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## Criminal Law: The Right to Resist and Unlawful Arrest: An Out-Dated Concept

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## NOTES AND COMMENTS

CRIMINAL LAW: THE RIGHT TO RESIST AN UNLAWFUL ARREST:  
AN OUT-DATED CONCEPT?

The recent "civil rights" demonstrations have brought into sharp focus some of the problems inherent in the law of arrest.

In Los Angeles, in August, 1965, resistance to what the arrestee contended was an unlawful arrest triggered a three-day riot which cost the lives of 34 persons and loss of property estimated at 200 millions of dollars.

In Rochester, New York, in 1964, rioting touched off by a purported unlawful arrest ended after full police authority had been brought to bear.

The press has been filled with stories and photographs of persons, after being arrested, being carried to waiting police vehicles. These persons contend that the "crime" for which they had been arrested was unconstitutional, therefore, the arrest was unlawful.

The "civil rights" demonstrators are not alone in resistance to what they believe is unlawful arrest. Misdemeanants and felons alike have been resisting arrest since early British history.<sup>1</sup>

The right to be free of an unlawful arrest has been inherent in our Angol-American jurisprudence since the signing of the Magna Carta in 1215.<sup>2</sup> Freedom from unlawful arrest is named in the Magna Carta; but also, the right to be free of unreasonable searches and *seizures*<sup>3</sup> is enumerated in both the United States Constitution<sup>4</sup> and the Oklahoma Constitution.<sup>5</sup>

This right to be free of an unreasonable arrest implies that if an arrest which is in fact unlawful is initiated, the person thus wronged has some remedy. The problem lies in the determination of what remedy is to be applied to this wrong, and more important (from our point of view) when it is to be applied.

In order to consider the problem, one must determine what an arrest is, when it is lawful, and conversely, when it is unlawful. In order to consider the remedy applicable, study must be given to the time when the arrest is determined to be unlawful, and who makes that determination.

<sup>1</sup> Hopkin Huggett's Case, 1 Kelyng 59, 84 Eng. Rep. 1082 (K.B. 1666).

<sup>2</sup> MAGNA CARTA, § 39.

<sup>3</sup> Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?* 51 J. CRIM. L., C. & P. S. 402 (1960). This article discusses "seizure" as it has been construed by the courts to include arrest of persons.

<sup>4</sup> U. S. CONST. amend. IV.

<sup>5</sup> OKLA. CONST. art. 2, § 30.

## ARREST — LAWFUL AND UNLAWFUL

The word "arrest" comes from the Latin through the French word "arreter" meaning to "stop," "stay" or "restrain;" the law requires an actual or constructive seizure or detention of the person, under a real or pretended authority for the purpose of taking the individual into the custody of the law.<sup>6</sup>

An arrest is "taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense."<sup>7</sup> Arrest is effected by an actual restraint of the arrestee's liberty,<sup>8</sup> and the person arrested must be conscious of the restraint.<sup>9</sup>

The duty or privilege to arrest is regulated by statute.<sup>10</sup> Under the applicable Oklahoma law, an officer must arrest those persons whom he has authority to arrest. He has no right not to arrest, and in fact, is guilty of a felony, if he "commits any unlawful act tending to hinder justice."<sup>11</sup>

Oklahoma Statutes provide that arrests may be made in the following ways, by an officer:

1. acting under the authority of an arrest warrant;<sup>12</sup>
2. without a warrant of arrest, "for a public offense committed or attempted in his presence;"<sup>13</sup>
3. without a warrant, "when the person arrested has committed a felony, but not in the presence of the arresting officer;"<sup>14</sup>
4. without a warrant, "when a felony has been committed and the officer has reasonable cause to believe that the person arrested has committed it;"<sup>15</sup>
5. without a warrant, "on a charge, made upon reasonable cause, of the commission of a felony by the party arrested;"<sup>16</sup>
6. without a warrant, at night, when an officer has reasonable cause to believe that a felony was committed by the person arrested, even though it is later determined that no felony was committed.<sup>17</sup>

<sup>6</sup> Wilgus, *Arrest Without A Warrant*, 22 MICH. L. REV. 541 (1924).

