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the search was unreasonable, where the owner of the vehicle has consented to the search.⁸³ But, a person has grounds to complain, where he is not the driver, but is in possession and has the right of control of the vehicle.⁸⁴ Likewise, a lessee of a car who is in possession of the vehicle has standing to object to an unreasonable search because he has a legal possessory interest which is protected by the Fourth Amendment.⁸⁵ But one who hires another to chauffeur him around town—taxi cab situation—has no right to object because the right of possession and control remains in the driver of the car.⁸⁶ On the other hand a bailee has standing to object to the introduction of evidence obtained from an unreasonable warrant because of his possessory interest.⁸⁷

One who disclaims ownership or possession of what is being sought to be introduced in evidence, has no right to object because the constitutional protection is only extended to those who have a proprietary or possessory interest in the property.⁸⁸ A thief, then, has no legal possession or legal interest in a stolen car; thus, he has no constitutional standing to object to the methods of seizure nor to the introduction of the evidence seized.⁸⁹

D. L. VILLARREAL

The Right to Resist an Unlawful Arrest Amended

The increased conflict between police and citizenry today, and the cry for law and order, make the question of individual rights crucial. Decisions governing police practices and the rights of the arrested individual have generally increased personal protections. But the common law right to resist an unlawful arrest is now being scrutinized and chiseled away. It is curious that a right that has been firmly established for over three hundred years is waning.

⁸³ *State v. McPeak, Cordell and Campbell*, 243 N.C. 283, 158 S.E.2d 511 (1968).

⁸⁴ *State v. J. Bishop*, 272 N.C. 283, 158 S.E.2d 511 (1968).

⁸⁵ *Weed v. United States*, 340 F.2d 827 (10th Cir. 1965).

⁸⁶ *State v. Sylvester Dawson*, 262 N.C. 607, 138 S.E.2d 234 (1964).

⁸⁷ *United States v. Eldrige*, 302 F.2d 463 (4th Cir. 1962).

⁸⁸ *Baskerville v. United States*, 227 F.2d 454 (10th Cir. 1955); *Wilson v. United States*, 218 F.2d 754 (10th Cir. 1955); *People v. Exum*, 382 Ill. 204, 47 N.E.2d 56 (1943).

⁸⁹ *Williams v. United States*, 323 F.2d 90 (10th Cir. 1963).

THE HISTORIC BASIS

Earliest English common law traces the right to resist an unlawful arrest to Magna Charta. In *Queen v. Tooley*¹ the court reduced a charge of murder to one of manslaughter after third parties had interfered in the unlawful arrest of one Anne Dekins. Though the arrest had already been accomplished and the defendant was in custody, the court upheld the right of the "rescuers" on the basis that:

A man ought to be concerned for Magna Charta and the laws, and if anyone against the law imprison a man, he is an offender against Magna Charta. We seven hold this to be sufficient provocation. . . .²

Early English courts employed great latitude in determining what force could be used to resist unlawful arrests and recognized a broad base of provocations which would justify resistance. The illegality of the arrest was their main criterion. This approach is most striking, for the ancient law was supremely concerned with the protection of the law officer in the performance of his duty.³ Strict adherence to the law was thus applied equally to both citizen and constable.

The right to resist an unlawful arrest grew out of the assertion that the arrest was a provocation to the individual, and he was justified in resisting with whatever force was necessary. The provocation was held sufficient to justify the stabbing of an officer in *Rex v. Thompson*,⁴ since assault was the only means of escaping the patently illegal arrest.

Technical defects in the warrant were deemed sufficient to reduce a charge of murder, arising from resistance to an unlawful arrest, to manslaughter. The *Ferrer's Case*⁵ involved the murder of an officer who was making the arrest of Sir Henry Ferrer, charged with debt. The homicide was not committed by Sir Henry, or even done in his presence, but by his servant seeking to protect him. The court ruled the arrest illegal on the basis that the warrant described Sir Henry as a knight while he was actually a baronet. This made the warrant "bad" and ex post facto illegal, thus reducing the servant's act to manslaughter.

