

# Have the Courts Taken Away Our Constitutional Protections?

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In *Barnes v. State of Indiana*, the Supreme Court of Indiana ruled that there is no common-law right of man to resist the unlawful entry of police officers into a citizen's dwelling.<sup>1</sup> According to the ruling, Barnes had no right to reasonably resist the unlawful entry of police officers into his residence. Rather, the court suggests that the unlawful entry of police into a residency is best resolved in civil court. Over two centuries ago, the American Revolution began due to the overbearing manipulation and regulation of the colonists by the British government. During the colonial era, James Madison proposed the Bill of Rights to protect against such an unreasonable search and seizure. Today, Madison must be turning over in his grave due to the concession of rights in *Barnes v. State of Indiana*.

Last year, the Supreme Court of the United States of America ruled that an officer may break into a citizen's place of residence if he or she believes that evidence is being destroyed.<sup>2</sup> In other words, law enforcement has the right to enter a dwelling if he or she hears a "suspicious sound." While the theory behind this ruling may seem unsettling, the application can be justified. The intention of the ruling coincides with Madison's Bill of Rights. In the context of the case, the police are given the right to follow a criminal into his or her home. Under the premises of the Bill of Rights these actions are not an unreasonable search and/or seizure because there is probable cause. However, in the trial of *Barnes v. State of Indiana*, the police did not have a right or duty to enter the Barnes residence. When law enforcement is being given more authority over public health, safety, and morals, we must evaluate whether the loss of our rights as citizens fosters a safer community.

When discussing the legality of the interactions of law enforcement and citizens, it is not uncommon to debate the Fourth Amendment to the United States Constitution. The Fourth Amendment reads, "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."<sup>3</sup> Most broadly summarized, the Fourth Amendment protects citizens from the unreasonable and excessive use of police force and power. The purpose of the Fourth Amendment is to provide for the safety and security of the general public. Under legal precedence, a law enforcement officer can legally frisk a person with less than probably cause.<sup>4</sup> However, this is justified in providing safer execution of official police duties. The Fourth Amendment also provides that officers can administer sobriety checkpoints without probable cause.<sup>5</sup> While sobriety checkpoints are undoubtedly an invasion of rights, these checkpoints can be justified as reasonable on the grounds of public safety.

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<sup>1</sup> Richard L. Barnes v. State of Indiana, 953 N.E.2d 473 (2011)

<sup>2</sup> Kentucky, Petitioner v. Hollis Deshaun King, 131 S. Ct. 1849 (2011)

<sup>3</sup> The Constitution of the United States of America

<sup>4</sup> Terry v. Ohio 392 U.S. 1 (1968)

<sup>5</sup> Michigan v. Sitz 496 U.S. 444 (1990)

In a society where drugs, sex, and crime plague the attention of our media, only subliminally do we evaluate the equity of these events. In its broadest definition, equity is acting in a fair, just, or right manner, when dealing with people. While our legal system is empowered with the duty to enforce equity, it appears that the principle of equity is at times forgotten. Referring to the definition of equity; is it fair, just, or right that legal precedence will encourage law enforcement to break and enter into homes of potentially innocent individuals?<sup>6</sup> Furthermore, is it fair, just, or right that citizens do not have the right to reasonably resist this unlawful entry?<sup>7</sup>

Although the foundation of our legal system relies on the principles of equity, the applications of equity widely differ in the legal community. As stated earlier, our legal system is bound by the duty to uphold the principles of equity. In doing so, courts around the nation interpret and at times overturn the laws put into place by our legislature. Therefore, the written principle of equity by which our legal system makes decisions is put in place through court decisions.

On the other end of the spectrum, equity is a separate field within our legal system. Where codified law refers to written codes and statutes, equity goes beyond the principles of natural law. Natural law can be better described as a universal standard of what is morally, ethically, and reasonably correct. In other words, the principle of natural law is so basic to human beings that it need not be written. Equity is commonly said to “mitigate the rigor of common law.”

