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Reviving the Knock and Announced Rule and Constructively Abolishing No-Knock Entries by Giving the People a Ground They Can Stand On

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Cover Page Footnote

I owe special thanks to my extensive network of friends and family, who have provided enduring support and encouragement throughout this journey. I would like to thank my husband, James, for his loving patience during law school and his incredible ability to lighten stress with his brilliant humor. I am forever grateful to my parents, David and Elsie, who have given me the spark and motivation to accomplish my dreams. Also, I would like to thank my brothers, David and Kenneth, and my sister, Amy, for their priceless words of wisdom. Finally, a very special praise to my two most precious little ones, David and Jonah, whose future is the driving force behind it all.

REVIVING THE KNOCK AND ANNOUNCE RULE AND CONSTRUCTIVELY ABOLISHING NO-KNOCK ENTRIES BY GIVING THE PEOPLE A GROUND THEY CAN STAND ON

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I. INTRODUCTION

"What I heard was a boom."[2] "Like somebody was trying to kick in the door."[3] "The first reaction from everyone inside was we were being robbed."[4] "Whoever was outside fired back in, and that's when I unholstered my gun and I fired two shots."[5] Two Columbus, Ohio police officers were shot and Derrick Foster was charged with two counts of felonious assault and attempted murder.[6] The two officers, part of the narcotics tactical unit, were attempting to execute a warrant on a suspected crack house when the incident occurred.[7] Realistically, Foster may have had no intention to fire his weapon at a police officer. After all, he was never charged with any drug crime from the raid.[8] Foster, a former Ohio State University football player, had a stable job as a code inspector for the City of Columbus.[9] He had no history with illicit drugs, had no criminal record, and had a current permit to carry a concealed weapon.[10] Despite these facts, he is currently serving a five-year prison sentence after striking a plea deal.[11] This story is just one of many examples of search warrant executions that end in the most unfortunate circumstances for citizens and police.[12] All too often, police attempt to enter a home to execute a warrant in a forceful manner and are met with fearful home occupants who are ready to defend themselves and their home fiercely, often unaware of the identity of the intruders.

This reaction to forced entry by the government is not a new development.[13] The people protested against government intrusion upon their homes in similar circumstances as early as 1603 in England.[14] The same type of intrusion through writs of assistance and general warrants resulted in aggressive protests such as the bloodshed of the Boston Massacre

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[2] *Officers, Ex-OSU Player Discuss Shooting*, WBNS 10-TV CENTRAL OHIO NEWS (May 21, 2008), http://www.10tv.com/live/content/local/stories/2008/05/21/foster_interview.html (statement of Derrick Foster in an interview with WBNS 10-TV News).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *2 Charged With Shooting Police Officers*, WBNS 10-TV CENTRAL OHIO NEWS (Apr. 30, 2008), http://www.10tv.com/live/content/local/stories/2008/04/30/police_shooting.html.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Officers, Ex-OSU Player Discuss Shooting*, WBNS 10-TV CENTRAL OHIO NEWS (May 21, 2008), http://www.10tv.com/live/content/local/stories/2008/05/21/foster_interview.html.

[11] *Man Sentenced In Shooting That Wounded Police Officers*, WBNS 10-TV CENTRAL OHIO NEWS (Apr. 1, 2009), http://www.10tv.com/live/content/local/stories/2009/04/01/story_gravely.html. Codefendant Michael Gravely, who faced trial, was sentenced to thirty-six years in prison. *Id.*

[12] Radley Balko conducted research for The CATO Institute and compiled an online interactive map of real stories of warrant executions that ended in death or injury. *Botched Paramilitary Police Raids*, CATO INSTITUTE, http://www.cato.org/raidmap/ (last visited Mar. 31, 2011).

[13] *See* Semayne's Case, (1604) 77 Eng. Rep. 194 (K.B.) 195; 5 Co. Rep. 91 a, 93 b.

[14] *Id.*

and the dumping of a shipload of tea into the Boston Harbor.[15] It was one of the reasons for the loss of many lives in the quest for America's independence.[16] Eventually, government intrusion upon the home helped pave the way to the American Revolutionary War and later, the creation of the Fourth Amendment.[17]

Modern American law, however, has not always upheld these strong founding values of freedom.[18] Today, the law is still being interpreted and a strong foundation in case law has yet to be laid permanently. Some states, with their passage of self-defense "castle" laws or "make my day" laws, have attempted to revive the doctrine of freedom from intrusion into homes.[19] This Comment will examine Ohio's self-defense statute. Under Ohio law, a person is given a presumption of having acted in self-defense, but only when he is acting against another who has entered unlawfully.[20] This presumption is not available in all self-defense cases.[21] For example, this presumption may not be available to a homeowner who engages in self-defense against what ends up being an unidentified police officer executing a no-knock warrant.[22] Adding to the problem, courts have essentially condoned the practice of no-knock entry, resulting in an explosion of its use.[23] This Comment will argue that since the current law provides little deterrence to police when executing no-knock entries, in order to fully revive the knock and announce rule and minimize the practice of no-knock entries, the legislature should amend the law to allow the self-defense presumption to apply to unannounced forced entry by government actors.

Section II of this Comment discusses the historical development of freedom from intrusion into the home. It also provides an analysis of the creation and development of Fourth Amendment protections in the United States against home intrusion by the government.

Section III provides an analysis of the inherent dangers of no knock entries. The section analyzes the necessity of no-knock entries in light of the risks they pose to those involved.

Finally, Section IV discusses the possible solutions to the issue and

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[15] JEFF WALLENFELDT, THE AMERICAN REVOLUTIONARY WAR AND THE WAR OF 1812 28, 30 (2010).

[16] *Id.* at 28.

[17] *Id.*

[18] Richards v. Wisconsin, 520 U.S. 385, 387–88 (1997); Hudson v. Michigan, 547 U.S. 586, 599–600 (2006).

[19] THOMAS J. GARDNER & TERRY M. ANDERSON, CRIMINAL LAW 109 (Carolyn Henderson Meier et al. eds., 10th ed. 2009).

[20] OHIO REV. CODE ANN. § 2901.05(B)(1) (West Supp. 2011).

[21] § 2901.05(B)(2)(a).

[22] *See, e.g.*, State v. Dykas, 925 N.E.2d 685, ¶ 19 (Ohio Ct. App. 8th 2010) (applying not the presumption of self-defense, but instead the common law self-defense doctrine).

[23] Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, SOCIAL PROBLEMS, Feb. 1997, at 7–8.

why they are ineffective. It also discusses why the solution proposed, allowing the self-defense presumption to apply to unannounced, forced entry by government officials, is a solution that will provide true protection to people in their homes.

