RESISTING UNLAWFUL ARRESTS: INVITING ANARCHY OR PROTECTING INDIVIDUAL FREEDOM?

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Freedom is a man's natural power of doing what he pleases, so far as he is not prevented by force or law.[1]

I. INTRODUCTION

At the heart of the American psyche is the staunch belief that we cannot tolerate threats to personal freedom. Our nation's history is rife with stories of great men united as one to fight tyranny and injustice. This belief was borne first from within the individuals involved and, in time, propagated into the massed armies that eventually sent the British home and established a new nation.

Few American tenets are as fundamental as the protection of individual rights and freedoms. Indeed, the government's pledge to protect this principle is embodied in the very cornerstone of our government—the United States Constitution. Its twenty seven amendments serve as a reminder and recogni-

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1. CORPUS IURIS III, 1.

tion that the government must be watched so that it does not trample an individual's rights while purporting to act under color of law.

All Americans are driven by their internal sense of justice nurtured by the notion of what it is to be American. It is against this backdrop that a once sacred right—the right of an individual to resist an unlawful arrest—is being reexamined in light of new and compelling public policy considerations.

This Article examines the historical foundation for the common-law right to resist unlawful arrests. It then discusses the various reasons for the trend toward its abrogation. Finally, this Article explores the middle ground between the complete abrogation of the right and its unlimited retention as a possible solution to this rancorous issue.[2]

II. THE RIGHT EXPLAINED—SCOPE

The right to resist an unlawful arrest stems from the basic principles governing the law of self-defense.[3] An unlawful arrest at common law amounted to a trespass against the person, such as a battery.[4] This was true even if the person effecting the arrest was a police officer or other law enforcement official.[5] The right, like the law governing self-defense, is a limited one. The person subjected to the illegal arrest may use only a "reasonable" amount of force to repel the arresting official.[6] Therefore, because law enforcement officials rarely use deadly force to arrest a suspect; the law of self-defense prohibited an individual from using deadly force to resist an arrest.[7]

The Constitution itself has been cited as a basis for asserting the right of self-defense.[8] The Fourth Amendment prohibits unreasonable seizures;

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2. This Article addresses only the abrogation of the right to resist an unlawful arrest made by law enforcement officials. It does not examine the right to resist an arrest effected by a private individual.

3. *See* State v. Ritter, 472 N.W.2d 444, 451 n.7 (N.D. 1991) (explaining that the right derives from an emphasis on self-reliance).

4. State v. Laurel, 476 P.2d 817, 820 (Or. Ct. App. 1970).

5. *See* People v. Eisenberg, 249 N.W.2d 313, 316 (Mich. Ct. App. 1976) ("An unlawful arrest is nothing more than an assault and battery against which the person sought to be restrained may defend himself as he would against any other unlawful intrusion upon his person or liberty."); Boyd v. State, 406 So. 2d 824, 826 (Miss. 1981) (quoting 6 AM. JUR. 2D *Assault & Battery* § 79 (1963)).

6. People v. Eisenberg, 249 N.W.2d at 315. *But see* State v. Poinsett, 157 S.E.2d 570, 571 (S.C. 1967) ("A person has a 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.").

7. *See* John Bad Elk v. United States, 177 U.S. 529, 535 (1900).

8. *See* White v. Morris, 345 So. 2d 461, 466-67 (La. 1977). *But see* Ellison v. State, 410 A.2d 519, 525-26 (Del. Super. Ct. 1979) (holding that the Fourth Amendment provides no constitutional basis for resisting an unlawful arrest), *aff'd*, 437 A.2d 1127 (Del. 1981); Roberts v. State, 711 P.2d 1131, 1135-36 (Wyo. 1985) (holding that no constitutional right to resist unlawful arrest exists).

therefore, an individual that resists an unlawful arrest is simply exercising his constitutionally guaranteed right under the Fourth Amendment.[9]

Although the lawfulness of the arrest is most often at issue, in some instances, the issue is whether an "arrest" occurred.[10] Confrontations not involving the potential for a deprivation of a person's liberty, do not trigger this right.[11]

A. *Historical Background*

The origins for the common-law right to resist an unlawful arrest can be traced back almost three hundred years to *The Queen v. Tooley*.[12] In *Tooley*, Samuel Bray, a constable believing that he was acting under a statute allowing him to arrest "incontinencies," came upon Anne Dekins, whom Bray believed was disorderly and should, therefore, be arrested in accordance with the statute.[13] After arresting her, and as he was taking her to prison, Bray encountered three men that demanded Dekins's release, even though they did not know her.[14] Bray explained that he was a constable and was performing his duties for the Queen.[15] Nonetheless, the men drew their swords.[16] Bray was able to get Dekins to prison, but shortly thereafter, he was again confronted by the same sword-wielding men that had demanded that he release Dekins from her imprisonment.[17] When Bray called to some people for help, a man named Joseph Dent came to his aid.[18] As Dent tried to assist Bray, one of the men killed him.[19]

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9. The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

10. *See, e.g.*, Barnard v. State, 602 A.2d 701, 705-06 (Md. 1992) (holding that the defendant was not arrested until the police told him that he was under arrest and they physically restrained him).

