup>134</sup>

The court noted that the defendant officer in question “did not even inform the person whom he shot of his official position.”<sup>135</sup>

*Mullis v. State* is another illustrative case that expounds upon the “reasonable fears” doctrine quoted above.<sup>136</sup> In *Mullis*, the defendant stabbed a police officer in the jugular vein with a pocket knife after the officer beat the defendant on the head in an effort to arrest him.<sup>137</sup> The trial judge charged the jury that “a person may kill to prevent an illegal arrest only when it is reasonably and absolutely necessary.”<sup>138</sup> On appeal, the court held that such a charge was error because this instruction “wholly eliminated the principle of ‘reasonable fears’ of a felonious assault by the deceased, a resistance to which would constitute justifiable homicide.”<sup>139</sup> The court stated that when an officer tries to make a lawful arrest but in a felonious manner, “or if

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134. *Norton*, 74 S.E. at 760 (emphasis added). The court’s holding stems from the trial court’s jury charge that if the defendant acted in self-defense “against one who manifestly intended by violence or surprise to commit a felony on his person,” the homicide would be justified. *Id.* The holding, affirming the defendant’s conviction, implies that the victim could not have manifestly intended to commit a felony on the officer because he was lawfully resisting an illegal arrest. *Id.*

135. *Id.*

136. *Mullis v. State*, 27 S.E.2d 91, 98, 100 (Ga. 1943) (citing Ga. Code of 1933 §§ 26-1011, 26-1012). The doctrine of reasonable fears was codified in the two cited sections of the Georgia 1933 Code. *See id.* Section 26-1011, covering justifiable homicide, self defense, and defense of habitation, states that one is justified in committing homicide “against one who *manifestly* intends or endeavors, by violence or surprise, to commit a felony . . . or against any persons who *manifestly* intend and endeavor, in a riotous and tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence”; section 26-1012 states that “a bare fear of any of those offenses . . . shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man . . . .” Ga. Code of 1933 §§ 26-1011, 26-1012 (1935) (emphasis added). For more recent cases applying the doctrine, see *Andrews v. State*, 480 S.E.2d 29, 30 (Ga. 1997) and *Crawford v. State*, 480 S.E.2d 573, 575 (Ga. 1997). Notably, “[t]he fears of a reasonable man don’t mean the fears of a coward, but of a man reasonably courageous, reasonably self-possessed.” *Johnson v. State*, 72 Ga. 679, at \*8 (1884), available at 1884 WL 2207.

137. *Mullis*, 27 S.E.2d at 94–96.

138. *Id.* at 96.

139. *See id.* at 100.

the circumstances are sufficient to excite the fears of a reasonable man that such a felony is intended, and the offender slays the officer . . . to protect himself from what is or *what reasonably appears to be* such a felonious assault, then . . . the killing would be justifiable.”<sup>140</sup>

According to *Mullis*, then, even during a legal arrest, if the officer’s manner of arrest reasonably appears to be felonious, the defendant would be justified in killing him.<sup>141</sup>

It is uncertain whether one can justify killing a police officer in a no-knock raid on the grounds of resisting arrest. Perhaps because few perfectly legal arrests appear to be felonious, lethal resistance is justified mostly in situations where the arrest (or manner thereof) is actually unlawful.<sup>142</sup> Moreover, in a vast majority of cases, the defendants know that they are resisting police.<sup>143</sup> But all in all, the law seems to balance the risk of committing a felony almost equally between an officer and a citizen in dubious encounters.<sup>144</sup> As the court in *Dixon v. State* said, “the arresting officer is charged with the duty of acting in conformity with the law, and acts at his peril if he violates it; and, likewise, the law having enjoined that the citizen quietly submit to lawful arrest, his adjudication that the arrest is unlawful is made at his peril.”<sup>145</sup>

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140. *Id.* at 98 (citing Ga. Code of 1933, §§ 26-1011, 26-1012). The court also cited *Norton* for the “reasonable fears” proposition quoted in the preceding paragraph. *Id.* at 99. The same “reasonable fears” standard applies to police officers who shoot at citizens. *Gordy v. State*, 92 S.E.2d 737, 739 (Ga. Ct. App. 1956) (holding that a police officer would be justified in killing a person whom he lawfully sought to arrest “under the fears of a reasonable man that a felony was about to be committed upon himself or a fellow officer”).

