IN THE
INDIANA SUPREME COURT

Case No. 82S05-1007-CR-343

RICHARD L. BARNES,	)	On Petition to Transfer
Appellant (Defendant below),	)	from the Indiana Court of
	)	Appeals
	)	Case No. 82A05-091 0-CR-592
	)	Appeal
vs.	)	from the Vanderburgh Supe1ior
	)	Court
	)	Cause No. 82002-0808-CM-759
STATE OF INDIANA,.	)	The Honorable Mary Margaret
Appellee (Plaintiff below)	)	Lloyd, Judge

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

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INTEREST OF AMICI CURIAE

Amici are scholars in the area of criminal law and procedure. Amici submit this brief to aid the Court on certain issues in this case which have broad implications for the law of Indiana and other jurisdictions.

John Wesley Hall is a litigator in Little Rock, Arkansas, author of the treatise *Search and Seizure* (4th ed., Dec. 2011) and the blog Fourthamendment.com, and former President of the National Association of Criminal Defense Lawyers.

K. Babe Howell is Associate Professor, CUNY School of Law. She is particularly interested in the impact the policing of minor offenses and gang affiliation has on the criminal justice system's legitimacy in communities of color.

Eric Rasmusen is the Dan R. and Catherine M. Dalton Professor of Business Economics and Public Policy at Indiana University's Kelley School of Business and has held visiting positions at Yale and Harvard Law Schools and Oxford. He has written over 50 articles on topics including criminal law and procedure.

Steve Russell is Associate Professor Emeritus of Criminal Justice, Indiana University. He is a Texas trial court judge currently sitting by assignment after seventeen years of full time judicial service.

Ronald S. Sullivan is Clinical Professor of Law, Harvard Law School, and Director of the Harvard Criminal Justice Institute. His research is on the areas of race and criminal law.

SUMMARY OF ARGUMENT

Indiana should recognize the common-law right to reasonably resist unlawful entry by police officers. This is good public policy, and is required by Ind. Code § 1-1-2-1 and § 1-1-2-1 without any exception based on the law the police are unlawfully enforcing.

ARGUMENT

Barnes was convicted of the Class A misdemeanors of battery on a law enforcement officer and resisting law enforcement. He argues that the trial court's failure to instruct the jury of his right to reasonably resist unlawful entry by police officers is reversible error.

This Court wrote:

> "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. We conclude that public policy disfavors any such right." *Barnes v. State*, 2011 Ind. LEXIS 353, *4 (Ind. 2011).

The issue is important, and we believe that the Court needs fuller briefing on it. Other briefs cover whether Indiana's self-defense statutes or the U.S. Constitution require Barnes's jury instruction. This brief is limited to points related to the common law. We will argue that public policy should

encourage citizens to resist unlawful police action, not acquiesce, because the consequences to society of civil rights violation are worse than the harm to the police from citizen resistance. Punishing people for protecting their rights is unjust and the alternative of civil suits for money damages is insufficient deterrence for state oppression and is actually weakened if the police can use criminal resistance in bargaining. We will also ask the Court to consider whether the right to defend one's home against unlawful government invasion is protected by Indiana's common-law reception statute and argue that to criminalize such defense is the creation of a common-law crime, barred by statute. Finally, we will argue that domestic violence cases differ from other police investigations only in how their facts create exigency and that police who act unlawfully should not be able to plead crime category in lieu of facts.

I. Public Policy Favors the Right to Resist Unlawful Police Action Because Other Remedies Are Insufficient.

One view of the common law is as the body of past precedents and customs; another is as the public policy a high court currently sees as best. In the instant case, the question is whether criminalizing resistance is good public policy. The *Petition to Transfer*'s public policy argument (at 4) is limited to:

"Assuming for a moment that the officer's attempted entry was in fact unlawful, but see below, shoving an officer across the hallway and into a wall cannot constitute 'reasonable resistance' exempting a person from criminal liability. To hold otherwise would be to encourage persons seeking to prevent officers from keeping the peace to physically attack and harm the officers."

The issue, however, is not whether persons may seek to stop officers from keeping the peace but whether they can stop officers from breaking the peace. The criminal liability of someone who unreasonably resists lawful entry is undisputed. Public policy analysis needs to consider both sides of a tradeoff: Should we worry more about (a) resistance to unlawful and (by mistake) to lawful police action or (b) unlawful police action?