11. *Id.* at 706 (defining an "arrest" as "'the taking, seizing or detaining of the person of another, *inter alia*, by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest'") (quoting Morton v. State, 397 A.2d 1385, 1388 (Md. 1979)); *see also* California v. Hodari D., 499 U.S. 621, 626 (1991) (stating that "an arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority"). In *Hodari D.*, the Court ruled that a "seizure" did not occur when a police officer, acting without probable cause, pursued a fleeing juvenile. *Id.* at 629. During the chase, the juvenile discarded a piece of rock cocaine. *Id.* at 623. Because a "seizure" had not taken place, the Fourth Amendment was not implicated. *Id.* at 629.

12. The Queen v. Tooley, 92 Eng. Rep. 349 (1709).

13. *Id.* at 349.

14. *Id.* at 350.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

Two issues were before the King's Bench on appeal: whether the arrest was lawful and, if the arrest was not lawful, whether the "provocation" of an unlawful act sufficiently mitigated the crime from murder to manslaughter.[20] A sharply divided court found that the killing could rise no higher than manslaughter.[21] The majority reasoned that the arrest effected without a warrant was unlawful.[22] The court held that "if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion; much more where it is done under a colour of justice, and where the liberty of the subject is invaded, it is a provocation to all the subjects of England."[23]

The minority warned that determinations as to the lawfulness of an arrest should not be left to a mob that would enjoy immunity for its subsequent actions.[24] The majority countered that the unlawfulness of the arrest acted only to reduce the crime and not to exonerate it.[25]

Almost two hundred years later in 1900, the United States Supreme Court would employ much the same rationale in the case of *John Bad Elk v. United States*[26] and reaffirm the common-law right to resist an illegal arrest.[27] In *John Bad Elk,* the defendant was a police officer and a Native American who lived on the Pine Ridge Indian reservation in South Dakota.[28] Another man saw John Bad Elk shooting his gun into the air and asked John Bad Elk to come by his office to discuss the incident.[29] When John Bad Elk did not show up, the man ordered the reservation's police to arrest the defendant.[30] The arrest was unlawful for a number of reasons.[31] First, it was unclear whether there was a violation of any applicable law.[32] At best, the crime would have constituted a misdemeanor.[33] Second, even assuming that the defendant had committed a misdemeanor, the violation had not been observed by the police.[34] Therefore, the police needed a warrant—something they never obtained.[35]

Nonetheless, the police searched for and eventually found John Bad Elk.[36] After some dilatory tactics by the defendant, the events came to a

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20. *Id.*
21. *Id.* at 352.
22. *Id.*
23. *Id.*
24. *Id.* at 353.
25. *Id.*
26. John Bad Elk v. United States, 177 U.S. 529 (1900).
27. *Id.* at 536-37.
28. *Id.* at 530.
29. *Id.*
30. *Id.*
31. *Id.* at 537.
32. *Id.* at 532.
33. *Id.* at 535.
34. *Id.* at 531.
35. *Id.* at 533.
36. *Id.* at 531.

head.[37] John Bad Elk asked the police officers under what authority and for what crime they were arresting him.[38] The officers replied that because the defendant was a police officer he should know the law and come with them.[39]

There were conflicting versions of what happened next.[40] The defendant testified that he knew the police officers were going to take him into the police station no matter what and that one of the officers appeared to be reaching for his gun.[41] The defendant shot first, however, killing one of the police officer.[42] On appeal, the Supreme Court found that the trial court's instructions to the jury were erroneous.[43] The Court stated:

> [T]he charge presented the [defendant] to the jury as one having no right to make any resistance to an arrest by these officers, although he had been guilty of no offence, and it gave the jury to understand that the officers, in making the attempt, had the right to use all necessary force to overcome any and all opposition that might be made to the arrest, even to the extent of killing the individual . . . .[44]