141. *See Mullis*, 27 S.E.2d at 98. The defendant in *Mullis* knew that the person he killed was a police officer. *Id.* at 94–96; *see also Paramore v. State*, 129 S.E. 772, 777 (Ga. 1925) (holding that the defendant may have been justified in killing an officer when the latter lawfully tried to arrest the defendant for a misdemeanor but then unlawfully shot at the defendant when he tried to run away). *But see Glaze v. State*, 120 S.E. 530, 533 (Ga. 1923) (“If a person kill [sic] an officer to prevent the latter from lawfully arresting him in a lawful way, the crime is murder.”); *Brown v. State*, 69 S.E. 45, 48 (Ga. Ct. App. 1910) (holding that mere menacing and threatening language or surroundings can only mitigate a killing from murder to manslaughter, but if the victim—a town marshal, in this case—had a “pointed pistol . . . coupled with the statement ‘God damn you, I will kill you,’” the killing would be justifiable).

142. *See, e.g., Mullis*, 27 S.E.2d at 99–100; *Paramore*, 129 S.E. at 777.

143. *See, e.g., Glaze*, 120 S.E. at 533; *Perano v. State*, 307 S.E.2d 64, 66 (Ga. Ct. App. 1983).

144. *See Dixon v. State*, 76 S.E. 794, 794–95 (Ga. Ct. App. 1912).

145. *Id.*

### *C. Defense of Habitation Applied*

There is very little Georgia case law addressing what happens when a home dweller shoots at police during a no-knock raid and kills an officer.<sup>146</sup> However, there are some cases where the defendant, after attacking police, tried to assert defense of habitation.<sup>147</sup> These cases, described below, offer a glimpse into the courts' potential approach to the problem and may be cited for precedent when the no-knock raid issue comes to the forefront.

In *Leach v. State*, a police officer came to the defendant's house in response to a "wife beating incident."<sup>148</sup> Before the officer came in, the defendant took a sawed-off shotgun, pointed it at the officer, and said "I'm going to kill you."<sup>149</sup> The officer retreated, and the defendant was charged with aggravated assault.<sup>150</sup> In response to the defendant's defense of habitation claim, the court held that "there was sufficient evidence for the jury to find either that the officer did not make an unlawful entry or was not attempting to make one."<sup>151</sup> It is not clear whether the court stressed the lack of an entry, or the lack of an unlawful entry.<sup>152</sup>

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146. However, there may be a ruling on the matter in the near future. In *Fair v. State*, the defendants were charged with murdering a police officer during the exercise of a no-knock warrant. *Fair v. State*, 664 S.E.2d 227, 229–30 (Ga. 2008). The defendants asserted immunity based on GA. CODE ANN. § 16-3-23, § 16-3-24, and § 16-3-24.2 (2007). *Fair*, 664 S.E.2d at 230. The court remanded the case back for a pre-trial determination of whether the defendants should be immune from prosecution. *Id.*

147. See discussion *infra* Part II.C.

148. *Leach v. State*, 239 S.E.2d 177, 178 (Ga. Ct. App. 1977).

149. *Id.* at 179.

150. *Id.*

151. *Id.* at 180.

152. See *id.* In denying the defense of habitation, it is often unclear whether courts stress the victim's lack of entry or lawfulness thereof. For example, in *Stobbs v. State*, the defendant shot a guest after an argument. *Stobbs v. State*, 533 S.E.2d 379, 381 (Ga. 2000). The court held that defense of habitation did not apply because "[section] 16-3-23 authorizes use of force to terminate an 'unlawful entry into or attack upon a habitation.' The statute is clearly concerned with the use of deadly force to counter entry, or attempted entry, into the home." *Id.* at 383. The court further noted that the defense is unavailable "when the victim is a guest in the home." *Id.*; see also *Lee v. State*, 415 S.E.2d 290, 293 (Ga. Ct. App. 1992) (holding that defense of habitation did not apply where the defendant invited the victim into his home because use of deadly force is justified when the occupant "reasonably believes that the entry is made or attempted for the purpose of committing a felony therein"); *Terrell v. Hester*, 355 S.E.2d 97, 99 (Ga. Ct. App. 1987) (holding that section 16-3-23 did not apply where the defendant beat the plaintiff—who may have been lawfully on the premises—outside the house because no entry actually occurred).

