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Criminal Law—Arrest—The Right To Resist Unlawful Arrest*

The common law right to resist an unlawful arrest has been critically reexamined during the past twenty-five years. The impetus for this reappraisal was provided by the Uniform Arrest Act. Section 5 of this Act provides:

> If a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest.[1]

The centuries-old right to resist an unlawful arrest has now been overturned by five states;[2] a sixth state has expressed its sympathy with this trend.[3] The New Mexico Supreme Court has traditionally affirmed the common law right to resist an unlawful arrest.[4] The recent New Mexico case *State v. Selgado*[5] provided New Mexico with an opportunity to reevaluate this doctrine; the Court, however, did not reach the issue.

In *Selgado* several police officers attempted to arrest the defendant and a companion when they tried to visit inmates of the city jail after visiting hours. A fight ensued when one of the officers resorted to a use of force while attempting to make the arrest. The defendant struck back with his fists and with his companion managed to escape from the police station. An officer, firing at the fleeing

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* State v. Selgado, 413 P.2d 469 (N.M. 1966).

1. For the full text of this Act, see Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 343 (1942). The Model Penal Code contains a similar, though slightly stricter provision. Model Penal Code § 3.04 (2) (a) (i) (Tent. Draft No. 8, 1958).

2. Delaware, New Hampshire, and Rhode Island have overturned the right to resist unlawful arrest by statute: Del. Code Ann. tit. 11 § 1905 (1953); N. H. Rev. Stat. Ann. § 594:5 (1955); R.I. Gen. Laws Ann. § 12-7-10 (1956). New Jersey has done so by judicial decision: State v. Koonce, 89 N.J. Super. 169, 214 A.2d 428 (App. Div. 1965). California required a combination of statute and judicial decision: Cal. Penal Code § 834(a); People v. Burns, 198 Cal. App. 2d 839, 18 Cal. Rptr. 921 (Super. Ct. App. Dept. 1962). In *Burns* appellants claimed § 834(a) violated their constitutional rights. The court concluded that it was a "reasonable exercise of the police power. The rights of all individuals are subject to reasonable regulation, and on proper occasion must be restricted for the common good." 18 Cal. Rptr. at 922.

3. People v. Briggs, 25 App. Div. 2d 50, 266 N.Y.S.2d 546 (1966).

4. State v. Kuykendall, 37 N.M. 135, 19 P.2d 744 (1933); State v. Middleton, 26 N.M. 353, 192 Pac. 483 (1920); State v. Calhoun, 23 N.M. 681, 170 Pac. 750 (1918); Territory v. Lynch, 18 N.M. 15, 133 Pac. 405 (1913); Territory v. Trapp, 16 N.M. 700, 120 Pac. 702 (1911), *rev'd on other grounds*, 225 Fed. 968 (8th Cir. 1915).

5. 413 P.2d 469 (N.M. 1966).

pair, killed the companion. At his trial the defendant contended that the fight began because the officers sought to arrest him without a warrant and without probable cause. This defense was rejected and the defendant was convicted of aggravated battery. On appeal the New Mexico Supreme Court, *held*, Affirmed. The defendant contended that he had a right to resist an unlawful arrest; his appeal rested solely upon that proposition.[6]

In a brief opinion, the supreme court decided the case on procedural grounds.[7] No mention was made of the right to resist unlawful arrest except in the most oblique manner; for example, the court said:

> The third tendered instruction purports to set forth the right of a person to resist an unlawful arrest but is an abstract statement of many rules in such form as to be confusing rather than enlightening.[8]

The opinion contains nothing which approaches an affirmation of the right to resist an unlawful arrest. It is the purpose of this Comment to suggest that New Mexico expressly overturn the right to resist an unlawful arrest.

A known arrest by a known officer should not be forcibly resisted regardless of whether or not the arrest is lawful. The right to resist an unlawful arrest is an application of the concept of self-help. Self-help, properly conceived, is not applicable to unlawful arrest situations. Its purpose is to grant an adequate remedy for a wrong when none is available through the judicial process. Thus, the right of self-defense is granted to a citizen because he cannot gain the protection of the law rapidly enough to prevent an impending injury, and once the injury has occurred, his legal remedies are inadequate. A subsequent money judgment against one's attacker is insufficient compensation for permanent injury or loss of life.