The Court generally defined a defendant's right to resist an unlawful arrest with an inexact formula that the defendant "had the right to use such force as was necessary to resist an attempted illegal arrest."[45] Just as the King's Bench in *Tooley* had done nearly two hundred years before, the Supreme Court in *John Bad Elk* suggested that the defendant's reaction to the illegal arrest might reduce the crime from murder to manslaughter.[46] Alternatively, the Court added that the illegal arrest might, depending on the issue of whether the defendant acted "reasonably" under the circumstances, excuse the killing entirely.[47]

Slowly, however, over the next sixty to seventy years, states began to examine the policy considerations behind the common-law right to resist an unlawful arrest. By the 1960s, a few states began to abolish the right.[48] Increasingly, throughout the next twenty years, more states joined the trend towards the abrogation of the right. Through either judicial fiat or legislative

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37. *Id.* at 533.
38. *Id.* at 532.
39. *Id.*
40. *Id.* at 531-33.
41. *Id.* at 533.
42. *Id.*
43. *Id.* at 534.
44. *Id.* at 537.
45. *Id.*
46. *Id.* at 537-38.
47. *Id.*
48. *See, e.g.*, Miller v. State, 462 P.2d 421, 427 (Alaska 1969) ("The old common law rule has little utility to recommend [resisting unlawful arrests] under our conditions of life today."); State v. Koonce, 214 A.2d 428, 436 (N.J. Super. Ct. App. Div. 1965) ("The concept of self-help is in decline. It is anti social in an urbanized society. It is potentially dangerous to all involved. It is no longer necessary because of the legal remedies available.").

enactment, the right has gone from the rule to the exception. Currently, thirty six states have abolished the right to resist an unlawful arrest.[49]

This erosion and virtual disappearance of a once sacrosanct right to resist an unlawful arrest can be attributed to a number of factors.[50] These factors are best understood when one considers the motivations to resist an unlawful arrest that a person would have had at the time of the *Tooley* decision.[51] In eighteenth-century England, and in her fledgling colonies, a person wrongfully arrested did not enjoy any of the pretrial procedural rights that today a person takes for granted.[52] Once arrested, a detainee could be confined for an indefinite period, often in deplorable conditions.[53] The timetable for the trial of a defendant's case was uncertain at best.[54] The absence of a formal arraignment prevented a defendant from learning of the charges that lead to his incarceration.[55]

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49. The following states have enacted statutes eliminating the right: ARK. CODE ANN. § 5-54-103 (Michie 1993); COLO. REV. STAT. ANN. § 18-8-103 (West 1986); CONN. GEN. STAT. ANN. § 53a-23 (West 1994); DEL. CODE ANN. tit. 11, § 464(d) (1995); FLA. STAT. ANN. § 776.051 (West 1992); HAW. REV. STAT. ANN. § 710-1026 (Michie 1993); 720 ILL. COMP. STAT. ANN. 5/7-7 (West 1993); IOWA CODE § 804.12 (1997); KAN. STAT. ANN. § 21-3217 (1995); KY. REV. STAT. ANN. § 520.090 (Michie 1990); MONT. CODE ANN. § 45-3-108 (1997); NEB. REV. STAT. ANN. § 28-1409(3) (Michie 1995); N.H. REV. STAT. ANN. § 594:5 (1986); N.Y. PENAL LAW § 35.27 (McKinney 1998); N.D. CENT. CODE § 12.1-05-03 (1997); OR. REV. STAT. § 161.260 (1995); 18 PA. CONS. STAT. ANN. § 505(b)(1)(i) (West 1983); R.I. GEN. LAWS § 12-7-10 (1994); S.D. CODIFIED LAWS § 22-11-5 (Michie 1988); TEX. PENAL CODE ANN. § 38.03 (West 1994). Judicial decisions in the following states have also eliminated the right: Miller v. State, 462 P.2d 421, 427 (Alaska 1969); State v. Hatton, 568 P.2d 1040, 1046 (Ariz. 1977); Evans v. City of Bakersfield, 27 Cal. Rptr. 2d 406, 409 (Ct. App. 1994); State v. Richardson, 511 P.2d 263, 268 (Idaho 1973); Casselman v. State, 472 N.E.2d 1310, 1317 (Ind. Ct. App. 1985); State v. Austin, 381 A.2d 652, 654-55 (Me. 1978); Commonwealth v. Moreira, 447 N.E.2d 1224, 1227 (Mass. 1983); State v. Wick, 331 N.W.2d 769, 771 (Minn. 1983); State v. Nunes, 546 S.W.2d 759, 762 (Mo. Ct. App. 1977); State v. Koonce, 214 A.2d at 433; State v. Doe, 583 P.2d 464, 467 (N.M. 1978); City of Columbus v. Fraley, 324 N.E.2d 735, 740 (Ohio 1975); State v. Gardiner, 814 P.2d 568, 576 (Utah 1991); State v. Peters, 450 A.2d 332, 335 (Vt. 1982); State v. Valentine, 935 P.2d 1294, 1304 (Wash. 1997); Roberts v. State, 711 P.2d 1131, 1134 (Wyo. 1985).

