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THE RIGHT TO RESIST AN UNLAWFUL ARREST: JUDICIAL AND LEGISLATIVE OVERREACTION?

*For most people, an illegal arrest is an outrageous affront and intrusion—the more offensive because under the color of law—to be resisted as energetically as a violent assault. . . .*¹

THIS COMMENT will focus on the subject of the right to resist an unlawful arrest. The choice of this topic is the result of a change in the common law rule in a few key states which may herald the demise of this rule in all of the states. It is also of particular note that the State of Ohio has seen fit to alter its position on the common law rule recently.² In its essence, this writing will address itself to the clash between the American legal tradition of providing an effective legal remedy for every actionable harm or injury suffered by an individual, and the fact that under the altered laws some innocent individuals will suffer wrongs occasioned by an unlawful arrest, not only without a remedy in their arsenal, but also without a defense to the criminal sanctions that may be imposed on them. This comment will cover only those situations where the arrest is conceded to be unlawful. The legality of the actual arrest is too broad a subject to be adequately covered here and has been extensively treated in other writings.³

I. THE RIGHT AT COMMON LAW AND FEDERAL LAW

The general rule regarding the right to resist an unlawful arrest is recognized by most states.⁴ The majority of states allow the use of reasonable force to resist an unlawful arrest.⁵ The leading case at common law cited for the proposition that there is a right to resist an unlawful arrest is *The Queen v. Tooley*.⁶ In that case a known person of the law illegally arrested one Anne Dekins, and three strangers came to her rescue killing

¹ *People v. Cherry*, 307 N.Y. 308, 311, 121 N.E.2d 238, 239-40 (1954).

² *City of Columbus v. Fraley*, 41 Ohio St. 2d 173, 324 N.E.2d 735 (1975), *cert. denied*, 423 U.S. 872 (1975).

³ See, e.g., J. CREAMER, *THE LAW OF ARREST, SEARCH AND SEIZURE* (1968); E. FISHER, *LAW OF ARREST* (1967); Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317 (1971).

⁴ E.g., *State v. Eddington*, 95 Ariz. 10, 386 P.2d 20 (1963); *Finch v. State*, 101 Ga. App. 73, 112 S.E.2d 284 (1960); *State v. Goering*, 193 Kan. 307, 392 P.2d 930 (1964); *State v. Miller*, 253 Minn. 112, 91 N.W.2d 138 (1958); *State v. Parker*, 378 S.W.2d 274 (Mo. 1964); *Walters v. State*, 403 P.2d 267 (Okla. Crim. App. 1965).

⁵ E.g., *State v. Robinson*, 6 Ariz. App. 424, 433 P.2d 75 (1967); *Finch v. State*, 101 Ga. App. 73, 112 S.E.2d 284 (1960); *State v. Lopez*, 256 La. 108, 235 So. 2d 394 (1970); *Jenkins v. State*, 232 Md. 529, 194 A.2d 618 (1963); *People v. Krum*, 374 Mich. 356, 132 N.W.2d 69 (1965); *Long v. State*, 223 Tenn. 238, 443 S.W.2d 476 (1969).

⁶ 92 Eng. Rep. 349 (K.B. 1710).

a constable in the process. The court noted that this was sufficient provocation to reduce the charge from murder to manslaughter.⁷ The leading federal case⁸ applying the common law concerned an incident which occurred on an Indian reservation. Indian policemen attempted to unlawfully arrest Bad Elk for shooting his gun "into the air for fun" and Bad Elk responded by shooting and killing one of the policemen. The court reversed his conviction for murder saying:

Instead of saying that plaintiff in error had the right to use such force as was absolutely necessary to resist an attempted illegal arrest, the jury were [sic] informed that the policemen had the right to use all necessary force to arrest him, and that he had no right to resist.⁹

The force of *Bad Elk* has been put in question recently, however, in dicta in *United States v. Simon*:¹⁰