In *Price v. State*, the defendant was charged with aggravated assault upon a peace officer because he shot at the police after they pursued him and broke into his apartment.<sup>153</sup> The defendant asserted defense of habitation under section 16-3-23.<sup>154</sup> First, the court found that the officers' entry into the apartment was lawful.<sup>155</sup> Next, the court found that the defendant's shooting may not have been justified under section 16-3-23, but the court only cited subsections (1) and (3) (then subsections (1) and (2)) for this lack of justification.<sup>156</sup> The court held that the defendant's "knowledge of the identity of the individuals as officers and his justification for firing on them were issues which were properly submitted to the jury."<sup>157</sup> The court's reasoning and holding directly imply that if the defendant did not know the officers' status, and if he was justified in shooting at them under subsections (1) and (3), then the actual lawfulness or unlawfulness of the officers' entry would be irrelevant.<sup>158</sup>

A Georgia Supreme Court case, *Washington v. State*, cites both *Davis*<sup>159</sup> and *Norton*<sup>160</sup> and provides some illumination of the issue.<sup>161</sup> In *Washington*, the defendant threatened to "blow the policeman's brains out" after the officers drove up to his house in response to a call.<sup>162</sup> After hearing more obscenities and threats, the police pursued the defendant into the house, where he shot and killed one of the officers and later bragged about it.<sup>163</sup> The court held that "the suspect cannot withdraw into his house, shoot and kill one of the

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153. *Price v. State*, 334 S.E.2d 711, 715 (Ga. Ct. App. 1985).

154. *Id.*

155. *Id.*

156. *Id.* at 716. Recall that subsections (1) and (3) do not mention unlawfulness of entry. GA. CODE ANN. § 16-3-23 (2007); see also *supra* Part II.A.

157. *Price*, 334 S.E.2d at 716.

158. See *id.*; but cf. *Parrish v. State*, 355 S.E.2d 682, 685 (Ga. Ct. App. 1987) (holding that the defense of habitation statute did not apply where the defendant pointed a gun at police officers because there was "no evidence that defendant was attempting 'to prevent or terminate [the officers'] unlawful entry into or attack upon a habitation' (alteration in original)). In *Parrish*, however, the defendant knowingly threatened the officers when they came upon, but did not enter or attempt to enter, his marijuana patch. *Id.* at 683.

159. *Davis v. State*, 4 S.E. 318 (Ga. 1887); see also discussion *supra* Part II.B.

160. *Norton v. State*, 74 S.E. 759 (Ga. 1912); see also discussion *supra* Part II.B.

161. *Washington v. State*, 263 S.E.2d 152, 154 (Ga. 1980).

162. *Id.* at 153.

163. *Id.*

officers who enters thereafter and then claim self-defense.”<sup>164</sup> The court cited only subsections (1) and (3) of the defense of habitation statute for its holding, and did not mention that the entry must actually be unlawful.<sup>165</sup> The court also distinguished *Davis* on the grounds that in *Davis*, “the defendant did not know that the person making the arrest was a law enforcement officer.”<sup>166</sup> Thus, *Washington* seems to imply that if the defendant did not know that the person in his house was a police officer, he might have been justified in shooting the officer.<sup>167</sup>

Importantly, the above cases deal with rather morally clear-cut situations where the defendants knew that police were after them and purposefully, even maliciously, tried to resist the law.<sup>168</sup> Moreover, the unlawfulness of the entry was not really the primary issue.<sup>169</sup> However, in a scenario where a homeowner mistakenly shoots at police raiders, reasonably believing them to be robbers, the unlawfulness of entry is bound to come into focus, and the moral innocence of the shooter is likely to affect a court’s decision.