50. Wardlaw v. Pickett, 1 F.3d 1297, 1302 n.5 (D.C. Cir. 1993).

> The elimination of the right to intervene to prevent an illegal arrest is based on the recognition that an arrest's liberty interest is now protected by safeguards which do not exist at common law, including prompt arraignment, reasonable bail, appointment of counsel, the exclusionary rule and the right to a speedy trial.

Id.

51. *See infra* Part II.A.1.

52. *See, e.g.*, State v. Richardson, 511 P.2d 263, 268 (Idaho 1973) (holding that a defendant has a right to present his theory of the case by means of proper jury instructions); City of Columbus v. Fraley, 324 N.E.2d at 739 (stating that modern day defendants have rights to appointed counsel, liberal bonding polices, prompt arraignment, and preliminary hearing).

53. State v. Richardson, 511 P.2d at 268.

54. *Id.*

55. *Id.* at 267.

With the ratification of the Constitution and its Bill of Rights, forces were set in motion that would eradicate much of the rationale for maintaining this common-law right. Each of the reasons for the abrogation is discussed below.

1. *Improved Jail Conditions and the Birth of Procedural Safeguards*

Scholars and jurists alike suggest that with the growth of the industrial society and its technological advances, many of the fundamental reasons for fighting unlawful incarceration and arrest, began to disappear.[56] First, these commentators point to the improved jail conditions.[57] When the King's Bench decided *Tooley,* jails were hellish places to await trial.[58] One author stated, "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."[59] Starvation was rampant and prisoners were often charged fees for necessities.[60] Today, critics seeking to abolish the right to resist unlawful arrest stress that our nation's jails and penitentiaries are closely monitored and policed.[61] Uniform standards now exist and a prisoner can be ensured of a day-to-day existence free from conditions that "involve the wanton and unnecessary infliction of pain, [or that are] grossly disproportionate to the severity of the crime warranting imprisonment."[62]

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56. *Id.* at 268 (stating that the common-law rule allowing resisting unlawful arrests "developed at a time when self-help was a more necessary remedy"); *see also* City of Columbus v. Fraley, 324 N.E.2d at 739.

57. State v. Valentine, 935 P.2d 1294, 1300-01 (Wash. 1997).

58. Sam Bass Warner, *Investigating the Law of Arrest*, 26 A.B.A. J. 151, 151-52 (1940).

59. State v. Valentine, 935 P.2d at 1301 (quoting Warner, *supra* note 58, at 152) (internal quotations omitted).

60. *Id.*

61. Congress, for instance, created the Federal Bureau of Prisons to monitor the conditions in federal penitentiaries. *See* 18 U.S.C § 4042(a)(2) (1994) (providing that the Bureau of Prisons shall not only supervise and manage the federal prisons but also "provide suitable quarters and provide for the safekeeping, care and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise").

62. Rhodes v. Chapman, 452 U.S. 337, 347 (1981). The *Chapman* decision dealt with the post conviction rights of prisoners under the Eighth Amendment. *Id.* at 339-40. Pretrial detainees enjoy greater protection because the conditions of their confinement are weighed against the Due Process Clause of the Fourteenth Amendment. *See* Martin v. Gentile, 849 F.2d 863, 870 (4th Cir. 1988). The *Martin* court stated:

> The due process rights of a pretrial detainee are at least as great as the [E]ighth [A]mendment protections available to the convicted prisoner; while the convicted prisoner is entitled to protection only against punishment that is "cruel and unusual," the pretrial detainee, who has yet to be adjudicated guilty of any crime, may not be subjected to *any* form of punishment.

Id.

Second, critics of the common-law right emphasize the importance of procedural safeguards guaranteed under the Eighth Amendment.[63] Today, many defendants that are arrested are subsequently released on bond pending trial.[64] Under Rule 5 of the Federal Rules of Criminal Procedure, a detainee is to be "promptly presented" before a judicial officer.[65] A consequence of Rule 5 is that courts notify newly arrested individuals of their charges and review an arrestee's continued detention at the earliest possible time.[66]

Third, even if an arrestee remains incarcerated pending trial, certain constitutionally mandated palladia exist mandating the speedy resolution of the matter.[67] The burden is now on the prosecution to move forward in a swift fashion or face dismissal of the charges.[68]

Finally, an arrestee experiences none of the isolation that once was commonplace. Today, an arrested person is given the obligatory "one phone call,"[69] and an indigent arrestee can expect, in most instances, legal representation.[70]

2. *Preference for Judicial Resolution of the "Unlawfulness" of the Arrest*

The second major justification for abolishing the right to resist an unlawful arrest is that requiring an individual to submit to a legitimate display of authority allows for the calm and studied resolution of the matter in

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63. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII; *see also* State v. Hatton, 568 P.2d 1040, 1045 (Ariz. 1977) (discussing the development of procedural safeguards for the pretrial detainee).

