

Winter 2013

“Oh, it is you, is it?": Closing the Door on Reasonable Resistance to Unlawful Police Entry in Indiana

Jesse Drum

Indiana University Maurer School of Law, jdrum@indiana.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Fourth Amendment Commons](#)

Recommended Citation

Drum, Jesse (2013) "“Oh, it is you, is it?": Closing the Door on Reasonable Resistance to Unlawful Police Entry in Indiana," *Indiana Law Journal*: Vol. 88 : Iss. 1 , Article 8.

Available at: <https://www.repository.law.indiana.edu/ilj/vol88/iss1/8>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

“Oh, it is you, is it?”: Closing the Door on Reasonable Resistance to Unlawful Police Entry in Indiana

JESSE DRUM*

INTRODUCTION

For over a century, Indiana residents could lawfully resist police officers who tried to enter their homes illegally.¹ On May 12, 2011, in *Barnes v. State*,² the Indiana Supreme Court parted from the common law and stripped Hoosiers of their right to reasonably resist unlawful police entries.³ The court granted a petition for rehearing on September 20, 2011, and “restated” its holding: Hoosiers can reasonably resist, but battery on a police officer is not reasonable resistance.⁴ Then, on March 20, 2012, Governor Mitch Daniels signed into law a bill “reaffirming the long standing right of a citizen to protect his or her home against unlawful intrusion.”⁵ Homeowners may use “reasonable force” to prevent unlawful police entry, but the statute does not define “reasonable force.”⁶

This Note argues that the Indiana Supreme Court blocked any effective means to resist unlawful police home entry when it prohibited Hoosiers from resisting with force that would constitute battery. The Indiana General Assembly was correct to codify the common-law castle doctrine. But the revised statute does not remedy the court’s limitation of reasonable resistance because it does not define “reasonable force.” Without any guidance from the legislature, the level of resistance that is reasonable to prevent unlawful police entry will be left to the judiciary.

The Indiana Supreme Court should abandon the *Barnes* rationale and adopt an approach more consistent with state precedent and the principles of privacy implicit in the Fourth Amendment of the U.S. Constitution⁷ and article I, section 11 of the

* J.D. Candidate, 2013, Indiana University Maurer School of Law. B.A., 2009, Northern Kentucky University. Thanks to Professor Scott for his comments and suggestions and to the members of *Indiana Law Journal* for their drudgery.

1. See *State ex rel. McPheron v. Beckner*, 31 N.E. 950, 952 (Ind. 1892) (“In our opinion the officer, in forcing an entrance into the dwelling house, was guilty of a trespass which rendered his subsequent acts unlawful, and justified the relatrix in resisting his further progress in serving the writ by force.”); *Casselman v. State*, 472 N.E.2d 1310, 1313–14 (Ind. Ct. App. 1985) (citing *McPheron*, 31 N.E. 950, at 951–52).

2. 946 N.E.2d 572 (Ind.), *aff’d on reh’g*, 953 N.E.2d 473 (Ind. 2011).

3. *Id.* at 574.

4. *Barnes v. State (Barnes II)*, 953 N.E.2d 473, 474–75 (Ind. 2011).

5. 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. IND. CODE § 35-41-3-2(i) (2012).

7. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV; see, e.g., *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 312–13 (1972) (“There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens. We look to the Bill of Rights to safeguard this privacy. Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech

Indiana Constitution.⁸ This Note proposes an interpretation of reasonable force for resisting unlawful police entry. It proposes a bright-line rule for where and how resistance is reasonable. The goals of the legislature in revising the statute will most likely be met if the court draws the line for reasonable resistance at the doorway.

Part I of this Note describes the Indiana Supreme Court's first *Barnes* opinion on transfer from the Indiana Court of Appeals, the reactions to that ruling, the court's rehearing of *Barnes*, and the Indiana General Assembly's response. Part II argues that the Indiana Supreme Court's definition of reasonable resistance in *Barnes* unduly infringes on the right to be secure from unreasonable searches and seizures. The legislature's response did not provide a viable solution. Part III outlines the history of the right to resist unlawful police action in Indiana. It traces the common-law right to resist unlawful entry, the right to resist unlawful arrest, and the distinction between resisting public arrest and private entry. These common-law developments provide a framework for a clearer, more effective rule for reasonable resistance. Part IV proposes that the court should draw the line for reasonable resistance at the doorway, rather than ban all "rude, insolent, or angry" touching of police officers acting outside the scope of their duty.⁹

I. *BARNES I*, *BARNES II*, AND THE GENERAL ASSEMBLY'S RESPONSE

Indiana case law developed to distinguish resisting unlawful arrests in public and unlawful entries into the home. In a case before the Indiana Court of Appeals in 2010,¹⁰ it was not clear whether the defendant resisted a public arrest or a home entry. The case was an opportunity to reconcile the two trajectories in the case law. The courts made three attempts: one by the Indiana Court of Appeals and two by the Indiana Supreme Court. The Indiana General Assembly responded by amending the defense of property statute. Now the courts will be charged with interpreting the revised statute.

from unreasonable surveillance.") (footnote omitted) (citations omitted).

8. The language of article 1, section 11 of the Indiana Constitution is nearly identical to that of the Fourth Amendment. See IND. CONST. art. 1, § 11.

9. See IND. CODE § 35-42-2-1(a) (2012). The statute reads as follows:

(a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:

(1) a Class A misdemeanor if . . .

(B) it is committed against a law enforcement officer or against a person summoned and directed by the officer while the officer is engaged in the execution of the officer's official duty . . .

(2) a Class D felony if it results in bodily injury to:

(A) a law enforcement officer or a person summoned and directed by a law enforcement officer while the officer is engaged in the execution of the officer's official duty.

10. *Barnes v. State*, 925 N.E.2d 420 (Ind. App. 2010), *vacated*, 946 N.E.2d 572 (Ind.), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011).

A. Barnes I

The facts before the Indiana Court of Appeals in *Barnes v. State*¹¹ were unremarkable. Officers responding to a “domestic violence in progress call”¹² saw Richard Barnes leaving his apartment with a bag.¹³ Barnes became agitated when an officer questioned him, and he told the officer that he was leaving, so the officer was not needed.¹⁴ One officer warned Barnes, who was by this time yelling, that he would be arrested for disorderly conduct if he did not calm down.¹⁵ Barnes answered, “if you lock me up for disorderly conduct, you’re going to be sitting right next to me in a jail cell.”¹⁶

Barnes’s wife came to the parking lot with more of his things.¹⁷ The officers tried to follow Barnes and his wife back into the apartment.¹⁸ At the doorway, Barnes told the officers that they could not enter.¹⁹ Although she did not invite the officers in, Barnes’s wife told Barnes, “[d]on’t do this,” and “[w]hy don’t you let them in.”²⁰ The police tried to enter:

When Officer Reed attempted to walk past Barnes to enter the apartment, Barnes shoved the officer into the hallway. Officer Reed and Barnes continued to struggle and eventually the other officer on the scene grabbed Barnes in a vascular neck restraint and took Barnes to the ground. Barnes continued to struggle and a taser was used to subdue Barnes. Barnes suffered an adverse reaction to the taser and was transported to the hospital.²¹

The State of Indiana charged Barnes with battery on a law enforcement officer and resisting law enforcement.²² The trial court refused Barnes’s request for a jury instruction on the right to reasonably resist unlawful entry into the home,²³ and the

11. 925 N.E.2d 420 (Ind. App. 2010), *vacated*, 946 N.E.2d 572 (Ind.), *aff’d on reh’g*, 953 N.E.2d 473 (Ind. 2011).

12. *Barnes v. State (Barnes I)*, 946 N.E.2d 572, 574 (Ind.), *aff’d on reh’g*, 953 N.E.2d 473 (Ind. 2011) (internal quotation marks omitted). Barnes’s wife told the dispatcher that Barnes did not hit her, but he did throw her phone against the wall. *Id.*

13. *Barnes*, 925 N.E.2d at 423.

14. *Id.*

15. *Id.*

16. *Id.* at 427 (internal quotation marks omitted).

17. *Id.* at 423.

18. *Id.*

19. *Id.*

20. *Id.* (internal quotation marks omitted).

21. *Id.*

22. *Id.* Barnes was also charged with disorderly conduct and interference with the reporting of a crime, *id.*, but those charges are not relevant to this Note.