### III. PROPOSAL: BALANCING RISKS, AVOIDING COLLISIONS

Courts should hold that the entry does not need to actually be unlawful for the defense of habitation statute to apply, especially in cases of no-knock police raids. The language of the statute is unclear,<sup>170</sup> but even if it leans towards an actual unlawfulness requirement, in the words of the United States Supreme Court, this is not “the end of the matter.”<sup>171</sup> As previously described, an actual

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164. *Id.* at 154.

165. *Id.*

166. *Id.* (citing *Davis v. State*, 4 S.E. 318 (Ga. 1887)).

167. *Washington v. State*, 263 S.E.2d 152, 154 (Ga. 1980).

168. *See id.* at 153; *see also Price v. State*, 334 S.E.2d 711, 715 (Ga. Ct. App. 1980); *Leach v. State*, 239 S.E.2d 177, 179 (Ga. Ct. App. 1977).

169. *See Washington*, 263 S.E.2d at 154; *see also Price*, 334 S.E.2d at 715; *Leach*, 239 S.E.2d at 179–80.

170. *See discussion supra* Part II.A.1.

171. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994) (holding that even though the statute’s “most natural grammatical meaning” disposes of a particular knowledge requirement, such a requirement must be imposed to avoid “anomalies” and because “some form of scienter is to be implied in a criminal statute even if not expressed”).



unlawfulness requirement would directly conflict with legislative intent by forcing occupants, at their peril, to think long and hard before defending themselves.<sup>172</sup> But the most important reason for not requiring an unlawful entry, and the focus of the discussion below, is that such a requirement would place an enormous risk of injury, prison, or death on those who are the least culpable and the least prepared.<sup>173</sup> Courts can also effectively mitigate any negative consequences of allowing occupants to shoot upon reasonable belief.<sup>174</sup>

### A. *What You Don't Know May Kill You*

If the entry must actually be unlawful, regardless of the occupant's reasonable belief, what would happen to a person who mistakenly shoots and kills an officer? This is literally an issue of life and death. In *Fair v. State*, the defendants shot and killed a police officer during a no-knock raid.<sup>175</sup> The state charged the defendants with murder and sought the death penalty based on the aggravating circumstance that the victim was a peace officer.<sup>176</sup> The court held that under Georgia law, the defendant does not have to know that the person killed was a police officer to be eligible for the death penalty.<sup>177</sup> Under *Fair*, it is scary to imagine what would happen if section 16-3-23 were to require actual unlawful entry.

Imagine an occupant who wakes up in the dark of night by thunderous pounding at the door, jumbled shouts, and the crack of breaking wood. Startled and overcome with fear, she reaches for the gun kept for protection and shoots at the perceived intruders.<sup>178</sup> As soon as the bullet leaves the barrel, she has done her deed, but society is not yet free to judge her action. Her innocence or guilt, life or

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172. See discussion *supra* Part II.A.3.

173. See discussion *infra* Part III.A–C.

174. See discussion *infra* Part III.D.

175. *Fair v. State*, 664 S.E.2d 227, 229–30 (Ga. 2008).

176. *Id.* at 229–31. A jury may impose a death sentence if it finds at least one statutory aggravating circumstance. GA. CODE ANN. § 17-10-30 (2008). Killing a police officer is one of those circumstances. *Id.*

177. *Fair*, 664 S.E.2d at 233.

178. A somewhat similar example may be found in Rutledge, *supra* note 21, at 629–30.

death, depend not on her but on who is behind the door. If they are robbers, then her shooting at them is completely justified, and even laudable.<sup>179</sup> If the intruders are police, then she is the worst criminal possible in the eyes of the law.<sup>180</sup> After all, as Justice Brennan stated, the death penalty is reserved only for the “most heinous crimes.”<sup>181</sup> It is strange and chilling to think, therefore, that whether you are a perfectly law-abiding citizen or the most heinous of criminals depends on factors completely beyond your control.<sup>182</sup>

### *B. Are They Real or Fake?*

Requiring that an entry actually be unlawful will force occupants to throw down their guns as soon as they see a badge or hear the word “police!” Yet such immediate surrender will expose many people to a great risk of harm. Cases of police impersonation are rampant throughout the country, and brazen criminals sometimes like to “disarm their victims by pretending to be cops.”<sup>183</sup> For example, in one Pennsylvania case, a serial killer used a police disguise to gain entry into a woman’s home, then raped her and strangled her with a drape cord.<sup>184</sup> More recently in Alabama, two men kicked in the door of an apartment claiming to be narcotics agents, hit the occupant in the head with a gun, then stole her money and prescription

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179. See GA. CODE ANN. § 16-3-23 (2007).