64. *See* 18 U.S.C. § 3142; FED. R. CRIM. P. 46 (dealing with provisions for bond for pretrial detainees).

65. FED. R. CRIM. P. 5(a); *see also* County of Riverside v. McLaughlin, 500 U.S. 44, 58 (1991) (holding that "prompt presentation" requires that in the absence of an arrest warrant a judicial determination of the probable cause for the arrest must occur within 48 hours).

66. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 126 (1975) (holding that the Fourth Amendment requires a judicial review of arrests leading to detention when the arrest is made without a warrant).

67. The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI; *see also* 18 U.S.C. § 3161 (establishing time periods in which to try those accused of crimes in federal courts).

68. *See* 18 U.S.C. § 3162 (proscribing sanctions for failing to try an accused within the appropriate time periods).

69. *See, e.g.*, Payne v. Arkansas, 356 U.S. 560, 567 (1958) (stating that the refusal to permit the defendant to make even one phone call, among other factors, denies the defendant his due process rights).

70. *See* 18 U.S.C. § 3161.

court.[71] One court stated, "the legality of a peaceful arrest should be determined by courts of law and not through a trial by battle in the streets. It is not too much to ask that one believing himself unlawfully arrested should submit to the officer and thereafter seek his legal remedies in court."[72] In court, so the argument goes, the parties can address the lawfulness of the arrest in a less emotional and volatile atmosphere.[73]

A number of ancillary arguments for eliminating the right are consistent with this deference to judicial resolution. The first is a practical one. Today, most arrestees are vastly out-gunned.[74] The typical police officer carries a whole array of weapons and devices designed specifically to subdue a suspect. An arrestee can expect to come face to face with a police officer armed with one or more guns designed to fire rapidly, a nightstick or flashlight used to strike a resistant arrestee, mace or other aerosol spray used to blind and disorient an individual, and hardened-steel handcuffs. In the hands of a well-trained officer, resistance is futile at best.[75] An individual resisting arrest against such a heavily armed foe risks serious injury or death.[76]

Just as resistance to an unlawful arrest increases the danger of injury to the arrestee, the danger to the police officer also increases.[77] It is axiomatic

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71. Miller v. State, 462 P.2d 421, 426 (Alaska 1969).

72. *Id.* at 427; *see also* CONN. GEN. STAT. ANN. § 53a-23 (West 1994). The comment to the Connecticut statute prohibiting resistance to an unlawful arrest states that "the rationale for this change . . . [is] that it is better social policy to require the arrestee to submit and challenge the arrest in court, rather than to permit him to use force at the place of arrest subject to later judicial determination of the legality of the arrest." *Id.* § 53a-23 cmt.

73. Miller v. State, 462 P.2d at 426.

74. City of Columbus v. Fraley, 324 N.E.2d 735, 739 (Ohio 1975) ("Policemen who once employed staves and swords to effect arrests now use guns and sophisticated weapons."); State v. Gardiner, 814 P.2d 568, 573 (Utah 1991) (stating that prohibiting the use of force curbs violent confrontations between citizens and armed police).

75. Of course, this analysis assumes that the arrestee is not armed and uses nondeadly force to resist the arrest.

76. *See, e.g.*, State v. Thomas, 262 N.W.2d 607, 611 (Iowa 1978) ("Peace officers are today lethally armed and usually well trained to efficiently effect arrests."); Roberts v. State, 711 P.2d 1131, 1135 (Wyo. 1985) ("Vesting an arrestee with the right to resist quite clearly invites the police to respond with force and frequently the violence would entail the use of deadly weapons, a circumstance that ought never be encouraged."). Besides the increased risk of injury and violence in resisting an arrest, those in favor of abolishing the right argue that a person who is successful in avoiding an arrest is at best postponing the inevitable. Escape is unlikely in this age of K-9 units, helicopters employing infrared detection devices, and coordinated search efforts using state of the art communication systems. With recapture a virtual certainty, it is better to require a person to submit and let the court determine the legality of the arrest. *Cf.* Evans v. City of Bakersfield, 27 Cal. Rptr. 2d 406, 412 (Ct. App. 1994) ("[I]t is highly unlikely that in a day when police are armed with lethal weapons and scientific communication and detection devices, a defendant using reasonable force can effectively deter an arrest."). *But see* Tennessee v. Garner, 471 U.S. 1, 15 n.13 (1984) (questioning whether modern technology employed by the police has made escape less likely).