II. BACKGROUND

As early as the seventeenth century, the people voiced opposition to government entry into their homes.[24] In the United States, the Fourth Amendment was drafted to provide protection to the people against forced entry.[25] However, the interpretation of the Amendment has proven to be a significant hindrance in preventing or limiting such invasions by the government.[26] In effect, the Fourth Amendment actually provides little or no protection from forced entry.[27]

A. A Man's Home Is His Castle—A Historical Perspective

The conflicting interests of governments desiring a peek into homes and the people asserting their rights to freedom from such intrusion involve a struggle that has been alive for many centuries.[28] The English common law castle doctrine provided protection against invasion of the home by private individuals.[29] In 1604, the court in *Semayne's* case upheld this notion, stating:

> [T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of [a] man is a thing precious and favoured in law; . . . if thieves come to a man's house to rob him, or murder, and the owner [or] his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing.[30]

In this case, the individual also gained the right to protect himself against an illegal home invasion by the government.[31] This opinion is one of the earliest records of a rule similar to the knock and announce rule in the

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[24] CARL J. FRANKLIN, CONSTITUTIONAL LAW FOR THE CRIMINAL JUSTICE PROFESSIONAL 99 (1999).

[25] THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 18 (2009).

[26] *See* Wilson v. Arkansas, 514 U.S. 927, 934 (1995) (holding "we have never squarely held that [knock and announce] is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold."). *But see* Richards v. Wisconsin, 520 U.S. 385, 395 (1997) (holding that the knock and announce rule can be dispensed with under exigent circumstances).

[27] Hudson v. Michigan, 547 U.S. 586, 599 (2006) (holding that a violation of the knock and announce rule does not warrant exclusion of the evidence at trial).

[28] FRANKLIN, *supra* note 24, at 99.

[29] *Id.*

[30] Semayne's Case, (1604) 77 Eng. Rep. 194 (K.B.) 195; 5 Co. Rep. 91 a, 93 b.

[31] FRANKLIN, *supra* note 24, at 99.

United States.[32] The court explained that the King could break down the door of a person to arrest him, but cautioned, "before he breaks it, he ought to signify the cause of his coming, and to make request to open doors."[33] The author of these powerful words probably did not realize the impact and lasting impression they would make on history.

By the 1760s, the use of general warrants and writs of assistance had been common in England for centuries and the people were gaining the power and courage to voice their distaste for the practice.[34] In 1765, the court in *Entick v. Carrington* revived a strong push to keep the government out of private homes.[35] The court declared, "[t]he great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances" and "[b]y the laws of England, every invasion of private property, be it ever so minute, is a trespass."[36] The case was seen as a major historical pushback on the broad power of the government to invade homes with general warrants lacking cause, description, and legitimate purpose.[37]

By the 1760s, the use of general warrants and writs of assistance had become common in the American colonies as well.[38] It was at this same time that the American colonists were growing more frustrated with the English government's issuance of writs of assistance to enforce import duties in America.[39] In 1761, sixty-three Boston merchants filed a case, famously known as *Paxton's* case, challenging the issuance of such writs of assistance.[40] Although the merchants were ultimately unsuccessful in their claims, the arguments presented by the protesting merchants' attorney, James Otis, ignited a spark in the future American revolutionists who were present.[41] President John Adams, later describing the event, said, "American independence was then and there born. . . . Every man of an immense, crowded audience appeared to me to go away as I did, ready to take up arms against writs of assistance."[42] Immediately after *Paxton's* case

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[32] MATTHEW LIPPMAN, CRIMINAL PROCEDURE 186 (2010).

[33] *Semayne's Case*, 77 Eng. Rep. at 195.

[34] MCINNIS, *supra* note 25, at 15. "General warrants allowed government agents broad discretion in the searches they conducted." *Id.* They required "no oath or affirmation," no "grounds explaining the basis of suspicion," and "placed no limits on the locations to be searched or the objects which could be seized." *Id.* "Writs of assistance were similar, but had a longer life span since they continued in operation until six months after the death of the sovereign under whom they were issued." *Id.* at 15–16.

[35] *Id.* at 17.

[36] Entick v. Carrington, 19 Howell's State Trials 1029 (1765).

[37] FRANKLIN, *supra* note 24, at 100. "[O]ur own Supreme Court has called the Entick case 'a great judgment,' 'one of the landmarks of English liberty,' 'one of the permanent monuments of the British Constitution.'" *Id.* (quoting Boyd v. United States, 116 U.S. 616, 626 (1886)).

[38] MCINNIS, *supra* note 25, at 18.

[39] *Id.*

[40] LIPPMAN, *supra* note 32, at 61.

[41] *Id.*

[42] JOHN WARNER BARBER & HENRY HOWE, OUR WHOLE COUNTRY: OR THE PAST AND PRESENT OF THE UNITED STATES 293 (photo. reprint) (1861).

was argued, the American colonial legislatures began to deny general warrants and writs of assistance.[43] The beginning of the colonies' organized resistance to government intrusion upon the home had begun.[44] The resistance gained strength even in England, where, in 1763, before the English Parliament, William Pitt made one of the most famous statements about restricting government intrusion.[45] Pitt declared that even when the poorest of men defies the crown, the home "may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."[46] These forceful ideas were later displayed permanently in the American legal system with the creation of the Fourth Amendment.[47]

B. The Rise and Fall of Fourth Amendment Protections

The historical ideas of setting limits on government entry into the home have been developed in the United States, in part, through the knock and announce rule embodied in the Fourth Amendment.[48] Interpretation of the knock and announce rule and its exceptions has also been the vehicle the court has used to dissolve the ideas that once led the movement for independence.[49] The Supreme Court first directly recognized the knock and announce rule of the Fourth Amendment in *Wilson v. Arkansas*.[50] The Court held that the principle was "embedded in Anglo-American law," declaring, "we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure."[51]

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[43] MCINNIS, *supra* note 25, at 19.

[44] *Id.*

[45] FRANKLIN, *supra* note 24, at 99.

[46] *Id.*

[47] LIPPMAN, *supra* note 32, at 61.

[48] U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

[49] An article printed in the Journal of Criminal Law, Criminology and Police Science in 1971 suggests that the controversial use of no-knock warrants in Washington, D.C. was not well-received by some members of Congress. *"No Knock" Search and Seizure and The District of Columbia Crime Act: A Constitutional Analysis*, 62 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 350, 350 (1971). "[I]t almost gives me high blood pressure to hear it solemnly advocated in the Congress of the United States that we do away with the boast in our law that a man's home is his castle" to "make it legal for officers of the law to enter houses of our citizens in like manner to that in which burglars now and have [always] entered them." *Id.* at 351 (quoting 116 CONG. REC. 24,851 (1970) (remarks of Senator Ervin)). "No-knock means extreme physical danger to all of us, including the police." *Id.* (quoting 116 CONG. REC. 25,201 (1970) (remarks of Senator McGovern)).