<sup>7</sup> A.L.I. Code of Criminal Procedure § 18 (1931); 4 Blackstone Commentaries 289.

<sup>8</sup> *Alter v. Paul*, 101 Ohio App. 139, 135 N.E. 2d 73 (1955).

<sup>9</sup> *Jenkins v. U.S.* 161 F.2d 99 (10th Cir. 1947); *Harrer v. Montgomery Ward & Co.*, 124 Mont. 295, 221 P.2d 428 (1950); *State v. Williams*, 237 S.C. 252, 116 S.E.2d 858 (1960).

<sup>10</sup> *Jones v. State*, 88 Okla. Cr. 243, 202 P.2d 228 (1949); *Duffey v. State*, 79 Okla. Cr. 218, 153 P.2d 629 (1944); *Marple v. State*, 51 Okla. Cr. 240, 1 P.2d 836 (1931). Regarding a peace officer's duty to arrest, see 21 OKLA. STAT. § 532 (1961); 37 Mo. Stat. § 544.140 (1949); *State v. Nolan* 354 Mo. 980, 192 S.W.2d 1016 (1946); *State v. Boyd*, 108 Mo. 518, 84 S.W. 191 (1904); *Walter, Some Proposals for Modernizing the Law of Arrest*, 39 CALIF. L. REV. 96, 103 (1951).

<sup>11</sup> 21 OKLA. STAT. § 532(3) (1961).

<sup>12</sup> 22 OKLA. STAT. § 187(1) (1961).

<sup>13</sup> 22 OKLA. STAT. § 196(1) (1961).

<sup>14</sup> 22 OKLA. STAT. § 196(2) (1961).

<sup>15</sup> 22 OKLA. STAT. § 196(3) (1961).

<sup>16</sup> 22 OKLA. STAT. § 196(4) (1961).

<sup>17</sup> 22 OKLA. STAT. § 198 (1961).

Arrests made under any circumstances other than those listed in the appropriate statute are unlawful.<sup>18</sup>

From these statutes it can be seen that the law, in Oklahoma, requires one of three things for an arrest by a peace officer to be lawful; he is required to arrest under a proper warrant, or for an offense committed or attempted in his presence, or upon reasonable belief that the person arrested has committed a felony.

As a matter of law, a person has a right to resist any unlawful arrest.<sup>19</sup>

The Oklahoma Court of Criminal Appeals, in an early case said:

A peace officer making an arrest without authority to do so occupies the same relations (*sic*) to the party arrested that any other private citizen would. He is a trespasser who has no right to detain the person, and hence no right to prevent an escape, and in preventing an escape he is still a trespasser.<sup>20</sup>

The court also held that the Oklahoma statute pertaining to self defense was applicable.<sup>21</sup> The statute states that one may use whatever force is necessary to repel a trespass, provided that the force used does not exceed that which is necessary.<sup>22</sup>

A majority of the states recognize the right to resist an unlawful arrest.<sup>23</sup> In these states the law has created an anomaly. In Oklahoma, for example, an officer is informed during the night, by a person whom he considers to be reliable, that X has committed a felony, when in fact X has committed no wrong. The officer has authority, under the statute, to arrest X,<sup>24</sup> and in fact, he is duty bound to effect the arrest.<sup>25</sup> But, X, who has committed no wrong, is privileged to resist arrest. It is unlawful as to him.<sup>26</sup>

The guilty person may also resist an unlawful arrest. Professor John B. Waite, writing in the *Michigan Law Review*, commented:

<sup>18</sup> Note that the statutes cited apply only to arrests by peace officers; the statute setting out a private citizen's right to arrest is 22 OKLA. STAT. § 202 (1961).

<sup>19</sup> See, *Yates v. State*, 73 Okla. Cr. 51, 117 P.2d 811 (1941); *Davis v. State*, 53 Okla. Cr. 411, 12 P.2d 555 (1932); *Collegenia v. State*, 9 Okla. Cr. 425, 132 P. 375 (1913).

