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Balancing the Scales: Reinstating Home Privacy Without Violence in Indiana

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INTRODUCTION

Many are familiar with this epic Home Alone line: "I am gonna give you to the count of ten to get your lousy, yellow, no-good keister off my property, before I pump your guts full of lead!"[1] Strangely enough, this sense of property protection has given rise to discussion about home privacy rights in Indiana. The Indiana Supreme Court's first decision in *Barnes v. State* (*Barnes I*)[2] prompted legal and political debates about the castle doctrine—a homeowner's right to forcibly protect her property—and whether citizens should have the right to physically prevent law enforcement officers from entering private homes without a warrant and without probable cause.[3] The *Barnes I* holding, along with the decision on rehearing (*Barnes II*),[4] caused the Indiana General Assembly to amend its castle doctrine statute, which now creates a legal defense that seems to rely on the subjective perceptions of ordinary citizens and creates a gray area in regard to homeowners' lawful actions during police searches.[5]

The facts surrounding *Barnes I* are that the defendant, Richard Barnes, and his wife, Mary, were arguing as Richard was packing his belongings to move out.[6] During the argument, Richard grabbed a phone out of Mary's hand and threw it against a wall.[7] Mary then called 911 and "told the dispatcher that [Richard] was throwing things in the apartment, but that he had not struck her."[8] The 911 dispatch was relayed as a "domestic violence in progress."[9] Two police officers arrived on

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1. HOME ALONE (Twentieth Century Fox Film Corporation 1990).
2. 946 N.E.2d 572 (Ind. 2011), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011).
3. *See, e.g.*, Paul K. Ogden, *Barnes v. State: Dissenters Are Correct that Court Goes Too Far in Tossing Out the Right of a Homeowner to Resist Unlawful Entry by a Police Officer; Did Court Completely Miss IC 35-41-3-2?*, OGDEN ON POLITICS (May 18, 2011, 10:29 AM), http://www.ogdenonpolitics.com/2011/05/barnes-v-state-dissenters-are-correct.html; *see also* Allison Bricker, *Ind. Sheriff: If We Need to Conduct Random House to House Searches We Will*, SMOKING ARGUS DAILY, (May 16, 2011, 1:15 PM), http://smargus.com/indiana-sheriff-if-we-need-to-conduct-random-house-to-house-searches-we-will/.
4. 953 N.E.2d 473 (Ind. 2011).
5. *See* Act of Mar. 20, 2012, Pub. L. No. 161-2012, 2012 Ind. Acts. 3428, 3428–31 (codified as amended at IND. CODE § 35-41-3-2 (2012)).
6. *See Barnes I*, 946 N.E.2d at 574.
7. *See id.*
8. *Id.*
9. *Id.*

the scene and confronted Richard in the parking lot outside of the apartment; during this encounter, Mary came out with a duffle bag and told Richard to retrieve the rest of his belongings.[10] Mary retreated back to the apartment, followed by Richard and both officers.[11] At the apartment's threshold, Richard affirmatively denied the officers entry and blocked the doorway.[12] One officer attempted to enter and Richard shoved him against a wall, which led to the officers subduing Richard with a chokehold and a Taser.[13] Richard was charged with battery on a law enforcement officer and resisting law enforcement—both class A misdemeanors—as well as disorderly conduct—a class B misdemeanor.[14] The Indiana Supreme Court affirmed all counts and held that the castle doctrine is no longer a legal defense against preventing police officers from entering a home.[15]

On rehearing, *Barnes II* proclaimed to reduce the scope of *Barnes I* only to battery against officers entering a private home,[16] but the practical effects of the two holdings were similar in regard to their effect on home privacy rights.[17] At issue was whether homeowners have a right to expel law enforcement officers from their homes without being criminally prosecuted. Despite the Indiana Supreme Court's efforts to deny that the *Barnes* facts gave rise to a Fourth Amendment issue,[18] both holdings essentially deferred to other Fourth Amendment infringement remedies to justify discarding, or severely limiting, the castle doctrine when police officers threaten home privacy.[19]

The decision in both *Barnes* cases prompted the Indiana General Assembly to create the *Barnes v. State* Subcommittee,[20] which subsequently drafted a bill—on which the approved statute is based—that lacks legal bite and may prove to be dangerous for both private citizens and police officers.[21] The new statute reads, in relevant part, as follows:

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *See id.*
16. Barnes v. State (*Barnes II*), 953 N.E.2d 473, 474 (Ind. 2011) ("[W]e hold that the Castle Doctrine is not a defense to the crime of battery or other violent acts on a police officer.").
17. One possibility of a practical effect of the "battery only" announcement might be situations where homeowners threaten officers, but this sort of behavior would just lead to the same sort of problems as battering officers; it is hard to imagine that other means of preventing officer entry are available.
18. *See Barnes II*, 953 N.E.2d at 474–75 ("We also emphasize that this holding does not alter, indeed says nothing, about the statutory and constitutional boundaries of legal entry into the home or any other place. Our earlier opinion was not intended to, and did not, change that existing law about [the Fourth Amendment].").
19. *See Barnes I*, 946 N.E.2d at 576. This Note, in Parts II and III, discusses the two most litigated Fourth Amendment remedies, evidence exclusion and § 1983 civil actions.
20. *See* Final Report of the Legislative Council Barnes v. State Subcommittee, 2011 Sess. (Ind. 2011), http://www.in.gov/legislative/interim/committee/lcbs.html.
21. Act of Mar. 20, 2012, Pub. L. No. 161-2012, 2012 Ind. Acts 3428, 3428–31 (codified as amended at IND. CODE § 35-41-3-2 (2012)).

> A person is justified in using reasonable force against a public servant if the person reasonably believes the force is necessary to:
>
> (1) protect the person or a third person from what the person reasonably believes to be imminent use of unlawful force;
>
> (2) prevent or terminate the public servant's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle . . . .[22]

As one would expect, the statute creates exceptions for situations where officers are in hot pursuit of a fleeing suspect or where a civilian is the initial aggressor.[23] However, Indiana's enactment of such a statute is illogical. Prosecutors would rarely attempt to prosecute offenders in the narrow situations to which the statute is intended to apply[24] because if the officers initiate the violence wrongfully, then the perpetrator would almost surely have a strong case for self-defense.[25] Even Governor Daniels stated: "In the real world, there will almost never be a situation in which these extremely narrow conditions [to justify forcibly expelling police officers] are met."[26] This statute may be fairly characterized as a mere political gesture that creates more legal problems than additional home privacy rights.

Setting aside the argument that the statute should not exist, there are two additional problems with the statute's wording. First, it relies on ordinary citizens to determine whether a police officer is acting "lawfully,"[27] which may lead to unnecessary violence and preventable injuries to both police officers and homeowners. In regard to home entries and other Fourth Amendment searches, courts have struggled to agree on proper standards—it is infeasible for Indiana to expect ordinary citizens to decipher Fourth Amendment law, or to even understand exactly what this statute allows.[28] Second, the statute allows the use of deadly force against a police officer only if the force is "reasonably necessary to *prevent serious bodily injury* to the person or a third person."[29] This requirement allows ordinary citizens to make another subjective judgment about when to use deadly force, a dangerous proposition. Further, the new statute completely disregards the rights of citizens to physically prevent an officer from *searching* the home unlawfully. If citizens do not have the right to physically prevent officers from unlawfully searching homes under the amended statute, then it does not bolster home privacy rights at all; instead, it merely creates confusion and a needless criminal defense that is rarely applicable.

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22. IND. CODE § 35-41-3-2(i)(1)–(2) (2012) (emphasis added).

23. § 35-41-3-2(j).

24. *See* Press Release, Indiana Governor Mitch Daniels, Governor Signs SEA 1, Final 2012 Bill Watch Update (Mar. 21, 2012) [hereinafter Press Release], http://www.in.gov/activecalendar/EventList.aspx?view=EventDetails&eventidn=54715&information_id=109805&type=&syndicate=syndicate.

25. *See* § 35-41-3-2(a) ("[T]he general assembly does not intend to diminish in any way the other robust self-defense rights that citizens of this state have always enjoyed.").

26. Press Release, *supra* note 24.

27. *Id.*

28. This point highlights Governor Daniels's concern with signing the bill into law: "What is troubling to law enforcement officers, and to me, is the chance that citizens hearing reports of change will misunderstand what the law says." *Id.*

29. § 35-41-3-2(k)(2) (emphasis added).

The language of Indiana's unreasonable search or seizure provision is practically identical to that of the Fourth Amendment,[30] and "remedies" for unlawful searches and seizures in both federal and Indiana state law no longer protect privacy per se—courts now aim to deter unreasonable police conduct.[31] The public discussion surrounding the *Barnes* cases and Indiana's new statute is shedding more light on the balance between homeowners' rights and police conduct—continually, courts are adding more weight to police interests at the expense of homeowners' privacy.[32] The statute passed by the Indiana legislature seems to be a political compromise rather than a legal tool that attempts to establish a balance between individual home privacy rights and the needs of law enforcement. Indiana's new statute, therefore, is ineffective in protecting homeowners against unlawful police entry and will inevitably put officers in more danger because Indiana citizens will not understand the purpose and meaning of the statute.

Instead of the amended castle doctrine statute, the Indiana legislature should have pursued a new and improved civil remedy for home privacy invasions. The Indiana Supreme Court partially justified its rationales in *Barnes I*[33] and *Barnes II*[34] by citing other available remedies for Fourth Amendment and home privacy violations.[35] Because the amended statute has a limited scope of applicability the Indiana legislature should evaluate these other remedies and determine whether Indiana adequately protects home privacy. Fourth Amendment and property remedies must sufficiently protect homeowners' rights so that the "narrow conditions"[36] that give rise to the applicability of the amended statute are supplemented by other legal remedies that provide adequate home privacy protection in more common circumstances without addressing or encouraging violence against police officers.

To balance the scales and protect home privacy, the law must be analyzed from the perspective of a homeowner whose rights are at stake—not from the perspective of a police officer performing a duty. Currently, Fourth Amendment remedies such as excluding criminal evidence and § 1983 actions[37] focus on acts of law

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30. *Compare* IND. CONST. art. 1, § 11, *with* U.S. CONST. amend. IV.

31. *See infra* Part II. Some might argue that this must be the angle from which the home privacy debate is discussed, but one premise of this Note is that placing too much emphasis on an officer's conduct is detrimental to the fundamental purpose of protecting citizens' privacy in the home.

32. *See infra* Part II.B.1–2.

33. Barnes v. State (*Barnes I*), 946 N.E.2d 572, 577 (Ind.), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011) ("In sum, we hold that [in] Indiana the right to reasonably resist an unlawful police entry into a home is no longer recognized under Indiana law.").