For most of our history, it was taken for granted that resisting unlawful arrest and entry by anyone, uniformed or not, was an American civil right. As of 1966, the right to resist unlawful arrest was recognized in 45 of 50 states. Max Hochandael & Harry W. Stege, *Criminal Law: The Right to Resist an Unlawful Arrest: An Out-Dated Concept?* 3 Tulsa L.J. 40, 46 (1966) (which includes Indiana as one of the 45). The Uniform Arrest Act changed this since, as one of its authors wrote:

"The right to resist illegal arrest by a peace officer is a right that can be exercised effectively only by the gun-toting hoodlum or gangster. … Since the right to resist an illegal arrest by a peace officer can be exercised only by the enemies of society, it should not exist under modern conditions." Sam B. Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 330 (1942).

The Model Penal Code also abandoned the right to resist arrest, in the light of:

> "(1) the development of alternate remedies for an aggrieved arrestee, and (2) the use of force by the arrestee was likely to result in greater injury to the person without preventing the arrest." Craig Hemmens & Daniel Levin, *Not a Law at All?: A Call for the Return to the Common Law Right to Resist Unlawful Arrest*, 29 Sw. U. L. Rev. 1, 23 (1999).

The "alternative remedy" is to allow the civil rights violation to occur and then sue for money damages via the federal Section 1983 or some other law. 42 U.S.C. §1983, *Civil Action for Deprivation of Rights.* What would be the damages in a case such as Mr. Barnes's, if we assume his view of the facts to be true? The damage might be a large sum for Mr. Barnes, but would it suffice to attract legal counsel? Recall that Barnes qualified for a public defender for his criminal case. The civil remedy may work for police unlawfulness that causes death or maiming, but for more mundane unlawfulness it is no more helpful than intentional tort suits as a remedy for battery. Courts have said that the exclusionary rule is needed because money damages are ineffective in deterring unlawful police behavior. "The rule is calculated to prevent, not to repair. Its purpose is to deter -- to compel respect for the constitutional guaranty *in the only effectively available way* -- by removing the incentive to disregard it" (italics added). *Elkins v. United States*, 364 U.S. 206 (1960). While the exclusionary rule

may help deter police from unlawful search of criminals, it does nothing[1] to deter unlawful search of the innocent.[2]

Little is known about the effect of civil suits against police. Qualified immunity protects most police actions from ever going to trial in a civil case. How often do individual police officers pay out of their own pockets? How many officers are judgment proof? Do police departments pay civil awards from the police department general budgets, or are they paid by insurance or by other city budgets? Professors Miller and Wright tried to find answers in 2004 and confessed failure. Marc L. Miller and Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 Buff. L. Rev. 757 (2004). In the absence of answers, we should be hesitant to say that any civil remedy suffices.

Criminalizing resistance actually diminishes the effectiveness of civil remedies. Suppose an officer behaves unlawfully, and his victim resists. If the victim threatens to bring suit, the police department can counter-threaten with criminal charges. . The victim, foreseeing that at the end of the day he would

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[1] Nothing, unless the Court accepts the argument in the *Petition for Rehearing,* at 3, that officer testimony in this case should be excluded--- that it is fruit of the poisoned tree since they were able to testify about the resistance only because of their own unlawful action. This would not exclude evidence from other witnesses to the resistance, however, and so would not always free the resistor from the risk of conviction.

[2] See generally Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent* , 81 Mich. L. Rev. 1229 (1982).

end up in jail with money damages only net of legal fees for both a criminal and a civil case, will drop his suit, and no doubt agree to stop complaining to the press and public too as part of the deal. What if the victim does not resist? He may be in no better shape. The only difference is that the officer, having committed the unlawful act and realized his vulnerability to civil suit, needs to compound his unlawfulness with a false arrest to use as a bargaining chip. .Battery is the easiest of crimes to fake when it's at the level of pushing--- no physical evidence to manufacture, and bystanders can't say a shove didn't happen while they were blinking. (But beware the information age: see the Florida tooth video story below at page 17.)