<sup>20</sup> *Collegenia v. State*, 9 Okla. Cr. 425, 132 P. 375 (1913).

<sup>21</sup> *Collegenia v. State*, *supra* note 19.

<sup>22</sup> 21 OKLA. STAT. § 643(3) (1961). This section of the statute is identical to the New York statute on self defense, N. Y. CONSOL. LAWS § 246 (McKinney 1944), as applied in *People v. Cherry*, 307 N.Y. 308, 121 N.E.2d 238 (1954).

<sup>23</sup> See, *State v. Eddington*, 95 Ariz. 10, 386 P.2d 20 (1963); *Finch v. State*, 101 Ga. App. 73, 112 S.E.2d 824 (1960); *People v. Smith*, 315 Ill. App. 671, 43 N.E.2d 420 (1942); *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. Cr. App. 1965); and *King v. State*, 131 Tex. Cr. 442, 99 S.W.2d 932 (1936).

<sup>24</sup> 22 OKLA. STAT. § 198 (1961).

<sup>25</sup> 21 OKLA. STAT. § 532(3) (1961).

<sup>26</sup> *Perrott v. Commonwealth*, 287 S.W.2d 440 (Ky. 1956) and *People v. Dreares*, 15 App. Div. 2d 204, 221 N.Y.S.2d 819 (1961).

As a matter of common sense, the average man may feel startled at the idea that a person *guilty* of felony [or misdemeanor] possesses a *legal right to resist the police officer* who endeavors to arrest him; but such appears to be the law.<sup>27</sup>

In a Washington case, the court said, "Every man, however guilty, has a right to shun an illegal arrest by flight."<sup>28</sup>

### HISTORICAL DEVELOPMENT

The historical development of the right to resist an unlawful arrest can be traced through the modern American cases<sup>29</sup> to *Bishop's New Criminal Law*, in which the author states, "If one, even an officer, undertakes to arrest another unlawfully, the latter may resist him."<sup>30</sup> It is interesting to note that the author cites no authority for this statement.

The authors of *Selected American Cases on the Law of Self Defence (sic)*<sup>31</sup> continue in much the same vein:

Although a man will not be justified, then, if he kill in defence (*sic*) against an illegal arrest of an ordinary character; yet, the law sets such a high value upon the liberty of the citizen, that an attempt to arrest him unlawfully is esteemed a great provocation, such as will reduce a killing in the resistance of such an arrest to manslaughter.<sup>32</sup>

In support of this statement, several British and American cases are cited. In *Rex v. Patience*,<sup>33</sup> decided in 1837, the court held that the arrest of the defendant was unlawful, therefore, he had a lawful right to resist. In *Rex v. Curvan*,<sup>34</sup> decided in 1826, the court held that there was no right to arrest, and the resistance by the defendant was lawful. In *Rex v. Thompson*,<sup>35</sup> decided in 1825, an arrest was attempted, but because of resistance by the defendant, failed. The court held the attempted arrest was unlawful, therefore, the defendant had a right to resist. So holding, the court cited *Rex v. Ford*,<sup>36</sup> decided in 1817. (Here the authority used in *Selected American Cases on the Law of Self Defence (sic)*<sup>37</sup> becomes less substantial.) In *Ford*, the court ruled that the arrest was legal, but

<sup>27</sup> Waite, *Public Policy and the Arrest of Felons*, 31 MICH. L. REV. 749, 754-55 (1933). (Emphasis by author.)

<sup>28</sup> *State v. Rousseau*, 40 Wash. 2d 92, —, 241 P.2d 447, 449 (1952).

<sup>29</sup> *Roberson v. State*, 43 Fla. 156, 29 So. 535 (1901) was cited by the Oklahoma Court of Criminal Appeals in *Walters v. State*, 403 P.2d 267 (1965). App. 1965).

<sup>30</sup> 1 BISHOP, NEW CRIMINAL LAW § 868 (2) (8th ed. 1892).