34. Barnes v. State (*Barnes II*), 953 N.E.2d 473, 474 (Ind. 2011) ("[W]e hold that the Castle Doctrine is not a defense to the crime of battery or other violent acts on a police officer."); *see also* IND. CODE §§ 35-41-3-2(b), 35-42-2-1(a)(1)(B) (2006) (amended 2012). In *Barnes II*, the court, by holding that no Indiana statute allows homeowners to commit battery against police officers who unlawfully invade the home, interpreted the traditional notions of the castle doctrine out of the Indiana Code. *See Barnes II*, 953 N.E.2d at 474.

35. *Barnes I*, 946 N.E.2d at 576 ("Nowadays, an aggrieved arrestee has means unavailable at common law for redress against unlawful police action.").

36. Press Release, *supra* note 24.

37. 42 U.S.C. § 1983 (2006) is the means for pursuing civil remedies for violations of

enforcement officers, which legally devalues home privacy.[38] The new Indiana statute cannot provide balance to this conflict because the castle doctrine is woven into the Fourth Amendment itself; the Supreme Court has traditionally enshrined the home with the highest degree of protection from government intrusions because of the Fourth Amendment's roots in the castle doctrine. Further, the statute's redistribution of subjective discretion from police officers to private citizens is not a legitimate or beneficial course of action. Instead, police officers' discretion should be more closely monitored in order to nudge officers toward consulting prosecutors and magistrate judges.

This Note proposes a state statute that would provide Indiana citizens with a viable civil remedy specifically for unlawful searches and seizures in the home. The proposed statute aims to cover the unaddressed home privacy concerns in the amended castle doctrine statute as well as mitigate the lack of home privacy protection that results from courts' focus on police officers' actions instead of homeowners' privacy. The premise underlying this Note is that courts have narrowed the scope of Fourth Amendment remedies to protect police interests and have accordingly denied victims of unlawful home entries a means of legal redress against law enforcement; thus, statutes like Indiana's amended castle doctrine provide more political collateral and become the desired recourse instead of pursuing stronger legal remedies. This Note presents a four-part argument to justify a more practical civil remedy for unlawful home entries. Part I will briefly discuss the castle doctrine and why its application to the Fourth Amendment cannot create an effective remedy. Part II will discuss the doctrinal evolution that has limited the effectiveness or existence of the exclusionary rule as a remedy. Part III will address the qualified immunity doctrine, which hinders § 1983's practical viability as a civil remedy, particularly in relation to home privacy. Part IV will propose a new statute and analyze its legitimacy in comparison with other existing remedies.

I. THE CASTLE DOCTRINE AND PROTECTING THE HOME

Although the castle doctrine has played a critical role in shaping the foundations of American law and arguably still has a place in contemporary law,[39] effectuating the doctrine as a Fourth Amendment supplement is implausible. The Fourth Amendment has enveloped the castle doctrine by theoretically providing legal remedies for homeowners, and the Supreme Court has attempted to preserve the indispensability of home protection in Fourth Amendment jurisprudence.[40] This

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constitutional rights. In regard to the Fourth Amendment, § 1983 actions are sometimes the only means of recourse for "innocent" parties, while those who are indicted and tried must move to get the evidence found in the unlawful search suppressed under the exclusionary rule.

38. *See infra* Parts II.B, III.

39. For a more complete discussion of the castle doctrine, see D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006) and David I. Caplan & Sue Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. The Fourth, Fifth, and Fourteenth Amendments—and the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. REV. 1073 (2005); Jesse Drum, Note, *Oh, it is you, is it?": Closing the Door on Reasonable Resistance to Unlawful Police Entry in Indiana*, 88 IND. L.J. 393, 407–16 (2013).

40. *See infra* Part II.B.

Note argues that the Indiana Supreme Court's *Barnes I* holding, therefore, correctly (although idealistically) relied on the strength of other Fourth Amendment remedies to combat home privacy invasions.[41]

A. The Short Version of Castle Doctrine History

United States common law has traditionally recognized the right of homeowners to defend themselves against nongovernment intruders. In *People v. Tomlins*,[42] one of the most famous American castle doctrine cases, then-Judge Cardozo concluded:

> It is not now and never has been the law that a man assailed in his own dwelling, is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home.[43]

Cardozo cited to *Beard v. United States*,[44] a Supreme Court case in which the Court held that a homeowner may stand his ground and even kill a trespasser when a reasonable threat exists.[45] *Tomlins* and *Beard* highlight the two traditional touchstones of the castle doctrine: (1) homeowners have no duty to retreat when an intruder threatens the homestead, and (2) homeowners may use reasonable force to defend themselves against home intruders. While the right of defending one's home against intruders has basis in the common law, the castle doctrine cannot supplement contemporary Fourth Amendment jurisprudence; the doctrine was developed to create an affirmative defense for homeowners who committed an otherwise criminal act against an intruder who posed a reasonable threat. Physically preventing police officers from unlawfully entering a home, however, is not within the original castle doctrine's scope.[46]

The castle doctrine was not created for the purpose of prohibiting police from entering a private home. In 1604, the castle doctrine was derived from Sir Edward Coke's opinion in *Semayne's Case*.[47] In *Seymayne's Case*, Coke held that one's home is akin to a castle or fortress, and the homeowner could defend against

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41. Barnes v. State (*Barnes I*), 946 N.E.2d 572, 577 (Ind.), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011).

42. 107 N.E. 496 (N.Y. 1914)

43. *Compare id*. at 497 *with* Ind. Code § 35-41-3-2(a) (2012).

44. 158 U.S. 550 (1895).

45. *Id*. at 564. In a case where the defendant was facing murder charges for killing a man who invaded his property while carrying a deadly weapon with intent to steal a cow, Justice Harlan wrote: "The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner . . . [the defendant] was not obliged to retreat . . . but was entitled to stand his ground and meet any attack made upon him with a deadly weapon . . . ." *Id.* at 564.

46. *See* Barnes v. State (*Barnes I*), 946 N.E.2d 572 (Ind.), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011). In *Barnes I*, the Indiana Supreme Court pointed out that modern developments such as bail, prompt arraignment hearings, the exclusionary rule, police department procedures, and § 1983 civil actions negate the need for the castle doctrine, and that "allowing resistance unnecessarily escalates the level of violence . . . ." 946 N.E.2d 572, 576 (citing State v. Hobson, 577 N.W.2d 825, 835–36 (Wis. 1998)).

47. (1604) 77 Eng. Rep. 194 (K.B.).

thieves and felons invading the homestead; however, Coke also stipulated that persons enforcing the king's law have a right of entry.[48] Coke imagined the castle doctrine to allow, rather than deter, government entry into a private home. As Professor D. Benjamin Barros points out, however, the castle doctrine took on a new meaning during the American Revolution when colonists aimed to prevent the government, British soldiers at that time, from entering one's home without process or justification.[49] Accordingly, the Supreme Court has interpreted the Fourth Amendment, at least to some extent, with the colonists' understanding of the castle doctrine in mind.[50]

B. The Fourth Amendment's Protection of the Home

The Supreme Court's decisions, at least traditionally, have allotted great weight to home privacy within Fourth Amendment jurisprudence despite the castle doctrine not originally being meant to protect home privacy against police officers at common law.[51] In fact, the Fourth Amendment was arguably crafted around the castle doctrine itself: "The maxim that 'every man's house is his castle,' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen."[52]

A long line of Supreme Court home privacy cases shows the Court's attempts to protect home privacy in order to avoid homeowners' violence against police officers, which may be allowed by the castle doctrine. In *Payton v. New York*,[53] the

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48. *Id*. at 195.

49. *See* Barros, *supra* note 39, at 265 (internal quotation and citation omitted) ("[T]he castle doctrine radically changed meaning over the course of two centuries, as 'A man's house is his castle (*except* against the government)' yielded to 'A man's house is his castle (especially against the government).'" (emphasis added)).

50. This is why the home traditionally has enjoyed the highest level of protection in Fourth Amendment law:

> There can be no doubt that [William] Pitt's address in the House of Commons in March 1763 echoed and re-echoed throughout the Colonies: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It 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!"

Payton v. New York, 445 U.S. 573, 601, n.54 (1980) (quoting Miller v. United States, 357 U.S. 301, 307 (1958) (internal quotation marks omitted)).

51. *See, e.g.*, *Payton*, 445 U.S. at 588–89 ("To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.") (quoting United States v. Reed, 572 F.2d 412, 423 (2d Cir. 1978) (internal quotation marks omitted)).

52. JUSTICE THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION, 367–68 (4th ed. 1878); *see also* Weeks v. United States, 232 U.S. 383, 390 (1914) ("[Colonists'] [r]esistance to [writs of assistance] established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any general authority to search and seize his goods and papers.").

53. 445 U.S. 573.

Court set the petitioner free when officers entered his home to arrest him for murder without a warrant, but pursuant to a New York statute.[54] *Payton*'s holding demonstrates that the Supreme Court has protected the home more than other personal spaces that carry some reasonable expectation of privacy.[55] Later, in *Kyllo v. United States*,[56] the Court held that the use of thermal imaging goggles by police to "explore details of the home that would previously have been unknowable without physical intrusion" was unreasonable without a warrant.[57] The *Kyllo* holding prevented police officers from employing uncommonly used technology to circumvent the need for a warrant to search homes.[58] Finally, in *Georgia v. Randolph*,[59] which, like *Barnes*, involved a domestic dispute,[60] the Court held that when a cotenant gives permission to enter a home over the objection of another cotenant, a warrantless search is unreasonable if the evidence is used against the physically present objecting cotenant.[61] Although *Randolph* set forth a somewhat confusing holding, the Court settled on a narrow rule that prohibited police officers from entering a home when a tenant who is present objects.[62] This holding differs from automobiles, for example, where a passenger's objection is irrelevant because passengers in an automobile are engaged in a "common enterprise" with the driver.[63] These cases are illustrative of the Supreme Court's heightened protection of home privacy.[64]

In *Barnes*, the Indiana Supreme Court was correct to eliminate the castle doctrine as a defense to assaulting police officers; applying the castle doctrine to such situations would require laypeople to speculate as to whether a search is lawful.[65] Defending one's home against violent trespassers, as the castle doctrine

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54. *Id.* at 576–78.

55. *Compare Payton*, 445 U.S. 573, *with* New York v. Belton, 453 U.S. 454 (1981) (explaining that a police officer may automatically search the passenger compartment of an automobile incident to a lawful custodial arrest).

56. 533 U.S. 27 (2001).

57. *Id.* at 40.

58. *See id.*

59. 547 U.S. 103 (2006).

60. *See id.*

61. *Id.* at 120. In the opinion, the Court emphasized that "nothing in social custom or its reflection in private law argues for placing a higher value on delving into private premises to search for evidence in the face of disputed consent, than on requiring clear justification before the government searches private living quarters over a resident's objection." *Id.*

62. For a full analysis on *Randolph*, see Craig Bradley, CRIMINAL PROCEDURE: RECENT CASES ANALYZED 104 (2d ed. 2010) (discussing *Georgia v. Randolph*).