The Model Penal Code's second argument is that victim resistance is futile and should be criminalized for the sake of the victims, who will otherwise be tempted to resist and be hurt without preventing the home invasion--- as indeed happened to Barnes. That it happened to Barnes, however, shows the weakness of this argument. A deterrent only works if people know about it. The functions of punishment are often divided into retribution, deterrence, incapacitation, and rehabilitation. We do not seek retribution, incapacitation, or rehabilitation against someone who resists unlawful arrest. Will he be deterred? Some people are less calculating and some are more calculating. The less calculating are not going to be deterred by criminalizing resistance. Most of us

might fall in this category. As Justice Holmes said, "Detached reflection cannot be demanded in the presence of an uplifted knife." *Brown v. United States*, 256 U.S. 335, 343 (1921). To the extent that one believes resistance to unlawful police action to be impulsive rather than calculating, the only rationale for criminalizing it is retribution, not deterrence.

More calculating people will, if they know of the law, take it into consideration. They, however, are the people who will also anticipate the physical danger and possible futility of resistance and will balance that against the possible benefit. Calculated, rational, resistance to lawbreaking is desirable--- but it is the only kind which would be deterred by criminalizing resistance.

Remember, too, the other class of calculating, well-informed actors: the police, who are trained in such things. Whatever the effect may be on the average citizen, police officers will realize that if resistance to their unlawful actions is criminalized their danger from unlawful behavior is diminished.

Some worry that citizens cannot tell what police behavior is unlawful. To be sure, criminal procedure is an intricate subject. But citizens are not likely to resist police entry because they recall a 5-4 court opinion and spot a defect. A citizen resists the police at his peril. He will not lightly disobey an armed adversary who outnumbers him, has good connections at City Hall, and has shown willingness to act unlawfully. Barnes was overcome, tasered, and

hospitalized. He thought defending his rights important enough to risk that danger. This indicates that he cared enough for his rights that he thought a civil lawsuit would not provide sufficient compensation. And he was not obviously mistaken about the unlawfulness of the entry. The three-judge appellate panel thought the evidence sufficient for a jury to be able to decide whether this particular warrantless, crimeless, forced entry by the police was unlawful. *Barnes v. State*, 925 N.E.2d 420, 426 (Ind. Ct. App., 2010).

What if an honest mistake by the police results in deaths from a citizen's resistance? As with self defense in other situations, allowing self-defense against the police is not a blank check for murder, no more than allowing police to use guns. All too often, SWAT teams acting in good faith but on mistaken information unlawfully invade the homes of innocent citizens and kill or are killed. The citizen should not spend fifty years in prison for the policeman's mistake. It is not unreasonable for someone to put the probability of imposters higher than that of police making a no-knock raid and getting the address wrong, particularly if he thinks highly of the police.

Consider two examples from May 2011 of what can happen when resistance to unlawful police action is criminalized.

In Pennsylvania, three plainclothes anti-gun task force officers beat up an 18-year-old because he was "sneaking around" a house and they thought a

bottle under his jacket was a gun (though no bottle ever appeared in evidence when he was brought up on charges of aggravated assault). The officers said that a resident told them she didn't know the teenager and he shouldn't have been on her property. The resident testified that she never said that and had known the defendant, a friend of her son, for several years. The judge dismissed all charges for lack of evidence. The officers' penalty?-- paid leave (with overtime). Chris Young, *Pay Daze,* Pittsburgh City Paper, http://www.pittsburghcitypaper.ws/gyrobase/Content?oid=oid%3A83636 (August 12, 2010).

In Florida, a young mother was charged with battery on a law enforcement officer. The policeman said, "Wareham, with her right hand, reached across her body and smacked me several times in my right hand and arm," and that he "pushed Wareham back in an effort to both create distance from her and I, and to prevent her from attacking [the other man]. Wareham stumbled forward and fell to the pavement," breaking her teeth. Clickorlando.com, *Woman: Orlando Cop Broke My Teeth in Takedown,* http://www.clickorlando.com/news/27952314/detail.html, (May 21, 2011). Bianca Prieto, *Lawyer: Woman's Teeth Broken during Arrest by Orlando Cop,* Orlando Sentinel, http://articles.orlandosentinel.com/2011-05-21/news/os-orlando-police-brutality-allegatio20110520_1_orlando-police-orlando-officer-arrest

(May 21, 2011). After she spat out her teeth and called 911, she was arrested on felony charges. Charges were dismissed after a reporter obtained city surveillance film (which the police already had for two months) which showed the officer hurling her to the street without provocation (video at Clickorlando.com, http://www.clickorlando.com/video/27960309/index.html (2011)). In his nine years on the force, the officer had charged at least seven people with battery against him. WFTV, *Surveillance Shows Officer Throwing Woman on Ground,* http://www.wftv.com/news/27968788/detail.html (May 20, 2011).