[50] Wilson v. Arkansas, 514 U.S. 927, 934 (1995) (holding "we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold.").

[51] *Id.* (quoting Miller v. United States, 357 U.S. 301, 313 (1958)).

But the Court wasted no time in limiting the reach of the rule. Two years later, in *Richards v. Wisconsin*, the Court held that while the reasonableness of each search depends on a case-by-case analysis, a forced entry without knocking may be justified under exigent circumstances.[52] The Court went on to explain that exigent circumstances may arise when police "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or . . . allow[] the destruction of evidence."[53] Later, in *Hudson v. Michigan*, the Supreme Court declared that a failure to adhere to the knock and announce rule did not warrant application of the exclusionary rule, thereby making the evidence available for use at trial.[54] In these few cases, the Supreme Court recognized the knock and announce rule, created exceptions to it, and ruled that the law provides no deterrence to limit violation. With these rulings, the Court virtually declared the rule unenforceable and, at least in practice, non-existent.

III. ISSUES

With recent Supreme Court decisions providing no strong foundation of protection against forced government entry into the home, a modern trend has emerged, making the use of no-knock entries a routine procedure in police departments across America.[55] The troubling effects resulting from this practice are far too damaging.[56] A close consideration of these harsh realities should be given before this trend becomes firmly embedded in our police culture and the possibility of ever returning to the days of William Pitt become lost to history forever.[57]

A. The Practice of No-Knock Entry Is On the Rise

It is understandable that many people may believe, or even hope, the use of Special Weapons and Tactics ("SWAT") teams is restricted to high-risk situations. In fact, Merriam-Webster Dictionary defines the term as "a police or military unit specially trained and equipped to handle *unusually hazardous situations* or missions."[58] The Los Angeles Police Department explains, on their website, that the SWAT team responds to hostage situations, suicide intervention, and "service of *high[-]risk warrants*."[59] However, research has shown that, in fact, the use of no-knock entries in

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[52] Richards v. Wisconsin, 520 U.S. 385, 385–86 (1997).
[53] *Id.* at 394.
[54] Hudson v. Michigan, 547 U.S. 586, 599 (2006).
[55] *See* Kraska & Kappeler, *supra* note 23, at 1.
[56] *Id.* at 7–8.
[57] FRANKLIN, *supra* note 24, at 99.
[58] Merriam-Webster Dictionary (2012), http://www.merriam-webster.com/dictionary/swat?show=0&t=1345211076 (emphasis added).
[59] *S.W.A.T.*, THE L.A. POLICE DEP'T, http://www.lapdonline.org/inside_the_lapd/content_basic_view/848 (emphasis added) (last visited Mar. 31, 2012).

routine warrant executions has been increasing dramatically.[60] In 1996, Peter Kraska and Victor Keppeler, professors at Eastern Kentucky University, began research on the use of SWAT teams in police departments across the United States.[61] The study involved a 40-question survey sent to 686 police departments which served cities with a population of 50,000 or more and employed at least 100 officers.[62] Of the 548 departments that responded to the survey, 89.4 percent employed SWAT teams and 20 percent of the other departments reported they "were planning on establishing one in the next few years."[63] Data from the study showed that among departments that have had SWAT teams since 1980, there was a 538 percent increase in the use of such teams between 1980 and 1995.[64] Departments reported that 75.9 percent of SWAT team use was for executing warrants.[65] Many departments reported using their SWAT teams to conduct between 200 to 700 warrant executions per year and the results showed that the use of SWAT teams in warrant execution consists "almost exclusively of . . . no-knock entries."[66] In sum, the research indicates that no-knock entries are a routine part of today's police work in the United States.[67]

B. No-Knock Entries Are Exceptionally Dangerous

Using no-knock entries, or short and deliberately inaudible announcements, to execute routine warrants puts the safety and lives of police and citizens in danger.[68] Undoubtedly, most police officers conduct their duties in a highly professional and ethical manner, carefully ensuring a minimal disruption of community peace. But regardless of how high any officer holds this intent, no-knock warrants, by nature, create a hostile, high-risk environment.[69] Usually, the warrants are executed just before dawn or at night.[70] Tools are used to gain entry by breaking the door or window open.[71] Once inside, police sometimes use devices such as flashbang grenades to temporarily prevent the occupants from being able to see or

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[60] *See generally* Kraska & Kappeler, *supra* note 23, at 1–2 (analyzing statistics on the use of SWAT teams in United States police departments).

[61] *Id.* at 5, 10.

[62] *Id.*

[63] *Id.* at 6.

[64] *Id.* at 7.

[65] *Id.*

[66] *Id.* (internal quotation marks omitted).

[67] *Id.* at 1. The authors call it "a normalization of these [SWAT] units into mainstream policing." *Id.*

[68] RADLEY BALKO, OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA 20 (2006).

[69] *Id.* The author suggests that no-knock entries are only one piece of the overall problem with paramilitary style policing in America. *Id.* "The intentionally inflicted confusion and disorientation, the forced entry into the home, and the overwhelming show of force, then, make these raids excessively volatile, dangerous, and confrontational." *Id.*

[70] *Id.* at 5.

[71] *Id.*

hear.[72] Police immediately take custody of the occupants and usually hold them at gunpoint while the search and seizure takes place.[73] Adding to the confusion, police are most often wearing plain clothes or military style tactical gear rather than easily identifiable uniforms.[74] Every aspect of the situation suggests a horrifying encounter that may rightfully be met with a fierce response from the occupants who are unable to ascertain the identity of the figures breaking through their door. When an unknown intruder invades a home in the dark, such a violent response is not beyond the scope of likelihood. It may even be considered naturally appropriate to some degree.

The danger and social harm created by the use of this risky practice is demonstrated in the consideration of a few cases. On February 11, 2010, at approximately 8:30 p.m., police in Columbia, Missouri used a SWAT team to execute a warrant to seize marijuana at the residence of Jonathan Whitworth.[75] The controversy of the case was magnified by the apparent use of a video recorder to capture the entire incident on tape.[76] In the video, the viewer can see that the suspect's wife and young child were present at the time and that officers held them at gunpoint while apprehending the suspect.[77] As police entered the home, they fatally shot the family's dog.[78] The warrant yielded "a grinder, a pipe and a small amount of marijuana."[79] Ultimately, Whitworth received a misdemeanor charge of "unlawful use of drug paraphernalia" and a three hundred dollar fine.[80] A three hundred dollar gain hardly seems worth the loss of the family dog and the social impact of the incident on the family, and especially the young child. This small gain loses its worth considerably since the Whitworth family has filed a civil suit against the police department for numerous claims including the

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[72] *Id.* "[Y]ou will need to have the ability to respond with chemical agents, such as OC or pepper gas products." GERALD W. GARNER, SURVIVING THE STREET: OFFICER SAFETY AND SURVIVAL TECHNIQUES 201 (2d ed. 2005).