The court had based its decision in *Tooley*⁶ upon an earlier case:

¹ *Queen v. Tooley*, 2 Ld. Raym. 1297, 92 Eng. Rep. 349 (K.B. 1710).

² *Id.*

³ TURNER, J., 1 RUSSELL ON CRIME 447 (12 ed. 1964).

⁴ *Rex v. Thompson*, 1 Mood. 380 (1825).

⁵ *Ferrer's Case*, Cro. Car. 371, 79 Eng. Rep. 924 (K.B. 1634).

⁶ *Supra* note 1.

RIGHT TO RESIST AN UNLAWFUL ARREST 127

Hopkin Huggett's Case.⁷ There, a third party intervened and killed an officer in behalf of a soldier who was being impressed without a valid warrant. The charge was reduced from murder to manslaughter by the court, saying: "Undue arrest or restraint of the liberty of any person is a provocation to all men of England. . . ." Four of the twelve justices dissented from this opinion.

The dissent in *Tooley* maintained that homicide committed in defense of a total stranger may be altruistic, but that the rationale of provocation which exonerates such action by the individual involved is lacking with regard to the stranger who voluntarily joins in the defense. This view was to become the dominant philosophy and practice as English law met the nineteenth century. The overruling of *Tooley* in *R. v. Warner*⁸ established the dissent as the rule; this was reaffirmed in *R. v. Davis*.⁹ In the latter case, the charge of murdering an officer was upheld though there were technical defects in the warrant. Subsequent cases limited the degree of force allowed in resisting an illegal arrest.

The contemporary English position is that an illegal arrest may be opposed with only as much force as is reasonable under the particular circumstances,¹⁰ and deadly force may only be used to counter deadly force or protect the individual from great bodily harm. In lesser threats, the mere illegality of the attempted arrest will not insulate the individual from a charge of murder:

. . . nothing short of an endeavor to destroy life or inflict great bodily harm will justify the taking of life, prevails in this case; so that if the person thus being unlawfully arrested kills the aggressor in resisting, he commits the lower degree of felonious homicide called manslaughter.¹¹

The English courts now hold that a legal process that is apparently valid must be obeyed; but the individual still retains the right to resist a patently illegal arrest. The provocation, it is held, is so great as to justify resistance.

American courts adopted the right to resist an unlawful arrest as part of the common law legacy. They too regarded the arrest as provocation, and as with their early Anglo-Saxon counterparts, the early Ameri-

⁷ *Hopkin Huggett's Case*, 84 Eng. Rep. 1028, 1 Hale 465 (K.B. 1666).

⁸ *R. v. Warner*, 1 Mood. 380 (1833).

⁹ *R. v. Davis*, 1 Leigh & Cave's C.C. Res. 64 (1861).

¹⁰ *R. v. Wilson*, 1 W.R.L. 493 (1955).

¹¹ 1 BISHOP'S CRIMINAL LAW 616 (9 ed. 1923).

128 NORTH CAROLINA CENTRAL LAW JOURNAL

can courts generally held any defect making the arrest illegal as justification for having resisted the arrest.¹² It is hard to understand, however, where one can find provocation in an arrest which is only later found to be illegal on an esoteric technicality. To be logically fathomed, this must be viewed as a legal fiction designed to serve a posteriori purposes. As to the private citizen, there could have been no judicial intent of a priori guidelines for behavior in such arrests. It can only be interpreted as a means of gaining official compliance with arrest procedure—a goal that remains illusive even with today's stringent Supreme Court mandates.

To correct this "technical loophole" some courts adopted the rule that the right of resistance was reserved solely for patently illegal arrests¹³ or those where the warrants were obviously "bad on their face."¹⁴ In 1823 the court in *U.S. v. Thompson*¹⁵ declared, "if the warrant contains on its face a cause of arrest within the jurisdiction of the magistrate, purports to have been issued within his jurisdiction, and is in other respects formal, the officer is bound to execute it and the defendant may not lawfully resist."¹⁶ Thereby, the District of Columbia Circuit Court upheld a charge of assault and battery in the resistance of a technically illegal arrest. There was no question about the charge of beating a slave, but the warrant was faulty since it had been issued by a magistrate who did not have jurisdiction and was signed in pencil.