This is not the case where a citizen is about to be unlawfully arrested. The injury threatening him 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! The New Mexico Supreme Court took cognizance of these principles in *Territory v. Lynch:*

6. Brief for Appellant, pp. 7-13, 20.
7. 413 P.2d 469.
8. *Id.* at 471.

> The law . . . calls upon the citizens [sic] to exercise patience, if illegally arrested, because he knows he will be brought before a magistrate, and will, if improperly arrested, suffer only a temporary deprivation of his liberty.[9]

If one is unlawfully arrested today, his period of confinement is likely to be brief. In the seventeenth and eighteenth centuries, bail was usually unattainable.[10] Today, it is freely granted for most offenses. Requirements of a prompt hearing and arraignment before a magistrate also serve to protect today's citizen from a lengthy unjustified detention. When the law of arrest was formulated, however, one did not know when the royal judges would arrive for a jail delivery—in some English counties it occurred but once a year.[11] Even then freedom often eluded the grasp of the innocent. If the prosecutor failed to appear, if a grand jury found insufficient evidence to warrant trial, or even if a jury found the prisoner not guilty, having already been confined for months, he was reincarcerated until he had paid certain fees demanded by the jailer, the clerk of the assize, clerks of the peace, and the like.[12] The summary remedy of habeas corpus now offers protection against most of these abuses.

The effect of these criminal and civil procedural remedies on the right to resist an unlawful arrest was summarized by the Supreme Court of New Jersey in *State v. Koonce*:

> In this era of constantly expanding legal protections of the rights of the accused in criminal proceedings, one deeming himself illegally arrested can reasonably be asked to submit peaceably to arrest by a police officer, and to take recourse in his legal remedies for regaining his liberty . . . .[13]

The evolution of the arrester from subjective amateur to objective professional is an additional reason for modifying the right to resist an unlawful arrest. Today's peace officers are salaried public servants, schooled in the basic law of arrest and the rights of the citizenry. Seldom do these professionals make arrests for personal motives as when the law of arrest was developing; in those days arrests were usually made by private citizens. In addition,

9. 18 N.M. 15, 34-35, 133 Pac. 405, 409 (1913).

10. Even as late as 1800, Jane Austen's aunt was denied bail on a shoplifting charge and spent the winter in jail despite her respectability, wealth, and the absurdity of the charge. Warner, *Investigating the Law of Arrest*, 26 A.B.A.J. 151, 152 (1940).

11. Howard, The State of Prisons 14 (1929).

12. *Id.* at 1.

13. 89 N.J. Super, 169, 214 A.2d 428, 436 (App. Div. 1965).

until the ninteenth century, the arrester, whether an officer or private citizen, carried no readily identifiable badge of authority.[14] Consequently, it was difficult for a private citizen to tell if he were being arrested by a bona fide agent of the law. Similarly, in earlier days, the fact that kidnapping was fairly common added to the citizen's fear of submitting himself to the physical control of another. A citizen must often have been in doubt whether he was being arrested for a crime, seized for ransom, or shanghaied for service as an English seaman or for some other form of servitude.[15] These practices are of minimal occurence today. Moreover, our uniformed police are readily identifiable as such, and plainclothesmen are instructed to furnish the identification which indicates their authority.

The immediate danger from an arrest, whether lawful or unlawful, is that the person arrested may be jailed. Seventeenth and eighteenth century prison conditions might well induce resistance to arrest, if only to keep out of jail.[16] A contemporary chronicler tallied the tragic sum of jail conditions during this period:

14. The first uniformed police force was not established until 1832 (London) and it was 1853 before a comparable force first appeared in the United States. Miller, *Arrest Without a Warrant by a Peace Officer in New York*, 21 N.Y.U.L.Q. Rev. 61 (1946).