[73] BALKO, *supra* note 68, at 5.

[74] *Id.*

[75] Brennan David, *Family Questions SWAT Drug Search That Led to Dog's Death*, COLUMBIA DAILY TRIBUNE, Feb. 23, 2010, at A1, *available at* http://www.columbiatribune.com/news/2010/feb/23/family-questions-swat-drug-search-that-led-to/.

[76] *Id.* (including a video recording of the raid). Though police did knock and announce their presence, the video recording of the incident shows that forced entry came approximately seven seconds after the knock and announcement. *Id.*

[77] *Id.*

[78] *Id.* Police asserted that the dog was acting in an "uncontrollably aggressive manner." *Id.* Although the video does not show a view of the dog, there do not appear to be any audible sounds of aggression from any dog either. *Id.* The viewer can, however, hear the dog making crying noises after it appears to have been shot. *Id.*

[79] Brennan David, *Drug Raid Inquiry is Ongoing*, COLUMBIA DAILY TRIBUNE, May 3, 2010, at A1, *available at* http://www.columbiatribune.com/news/2010/may/03/drug-raid-inquiry-is-ongoing/.

[80] Brennan David, *SWAT Raid Prompts Police Review of Policy*, COLUMBIA MISSOURIAN, May 6, 2010, *available at* http://www.columbiamissourian.com/stories/2010/05/06/swat-raid-prompts-police-review-policy/.

cost of counseling after the raid.[81]

The facts of some cases suggest that regardless of whether the police knock, the volatile environment created by hostile entry can turn bad quickly. For example, in February 2004, police executed a warrant for marijuana at a Middletown, Pennsylvania home.[82] James Hoskins, whose brother was the suspect of the warrant, was watching television in a bedroom with his girlfriend when police entered his home.[83] Hoskins heard a commotion downstairs and he had arisen from the bed to investigate what was happening.[84] He was standing in the bedroom naked, holding a t-shirt over his genitals when the bedroom door burst open and police shot him.[85] It is unclear whether police knocked before entering the home, but Hoskins has said that police did not knock on the bedroom door before bursting in and shooting him.[86] Hoskins spent several days in a medically induced coma and underwent at least ten operations to repair internal organs.[87] His leg required amputation.[88] At the time of the shooting, the police had already apprehended the suspect, Hoskins' brother, but they were still exploring the home while armed.[89] The apparently illogical result of this case was recognized by Hoskins' attorney, who told the *Philadelphia Inquirer*, "once you have [the suspect] in custody, don't you stand down a bit? I guess I'm shocked that they would use such force. First of all, Jim did nothing wrong, and second, it's a marijuana bust."[90]

In September 2000, police executed a no-knock, forced entry warrant at the home of Moises Sepulveda in Modesto, California.[91] Moises had no prior criminal history and the warrant was part of an investigation into marijuana distribution.[92] Immediately upon entry, the police ordered Moises, his wife, and their three children to lie face down at gunpoint.[93] Thirty seconds after the forced entry, the shotgun being held to eleven-year-

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[81] *Jonathan Whitworth Sues City of Columbia Police Officers For Shooting Pit Bull During Raid*, THE PITCH BLOG, http://blogs.pitch.com/plog/2010/09/jonathan_whitworth_sues_city_of_columbia_police_officers_for_shooting_pit_bull_during_drug_raid.php (last visited Mar. 31, 2012). Since the Whitworths filed their complaint, the court granted Defendant Bolinger's motion for summary judgment on all of Whitworth's claims against him. Whitworth v. Bolinger, No. 2:10-CV-04208-NKL, 2011 U.S. Dist. LEXIS 134130, at *1 (W.D. Mo. Nov. 21, 2011).

[82] Larry King, *Condition Upgrade For Man Police Shot*, PHILADELPHIA INQUIRER, Feb. 18, 2004, at B01.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] Christine Schiavo, *Bucks Man Sues over Police Shooting*, PHILADELPHIA INQUIRER, Mar. 13, 2004, at B02.

[89] King, *supra* note 82.

[90] *Id.*

[91] BALKO, *supra* note 68, at 63–64.

[92] *Id.* The Federal Bureau of Investigation (FBI) requested that the local police department make the entry so the FBI could then execute the warrant. *Id.*

[93] *Id.*

old Alberto Sepulveda's body accidentally discharged, killing the child immediately.[94] There were no drugs or weapons found in the home.[95] An eleven-year-old child died for the sake of seizing some marijuana that did not exist.[96] The City of Modesto and the federal government ultimately settled a civil suit with the family for three million dollars.[97]

The inherent violence and sense of urgency used in no-knock entries can be a recipe for disaster for even the most seasoned veteran on the police force.[98] When faced with such hostility, the perception of the police officers is likely heightened, and even the slightest movement by a suspect can understandably be seen as a threat.[99] The severe consequences of failing to quickly respond can force police to make split-second decisions that could mean life or death for police and the suspect.[100] For example, in 1998, police in Houston, Texas entered the home of Pedro Oregon Navarro in a search for crack cocaine.[101] Once inside the apartment, one officer accidentally fired his weapon and hit another police officer.[102] The other police officers mistakenly believed that the suspect had been the one who shot their coworker.[103] They immediately opened fire on Navarro, shooting thirty rounds, twelve of which hit him, nine of them in his back.[104] Naturally, no-knock searches manufacture this sort of volatile environment, which can have the most unfortunate consequences for police and citizens alike. These few cases show how quickly things can turn deadly when police violently force themselves into private homes in routine search for contraband.

C. The Risk of Misinformation Expands the Reach of Danger

In addition to the inherent danger in no-knock entries, there is a significant risk of obtaining misinformation, thereby making the already dangerous practice even more so.[105] The dangerousness of the practice, coupled with the high risk of misinformation, inevitably results in the deadly

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[94] *Id.*

[95] *Id.*

[96] Police Chief Roy Wasden was quoted by the *Modesto Bee*, stating, "What are we gaining by serving these drug warrants? . . . It's not worth the risk." *Id.* (internal quotation marks omitted).

[97] *Id.*

[98] GARNER, *supra* note 72, at 194. "It is critical that you be prepared for any eventuality. That's why you should make your approach and entry as if you expected to be fired on or otherwise attacked at any moment." *Id.* at 202.

[99] *Id.* at 203.

[100] *Id.* at 198.

[101] Steve Brewer, *Oregon Drug Raid Detailed*, HOUSTON CHRONICLE, Mar. 25, 1999, at A33.

[102] *Id.*

[103] *Id.*

[104] *Id.*; *see also Drug War Victims*, DRUG WAR RANT, http://www.drugwarrant.com/articles/drug-war-victim (last visited March 20, 2012).