THE PERIOD OF TRANSITION

In most American jurisdictions the common law right to resist an unlawful arrest is still operative. But since 1942 and Professor Warner's *Uniform Arrest Act*¹⁷ the right has been questioned. Since then, seven states¹⁸ have completely abolished, or severely restricted the common law right. Interestingly, these states are almost all populous, industrial states

¹² CHEVIGNY, *The Right to Resist An Unlawful Arrest*, 78 Yale L.J. 1128, 1131 (1969).

¹³ *U.S. v. Goure*, 25 F. Cas. 1381 (No. 15,240) (C.C.D.C. 1834). The arrest was on vague suspicion alone, and the defendant threatened the lives of the officers. His right to resist was upheld.

¹⁴ Annot., 10 A.L.R. 3d. 1146 (1966).

¹⁵ *U.S. v. Thompson*, 28 F. Cas. 89 (No. 16,484) (1823).

¹⁶ *Id.* at 90.

¹⁷ WARNER, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 330 (1942).

¹⁸ CAL. PENAL CODE § 834a (West. Supp. 1968); DEL. CODE ANN. TITLE II, § 1905 (1951); ILL. ANN. STAT. ch. 38, § 7-7 (Smith-Hurd 1961); N.H. REV. STAT. ANN. 594.5 (1955); N.Y. PENAL LAW § 35.27 (McKinney Supp. 1968); R.I. GEN. LAWS ANN. 12-7-10 (1941); and New Jersey by judicial decision, *State v. Koonce*, 89 Super. 169, 214 A.2d 428 (App. Div. 1965).

RIGHT TO RESIST AN UNLAWFUL ARREST 129

with large urban centers where police-citizen encounters are most frequent.

Another index of the trend in this country was rejection of the right to resist unlawful arrests by the American Law Institute in 1958.¹⁹

To date, New Jersey is the only state to abolish the right by judicial decision.²⁰ But there are indications of coming change in other jurisdictions: the Second Circuit, in its opinion in *U.S. v. Heliczer*²¹ noted, though only by way of dictum, that the right is "waning." We may expect to hear more judicial voices on the question of sustaining the right.

With this background we can examine the advantages of retaining the common law privilege of resisting, against the obvious problems it presents in our society.

THE RIGHT TO RESIST SCRUTINIZED

Professor Warner, in his article advancing the abolishment of the right to resist an unlawful arrest,²² maintains the dubious position that:

. . . 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. . . .

Though at one time the innocent may have been as likely to resist illegal arrest as the guilty, this is no longer true. An innocent man will not kill to avoid a few hours, or at the most several days, in jail. Besides, he will ordinarily have no gun, and therefore will be unable to resist successfully.

Thus 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. What he fears is not an illegal arrest, but a legal one, since a legal arrest is based on reasonable belief in his guilt and hence is likely to result in a prison sentence.²³

Professor Warner exhibits a simplistic view of the citizen's resistance when he focuses upon the use of firearms. He further implies that resistance stems only from an effort to avoid incarceration, and overlooks the element of provocation expounded by Anglo-American courts. As to the "criminal element's" fear of the arrest resulting in a valid charge,

¹⁹ MODEL PENAL CODE § 3.04(2)(a) (Tent. Draft No. 8, 1958).

²⁰ *State v. Koonce*, 89 N.J. Super. 169, 214 A.2d 428, 436 (App. Div. 1965).

²¹ *U.S. v. Heliczer*, 373 F.2d 241, 246 (2d. Cir. 1967).

²² *Supra* note 17.

²³ *Supra* note 17 at 331.

by definition, the right only vests when the arrest is actually illegal, and thus would nevertheless sustain a charge. We cannot ignore violation of the law by those who enforce it, even when they are dealing with criminals, or we will erase the boundary between them.