23. *Id.* at 424. Barnes requested the following jury instruction: “When an arrest is attempted by means of a forceful and unlawful entry into a citizen’s home, such entry represents the use of excessive force, and the arrest cannot be considered peaceable. Therefore, a citizen has the right to reasonably resist the unlawful entry.” *Id.*

jury found Barnes guilty of battery on a police officer and resisting law enforcement.²⁴

The Indiana Court of Appeals reversed and remanded Barnes's conviction.²⁵ The court, citing *Robinson v. State*,²⁶ agreed that Barnes's proposed jury instruction should have been given because it was a correct statement of the law.²⁷ Because there were neither exigent circumstances nor consent, the officer's attempt to enter Barnes's apartment was unlawful.²⁸ Although *Robinson* held that "[t]he right to reasonably resist an unlawful entry does not include the right to commit a battery upon a police officer,"²⁹ the *Barnes* court noted that "there can be a fine line between reasonable resistance and battery, *but that is for the jury to resolve*."³⁰ Therefore, because the jury could have concluded that Barnes's resistance was reasonable, the court found that the failure to give the jury instruction was not harmless error.³¹

On transfer, the Indiana Supreme Court reversed.³² The court held that "the right to reasonably resist an unlawful police entry into a home is no longer recognized under Indiana law."³³ Although Indiana courts have acknowledged that a different analysis applies to resisting arrest outside the home than to resisting police entry into the home,³⁴ the court found that "a right to resist an unlawful police entry into a home is against public policy and is incompatible with modern Fourth Amendment jurisprudence"³⁵ for the same reasons given in earlier cases abrogating the right to resist public arrests.³⁶ The court found the right to resist unlawful entry contravenes public policy for three reasons: first, citizens have means of redress unavailable at common law; second, resistance escalates the risk of injury to the parties involved; and third, warrants are not necessary for every police entry.³⁷

Two justices dissented. Justice Dickson found the majority's holding unnecessarily broad:

It would have been preferable, in my view, for the Court today to have taken a more narrow approach, construing the right to resist unlawful police entry, which extends only to *reasonable* resistance, by deeming *unreasonable* a person's resistance to police entry in the course of investigating reports of domestic violence. Such a formulation would

24. *Id.* at 423.

25. *Id.*

26. 814 N.E.2d 704, 707 (Ind. Ct. App. 2004). *See generally infra* Part III.D–E.

27. *Barnes*, 925 N.E.2d at 424.

28. *Id.* at 425.

29. *Robinson*, 814 N.E.2d at 708.

30. *Barnes*, 925 N.E.2d at 426 (quoting *Robinson*, 814 N.E.2d at 709) (internal quotation marks omitted) (emphasis in original).

31. *Id.*

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

33. *Id.*

34. *See, e.g., id.* at 576 (discussing *Casselman v. State*, 472 N.E.2d 1310, 1315–18 (Ind. Ct. App. 1985)). *See generally infra* Part III.

35. *Barnes I*, 946 N.E.2d at 576.

36. *See, e.g., Fields v. State*, 382 N.E.2d 972, 975–76 (Ind. Ct. App. 1978).

37. *Barnes I*, 946 N.E.2d at 576.

have been more appropriate for the facts presented and more consistent with principles of judicial restraint. Such a more cautious revision of the common law would have, in cases not involving domestic violence, left in place the historic right of people to reasonably resist unlawful police entry into their dwellings.³⁸

Justice Rucker also found the majority's opinion too broad but acknowledged the different policy rationales for resisting arrest in public and resisting entry into the home.³⁹ Justice Rucker wrote that "the common law rule supporting a citizen's right to resist unlawful entry into her home rests on a very different ground, namely, the Fourth Amendment to the United States Constitution."⁴⁰ For Justice Rucker, the

issue in this case [was] not whether Barnes had the right to resist unlawful police entry into his home—a proposition that the State [did] not even contest—but rather whether the entry was illegal in the first place, and if so, whether and to what extent Barnes could resist entry without committing a battery upon the officer.⁴¹

For support, Justice Rucker cited the U.S. Supreme Court cases *Payton v. New York* and *Miller v. United States*.⁴²

B. The Aftermath of Barnes I

The public responded to the Indiana Supreme Court's decision with outrage.⁴³ Citizens made threatening phone calls and sent e-mails to the judiciary and law enforcement.⁴⁴ Citizens staged a Fourth Amendment rally at the Statehouse⁴⁵ and created a Facebook page to discuss it.⁴⁶ The case, which was mostly regarded as an attack on Fourth Amendment rights,⁴⁷ also provided material for discussion outside

38. *Id.* at 579 (Dickson, J., dissenting) (emphasis in original).

39. *Id.* at 579–80 (Rucker, J., dissenting).

40. *Id.* at 580.

41. *Id.*

42. *Id.* (quoting *Payton v. New York*, 445 U.S. 573, 585 (1980) ("Indeed, 'the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'"); *Miller v. United States*, 357 U.S. 301, 307 (1958)).

43. See, e.g., Dan Carden, *Outrage Leading to Action Against Ind. Supreme Court Ruling*, TIMES OF NORTHWEST IND., (May 18, 2011, 6:15 PM), http://www.nwitimes.com/news/state-and-regional/indiana/article_988ef0c9-bcd1-5683-8a62-fd7062aa1a78.html.

44. See Marcia Oddi, *Indiana State Bar Association Releases Statement on Barnes Decision*, IND. L. BLOG (May 20, 2011, 10:26 AM), http://indianalawblog.com/archives/2011/05/ind_decisions_i_105.html.

45. See Nikki Kelly, *Justices Asked to Review Ruling: Attorney General Opposes Decision on Police Searches*, J. GAZETTE, May 21, 2011, at 1C; *Indiana Citizens Take Back 4th Amendment*, RTR.ORG (May 26, 2011), <http://rtr.org/pages/indiana-rally-live>.

46. *Stand Up for Your Fourth Amendment Rights*, FACEBOOK (May 25, 2011), <http://www.facebook.com/events/190100751036509/>.

47. See, e.g., Thomas R. Eddlem, *Indiana Supreme Court Says Citizens Can't Resist Rogue Police*, NEW AM. (May 16, 2011, 1:00 AM),

of Indiana.⁴⁸ The Indianapolis Bar Association issued a press release defending the decision while also presciently reminding the public that this might not be the final word on the case.⁴⁹

In addition to (or perhaps in response to) the public outcry following *Barnes I*, both parties and amici curiae filed petitions for rehearing. In his brief, Barnes argued that the Indiana Supreme Court ruling abrogated the Fourth Amendment, essentially giving police officers free reign to enter any residence without a warrant.⁵⁰ The State argued in its brief that the court's holding was unnecessarily broad.⁵¹ According to the State, it was not necessary to completely abolish the common-law right to reasonably resist, and the court should narrow its opinion to hold that reasonable resistance does not include battery against a police officer.⁵² As amici, members of the Indiana General Assembly filed a brief requesting a narrowed holding consistent with "Indiana's robust self-defense statute."⁵³ The congressmen noted the difference between the right to resist unlawful arrest in the street and the right to resist unlawful police entry in the home and argued that

<http://www.thenewamerican.com/usnews/constitution/item/7959-indiana-supreme-court-says-citizens-cant-resist-rogue-police>; Mark Kiesling, *Indiana High Court Moves Another Step Toward Fascism*, TIMES OF NORTHWEST IND., (May 15, 2011, 12:00 AM), http://www.nwitimes.com/news/opinion/columnists/mark-kiesling/article_3e36c0f8-59fa-5ceb-9e8e-80ee1a12ef66.html.

48. See, e.g., Nat Hentoff, *Police Now Have Unprecedented Power to Invade Our Home*, CATO INST. (May 28, 2011), <http://www.cato.org/publications/commentary/police-now-have-unprecedented-power-invade-our-home>; Orin Kerr, *No Right to Assault Police Officer Entering Home Even If Entrance Is Unlawful, Indiana Supreme Court Holds*, THE VOLOKH CONSPIRACY (May 13, 2011, 12:44 PM), <http://volokh.com/2011/05/13/no-right-to-assault-police-officer-entering-home-even-if-entrance-is-unlawful-indiana-supreme-court-holds/>.

49. Press Release, Indianapolis Bar Association, Indianapolis Bar Association Responds to Criticism of Marion County Circuit Court Judge (May 24, 2011), available at <http://www.indybar.org/news/pressroom.php/2011/11>.

50. Petition for Rehearing at 1–4, *Barnes v. State (Barnes II)*, 953 N.E.2d 473 (Ind. 2011) (No. 82S05-1007-CR-343). Barnes also argued that the court's holding was an ex post facto punishment in violation of the Due Process Clause of the Fifth Amendment and the disorderly conduct conviction was a First Amendment violation, *id.* at 4–8, but this Note is not concerned with those arguments.

51. See State's Brief in Response to Petition for Rehearing at 2, *Barnes II*, 953 N.E.2d 473 (Ind. 2011) (No. 82S05-1007-CR-343).