<sup>31</sup> HERRIGAN & THOMPSON, SELECTED AMERICAN CASES ON THE LAW OF SELF DEFENCE (*sic*) (1874).

<sup>32</sup> *Id.* at 716.

<sup>33</sup> *Rex v. Patience*, 7 Car. & P. 775, 173 Eng. Rep. 338 (N.P. 1837).

<sup>34</sup> *Rex v. Curvan*, 1 Moody 132, 168 Eng. Rep. 1213 (K.B. 1826).

<sup>35</sup> *Rex v. Thompson*, 1 Moody 80, 168 Eng. Rep. 1193 (K.B. 1825).

<sup>36</sup> *Rex v. Ford*, Rus. & Ry. 329, 168 Eng. Rep. 828 (K.B. 1817).

<sup>37</sup> *Herrigan & Thompson, op. cit. supra* note 31.

commented, as dictum, that one has a lawful right to resist an unlawful arrest.

In *The Queen v. Tooley*,<sup>38</sup> decided in 1710, the court held that the defendant had a right to resist an unlawful arrest, and therefore, his resistance would be excused. So ruling, the court mentioned *Hopkin Huggett's Case*,<sup>39</sup> decided in 1666, but overruled it.

*Hopkin Huggett's Case* ruled that one could not resist an unlawful arrest, nor could persons aid one unlawfully arrested. The court said:

And we thought it to be of dangerous consequence to give any encouragement to private men to take upon themselves to be the assertors of other men's liberties, and to become patrons to rescue them from wrong; especially in a nation where good laws are for the punishment of all such injuries, and one great end of law is to right men by peaceable means, and to discountenance all endeavors to right themselves, much less other men, by force.<sup>40</sup>

With this language, the court overruled the next case upon which the authors of *Selected American Cases on the Law of Self Defence (sic)* and the courts in subsequent cases have relied.

*Sir Henry Ferrers's (sic) Case*,<sup>41</sup> decided in 1635, is unusual in that it has apparently been misinterpreted by the authorities which cite it.

{T}roubling to dip into the "history of Anglo-Saxon jurisprudence" can be quite a different thing from merely assuming that it is what one might wish it to be.<sup>42</sup>

*Ferrers's (sic) Case* involved an unlawful arrest. The facts were these. A warrant had issued for the arrest of Sir Henry Ferrers, Knight. His true name was Sir Henry Ferrers, Baronet. The warrant was executed; Ferrers obeyed and was taken into custody. His servant attempted to rescue him, and in so doing, killed the arresting constable. The court, in deciding the case, said:

But upon the evidence it appeared clearly, that Sir Henry Ferrers obeyed, and was put into an (*sic*) house before the fighting betwixt the officer and his servant; wherefore he was found "not guilty" of the murder and manslaughter.<sup>43</sup>

Obviously, the case was decided on the merits; Ferrers had been charged with murder, the contention being that he was "present, aiding and abetting & c."<sup>44</sup> The evidence led the court to believe that he had been removed from the scene of the fighting, that he had complied with the arrest, although it was unlawful.

<sup>38</sup> *The Queen v. Tooley*, 2 Ld. Raym. 1296, 92 Eng. Rep. 349 (K.B. 1710).

<sup>39</sup> *Hopkin Huggett's Case*, *supra* note 1.

<sup>40</sup> *Id.* at 1083.

<sup>41</sup> *Sir Henry Ferrers's (sic) Case*, Cro. Car. 371, 79 Eng. Rep. 924 (K.B. 1635).

<sup>2</sup> Kuh, *Reflections on New York's 'Stop and Frisk' Law and Its Claimed Unconstitutionality*, 56 J. CRIM. L., C. & P.S. 32, 33 (1965).

<sup>43</sup> *Sir Henry Ferrers's (sic) Case*, *supra* note 41 at 372, 79 Eng. Rep. at 924.

<sup>44</sup> *Sir Henry Ferrers's (sic) Case*, *supra* note 41 at 371, 79 Eng. Rep. 924.