180. See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2665 (2008) (stating that the death penalty “must be reserved for the worst of crimes”); see also *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

181. *Furman*, 408 U.S. at 286 (Brennan, J., concurring).

182. One may think that other defenses, like self-defense, would be available to such a person. However, the self-defense statute suffers from the same ambiguity regarding unlawfulness as defense of habitation and, furthermore, requires the perceived danger to be imminent. See GA. CODE ANN. § 16-3-21(a) (2007) (stating that a person is justified in using force against another’s “imminent use of unlawful force”); see also discussion *supra* Part I.B.

183. Colleen Long, *Police Impersonators Flash a Badge, Fool a Victim*, ASSOCIATED PRESS ALERT (Conn.), July 13, 2008 (quoting Dr. Naftali Berrill, a lead psychologist at the New York Center for Neuropsychology and Forensic Behavioral Science); see also BALKO, *supra* note 16, at 20; Kristan Trugman, *Power Lures Police Impersonators*, WASH. TIMES (D.C.), Sept. 10, 1999, at C1, available at 1999 WLNR 412267.

184. Manuel Gamiz Jr., *Illinois Inmate Charged in 1979 Killing: Suspected Serial Killer Timothy Krajcir Raped, Choked Berks County Woman, Police Say*, MORNING CALL (Allentown, Pa.), Jan. 12, 2008, available at 2008 WLNR 675980.

medications.<sup>185</sup> In another case, two Los Angeles ex-policemen were convicted of committing “home-invasion robberies that were designed to look like legitimate police searches of homes and businesses.”<sup>186</sup> And in Georgia, “men posing as police forced their way into an apartment . . . and shot and wounded a thirteen-year-old girl.”<sup>187</sup>

Corporal Ilana Spellman, the spokeswoman for the Gwinnett County Police Department, warned the public about police impersonators.<sup>188</sup> She said that although police sometimes use unmarked cars and wear plain clothes, “usually we’re going to announce ourselves and allow someone to come to the door before we’re going to breach a doorway.”<sup>189</sup> But in a no-knock entry, how will a disoriented occupant identify the intruders? In the few seconds of sheer terror, will she be able to correctly discern the real police from potentially dangerous impersonators?

### C. Sharing the Risk

Pretenders are out there, but most police are real and law-abiding, and it may seem unfair to allow jittery occupants to kill honest officers who are simply following their duties. Though police certainly deserve all the protection the law allows, civilians should

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185. Holly Hollman, *Alleged Fake Narc Agents Deny Police Version of Story*, DECATUR DAILY (Ala.), June 5, 2008, available at 2008 WLNR 10609127.

186. Wendy Thomas Russel, *Ferguson Brothers Convicted of Felonies; COURT: LBPD Officer Found Guilty on Two Counts of Conspiracy and One Firearm Charge*, LONG BEACH PRESS-TELEGRAM (Cal.), Jan. 31, 2008, at 1A, available at 2008 WLNR 1806857.

187. Andria Simmons, *Fake Cops Target Hispanics in Nine Robberies*, ATLANTA J.-CONST., July 9, 2008, at B3, available at 2008 WLNR 12838445.

188. *Id.*

189. *Id.* (emphasis added). For other recent examples of criminals impersonating police, see John Annese, *Insist That Cops Show ID Cautions Police Commissioner: Home Invasion by Fake Officers Points Up the Need for Islanders to be Vigilant*, STATEN ISLAND ADVANCE (N.Y.), Sept. 5, 2008, at A01, available at 2008 WLNR 16858478; Matt Burgard, *Pair of Scam Artists Strikes*, HARTFORD COURANT (Conn.), June 6, 2008, at B3, available at 2008 WLNR 10727089; Amber Craig, *Police Say Burglar Posed as FBI Agent*, PRESS-REGISTER (Mobile, Ala.), Oct. 16, 2008, at A1, available at 2008 WLNR 20108044; Hank Dudding & Jody Callahan, *Police: Real Cop Nabs 3 Fakes*, MEMPHIS COM. APPEAL (Tenn.), Oct. 10, 2008, at B2, available at 2008 WLNR 19347604; *Man Robbed by Bogus Police Officers in Home Invasion*, VENTURA COUNTY STAR (Cal.), Jan. 14, 2010, available at 2010 WLNR 840502; *Police Impersonators Break into a House*, STAR-LEDGER (Newark, N.J.), Feb. 4, 2010, at 22, available at 2010 WLNR 2353532.