52. *Id.*

53. Brief of Amici Curiae Senators M. Young, Long, Alting, Banks, Becker, Boots, Bray, Buck, Charbonneau, Delph, Eckerty, Gard, Glick, Grooms, Head, Hershman, Holdman, Hume, Kruse, Landske, Lawson, Leising, Merritt, Miller, Mrvan, Nugent, Paul, Randolph, Schneider, Smith, Steele, Taylor, Tomes, Walker, Waltz, Waterman, Wyss, Yoder, R. Young, Zakas, and Representatives Behning, Brown, Burton, Cheatham, Cherry, Culver, Davis, Dembowksi, Dermondy, Dodge, Eberhart, Ellspermann, Foley, Friend, Heaton, Hinkle, Kersey, Klinker, Koch, Leonard, Mahan, Morris, Moses, Neese, Rhoads, Saunders, Speedy, Torr, Turner, Tyler, and Wolkinsin Support of Appellant's Petition for Rehearing at 2–3, *Barnes II*, 953 N.E.2d 473 (Ind. 2011) (No. 82S05-1007-CR-343) (citing IND. CODE § 35-41-3-2 (2006) (“(b) A person: (1) is justified in using reasonable force, including deadly force, against another person; and (2) does not have a duty to retreat; if the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle.”) (emphasis omitted)).

public policy favored the right to reasonably resist entry into the home.⁵⁴ Finally, criminal law and procedure scholars filed a brief as amici.⁵⁵ The professors focused on the common-law right and argued that public policy should encourage citizens to resist unlawful police entry because the harm to society from civil rights violations is worse than the potential harm to the officers.⁵⁶

C. Barnes II

On rehearing, in *Barnes v. State (Barnes II)*,⁵⁷ the Indiana Supreme Court agreed with the State.⁵⁸ In *Barnes I*, the court addressed “the question of whether Indiana should recognize the common-law right to reasonably resist unlawful entry by police officers.”⁵⁹ To that common-law question, the court unequivocally answered no.⁶⁰ In *Barnes II*, the court rephrased the “central question” it addressed in *Barnes I* to “whether the defendant was entitled to have the jury told that the common law right to defend one’s home against invasion was a defense against Indiana’s statute that criminalizes violence against police officers acting in the course of their duties.”⁶¹ The court answered this narrow statutory question by holding that “the Castle Doctrine is not a defense to the crime of battery or other violent acts on a police officer.”⁶²

The Indiana Supreme Court did not address its *Barnes I* reasoning for abolishing the right to resist unlawful entry. The court’s reasoning for restating its “essential holding” was limited to the State’s interpretation of what the “central thesis” should have been and “bring[ing] Indiana common law in stride with jurisdictions that value promoting safety in situations where police and homeowners interact.”⁶³

54. *Id.* at 4–5.

55. Brief of John Wesley Hall, K. Babe Howell, Eric Rasmusen, Steven Russell, and Ronald S. Sullivan as *Amici Curiae* in Support of Appellant’s Petition for Rehearing, *Barnes II*, 953 N.E.2d 473 (Ind. 2011) (No. 82S05-1007-CR-343).

56. *Id.* at 8–9.

57. 953 N.E.2d 473 (Ind. 2011).

58. *Id.* at 474. The court agreed with the State so much, in fact, that it misinterpreted its own prior holding. *Compare id.* (“We deem the Attorney General to have restated the central thesis of our resolution of this case.”), *and id.* (“Neither the trial court, nor the Court of Appeals, nor this Court have agreed with Barnes that the officers violated any statute or any provision of the state or federal constitutions when they sought entry, *at the wife’s request*, to investigate and ensure the wife’s safety.”) (emphasis added), *with Barnes I*, 946 N.E.2d 572, 574 (Ind.), *aff’d on reh’g*, 953 N.E.2d 473 (Ind. 2011) (“Mary did not explicitly invite the officers in, but she told Barnes several times, ‘don’t do this’ and ‘just let them in.’”). Even if Mary had invited the officers in, the United States Supreme Court in *Georgia v. Randolph*, 547 U.S. 103, 106, 122–23 (2006), held that, absent an exigent circumstance, police may not enter a dwelling when one spouse consents and the other refuses. Here, it would have been easy for the Indiana Supreme Court to find that there was an exigent circumstance because police were responding to possible domestic violence.

59. *Barnes I*, 946 N.E.2d at 575.

60. *Id.* at 577 (“[W]e hold that [in] Indiana the right to reasonably resist an unlawful police entry into a home is no longer recognized under Indiana law.”).

61. *Barnes II*, 953 N.E.2d at 474.

62. *Id.*

63. *Id.* at 474–75.

Justice Dickson, who dissented in *Barnes I* because the court's opinion was unnecessarily broad,⁶⁴ concurred only in the result. Justice Rucker dissented again. While he agreed rehearing was warranted, Justice Rucker believed there was tension between the battery on a police officer statute⁶⁵ and the resistance with reasonable force statute.⁶⁶ Justice Rucker "would grant rehearing to explore whether, as a matter of Indiana statutory law, defendant Barnes was entitled to a jury instruction regarding police entry into his home."⁶⁷

D. The General Assembly Responds

In response to *Barnes I*, the Indiana General Assembly created the "Barnes v. State Subcommittee."⁶⁸ The subcommittee recommended a revised version of the defense of person or property statute to the general assembly.⁶⁹ Governor Mitch Daniels signed the bill into law on March 20, 2012.⁷⁰

The previous statute did not specifically provide a defense for force used to prevent unlawful action by police officers.⁷¹ The revised version does. It provides, in relevant part:

- (i) A person is justified in using reasonable force against a public servant⁷² if the person reasonably believes force is necessary to:
 - (1) protect the person or a third person from what the person reasonably believes to be the 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; or
 - (3) prevent or terminate the public servant's unlawful trespass on or criminal interference with property lawfully in the person's possession, lawfully in possession of a member of the person's

64. See *Barnes I*, 946 N.E.2d at 579 (Dickson, J., dissenting).

65. *Barnes II*, 953 N.E.2d at 475 (Rucker, J., dissenting) (citing IND. CODE § 35-42-2-1(a)(1)(B) (2010)).

66. *Id.* (Rucker, J., dissenting) (citing IND. CODE § 35-41-3-2(b) (2010)).

67. *Id.* (Rucker, J., dissenting).

68. See Final Report of the Legislative Council *Barnes v. State Subcommittee*, 2011 Sess. (Ind. 2011), <http://www.in.gov/legislative/interim/committee/lcbs.html>.

69. *Id.*

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

71. See IND. CODE § 35-41-3-2 (2010). In his *Barnes II* dissent, Justice Rucker noted the tension between the battery on a police officer statute, section 35-42-2-1(a)(1)(B), and the previous version of section 35-41-3-2(b). *Barnes II*, 953 N.E.2d at 475 (Rucker, J., dissenting).

72. "Public servant" is defined in Indiana Code section 35-31.5-2-261 (2012), in relevant part, as "a person who: (1) is authorized to perform an official function on behalf of, and is paid by, a governmental entity"

immediate family, or belonging to a person whose property the person has authority to protect.⁷³

The statute also allows for the use of deadly force against an officer if a two-part test is met:

- (k) A person is not justified in using deadly force against a public servant whom the person knows or reasonably should know is a public servant unless:
- (1) the person reasonably believes that the public servant is:
 - (A) acting unlawfully; or
 - (B) not engaged in the execution of the public servant's official duties; and
 - (2) the force is reasonably necessary to prevent serious bodily injury to the person or a third person.⁷⁴

In the revised statute, the general assembly “declare[d] that it is the policy of this state to recognize the unique character of a citizen’s home” and sought “to ensure that a citizen feels secure in his or her own home against unlawful intrusion by another individual or a public servant.”⁷⁵ In a press release after he signed the bill into law, Governor Daniels declared that the law protects police officers because it “narrow[s] the situations in which someone would be justified in using force against them.”⁷⁶ Daniels continued, “Moreover, unless a person is convinced an officer is acting unlawfully, he cannot use any force of *any* kind. In the real world, there will almost never be a situation in which these extremely narrow conditions are met.”⁷⁷

II. IMPLICATIONS OF *BARNES*

The central question the Indiana Supreme Court addressed in *Barnes I* was the efficacy of the common-law right to resist unlawful entry by police officers.⁷⁸ It followed from the court’s holding that if “the right to reasonably resist an unlawful police entry into a home is no longer recognized under Indiana law,”⁷⁹ then “*Barnes* is not entitled to batter [Officer] Reed, irrespective as to the legality of Reed’s entry.”⁸⁰ In *Barnes II*, the court ignored its common-law discussion and focused instead on the defenses against battery on an officer:⁸¹

73. IND. CODE § 35-41-3-2(i) (2012).

74. § 35-41-3-2(k).

75. § 35-41-3-2(a).

76. Daniels Press Release, *supra* note 70.

77. *Id.* (emphasis in original).