The Model Penal Code's rationale for criminalizing resisting applies equally to unlawful home entry and to arrest. The *Barnes* opinion talks about both unlawful entry (e.g., "we decline to recognize a right to resist unlawful police entry into a home") and unlawful arrest (e.g., "We also find that allowing resistance unnecessarily escalates the level of violence and therefore the risk of injuries to all parties involved without preventing the arrest—as evident by the facts of this instant case"). *Barnes* at *8. Is the Court's ruling meant to apply to both?

Citizen resistance has been a remedy of the first importance on more than one occasion in the nation's history. As Professor Miller notes, it has been the case that "Sometimes the sheriff wore a badge, sometimes he wore a

sheet." Darrell A. H. Miller, *Retail Rebellion and the Second Amendment*, 86 Indiana Law Journal 939, 959 (Summer 2011). During Reconstruction, "Police departments on at least three occasions joined with white rioters to disarm, assault, and kill freedmen, Union sympathizers, and black federal troops" (also at 959, followed by details).

The right to resist illegal state action is fundamental. "In the 1920s, legal scholarship began criticizing the right as valuing individual liberty over the physical security of the officers." *Barnes*, at *6. To those scholars, individual liberty seemed secure. But in Indiana, the 20's was the decade of the Klan. In 1924 it elected a governor and a majority in both houses of the legislature. Indiana University Department of History, *A Closer Look at Indiana's Klan,* http://www.iub.edu/~imaghist/for_teachers/mdrnprd/lstmp/Klan.html (undated). We must not be complacent today, even if our modern blind spots are not racial.

Was justice blind? Barnes said to the officer, "if you lock me up for disorderly conduct, you're going to be sitting right next to me in a jail cell" (Tr. 18). But Barnes was the only one who ended up in jail. Having an appellate court later decide that the evidence couldn't support a charge of disorderly conduct is small consolation.

II. Ind. Code § 1-1-2-1 and § 1-1-2-2 Require that Indiana Courts Follow the English Common Law of 1607 and Not Create Common-Law Crimes, so the Court Should Ask for Briefing on the Antiquity of the Right to Resist Entry and Cannot Create the New Crime of Resisting Unlawful Police Action.

A. Indiana's "Reception Statute"

IC 1-1-2-1, *Hierarchy of Law* (Indiana's "reception statute") says:

> "The law governing this state is declared to be: … Fourth. The common law of England, and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth,) and which are of a general nature, not local to that kingdom, and not inconsistent with the first, second and third specifications of this section."

The Indiana Supreme Court said in *Barnes* (at *6) that "The English common-law right to resist unlawful police action existed for over three hundred years…" The reception statute may[3] require "over three hundred" to mean "at least four hundred and four", but if the English common law did give citizens the right to resist unlawful entry into their homes by the sovereign, IC

[3] "May", because it is unclear whether the reception statute, with its first comma, requires the common law to be officially recorded, and, if so, before 1607 or before 1776. One of the few articles written on reception statutes is Joseph Fred Benson, *Reception of the Common Law in Missouri,* 67 Mo. L. Rev. 595 (2002).

§ 1-1-2-1 incorporates this by statute. The statutes on which Barnes were convicted could be interpreted as having overruled the common-law right of resistance, but the *Brief of Amici Curiae Senators M. Young et al.* explains that the Indiana legislature has been friendly to the right of resistance, so statutory silence should not be seen as repudiation.

B. The Fourth Amendment looks to the common law for "reasonableness".

In *Wilson v. Arkansas,* 514 U.S. 927 (1995), the Supreme Court recognized that the common law right of privacy in the home was a predicate for interpreting the Fourth Amendment:

> "The Fourth Amendment to the Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In evaluating the scope of this right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable," our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment." [at 931, citations omitted]

Accordingly, *Wilson* recognized a common law right to an officer's announcing his purpose before entering.

The common law recognized the right to defend one's home from entry by "King's messengers."[4] As Pitt the Elder put it:

[4] *Leach v. Money [Three King's Messengers],* 19 Howell's St. Tr. 1001, 97 Eng. Rep. 1074 (K.B. 1765); *Wilkes v. Wood,* 19 Howell's St. Tr. 1153, 98 Eng. Rep. 489 (K.B. 1763).

> 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![5]

In 1604, Justice Coke said, "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." *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194, 195 (K.B. 1604). *Semayne's Case* is integral to the Fourth Amendment−the Supreme Court has cited or quoted it *eleven* times since 1957.