15. Warner, *Investigating the Law of Arrest, supra* note 10.

16. "Gaol fever," a highly contagious fatal form of typhus, frequently swept the prisons. It was so pestilential that prisoners brought before the Lent Assize at Taunton (1730) infected the court itself—causing the deaths of the lord chief baron, the sheriff, the sergeant, and hundreds of others. More prisoners died from "gaol fever" than were put to death by all the public executioners in the realm—at a time when there were 241 capital offenses. Howard, *op. cit. supra* note 11, at 6-7. Howard's observations were made from 1773 to 1775.

In several prisons there was no food allowance; in others it consisted of a meager bread ration. "Water soup" (bread boiled in water) was not uncommon fare. Prisoners who received bread allowances on alternate days were so hungry that they often ate the entire amount the first morning and then went hungry the rest of that day and the next. Persons who entered jail in the picture of health, emerged scarcely able to move from hunger, and incapable of any labor for weeks thereafter. *Id.* at 1 *passim.*

No medical facilities were available in the prisons. The air was foul and noxious from the "effluvia" of the sick and the lack of sewage facilities. Prisoners were crowded together in close rooms and underground dungeons and chains were often required to prevent escape. Men were not separated from women, nor the sane from the insane. Howard did not wonder that many jailers made excuses and would not accompany him into the wards. *Id* at 4 *passim.*

In addition, every incident of prison life from admission to discharge was made the occasion for levying fees against the prisoners. There were charges for the arrest, for the privilege of detention in this or that part of the prison, for bed and bedding, for food and other "conveniences" of life, and for release. In Massachusetts at the end of the seventeenth century those who were unable to pay their fees "might be sold for life or a period of years into the service of anybody willing to pay their fees." Warner, *Investigating the Law of Arrest, supra* note 10.

> [A]ll the complicated horrors of a prison, put an end every year to the life of one in four of those that are shut up from the common comforts of human life.
>
> Thus perish yearly five thousand men, overborne with sorrow, consumed by famine, or putrified by filth, many of them in the most vigorous and useful part of life . . . .[17]

Where imprisonment was often the equivalent of a death sentence, or at least, a living death, one can understand why men resisted unlawful arrest.

There is, however, an even more important reason why the right to resist unlawful arrest should be discarded, namely that forcible resistance to unlawful arrest invariably endangers the life and limb of the policeman, the person resisting, and the innocent bystanders. The attempted arrest frequently begins an escalation of force which results in a pitched battle and death. That death is a common result of resisting unlawful arrest is demonstrated by the New Mexico cases.[18] The facts in *Selgado* vividly exhibit this tragic escalation of force.[19]

When the right to resist developed, resistance did not pose such grave danger to bodily safety because of the imperfect stage of weaponry development and the personality of the arrester and the person arrested.[20] Today, officers are armed with pistols and rifles and are instructed to shoot if necessary to effect the arrest. An unarmed citizen who tries to resist is foolishly endangering his own safety; an armed citizen who tries to resist is foolishly endangering the safety of both parties and innocent bystanders.

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17. The Gentleman's Magazine and Historical Chronicle, Jan. 1759, p. 17.

18. Six of the seven New Mexico Supreme Court cases involving the right to resist unlawful arrest resulted in at least one death:

State v. Selgado, 413 P.2d 469 (N.M. 1966); City of Albuquerque v. Leatherman, 74 N.M. 780, 399 P.2d 108 (1965) (no death); State v. Kuykendall, 37 N.M. 135, 19 P.2d 744 (1933); State v. Middleton, 26 N.M. 353, 192 Pac. 483 (1920); State v. Calhoun, 23 N.M. 681, 170 Pac. 750 (1918); Territory v. Lynch, 18 N.M. 15, 133 Pac. 405 (1913); Territory v. Trapp, 16 N.M. 700, 120 Pac. 702 (1911), *rev'd on other grounds*, 225 Fed. 968 (8th Cir. 915).

19. 413 P.2d at 470.