[105] BALKO, *supra* note 68, at 21. The author has analyzed a number of cases in which innocent people were injured as a result of misinformation and police mistakes in warrant executions. *Id.* at 63.

consequences being borne by completely innocent citizens.[106] Justice Brennan, in the concurring opinion of *Ker v. California*, recognized this reality, stating, "cases of mistaken identity are surely not novel in the investigation of crime. The possibility is very real that the police may be misinformed as to the name or address of a suspect, or as to other material information."[107] In fact, the nature of our justice system invites the use of unreliable or blatantly incorrect information in crime investigation.[108] In many jurisdictions, confidential informants are given incentives such as a deal to be released from prison or even money in exchange for information.[109] These facts, coupled with little deterrence from lying, form a recipe that can produce troubling results. A study conducted in 2005 by the Center on Wrongful Convictions showed that 45.9 percent of the 111 death row exonerations since the 1970s were attributed to discovery of misinformation by informants.[110] These statistics suggest that there is more than just a mere possibility that misinformation accompanies a significant portion of police work.

The prevalence of misinformation can produce devastating results for innocent citizens in cases of no-knock entry.[111] For example, in 1994, police in Boston, Massachusetts, dressed in full SWAT gear and armed with shotguns and 9-mm Glock handguns, executed a no-knock entry on the home of seventy-five-year-old Accelyne Williams.[112] When the police entered, Williams became fearful, ran for the bedroom, and locked the door.[113] The officers broke down the bedroom door, maneuvered Williams to the floor, and handcuffed him.[114] Williams suffered a heart attack and died during the incident.[115] Police had received a tip from an informant who, as the police report described him, was "tipsy."[116] There was no evidence of wrongdoing by Williams recovered from the apartment.[117] Police Commissioner Paul Evans later admitted, "[t]here is a likelihood or

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[106] *Id.* at 43. "[B]otched paramilitary drug raids—and the death, injury, and terrorizing of innocents that come with them—aren't merely a regrettable, infrequent consequence of an otherwise effective police tactic. Rather, they're the inevitable consequence of a flawed, overbearing, and unnecessary form of drug policing." *Id.* "It's no secret that errors and oversights committed in warrant service or the execution of a raid can have fatal consequences." GARNER, *supra* note 72, at 194.

[107] Ker v. California, 374 U.S. 23, 57 (1963).

[108] *See* BALKO, *supra* note 68, at 21. "[I]n 1995, *National Law Journal* estimated that money paid to informants jumped from $25 million in 1985 to about $97 million in 1993." *Id.*

[109] *Understand The Causes: Informants*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited Mar. 12, 2012).

[110] ROB WARDEN, THE SNITCH SYSTEM 3 (2004).

[111] BALKO, *supra* note 68, at 21. "An overwhelming number of mistaken raids take place because police relied on information from confidential informants." *Id.*

[112] *Police Mistakes Cited in Death of Boston Man*, N.Y. TIMES, May 16, 1994, at A12.

[113] *See id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

possibility that we did hit the wrong apartment."[118] Such tragic results demonstrate the significant risk associated with the coupling of likely misinformation and no knock entries.[119]

D. Is the Creation of Such Danger Really Necessary?

Logically, one might be inclined to ask whether the creation of such violence and risk to life is necessary or even effective. In most cases, it is not.[120] Admittedly, it cannot be disputed that when police encounter already hostile situations, such as hostage situations or bank robberies, even the slightest bit of surprise on the suspect can be a huge factor in obtaining the most favorable outcome.[121] However, these cases are a minority and most no-knock entries occur in the execution of routine warrants.[122] In these situations, the no-knock entry will likely escalate violence rather than avoid it.[123]

Many arguments arise in support of no-knock warrant execution to show that their use is necessary. These arguments closely resemble the examples in the opinion of *Richards v. Wisconsin*. In *Richards*, the Court laid out situations which might allow for dispensing with the knock and announce rule when knocking and announcing might be "dangerous or futile" or "allow[] the destruction of evidence."[124]

1. To Prevent Evidence Destruction

One argument that flows from this ruling is that no-knock entries are necessary to prevent evidence destruction, especially in the case of a narcotics search.[125] In *United States v. Banks*, the Court held that a fifteen to twenty second lapse of time between knocking and forcing entry was reasonable.[126] The Court conceded that the call was "a close one" and further clarified that "15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine."[127] Thus, the Court's analysis suggested that it could reasonably

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[118] Joseph Mallia & Maggie Mulvihill, *Minister Dies as Cops Raid Wrong Apartment*, BOS. HERALD, Mar. 26, 1994, at 1 (internal quotation marks omitted).

[119] BALKO, *supra* note 68, at 64. "The success or failure of a warrant or raid expedition could well hinge on the quality of information you have available upon which to base your tactical plans for a safe operation." GARNER, *supra* note 72, at 196.

[120] BALKO, *supra* note 68, at 43. Police raids are "the inevitable consequence of a flawed, overbearing, and *unnecessary* form of drug policing." *Id.* (emphasis added).

[121] GARNER, *supra* note 72, at 195. "Surprise is vital. Keep the bad guys guessing. Surprise them [at] 5 A.M. . . . Plan your entry from a point they would not expect." *Id.*

[122] *See generally* Kraska & Kappeler, *supra* note 23, at 5–12 (analyzing statistics on the use of SWAT teams in United States police departments).

[123] BALKO, *supra* note 68, at 19. "[T]hey actually *escalate* provocation and bring unnecessary violence to what would otherwise be a routine, nonviolent police procedure." *Id.* (emphasis in original).

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

[125] *Id.* at 391.

[126] United States v. Banks, 540 U.S. 31, 38 (2003).

[127] *Id.* at 38, 40.

take a person *at least* fifteen to twenty seconds to be in a position to destroy evidence. So if proponents of no-knock entries argue that they are necessary to prevent evidence destruction, then clearly the argument encounters difficulty when considering the risk to the lives of police officers and citizens for the sake of seizing an amount of drugs which could be destroyed in fifteen to twenty seconds. From this perspective, they hardly seem *necessary* by any ordinary sense of the term. New pledges by the federal government to reduce enforcement of marijuana possession laws make this argument even weaker.[128] Moreover, it may be difficult, by any degree of persuasion, to label the practice necessary on these grounds when the breaking of the door may take longer than the fifteen-to-twenty second wait, depending on the strength of the door. Practically speaking, the use of the no-knock entry does not allow the police access to the evidence any quicker than a knock and announce with the reasonable wait period might.