Warner further supports his position with the fact that the historical reasons behind the formulation of the right—danger of disease in the jails, lack of opportunity for bail, physical torture and such—are no longer controlling.

He and his supporters²⁴ repeatedly point out the legal remedies that are available to the wronged citizen. The great fallacy in this reasoning is that even under optimum conditions, these remedies serve only to check abuse of police power. cursory examination of the operational efficacy of those remedies cited as substitutes for resistance is sufficient to ascertain their gross inadequacy. Bail, for instance, is not only expensive, but often unattainable to those who are most often in need of it. In cases of systematic abuse or persecution by the police, the relief of civil injunction cannot be gained until proof of such abuse is established—an all but impossible condition to meet.²⁵ Civil damages under false arrest are naturally regarded as a means of redress to the individual. But there are a multitude of pitfalls which waylay litigation; though action may be brought against the policeman, his superiors, and the municipality, each denies liability by attributing it to another. This makes success cumbersome and infrequent.²⁷

Under the rationale that, "the place to dispute legality of arrest without a warrant is before the magistrate,"²⁸ the idea of the provocation of the arrest is ignored. In the majority opinion in *People v. Cherry*²⁹ the court indicated its appreciation of the emotional response evoked by a patently illegal arrest:

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. . . . If force be necessary to prevent an unlawful arrest, then force may be employed,

²⁴ 27 U. OF PITTS. L. REV. 716 (1966); 9 OKLA. L. REV. 60 (1956); 7 NAT. RES. L.J. 119, 124 (1967); 3 TULSA L.J. 40, 42 (1966).

²⁵ *Supra* note 12 at 1134.

²⁶ *Supra* note 12 at 1135.

²⁷ See, Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. OF CHICAGO L. REV. 345, 346 (1936).

²⁸ *People v. Barton*, 291 N.Y.S.2d 577 (1968).

²⁹ *People v. Cherry*, 121 N.E.2d 238, 239-240 (N.Y. 1954).

RIGHT TO RESIST AN UNLAWFUL ARREST 131

the one limitation on its exercise being that the victim may not pursue his counterattack merely for the sake of revenge or infliction of needless injury.

SCOPE OF THE RIGHT

Courts have taken various positions on the question of when the traditional right to resist an unlawful arrest is operative.

As early as 1823, the court in *U.S. v. Thompson*³⁰ withdrew the right to resist what was technically, but not patently, an unlawful arrest. In *Robinson v. U.S.*³¹ it was held that to justify resistance to an arrest, the individual must know the arrest is actually illegal; his innocence alone is not justification.

Limitations on the right have thus evolved. Not only do these involve knowledge of the patent illegality of the arrest and restriction on the initiation of force, but also the amount of force that may be used to resist.

One sought to be illegally arrested has no right to make a physical attack on the officer seeking to make the arrest simply because the officer tells the person to be arrested to consider himself under arrest or that he has a warrant for him.³²

The officer must initiate the physical action in the arrest before there is a right to physically counter the attempt.³³ The individual illegally arrested must not, therefore, initiate the use of force; but the provocation of the unlawful arrest will usually reduce the crime, i.e., from murder to manslaughter.³⁴

There is great variation in the amount of force with which one may resist an unlawful arrest. The old English courts seemed to set no limit in this area, but that position has been greatly modified both in Britain³⁵ and the United States. A priori determination of the amount of force permitted to resist an unlawful arrest is hampered by the courts' dealing only with force that is prohibited, and not with force that is allowed.

Courts use many standards to determine what force they will permit

³⁰ *Supra* note 15.

³¹ *Robinson v. U.S.*, 4 Okla. Cr. 336, 111 P. 984 (1910).

³² *State v. Francis*, 152 S.C. 17, 70 A.L.R. 1133 (1929).

³³ *Harris v. State*, 21 Ga. App. 792, 95 S.E. 268 (1918); *State v. Robinson*, 145 Me. 77, 72 A.2d 260 (1950).