While the court in *Ferrers's (sic) Case* does talk of an unlawful arrest, there was no issue involving the arrest, rather the murder of the officer, and Ferrers' participation therein. Without question, the comments of the court about unlawful arrest, which have been followed by subsequent courts almost religiously, are dicta.

From these cases, it appears that the law was in a state of flux between 1635 when *Ferrers's (sic) Case* was decided and 1710 when *Tooley's case* was decided. It also appears that the law had solidified by 1825 when the *Thompson* case was decided. From 1825 to date, the law in the United States has remained consistent with the principle enunciated in *Tooley's case*.

The confusion as to how the law came to be what it is today should by now be readily apparent to the most casual observer. The modern law is clear, regardless of the fact that it is based on dicta.

In the majority of the United States, the person sought to be arrested can resist that which he believes to be an unlawful arrest; an officer is bound, and under legal sanctions should he fail,<sup>45</sup> to "act aggressively"<sup>46</sup> and carry through with an arrest once he commences it.

In history, there is disagreement with the present law. Some philosophers hold that the government of man should be supreme, unless the decrees of that government are contrary to basic moral concepts.

Saint Thomas Aquinas, in his *Summa Theologica*, said: Now it happens often that the observance of some point of law conduces to the common good in the majority of cases and yet in some cases is very hurtful. Since then the law-giver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. . . . Nevertheless it must be noted that if the observance of the law according to the letter does not involve any sudden risk needing instant remedy, it is not the business of anyone whatsoever to expound what is useful and what is not useful to the state.<sup>47</sup>

From *this*, it can be seen that at least one philosopher does not agree with the modern American law.

In addition, John Locke, the great advocate of individual liberty as opposed to state intervention, said:

{W}here the injured party may be relieved and his damages repaired by appeal to the law, there can be no pretence for force, which is only to be used where a man is intercepted from appealing to the law.<sup>48</sup>

<sup>45</sup> 21 OKLA. STAT. § 532 (3) (1961).

<sup>46</sup> *Champion v. State*, 253 Ala. 428, —, 44 So.2d 616, 620 (Ct. App. 1949).

<sup>47</sup> Aquinas, *Summa Theologica—Part I of Second Part Q.* 96, Art. 6, in 20 GREAT BOOKS OF THE WESTERN WORLD 235 (Hutchins ed. 1952).

<sup>48</sup> Locke, *Concerning the True Original Extent and End of Civil Government*, ch. 18 § 207, in 35 GREAT BOOKS OF THE WESTERN WORLD 25, 72 (Hutchins ed. 1952).

Locke maintained, however, that there must be some adequate remedy afforded the wronged party, and in a later section stated that if the majority of the people are wronged, "how they will be hindered from resisting illegal force used against them I cannot tell. This is an inconvenience, I confess, that attends all governments. . . ."<sup>49</sup>

John Stuart Mill suggests the *law* in answer to Locke's query. "Whenever, . . . there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty and placed in that of morality or law."<sup>50</sup>

### THE MODERN VIEW

It could be argued that the views of these men have been passed by the times. However, that they lived and wrote centuries ago does not affect the validity of their thoughts, their concepts, and the effect of the ideas which they upheld. As recently as 1964, Judge J. Edward Lumbard, speaking before the Chicago Crime Commission, agreed with Aquinas, Locke and Mill. Judge Lumbard said:

Our effort must be on a national scale and, in order to bear fruit, it must win the consensus of all citizens who believe that orderly government is the indispensable basis for individual liberty and the reasonable enjoyment of our cherished freedoms.<sup>51</sup>

Judge Lumbard, while speaking for himself, was but echoing the opinions of others knowledgeable in the field, such as Professor John B. Waite, of the University of Michigan Law School, and Professor Sam B. Warner, of the Harvard Law School. Both of these men, according to O. W. Wilson, Superintendent of the Chicago Police Department, "have accompanied the police on their tours of duty to learn and report the true facts."<sup>52</sup> As a result of their experience, and as a solution to the anomaly created by the present law, Professor Warner played the principle role in drafting the Uniform Arrest Act.<sup>53</sup>

The right to resist an unlawful arrest is recognized in 45 of the 50 states.<sup>54</sup> Four of the states which forbid resistance to an unlawful arrest operate under Section 5 of the Uniform Arrest Act. They are Rhode Is-

<sup>49</sup> 35 GREAT BOOKS OF THE WESTERN WORLD, *op. cit. supra* note 48, § 209, at 73.