78. *Barnes v. State (Barnes I)*, 946 N.E.2d 572, 575 (Ind.), *aff’d on reh’g*, 953 N.E.2d 473 (Ind. 2011) (“Now this Court is faced for the first time with the question of whether Indiana should recognize the common-law right to reasonably resist unlawful entry by police officers.”).

79. *Id.* at 577.

80. *Id.* at 578.

81. *See Barnes v. State (Barnes II)*, 953 N.E.2d 473, 474 (Ind. 2011) (“The central question we addressed earlier was whether the defendant was entitled to have the jury told

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 right of the people to be secure in their persons, houses, and papers against unreasonable searches and seizures.

This also reflects the basis for our holding about defenses available to criminal defendants charged with violence against police officers: the ruling is statutory and not constitutional. The General Assembly can and does create statutory defenses to the offenses it criminalizes, and the crime of battery against a police officer stands on no different ground. What the statutory defenses should be, if any, is in its hands.⁸²

The court punted the question to the legislature, leaving everyone guessing as to the status of the common-law right to resist unlawful entries by police officers. The legislature fielded the court's punt but then fumbled back to the court without addressing an important question.

A. Unanswered Questions

Rather than sweep a century of common law under the rug, the Indiana Supreme Court should have directly addressed whether a citizen can resist in the scenario that Barnes resisted. That is, when the police meet a suspect outside of his dwelling, can the suspect go into his residence and use force to keep the police out?⁸³ And if the homeowner can use force to keep the police out, how much force can he use?

The Indiana Court of Appeals found that Barnes's proposed jury instruction about a citizen's right to reasonably resist was a correct statement of the law.⁸⁴ *Barnes I* changed the existing law as the court of appeals found it and held that no resistance is reasonable in any scenario.⁸⁵ Then, on rehearing, *Barnes II* held that the castle doctrine is not a defense to the crime of battery on a police officer: Hoosiers might still be able to reasonably resist, but battery against a police officer is not reasonable resistance.

The Indiana General Assembly did not alter the *Barnes II* holding when it revised the defense of property statute. The revised statute provides that a person may use reasonable force against a police officer to prevent what the person reasonably believes is an unlawful entry.⁸⁶ The statute allows for the use of deadly force in limited circumstances,⁸⁷ but someone in Barnes's situation would never be justified in using deadly force against the police because deadly force was not necessary to prevent serious bodily injury to anyone.

that the common-law right to defend one's home against invasion was a defense against Indiana's statute that criminalizes violence against police officers acting in the course of their duties.").

82. *Id.* at 474–75 (citing U.S. CONST. amend. IV; IND. CONST. art. I, § 11).

83. *See Barnes I*, 946 N.E.2d at 574.

84. *Barnes v. State*, 925 N.E.2d 420, 424 (Ind. Ct. App. 2010).

85. *Barnes I*, 946 N.E.2d at 577.

86. IND. CODE § 35-41-3-2(i) (2012).

87. § 35-41-3-2(k).

The Indiana courts will soon be tasked with interpreting what the legislature meant by “reasonable force” because the legislature did not provide a definition. Without a clear definition of reasonable force, homeowners will decide not only whether the police are acting unlawfully, but also how much force *they* think is reasonable. This could lead to unnecessary violence that exceeds the batteries that are common in cases where police and homeowners meet at the door.⁸⁸

B. Reasonable Resistance Without Battery

The Indiana Supreme Court should not have drawn the line of reasonable resistance at battery because citizens cannot reasonably resist unlawful police entry into their homes without committing battery. To prove a battery on a police officer, the State must only demonstrate that the defendant knowingly or intentionally touched the officer rudely, insolently, or angrily.⁸⁹ As the professors noted in their amicus brief for rehearing, battery is one of the easiest crimes to fabricate.⁹⁰ There is no tangible evidence for battery that does not amount to visible physical injury, and when the alleged crime occurs at the doorway of a private residence, there are often no witnesses.⁹¹ When an officer acting without a warrant knocks on a door and his knock is answered, he may simply insert his foot into the doorway and wait for the resident to commit the battery of closing the door on it.⁹² When the resident closes the door on the officer’s foot—commits a misdemeanor in the officer’s presence—the officer can make an arrest.⁹³

The only way to reasonably resist an unlawful police home entry without using force is to not open the door when the police knock. Even notwithstanding recent United States Supreme Court precedent that might turn not answering the door into an exigent circumstance and cause for warrantless entry,⁹⁴ a closed door is false security against unwelcome invasion of privacy. As Judge Posner observed in *Hadley v. Williams*⁹⁵:

Since few people will refuse to open the door to the police, the effect of the rule of [the Second and Ninth Circuit Courts of Appeals that when a person answers a police knock, the police can seize anything they see under the plain view doctrine] is to undermine, for no good reason that we can see, the [Payton] principle that a warrant is required for entry

88. See generally *infra* Part III.

89. § 35-42-2-1.

90. Brief of John Wesley Hall et al., *supra* note 55, at 13.

91. *Id.*

92. Sticking a foot (or a cane) in the doorway to keep the door open is a common practice among police officers in Indiana, see *State ex. rel. McPheron v. Beckner*, 31 N.E. 950, 950 (Ind. 1892) (the officer stuck his cane in the door); *Adkisson v. State*, 728 N.E.2d 175, 177 (Ind. Ct. App. 2000) (officer placed his foot in the doorway); *Casselman v. State*, 472 N.E.2d 1310, 1312 (Ind. Ct. App. 1985) (same), and will likely become more common after *Barnes II*.

93. See, e.g., *Adkisson*, 728 N.E.2d at 177–78.

94. See *Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011) (holding that exigent circumstances rule applies when the police do not create the exigency by violating the Fourth Amendment).

95. 368 F.3d 747 (7th Cir. 2004).

into the home, in the absence of consent or compelling circumstances. Those cases equate knowledge (what the officer obtains from the plain view) with a right to enter, and by doing so permit the rule of *Payton* to be evaded.⁹⁶

The Indiana Supreme Court recognized the likelihood that citizens will open their doors to the police in *Cox v. State*⁹⁷: “Opening the door to ascertain the purpose of an interruption to the private enjoyment of the home is not an invitation to enter, but rather is a common courtesy of civilized society.”⁹⁸ The court also recognized that homeowners who open their doors have certain privileges: “Attendant to this courtesy is the ability to exclude those who are knocking and preserve the integrity of the physical boundaries of the home.”⁹⁹ The *Barnes* rule limits the ability of Hoosiers who open their doors from excluding the police when the police make it impracticable to close the door once it is opened. The rule effectively makes opening the door an invitation for police to enter or overstay their welcome.¹⁰⁰ Once the police enter, the remedies for invasion of privacy are scant.

C. An Ineffective Exclusionary Rule

There is, of course, an exclusionary rule, which the United States Supreme Court applied to the states in *Mapp v. Ohio*,¹⁰¹ to exclude evidence that was obtained in violation of the Fourth Amendment from a defendant’s trial.¹⁰² The Indiana Supreme Court actually adopted an exclusionary rule before *Mapp* made it mandatory in the 1923 case *Callender v. State*.¹⁰³ In *Callender*, the court held that “[i]f the property was secured by search and seizure under the pretext of a search warrant, which was invalid for any reason, then the property so seized could not be

96. *Id.* at 750.

97. 696 N.E.2d 853 (Ind. 1998).

98. *Id.* at 858.

99. *Id.* (citing *United States v. Berkowitz*, 927 F.2d 1376, 1387 (7th Cir. 1991)).

100. Some might argue that little is to be gained from a standoff at the doorway. But, as Professor Bradley argues, officers have quite a bit to gain from prolonging their presence outside an open door:

In fact, the police’s physical presence is designed to put pressure on the suspect, as well as to allow the police to check for any physical evidence they may see. This is the reason why the police do not simply call on the phone. The police could also question people on the street. The notion that “a man’s home is his castle” would seem to encompass the principle that police cannot come there to interrogate the occupant without legal authorization—like an arrest or search warrant.

Craig M. Bradley, “*Knock and Talk*” and the Fourth Amendment, 84 IND. L.J. 1099, 1109 (2009).

101. 367 U.S. 643 (1961).

102. For a description of § 1983 civil remedies for violations of constitutional rights, see generally Tyler Anderson, Note, *Balancing the Scales: Reinstating Home Privacy Without Violence in Indiana*, 88 IND. L.J. 361, 382–88 (2013).