63. *See* Wyoming v. Houghton, 526 U.S. 295, 304–05 (1999); Maryland v. Wilson, 519 U.S. 408, 413–15 (1997).

64. Further illustration of this point can be found by examining Fourth Amendment search cases outside of the home. For example, the primary case for automobile searches is *California v. Acevedo*, 500 U.S. 565 (1991), which held that searching an entire car for a container that the police have probable cause to believe contains illegal substances is constitutional under the Fourth Amendment.

65. *See* Barnes v. State (*Barnes I*), 946 N.E.2d 572, 576 (Ind.), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011) ("In these situations, we find it unwise to allow a homeowner to adjudge the legality of police conduct in the heat of the moment.").

was originally meant to allow,[66] is a far cry from allowing discretionary assaults on police officers, which the new Indiana statute allows in some circumstances.[67] The Indiana statute's recognition of the castle doctrine might even raise further concerns such as whether homeowners are allowed to use firearms against police officers in certain situations.[68] In order to avoid the unnecessary violence that the castle doctrine creates in cases like *Barnes* and the narrow circumstances that the Indiana statute intends to cover, Indiana must look to other Fourth Amendment remedial measures to protect home privacy. The adequacy of the other current remedies, however, cannot effectively preserve home privacy against "zealous"[69] police officers' authority to enter a home.

II. THE EXCLUSIONARY RULE AND ITS EXCEPTIONS

Although the exclusionary rule was not at issue in *Barnes*, its status as a Fourth Amendment remedy plays a role in the castle doctrine and home privacy debate. When the police seize incriminating evidence during an unlawful Fourth Amendment search, the defendant can move to suppress the evidence pursuant to the exclusionary rule.[70] The effect of evidence suppression, therefore, is to set guilty parties free when the police violate the Fourth Amendment in order to encourage police officers to be more careful. As this Note points out, however, police discretion to obtain a warrant or enter a home has recently expanded due to courts' unwillingness to set guilty parties free; the exclusionary rule, then, has little value as a prophylactic or remedial measure to combat invasions of home privacy by law enforcement.

A. Brief History of the Exclusionary Rule

The birth of the suppression remedy is commonly accredited to *Weeks v. United States*,[71] where the Supreme Court held that it was prejudicial error for the trial court to continue proceedings relying on the petitioner's papers, which were wrongfully seized.[72] However, the scope of the exclusionary rule, under *Weeks*, was limited only to "the Federal Government and its agencies."[73] Therefore, as the

66. *See supra* Part I.A.

67. *See* IND. CODE § 35-41-3-2(i)(1)–(3) (2012).

68. For a full discussion on Second Amendment rights and the ability of citizens to resist unlawful police conduct, see Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939 (2011).

69. *See* Payton v. New York, 445 U.S. 573, 602 (1980). In *Payton*, the Supreme Court used this adjective to describe police officers' ability to make an objective probable cause determination in the heat of the moment in comparison to a magistrate. *See id.*

70. *See* Mapp v. Ohio, 367 U.S. 643 (1961). *Mapp* is the standard citation for the origin of the exclusionary rule because the Court's holding gave the rule its teeth by applying it to the states. *See also* Weeks v. United States, 232 U.S. 383 (1914) (establishing the exclusionary rule for federal cases only).

71. 232 U.S. 383.

72. *Id.* at 398.

73. *Id.*

Court pointed out in *Mapp v. Ohio*,[74] the *Weeks* holding created a situation where "a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may [make use of the evidence], although he supposedly is operating under the enforceable prohibitions of the same Amendment."[75] Accordingly, in *Mapp*, the Court applied the exclusionary rule to states by way of the Fourteenth Amendment.[76] Indiana, however, adopted the suppression remedy in 1923, long before *Mapp* was decided.[77]

The exclusionary rule ideally operates on the theory that law enforcement should always obey the laws it enforces: "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[78] In practice, however, the exclusionary rule is now a deterrence measure focused solely on police conduct instead of defendants' privacy rights: "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search."[79] The Court, in recent years, has tended to ignore some previously recognized Fourth Amendment rights in order to keep guilty criminals in jail unless suppression would deter egregious police conduct in the future.[80] The court-created good faith exception[81] and permission of warrantless entries into homes pursuant to exigent circumstances[82] have further disfavored home privacy rights while increasing police officers' subjective discretion.[83]

B. The Good Faith Exception

After over twenty years of judicial debate regarding the exclusionary rule's purpose in Fourth Amendment law,[84] the Supreme Court implemented the good

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74. 367 U.S. 643.

75. *Id.* at 657.

76. *Id.* at 655 ("Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.").

77. *See* Callender v. State, 138 N.E. 817 (Ind. 1923) (holding that property seized pursuant to an invalid search warrant is inadmissible against the defendant).

78. *Mapp*, 367 U.S. at 659.

79. Davis v. United States, 131 S. Ct. 2419, 2426 (2011) (citing Stone v. Powell, 428 U.S. 465, 486 (1976)).

80. *See infra* Part II.B.

81. *See* United States v. Leon, 468 U.S. 897 (1984); *infra* Part II.B.

82. *See, e.g.*, Kentucky v. King, 131 S. Ct. 1849 (2011); *infra* Part II.C.

83. For a full discussion on the history and basis of the exclusionary rule as a remedy, see William C. Heffernan, Foreword, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799 (2000).

84. *See, e.g.*, United States v. Payner, 447 U.S. 727 (1980); United States v. Calandra, 414 U.S. 338 (1974); Coolidge v. New Hampshire, 403 U.S. 443 (1971). *Compare* Wong Sun v. United States, 371 U.S. 471, 484–85 (1963) (holding that the exclusionary rule "extends as well to the indirect as the direct products of [unlawful searches]") *with* Stone v. Powell, 428 U.S. 465 (1976) (holding that applying the exclusionary rule in some situations, such as a habeas corpus petition and other "collateral review of Fourth Amendment claims"

faith exception in *United States v. Leon*.[85] In *Leon*, police officers found a large quantity of narcotics while conducting searches of three different residences pursuant to a facially valid search warrant—the warrant was subsequently deemed invalid because the affidavit was insufficient to show probable cause.[86] Acknowledging the continuing debate regarding the correct scope of the exclusionary rule,[87] the Court held that evidence cannot be excluded when a law enforcement officer acts with "objective good faith" unless the warrant has serious facial deficiencies.[88] Because *Leon* was limited to situations where officers obtained warrants, its holding, to some extent, still checked police discretion. After *Leon*, however, the Court continued to expand the scope of the good faith exception in federal law, which was also reflected in Indiana's state law.[89]

1. The Expansion of the Good Faith Exception in Federal Law

Since *Leon*, the Supreme Court has substantially expanded the applicable scope of the good faith exception. In *Illinois v. Krull*,[90] the Court held that a police officer's good faith reliance on an unconstitutional statute allowing warrantless administrative searches of automobiles was reasonable under the good faith exception.[91] Further, in *Herring v. United States*,[92] the Court held that good faith included negligent acts by police departments such as not verifying computer records of outstanding warrants.[93] In *Herring*, the Court established that officers must be grossly negligent or reckless in order for evidence to be excluded.[94] In her article analyzing the Court's holding in *Herring*, Professor Jennifer E. Laurin argues that the Court may have used a method of "borrowing and convergence" to establish a good faith standard that would sync with other Fourth Amendment remedies.[95] Professor Laurin argues that *Herring* probably did not square with the Court's good faith jurisprudence announced in *Leon*, but was reasonably related to

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imposes too great of a societal burden by potentially letting guilty defendants free). The debate shown here was waged in several Fourth Amendment cases between 1961 and 1984. One view was a liberal application of the rule, such as the holding in *Wong Sun*, also known as the "fruit of the poisonous tree" doctrine, but opponents of the liberal view argued for a more limited application of the rule as in *Stone v. Powell*.

85. 468 U.S. 897.

86. *Id.* at 902–03.

87. *See id.* at 907 ("The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern.").

88. *Id.* at 922–23.

89. *See infra* Part II.B.1–2.

90. 480 U.S. 340 (1987).

91. *Id.* at 356–57 (applying a standard for state statutes identical to that for warrants announced in *Leon*).

92. 555 U.S. 135 (2009).

93. *See id.* at 146 ("If the police have been shown to be *reckless* in maintaining a warrant system, or to have *knowingly* made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation.") (emphasis added).

94. *Id.*

95. Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011).

the qualified immunity rationale for § 1983 actions announced in *Harlow v. Fitzgerald*.[96]

While Professor Laurin presents a thorough analysis of *Herring*, the recent Supreme Court decision in *Davis v. United States*[97] seems to suggest that the Court simply does not want exclusion to be a remedy upon which guilty defendants can rely.[98] In *Davis*, the Court held that relying on appellate court precedent is reasonable and that applying the good faith exception to trump the retroactive law doctrine[99] was justifiable.[100] The *Davis* decision significantly widened the scope of the good faith exception and instilled the Court's view that "society must swallow this bitter pill [of allowing guilty defendants to go free] when necessary, but only as a 'last resort.'"[101] *Herring* and *Davis* stand for the proposition that acknowledging the full scope of guilty defendants' Fourth Amendment rights would levy too high of a social cost to be justified. While Professor Laurin's general thesis still holds weight after *Davis*, the Court's language suggests that it is more concerned with punishing guilty defendants than privacy rights under the Fourth Amendment.[102] This viewpoint on the balance between home privacy and the needs of law enforcement diminishes the prophylactic and remedial value of the exclusionary rule to almost nothing.

One must keep in mind that the primary, and perhaps only, emphasis of the good faith exception, currently, is the conduct of police officers. In *Leon*, the Court stated: "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."[103] A critical question for the purposes of protecting against the unlawful entry of a private residence,[104] however, is whether suppression remedies the violation of the

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96. 457 U.S. 800, 814 (1982) (noting the public policy considerations justifying qualified immunity include the increased social costs of litigation for public entities and the "diversion of official energy from pressing public issues"); Laurin, *supra* note 95, at 724–26.

97. 131 S. Ct. 2419 (2011).

98. *See id.* at 2428–29 ("The officers who conducted the search did not violate Davis's Fourth Amendment rights *deliberately, recklessly, or with gross negligence*. Nor does this case involve any 'recurring or systemic negligence' on the part of law enforcement. . . . Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case.") (emphasis added) (citations omitted).

99. *See* Griffith v. Kentucky, 479 U.S. 314 (1987) (holding that criminal procedure issues apply retroactively to all pending cases).

100. In *Davis*, the search was conducted consistent with the methods announced in an appellate court case, *United States v. Gonzalez*, 71 F.3d 819 (11th Cir. 1996), which was later held to be unconstitutional and its abrogation recognized by the Court in *Davis*. 131 S. Ct. at 2428. The petitioner and the dissent argued that applying the good faith exception to an overruled precedent revives the overruled "retroactivity regime" established in *Linkletter v. Walker*, 381 U.S. 618 (1965). *Davis*, 131 S. Ct. at 2429–30. The majority disagreed and held for the government. *Id.* at 2430–32.