As an additional ground for sustaining Simon's conviction, the government argues that even if the arrest was unlawful, Simon had no right to resist the arrest as he did. We think this argument has merit, and that the consequences of accepting defendant's argument to the contrary would lead to great mischief with respect to encouraging resistance to, and to endangering, arresting officers. We recognize that law enforcement officers are frequently called on to make arrests without warrants and should not be held, so far as their personal security is concerned, to a nicety of distinctions between probable cause and lack of probable cause in differing situations of warrantless arrests. It is for this reason we believe that the force of *John Bad Elk* has been diminished.¹¹

Although *Bad Elk* has not been expressly overruled by the United States Supreme Court, it appears that the federal courts, when presented with the question of the right to resist arrest under a federal statute, are applying a narrower test.¹²

As the law now stands (1) a person being arrested has the right to resist with reasonable force an unlawful arrest by a private citizen or a peace officer and (2) one who has no actual knowledge that he

⁷ *Id.* at 353.

⁸ *John Bad Elk v. United States*, 177 U.S. 529 (1900).

⁹ *Id.* at 537.

¹⁰ 409 F.2d 474 (7th Cir. 1969).

¹¹ *Id.* at 477.

¹² *United States v. Goodwin*, 440 F.2d 1152 (3d Cir. 1971); *United States v. Linn*, 438 F.2d 456 (10th Cir. 1971); *United States v. Simon*, 409 F.2d 474 (7th Cir. 1969); *United States v. Henczer*, 373 F.2d 241 (2d Cir. 1967).

is being arrested and the circumstances are such as to afford him no reasonable ground to suppose that he is being arrested and he has no fair opportunity to inquire or otherwise ascertain why another is taking or attempting to take him into custody and the situation in which he finds himself is such as to cause him reasonably to believe that he is being subject to hostile attack against his person, has a right to use reasonable force to defend himself.¹³

Here, the court's statement of the law subtly changes the reason for a lawful resistance from the objective look at the arrest's legality in hindsight to the subjective state of mind of the arrestee. The court, here, will still consider the lawfulness of the arrest, but it also wants to see that the arrestee feels he is being subjected to a hostile attack against his person rather than dwell on his knowledge of whether the arrest is legal or not. There has also been a further narrowing of (1) *supra* by at least one federal court.¹⁴ This court reversed the defendant's conviction for possession of marijuana with intent to distribute because the customs officials arresting him had no probable cause to search the defendant's luggage.¹⁵ However, the court sustained the defendant's conviction for assaulting a federal officer in the course of his official duties because at this point in time the officers "[h]ad probable cause to believe that a felony was being committed in their presence. The warrantless arrest was therefore lawful, in itself. It was 'unlawful' only in the exclusionary-rule sense that it was 'fruit' of the prior unlawful search."¹⁶ Thus, it appears that some federal courts, while not rejecting the common law right to resist an unlawful arrest, have narrowed the right, and more federal courts may join them in the future.¹⁷ The United States Supreme Court has not expressly ruled on this issue recently, but mention has been made in dictum,¹⁸ and a final disposition of this question may have to be postponed until the Court decides to hear a case of this nature. It is a matter of conjecture at this point, but the Supreme Court could base a decision regarding the right of resistance to an unlawful arrest on alleged crimes under federal law only or it could hold in a much broader vein that resistance to unlawful arrests is a constitutionally protected privilege.

¹³ United States v. Heliczzer, 373 F.2d 241, 248 (2d Cir. 1967).

¹⁴ United States v. Moore, 483 F.2d 1361 (9th Cir. 1973).

¹⁵ *Id.* at 1364.

¹⁶ *Id.* at 1364-65.

¹⁷ United States v. Heliczzer, 373 F.2d 241, 246 n.3 (2d Cir. 1967):

[t]here is growing authority that its [the right to resist an unlawful arrest] vitality is waning.

¹⁸ United States v. DiRe, 332 U.S. 581, 594 (1948):

One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases.

II. DIFFERING STATE VIEWS ON THE RIGHT TO RESIST

As may be expected in the area of substantive criminal law, the state jurisdictions which recognize the right to resist an unlawful arrest attach various qualifications and limitations on the right. However many different views there are on the matter among the several jurisdictions, none of them views the right in absolute terms. No state bestows an unqualified right to kill in the illegal arrest situation. Only certain events and circumstances justify the taking of the arrestor's life during an unlawful arrest.