103. 138 N.E. 817 (Ind. 1923). Indiana also adopted a good-faith exception to the exclusionary rule before the United States Supreme Court did in *United States v. Leon*, 468 U.S. 897 (1984). See IND. CODE § 35-37-4-5 (2012) (effective 1983).

used as evidence against the appellant, and its admission over his objection was prejudicial error.”¹⁰⁴

The purpose of the exclusionary rule is to deter police misconduct.¹⁰⁵ But if the police are not deterred by the risk of evidence being excluded at trial, the exclusionary rule cannot adequately protect the dweller’s privacy interest. As the Indiana Supreme Court observed in *Pirtle v. State*¹⁰⁶:

In suppressing evidence which is material and relevant, but which is obtained by the exploitation of constitutionally prohibited police conduct, the courts are attempting to deter the proscribed conduct by making it unprofitable. In regard to the Fourth Amendment, the illegal conduct is the initial invasion of the privacy of a person or his property. No subsequent exclusion of evidence will restore that privacy. However, the courts have determined that, at the least, the Government should not have the advantage of its wrong in a case against the person whose privacy was invaded.¹⁰⁷

The *Barnes* rule actually encourages police misconduct because it gives officers another tool to enter a person’s home without a warrant. It weakens the already frail exclusionary rule by working against it.

D. The Privacy Interest

Implicit in the Fourth Amendment is the right of citizens to enjoy privacy in their homes.¹⁰⁸ In *Johnson v. United States*,¹⁰⁹ Justice Jackson famously stated:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers. Crime, even in the privacy of one’s own quarters, is, of course, of grave concern to society, and the law

104. *Callender*, 138 N.E. at 818.

105. *See, e.g.*, *State v. Adams*, 762 N.E.2d 728, 730 (Ind. 2002).

106. 323 N.E.2d 634 (Ind. 1975).

107. *Id.* at 642 (emphasis added) (citing *Weeks v. United States*, 232 U.S. 383 (1914)).

108. *See, e.g.*, *Bradley, supra* note 100, at 1101–03; *Boyd v. United States*, 116 U.S. 616, 630 (1886) (The principles of the Fourth Amendment “apply to all invasions on the part of the government and its employes of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . .”).

109. 333 U.S. 10 (1948).

allows such crime to be reached on proper showing. 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. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.¹¹⁰

When the Supreme Court held in *Payton v. New York*¹¹¹ that routine felony arrests inside the suspect's home were unconstitutional without a warrant or consent, privacy was the Court's central concern.¹¹² Justice Stevens, writing for the majority, asserted that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."¹¹³ The Court renounced any substantial difference in entering a home to search for property and entering a home to search for a person:

The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.¹¹⁴

The Court also evaluated the common law at the time the Framers adopted the Fourth Amendment to determine that no definitive source existed that allowed warrantless entries without exigent circumstances.¹¹⁵ The Court gathered from the common-law sources "a sensitivity to privacy interests that could not have been lost on the Framers."¹¹⁶ The privacy interests were clear in "[t]he zealous and frequent repetition of the adage that a 'man's house is his castle.'"¹¹⁷

110. *Id.* at 13–14 (footnotes omitted).

111. 445 U.S. 573, 576 (1980).

112. *See id.* at 585–89.

113. *Id.* at 585 (internal quotation marks omitted) (quoting *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 313 (1972)).

114. *Id.* at 589–90 (citations omitted).

115. *See id.* at 591–98.

116. *Id.* at 596.

117. *Id.* at 596–97 (citing *Semayne's Case*, (1603) 77 Eng. Rep. 194, 195 (K.B.) (citation omitted)) ("That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills one *per infortun'*, without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing . . . every one may assemble his friends and neighbours to defend his house against violence: but he cannot

III. THE COMMON-LAW RIGHT TO RESIST UNLAWFUL POLICE ENTRY IN INDIANA

The Indiana Supreme Court adopted the common-law castle doctrine at the close of the nineteenth century.¹¹⁸ From its early common-law roots, the Indiana appellate courts developed two branches of precedent: resisting unlawful public arrests and resisting unlawful home entries by police. The Indiana Supreme Court recognized the right to resist unlawful public arrests in 1972,¹¹⁹ but then the Indiana Court of Appeals abandoned it in 1978.¹²⁰ Then the courts considered the policies for maintaining the right to resist unlawful home entries by police, including the issue of how much resistance is reasonable. The *Barnes* cases presented an opportunity for the court to reconcile resisting unlawful public arrest with resisting unlawful home entry.

A. Recognizing the Right to Resist Unlawful Police Entry

The first case to recognize the common-law right to resist unlawful police entry in Indiana, *State ex rel. McPheron v. Beckner*,¹²¹ resolved a dispute over a sewing machine. In an action in replevin for the sewing machine, the constable visited the residence of the owner of the machine, but the owner was not home.¹²² The owner's mother let the constable in to view the machine, but he left without taking it.¹²³ He returned and rang the doorbell later that afternoon.¹²⁴

The relatrix, upon going to said door, opened it a few inches, when said Beckner, upon said door being so opened, slipped his cane in, and the relatrix thereupon said, "Oh, it is you, is it?" and immediately, and before the said Beckner had entered, or partly entered, said dwelling house, attempted, by leaning and pushing against the said door, to close the same, and to keep said Beckner from entering said dwelling; that said Beckner called to his associates to come, and then and there . . . pushed with great force on said outer door of said dwelling house, and forced the same open, against the will and power of said relatrix, who was thereby thrown back on a banister near said door, and injured. After the officer had gained an entrance into the dwelling he proceeded to execute the command of his writ, the relatrix resisting him at every step. During the struggle the relatrix received further injuries.¹²⁵

The Indiana Supreme Court adopted the castle doctrine: "Except as modified by statute . . . every man's house is to be treated as his castle, and kept sacred from

assemble them to go with him to the market, or elsewhere for his safeguard against violence . . .").

118. *See State ex rel. McPheron v. Beckner*, 31 N.E. 950 (Ind. 1892).

119. *See Heichelbech v. State*, 281 N.E.2d 102 (Ind. 1972).

120. *See Fields v. State*, 382 N.E.2d 972 (Ind. Ct. App. 1978).

121. 31 N.E. 950 (Ind. 1892).

122. *Id.* at 950.

123. *Id.*

124. *Id.*

125. *Id.* at 950–51.

forcible intrusion”¹²⁶ The officer trespassed, and therefore the mother was justified in resisting with force.¹²⁷

For over a century following Indiana’s adoption of the castle doctrine, no one challenged the right to resist unlawful police entry in Indiana’s appellate courts. The right was not tested until 1985, when the Indiana Court of Appeals decided in *Casselman v. State*¹²⁸ that the defendant could resist the unlawful entry by an officer because the officer’s entry was excessive force.¹²⁹ Before that, however, the Indiana appellate courts considered the related question of whether citizens could resist unlawful arrests in public places.

B. The Right to Resist Unlawful Arrest

The Indiana Supreme Court recognized the right to resist unlawful public arrests with hesitation. Only six years after recognizing the right, the Indiana Court of Appeals decided the policy that favored resisting arrests in public was outdated in modern society.

1. Recognizing the Right to Resist Public Arrest

The Indiana Supreme Court discussed the right to resist unlawful public arrests in *Heichelbech v. State*.¹³⁰ Heichelbech used his mother as a shield to resist his arrest after an officer saw him driving while allegedly intoxicated and conducted field sobriety tests that confirmed his suspicion.¹³¹ The court noted that “[t]he defendant was entitled to resist the arrest, *only if the officer had no right to arrest*; and recent cases have held that even then he may, nevertheless, not be entitled to use force.”¹³² Because Heichelbech’s arrest was lawful, the court did not expand on when the defendant would be entitled to use force.¹³³

The Indiana Court of Appeals resolved the question of when a defendant is entitled to use force to resist unlawful arrest in *Williams v. State*.¹³⁴ In that case, after being civilly arrested by a bartender, the defendant resisted the police officers who tried to take him into custody.¹³⁵ The court cited *Heichelbech* as support for

126. *Id.* at 951.

127. *Id.* at 951–52 (quoting *State v. Armfield*, 9 N.C. (2 Hawks) 246, 247 (1822) (“A man’s house is deemed his castle, for safety and repose to himself and family; but the protection and repose would be illusive and imperfect if a man were deprived of the right of shutting his own door when he sees an officer approaching to execute civil process. If the officer cannot enter peacefully before the door is shut, he ought not to attempt it, for this unavoidably endangers a breach of the peace, and is as much a violation of the owner’s right as if he had broken the door at first.”)).

128. 472 N.E.2d 1310 (Ind. Ct. App. 1985).

129. *See id.* at 1316.

130. 281 N.E.2d 102 (Ind. 1972).

131. *Id.* at 103.

132. *Id.* at 104 (emphasis in original) (citations omitted).

133. *See id.* at 105.

134. 311 N.E.2d 619 (Ind. Ct. App. 1974).