2. For Officer Safety

Another argument made by proponents of no-knock policies is that the practice ensures officer safety by not giving the occupant enough time to obtain a weapon.[129] Executing a no-knock entry does not alleviate the likelihood that a suspect may be heavily armed. In fact, it may well increase the likelihood that an armed suspect be more inclined to use such weapons when faced with unidentified intruders in the night. This actually places the police in a more dangerous situation than they might have otherwise been after knocking and announcing.[130] In *Hudson v. Michigan*, the Court recognized this reality, stating that the interests protected by the knock and announce rule included "the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident."[131] Thus, although the Supreme Court has suggested that the reason police should knock and announce is because not doing so puts human life in danger,[132] proponents of no-knock entries argue that the practice is necessary to preserve officer safety. It is difficult to justify the necessity of no-knock entries on the basis of safety when the Supreme Court

[128] Roger Parloff, *How Marijuana Became Legal*, FORTUNE, Sept. 18, 2009, *available at* http://money.cnn.com/2009/09/11/magazines/fortune/medical_marijuana_legalizing.fortune/index.htm. The author describes how marijuana use has become de-facto legal. *Id.* "[A]ttorney [G]eneral, Eric Holder, confirmed at a press conference that he would no longer subject individuals who were complying with state medical marijuana laws to federal drug raids and prosecutions." *Id.* The author suggests that this could have far reaching consequences. *Id.* "If a state doesn't tightly limit what 'medical use' means," then it could virtually be used in any situation. *Id.* Thus, the regular use of marijuana has become de facto legal. *Id.*

[129] *See Richards*, 520 U.S. at 394.

[130] BALKO, *supra* note 68, at 19.

[131] Hudson v. Michigan, 547 U.S. 586, 594 (2006). The matter of whether a knock and announce violation had occurred was not at issue in the case, as Michigan had conceded that the entry was a violation. *Id.* at 590. The issue in the case was whether or not the violation warranted application of the exclusionary rule, prohibiting the use of the seized evidence against the accused at trial. *Id.*

[132] *Id.*

has expressly stated that not knocking and announcing is a threat to human life.

3. To Prevent Escape

Another argument used to justify no-knock warrants is to prevent the escape of a suspect who might try to flee.[133] In most cases police have a home surrounded by SWAT team members before executing a no-knock warrant.[134] Regardless of whether the entering officers had knocked and announced or simply barged in, it would likely be difficult for a suspect to succeed in an escape attempt without being apprehended by the surrounding SWAT team. Because escape is very unlikely to occur, it is difficult to justify the risky and unsafe practice on this speculative ground. Excepting hostage or bank robbery cases, the practice of no-knock entries is neither necessary nor effective for producing the intended results of a routine warrant. Chances are likely that, in reality, the practice escalates the risk and danger to human life, unnecessarily.

In sum, the practice of dangerous no-knock entries presents a tough conflict in the interests of the people in protecting themselves and the police in investigating crime. Justice Brennan, in his concurring opinion in *Ker v. California*, recognized the interests of the home occupant when a no-knock entry is performed: "how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost."[135] Justice Kennedy, in his concurring opinion in *Hudson v. Michigan*, further warned, "[i]f a widespread pattern of [knock and announce] violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern."[136] While the Justices of the Court were willing to recognize that a problem does exist between these two conflicting interests, they stopped short of defining a violation, subject to meaningful remedies to deter police from engaging in this dangerous practice.[137]

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[133] *See* United States v. Hudson, 100 F.3d 1409, 1417 (9th Cir. 1996) (quoting United States v. McConney, 728 F.2d 1195, 1206 (9th Cir. 1984)); United v. Nolan, 718 F.2d 589, 596 (3d Cir. 1983) (quoting United States v. Kane, 637 F.2d 974, 978 (3d Cir. 1981)); *see* United States v. Williams, 573 F.2d 348, 350 (5th Cir. 1978).

[134] GARNER, *supra* note 72, at 201. "The *perimeter team* will be responsible for sealing off the area . . . [T]hey keep the bad guys from escaping, [and] prevent innocent motorists or pedestrians from straying into the danger zone." *Id.*

[135] Ker v. California, 374 U.S. 23, 49 (1963) (Brennan, J., concurring).

[136] Hudson v. Michigan, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring).

[137] *See id.* at 594 (majority opinion) (holding that a violation of the knock and announce rule did not warrant application of the exclusionary rule).

IV. GIVING THE PEOPLE A GROUND THEY CAN STAND ON

Despite longstanding historical opposition to home intrusion, courts are interpreting the law in ways that provide little support to the people as government actors continue to encroach upon the castle door.[138] Consequently, the liberties that the Framers of the Fourth Amendment sought to protect are at risk of being lost to history if the trend continues.[139] The Ohio legislature has attempted to place restrictions on government entry into the home by requiring that particular procedures be followed before a no-knock entry may be authorized.[140] However, these statutes, as well as the common law self-defense doctrine, provide insufficient protection for self-defending home occupants facing police intrusion. In our American system of checks and balances, the legislature has the power to remedy this problem and break the trend of government encroachment upon the home by providing statutory protection to citizens. Amending section 2901.05 of the Ohio Revised Code to allow the presumption of self-defense to apply to forced, unannounced entry by government actors could produce this result for Ohio.

A. Statutorily Limiting the Execution of No-Knock Searches Is Ineffective

The Ohio legislature has attempted to place statutory restrictions on the use of no-knock entries.[141] Ohio law requires a police officer to provide notice of his intention to enter and be refused admittance before he may break down the door.[142] However, the law allows police officers to request a no-knock warrant to enter forcibly without first having to be refused.[143] The request must contain "[a] statement that the affiant has good cause to believe that there is a risk of serious physical harm to the law enforcement officers . . . if they are required to comply with the [knock and announce requirement]."[144] Statutes like these may suggest that there are real restrictions preventing the overuse of no knock entries. In practice, however, the rule provides little or no relief to the homeowner.[145]

Research suggests, at least in some jurisdictions, that obtaining approval for a no-knock warrant amounts to nothing more than requesting a "rubber-stamp" approval.[146] Moreover, despite the wording of the law, the

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[138] *Id.*

[139] Lippman, *supra* note 32, at 61.

[140] OHIO REV. CODE ANN. § 2935.12(A) (West 2010); § 2933.231(B).

[141] *See* § 2935.12(A); § 2933.231(B).

[142] § 2935.12(A). "[T]he peace officer . . . may break down an outer or inner door or window . . . if, after notice of his intention to make the arrest or to execute the warrant . . . he is refused admittance." *Id.*

[143] § 2933.231(B).

[144] § 2933.231(B)(1).

[145] BALKO, *supra* note 68, at 24; State v. Southers, No. CA-8682, 1992 Ohio App. LEXIS 3000, at *11 (5th Dist. June 8, 1992).