77. Statistics dealing with the use of force in making arrests are limited. *See generally* TOM MCEWEN, BUREAU OF JUSTICE STATISTICS, NATIONAL DATA COLLECTION ON POLICE USE OF FORCE (1996) (reporting on prior studies dealing with the use of force in arrests, the problems in collecting data, and the future efforts to be taken in collecting statistics).

that police officers are engaged in a very perilous profession. A recent study reported that police officers have the third most dangerous occupation in America.[78] Police officers encounter a myriad of dangers; in addition to effecting arrests, police officers have other duties, such as working traffic accident scenes on busy highways and mediating heated domestic disputes.

Many "lawfully arrested" persons undoubtedly believe that their arrest is without merit. Nonetheless, the vast majority of arrests are lawful and fully supported by the requisite probable cause; it is the rare occurrence when a person is unlawfully arrested. Given the heightened danger to police, and the preference for the judicial determination of the lawfulness or unlawfulness of an arrest, the equities weigh in favor of the police. The New Mexico Supreme Court succinctly summarized the argument that "a police officer who makes an arrest should not lose all his authority if the arrest is subsequently judged to be unlawful. Police officers must be free to carry out their duties without being subjected to interference and physical harm."[79]

B. *Difficulty in Distinguishing Between a "Lawful" and an "Unlawful" Arrest*

The third major justification for the cassation of the common-law right concerns the indistinct demarcation between a lawful arrest and an unlawful arrest. The rise in procedural safeguards and strict rules governing police procedures has resulted in many highly technical demands and restrictions pertaining to arrests. When a police officer violates these rules and safeguards, the lawful arrest is transformed into an unlawful one, often without either party to the arrest having any knowledge that the legality of the arrest will not pass muster.[80] Previously, the lawfulness of an arrest frequently centered upon whether the police officer had probable cause.[81] Today, probable cause is but one of a multitude of prerequisites that courts examine when a defendant challenges an arrest. It is risky to leave this "close call" to the arrestee on the street. One court stated:

> The right or wrong of an arrest is often a matter of close debate as to which even lawyers and judges may differ. In this era of constantly expanding legal protections of the rights of the accused in criminal proceedings, one

78. Laura Meckler, *Job Risks High for Cabbies*, ROCKY MOUNTAIN NEWS, July 9, 1996, at 20A. The top three most dangerous jobs were: cab drivers, sheriffs and bailiffs, police and detectives. *Id.*

79. State v. Doe, 583 P.2d 464, 467 (N.M. 1978); *accord* State v. Koonce, 214 A.2d 428, 436 (N.J. Super. Ct. App. Div. 1965).

80. Roberts v. State, 711 P.2d at 1134.

81. *See, e.g.*, Sibron v. New York, 392 U.S. 40, 62 (1968) (holding that the police officers did not have probable cause to arrest the defendant and that the search could not be justified as incident to a lawful arrest); Wilson v. Schnettler, 365 U.S. 381, 383 (1961) (stating that if the officers had probable cause then the arrest was lawful).

> deeming himself illegally arrested can reasonably be asked to submit peaceably to arrest by a police officer . . . .[82]

C. *The Existence of Alternative Remedies*

A final important reason for the abandonment of the right to resist unlawful arrest is that an unlawfully arrested individual has a wide assortment of remedies available to him.[83] These remedies, and the redress they provide, eliminate the need to forcibly resisting the unlawful arrest. These alternatives to resisting arrest relate, not only to the prosecution for the crime for which the individual is arrested, but also to civil damages for the injury suffered.[84]

1. *Exclusion of the "Fruits" of the Illegal Arrest*

Since the landmark United States Supreme Court case *Wong Sun v. United States*,[85] a fundamental tenet of search and seizure is that police officers should not benefit from their ill-gotten gains.[86] With the passage of time, and the growing number of cases interpreting the Fourth Amendment's prohibition against illegal searches and seizures, evolved the well-known sanction embodied by the "exclusionary rule."[87] The exclusionary rule generally operates to prevent government agents from benefiting in their prosecution of an individual using evidence obtained in violation of the individual's constitutional rights.[88] The exclusionary rule, as applied to illegal arrests, has undergone a number of transformations. Once broad in its scope, recent cases make it clear that the rule is quite limited.