135. *Id.* at 619–20.

the defendant's common-law right to resist an unlawful arrest.¹³⁶ However, the court held that the degree of force used by the arrestee must be proportionate to the force used by the arresting officers.¹³⁷ Because the officers only used physical restraint against the defendant, the defendant used excessive force when he discharged the officer's pistol.¹³⁸ The court then provided: "Moreover, recent cases have held that a private citizen may not use force in resisting a peaceful arrest by an individual who he knows, or has reason to know, is a police officer performing his duties regardless of whether the arrest in question is lawful or unlawful."¹³⁹

2. Revoking the Right to Resist Public Arrest

In light of the dicta in *Heichelbech* and *Williams*, it was not surprising that the Indiana Court of Appeals renounced the right to resist unlawful public arrest four years later in *Fields v. State*.¹⁴⁰ In *Fields*, a police officer attempted to arrest the defendant for trying to move the defendant's truck from the street with his own wrecker after the officer called a tow truck to have the defendant's truck removed.¹⁴¹ The arrest was unlawful because the defendant had a statutory right to move his illegally parked truck himself.¹⁴² The defendant latched on to his truck's towing cable, and it took mace and three officers to subdue him.¹⁴³ Although the arrest was unlawful, the court held for the first time that a private citizen may not use force to resist a public arrest, regardless of the legality of the arrest.¹⁴⁴ The court reasoned:

We are of the opinion that the common law rule is outmoded in our modern society. A citizen, today, can seek his remedy for a policeman's unwarranted and illegal intrusion into the citizen's private affairs by bringing a civil action in the courts against the police officer and the governmental unit which the officer represents. The common law right of forceful resistance to an unlawful arrest tends to promote violence and increases the chances of someone getting injured or killed.¹⁴⁵

Although only four years had passed since the Indiana Court of Appeals officially adopted the common-law right to resist unlawful arrest, the court distinguished modern society from the time when the common-law rule was developed: "[It] was developed largely during a period when most arrests were made by private citizens, when bail for felonies was usually unattainable, and when years might pass before the royal judges arrived for jail delivery."¹⁴⁶ The court also

136. *Id.* at 621.

137. *Id.*

138. *Id.*

139. *Id.* (citations omitted).

140. 382 N.E.2d 972 (Ind. Ct. App. 1978).

141. *Id.* at 973.

142. *Id.* at 974-75.

143. *Id.* at 973.

144. *Id.* at 976.

145. *Id.* at 975.

146. *Id.* at 976 (alteration in original) (quoting Sam B. Warner, *The Uniform Arrest Act*,

noted that “conditions in English jails were then such that a prisoner had an excellent chance of dying of disease before trial.”¹⁴⁷

C. Distinguishing the Right to Resist Unlawful Public Arrests from the Right to Resist Unlawful Home Entries

The Indiana courts distinguished resisting unlawful public arrests from resisting unlawful police home entries. Two main reasons emerged from the case law for why different policies supported allowing citizens to resist entry into their homes but not arrests in public. First, the *means used* to make the arrest can make an entry into the home illegal. Second, the Fourth Amendment to the U.S. Constitution makes the home a special place.

1. The Means Used to Make an Arrest

In *Casselman v. State*,¹⁴⁸ the Indiana Court of Appeals distinguished an arrest in the defendant’s home from the public arrests at issue in *Williams* and *Fields*. The defendant in *Casselman* filed for bankruptcy, but he did not inform the court hearing a lawsuit against him about an automatic stay.¹⁴⁹ When the defendant twice failed to appear at civil hearings, the court ordered the sheriff to take the defendant into custody for contempt.¹⁵⁰ When a police officer arrived at the defendant’s residence to serve the writ of contempt, the defendant told the officer about the bankruptcy, but the officer began to read the writ over the defendant’s protestations:

When Wofford continued to read, Casselman tried to close the door. Wofford reached for the door to try to stop him from closing it. Casselman pushed Wofford away but Wofford grabbed the door again, reached in, stuck [his] left front leg in to try to keep the door open. After a shoving and grabbing match, Casselman retreated into his house. Wofford followed, drew his service revolver, pointed it at Casselman and instructed him to “freeze.” Wofford then took Casselman into custody.¹⁵¹

Casselman was convicted of resisting law enforcement.¹⁵²

The Indiana Court of Appeals correctly distinguished the “modern rule” applied to the public arrests in *Williams* and *Fields* from the common-law rule for resisting unlawful home entries like that in *McPheron*. In the earlier cases, “[t]he unlawfulness of the arrests arose from the absence of sufficient grounds for the arrests, not from the means used to effect the arrest.”¹⁵³ Because the modern rule was not “intended as a blanket prohibition so as to criminalize any conduct

28 VA. L. REV. 315, 315 (1942)) (internal quotation marks omitted).

147. *Id.*

148. 472 N.E.2d 1310 (Ind. Ct. App. 1985).

149. *Id.* at 1311.

150. *Id.*

151. *Id.* at 1312 (alteration in original) (internal quotation marks omitted).

152. *Id.*

153. *Id.* at 1315.

evinced resistance where the *means used* to effect an arrest are unlawful . . . [A] citizen might rightfully resist the use of excessive force by one attempting to make an arrest.”¹⁵⁴ The court considered the officer’s unlawful entry into the defendant’s home to be excessive force.¹⁵⁵ Although *Williams* and *Fields* revoked the right to resist peaceful arrests in public places, after *Casselman*, the common-law right to resist unlawful police entry into the home for civil arrests still applied in Indiana.¹⁵⁶

2. The Sanctity of the Home

Thirteen years later, the Indiana Supreme Court considered the constitutionality of “threshold arrests” in *Cox v. State*.¹⁵⁷ In *Cox*, the police had probable cause to believe that the defendant committed murder, but they did not obtain an arrest warrant.¹⁵⁸ When the police knocked on the defendant’s door, the defendant opened it but left the screen door closed: “When the officers asked him to come with them he attempted to shut the front door but an officer opened the screen door, blocked the front door, reached inside the house, and pulled Cox out by the arm.”¹⁵⁹ The defendant then made incriminating statements at the police station.¹⁶⁰ The court held that even if the entry was unlawful, the statements could not be excluded because the statements were made outside of the defendant’s home.¹⁶¹

Without actually resolving the “threshold arrest” question,¹⁶² the court in *Cox* discussed *United States v. Santana* and *Payton v. New York*.¹⁶³ In *Santana*, the police had information that the suspect sold heroin to an undercover agent.¹⁶⁴ When officers arrived at the suspect’s house, she was standing in her doorway holding a paper bag.¹⁶⁵ The suspect fled into her house followed by the officers.¹⁶⁶ The Court held that the suspect could not defeat a proper arrest that began in a public place by retreating into her home.¹⁶⁷

Payton decided two New York cases. In the first, the police had probable cause to believe that Payton had committed murder.¹⁶⁸ The officers went to Payton’s

154. *Id.* at 1316 (emphasis in original).

155. *Id.*

156. *Id.* at 1317.

157. 696 N.E.2d 853 (Ind. 1998). A threshold arrest is “one made or attempted without a warrant when the suspect is either at or slightly within or behind the threshold of the home but not in front of the threshold or outside of the home.” *Id.* at 857 (citing 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 6.1(e) (3d ed. 1996)).

158. *Id.* at 855.

159. *Id.*

160. *Id.*

161. *Id.* at 859.

162. *See id.* (“Accordingly, because Cox made his statement outside of his home following the alleged *Payton* violation, the exclusionary rule would not bar its admission even if *Payton* had been breached.”).

163. *Id.* at 856–59 (discussing *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Santana*, 427 U.S. 38 (1976)).

164. *See Santana*, 427 U.S. at 39–40.

165. *Id.* at 40.

166. *Id.*

167. *Id.* at 42–43.

168. *See Payton*, 445 U.S. at 576.

apartment without a warrant.¹⁶⁹ When no one answered the door, the officers broke it open and entered the apartment.¹⁷⁰ Once inside, the officers saw a shell casing in plain view that was later used as evidence in Payton's murder trial.¹⁷¹ In the second case, the police had probable cause to believe that the defendant, Riddick, had committed two armed robberies, but they also did not get a warrant.¹⁷² When Riddick's son answered the door, the police could see Riddick sitting inside.¹⁷³ They entered his house and arrested him.¹⁷⁴ The Court held that the police may not enter a suspect's home to make a routine felony arrest without a warrant or consent.¹⁷⁵

The Indiana Supreme Court in *Cox* did not accept that *Santana* established that the threshold of the home is always a Fourth Amendment public place.¹⁷⁶ The court declared, "[t]here is no question that police are required by the federal constitution to obtain a warrant to arrest a suspect who hunkers down inside his home and refuses to leave or answer the door."¹⁷⁷ According to the court, when applied to knock and arrest cases, *Payton* "means only that a suspect may hunker down from the threshold of the home as well as the interior."¹⁷⁸ The court refrained from ruling on the "interesting issue" of whether a warrant is required for a suspect who refuses police entry after they knock on the door.¹⁷⁹

The Indiana Court of Appeals applied the *Casselman* and *Cox* reasoning to distinguish the rule for public arrests from the rule for criminal arrests inside the home in *Adkisson v. State*.¹⁸⁰ The police in *Adkisson* knocked on the defendant's door after they received complaints from the neighbors about an alleged disturbance that left two neighbors injured.¹⁸¹ The defendant refused the officers' request to enter her apartment, so the officers questioned her from outside the open door.¹⁸² When the defendant tried to cut off the inquiries by closing her door, an officer stuck his foot in the doorway, preventing her from closing it.¹⁸³ The officer then informed the defendant that she was being arrested for battery,¹⁸⁴ and he

169. *Id.*

170. *Id.*

171. *Id.* at 576–77.