³⁴ 5 AM. JUR. 2d. *Arrest* § 94.

³⁵ *Supra* note 10; see also, *The People (Att.-Gen.) v. White*, Ir. R. 247 (1947) and the discussion of this case in *Journal of Criminal Law*, No. 45 (January 1948), 82 *et seq.*

in resisting an unlawful arrest. The most broadly accepted view³⁶ is that the amount of force may only be that which is necessary to maintain freedom, without resorting to homicide³⁷ or the use of a deadly weapon.³⁸ Though such resistance will not often be successful with modern police techniques,³⁹ this position protects the right of the individual to assert his sense of justice, while the bar against homicide protects the lives involved.

There is also the theory that force may be met with force. Thereby, the force initiated by the arresting officer may be countered in equal measure by the individual.⁴⁰ Thus some courts following this view carry it to the point that if the officer uses felonious force, so may the resister.⁴¹ If the force used is no greater than that initiated in making the arrest, the individual is within the scope of his right.⁴² This proposition of allowing force proportionate to force would seem to have an inherent tendency to escalate the violence of illegal arrests.

Most jurisdictions maintaining the right to resist unlawful arrests associate it with the right of self-defense. They hold the amount of force permitted in resisting the loss of freedom to be akin to that allowed under the theories of self-defense when in fear of bodily harm.⁴³ This analogy is not completely accurate. Whereas the right of self-defense

³⁶ OKLA. L. REV., *supra* note 24 at 64.

³⁷ *Dugan v. State*, 54 Ariz. 247, 94 P.2d 873 (1939); *People v. Smith*, 315 Ill. App. 671, 43 N.E.2d 240 (1942); *State v. Robinson*, *supra* note 33; *Giles v. State*, 176 Miss. 551, 169 So. 880 (1936); *Hurd v. State*, 119 Tenn. 583, 108 S.W. 1064 (1907); *State v. Anselmo*, 46 Utah 137, 148 P. 1071 (1915).

³⁸ *People v. Smith*, 315 Ill. App. 617, 43 N.E.2d 420 (1942); *State v. Cates*, 97 Mont. 173, 33 P.2d 578 (1934); *State v. Meyers*, 57 Ore. 50, 110 P. 407 (1910); *State v. Rousseau*, 40 Wash. 2d 92, 241 P.2d 447 (1952); *State v. Gum*, 68 W. Va. 105, 69 S.E. 463 (1910).

³⁹ 5 AM. JUR. 2d., *Arrest* §94 n.4: Every man, however guilty, has a right to flee from an illegal arrest, and the exercise of this right does not subject him to arrest as a fugitive.

⁴⁰ OKLA. L. REV. *supra* note 24 at 63; *Perdue v. State*, 5 Ga. App. 821, 63 S.E. 922 (1909); *Smith v. State*, 84 Ga. App. 79, 65 S.E.2d 709 (1951); *Alday v. State*, 57 So. 2d 333 (Fla. 1952).

⁴¹ *Mullens v. State*, 196 Ga. 569, 27 S.E.2d 91, 98 (1943); *Smith v. State*, *supra* note 40.

⁴² *Id.*

⁴³ *Wilkenson v. State*, 143 Miss. 324, 46 A.L.R. 895 (1926): The right to resist an unlawful arrest is a phase of the right of self-defense; that as in other cases of self-defense the person sought to be arrested is justified in taking life only when he has reasonable ground to apprehend that he is in imminent danger of death or great bodily harm; that he is not justified in killing merely for the purposes of resisting an unlawful arrest where the only injury that could be reasonably apprehended is an unlawful detention for a short time or other injury short of death or great harm; that the officer attempting to make an unlawful arrest is simply the aggressor in a like difficulty.

arises in the face of reasonable belief,⁴⁴ the right to resist is predicated upon the *actual* illegality of the arrest. Because the right of self-defense is operative when an officer uses excessive force to make an arrest,⁴⁵ the distinctions between these separate defenses become blurred. An individual has the right of self-defense whether the arrest is legal or illegal.⁴⁶ Thus, while there is a theoretical overlapping of defenses in some instances, in others the need of one or the other is unique. By overlooking these essential differences, the courts are in peril of summarily eliminating the right of resisting an unlawful arrest under the belief that the citizen is protected by the doctrine of self-defense.