[146] David Migoya, *Judges Rubber-Stamp No-Knocks: Easy Approval Among Flaws in Process, Records Show*, DENVER POST, Feb. 27, 2000, at A01. "No-knock search warrants appear to be approved

requirement that an officer obtain a preapproved no-knock warrant is not really a prerequisite to executing a no-knock search at all.[147] In *State v. Southers*, the court held "[w]here exigent circumstances exist, the officers conducting the search are justified in by-passing the requirements of R.C. 2935.12," the Ohio statutory knock and announce requirement.[148] The court further explained that "[e]xigent circumstances include situations where the officers believe that evidence can and will be destroyed quickly or where the announcement would place a police officer in jeopardy."[149] The ultimate result is for police to justify a no-knock entry, they are, at most, required to provide an after-the-fact demonstration that exigent circumstances existed at the time of their entry into the home. They must only show this if the home occupant challenges the entry. No real protection is provided before the entry other than the mere possibility that the police may have to explain their actions at some point in the future, with the benefit of hindsight. In reality, even then there is no deterrence for police because, as the Supreme Court held in *Hudson v. Michigan*, the exclusionary rule does not apply to violations of the knock and announce rule.[150] Thus, in practice, the statutory limits on no-knock entries provide little or no protection at all.

B. Common Law, Absent Ohio's Self-Defense Presumption Statute, Is Ineffective

When a person engages in self-defense upon the forced entry of a police officer into his home, Ohio's self-defense presumption statute does not apply.[151] The Ohio law provides the person protection only in instances where an intruder entered unlawfully.[152] Without the presumption, one using force against an intruding government actor is limited to the common law self-defense analysis to determine whether his conduct was proper.[153] The Supreme Court of Ohio laid out the elements to this analysis in *State v. Goff*.[154] The defendant must show, by a preponderance of the evidence, that: (1) the defendant was not at fault in creating the situation; (2) the defendant believed he was in imminent danger and such force was the only way to escape; and (3) the defendant did not violate the duty to retreat.[155] In application, the common law rule may hold little weight for the home

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so routinely that some Denver judges have issued them even though police asked only for a regular warrant." *Id.*

147 *Southers*, 1992 Ohio App. LEXIS 3000, at *1.

148 *Id.*

149 *Id.* (internal quotation marks omitted) (citing State v. DeFiore, 64 Ohio App. 2d 115, 117 n.1 (1979)).

150 Hudson v. Michigan, 547 U.S. 586, 594 (2006).

151 *See* OHIO REV. CODE ANN. § 2901.05(B)(1) (West Supp. 2011).

152 *Id.*

153 *See* State v. Dykas, 925 N.E.2d 685, 689–91 (Ohio Ct. App. 8th 2010).

154 State v. Goff, 942 N.E.2d 1075, 1082 (Ohio 2010) (quoting State v. Thomas, 673 N.E.2d 1339, 1342 (Ohio 1997)).

155 *Id.* (quoting *Thomas*, 673 N.E.2d at 1342).

occupant when defending himself against an intruder who ends up being a police officer. For example, in *State v. Williams*, the court stated that the first element, that the defendant was not at fault in creating the situation, turned "upon [the jury's] assessment of the witnesses' credibility."[156] The court further stated that the second element, a bona fide belief of imminent danger, "turned upon the jury's finding as to whether the officers had identified themselves as policemen in entering the residence," and ultimately, credibility.[157] The rule, applied as an affirmative defense, places the burden of persuasion upon the defendant.[158] Undoubtedly, this burden can be rather demanding on a defendant when faced with the reality of a jury that is charged with weighing his word against that of a sworn police officer.[159]

One survey conducted by University of Minnesota Law Professor Myron Orfield produced troubling results in this respect.[160] Professor Orfield surveyed Chicago narcotics officers in their views on the exclusionary rule.[161] Seventy-six percent of officers surveyed responded that they believe police "shade the facts a little (or a lot)" to establish probable cause.[162] Furthermore, forty-eight percent of the officers responded that they believed judges were "frequently" correct in disbelieving police testimony.[163] Of course, police officers, as well as defendants, are human and naturally may be subject to the pure inclination to risk perjury and simply slant the testimony to suit the desired result, though such conduct is not justifiable by any means. The jury that attributes weight to a police officer's testimony based on his status might well produce a grossly inaccurate result. The same obviously holds true for adopting the false testimony of a defendant. When a case hinges on the believability of conflicting witness testimony, the jury will find itself in an impossible position. Even the most trusting onlooker would be inclined to question the accuracy of the result.

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[156] State v. Williams, 684 N.E.2d 358, 371 (Ohio Ct. App. 11th 1996) (quoting *Thomas*, 673 N.E.2d at 1342). The defendant and the police presented conflicting testimony. *Id.* at 369. The defendant testified that the police fired at him first and that he fired back in self-defense. *Id.* at 362. However, the police testified that it was the defendant who shot first and that they fired back in defense. *Id.*

[157] *Id.* at 372. The defendant testified that he did not hear the officers announce themselves before the incident began. *Id.* at 362. The police testified that they shouted that they were police both before and after entering the residence. *Id.* at 372.

[158] *Goff*, 942 N.E.2d at 1082 (quoting *Thomas*, 673 N.E.2d at 1342).

[159] *See, e.g.*, *Williams*, 684 N.E.2d at 371 (finding that the guilty verdict was not against the manifest weight of the evidence because the jury ultimately must determine witness credibility when the defendant and police gave conflicting testimony as to who fired first and whether the police announced their presence).

[160] Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017 (1987). To determine the effect of the exclusionary rule on the behavior of police in executing searches and seizures, the author conducted surveys and interviews with officers about their experiences in evidence suppression. *Id.*

[161] *Id.* at 1017.

[162] *Id.* at 1050.

[163] *Id.*

C. Shifting the Burden

Currently, Ohio law provides certain protections to individuals when using force in self-defense against a home intruder. Section 2901.09(B) of the Ohio Revised Code states "a person who lawfully is in that person's residence" or "lawfully is an occupant of that person's vehicle . . . has no duty to retreat before using force in self-defense."[164] Ohio law further provides:

> [A] person is presumed to have acted in self[-]defense . . . if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has . . . so entered, the residence or vehicle occupied by the person using the defensive force.[165]

The law is a clear message to those who attempt to invade a home that their entry may be rightfully met with great force and defense by the occupants. However, since the law is limited in application to unlawful entries, it does not apply to the use of force against an unidentified intruder who later turns out to be a police officer with a warrant, even when that police officer may have utilized a forced, unannounced entry into the home. Revising section 2901.09(B) to apply to these situations can provide meaningful protection to people who find themselves in these scenarios.