In *Arizona v. Evans*,[89] the United States Supreme Court explained that the exclusionary rule is the remedy for the constitutional right prohibiting unreasonable searches and seizures.[90] It is not in and of itself a guarantee of the Fourth Amendment.[91] As the Court declared, "The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect."[92] The Court added, "the rule's application has been restricted to

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82. State v. Koonce, 214 A.2d at 436; *accord* Miller v. State, 462 P.2d 421, 426 (Alaska 1969); Roberts v. State, 711 P.2d at 1134; *cf.* State v. Gardiner, 814 P.2d 568, 574 (Utah 1991).

83. *See, e.g.*, State v. Ritter, 472 N.W.2d 444, 452 (N.D. 1991) (finding that in many cases, judicial remedies for unlawful police action remain appropriate).

84. *Id.* at 452 n.11 (noting that officers may be liable for the tort of false imprisonment or for deprivation of constitutional rights under 42 U.S.C. § 1983).

85. Wong Sun v. United States, 371 U.S. 471 (1963).

86. *Id.* at 487-88.

87. *Id.* at 484; Arizona v. Evans, 115 S. Ct. 1185, 1191 (1995).

88. Arizona v. Evans, 115 S. Ct. at 1191-94.

89. Arizona v. Evans, 115 S. Ct. 1185 (1995).

90. *Id.* at 1192-93.

91. *Id.*

92. *Id.* at 1191 (citations omitted). In *Evans*, a police officer made a traffic stop of the vehicle the defendant was driving. *Id.* at 1188. During a computer check into the status of the defendant's driver's license, the police officer learned that a warrant was outstanding for the

those instances where its remedial objectives are thought most efficaciously served."[93] Consequently, whether courts will apply the exclusionary rule to evidence derived from an unlawful arrest depends, not on whether the arrest violates the Fourth Amendment, but whether excluding the evidence will deter the conduct involved.

As a result of the *Evans* decision, the interplay between an illegal arrest and the exclusionary rule is unclear. What seems clear is that unlawful arrests stemming from mistakes made by non law-enforcement officials will not result in the suppression of evidence obtained by the prosecution. If, however, an unlawful arrest can be shown to stem from other law enforcement errors or conduct that may be deterred by suppression of seized evidence, then the exclusionary rule could come into play.[94]

Even illegal arrests stemming from police misconduct will not always lead to the suppression of evidence obtained following the arrest. The case of *New York v. Harris*[95] is illustrative. In *Harris*, the police developed the defendant as a murder suspect.[96] Despite possessing the requisite probable cause to arrest Harris in a public setting, the police went to his residence.[97] Without first obtaining an arrest warrant authorizing entry into his home,[98] the police entered his home, with weapons drawn, read him his *Miranda* rights, and questioned him regarding the murder.[99] While still in his home, the defendant gave a statement and confessed to the murder.[100] The police arrested him and took him to the police station.[101] Once there, after being advised of his *Miranda* rights for the second time, Harris again confessed to the murder.[102] A third confession, which came sometime later, was ruled inadmissible by a trial court.[103]

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defendant's arrest. *Id.* Based upon this information, the police officer began to place the defendant under arrest, at which time the defendant dropped what the police officer believed was a marijuana cigarette. *Id.* During a subsequent search of the vehicle, more marijuana was found under the passenger's seat. *Id.* The warrant that had formed the basis for the defendant's arrest was later determined to have been mistakenly left in the computer's database. *Id.* It had been quashed 17 days prior to the defendant's arrest. *Id.* The determination that the error was attributable to court employees and not police officials was pivotal to the Court's decision. *Id.* at 1193-94. The Court reasoned that because the police were not involved in the failure to remove the warrant from the computer's database, the suppression of the evidence would not have any deterrent effect on them. *Id.*

93. *Id.* at 1191 (citing United States v. Leon, 468 U.S. 897, 908 (1984)).

94. *Id.* at 1193-94.

95. New York v. Harris, 495 U.S. 14 (1990).

96. *Id.* at 15.

97. *Id.*

98. The Supreme Court had previously held in *Payton v. New York*, that a warrantless, nonconsensual entry into a person's home, in the absence of exigent circumstances, violates the Fourth Amendment. Payton v. New York, 445 U.S. 573, 590 (1980).

99. New York v. Harris, 495 U.S. at 15-16.

100. *Id.* at 16.