The rationales and policies of the different state views are basically very similar. They usually center around the theory of self-defense to an assault on the person and/or the theory that personal liberty is a fundamental right which is not to be interfered with. The differences in the state views are largely a matter of degree and not a matter of substantive deviation. Some deal with the amount of resistance that is permissible while others are concerned with the amount or type of provocation that is thrust upon the arrestee.

One jurisdiction, South Carolina,¹⁹ comes very close to recognizing an absolute right in the unlawful arrest situation. The state's Supreme Court has announced the principle that a person has the right "to resist an unlawful arrest, even to the extent of taking the life of the aggressor, if it be necessary, in order to regain his liberty"²⁰ Of particular note in this jurisdiction is the fact that the right is not conditioned or qualified on any danger to the arrestee's life, but rather the right is given when it is necessary for the arrestee to free himself from the illegal custody. This principle has been reaffirmed in a more recent case.²¹ As far as can be determined, South Carolina stands alone on this particular proposition.

A number of jurisdictions permit the use of reasonable force in the resistance of an unlawful arrest, as was indicated earlier.²² The divergent point in these jurisdictions centers around the amount of force that is considered "reasonable". Some states hold that the right of resisting an unlawful arrest is allied with the right to self-defense which permits the taking of another's life when the arrestee's life is threatened.²³ A good statement of this view appears in *State v. Anselmo*:²⁴

¹⁹ *State v. Bethune*, 112 S.C. 100, 99 S.E. 753 (1919).

²⁰ *Id.* at 100, 99 S.E. at 754.

²¹ *State v. Poinsett*, 250 S.C. 293, 157 S.E.2d 570 (1967).

²² See cases cited note 5 *supra*.

²³ *Gordy v. State*, 93 Ga. App. 743, 92 S.E.2d 737 (1956) (dictum); *Wilkinson v. State*, 143 Miss. 324, 108 So. 711 (1926); *Hurd v. State*, 119 Tenn. 583, 108 S.W. 1064 (1907); *State v. Anselmo*, 46 Utah 137, 148 P. 1071 (1915).

Where an unlawful arrest is attempted by an officer or another, the person sought to be thus unlawfully arrested may no doubt resist such an arrest with all proper and reasonable means. He may, however, not kill the offending officer or person, unless it reasonably appears to such citizen that his life or limb is in danger. In other words, life may not be sacrificed in such cases, unless pursuant to the right of self-defense, the same as in other cases of personal trespass.²⁵

Another position taken on the amount of force deemed reasonable in resisting an illegal arrest considers the jeopardy that the arrestee is subjected to in the circumstances surrounding the arrest. Where the unlawful arrest does not put the person being arrested in fear of imminent danger to his life, the courts are more likely to decrease the amount of force that is considered "reasonable" under the circumstances. These jurisdictions hold that the use of a deadly weapon upon the arresting officer is not justified even though the arrest is concededly illegal.²⁶ The reasoning behind this view was amply stated by the Indiana Court of Appeals in *Williams v. State*:²⁷

While the amount and nature of permissible resistance varies from case to case and must be judged in light of the necessities of a particular situation, it is generally recognized that a degree of force may not be employed which is disproportionate to that which is used to take the arrestee into custody. . . Here, there is no evidence that the officers utilized any means of force other than physical restraint in order to place [the defendant] in custody. Appropriate resistance under such circumstances does not include [the defendant's] discharge of the pistol twice at the officer.²⁸

One court has even placed the pushing of an arresting officer into the path of an oncoming automobile as analogous to the use of a deadly weapon in resisting an unlawful arrest where such "force" was not reasonably called for in a temporary detention situation.²⁹

Still another view concerning the right to resist is proffered by a final set of state jurisdictions. This view states that an illegally arrested person

²⁵ *Id.* at 152, 148 P. at 1076-77.

²⁶ *Williams v. State*, 311 N.E.2d 619 (Ind. App. 1974); *State v. King*, 20 N.C. App. 390, 201 S.E.2d 563 (1974); *Potter v. State*, 507 P.2d 1282 (Okla. Crim. App. 1973) (dictum); *State v. Rousseau*, 40 Wash. 2d 92, 241 P.2d 447 (1952); *State v. Gum*, 68 W. Va. 105, 69 S.E. 463 (1910).