In 1634, officer Stone came to arrest Sir Henry Ferrers for debt and was killed by Ferrers's servant. The Crown indicted Ferrers for aiding and abetting the killing, but the court held that the killing was not murder because the warrant for Ferrers's debt arrest was defective. It said, "Sir Henry Ferrers, Knight", not "Sir Henry Ferrers, Baronet". *Sir Henry Ferrers's Case*, 79 Eng. Rep. 924 (K.B. 1634). This suggests that by 1634 the right to resist unlawful police action was well enough established that it extended even to action unlawful only because of minor technicalities.

C. Common-Law Crimes.

Ind. Code § 1-1-2-2, *Criminal Law Statutory*, says, "Crimes shall be defined and punishment therefor fixed by statutes of this state and not

[5] William Pitt to Parliament, March 1763, as noted in *Miller v. United States,* 357 U.S. 301, 307 & n. 7 (1958).

otherwise." Eliminating a criminal defense is essentially the same as creating a common-law crime, which is barred by this statute.[6] Until now, Indiana citizens have resisted unlawful police entry without criminal sanctions. The court should not rule that behavior formerly lawful is now criminal without any change in statute.[7]

This brief's deadline was too tight for complete research on the common law, the Fourth Amendment, and these two statutes. If a rehearing is granted, we respectfully suggest that the Court ask for rebriefing.

III. Unlawful Police Action Associated with Domestic Violence Should Be Treated Like Any Other Unlawful Police Action.

A police action clearly unlawful in dealing with embezzling might be clearly legal in dealing with domestic violence. If a man is suspected of burglary, the police may not enter his home without a warrant, but no warrant is needed in the exigent circumstance of a woman screaming inside. The point

[6] Defenses, unlike offenses, can continue to arise in the common law. "Criminal defenses in Indiana, however, need not be statutory. Although Indiana recognizes a dozen or so statutory defenses, its courts have been willing to consider other defenses." Ray F. Bowman III, *English Common Law and Indiana Jurisprudence*, 30 Ind. L. Rev. 409, 415 (1997). To remove a defense, however, is to criminalize behavior that would otherwise be lawful.

[7] This point may be usefully paired with the *Petition for Rehearing*'s point (at 4) that judicially created ex post facto laws are prohibited by *Marks v. United States*, 430 U.S. 188 (1977).

of law to be decided in this rehearing takes it as given that the police entry in a domestic violence case is unlawful. Whichever way it is decided leaves police discretion in domestic violence cases exactly where it has been. The point to be decided is not what is unlawful, but how people may resist what is unlawful. Suppose the wife says, "My neighbor phoned by mistake," but the policeman says, "Since I've gone to all the trouble, how about a hundred bucks or I'll stay for a while?" We do not want to provide a safe harbor for police malfeasance. The lawfulness of entry should depend on the facts, but once it is clear that entry is unlawful, resistance should not be criminalized just because of the charge.

Barnes shows the problem. Mrs. Barnes tried to telephone her sister and. Barnes grabbed the telephone and threw it against a wall (Tr. 77, 78). She telephoned the police on her cell phone, telling the dispatcher that Barnes had not struck her (Tr. 77). When the police arrived, Barnes was leaving (Tr. 16). Mrs. Barnes came out to the parking lot and told the officers she hadn't been struck (Tr. 81-82). When she and Barnes returned to the apartment, she did not invite the officers in (Tr. 47). Barnes was not charged with battery against Mrs. Barnes.

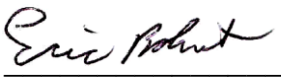
By the time the police arrived, the husband and wife were not even in the same building. Nobody was ever arrested for domestic violence. A

defendant's criminal liability should not depend on how a dispatcher checked the box for a 911 call but on what the defendant did.

CONCLUSION

Police getting pushed is not too high a price to pay for safety from unjustified entry by the forces of state security. Amici respectfully request that this Court hold that there exists in Indiana a right at common law to reasonably defend oneself and one's home against unlawful police action.

Respectfully submitted,



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Dated: June 13, 2011

WORD COUNT CERTIFICATE

As required by Indiana Appellate Rule 44, I verify that this Brief of Amici Curiae contains no more than 4,200 words.

Eric Bohnet

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served via United States First Class Mail, postage prepaid, on the __13th__ day of June 2011, addressed to:

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