172. *See id.* at 578.

173. *Id.*

174. *Id.*

175. *Id.* at 576.

176. *See Cox v. State*, 696 N.E.2d 853, 858 (Ind. 1998).

177. *Id.* (citing *Payton*, 445 U.S. at 573).

178. *Id.*

179. *See id.*

180. 728 N.E.2d 175, 178–79 (Ind. Ct. App. 2000); *see also S.E. v. State*, 744 N.E.2d 536 (Ind. Ct. App. 2001) (holding that a juvenile had the right to resist officers' attempts to enter his home when he had committed no crime and the officers had consent to enter the home from an individual who lacked common authority over the house).

181. *Adkisson*, 728 N.E.2d at 176.

182. *Id.* at 176.

183. *Id.* at 177.

184. *Id.* It is unclear from the opinion if the officer was arresting the defendant for the alleged battery against her neighbors or for the battery of closing the door on the officer's foot. The issue on appeal was the defendant's conviction for resisting law enforcement. *See id.* at 176–77.

followed the defendant into her apartment.¹⁸⁵ A struggle ensued, and the officer maced the defendant three times to subdue her.¹⁸⁶

The court admitted that the officer may have had probable cause to believe the defendant committed battery against her neighbors and could have accordingly arrested her without an arrest warrant.¹⁸⁷ But the court found the arrest unlawful because it was not initiated in a public place and there were no exigent circumstances.¹⁸⁸ The court stated the rule that “absent consent, the Fourth Amendment requires that even when probable cause for a warrantless arrest exists, an officer may only enter a defendant’s home to make the arrest when exigent circumstances exist that make it impracticable to obtain a warrant first.”¹⁸⁹ The court distinguished *Santana* on the grounds that the police caused the defendant in *Adkisson* to appear in the doorway and the officer did not inform the defendant that she was under arrest until the officer was inside the apartment.¹⁹⁰

In *Johnson v. State*,¹⁹¹ the Indiana Court of Appeals upheld a conviction for resisting arrest because the defendant came to his doorway on his own, and the officers initiated the arrest in the doorway. The first time a police officer knocked on the defendant’s trailer door to issue a dog restraint citation, the defendant answered, colorfully¹⁹² refused the citation, and then slammed the door.¹⁹³ The officer returned to his cruiser and called for backup.¹⁹⁴ While waiting for backup to arrive, the defendant’s wife signaled for the officer to come to the porch.¹⁹⁵ When the officer was back on the porch, the defendant opened the door and began haranguing him while he was explaining the citation to the defendant’s wife.¹⁹⁶ The officer tried to arrest the defendant in his doorway for disorderly conduct, but the defendant retreated inside the trailer.¹⁹⁷ The officer followed and a scuffle ensued.¹⁹⁸

185. *Id.* at 177.

186. *Id.*

187. *Id.*

188. *Id.* at 177–78. The Indiana Court of Appeals discussed exigent circumstances in *Alspach v. State*: “Termed exigent circumstances, such have been found (1) where a suspect is fleeing or likely to take flight in order to avoid arrest; (2) where incriminating evidence is in jeopardy of being destroyed or removed unless an immediate arrest is made; (3) where a violent crime has occurred and entry by police can be justified as means to prevent further injury or to aid those who have been injured; and (4) in cases that involve hot pursuit or movable vehicles.” 755 N.E.2d 209, 212 (Ind. Ct. App. 2001) (citing *Snellgrove v. State*, 569 N.E.2d 337, 340 (Ind. 1991)). The *Alspach* court upheld the defendant’s conviction for resisting law enforcement because the trail of blood leading to the defendant’s door and the yells from inside the apartment created an exigent circumstance. *Id.* at 212–13.

189. *Adkisson*, 728 N.E.2d at 177 (citing *Payton v. New York*, 445 U.S. 573, 576 (1980)).

190. *Id.* at 177–78.

191. 747 N.E.2d 623 (Ind. Ct. App. 2001).

192. *See id.* at 626 (“In response, [defendant] Johnson called Officer Johns a ‘mother f-----,’ told him to get the ‘f---’ off of his land, and slammed the door in his face.”).

193. *See id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

The court in *Johnson* distinguished *Adkisson* in order to uphold the conviction for resisting arrest on four grounds: first, in *Adkisson*, the defendant remained in her home, and in *Johnson*, the defendant was in his doorway; second, the officer in *Johnson* did not bring the defendant to the doorway by knocking the second time he was on the porch; third, the defendant in *Johnson* engaged himself in a public confrontation with the officer by interrupting his attempts to explain the citation to the defendant's wife; and fourth, the officer in *Johnson* was invited to the porch by the defendant's wife.¹⁹⁹ Because the officer initiated the arrest in the doorway, he was in hot pursuit when he followed the defendant inside.²⁰⁰ Therefore, the general rule announced in *Williams*—a citizen cannot use force to resist a peaceful public arrest, regardless of whether it is a lawful one—was controlling.²⁰¹

D. Defining Reasonable Resistance

In *Robinson v. State*,²⁰² the Indiana Court of Appeals considered for the first time how much resistance is reasonable to prevent an unlawful home entry. When the police arrived to check on a possible domestic disturbance on a tip from a telemarketer, the defendant met them outside on his porch.²⁰³ After the defendant informed the officers that their services were not needed, an officer tried to walk around the defendant to enter his house.²⁰⁴ The defendant pushed him off the porch, initiating a fight and eventually a conviction for battery on a law enforcement officer.²⁰⁵

The State could not prove that a violent crime occurred or that an exigent circumstance existed; therefore, the officer was not acting within the scope of his duty when he tried to enter the defendant's residence.²⁰⁶ Nonetheless, the court affirmed the defendant's battery conviction.²⁰⁷ The court held "[t]he right to reasonably resist an unlawful entry does not include the right to commit a battery upon a police officer."²⁰⁸ The court reasoned that "the right of reasonable resistance to an unlawful entry by police officers has only been extended to force used to resist efforts to push open a door to gain entry."²⁰⁹

The *Robinson* facts presented an interesting scenario for the court. The defendant was in a public place when he resisted the unlawful entry into his home. The defendant was neither resisting a public arrest, as in *Fields*, nor resisting an

199. *Id.* at 632.

200. *Id.*

201. *See id.*

202. 814 N.E.2d 704, 706 (Ind. Ct. App. 2004). After being told that the defendant's wife was asleep, a telemarketer called back four times and eventually called the police to report a possible domestic disturbance. *Id.*

203. *Id.* at 706–07.

204. *Id.* at 707.

205. *Id.*

206. *Id.* at 708.

207. *Id.* at 710.

208. *Id.* at 708.

209. *Id.* at 709 (citing *S.E. v. State*, 744 N.E.2d 536, 538 (Ind. Ct. App. 2001); *Adkisson v. State*, 728 N.E.2d 175, 178 (Ind. Ct. App. 2000); *Casselmann v. State*, 472 N.E.2d 1310, 1312 (Ind. Ct. App. 1985)).

entry from inside his home, as in *Adkisson*. The court could have found *Robinson* analogous to either line of cases or created a new rule for the hybrid scenario. The court's broad holding, which presumably affected the *Adkisson* line of cases and applied to resistance from inside the home, changed the root of the analysis from *where* the homeowner resists to *how* the homeowner resists.

E. Bringing It All Together

The Indiana Court of Appeals outlined the boundaries of the law of resisting unlawful entry when it upheld a conviction for battery on a law enforcement officer in *Masotto v. State*.²¹⁰ Officers were summoned to the defendant's apartment on three separate occasions in one night for noise complaints.²¹¹ On the third visit, another resident of the apartment invited the officers inside.²¹² The defendant, who was under her bedcovers in her room, would not turn her stereo down or produce identification so the officers could issue a citation.²¹³ The officer-in-charge decided to return the following day to issue the citation.²¹⁴ When the officers were on their way out the door, the defendant, who had by this time emerged from her room completely naked, shoved the last officer in line and closed the door on his heel.²¹⁵ The officers arrested the defendant for battery.²¹⁶

Masotto appealed her conviction, and the court distinguished the facts in her case from precedent:

Even accepting Masotto's argument that the officers acted unlawfully when they entered her apartment, this does not excuse her actions. The officers did not attempt a forceful entry; they were invited in by Vasquez. In addition, Masotto was not resisting the officer's entry or her arrest; her actions can most generously be characterized as assisting their departure. Such a parting shot falls squarely within the boundaries of the conduct the battery on a law enforcement officer statute seeks to prevent.²¹⁷

The court's reasoning suggests that even after *Robinson*, resistance amounting to battery might be justified to prevent an unlawful police entry, as long as the defendant resists the officers at the door.