²⁷ 311 N.E.2d 619 (Ind. App. 1974).

²⁸ *Id.* at 621.

²⁹ *State v. Rousseau*, 40 Wash. 2d 92, 241 P.2d 447, 449 (1952).

may not resist the arrest to the extent that serious bodily injury will result to the arresting officer.³⁰

III. THE OHIO RULE

The best judicial statement on the former view in Ohio is found in *City of Columbus v. Holmes*.³¹ This case cited proposition as the law at that particular time:

Since the right of personal property is one of the fundamental rights guaranteed to every citizen, and any unlawful interference with it may be resisted, every person has a right to resist an unlawful arrest; and, in preventing such illegal restraint of his liberty, he may use such force as may be necessary.³²

The defendant had been arrested by a Columbus police officer for disorderly conduct. Subsequently, she was acquitted of this charge by the court sitting as the jury. However, she was found guilty of willfully resisting her arrest. On appeal, the court stated that since this case involved a warrantless arrest for a misdemeanor that was not committed in the presence of the arresting officer, the arrest was thus unlawful.³³ Upon finding the arrest without authority of law, the Franklin County Court of Appeals found that the defendant had the right to resist the illegal arrest because she was trying "to protect what she claimed was her property"³⁴ from the summary disposition and transfer attempted by the officer" who was acting on the boarder's complaint.³⁵

In 1975, however, the State of Ohio became the tenth state to abolish the common law rule. The opportunity for this judicial turnabout arose out of a reported complaint by a white family in an interracial neighborhood in the city of Columbus. When five police officers were sent to investigate the complaint, an argument developed between the officers and one of the neighborhood's black residents (the defendant). The defendant allegedly used obscene language which caused the police to place her under arrest for disorderly conduct. This precipitated defendant's resistance to the arrest which consisted of swinging her arms, yelling, kicking the officers and

³⁰ *Abrams v. United States*, 237 F.2d 42 (D.C. Cir. 1956); *Adams v. State*, 175 Ala. 8, 57 So. 591 (1912); *State v. Smithson*, 54 Nev. 417, 19 P.2d 631 (1933).

³¹ 107 Ohio App. 391, 152 N.E.2d 301 (1958).

³² *Id.* at 398, 152 N.E.2d at 306 (quoting from 5 OHIO JUR. 2d *Arrest* §52 (1954)).

³³ *Id.* at 398, 152 N.E.2d at 305.

³⁴ The car was purportedly given to her by a former boarder and the title had not yet been legally passed to her.

then breaking away from them.³⁶ She was then further charged with using violence against a police officer.³⁷ The Ohio Supreme Court reversed the defendant's conviction that was based on the disorderly conduct charge,³⁸ and then turned to a consideration of the conviction which rested on the use of violence against a police officer.

The defendant argued that if the court deemed her disorderly conduct arrest to be invalid (which the court eventually did), then her resistance to such arrest was to be found privileged under the common law rule which Ohio had adhered to up to this point in time.³⁹ The Court took this case as an opportunity to review its position on the common law right to resist an unlawful arrest. Taking note of other jurisdictions which had negated the common law rule and of the fact that the police officers involved in this illegal arrest had not used any excessive or unnecessary force, the Ohio Supreme Court stated:

We agree with those courts and legislatures which have chosen to abandon the rule allowing forcible resistance to arrest. We believe it essential that potentially violent conflicts be resolved, not in the streets, but in the courts. Thus, we hold that in the absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances.⁴⁰

Thus, the State of Ohio no longer gives the person whose personal liberty is about to be seized by the state unlawfully, the right to physically and forcibly resist the seizure unless the arrestors use excessive or unnecessary force.

IV. STATES WHICH HAVE ABOLISHED THE RIGHT

There has been a rising sentiment for the abolition of the common law right to resist. At the time of this writing, there are six jurisdictions which have abrogated the right by statute.⁴¹ One of these states has judicially

³⁶ *City of Columbus v. Fraley*, 41 Ohio St. 2d 173, 174, 324 N.E.2d 735, 736 (1975).