THE RIGHT ABOLISHED

The seven states that have abolished the common law right maintain the same basic position: a person is not justified in physically resisting an illegal arrest.⁴⁷

In California, where the statute states,

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 arrests,⁴⁸

the court held, in *People v. Curtis*,⁴⁹ that the defendant who resisted an unlawful arrest can be validly convicted of only simple assault and battery, and not a felony under the statute making a battery on a peace officer engaged in the performance of his duty a felony.⁵⁰ While the court upheld the statute abolishing the right to resist, it still acknowledged the fact that there is a difference in the police making a valid arrest, and their acting beyond the scope of their legal duty. Though the statute purports to completely abolish the right to use force, one might get the feeling that the court was reluctant to wholly embrace the new statute. The court went on to say, "the section was meant at most to eliminate

⁴⁴ PROSSER, TORTS 110 (3 ed. 1964).

⁴⁵ NAT. RES. L.J. *supra* note 24.

⁴⁶ 5 AM. JUR. 2d., *Arrest* § 94 (1962).

⁴⁷ *State v. Owens*, 102 N.J. Super. 187, 245 A.2d 736 (1968).

⁴⁸ CAL. PEN. CODE ANN. § 245b and § 834a (West 1967); *People v. Cannedy*, 76 Cal. Rptr. 24; *People v. Rhone*, 73 Cal. Rptr. 463, 276 A.C.A. 711; Illegality of an arrest would not justify resistance on the part of the defendant accused of assault and battery on two peace officers.

⁴⁹ *People v. Curtis*, 74 Cal. Rptr. 713, 450 P.2d 33 (1969).

⁵⁰ CAL. PEN. CODE ANN. § 243 (West 1967).

common law defense of resistance to unlawful arrest, and not to make such resistance a new substantive crime."⁵¹

The New York statute that eliminated the common law right in that jurisdiction, provides that, "a person may not use physical force to resist. . . ."⁵² This would indicate that passive resistance is not in violation of the law.⁵³ There is, then, the problem of deciding when passive resistance ceases to be passive, and becomes active.

Also to be considered, in jurisdictions abolishing the right, are the antecedent legal consequences that can arise. The defendant may find himself charged under an obstructing justice statute,⁵⁴ though he is not culpable under the statute abolishing the right to resist. The American Law Institute noted this pitfall by excluding such prosecution in their Model Penal Code.⁵⁵ But this proposal has not been adopted in New York,⁵⁶ for instance, where a charge of obstructing justice can result even when there has been compliance with the "no sock" provision. This, then, precludes the person's reliance upon the other "remedies" that the proponents of abolishing the right cite as relief, since the arrest is no longer "illegal." This smacks of inequity.

The problem of entrapment also develops from the present statutes. Again to take New York as an example, the protection afforded by statute against legal entrapment does not extend to situations that may occur as a result of an illegal arrest:

In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was induced or encouraged to do so by a public servant. . . .

⁵¹ *Id.*

⁵² N.Y. PENAL LAW § 35.27 (McKinney Supp. 1968).

⁵³ *People v. Solomonow*, 291 N.Y.S.2d 145 (1968).

⁵⁴ N.Y. PENAL LAW § 195.05 (McKinney 1967) provides that: A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs, or perverts the administration of law or other governmental functions or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act. Obstructing governmental administration is a class A misdemeanor.

⁵⁵ MODEL PENAL CODE § 3.04 (1962), Obstructing Administration of Law or Other Governmental Function: A person commits a misdemeanor if he purposely obstructs, impairs or prevents the administration of law or other governmental function by force . . . physical interference or obstacle . . . *except* (emphasis added) that this section does not apply to flight by a person charged with crime, refusal to submit to arrest . . . or any other means of avoiding compliance with law without affirmative interference with governmental functions.