Circumstances can provide for situations where common law, precedence developed through court decisions, conflicts with equity. In these situations, an individual can be charged with committing an offense for actions that were made in good faith. At trial, the accused can plead their case using equity as their defense. To summarize, equity can be used as an exception to codified law. While the legal principle of equity is intended to resolve discrepancies in positive law, does it always reach an equitable compromise?

On November 18, 2007, Richard Barnes was moving out of the apartment he shared with his wife. While removing his possessions from the apartment, Barnes and his wife began to argue. During the argument, his wife took the phone and tried to call her sister. In frustration, Barnes took the phone from his wife and threw it against the wall. Shortly thereafter, Barnes’ wife called 911 and told the dispatcher that Barnes was throwing things, but had not struck her. The dispatcher sent out a “domestic violence in progress” message to officers on duty.<sup>8</sup>

As officers arrived on the scene, Barnes and his wife were in the parking lot of their apartment complex. Barnes began arguing with the police as they tried to get him to calm down.

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<sup>6</sup> Kentucky, *Petitioner v. Hollis Deshaun King*, 131 S. Ct. 1849 (2011)

<sup>7</sup> *Richard L. Barnes v. State of Indiana*, 953 N.E.2d 473 (2011)

<sup>8</sup> See 1

When Barnes returned to his apartment to gather more of his belongings, the two officers followed. After Barnes' wife entered the apartment, Barnes turned around and blocked the two officers from entering his apartment. It is important to note that neither Barnes nor his wife had invited the officers into their apartment. At this time, officers tried to forcibly enter the dwelling and Barnes resisted by shoving the officer against the wall. In response, the officers tasered Barnes and arrested him. Barnes was charged with battery on a police officer, resisting law enforcement, disorderly conduct, and interference with the reporting of a crime.<sup>9</sup>

If the police had no right to enter Barnes' apartment, the only charge that would be pressed against Barnes is disorderly conduct; a disputable accusation brought prior to the police entry. Looking to the facts, Barnes clearly did not invite the officers into his place of residence. Furthermore, Barnes' wife did not ask the police officers to enter their apartment. We must therefore ask ourselves, did the police have a legal right to enter Barnes' residence. In a 1980 Indiana Court of Appeals decision, it was ruled that a police officer must be engaged in official duties for a person to be accused of battery on a police officer.<sup>10</sup> In other words, was it an "official duty" of the police officers to enter Barnes' apartment?

In a 2002 case in California, officers were found to have used excessive force in removing protesters from a nonviolent protest in a manner that violated the Fourth Amendment. When protestors refused to give in to police orders, law enforcement used pepper spray on the nonviolent protestors. In the legal case that ensued, it was found that police should not use substantial force against an individual unless the said individual is posing an apparent threat to police and public safety.<sup>11</sup> In arresting a peaceful protester, there is no need to inflict any harm upon a peaceful individual. Clearly, the officers' actions did not align with the best interest of the public.

As in the California case, was it in the best interest of the public to forcefully enter a dwelling in which the police were not invited? Clearly, Barnes was visually angered and upset, but did he pose a reasonable threat to his wife. Remember when the police arrived at the scene of a "domestic violence in progress" dispatch, they were able to confront Barnes and his wife outside of their home. At this time, police found both individuals visually upset, but unharmed. Therefore, was it necessary for the police to use excessive force to enter a dwelling for which they did not have a probable cause to enter the home?

Eventually, the Barnes case made it to the Indiana Supreme Court. In his appeal, Barnes argued that the Indiana Court of Appeals erred in refusing to grant his jury instructions. Barnes proposed jury instructions were as follows:

"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

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<sup>9</sup> See 1

<sup>10</sup> Tapp v. State, 406 N.E.2d 296 (1980)

<sup>11</sup> Headwaters Forest Defense v. County of Humboldt, 276 F.3d 1125 (2002)

cannot be considered peaceable. Therefore, a citizen has the right to reasonably resist the unlawful entry.”