<sup>50</sup> Mill, *On Liberty*, ch. 4, in 43 GREAT BOOKS OF THE WESTERN WORLD 267, 306 (Hutchins ed. 1952).

<sup>51</sup> Lumbard, *The Citizen's Role in Law Enforcement*, 57 J. CRIM. L.C. & P. S. 67, 72 (1965). This article is the text of an address delivered by Judge Lumbard on November 15, 1964, to the Chicago Crime Commission.

<sup>52</sup> Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L., C. & P. S. 395, 399 (1960).

<sup>53</sup> The UNIFORM ARREST ACT is set out in full in 28 VA. L. REV. 315, 343 (1942). For the purpose of this comment, we are concerned only with section 5, which provides in substance, that one may not resist arrest by a peace officer.

<sup>54</sup> For a sampling of various jurisdictions, see *supra* note 23.

land, New Hampshire, Delaware and California.<sup>55</sup> The Uniform Arrest Act is an attempt, on the part of educated, informed persons to provide a compromise between unbounded liberty and an ordered society. Section 5 of the 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.<sup>56</sup>

In a fifth state, New Jersey, a court of appeals recently ruled that resistance to an unlawful arrest is unlawful. "Self-help," said the court, "is antisocial in an urbanized society."<sup>57</sup> Acting where the state legislature had not, the court said: "We declare it to be the law of this state that 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, whether or not the arrest is illegal."<sup>58</sup>

### REMEDIES

It is submitted that this section is the only solution of the anomaly brought about by the confrontation of the duty-bound, reasonably careful officer with the suspicious, though innocent, citizen in the arrest-resist situation.

However, while the Uniform Arrest Act provides that a person who has been arrested by a peace officer may not lawfully resist arrest, it does not prohibit or preclude the traditional remedies afforded the victim of an unlawful arrest. A person, unlawfully arrested, still has access to the traditional tort remedies for false imprisonment or false arrest. In addition, the criminal sanctions of false arrest, false imprisonment, or in extreme cases, kidnapping are present to deter the mistaken or overzealous officer. However, it is recognized that, "Civil suits for damages filed against the individual officer have not proved adequately effective in preventing police abuse of authority."<sup>59</sup>

Nor have criminal sanctions against police officers been particularly successful, as is noted by Caleb Foote in the *Minnesota Law Review*. Professor Foote observed: "There are criminal penalties in existence providing for the punishment of many types of police violations of individual rights, but these are ineffective for the obvious reason that policemen and prosecutors do not punish themselves."<sup>60</sup>

<sup>55</sup> R. I. GEN. LAWS ANN. § 12-7-10 (1956); N. H. REV. STAT. ANN. 594:5 (1955); DEL. CODE ANN. TIT. 11, § 1905 (1953); CAL. PENAL CODE § 835 (a) (Supp. 1965).

<sup>56</sup> UNIFORM ARREST ACT § 5.

<sup>57</sup> TIME, Nov. 12, 1965, p. 61.

<sup>58</sup> *Ibid.*

<sup>59</sup> Wilson, *supra* note 52, at 400.

<sup>60</sup> Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). See also, LAFAYE, ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY 426 (1965).

It would be, under these circumstances, foolish to advocate the Uniform Arrest Act. One basic premise of our form of government and of our system of law is that there be an adequate remedy for every wrong. The Uniform Arrest Act removes the right to resist an unlawful arrest; it provides no remedy in the event an unlawful arrest is effected.