101. *Davis*, 131 S. Ct. at 2427 (citing Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

102. *See id.*

103. United States v. Leon, 468 U.S. 897, 921 (1984).

104. *See supra* Part II.A. The Court has expressly stated that the exclusionary rule is *not* intended to remedy violations of defendants' rights. However, the topic of this Note and the Indiana Supreme Court's holding in *Barnes* require that defendants' rights be observed in this analysis; otherwise, the exclusionary rule is nothing but a general spot check on police officers to make sure their unlawful searches are not so egregious as to warrant subsequent

defendant's rights—the Supreme Court has rarely addressed this question. One further point to note is that, as the Court stated in *Davis*, the police are not exclusively punished when evidence is excluded; the cost of suppressing evidence is levied on all of society by letting guilty defendants remain at large.[105] Claiming to protect police officers or deter certain police conduct avoids a primary issue with exclusion and allows the Court to speak for society in regard to how much home privacy is enough to balance the bitter result of letting guilty criminals go free.[106] Looking at evidence suppression from the perspective of homeowners rather than police officers would more accurately reflect the purposes for, and rationale behind, the Fourth Amendment.

2. The Good Faith Exception in Indiana

Indiana courts have shown mixed reactions to the Supreme Court's interpretation of the good faith exception.[107] Indiana's good faith statute,[108] on its face, is fairly consistent with the previously discussed federal law;[109] however, Indiana's good faith statute was adopted in 1983,[110] one year before the birth of the federal good faith exception in *Leon*.[111] While Andrew Krull's article is correct that Indiana courts have not been entirely consistent with the federal good faith exception,[112] the Supreme Court's jurisprudence, without question, has influenced Indiana's good faith doctrine.[113] Also, it is impractical to pursue an elaborate

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judicial action, and the Indiana Supreme Court erred in relying on the exclusionary rule to justify eliminating the castle doctrine.

105. *Davis*, 131 S. Ct. at 2426–27.

106. On this point, Professor Laurin's article offers a great analysis. The fact that most good faith cases aim to protect police, instead of worrying about the defendant, may be an effort to somehow sync exclusion with standards for Fourth Amendment civil remedies. *See* Laurin, *supra* note 95. However, as a matter of policy, it is still difficult to reconcile *Herring* with defendant's rights based on such a view because allowing a guilty criminal, and guilty criminals in the future, to go free is a different policy concern than holding police departments or officers civilly liable for bad conduct. Laurin's analysis probably works in situations where a guilty criminal wins a motion to suppress *and* files a § 1983 action, but *Herring* really cannot be justified by Laurin's analysis in civil matters where innocent parties are victims of an unlawful search.

107. For a full discussion on the good faith exception in Indiana, see Andrew C. Krull, *Turning Back the Clock: Why the 'Good Faith' Exception Was Not and Should Not be Recognized in Indiana*, RES GESTÆ, Oct. 2007, at 29. Krull calls the good faith exception the "'oops, we didn't know' exception or the 'ignorance of the law works for the police and issuing magistrates but not for common citizens' exception." *Id*. at 29. Krull also cites to state court decisions in sixteen states that reject the Supreme Court's interpretation of the good faith exception to some extent. *Id.* at 29 n.2.

108. IND. CODE § 35-37-4-5 (2012).

109. *See supra* Part II.B.1.

110. State v. Brown, 840 N.E.2d 411, 415 (Ind. Ct. App. 2006).

111. United States v. Leon, 468 U.S. 897 (1984).

112. *See* Krull, *supra* note 107.

113. This Subsection will show that, like the Supreme Court, the trend in Indiana has been to broaden the scope of the good faith exception; however, as Krull suggests in his article from 2007, there is some debate in the courts as to the precise scope of the good faith exception. *See id*. at 29.

change of Indiana's "good faith" jurisprudence to establish more home privacy protection, as Krull seems to advocate.[114]

Some Indiana decisions have established a narrower good faith exception in favor of preserving home privacy. In *State v. Brown*,[115] the Indiana Court of Appeals concluded that the Indiana good faith statute operates independently of federal good faith jurisprudence[116] and wrote, "a state may provide greater protection from searches and seizures than the Fourth Amendment requires."[117] In *Brown*, a police officer gave probable cause testimony and obtained a warrant as a result of her testimony; however, a recording of the hearing showed that the officer was not under oath when she testified.[118] The appellate court affirmed the trial court's grant of defendant Brown's motion to suppress, holding that the exclusionary rule and the good faith exception are "creatures of the judiciary"[119] while the oath or affirmation requirement for warrants is "not a mere technicality but is an essential and indispensable part of the warrant requirement . . . ."[120] Writing for the court, Judge Najam dictated that the exclusionary rule "is designed not only to deter police misconduct but also to ensure that warrants are properly issued."[121] Although Judge Najam's opinion suggests that Indiana's good faith jurisprudence provides more home privacy protection than the federal standard, the Indiana Appellate Court subsequently distinguished the *Brown* opinion in *Wendt v. State*.[122] In *Wendt*, a police officer, in a probable cause hearing, provided the magistrate with false information.[123] The appellate court held that the standard for misleading the magistrate, or for insufficient basis of probable cause, is that the officer must act with reckless disregard for the truth—a very high standard for defendants.[124]

Although *Brown* may not be a reflection of Indiana good faith law generally, Indiana courts have shown that they may not apply the good faith exception where warrants are suspect. In *Jaggers v. State*,[125] the police used information received from an anonymous tip to establish probable cause and obtain a warrant.[126] On the

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114. *See id.* at 34–35.

115. 840 N.E.2d 411 (Ind. Ct. App. 2006).

116. *Id.* at 417. *See generally supra* Part II.B.1 (discussing federal good faith jurisprudence).

117. *Brown*, 840 N.E.2d at 417.

118. *Id.* at 413.

119. *Id.* at 422.

120. *Id.*

121. *Id.* at 420.

122. 876 N.E.2d 788, 790 (Ind. Ct. App. 2007). In *Wendt*, the state appellate court held that when a warrant is based on an informant's information and the informant gives different information at trial than that in the warrant, the good faith exception still applies. *Id.* at 791.

123. *See id.*at 791.

124. *Id.* Curiously, this standard is the same as the Supreme Court's standard for actual malice in libel cases under the First Amendment. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964). Is this Indiana court suggesting that police officers must either blatantly lie or not look into the matter at all in order to violate the Fourth Amendment under these circumstances? If so, this standard is nearly impossible to satisfy. Either way, this standard is a sharp contrast from Judge Najam's opinion in *Brown*. 840 N.E.2d 411.

125. 687 N.E.2d 180 (Ind. 1997).

126. *Id.* at 181.

appellant's motion to suppress, the Indiana Supreme Court placed little weight on the fact that the officer might have mislead the magistrate to the extent that the good faith exception would not apply.[127] But, the court nonetheless excluded the evidence because the police relied on a warrant that was based on information "so lacking in indicia of probable cause that no well-trained officer would reasonably have relied on the warrant."[128] Although *Jaggers* acknowledged an exception to good faith set forth by the Supreme Court,[129] the reason that the information lacked probable cause was because the anonymous tip failed the legal standard developed in *Illinois v. Gates*[130] for determining informants' reliability.[131] Thus, the Indiana Supreme Court essentially held that Indiana police officers do not act in good faith when they misconstrue the *Gates* test.[132] This inference suggests that the Indiana Supreme Court intended to apply the good faith exception slightly more narrowly than the U.S. Supreme Court has since *Leon* and thereby allot more state protection to home privacy interests under the Fourth Amendment.

About a decade after *Jaggers*, however, Indiana courts seemed to broaden the scope of the state's good faith exception. In *State v. Spillers*,[133] police officers used information from an arrestee to establish probable cause for a warrant to search Spillers's home.[134] The Indiana Supreme Court determined that this information was unreliable and did not establish probable cause because the informant had already been caught with cocaine, so revealing information about his dealer (Spillers) did not expose the informant to additional criminal liability.[135] Although the unreliable information undermined probable cause, the court nonetheless denied exclusion because the officers acted in good faith: "[To have reasonable knowledge of what the law prohibits] does not mean that officers are required to engage in

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127. *Id.* at 185. *See also* United States v. Leon, 468 U.S. 897, 923 (1984).

128. *Jaggers*, 687 N.E.2d at 185.

129. *Compare Jaggers*, 687 N.E.2d at 185, *with Leon*, 468 U.S. at 923.

130. 462 U.S. 213 (1983). In *Gates*, the Supreme Court established the standard by which anonymous tips become reliable to establish probable cause. *Id.* at 238.

131. *See Jaggers*, 687 N.E.2d at 182–83.

132. *Id.* at 183–84. *See also* Figert v. State, 686 N.E.2d 827 (Ind. 1997). In *Figert*, the Indiana Supreme Court suppressed evidence obtained pursuant to a warrant because the warrant contained an officer's opinion that additional drug paraphernalia would be found in the defendant's trailer. *Id.* at 833. Further, the court opined that naming three different places on one warrant was disfavored even though the three places were in a rural area, close in proximity, and owned by the same person. *Id.* at 832–33. In *Leon*, the warrant named three residences in completely separate locations but was upheld under the good faith exception. *Leon*, 468 U.S. at 902, 905. The difference in *Figert* was that the third trailer's probable cause was based on the officer's opinion, but one might speculate that the Indiana Supreme Court generally disfavored that aspect of *Leon*.

133. 847 N.E.2d 949 (Ind. 2006).

134. *Id.* at 952.

135. *Id.* at 956–57. A criminal defendant who is caught red-handed is not necessarily a reliable informant. Obviously, defendants caught in the act have little bargaining power with prosecutors and might be more willing to give up information in exchange for a sentence reduction. Therefore, the fact that the informant against Spillers was willing to point the finger at Spillers does not necessarily make him a reliable informant because he was already facing a criminal sentence, had nothing to lose, and the police did not sufficiently verify the accuracy of the informant's testimony.

extensive legal research and analysis before obtaining search warrants."[136] This holding flies in the face of the same court's rationale in *Jaggers*.[137] The *Jaggers* court implied that informant information that fails a legal test warrants exclusion,[138] but, on the other hand, the *Spillers* court held that even a warrant based on unreliable information from a freshly arrested informant can be relied on in good faith.[139]

After *Spillers*, the Indiana Supreme Court, similar to the Supreme Court's holding in *Davis v. United States*,[140] held that "[r]etroactive application of [the exclusionary rule] would not advance its purpose for the obvious reason that deterrence can operate only prospectively."[141] In *Membres v. State*, the appellant moved to suppress evidence seized during a search of his trash bags.[142] Membres argued that a new standard of criminal procedure, which required "reasonable suspicion" for trash searches, was applicable to the case because the new standard developed while his trial was pending.[143] In denying Membres's motion to suppress, the Indiana Supreme Court used language almost identical to that in *Davis*:

> Exclusion of the fruit of a random search, although important in protecting Indiana citizens from unreasonable searches and seizures, does not in any way serve to avoid an unjust conviction. To the contrary, exclusion of relevant and otherwise admissible evidence can prevent conviction where reliable evidence supports it. Because there is this cost to enforcing the exclusionary rule, it should be done only where appropriate to advance its purpose.[144]

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136. *Id.* at 958. In its holding, the Indiana Supreme Court quoted *Hensley v. State*, 778 N.E.2d 484, 489 (Ind. Ct. App. 2002):

> The exclusionary rule is designed to deter police misconduct, and in many cases there is no police illegality to deter. Although the magistrate or judge is responsible for determining whether an officer's allegations establish probable cause, an officer's reliance on the magistrate's probable-cause determination must be objectively reasonable. The *Leon* Court emphasized that the objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits. In some circumstances an officer will have no reasonable grounds for believing that the warrant was properly issued. *Depending on the circumstances of the particular case, a warrant may be so facially deficient that the executing officers cannot reasonably presume it to be valid*.