The basis for the jury instructions reflected Indiana Code § 35-41-3-2(b) as well as the Fourth Amendment. Indiana Code § 35-41-3-2(b) states:

“A person is justified in using reasonable force, including deadly force, against any other person; and 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.”

Barnes’ actions in attempt to halt the unlawful entry of police into his apartment are grounded in Indiana codified law.

Against codified law and legal precedence, in his summary of the Barnes case Justice David writes, “We believe however that a right to resist an unlawful police entry into a home is against public policy and is incompatible with modern Fourth Amendment jurisprudence. Today, an aggrieved arrestee has means unavailable at common law for redress against unlawful police action.”<sup>12</sup>

In other words, if law enforcement ignores your constitutional and statutory rights, you can press charges in a civil suit. Once more, the only defense you have against an unlawful police entry into your home is the ability to file a civil suit. At what point do police powers become too strong? When did America, a nation founded on the principle of standing up for what you believe and fighting for what is right, become a nation where we must cower in the presence of unlawful government authority? As time passes and precedence is formed, are our protections from unreasonable searches and seizures eroding?

As our legal system continues to progress and evolve, there appears to be a trend towards police power in enforcing public health, safety, and morals. After all, we expect our law enforcement to be citizens as well as officials of our communities. However, dire consequences can result when law enforcement is given the broad and nondescript power to uphold public health, safety, and morals.

Referring to the Barnes case, the actions of the police officers can be argued to promote public health and safety. Responding to a domestic dispute call, the officers’ intentions were to protect Mrs. Barnes. However, in attempting to prevent a potential threat, the police officers became a threat themselves. While at the scene, the police officers had the opportunity to see Mrs. Barnes uninjured and in good health. Although Mr. Barnes was upset, he had not shown any sign of physical aggression towards Mrs. Barnes. Therefore, the officers acted to prevent a

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<sup>12</sup> See 1

“potential” threat by becoming a forceful threat of their own. If the officers had simply stayed outside Barnes’ apartment, and not made an unlawful entry into the Barnes’ home, it is likely that no one would have been injured and that no charges would have been pressed.

In a nation and states where personal defense is supported through the Second Amendment, giving excess police power could be devastating. In Indiana, one in 15 adults has a concealed carry permit allowing them to carry a handgun. There are over 300,000 adults in Indiana that have a concealed carry permit in their possession.<sup>13</sup> If Barnes had been armed with a handgun or another weapon, the actions of the police could have instigated a deadly encounter.

Enraged by the court decision, the citizens and legislators of Indiana have taken action. Amongst other legislation pending, legislators have clarified the ruling of the Barnes case by amending its legislation. The right of a citizen to use force, including deadly force, against any other person illegally entering a person’s dwelling is governed under Indiana Code § 35-41, Indiana’s so called “Castle Doctrine.” The amended bill further defines the rights of citizens in resisting the entry of law enforcement. In other words, if an officer is unannounced or has no official duty in entering a home, a citizen can take forceful action to remove the officer. The amendment also clarifies situations in which a person is not justified in using force against an officer. Situations in which a person is not justified in using force to resist law enforcement include but are not limited to: individuals committing or escaping from the commission of a crime, individuals provoking police action, individuals who reasonably believe that an officer is acting within the scope of his official duty. In a state where the Second Amendment is taken to heart, citizens are once more comfortable with the language of this clarification. The amended bill aims to increase the safety of the public and citizens of Indiana.

As common law and codified law struggle to define the legal entry of law enforcement, the Supreme Court recently decided yet another controversial case. In *Georgia v. Randolph*, the Supreme Court was forced to evaluate when an officer has been given consent to search a dwelling.<sup>14</sup> As noted before, the Fourth Amendment to the Constitution states, “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.” Under the Fourth Amendment, citizens are protected from “unreasonable searches and seizures.” But what happens when one resident agrees to allow police into their dwelling while another resident is not present? What happens when one resident gives voluntary consent to a search while another resident does not give consent to a warrantless search?