not shoulder all the risks of a deadly encounter.<sup>190</sup> After all, police are significantly more prepared to deal with deadly situations and to avoid harm than private citizens.<sup>191</sup> For example, a typical SWAT team is equipped with, among other things, battle fatigues, bulletproof helmets and vests, gas masks, boot knives, and military grade assault weapons.<sup>192</sup> Also, officers who conduct raids are required to undergo at least one hour of training per month.<sup>193</sup> Compare that to a startled civilian with no martial experience and an old revolver who just woke up or came out of the shower.<sup>194</sup> As Balko notes, it is unrealistic and unfair to expect civilian occupants to “show remarkable poise and composure, exercise good judgment, and hold their fire, even as teams of armed assailants are swarming their homes.”<sup>195</sup> Police are in much better shape to evaluate and minimize the risks of breaking into a home unannounced.<sup>196</sup>

#### *D. Life and Justice for All*

Allowing homeowners to defend themselves in good faith against no-knock police raids is the right and reasonable course to take.<sup>197</sup> However, the legislature and the courts may be put off by the resulting legal collision.<sup>198</sup> After all, during a no-knock entry, both the police and home dwellers would be able to legally kill each other.<sup>199</sup> Legalizing such deadly encounters will not solve the

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190. See BALKO, *supra* note 16, at 35–36.

191. *Id.*

192. *Id.* at 5; see also ROBERT SNOW, SWAT TEAMS: EXPLOSIVE FACE-OFFS WITH AMERICA'S DEADLIEST CRIMINALS 99–121 (1996) (describing weapons and other equipment used by SWAT teams). But note that “SWAT officials are armed with much more destructive and dangerous equipment than are regular police officers.” *Id.* at 103.

193. BALKO, *supra* note 16, at 36.

194. See *supra* INTRODUCTION; see also *United States v. Banks*, 540 U.S. 31, 33, 39 (2003) (finding that, after announcing themselves, fifteen to twenty seconds was long enough for police to wait before entering even though the defendant was in the shower and did not hear the police announce themselves); BALKO, *supra* note 16, at 35–36.

195. BALKO, *supra* note 16, at 36.

196. *Id.*

197. See discussion *supra* Part III.A–C.

198. See Butler, *supra* note 22, at 451.

199. See GA. CODE ANN. § 17-4-20(b) (2008) (allowing use of deadly force by police “when the officer reasonably believes that the suspect poses an immediate threat of physical violence to the officer or others”); *Allen v. City of Atlanta*, 510 S.E.2d 64, 65–66 (Ga. Ct. App. 1998) (reversing an officer's

problem, but our justice system should not blame and punish the police or private citizens for taking reasonable actions in pursuit of self-preservation.<sup>200</sup> Perhaps, as Balko said, “the fault lies with the bad public policy that puts police officers in such unnecessarily perilous situations.”<sup>201</sup> But adequate protection of both police and citizens can be achieved without eliminating no-knock raids altogether and without imposing an actual unlawfulness requirement in section 16-3-23.<sup>202</sup>

In construing the defense of habitation statute, courts should apply an objective reasonableness standard in assessing the defending occupant’s apprehension of danger, as is the case with self-defense.<sup>203</sup> The courts should then enunciate the circumstances under which an occupant’s belief that robbers are invading her house is objectively reasonable.<sup>204</sup> Thereby, officers in preparation for a no-knock raid would bear those circumstances in mind and would do their best to avoid inciting any reasonable apprehension of danger in the occupant. And if worse comes to worst, the court will at least have a clear and fair framework for deciding whether the occupant was justified in shooting.