Spillers, 847 N.E.2d at 957–58 (emphasis added) (citations omitted in original) (quoting *Hensly*, 778 N.E.2d at 489).

137. *See* Jaggers v. State, 687 N.E.2d 180, 182–83 (Ind. 1997).

138. *See id.* at 184.

139. 847 N.E.2d at 958.

140. 131 S. Ct. 2419 (2011).

141. Membres v. State, 889 N.E.2d 265, 274 (Ind. 2008).

142. *Id.* at 268.

143. *Id.* at 269–71 (discussing retroactive application of Litchfield v. State, 824 N.E.2d 356 (Ind. 2005), which was decided two weeks after search of Membres's trash).

144. *Id.* at 274; United States v. Davis, 131 S. Ct. 2419, 2428–29 (2011).

The *Membres* court relied on Indiana law,[145] but the application of Indiana good faith law, outside of Judge Najam's opinion in *Brown*,[146] has been similar to the Supreme Court's good faith exception in downplaying home privacy in favor of incarcerating guilty criminals.

3. The Good Faith Exception and Home Privacy

Regardless of one's opinion of the good faith doctrine, it cannot be seen as an adequate prophylactic or remedial measure that negates the need for the castle doctrine. The problem is, as shown above, the courts rely on "reasonableness" as the touchstone of privacy rights under the Fourth Amendment. Despite their efforts, courts cannot objectively determine whether a police officer's actions were reasonable "by [retroactively] examining the factual circumstances that the officers confronted."[147] By trying to decipher objective reasonableness, courts have done little more than deem unconstitutional searches legitimate for the sake of protecting police officers and preventing guilty criminals from going free, which flies in the face of the purpose of the Fourth Amendment.[148]

Although Indiana is free to grant more Fourth Amendment rights to citizens than has the Supreme Court,[149] this Note does not argue that Indiana should reduce the scope of its good faith exception in criminal law. The good faith exception certainly focuses on police officers rather than homeowners, but this Note does not seek to analyze whether such a change to the criminal law would be beneficial. Police officers should have some room for error, even at the expense of some Fourth Amendment rights, but the extent to which home privacy rights have been disregarded has made the law such that courts cannot reasonably rely on exclusion as an adequate remedy to breaches of home privacy.[150]

C. Exigent Circumstances

The exigent circumstances exception, in some cases, is more harmful to home privacy than the good faith exception. Unlike the good faith exception, which disallows suppressing evidence seized because of police officers' reliance on some authority, exigencies are situations where officers have discretion to execute a warrantless entry of a home without any legal home privacy violation at all. The

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145. *Id.* at 274 (citing Callender v. State, 138 N.E. 817 (Ind. 1923), to show that Indiana adopted the exclusionary rule long before *Mapp* applied the exclusionary rule to the states).

146. *See supra* text accompanying notes 115–21.

147. L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1143 (2012).

148. *See* Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1562–63 (2009) (arguing that the exclusionary rule and other prophylactic approaches to correcting the exclusionary rule in community caretaking situations presents a risk of watering down the potency of the Fourth Amendment's protections); *supra* Part II.A; *supra* notes 70–75 and accompanying text.

149. *See* Michigan v. Long, 463 U.S. 1032 (1983).

150. For a full discussion on potential alternatives to problems with the exclusionary rule, see, for example, Dimino, *supra* note 148.

Supreme Court's exigent circumstances doctrine allows the police to enter a home with probable cause, but without a warrant, when officers are in "hot pursuit" of a fleeing suspect;[151] the officers have reason to believe the suspects are destroying evidence;[152] or when the officers need to enter a home to prevent harm or injury to someone inside of the home.[153] Because the exigent circumstances doctrine is based on a "reasonableness" standard—like the good faith exception[154]—and allows officers to enter a private home based on personal judgment, this exception, particularly in hot pursuit and destruction of evidence situations,[155] further limits the viability of the exclusionary rule as an adequate protector of home privacy.

1. Hot Pursuit

The hot pursuit exigency allows officers to enter a home without a warrant while pursuing a suspect. In *Warden v. Hayden*,[156] the Court held that the warrantless entry into the defendant's home was reasonable when he was seen committing a robbery and entering the home minutes prior to the officers' arrival: "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."[157] The Court relied on *Warden* in deciding *United States v. Santana*,[158]

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151. *See* United States v. Santana, 427 U.S. 38 (1976) (retreating into home during course of arrest does not justify suppression when officers pursued suspect into home); Warden v. Hayden, 387 U.S. 294 (1967) (pursuit of identified robber who had entered a private home minutes before the officers was reasonable). *Cf.* Welsh v. Wisconsin, 466 U.S. 740 (1984) (pursuit of the defendant, who was suspected of driving drunk, into his home was unreasonable due to the time that had elapsed and the nature of the crime).

152. *See* Kentucky v. King, 131 S. Ct. 1849 (2011) (police-created exigencies are still applicable to the exigent circumstances exception so long as "the police [do not] create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment); United States v. Banks, 540 U.S. 31 (2003) (forcible entry into home after knock, while serving a search warrant, was justified due to possibility of suspects destroying drug evidence).

153. *See* Brigham City v. Stuart, 547 U.S. 398 (2006) (when officers see a fight occurring inside of a home, it is reasonable for the officers to enter the home without a warrant); Arizona v. Hicks, 480 U.S. 321 (1987) (entering an apartment from which a gunshot was fired was reasonable); Holder v. State, 847 N.E.2d 930 (Ind. 2006) (police officers sniffing around a home was reasonable under the exigent circumstances exception due to the odor of an explosive and flammable chemical being emitted from the home); Cudworth v. State, 818 N.E.2d 133 (Ind. Ct. App. 2004) (warrantless search of home was unreasonable because there was no showing that appellant was in need of immediate aid).

154. *Brigham City*, 547 U.S. at 404–05 (warrantless home entry by police officers is allowed when the circumstances show an objectively reasonable basis for entry, regardless of the officers' subjective intent).

155. Although the *Barnes* facts probably represent a community-caretaking situation, 946 N.E.2d 572 (Ind.), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011), the purpose of this Note is to discuss the problems with home privacy rights, generally, on which the *Barnes* decisions shed light. For a full discussion of problems with community-caretaking searches, see Dimino, *supra* note 148.

156. 387 U.S. 294 (1967).

157. *Id.* at 298–99.

158. 427 U.S. 38 (1976).

where it defined hot pursuit as "some sort of chase, but it need not be an extended hue and cry in and about the public streets."[159]

The hot pursuit exigency has created a difficulty with the home privacy balance because it is difficult for judges and police officers to determine what constitutes a hot pursuit. Although homeowners probably never want officers entering a home without a warrant, the hot pursuit exigency sets forth reasonable limitations to home privacy because officers' subjective judgments are limited during a hot pursuit. The Supreme Court determined one boundary of hot pursuit in an atypical case that has proven to be somewhat of an enigma in Fourth Amendment case law. In *Welsh v. Wisconsin*,[160] the Court held that entering the home of a defendant suspected of driving while intoxicated was not a legitimate exigency and, thus, entering the home without a warrant was unreasonable.[161] The Court ruled that the facts of *Welsh* did not show that the police officer was engaged in a hot pursuit at all[162]: the officer was called to the scene by a third party, found the defendant's abandoned car, and checked the car's registration to obtain the defendant's address.[163] The nature of the hot pursuit exigency is such that police officers do not have time to make calculated decisions in pursuit of a fleeing or dangerous suspect; therefore, courts tend to maintain a reasonable balance between law enforcement needs and home privacy by applying the hot pursuit exception only to cases where halting an investigation to obtain a warrant is impractical or dangerous.[164]

The problem with hot pursuit exigencies, however, is that judges cannot put themselves in the positions of the police officers and vice versa. Police officers do not know the intricacies of Fourth Amendment jurisprudence regarding home privacy, and judges cannot understand the difficulties of fighting crime in most cases. Therefore, there may be a natural tendency to skew the balance between homeowners' rights and needs of law enforcement—after all, police officers are not entering judges' homes in hot pursuit. The new Indiana statute also accounts for hot pursuit exigencies,[165] and seems to make an attempt to create a sort of balance in home privacy rights. But, this specific provision in the new statute does not protect home privacy and also does not proactively protect officers from the dangerous nature of hot pursuits; the statute retroactively eliminates the defense for suspects who harm police officers during a hot pursuit—for the statute to be applicable, the damage has already been done.

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159. *Id.* at 43 (alteration in original omitted) (internal quotation marks omitted). In *Santana*, police officers set up a drug bust, and upon moving in to arrest the defendant, she retreated into the house. *Id.* at 39–40.

160. 466 U.S. 740 (1984).

161. *Id.* at 754 ("To allow a warrantless home entry on these facts would be to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction."). *See also* Sapen v. State, 869 N.E.2d 1273 (Ind. Ct. App. 2007) (police officer entering the defendant's garage and home office based on the suspicion that the defendant was driving while intoxicated was unreasonable).

162. *Id.* at 753 ("[T]he claim of hot pursuit is unconvincing because there was no *immediate or continuous pursuit* of the petitioner from the scene of a crime.") (emphasis added).

163. *Id.* at 742.

164. *See* Warden v. Hayden, 387 U.S. 294 (1967).

165. *See* IND. CODE § 35-41-3-2(j)(1) (2012).