20. The armaments possessed by the person making the arrest and the person arrested consisted of no more than quarterstaves or swords. Their range is limited and a hasty retreat was often feasible without fatal consequences. If a private citizen were making the arrest, his duty to capture and interest in doing so was likely to be overshadowed by prudence for his own safety. And, if constables or sheriffs were making the arrest, it was unlikely that they "would attack with such vigor as to require killing them to escape . . . if we may judge by popular accounts of their usual age and military prowess." Warner, *Investigating the Law of Arrest, supra* note 10, at 154.

> [T]he right to resist by force an illegal arrest by a man known to be a police officer is a right which is calculated, if exercised under modern conditions, to increase . . . the mass of human suffering.[21]

The foregoing discussion has attempted to summarize those changed conditions that dictate the overturn of a right to resist unlawful arrest. The New Mexico Supreme Court indicated its awareness of many of these evolutionary developments in *Cave v. Cooley*.[22] In addition, the New Mexico Legislature has prohibited resistance to an unlawful arrest when the officer is acting under a warrant.[23] However, during the generation that the right to resist an unlawful arrest has been reexamined and recommended for burial, the New Mexico Supreme Court has not had occasion to pass upon this issue.[24]

Thus, it appears that changes in society have occurred which merit corresponding changes in the right to resist an unlawful arrest. In addition, as the "right" works out in practice, it results in a combination of ironies that vitiates any effectiveness it otherwise might have.

First, it is primarily the guilty who resist unlawful arrests.[25] Frequently, they are armed (often with concealed weapons) and therefore possess the wherewithal to risk the danger of resistance. Law-abiding citizens are rarely armed in contemporary society. Furthermore, the guilty have a motive for their resistance. They resist from fear of being captured and from fear of being brought before the bar of justice to answer for their misdeeds. The law-abiding citizen on the other hand has little to fear from arrest. Unaccustomed to lawlessness, the idea of escape through violence will probably not even occur to him.[26] "The right to resist illegal arrest by a guntoting hoodlum or gangster."[27]

A second defect of the common law rule permitting resistance to unlawful arrest is that a law-abiding private citizen who might seek to resist in good faith has no sound method by which to gauge

21. *Ibid.*

22. 48 N.M. 478, 484, 152 P.2d 886, 890 (1944).

23. N.M. Stat. Ann. § 40A-22-1(A) (Repl. 1964).

24. After State v. Kuykendall (1933), there was a thirty-two year gap until the issue rearose (peripherally) in City of Albuquerque v. Leatherman, 74 N.M. 780, 399 P.2d 108 (1965), and then came forward more positively the following year in *Selgado*.

25. Comment, 39 Calif. L. Rev. 96, 112 (1951); Warner, *The Uniform Arrest Act, supra* note 1, at 330.

26. Comment, 39 Calif. L. Rev. 96, 112 (1951).

peace officer is a right that can be exercised effectively only by the

27. Warner, *The Uniform Arrest Act, supra* note 1, at 330.

the legality of his conduct. That he knows or thinks himself innocent of the charge will not justify resistance—innocent men may be lawfully arrested. That he reasonably or honestly believes the arrest to be unlawful will not justify resistance—the person arrested is not the arbiter of the legality of his own arrest. What exculpates one who resists arrest is a subsequent judicial determination that the arrest was in fact unlawful.

Third, and perhaps the chief irony of the present law, is the contretemps posed by two hopelessly conflicting but legally permissive uses of force: peace officers have a duty to overcome resistance and perfect the arrest, and citizens have a right to prevent unlawful arrest by forcible resistance. Both may use that force necessary to overcome the other.[28]

Fourth, the right to resist an unlawful arrest is an artificial right; it does not accomplish its purpose. The purpose of the resistance is to prevent the arrest. The right to resist, however, is only raised by a defendant in a criminal action. Having first been unlawfully arrested, the defendant's resistance leads to his lawful arrest for the results of his resistance (usually some form of assault and battery or homicide). He is then subjected to confinement, indictment, and a trial, when all he wanted to do was prevent a temporary deprivation of his liberty by the law. A right supposedly protecting the innocent citizen, succeeds instead in getting him into more trouble than he ever would have encountered had he not resisted in the first place.