To determine whether an occupant had an objectively reasonable belief that her house was being robbed, courts may find it helpful to

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suspension for shooting at an approaching car’s driver when the latter failed to stop and drove towards officer); BALKO, *supra* note 16, at 35 (describing how even faultless officers will fire back at raid targets in order to protect their own lives).

200. See BALKO, *supra* note 16, at 35.

201. *Id.*

202. *But see id.* at 26–27 (suggesting that no-knock raids are generally ineffective and do not serve their ostensible purpose).

203. See *Lewis v. State*, 515 S.E.2d 382, 383 (Ga. 1999) (holding that in self-defense, the “subjective fears of a particular defendant are irrelevant”); *Nelson v. State*, 331 S.E.2d 554, 557 (Ga. 1985) (holding that when a person asserts self-defense, his actions are governed by a reasonable person standard); *Bell v. Smith*, 488 S.E.2d 91, 93 (Ga. Ct. App. 1997) (“The question is not whether [the defendant] *actually* feared the occupants of the truck, but rather whether an objective *reasonable person* would have believed [the person protected] to be in *imminent danger*.”). For Georgia’s self-defense statute, see GA. CODE ANN. § 16-3-21 (2007).

204. Because the defense of habitation statute allows for immunity from prosecution, the court, not the jury, will decide whether the circumstances in any given case create an objectively reasonable belief in the occupant that criminals were invading her home. See *Bunn v. State*, 667 S.E.2d 605, 608 (Ga. 2008); see also *Fair v. State*, 664 S.E.2d 227, 230 (Ga. 2008).

consider several factors.<sup>205</sup> For example, the defendant's general behavior may be relevant: if the defendant is a previously convicted felon or is engaged in habitual and serious criminal activity, he may be more aware of the possibility of a police raid and would be more likely to knowingly kill an officer than an innocent person.<sup>206</sup> Also important are the time of day and the character of the neighborhood—if it is nighttime, or if there have been previous home invasions in the area, the occupants might be more likely to think that robbers are breaking in.<sup>207</sup> Finally, the method of entry should be carefully examined.<sup>208</sup> If police use loudspeakers or sirens to alert the occupant of their presence; if they wear uniforms rather than plain clothes; and if they enter in an organized rather than a “violent and tumultuous”<sup>209</sup> manner, then the occupant would be less likely to mistake the police for robbers.<sup>210</sup>

Clear guidelines as to what constitutes reasonable belief would alleviate tensions both in court and in the field. Police would be encouraged to evaluate more seriously whether the occupant might reasonably mistake them for robbers, thereby reducing the chance of a deadly encounter.<sup>211</sup> Furthermore, trigger-happy occupants would also be kept in check. After all, innocent landlords, deliverymen, postal workers, and salesmen do not forcefully break into houses at night.<sup>212</sup> And if a shooting does occur, the objective reasonable belief

205. For example, courts consider several factors to determine whether a warrantless, non-consensual entry is justified. *E.g.*, *United States v. Standridge*, 810 F.2d 1034, 1037 (11th Cir. 1987).

206. *Cf. United States v. Knights*, 534 U.S. 112, 119–20 (2001) (holding that a probationer has a lesser expectation of privacy, with respect to police searches, than an ordinary citizen). But a criminal may also be more likely to think that he is being attacked by a rival gang or other criminals. *No-Knock Search Warrants: Weighing Risks vs. Benefits*, MACON TEL. (Ga.), Aug. 7, 2007, available at 2007 WLNR 15103314; see also *BALKO*, *supra* note 16, at 32.

207. *Cf. United States v. Magda*, 547 F.2d 756, 758 (2d Cir. 1976) (holding that, with respect to the reasonableness of a police stop, “[t]he reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely”).

208. This is not to propose eliminating no-knock entries altogether. Police may sufficiently surprise the occupant without provoking a deadly reaction by making their presence known *during*, not *before*, entry. A person awakened to the sound of loudspeakers and sirens is not likely to think that robbers are invading; real criminals would probably not want to announce themselves to the whole neighborhood.