2. Destruction of Evidence

The "imminent destruction of evidence" exigency[166] is the exception to the warrant requirement that has become most detrimental to home privacy. The destruction of evidence exigency allows police officers to enter a home without a warrant, or to restrict suspects from entering their home,[167] when the police have probable cause to believe destructible evidence is inside.[168] Many cases that apply the destruction of evidence exigency involve narcotics;[169] if the police have a reasonable suspicion that the suspect will destroy the drugs, the police may enter the home immediately in order to preserve the evidence.[170] The Court's holding in *Kentucky v. King*,[171] which determined that police-created exigencies are within the scope of the exception,[172] is illustrative of this exigency's detriment to home privacy. In *King*, police officers were pursuing a fleeing suspect, but did not see which apartment the suspect entered.[173] Because the smell of marijuana emanated from King's apartment, the police officers knocked and entered the apartment as soon as they heard "people inside moving."[174] Although the Court remanded the question of whether any movement could constitute reasonable suspicion that evidence would be destroyed,[175] the Court nonetheless held that police conduct may create an exigency without violating the Fourth Amendment.[176]

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166. *E.g.*, Holder v. State, 847 N.E.2d 930, 938 (Ind. 2006) ("Possible imminent destruction of evidence is one exigent circumstance that may justify a warrantless entry into a home if the fear on the part of the police that the evidence was immediately about to be destroyed is objectively reasonable.").

167. *See* Illinois v. McArthur, 531 U.S. 326 (2001).

168. *See id. See also, e.g.*, Kentucky v. King, 131 S. Ct. 1849 (2011); United States v. Banks, 540 U.S. 31 (2003).

169. *King*, 131 S. Ct. 1849, and *Banks*, 540 U.S. 31, *McArthur*, 531 U.S. 326, for example, all involved drug crimes.

170. *See Banks*, 540 U.S. at 36–37. *Banks* is somewhat of a special case because it applies the destruction-of-evidence exigency to the execution of warrants. The police in *Banks* had a warrant, but entered the house approximately 15–20 seconds after knocking because of fear that the suspect would destroy the cocaine. *Id*. at 38. The Court unanimously held that when police officers have a reasonable suspicion that a suspect might destroy evidence, they may enter the home and are immune from liability for damages incurred in the entry, such as breaking down a door. *Id.* at 37. This doctrine is applicable to warrantless entries as well. *See supra* text accompanying notes 156–65.

171. 131 S. Ct. at 1858 ("[W]arrantless searches are allowed when the circumstances make it reasonable . . . to dispense with the warrant requirement. . . . [T]he exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense.").

172. The police in *King* created the exigency by knocking on the wrong door after they had lost their suspect. However, the Court held that as long as police officers do not engage in, or threaten to engage in, conduct that violates the Fourth Amendment, police-created exigencies are the same as any other exigency. *Id.*

173. *Id.* at 1854.

174. *Id.* at 1854–55 (internal quotation marks omitted).

175. *See id.* at 1863–64 ("Like the court below, we assume for the purposes of argument that an exigency existed.").

176. *See id.* at 1862 ("Occupants who choose not to stand on their constitutional rights [by answering the door and denying entry] but instead elect to attempt to destroy evidence

The destruction of evidence exigency has created a difficult friction in Fourth Amendment jurisprudence between the needs of law enforcement and home privacy rights.[177] The Court, again, seems to be favoring the needs of law enforcement to the detriment of home privacy.[178] Some have argued that courts should set out a bright-line standard for application of,[179] and manageable definitions of,[180] destruction-of-evidence exigencies so that exigencies are not assessed on a case-by-case basis.[181] These arguments are legitimate, but it is difficult to believe the Supreme Court or individual states will clearly define destruction of evidence exigencies and thereby restrict reasonable police conduct.[182] Because there are no clearly defined standards of what constitutes an exigency in destruction-of-evidence situations, the newly-amended Indiana statute implausibly assumes citizens will be able to reasonably decipher when a law enforcement officer is acting lawfully and when reasonable resistance is appropriate.[183]

The exigent circumstances exception, along with the good faith exception, have shown that, despite the "objective reasonableness"[184] standard for excluding

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have only themselves to blame for the warrantless exigent-circumstances search that may ensue.").

177. *Compare King*, 131 S. Ct. at 1862, *with* Johnson v. United States, 333 U.S. 10, 14 (1948) ("The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance."). *See also* Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 17 PACE L. REV. 37, 44 (1997) (arguing for bright line definition of the destruction of evidence exigency, which allows warrantless home entries only in specific and limited circumstances where officers' conduct does not create the exigency and a warrant cannot be practically obtained).

178. *See King*, 131 S. Ct. at 1864 ("In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant.") (Ginsburg, J. dissenting).

179. *See* Salken, *supra* note 177, at 42. Although the Supreme Court implicitly rejected Salken's proposed statute in *Kentucky v. King*, holding that police-created exigencies are reasonable, this general line of argument has merit because bright-line standards have shown to be beneficial to both the police and private citizens in other areas of criminal law. *See King* 131 S. Ct. at 1863–64.

180. *See* John Mark Huff, *Warrantless Entries and Searches Under Exigent Circumstances: Why Are They Justified and What Types of Circumstances Are Considered Exigent?*, 87 U. DET. MERCY L. REV. 373 (2010) (synthesizing the array of factors that courts use to determine exigent circumstances in order to present a practical guideline for analyzing such cases). *See also King*, 131 S. Ct. at 1861 (never reaching the question as to whether any movement inside constitutes an exigency).

181. One example of bright-line standards working is the Fifth Amendment *Miranda* doctrine, which essentially gives arrestees two options (silence or an attorney) during interrogation, but also defines exactly what officers must do in order to conduct a legitimate interrogation. *See* Dickerson v. United States, 530 U.S. 428 (2000) (although supplementary to the main issue of the case, many police forces submitted amicus briefs in favor of *Miranda*'s bright-line formulation of Fifth Amendment rights).

182. *See* L. Timothy Perrin, H. Mitchell Caldwell & Carol A. Chase, *It is Broken: Breaking the Inertia of the Exclusionary Rule*, 26 PEPP. L. REV. 971 (1999).

183. *See supra* text accompanying note 22.

184. *See* Brigham City v. Stuart, 547 U.S. 398 (2006); *see also* Whren v. United States, 517 U.S. 806 (1996) (constitutional reasonableness does not depend on the motivations of

evidence, the subjective judgment of police officers is critical in assessing Fourth Amendment rights. Whether a police officer obtains a warrant is a completely subjective determination; the "objective reasonableness" test retroactively determines whether the officers who choose not to obtain a warrant do so reasonably. Courts defer to police officers' judgment simply because of their occupational status, not because of skill, experience, training, or expertise—police officers are not privy to the large body of Fourth Amendment case law.[185] Relying on officers' subjective judgment in Fourth Amendment jurisprudence has led to a "hopeless clutter" of case law in regard to determining a fair and balanced standard.[186] Due to this standard, the exclusionary rule does not serve as a prophylactic or remedial measure.[187] In cases such as *Barnes*, therefore, it is inadequate to rely on the exclusionary rule as a guardian of home privacy. Further, the newly-amended Indiana statute perpetuates the subjective intent problem by requiring citizens to determine whether an officer is acting lawfully instead of filtering officers' "mixed-motive"[188] determinations of probable cause to magistrates and prosecutors.

III. SECTION 1983 ACTIONS—THE QUALIFIED IMMUNITY PROBLEM

Section 1983 is more applicable to the *Barnes* decisions because, in the facts, the police did not find contraband to use against the defendant in a criminal proceeding. When police officers conduct an unlawful search and no criminal charges result, or the suppression remedy has been exhausted, the victim of the unlawful search can file a civil action under 42 U.S.C. § 1983.[189] The surface requirements for stating a cause of action under § 1983 seem simple enough; the plaintiff must assert that some person, acting under the "color of state or territorial

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the officers involved).

185. *See* Richardson, *supra* note 147, at 1155.

186. *See id.* at 1157 (citing Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 415 (2006)).

187. *See* Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1375 (2008) (showing in a federal court sample, evidence was excluded in only 1.3% of cases and prosecutors refused to prosecute due to fear of exclusion in only 0.2% of cases in which felony arrests were made.).

188. *See* Dimino, *supra* note 148, at 1492–93.

189. Section 1983, 42 U.S.C. § 1983 (2006), is a federal statute that allows citizens to bring civil suits against local and state government entities for unconstitutional acts. The method of suing a federal entity on a direct civil claim dealing with constitutional rights is a *Bivens* action. This action gets its name from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). For the purposes of this Note, I will not discuss *Bivens* in great detail because it applies to federal entities, but I will cite to some of the ideals that the doctrine aims to fulfill in regard to civil remedies generally. The general holding in *Bivens* was that state tort claims are not sufficient remedies for constitutional wrongs in some cases, and public officials may be individually liable for constitutional wrongs under federal law. *See id.* at 397. However, this cause of action has never really been effective. For a full discussion, see Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 66 (1999) (showing data that *Bivens* actions almost never result in damages for the plaintiff—one notable statistic given was out of approximately 12,000 *Bivens* actions between 1971 and 1985, only four plaintiffs received damages that were not reversed on appeal).

law," deprived the plaintiff of a constitutional right.[190] The viability of this remedy has decreased, however, in correspondence with the expanded application of the qualified immunity defense, which immunizes police officers and municipal police departments from civil liability unless a clearly established constitutional right has been violated.[191] Moreover, § 1983 suits relating to Fourth Amendment issues, namely home privacy, seem to be particularly difficult for plaintiffs because the standard, at least partially, relies on criminal case law regarding the exclusionary rule, and, as seen in Part II, the criminal standards weigh heavily against home privacy rights.[192] This application makes little sense if one considers the rationale of Fourth Amendment expansion in exclusionary rule jurisprudence—keeping guilty criminals off of the streets—in relation to the nature of § 1983 actions where the homeowner may not be indicted or suspected for any crime.

The qualified immunity defense in § 1983 actions was once regarded as a standard intended to mirror common law government immunity for the sake of public policy.[193] In *Gomez v. Toledo*,[194] the Court recognized that qualified immunity was a typical defense that is not "relevant to the existence of the plaintiff's cause of action" and that the burden of showing qualified immunity rests with the defendant.[195] Further, *Gomez* endorsed a standard for qualified immunity that required "objectively reasonable belief" that the conduct performed was lawful, and a sincere, good faith belief on the government actor's part that at the time of the act he or she was acting lawfully.[196] This standard had two problems. First, § 1983 qualified immunity is intended to be immunity from suit, and it is impossible to determine whether a municipal police officer or department should be immune from suit when the standard relies on "reasonableness." Second, as one might suspect, making a showing that the defendant is entitled to judgment as a matter of law[197] on an issue of subjective intent, which is governed by factual interpretation, proved to be very difficult, and a surplus of litigation ensued. Thus,

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190. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980).

191. For a full discussion on the restrictions that hinder successful § 1983 claims, see Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to § 1983*, 16 TEX. J. C.L. & C.R. 29 (2010).

192. *See* Pearson v. Callahan, 555 U.S. 223, 244 (2009) (holding that officers entering a home without a warrant are entitled to qualified immunity where there is any conflicting state or federal law because the law in such cases is not "clearly established").