In *United States v. Matlock*, the Supreme Court decided that in the absence of an occupant, a co-occupant can give voluntary consent to a warrantless search. Any evidence

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<sup>13</sup> [www2.indystar.com/articles/1/161649-4651-092.html](http://www2.indystar.com/articles/1/161649-4651-092.html)

<sup>14</sup> *Georgia v. Randolph*, 547 U.S. 103 (2006)

gather during the warrantless search can then be used in the prosecution of the absent occupant.<sup>15</sup> Building upon this case, the Supreme Court ruled that “A warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not.”<sup>16</sup> In other words, the police can conduct a warrantless search of your house through the consent of a stranger believed to be a co-occupant. A police officer must not be correct in his assumption that an individual resides within a dwelling, rather he must simply reasonably believe based upon the circumstantial evidence at the time of the voluntary consent to a warrantless search.

In *Georgia v. Randolph*, the Supreme Court was forced to determine voluntary consent to a warrantless search. However, in *Georgia v. Randolph*, one occupant of the dwelling consented to the search while the other disagreed. Having the consent of one occupant, while ignoring the objection of the other, the police entered the dwelling and found controlled substances and drug paraphernalia. Randolph was arrested at the scene for possession of drugs. In the trial, the defense sought to dismiss the evidence gathered by police on the grounds that he had objected to the warrantless search.

The Supreme Court ruled in a 5-3 decision in favor of Randolph, stating, “A physically present co-occupant’s stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.” In doing so, the court came dangerously close to undercutting the decisions of *United States v. Matlock* and *Illinois v. Rodriguez*. In *United States v. Matlock*, defendant Matlock was in a squad car nearby, unable to object to the warrantless search. In *Illinois v. Rodriguez*, Rodriguez was asleep in his apartment when the police entered. In both of these scenarios, the police had the opportunity to seek permission from these individuals and did not. In the majority opinion of *Georgia v. Randolph* this is justified in writing, “we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant’s permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.”

Looking back to the Barnes case, neither Barnes nor his wife had directly invited the police officers into their home. Regardless of whether the phone call by Mrs. Barnes constitutes an invitation, Barnes, “A physically present co-occupant,”<sup>17</sup> refused the entry of police officers. Therefore, under past precedence, the police had no right to enter the dwelling unless they were acting under their official duties.

Taking the *Georgia v. Randolph* case back to the theme of the paper, was this an equitable decision? As Justice Souter described in the majority opinion, the court has drawn “a fine line.” However, the line appears to be more inequitable than “fine.” In both *United States*

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<sup>15</sup> *United States v. Matlock*, 415 U.S. 164 (1974)

<sup>16</sup> *Illinois v. Rodriguez*, 497 U.S. 177 (1990)

<sup>17</sup> See 14

v. Matlock and Illinois v. Rodriguez, the defendant was available for the police to have inquired for a warrantless search. In both of these cases, the police chose not to seek the permission of the occupant. How can this be justified? In the legal community, the concept of what is “reasonable” is often used as the basis in making decisions. For example, in the amended Indiana code it states, “A person is justified in using reasonable force.” Under tort law, juries are tasked with evaluating whether or not an individual’s actions were reasonable. Under these premises, it seems reasonable for the police to make every reasonable attempt to seek the permission of an occupant to enter his or her dwelling.

As the number of cases establishing legal precedence continues to rise, the power of law enforcement is slowly increasing. Due to the increasing power of law enforcement, the protections guaranteed under the Fourth Amendment are slowly but surely decaying. Keep in mind, the protections the people of the United States are losing are some of the same protections that incited the American Revolution. While some argue that the changing times require changing laws, one thing is clear. The empowerment of law enforcement under public health, safety, and morals has diminished the Constitutional protections. As it stands today, citizens are more vulnerable to the power of law enforcement and more exposed to potential criminals than ever before. The compilation of legal precedence has begun to tip the scale of equity in favor of a powerless people. The United States was founded on Constitutional protections and the right to fight for what you believe. As these founding principles erode, the identity of the nation and its people will change. Only time will tell if a vulnerable people is a safe people.