³⁷ COLUMBUS, OHIO, CODE OF ORDINANCES §2355.01 provides:

No person shall strike or assault a police officer or draw or lift any weapon or offer any violence against a police officer, when said police officer is in the execution of his office.

³⁸ 41 Ohio St. 2d at 177-78, 324 N.E.2d at 738.

³⁹ See notes 31-35 and accompanying text *supra*.

⁴⁰ 41 Ohio St. 2d at 178, 324 N.E.2d at 740.

⁴¹ CAL. PENAL CODE §834a (West 1970); DEL. CODE ANN. tit. 11, §1905 (1953); ILL. REV. STAT. ch. 38, §7.7 (1971); N.H. REV. STAT. ANN. §594.5 (1974); N.Y. PENAL LAW §35.27 (McKinney Supp. 1975); R.I. GEN. LAWS §12-7-10 (1969).

lessened the harshness of this new law somewhat. The Supreme Court of California in construing its statute⁴² has said:

Moreover, simply as a matter of statutory construction, it is clear that section 834a was meant at most to eliminate the common law *defense* of resistance to unlawful arrest, and not to make such resistance a new substantive crime. . . . We confirm that a resisting defendant commits a public offense; but if the arrest is ultimately determined factually to be unlawful, the defendant can be validly convicted only of simple assault or battery. (emphasis added.)⁴³

Thus, California keeps the criminal defendant in this situation from being convicted of a new felony by holding that he is only guilty of a simple assault and battery.

Another set of states have abolished the common law right to resist an unlawful arrest by case law. Four jurisdictions have done so by this method.⁴⁴ The Supreme Court of New Jersey justified this change in the law by stating that the defendant's remedy was "to seek recourse in the courts for the invasion of his right of freedom."⁴⁵

The courts and legislatures which have eliminated the common law rule on the right to resist an illegal arrest have used language which is very similar to that used in the Model Penal Code and in the Uniform Arrest Act. The Model Penal Code provides:

(a) The use of force is not justifiable under this Section:

(1) to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful . . .⁴⁶

The Uniform Arrest Act provides in Section 5:

If a person has reasonable ground to believe that he is being arrested by a police officer, it is his duty to refrain from using force or any

⁴² CAL. PENAL CODE §834a (West 1970) provides:

If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.

⁴³ *People v. Curtis*, 70 Cal. 2d 347, 354-56, 450 P.2d 33, 37-38, 74 Cal Rptr. 713, 717-18 (1969).

⁴⁴ *Miller v. State*, 462, P.2d 421 (Alas. 1969); *State v. Richardson*, 95 Idaho 446, 511 P.2d 263 (1973), *cert. denied*, 414 U.S. 1163 (1973); *State v. Mulvihill*, 57 N.J. 151 270 A.2d 277 (1970); *City of Columbus v. Fraley*, 41 Ohio St. 2d 173, 324 N.E.2d 735 (1975), *cert. denied*, 423 U.S. 872 (1975).

⁴⁵ *State v. Mulvihill*, 57 N.J. 151, 156, 270 A.2d 277, 279 (1970).

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⁴⁶ MODEL PENAL CODE §3.04 (2) (a) (i) (Proposed Official Draft, 1962).

weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest.⁴⁷

An example of a jurisdiction's dependency on the above model statutes is Ohio's recent case changing the common law rule.⁴⁸

V. ARGUMENTS AGAINST RETAINING THE COMMON LAW RIGHT

A number of arguments have been presented to the effect that the common law right is no longer necessary in the modern context of illegal arrests. A forceful stand in this regard has been taken by at least one legal commentator.⁴⁹ That writer feels that the traditional concept of self-help does not apply in the unlawful arrest situation because the self-help doctrine is only applicable in situations where there is not an adequate remedy in the judicial realm.⁵⁰ The author explains it in this manner:

The injury threatening [the person in the unlawful arrest situation] is the temporary deprivation of his personal liberty by an officer of the law. The law cannot restore an arm, an eye, or a life; it can and does restore freedom. Life and liberty, though equally precious, cannot be viewed on the same plane where self-help is concerned. Liberty can be secured by a resort to law, life cannot!⁵¹