193. *See Gomez*, 446 U.S. at 639 ("[Qualified immunity] has been based on an unwillingness to infer from legislative silence a congressional intention to abrogate immunities that were both 'well established at common law' and 'compatible with the purposes of the Civil Rights Act.'") (citation omitted).

194. 446 U.S. 635 (1980).

195. *Id.* at 640.

196. *Id.* at 639–41 (citing Wood v. Strickland, 420 U.S. 308, 321 (1975)). *Wood v. Strickland* is most often the case accredited with establishing this subjective reasoning.

197. *See* FED. R. CIV. P. 56 (requiring, for summary judgment, that no issue of material fact be disputed, and movant is entitled to judgment as a matter of law). Many § 1983 lawsuits proceeded to discovery because of the federal summary judgment requirement. *See* Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 148 ("It soon became apparent to the Court that the subjective element of the immunity allowed too many insubstantial claims to go to trial, because allegations of malicious intent were difficult to rebut on a motion to dismiss or summary judgment.").

the subjective intent standard followed in *Gomez* was abandoned two years later in *Harlow v. Fitzgerald*.[198]

By eliminating the subjective element in qualified immunity analyses, the *Harlow* holding promoted judicial efficiency by preventing litigation in many meritless § 1983 claims; however, the new standard also established a means by which government actors could disproportionately avoid liability through qualified immunity.[199] In *Harlow*, the Court stated:

> [W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known.[200]

A "clearly established" right must be "sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right."[201] This standard has proven just as difficult for plaintiffs to overcome as defendants overcoming subjective malice allegations, and therefore merely reversed the balance of rights instead of shifting it. Further, when plaintiffs cannot meet the "clearly established" standard, they are theoretically barred from suit and are left with no remedy for the alleged violation—when qualified immunity is not granted, defendants at least have the opportunity to win on the merits or by summary judgment.[202]

The elimination of the subjective element of qualified immunity analyses has created a distinct imbalance between citizens and government actors. As noted in Part II, Indiana courts have held that the standard for police misleading a magistrate in obtaining a warrant is reckless disregard for the truth,[203] and the Supreme Court has determined that the police must act with gross negligence or recklessness to constitute a Fourth Amendment violation.[204] Further, courts have not hesitated to defer to police officers' subjective judgments in not obtaining a warrant.[205] It seems unfair, or at least inconsistent, then, that excluding improperly seized evidence

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198. 457 U.S. 800, 816–18 (1982) (noting that "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury").

199. The holding in *Harlow* was eventually manifest in the holdings of *Saucier v. Katz*, 533 U.S. 194 (2001), and *Pearson v. Callahan*, 555 U.S. 223 (2009), which made it extremely difficult, especially under Fourth Amendment claims, for plaintiffs to get over the qualified immunity standard. *See* John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115; Bodensteiner, *supra* note 191.

200. *Harlow*, 457 U.S. at 817–18 (emphasis added).

201. Anderson v. Creighton, 483 U.S. 635, 640 (1987) (holding, in part, that qualified immunity can apply to government officials who conduct unlawful warrantless searches).

202. *See* FED. R. CIV. P. 56.

203. *See supra* note 124 and accompanying text.

204. *See* Herring v. United States, 555 U.S. 135 (2009).

205. *See supra* Part II.

requires a showing of bad faith when bad faith is not even considered in preventing plaintiffs from suing government officials under § 1983.[206]

Another aspect of the imbalance created in *Harlow* is that § 1983 actions for home search violations may be difficult to show because many rights are not "clearly established." For Fourth Amendment claims, the "clearly established" standard places a particularly heavy burden on plaintiffs; the exceptions to the warrant requirement are analyzed on a case-by-case basis, and "clearly established" standards are uncommon.[207] For example, in *Pearson v. Callahan*,[208] the Supreme Court held that officers were entitled to qualified immunity under the rarely recognized "consent-once-removed" doctrine when the officers conducted a warrantless home entry and arrest based on the consent of an informant, not the homeowner.[209] For the Court, qualified immunity protects "all [police officers] but the plainly incompetent or those who knowingly violate the law."[210] This view of § 1983 creates a gaping hole in which home privacy rights can be lost or disregarded. Eliminating meritless cases is a legitimate interest, but the evolution of § 1983 since *Harlow* has tipped the balance too far in favor of defendants and has made it too difficult for plaintiffs with traditionally legitimate claims to recover damages when home privacy rights have been violated.

In addition to the "clearly established" right standard, the Court has developed various standards of "sequencing" for § 1983 determinations.[211] The sequencing of qualified immunity determinations is particularly important because qualified immunity is "immunity from suit rather than a mere defense to liability . . . . [I]t is effectively lost if a case is erroneously permitted to go to trial."[212] Therefore, the constitutional issues must be addressed early in the litigation process. In *Siegert v. Gilley*,[213] the Court held that once a defendant pleads qualified immunity, the judge must determine the state of the current constitutional law and whether the law was clearly established at the time of the alleged violation before proceeding to discovery.[214] Later, in *Saucier v. Katz*,[215] the Court established a two-step process by which the *Siegert* analysis must be conducted; first, the judge must determine

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206. *See supra* note 124. Because a bad faith or actual malice standard is so high, it is unfair to apply it in this way. One can contrast this application with that in First Amendment torts where the actual malice standard serves free speech by preventing public figures from receiving damages for public opinion. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964). Here, on the other hand, the subjective standard is not protecting constitutional rights, but protecting those who have allegedly violated the constitutional right.

207. *See supra* Part II.

208. 555 U.S. 223 (2009).

209. *Id.* at 228, 244–45.

210. Malley v. Briggs, 475 U.S. 335, 341 (1986).

211. For statistical breakdowns of the different sequencing standards, see Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401 (2009); Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667 (2009); Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523 (2010).

212. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis omitted).

213. 500 U.S. 226 (1991).

214. *Id.* at 231–34.

215. 533 U.S. 194 (2001).

whether a constitutional right was violated; then the judge must determine whether that right was clearly established.[216] The Court justified the *Saucier* standard by determining, logically, that if no violation of a constitutional right occurred, the right could not be clearly established.[217] However, in *Pearson v. Callahan*,[218] the Court retreated from *Saucier*'s mandatory two-step process and granted lower courts discretion as to the sequence of analyzing the two necessary questions set forth in *Saucier*, which put more emphasis on the "clearly established" analysis without requiring a consideration of whether a right was violated.[219] Because the "clearly established" standard is such a high bar for plaintiffs, the sequencing decisions are important for two reasons: (1) the sequence of the analyses, according to some empirical studies, produce different outcomes for plaintiffs,[220] and (2) initially addressing the constitutional questions, as *Saucier* mandates, might allow courts to develop clearly established constitutional rights for future § 1983 actions.[221]

In establishing a sequence for qualified immunity analysis,[222] the Court aimed to organize § 1983 suits and rectify the administrative difficulties that result from litigating meritless cases.[223] Although efficiency is a general goal of recognizing the qualified immunity defense, tackling constitutional questions when the government actor is inevitably entitled to qualified immunity clogs dockets and increases expenses for all parties. The Court endorsed this point in *County of Sacramento v. Lewis*,[224] when it barred the plaintiff's Fourteenth Amendment Due Process action because the government actors clearly did not satisfy the requisite "malicious motive" during a high-speed chase.[225] Further, as Professor Nancy Leong points out in her empirical analysis of pre-*Pearson* sequencing standards, pressuring courts with restricted resources to decide constitutional issues that will inevitably result in qualified immunity may lead to poor holdings on important issues.[226] Leong's empirical analysis concludes that courts generated more constitutional law due to the *Saucier* sequencing standard,[227] but it "uniformly denies the existence of plaintiffs' constitutional rights" in comparison with § 1983 cases prior to *Siegert* and *Saucier*.[228] Other empirical analyses have drawn different conclusions, however, possibly because Leong compared post-*Saucier* data with

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216. *Id.* at 201.
217. *See id.*
218. 555 U.S. 223 (2009).
219. *Pearson*, 555 U.S. at 236–37 (noting that the *Saucier* standard can be a waste of judicial resources in certain cases; for instance, when a constitutional right is violated, but it is clear that the right was not clearly established).
220. *See* Leong, *supra* note 211; Sobolski & Steinberg, *supra* note 211.
221. *See* Jeffries, *supra* note 199.
222. *See supra* text accompanying notes 211–16.
223. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833 (1998).
224. *Id.*
225. *Id.* at 854–55.
226. Leong, *supra* note 211, at 680–81 (citing *County of Sacramento*, 523 U.S. at 858–59 (Breyer, J. concurring)).
227. *Id.* at 692–93.
228. *Id.* at 693.

that of cases before the initial *Siegert* standard was imposed.[229] While Leong's analysis may not be the most accurate empirical analysis of the sequencing standards, Leong's analysis is important for the purposes of this Note because it shows that the sequencing standards may have created a tradition of denying constitutional rights that were recognized prior to *Siegert*.[230]

After determining that sequencing forces courts to address constitutional issues, the next question, for the sake of analyzing the viability of § 1983 as a remedy, is whether addressing the constitutional issue in each case should be *mandatory*.[231] Professor John C. Jeffries, Jr. argues that *Saucier* may be the better sequencing test because forcing courts to rule on whether a constitutional right exists in each case creates a basis for "clearly established" law.[232] Professor Jeffries argues, however, that the *Saucier* test may allow constitutional rights to be compromised when "claims are resolved solely on the grounds of qualified immunity."[233] In other words, the benefit of establishing clear rules for § 1983 actions loses its efficacy when the rules are crafted under the assumption that qualified immunity is the overwhelmingly preferred outcome.[234] The *Pearson* test[235] might exacerbate this problem with the *Saucier* test;[236] if judges make decisions based on a preference for qualified immunity, then not mandating the constitutional issue to be addressed limits the available "clearly established" law on which § 1983 plaintiffs may rely while the result in the instant case remains the same.[237] On the other hand, if Leong's empirical analysis is illustrative of all § 1983 actions, then forcing judges to address constitutional issues further decreases the chances of plaintiffs' success because the constitutional issues will likely be decided in favor of awarding government actors qualified immunity, which further eliminates legally enforceable home privacy rights. The sequencing standards, then, have essentially proved to be a double-edged sword to § 1983 plaintiffs.

Many of the same difficulties with vindicating Fourth Amendment violations are present in § 1983 actions, as in excluding unlawfully seized evidence in criminal cases. First, Fourth Amendment violations will rarely be "clearly established"; therefore, searches that are "reasonably unreasonable" might still justify qualified immunity in a § 1983 action.[238] Based on this premise, both sides of the argument

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229. Sobolski & Steinberg, *supra* note 211, at 551–52.

230. "Recognized prior" refers to Leong's comparison of constitutional rights after *Saucier* with those before *Siegert*.

231. This was the holding in *Saucier*, but the mandatory portion of *Saucier* was overruled by *Pearson*. *See supra* text accompanying notes 215–18.