Ultimately, the current state of the law provides little protection to homeowners who engage in self-defense against what turns out to be a forced government entry into their home. The statutory limits placed on such entry and the common law self-defense doctrine are insufficient protection in those situations because they ultimately place the burden of proof on the homeowner. Shifting the burden to the government would provide a more just result. Realistic policy considerations call for such a shifting. However, it is important to note that this proposal is not a free-for-all justification for the use of arbitrary force against police officers executing warrants. Shifting the burden of proof to the government is a small change with meaningful results that would benefit our society as a whole, including police officers and the general public.

1. Policy Considerations

It cannot be disputed that in some cases a no-knock warrant produces evidence that ultimately helps remove dangerous criminals from our communities. It is those cases which are the driving force behind its continued practice. However, the high degree of risk put on innocent lives far outweighs the possible benefit to be gained from the police having

[164] OHIO REV. CODE ANN. § 2901.09 (West Supp. 2011).
[165] § 2901.05(B)(1).

access to evidence fifteen to twenty seconds earlier, at most.[166] With the implementation of any law enforcement practice there will always be good results and bad results. Generally, the unfortunate results are rare and the good that flows from the practice outweighs the negative burden of the bad result.[167] However, when a rule reaches the point that the bad result has extremely horrific consequences and its application has a high probability of being abused and a low likelihood of success, a civilized society must logically ask whether the rule should remain.[168] From the perspective of eleven-year-old Alberto Sepulveda, even just one bad result may be one too many to tolerate.[169] By allowing the self-defense presumption of section 2901.05 of the Ohio Revised Code to apply to unannounced forced entry by government officials, the dangerous and unnecessarily risky practice of executing routine warrants through no-knock entries can be constructively abolished in Ohio and the knock and announce protections of the Fourth Amendment can be revived.

2. What the Proposal Is: A More Just Outcome

The proposal would directly affect those who engage in self-defense when faced with an unidentified intruder who turns out to be a government actor. The primary result of the rule would be to shift the burden of persuasion to the government.[170] The home occupant would be given a presumption of self-defense and before the case could proceed, the government would be required to show by a preponderance of the evidence that the person was not acting in self-defense.[171]

Logically, it is fitting for the government to carry this burden. After all, it is the police who manufactured the situation giving rise to the self-defense in the first place by failing to knock and announce their presence.[172] Moreover, the government is certainly in a better position to carry this burden. The government has more resources and deals with this type of situation on a daily basis; whereas, most citizens go their entire lives without ever having to deal with a no-knock entry. When a home occupant must attempt to prove to a trier of fact that his behavior constituted self-defense,

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[166] *See* United States v. Banks, 540 U.S. 31, 40 (2003).

[167] GARNER, *supra* note 72, at 194. "The majority of the time these warrant service expeditions and raids go off more or less according to plan and no one is seriously injured. Quite frankly, raw luck sometimes plays a role in the outcome of some less-than-well-planned-and-executed operations." *Id.*

[168] "All too often, however, things go critically wrong and someone–perhaps a peace officer–dies in the process." *Id.* "What are we gaining by serving these drug warrants? It's not worth the risk." BALKO, *supra* note 68, at 64 (internal quotation marks omitted) (quoting Ty Phillips & Michael G. Mooney, *How Did the Gun Go Off? Police Report Fails to Answer Question in SWAT Shooting of Alberto Sepulveda*, MODESTO BEE, Jan. 11, 2001, at A1).

[169] BALKO, *supra* note 68, at 64.

[170] OHIO REV. CODE ANN. § 2901.05(B)(3) (West 2006). The presumption "is a rebuttable presumption and may be rebutted by a preponderance of the evidence." *Id.*

[171] *See id.*

[172] *See* BALKO, *supra* note 68, at 19.

coupled with a likely scenario of his word being weighed against that of a police officer, the heavy burden approaches the boundaries of impossible. The chances that a defendant who rightfully exerted force against the intruder will suffer a severe injustice by a skeptical jury should not be taken lightly. On the other hand, police, armed with the knowledge that they will have to later justify their conduct, can equip their force with proper evidentiary tools, such as the video camera used in the Whitmore warrant execution, to meet the burden of proof.[173] The ultimate result would be predictability and a more assuredly just outcome.

With police on notice that they will bear the burden of proof if challenged, and the people on notice that their actions will be subject to scrutiny through that burden, a winning situation will result for all parties. Faced with a requirement that they justify their conduct, police will naturally be inclined to reserve no-knock entries for the true emergency situations that they are more appropriately fitted for, such as hostage situations and bank robberies. This would serve as a constructive abolishment of no-knock entries in routine warrant executions. Likewise, home occupants would be provided the true protection of the self-defense presumption statute, as there would be less doubt in their minds when faced with an unidentified intruder in the night.

3. What the Proposal Is Not

It would be a mistake for one to be led down the shaky path of assuming that such a rule would give people the right to arbitrarily exert force and violence against police officers. The rule would simply shift the burden of persuasion to the government and allow the home occupant to enjoy a presumption of self-defense.[174] A defendant who is found to have wrongfully used force against a police officer would be subject to the same penalties as the current law provides.[175] In all likelihood, the government's production of evidence to defeat the presumption would actually give the jury less doubt that the defendant should be convicted when the facts call for such an outcome. Additionally, the predictability in the rule would make it less likely for the situation to even arise. If people are made aware of the likely outcome before their conduct occurs, most people will usually try to avoid the conduct that will result in their conviction. The number of cases would be reduced and predictability and certainty in a just outcome would result.

Most notably, such a rule would provide a deterrent effect on police

[173] David, *supra* note 75, at A1.
[174] § 2901.05(A).
[175] § 2901.05(B)(2)(a).

officers. Currently, there is little deterrence to abusing no knock entries.[176] Police have become accustomed to using no-knock entries in routine cases because the courts have provided little remedy for their abuse.[177] Police would undoubtedly be deterred from executing a no-knock entry on a home if faced with the real possibility that the occupants may be ready to defend themselves and would be given a presumption of self-defense if they did so. Naturally, the dangerous and risky practice of executing no-knock searches would most probably be drastically reduced. Likewise, the occurrence of tragic results in these cases would also naturally decline.

V. CONCLUSION

Although the Framers of the Fourth Amendment intended to provide true protection against forceful government entry into the home, their hopes have not played out well in the modern American legal system. Decades of jurisprudence have disappointedly failed to firmly uphold these strong founding values. To make matters worse, law enforcement has grasped onto this failure by making no-knock entries a routine practice.[178] The lawmaking body of our government has the power reverse this trend. Revising section 2901.09(B) of the Ohio Revised Code to allow the presumption of self-defense to apply to forced, unannounced entries by police, would give the people of Ohio a ground they can actually stand on.

[176] *See* Hudson v. Michigan, 547 U.S. 586, 594 (2006) (holding that a violation of the knock and announce rule did not warrant application of the exclusionary rule).

[177] *Id.*

[178] *See* Kraska & Kappeler, *supra* note 23, at 5–12.