It has also been pointed out that the unlawful arrest situation presents a set of ironies when the common law view is followed. First, it is stated that mainly guilty people resist unlawful arrests.⁵² Secondly, even one who resists an unlawful arrest in good faith belief that he is correct has no foolproof method of determining whether his actions are lawful.⁵³ This argument supports the theory that is presented in opposition to the common law right, that it is for the courts to determine whether the arrest is legal or not. The arrestee's belief as to the legality of the arrest should not be a determining factor. Thirdly, it is stated that the right presents a dilemma in terms of two parties (the police officer and the arrestee) legally responding with force to one another's actions. In the unlawful arrest scenario, the officers "have a duty to overcome resistance and perfect the arrest, and citizens have a right to prevent unlawful arrest by forcible resistance."⁵⁴

⁴⁷ UNIFORM ARREST ACT §5 (as found in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 345 (1942)).

⁴⁸ *City of Columbus v. Fraley*, 41 Ohio St. 2d 173, 178, 324 N.E.2d 735, 739 (1975).

⁴⁹ Comment, *The Right to Resist an Unlawful Arrest*, 7 NATURAL RESOURCES J. 119 (1967). [hereinafter cited as Comment]

⁵⁰ *Id.* at 120.

⁵¹ *Id.*

⁵² *Id.* at 124.

⁵³ *Id.* at 124-25.

This results in the alternating escalation of force by each party until the watershed is reached and one of them is either seriously or fatally injured.⁵⁵ Finally, it has been said that the common law right is an illusory one. It does not prevent the arrest; it precipitates a further criminal charge in some instances.⁵⁶

Another position taken against retaining the common law right is the notion that the whole idea of self-help is of diminishing importance in the modern context. The first New Jersey court to rule that the right was abolished put it this way: "The concept of self-help is in decline. It is anti-social in an urbanized society. It is potentially dangerous to all involved."⁵⁷

It has also been urged that modern conditions have eliminated any need for the common law right. It is said that the right was developed at a time "when bail for felonies was usually unattainable, and when years might pass before the royal judges arrived for a jail delivery. Further, conditions in the English jails were then such that a prisoner had an excellent chance of dying of disease before trial."⁵⁸ A further argument is that the modern criminal defendant's constitutional rights are better protected now.⁵⁹ A final point made is that there are other adequate remedies for the person unlawfully arrested. These remedies will be discussed later.

VI. ARGUMENTS FOR RETAINING THE COMMON LAW RIGHT

Although the right has come under increasing attack recently, especially in the more industrial and urbanized states, there are still sound reasons for the retention of the right. Despite the arguments of the rule's antiquity and its modern ineffectiveness, it is still believed that the right "is based on the principle that an illegal arrest is an assault and battery"⁶⁰ on the person so arrested. To deny such person the right to resist in this circumstance would be analogous to stripping away the somewhat similar common law privilege of self-defense. So, the right to resist contains an element of "fair play" between the opposing parties.

⁵⁵ *But cf.* *McDaniel v. People*, 179 Colo. 153, 499 P.2d 613 (1972), *cert. denied*, 409 U.S. 1060 (1972), where the court held that excessive force was not permitted by the arrestee under the state's resistance to arrest statute. This contradicts the escalating force theory because some states have taken this into account when drafting their statutes and these states have not felt compelled to abolish the right.

⁵⁶ Comment, *supra* note 49, at 125. However, he wrongly states the purpose of the right. It may be that its purpose is more psychological and symbolic than practical or physical. The right is a trademark of a free and democratic form of government.

⁵⁷ *State v. Koonce*, 89 N.J. Super. 169, 184, 214 A.2d 428, 436 (1965).

⁵⁸ Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

⁵⁹ *Chevigny, The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1134 (1942).

⁶⁰ *Curtis v. United States*, 222 A.2d 840, 842 (D.C. Ct. App. 1966).