The judicial or legislative adoption of section 5 of the Uniform Arrest Act, or a facsimile thereof, is not a total abandonment of an individual's right to use force against an arresting officer. Section 5 is itself limited to certain sets of circumstances. In addition, other traditional defenses remain available to the person arrested in certain unlawful arrest situations.

For example, under Section 5 the use of force is not prohibited where a reasonable man would not believe he was being arrested by a peace officer. This might occur where the officer, especially a plainclothesman, lacked or refused to produce a badge, identifica-

28. Believing his arrest to be unlawful, the person being arrested may resist with (x) amount of force—that necessary to prevent the arrest. Believing the arrest to be lawful, the officer is duty-bound to overcome this resistance and complete the arrest. This will require (x + y) force. Whatever force the officer uses (x + y) can now be equally meted out by the person being arrested to prevent the arrest. For the officer to overcome the suspect at this stage, and an (x + y + z) quantum of force will be necessary. This build-up and showdown mechanism is indelibly cast in the present law; it would be comic were it not so wasteful and deadly in its consequences.

tion card, or other index of duly constituted authority. Or, it might occur where the mode of apprehension was so sudden or under such unusual circumstances that the person arrested, becoming alarmed or frightened, did not reasonably believe a peace officer was attempting to arrest him.[29]

The right to self-defense also provides protection for the individual in certain unlawful arrest situations, namely, where an officer exerts excessive force in making the arrest. When an officer attempting to make an arrest abuses his authority and uses unnecessary force or violence, the right to self-defense arises,[30] whether or not the arrest was otherwise lawful.[31] Although courts often treat them as interchangeable, the rights to self-defense and to resist an unlawful arrest are separate defenses;[32] the defenses are designed to protect the individual against different conditions. Thus, the removal of the latter should not jeopardize an accused's claim for self-help under the former.[33] From a practical standpoint, however, it will probably seldom exculpate a defendant who has forcibly resisted an unlawful arrest.

When the person arrested has an otherwise valid claim of provocation and heat of passion, mitigation should remain available to reduce any homicide conviction from murder to manslaughter. The chances of successfully evoking a plea in mitigation however are also minimal. Because of the evolution in criminal procedures, jail conditions, and the increased danger from resistance, an individual is less likely to be provoked at what he considers an unlawful arrest in 1967 than he would have been in 1767. Nevertheless, an unlawful arrest "may be under circumstances sufficient to constitute adequate provocation . . . ."[34] Although one who resists should not be automatically barred from a plea of excusable homicide, he

29. For an example of how this might arise, see the fact situation in People v. Cherry, 307 N.Y. 308, 121 N.E.2d 238 (1954).

30. 26 Am. Jur. *Homicide* § 229 (1940).

31. 5 Am. Jur. 2d *Arrest* § 94 (1962); Voorhees, The Law of Arrest § 86 (2d ed. 1915).

32. Notes & Comments, 9 Okla. L. Rev. 60, 62-63 (1956).

33. In Delaware (a state which has adopted § 5 of the Uniform Arrest Act), a recent decision made the right of self-defense contingent upon the lack of reasonable knowledge that the party injured by resistance was a police officer attempting to make an arrest. State v. Winsett, 205 A.2d 518 (Del. Super. 1964). This conclusion is unwarranted. It is one case if the officer's threat or use of force is only that which is necessary to bring about the arrest. It is quite another if the officer (through neglect, recklessness, or design) uses excessive force which endangers the suspect's life or limb regardless of whether he submits.

34. Perkins, Criminal Law 51 (1957).

must demonstrate both that a reasonable man would have been provoked to heat of passion, and that he personally was in fact so provoked.