209. GA. CODE ANN. § 16-3-23(1) (2007).

210. See *Simmons*, *supra* note 187; see also *Long*, *supra* note 183.

211. See *BALKO*, *supra* note 16, at 41–42 (advocating tighter search warrant standards).

212. *Cf. People v. McNeese*, 892 P.2d 304, 311 (Colo. 1995) (saying that Colorado's defense of habitation statute was not meant to “encourage arbitrary, casual killings”).

standard as to the unlawfulness of the entry would ensure that home dwellers do not get punished for acting reasonably and that only the most culpable individuals wind up in prison or on death row.

### CONCLUSION

“Innocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion.”<sup>213</sup> But the deterioration of the knock-and-announce requirement makes it easier for law enforcement to lawfully conduct no-knock raids<sup>214</sup> and increases the risk of deadly encounters between police and citizens.<sup>215</sup> Like the story of Kathryn Johnston has shown, even law-abiding civilians may not surrender without a fight when strangers violently break into their homes.<sup>216</sup> As killings tend to invite criminal charges, Georgia’s defense of habitation statute may offer a critical legal defense to occupants who use deadly force against police upon mistaking them for robbers.<sup>217</sup> The key question is whether, under the statute, the intruder’s entry must actually be unlawful, or whether the occupant may shoot upon reasonable belief that the entry is unlawful.<sup>218</sup>

Though the statutory text alone does not provide a clear answer,<sup>219</sup> instruments of textual interpretation are consistent with the proposition that the occupant need only reasonably believe that the entry is unlawful.<sup>220</sup> Further, an exploration of relevant case law shows that Georgia allows its residents to defend themselves against reasonably perceived threats, even if those threats appear in a police

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213. *Ker v. California*, 374 U.S. 23, 57 (1963) (Brennan, J., concurring).

214. *See* BALKO, *supra* note 16, at 30.

215. *Butler*, *supra* note 22, at 453.

216. *See* discussion *supra* INTRODUCTION.

217. *See* discussion *supra* Part I.B; *see also* Balko, *supra* note 16, at 35 (“[Occupants] who have used force to defend themselves from improper raids have been prosecuted for criminal recklessness, manslaughter, and murder and have received sentences ranging from probation, to life in prison, to the death penalty.”).

218. *See* discussion *supra* Part II.A.

219. *See* discussion *supra* Part II.A.

220. *See* discussion *supra* Part II.A.1–2.

uniform.<sup>221</sup> Finally, with a view to legal precedent, those few cases that have applied defense of habitation to police encounters are consistent with exculpating an occupant who has a reasonable apprehension of danger.<sup>222</sup>

Courts should interpret the defense of habitation statute to require only reasonable belief that the entry is unlawful.<sup>223</sup> Otherwise, the occupant faces a cruel dilemma.<sup>224</sup> If he shoots, he risks being charged with capital murder of a police officer,<sup>225</sup> but if he waits to ascertain the intruder's identity, he exposes himself to robbers or police impersonators.<sup>226</sup> Georgia legislature certainly did not intend for such dreadful hesitation to destroy the protections bestowed by the statute.<sup>227</sup>

Requiring only reasonable belief is not likely to endanger officers or encourage thoughtless shootouts.<sup>228</sup> In fact, courts can promote more police caution and safety by creating clear guidelines as to what constitutes reasonable belief of danger in an occupant.<sup>229</sup> Such guidelines will encourage officers to consider the reasonable apprehensions of the occupant before any no-knock raid, thereby avoiding a mistaken, but deadly reaction.<sup>230</sup> And if a tragedy does occur, such guidelines will ensure that any defendant's punishment is "tailored to his personal responsibility and moral guilt."<sup>231</sup>

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221. See discussion *supra* Part II.B.

222. See discussion *supra* Part II.C.

223. See discussion *supra* Part III.

224. See discussion *supra* Part III.A–B.

225. See discussion *supra* Part III.A.

226. See discussion *supra* Part III.B.

227. See discussion *supra* Part II.A.3.

228. See discussion *supra* Part III.D.

229. See discussion *supra* Part III.D.

230. See discussion *supra* Part III.D.

231. *Enmund v. Florida*, 458 U.S. 782, 801 (1982); see also discussion *supra* Part III.D.