In a detailed article on the subject,⁶¹ Paul Chevigny has noted a couple of reasons why the right is still considered vital to the individual. Despite the "futility of the resistance" argument and the contention that the arrestee cannot accurately judge the legality of the arrest, he feels that "the decision to resist is the work of a moment rather than the result of carefully considered alternatives."⁶² He considers the real question to be whether the citizen should be convicted of a crime when he resists an unlawful arrest. This question leads to one of the most hideous aspects of the downfall of the right in some states. The fact that a person can be unlawfully arrested for a crime such as disorderly conduct,⁶³ have that charge dismissed, and still be convicted for resisting the illegal arrest, is so preposterous that it surpasses the realm of irony. To say that this is in line with the American tradition of criminal justice is to make a mockery of the same. Chevigny feels:

[T]he freedom to refuse to obey a patently unlawful arrest is essential to the integrity of a government which purports to be one of laws, and not of men. Unless it is desirable to kill the impulse to resist arbitrary authority, the rule that such an arrest is a provocation to resist must remain fundamental.⁶⁴

Short shrift has also been made of the argument that other adequate remedies exist to act as substitutes for the right to resist.⁶⁵ Although bail is more readily available now, it still doesn't spare the arrestee the expense of paying it himself or paying a bondsman. It does not erase the stigma of the arrest either, even if he is eventually vindicated. Administrative remedies that have been initiated by local police departments are difficult to kick into motion and often the arrestee's "story" is deemed uncorroborated and unsubstantiated by the police hierarchy. Civil injunctions are practically impossible to obtain unless a clear pattern of abuse is established by the complainant. Civil damage suits against the offending officer are sometimes

⁶¹ Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128 (1969). [hereinafter cited as Chevigny].

⁶² *Id.* at 1137.

⁶³ See *City of Columbus v. Fraley*, 41 Ohio St. 2d 173, 324 N.E.2d 735 (1975), *cert. denied*, 423 U.S. 872 (1975).

⁶⁴ Chevigny, *supra* note 61, at 1147.

⁶⁵ *Id.* at 1133-34:

To assert that adequate legal remedies now exist to redress false arrests and other police abuses is to misconstrue the rationale of the right. The right does not exist to encourage citizens to resist, but rather to protect those provoked into resistance by unlawful arrests. In the excitement of an arrest, a person is likely to respond to his emotions, and if his impulse to resist is provoked by arbitrary police behavior, it is fundamentally unfair to punish him for giving in to that impulse with measured resistance.

uncollectible after the arduous path to judgment is overcome, and criminal proceedings against the same are usually not sanctioned because false arrest is usually not considered a crime. For these reasons, it is submitted, the abolition of the common law right leaves the wronged person without an adequate legal remedy and thus ignores another foundation of American jurisprudence.

VII. POSSIBLE CONSTITUTIONAL BASES FOR THE RIGHT

It has been noted that there are three possible constitutional bases for the right to resist an illegal arrest.⁶⁶ One such basis concerns the "vindication of certain constitutional rights."⁶⁷ Primary examples of this are the civil rights, free speech, and antiwar demonstrations of the Sixties where demonstrators were arrested for disobeying orders to disperse. The rationale behind this theory⁶⁸ is that an individual should not be required to submit peacefully to such an arrest where he is exercising his rights guaranteed under the First Amendment.

Another basis may be found in the area of arbitrary police orders. "The Supreme Court has . . . acknowledged that due process protects an individual from being punished for violating an arbitrary police order."⁶⁹ It has been suggested that an arrest is closely akin to a police order and that an order's arbitrariness can be analogized to an arrest's unlawfulness.

A further basis may be found in the fact that a police officer should not be given any feeling of success (because of a conviction) resulting from an illegal arrest. It would seem that Due Process should outlaw this kind of state action.⁷⁰ To allow this may also encourage police misconduct.

A final constitutional argument against the abrogation of the common law right to resist an unlawful arrest may be founded on the Fourth Amendment⁷¹ It should be noted that the Amendment prohibits seizures of persons which are unreasonable. Is it beyond reason to posit that unlawful arrests fit into this prohibition? To take away the right to resist in the unlawful arrest situation under this reading of the Constitution is to strip away a citizen's constitutional rights. The Supreme Court has not ruled on this

⁶⁶ *Id.* at 1138.

⁶⁷ *Id.*

⁶⁸ It is *only* a theory in the area of constitutional law at this point.