232. *See* Jeffries, *supra* note 199.

233. *Id.* at 120.

234. *See id.* at 120–21. Leong's empirical analysis shows this to be the case in regard to rights under *Saucier* in comparison with rights before *Siegert*. *See supra* text accompanying notes 227–28. Also, qualified immunity is almost certain except in cases where government actors portray a "malicious motive" or act with recklessness. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223 (2009).

235. *See supra* text accompanying note 219.

236. *See supra* text accompanying note 216.

237. Professor Jeffries also makes this argument, but aims the argument at discussing § 1983 actions independently. *See* Jeffries, *supra* note 199.

238. *See* Saucier v. Katz, 533 U.S. 194, 203 (2001).

concerning constitutional issues in the qualified immunity sequence hurt plaintiffs in many § 1983 claims because courts already allow a significant amount of police discretion in criminal cases.[239] By building additional immunities into civil liability in § 1983 actions, courts create an exceedingly difficult bar for plaintiffs to clear. Creating such a high bar for plaintiffs undermines the purpose of providing civil damages for constitutional wrongs, which is to remedy harms in order to check the government actors' power.[240] In general, it is neither good policy nor consistent with the purposes of the Fourth Amendment to besiege police officers and departments with lawsuits; however, there must be more balance when the police have significant discretion[241] over citizens' civil liberties such as home privacy.

IV. PROPOSED STATUTE AND ANALYSIS

If the Fourth Amendment is based, at least partially, on the American conception of the castle doctrine, then one main concern of the Fourth Amendment should be to prevent government actors from unlawfully invading the privacy of the home.[242] This Note has argued that using the castle doctrine as a defense to forcibly preventing police officers from entering a home is an irrational solution;[243] however, public policy, according to the courts, also favors not remedying Fourth Amendment violations when criminals are prosecuted with unlawfully seized evidence[244] or when government actors may be subjected to civil liability.[245] Therefore, the Indiana Supreme Court's holding in *Barnes* highlights a difficult problem that leaves victims of home privacy breaches without much legal recourse. The newly-amended Indiana statute does not remedy the problem brought to light in *Barnes* because it shifts an excessive amount of discretion to civilians and could possibly create more dangerous situations for police officers. Because current remedies for unlawful home entry by police are inefficacious, the Indiana legislature should pass a statute with language similar to the following:

> (a) A plaintiff has a prima facie cause of action in a civil case against a law enforcement officer individually, and/or the acting law enforcement department, when a court has first determined, on facts viewed most favorably for the plaintiff, that an unlawful search or seizure has been conducted in a place of residence by that officer or

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239. *See supra* Part III.

240. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 392 (1971) ("An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. . . . And where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to *adjust* their remedies so as to grant the necessary relief." (emphasis added) (citation omitted) (internal quotation omitted)).

241. *See supra* Part II. Exclusionary rule jurisprudence has placed a great deal of discretion into the hands of police officers.

242. *See supra* Part I.

243. *See supra* Part I.

244. *See supra* Part II.

245. *See supra* Part III.

policies of that department, in violation of Indiana Constitution article 1, section 11.

(b) Determinations under section (a) will not be affected by the good faith exception, pursuant to Indiana Code 35-37-4-5(c).

(c) No immunities to law enforcement officers will be available to prevent such actions under section (a); however, acts perceived to be in good faith by the court or finder of fact are not eligible for punitive damages under any circumstances, and damages in such cases are limited to physical harms to the plaintiff and the plaintiff's chattels.

(d) The law enforcement department can be held liable for its own unlawful policies and for the actions of its officers, even to the extent of punitive damages for particularly egregious acts.

(e) This statute does not apply in situations where evidence seized during the unlawful act at issue is used in criminal proceedings against the party or a party in privity with the party who would bring suit under this section.

This proposed statute aims to mitigate the difficulties of remedying Fourth Amendment violations under both the exclusionary rule and § 1983 actions.[246]

Although this proposed statute offers only a civil remedy, it also prevents those who have been found with incriminating evidence from taking advantage of a more obtainable civil remedy by disqualifying suits that were first criminal actions. Further, the proposed statute assumes that exposing police officers to potential liability for home privacy violations[247] will cause police officers to act more carefully and obtain warrants or consult prosecutors more often. This effect may, in turn, decrease the amount of improper home searches without dramatically changing exclusionary rule precedents or forcing courts to veer away from current policy considerations. In other words, police officers maintain some of the legal discretion allotted under Fourth Amendment criminal law, but may choose to use that discretion more carefully when a greater likelihood of civil liability, however minimal, is present. Theoretically, this result would strike a better balance between homeowners' rights and the needs of law enforcement.

In addition to encouraging officers to be more careful during the initial search, this proposed statute creates a viable means for innocent parties to recover civil damages instead of attempting to overcome qualified immunity in § 1983 claims[248]

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246. For another proposal of a "hybrid" solution to the Fourth Amendment remedy problem, see Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1 (2001). Professor Dripps argues that the exclusionary rule, in criminal cases, should be used more often by courts, but that the state should have the option of paying damages (potentially to a charity for victims of the crime involved) instead of excluding the evidence. This way, the states are liable for Fourth Amendment violations, but guilty parties do not claim the benefit.

247. *See supra* Part II. Places outside of the home are generally entitled to less protection because the reasonable subjective expectation of privacy is less than that in a home. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). *See, e.g.*, California v. Acevedo, 500 U.S. 565 (1991) (probable cause justifies the warrantless search of an automobile).

248. *See supra* Part III.

or forcibly expelling the officers under the Indiana castle doctrine statute. By making it more feasible for plaintiffs to be able to state a cause of action and proceed to discovery, the proposed statute will allow courts to address the merits and more accurately determine, in each case, whether a constitutional violation has occurred. Although this proposal has potential problems with decreasing judicial efficiency and levying some extra economic costs on taxpayers, these problems might give society and the legal system an incentive to hold officers more accountable for breaching home privacy. Because the Fourth Amendment most stringently protects against unlawful searches of private homes, many cases under this proposed statute, which focuses on unlawful *home* entry, will be worthy of litigation.[249] Additionally, the easy cases will often lend themselves to summary judgment, just as many not-so-easy cases do under current § 1983 claims. The benefit of the potential "sorting" or "sequencing"[250] standards that may arise under the proposed statute is that it could dispose of meritless cases without sweeping potentially legitimate cases under the rug like current qualified immunity standards.

Some may argue that eliminating qualified immunity may lead to more restrictive court holdings due to the engrained policy preference of protecting law enforcement.[251] Professor Jeffries argues that, without qualified immunity, "the prospect of imposing damages liability for past violations of new pronouncements would inhibit courts from some rulings they might otherwise embrace."[252] Professor Jeffries thinks that courts would not award damages even when the particular rule of law is beneficial. Although this argument is at least applicable to § 1983 actions, applying such an argument to a state statute aimed at preserving home privacy rights may not raise such a concern. First, the good faith provision in section (c) of the proposed statute would significantly limit damages in cases where officers rely on old precedent after a new precedent is adopted. Further, this Note argues that home privacy rights *themselves* are understood and embraced; it is the remedies for these rights that have diminished. There is no reason, for example, that private citizens should not be compensated for obvious physical damages when home privacy rights have been violated by a police officer, whether the act was or was not in good faith. Finally, the severity of Professor Jeffries's problem is mitigated in the context of a state statute. Indiana can more likely maintain the appropriate scope of actions under the proposed statute, using state law, than courts attempting to deal with a federal statute, like § 1983, or a large body of federal case law.

Other critics of the proposed statute may argue that it will clog dockets and cause just as many problems as current § 1983 doctrine because plaintiffs will merely file in federal court and tack on another claim under the proposed state statute because it would be within the same transaction or occurrence.[253] Maybe so,

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249. *See supra* Part I.B.

250. *See supra* text accompanying notes 211–16.

251. *See* Jeffries, *supra* note 199, at 122 ("Of course, *if there were no qualified immunity*, there would be good reason to fear that constitutional tort cases would produce more cramped and restrictive determinations than would otherwise be reached . . . .") (emphasis in original).

252. *Id.*

253. *See generally* 28 U.S.C. § 1343 (2006); Hagans v. Lavine, 415 U.S. 528 (1974).

but federal courts would nonetheless have to apply state law in regard to the state statute, and further, this Note argues that home privacy cases are worth the resources because of the importance of the right at stake—especially in light of the alternative proposed by the Indiana legislature. Granted, there are concerns about judicial resources and additional taxation that would almost certainly result from the proposed statute, but these concerns do not touch upon the question of whether these inconveniences and additional costs would be worth a more comprehensive and careful protection of home privacy—this Note argues that they would be.

Although this Note's proposed statute may not have given Mr. Barnes a criminal defense, such a statute may help to avoid similar homeowner aggression by providing an accessible civil remedy for home privacy invasion. Perhaps Mr. Barnes would not have assaulted the police officers had he known he would be able to file a civil suit to determine whether the officers unlawfully invaded the home—one that would be free of the inadequacies found in § 1983 actions.[254] More importantly, perhaps the officers who arrived at the Barnes's apartment would have allowed caution to prevail and not entered if they knew such an entry may have given rise to civil liability. The lesson to be learned from the *Barnes* cases is not that homeowners need more guns and more leeway to assault police officers who unlawfully enter the home;[255] the lesson is that alternative remedies need to be strengthened so that average citizens are not called upon to make legal determinations or snap judgments when their perceived home privacy rights are threatened.

CONCLUSION

After *Barnes*, the Indiana legislature rightly considered passing new legislation because it became clearer that victims of home privacy violations had few, if any, viable remedies. The foundation of law in this country is based on the proposition that for every right, there must be a remedy in case of a violation.[256] The right of home privacy and protection against unlawful home entries by law enforcement is a foundational and highly cherished right in the Constitution. Along with freedom of speech and religion, home privacy is a touchstone of American civil liberty. The recently-amended Indiana statute does not protect this right; in fact, it hinders legal home privacy protection by defining extremely narrow, factual circumstances that citizens, particularly those who feel their "castle" has been breached, cannot comprehend. The *Barnes* decision was not wrong, or against public policy, but the other remedies on which Indiana courts and citizens must rely are inadequate in protecting home privacy and providing viable remedies that citizens can pursue; even worse is the prospect of citizens misinterpreting the new Indiana statute and committing violent acts against police officers. Although public policy considerations have made Fourth Amendment remedies less effective, alternatives

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254. *See supra* Part III.

255. *Contra* Inst. for Legislative Action, *Issues by Topic: Self-Defense/Castle Doctrine*, NRAILA.ORG, http://nraila.org/news-issues/issues/self-defense-castle-doctrine.aspx.

256. *See* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

such as this Note's proposed statute are plausible. Indiana should implement such an alternative in order to mitigate the difficulties with the exclusionary rule and § 1983 actions, which would, in turn, provide Indiana citizens with an accessible and identifiable remedy when their home privacy rights are violated.