⁵⁶ N.Y. PENAL LAW § 195.05 (McKinney 1967).

. . . [but] Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.⁵⁷

The last section frees the police from the defendant's defense of entrapment if the officer only creates a situation, ripe with provocation, to which the individual will probably react, so long as the officer has not "encouraged" him to do so. It is not difficult to envision an encounter where an arbitrary police order is calculated to evoke a greater than "passive" response from the individual. This response can then result in a viable charge predicated on that which was initially an illegal act by the police. The situation seems closely analogous to the "fruit of the poisoned tree" doctrine governing the use of illegally obtained evidence. In an arrest resulting from such a deliberately provocative order, the fruits yielded by the poison tree of police abuse are still ripe for use against the defendant.

CONCLUSION

The right to resist an unlawful arrest must rest upon the provocation that a patently illegal arrest arouses in the individual. Esoteric technicalities which are later found to make the arrest illegal should not shield the individual who resisted what he could not have known to be an illegal arrest.⁵⁸ Neither is the right a license for homicide. It is predicated on the fact that men in a free society will react to vindicate themselves when confronted by illegal abuse of power—whether the legal right exists or not.

Supporters of abolishing the right enumerate alternative remedies through which the aggrieved citizen may seek redress. Unfortunately, they ignore the emotional provocation of the moment, and deal only with the situation after it is cold. But the right is not based upon labored contemplation of the legality of the situation.⁵⁹ Historically, when there was time for reflection,⁶⁰ or when resistance was delayed,⁶¹ the resistance was often held to be beyond the protection of the right. Its very nature

⁵⁷ N.Y. PENAL LAW § 35.40 (McKinney 1967).

⁵⁸ *Walker v. City of Birmingham*, 388 U.S. 307 (1967); The court held that an injunction which was not transparently invalid must be obeyed until it is struck down by a court. As early as the nineteenth century, English cases held that provocation was not necessarily a finding as a matter of law in every illegal arrest: (Technical defects in the warrant) *Reg. v. Davis*, 1 Leigh & Cave's C.C. Res. 64.

⁵⁹ *People v. McNeil*, 15 N.Y.2d 717, 266 N.Y.S.2d 614, 20 N.E.2d 648 (1965).

⁶⁰ *Reg. v. Allen*, 7 Ld. Raym. 222 (1967).

⁶¹ *Id.*

of protecting the individual's reaction could not, therefore, be afforded by any of the traditional remedies.

The right need not operate as a means of circumventing the law, or even as a way to avoid the illegal arrest, but should act to protect the reaction elicited by the affront of the situation. It prevents the innocent individual's being charged with resisting arrest to camouflage an otherwise hollow illegal arrest, and guards against legal entrapment resulting from the human reaction to arbitrary assertions of power. It is a unique protection of the individual's sense of justice and sovereignty in the face of abused authority.

Believing that the act of resisting an unlawful arrest is seldom founded on legal knowledge, but on visceral reaction, we feel that the existing statutes abolishing the right to resist an unlawful arrest only serve a punitive function, and do not act to curb the incidents of resistance on the streets.

It is difficult to articulate a statute that will at once protect the individual's justified response to an inflammatory situation, and preclude a charge which is solely the result of this response, while rescinding the privilege of avoiding unauthorized arrests through the use of violence.

Such a statute amending the common law right should express this intent:

The right to resist an unlawful arrest is no longer a privilege to attempt to avoid the illegal arrest. It remains only to protect the individual's initial, uncalculated reaction to the provocative situation of an arbitrary or patently illegal arrest.

No charge will thus result from an uncalculated reaction to resist, unless there has been an effort to inflict serious bodily harm, or the use of a deadly weapon.

The statute might read:

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.

The unamended common law right to resist unlawful arrest does have inherent dangers in our crowded, mobile society. Our proposed model is an effort to protect both citizen and police from abuse.

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