⁶⁹ Chevigny, *supra* note 61, at 1139.

⁷⁰ *Id.*

⁷¹ U.S. CONST. amend. IV 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 . . . (emphasis added.)

yet, but Justice Douglas identified the issue in his dissent in *Wainwright v. New Orleans*⁷² and pointed out that the majority's decision and the decision in the "stop and frisk" case⁷³ had "forsaken the Western tradition and taken a long step toward . . . oppressive police practices."⁷⁴ Whether the present Supreme Court (whose tendency seems to be to "hold the line" on constitutional rights in criminal cases) will extend the Fourth Amendment to embrace the right to resist illegal arrests is at best a question of a highly speculative nature.

VIII. TWO SUGGESTED ALTERNATIVES

It is the view of this author that the jurisdictions which have abolished the common law right have taken a position which is as extreme as they claim the common law rule is. Some middle position which takes into account the safety of the arresting officer *and* the personal liberty of the arrestee must be fashioned into a judicial rule or legislative fiat. Two suggestions have been put forward which make more sense than the recent trend. One suggestion was presented by the California Bar Association Committee on Criminal Law and Procedure:

The Committee did feel, however, that the answer might lie in a new kind of civil action, or better, a summary type of proceeding, *for a substantial money judgment* in favor of the wronged individual, *whether innocent or guilty*, and *against the political subdivision* whose enforcement officers violated that person's rights. After not very many outlays of public funds the taxpayers and administrative heads would insist upon curbing unlawful police action. (emphasis added.)⁷⁵

This suggestion gives the arrestee the offensive in the illegal arrest situation. Another suggestion places its emphasis on the defensive side of the person unlawfully arrested. This position offers a simple model statute on the subject:

The actor is not justified in using force to resist an unlawful arrest, which the actor knows is being made by a peace officer, except that no charge shall result from the actor's uncalculated reaction in resisting a patently illegal arrest, unless the actor has used a deadly weapon.⁷⁶

⁷² 392 U.S. 598, 610 (1968):

If this case is to be decided by the traditional Fourth Amendment standards, . . . the question is whether a person who is unconstitutionally arrested must submit to a search of his person, or whether he may offer at least token resistance.

⁷³ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁷⁴ *Wainwright v. New Orleans*, 392 U.S. 598, 615 (1968).

⁷⁵ 29 J. ST. B. CAL. 263, 264 (1954).

⁷⁶ Comment, *The Right to Resist an Unlawful Arrest Amended*, 2 N.C. CENT. L.J. 125 (1970). 13

These suggestions, I believe, preserve the worthier elements of the two extreme positions taken on the right to resist an unlawful arrest.

CONCLUSION

For years the Anglo-American system of law recognized the common law right to resist an illegal arrest. Resistance, even to the extent of at least some form of limited physical force, was deemed justified when the arrest was patently unlawful in nature. A reasonable good faith belief in the arrest's illegality was also often permitted as a valid reason for resistance under the common law. Now, it appears that the wall of lawful resistance is beginning to crack and may possibly soon crumble. The states which are often viewed as key indicators of significant modern legal trends have reversed this common law right and one might predict that the others will eventually join the bandwagon. The premises upon which this "about face" is based focus on the evolution of modern society into one that is no longer pastoral in nature and is preoccupied with guns and violence. "Law and order" proponents may perhaps welcome this shift in the law, but civil libertarians will probably see it as just one more step toward the end of a free society. The abolition of the right to resist an unlawful arrest may possibly make us a nation of "sheep". American citizens may further be expected to become passive in their reactions to the conduct of their lawful authorities such that many forms of dissent will no longer be tolerated. Perhaps the spectre painted is a bit extreme, but it is well to remember that our legal and societal institutions are slow to change but steadfast in their development. Once the machinery is kicked into gear the brakes become more difficult to apply.

What is to stop this trend? State governments are probably the least likely to accomplish this. It may be that the federal government through Congress or the federal court system will nip this in the bud. As mentioned earlier, there are possible federal constitutional grounds upon which to base a right to resist an illegal arrest. Perhaps the right case or situation will develop to make this possible.

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