In the *Barnes* cases the Indiana Supreme Court could have reconciled the two branches of precedent. *Robinson* presented the closest fact pattern to *Barnes*.²¹⁸ Like *Robinson*, *Barnes* was not resisting a public arrest,²¹⁹ therefore the *Fields* rule

210. 907 N.E.2d 1083, 1085–86 (Ind. Ct. App. 2009).

211. *Id.* at 1083–84.

212. *Id.* at 1084.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 1085–86.

218. *See supra* notes 12–21 and accompanying text.

219. *Compare Barnes v. State*, 925 N.E.2d 420, 423 (Ind. Ct. App. 2010), *vacated*, 946 N.E.2d 572 (Ind.), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011), *with Robinson v. State*, 814

did not apply.²²⁰ But Barnes, unlike Robinson, retreated into his home before he resisted.²²¹ Barnes met the police outside, so his case was not clearly analogous to the cases in which the defendant answered the police knock with force.²²² The Indiana Supreme Court did not recognize these differences in either opinion. On its face, the legislature's revised statute does not provide for these subtleties.

IV. A REASONABLE DEFINITION

In accordance with Indiana precedent and the Fourth Amendment privacy roots, the Indiana Supreme Court in *Barnes* should have followed the line drawn by the United States Supreme Court in *Payton*. That is, the court should have "drawn a firm line at the entrance to the house."²²³ The court will eventually have an opportunity to interpret what the Indiana General Assembly meant when it provided in the revised statute that Hoosiers can use "reasonable force" to prevent unlawful home entries. When it does, the court should adopt a rule for reasonable force as follows:

A person has the right to use reasonable force to resist what the person reasonably believes is unlawful police entry if:

(1) the person is already inside his home when the police announce their presence at the door.

(a) Reasonable force is that which is necessary to keep the door closed, but does not amount to deadly force.

(b) Reasonable force includes battery against a police officer if the officer crosses the threshold of the doorway without invitation or exigent circumstance.

(2) A person who answers the police knock at his door is entitled to close the door, and the officer assumes the risk of injury if he inserts an appendage into the doorway.

(3) If, however, a person is outside of the threshold of his doorway when the police arrive and announce their presence, the person may retreat into his home, but he may not match the officer's force if the officer tries to prevent his retreat from outside the threshold of the doorway.

It is for the jury to determine the conditions of the resistance.

This rule combines the two prominent strands of Indiana precedent: resisting arrest in public and resisting entry from inside the home. Therefore, when the police apprehend a subject outside of his home, in public view, the "modern rule" of *Fields* applies: a person cannot use force to resist a public arrest, regardless of

N.E.2d 704, 706–07 (Ind. Ct. App. 2004).

220. See *Fields v. State*, 382 N.E.2d 972, 976 (Ind. Ct. App. 1978) (holding that private citizens may not resist illegal arrest with force).

221. Compare *Barnes*, 925 N.E.2d at 423, with *Robinson*, 814 N.E.2d at 706–07.

222. Compare *Barnes*, 925 N.E.2d at 423, with, e.g., *Casselman v. State*, 472 N.E.2d 1310, 1312 (Ind. Ct. App. 1985).

223. *Payton v. New York*, 445 U.S. 573, 590 (1980).

the legality of the arrest.²²⁴ When the police meet a person inside his home, the *Casselman* rule applies: a person may reasonably resist an unlawful entry.²²⁵

This interpretation is especially useful in determining the outcome of cases that do not clearly fit in either the public arrest or home entry category, cases like *Robinson*,²²⁶ *Masotto*,²²⁷ and *Barnes*.²²⁸ The rule also addresses the scenario most likely covered by the revised statute: all instances of unlawful police entry that do not meet the narrow two-part test for deadly force.²²⁹ A clear definition will prevent unnecessary excessive violence that might result from homeowners deciding how much resistance is reasonable.

If this rule was the law before *Barnes*, Barnes's conviction would depend on a different jury determination on remand. The Indiana Court of Appeals found that the officer's attempted warrantless entry into Barnes's apartment was unlawful because there was no consent or exigent circumstance.²³⁰ The court reversed and remanded so that the jury could determine whether Barnes's resistance was reasonable resistance or battery.²³¹ Under this proposed rule, the case would have been remanded for the jury not to determine whether the nature of the resistance was reasonable, but to determine whether the resistance was initiated inside or outside the threshold of the doorway.

The opinions are not entirely clear about where Barnes was standing when he shoved the officer into the hallway or if the officers tried to restrain Barnes before he entered his apartment.²³² If the jury were to find that Barnes was already inside his apartment before the officer tried to enter, and the officers did not try to restrain Barnes before he entered his apartment, Barnes's resistance would be reasonable force used to resist the unlawful police entry. His conviction would be reversed. If,

224. *Fields*, 382 N.E.2d at 976.

225. *Casselman v. State*, 472 N.E.2d 1310, 1317 (Ind. Ct. App. 1985).

226. 814 N.E.2d at 706–07 (defendant met the officers on the porch and used force to resist their entry).

227. *Masotto v. State*, 907 N.E.2d 1083, 1084 (Ind. Ct. App. 2009) (defendant pushed an officer and closed the door on his heel as he was leaving her residence).

228. *Barnes v. State*, 925 N.E.2d 420, 423 (Ind. Ct. App. 2010), *vacated*, 946 N.E.2d 572 (Ind. 2011), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011) (defendant met the officers outside, went inside his apartment, and used force to resist the officer's entry).

229. *See* IND. CODE § 35-41-3-2(k) (2012); Daniels Press Release, *supra* note 70 (“In the real world, there will almost never be a situation in which these extremely narrow conditions are met.”).

230. *Barnes*, 925 N.E.2d at 425. This Note does not foreclose the idea that the courts could create a new exigent circumstance for possible domestic violence situations, but that article is for someone else to write.

231. *Id.* at 430.

232. *See id.* at 423; *Barnes v. State (Barnes I)*, 946 N.E.2d 572, 574 (Ind. 2011), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011). Barnes suggested in his brief that he stood in his doorway and only resisted to prevent the officers from entering his apartment. Brief for Appellant at 3, 10, *Barnes v. State*, 925 N.E.2d 420 (Ind. Ct. App. 2010), *vacated*, 946 N.E.2d 572 (Ind. 2011), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011) (No. 82A05-0910-CR-592). The State did not refute this contention and even added that, from his doorway, Barnes “dr[ew] an imaginary line with his finger that [the officers] were told they could not cross.” Brief of Appellee at 4, 10, *Barnes v. State*, 925 N.E.2d 420 (Ind. Ct. App. 2010), *vacated*, 946 N.E.2d 572 (Ind. 2011), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011) (No. 82A05-0910-CR-592).

however, the jury were to find that the officers initiated their restraint before Barnes entered his apartment, then the resistance was unreasonable, and Barnes's conviction would stand.

The question of what is "reasonable force" will soon be back on the dockets of the Indiana appellate courts. This Note proposes an interpretation of the revised statute that will discourage police from violating citizens' Fourth Amendment rights by entering their residence without a warrant or exigent circumstances. The interpretation provides a bright-line rule for citizens and police: the doorway. With a bright-line understanding of where and how resistance is considered "reasonable force," the risk of violence against police officers and homeowners is minimized. It gives the legislature's reaffirmation of "the long standing right of a citizen to protect his or her home against unlawful intrusion"²³³ actual meaning.

The exclusionary rule is also designed to deter police misconduct, but by its nature it cannot adequately protect an individual's privacy interest. The doorway should be the final bastion of privacy. This rule should encourage police departments to adopt policies that favor the acquisition of warrants. The *Barnes* rule encourages police department policies that circumvent the warrant requirement.

CONCLUSION

Indiana common law favors maintaining the right of Hoosiers to resist unlawful police entry with force. The legislature was correct to codify this right. The *Barnes* rule, which purports to keep the right to reasonably resist intact but makes battery unreasonable resistance, will undermine the right to resist. The legislature should have defined "reasonable force." Resistance without battery is not reasonable resistance. A better interpretation of the revised statute draws a clear line at the door, where resistance is reasonable from inside, but unreasonable from outside.

233. Act of Mar. 20, 2012, Pub. L. No. 161-2012, 2012 Ind. Acts 3428, 3428 (codified as amended at IND. CODE § 35-41-3-2(a) (2012)).