The Supreme Court of Washington, in *State v. Rousseau*,<sup>61</sup> suggests:

If further protections are desirable against unlawful arrest, search and seizure, they can and should be provided legislatively rather than through a somewhat emotional shotgun application of a rule of evidence which misses the bull's-eye, the specific aim or purpose of the rule—that is the protection of the innocent, law-abiding citizen—about as often as it hits it. Legislation, on the other hand, could be pinpointed and directed precisely at specific protection for innocent persons who are victimized by law enforcement officers. Among other things, (a) criminal penalties, and (b) the amount of civil damages recoverable could be increased significantly. The legislature in a variety of ways could facilitate recovery of civil damages and provide any needed additional protection for innocent victims of unlawful arrest, search and seizure.<sup>62</sup>

Much the same was advocated by Chicago's Superintendent of Police, O. W. Wilson, in his article "Police Arrest Privileges in a Free Society: A Plea for Modernization."<sup>63</sup> Wilson cites approvingly a study by the California Bar Association Committee on Criminal Law and Procedure, which proposed:

[T]he answer [to the problem of unlawful arrest, search and seizure] might lie in a new kind of civil action, or better, a summary type of proceeding, for a substantial 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 many outlays of public funds the taxpayers and administrative heads would insist upon curbing unlawful police action.<sup>64</sup>

### CONCLUSIONS

We submit that the legal right to resist an unlawful arrest is an outdated concept; it is founded on considerations perhaps valid centuries ago, but which should have no effect on the modern law of arrest.

When the law of arrest developed, resistance to an arrest by a peace officer did not involve the serious dangers it does

<sup>61</sup> *State v. Rousseau*, 40 Wash. 2d 92, 241 P.2d 447 (1952).

<sup>62</sup> *Id.* at —, 241 P.2d at 452 (Concurring opinion).

<sup>63</sup> Wilson, *supra* note 52, at 400-01.

<sup>64</sup> *Ibid.*, quoting 29 CAL. S. B. J. 263-64 (1954).

today. Constables and watchmen were armed only with staves and swords, and the person to be apprehended might successfully hold them off with his own weapon and thus escape. Today, every peace officer is armed with a pistol and has orders not to desist from making an arrest though there is forceful resistance. Accordingly, successful resistance is usually possible only by shooting the officer to prevent him from shooting first.<sup>65</sup>

What has been created is an extremely dangerous and undesirable anomaly which progressive legislation, as urged by the Washington court<sup>66</sup> and the California Bar,<sup>67</sup> can correct.

Judge Lumbard, addressing the Chicago Crime Commission, urged legislative reformation of our criminal laws, saying: "[W]e must completely overhaul criminal justice. In many of our states there has been no thorough re-examination for almost 100 years."<sup>68</sup>

What is acknowledged by every authority in the field is the desirability of maximum public security with minimum interference with public liberty. The law has the duty to mediate these opposites within the framework of American liberties. "[I]n view of the considerations involved, is it not better, that illegal arrest be remedied by the proper machinery of the law rather than by the pistol?"<sup>69</sup>

Fully realizing that imposition by the law of Section 5 of the Uniform Arrest Act will lower the minimum allowable interference with individual liberties, it is nonetheless urged as the necessary compromise to protect both the individual and the officer from injury or even death.

Any compromise, however, requires some mutual concession. Individuals, wronged by mistaken or overzealous peace officers, should have effective sanctions provided by law, rather than the present inadequate remedies.

In short, Section 5 of the Uniform Arrest Act should be enacted to end the presently existing anomaly: the right to resist an unlawful arrest versus the duty to arrest and overcome resistance. To temper the use of this near-absolute freedom to arrest, based on reasonable belief, legislation should be enacted, concurrent with this section of the Uniform Arrest Act, allowing the wronged individual to bring an action in tort against both the arresting officer and the political subdivision by which he is employed.

*Max Hochanadel*

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<sup>65</sup> Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 330 (1942).

<sup>66</sup> *State v. Rousseau*, *supra* note 62.

<sup>67</sup> Wilson, *supra* note 52, at 400-01.

<sup>68</sup> Lumbard, *supra* note 51, at 67.

<sup>69</sup> Note, 23 MICH. L. REV. 62, 66 (1924).