Much of the case law on resistance to unlawful arrest gets embroiled in discussions of how much force an arrested person may use to resist when he is not threatened with death or great bodily harm, and whether an unlawful arrest is such provocation as will automatically reduce a homicide to manslaughter. The resulting jumble of unlawful arrest, self-defense, and provocation has produced an untidy and confusing area of the law.[35] By removing the right to resist unlawful arrest, but retaining the traditional protection afforded by self-defense and provocation in unlawful arrest situations, the case law can achieve greater clarity and consistency.

The law provides certain tort remedies for unlawfully arrested persons, the most common being actions for false imprisonment and false arrest. One commentator has suggested that removing the right to resist unlawful arrest deprives the citizen of these remedies.[36] If this were so it would defeat the purpose of the judicial decision or statute which had abrogated the right to resist unlawful arrest. A primary goal of altering the common law rule is to force a conflict over the legality of an arrest into a judicial arena instead of having it determined on a field of mortal combat. Curtailment of one's civil remedies for unlawful arrest would be inconsistent with this end and would hardly induce compliance on the arrested person's part. Without hope of legal redress, contemporaneous physical redress acquires a more appealing hue.

While interpreting a California statute as having overturned the right to resist unlawful arrest, *People v. Burns* specifically stated that "a person can still pursue his lawful remedies against the police officer."[37] That statute simply requires one who is unlawfully arrested "to seek his redress by resort to the courts, rather than by resort to violence."[38] Moreover, the case law amply demonstrates that elimination of the right to resist unlawful arrest does not diminish an individual's civil remedies for false arrest or imprisonment.[39]

35. *E.g.*, State v. Gum, 68 W. Va. 105, 69 S.E. 463 (1910).

36. 27 U. Pitt. L. Rev. 716, 719 (1966).

37. People v. Burns, 198 Cal. App. 2d 839, 18 Cal. Rptr. 921, 922 (Super. Ct. App. Dept. 1962).

38. *Ibid.*

39. See Gill v. Epstein, 62 Cal. 2d 611, 401 P.2d 397, 44 Cal. Rptr. 45, (1965); Beauregard v. Wingard, 237 Cal. App. 2d 760, 47 Cal. Rptr. 279 (Dist. Ct. App. 1965); Ahern v. Lynch, 207 A.2d 296 (R.I. 1965); Berberian v. Smith, 206 A.2d 531

Practically speaking, it is difficult to recover damages for false imprisonment in an unlawful arrest situation. The police and the municipalities they represent are often effectively judgment proof or civilly immune. In addition, juries are hesitant in granting recovery in unlawful arrest cases. This condition however, antedated the trend begun by the Uniform Arrest Act and has little relation to it. An action for false imprisonment is granted independently of the individual's decision to resist *vel non* the unlawful arrest.

The difficulty of the plaintiff's recovery is chargeable to the law of municipal corporations and to our present jury system. Whether these judicial structures should themselves be reexamined and overhauled is the scope of a much wider inquiry. Thus, although it has been argued that an unlawfully arrested plaintiff should possess a more guaranteed form of recovery, this should not be made a condition precedent to an abrogation of the right to resist forcibly an unlawful arrest.[40] The removal of a dangerous and badly outworn concept from the law should not be prevented by analogy to the contract theory of bargained-for consideration, especially when the consideration sought is in itself an uncertain and noncorrelative commodity.

Where then does New Mexico stand? The last generation has evoked convincing arguments calling for the elimination of the common law right to resist unlawful arrest. The New Mexico Supreme Court, at least marginally aware of these arguments, has not affirmed "the right" for thirty-three years, though it has recently had opportunity to do so. Whether this combination of circumstances is the result of coincidence or judicial design, the time is ripe for the New Mexico Supreme Court to overturn the dangerously anachronistic right to resist unlawful arrest.

As Oliver Wendell Holmes once said:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[41]

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(R.I. 1965); Tessier v. LaNois, 198 A.2d 142 (R.I. 1964). *Cf.* People v. Brock, 220 Cal. App. 2d 605, 34 Cal. Rptr. 113 (Dist. Ct. App. 1963).

40. For proponents of this view, see Notes & Comments, 3 Tulsa L.J.40 (1966); 27 U. Pitt. L. Rev. 716 (1966).

41. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).