101. *Id.*

102. *Id.*

103. *Id.*

On appeal, only the admissibility of the second confession was at issue before the United States Supreme Court.[104] The Court ruled that the confession was admissible. The Court stated:

> [T]he rule in *Payton* [requiring an arrest warrant as a predicate to entering a suspect's home] was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime.[105]

In *Harris*, the Court restated the rule for the operation of the *Wong Sun* doctrine in the illegal arrest setting.[106] Evidence obtained after an arrest lacking probable cause will not automatically be excluded.[107] If the evidence is sufficiently divorced or "attenuated" from the illegal arrest, the Court has ruled that it will be admissible.[108] This examination of the separation between the illegal arrest and the evidence gathered after the arrest has become known as the "attenuation analysis."[109] This analysis is triggered only when it can first be said that the evidence "'is in some sense the product of illegal governmental activity.'"[110] When the illegality of the arrest stems from a lack of probable cause, "'the wrong consists of the police's having control of the defendant's person.'"[111] The Court has repeatedly held that the "fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality" of the search.[112] Where the police lack probable cause and the evidence derived as a result of the arrest is causally related to the arrest, the exclusionary rule mandates the suppression of the evidence.[113] This is so because the deterrent effect of the exclusionary rule would be served.[114]

In sum, an individual illegally arrested cannot expect a court to engage in a "but for" analysis in determining whether or not to exclude evidence obtained after the arrest.[115] Rather, the police conduct that makes the arrest illegal will be examined to determine what, if any, deterrent effect will be served by excluding evidence derived from an illegal arrest.[116]

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104. *Id.*
105. *Id.* at 17.
106. *Id.* at 19.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 19 (quoting United States v. Crews, 445 U.S. 463, 471 (1980)). The "attenuation analysis" was first announced in *Brown v. Illinois*, 422 U.S. 590 (1975).
111. New York v. Harris, 495 U.S. at 19 (quoting People v. Harris, 532 N.E.2d 1229, 1235 (N.Y. 1988) (Titone, J., concurring)).
112. *Id.*
113. *Id.* at 18-19.
114. *Id.* at 20.
115. *Id.* at 17.
116. *Id.* at 14-15.

2. *Civil Remedies*

The ability to "hurt" the offending police officer by holding him personally liable for damages has also been cited as a reason for the abrogation of the right to forcibly resist illegal arrest.[117] An individual arrested illegally can seek redress through a variety of civil remedies—most notably, actions brought under 42 U.S.C. § 1983[118] and state actions for false imprisonment.

a. *42 U.S.C. § 1983.* In pertinent part, 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[119]

To prevail a person must show first a constitutional violation, in the unlawful arrest context, a violation of the Fourth Amendment's prohibition against unreasonable seizures.[120] This is most often accomplished by showing that no probable cause existed for the arrest.[121] Probable cause, as used in § 1983 actions, has been found when a police officer demonstrates that "the facts and circumstances within [his] knowledge and of which [he has] reasonably trustworthy information [are] sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense."[122]

Proving the absence of probable cause is only the first hurdle for arrestees. Police officers, while acting in their official capacity, enjoy qualified immunity.[123] The qualified immunity defense is a judicially crafted attempt to permit actions and recovery for violations of constitutional rights while

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117. *See* State v. Ritter, 472 N.W.2d 444, 452 (N.D. 1991).

118. 42 U.S.C. § 1983 (1994).

119. *Id.* The statute in its entirety states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

120. Booker v. Ward, 94 F.3d 1052, 1057 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 952 (1997).

121. *Id.*

122. *Id.* (citations omitted).

123. Swenson v. Culberson County, 925 F. Supp. 478, 482 (W.D. Tex. 1996) (citing Pierson v. Ray, 386 U.S. 547, 555 (1967)).

"avoiding the overdeterrence of independent decision making by government officials."[124]

In practice, the ability of a police officer to plead qualified immunity is a formidable defense for the arresting officer. Essentially, the police officer is entitled to the defense unless it can be said "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[125] Thus, a plaintiff cannot simply allege that a police officer lacked probable cause and expect to escape the interposition of the qualified immunity defense. Rather, an officer's belief in the lawfulness of his conduct must be shown to have been unreasonable.[126]

This objective legal reasonableness standard has been criticized as creating a double-standard.[127] The test couples "the constitutional standard already embodied in the Fourth Amendment and a more generous standard that protects any officer who reasonably could have believed that his conduct was constitutionally reasonable."[128] The result is that a plaintiff's case has a threshold requirement to show an absence of probable cause and then show that the officer knew that he was acting in violation of the individual's right, in order to be free from seizures not supported by probable cause.

Thus, without a particularly egregious set of facts, the successful pleading of a qualified immunity defense is the "norm" rather than the exception.[129] The Court has made it clear that the qualified immunity is meant to be used as a pretrial device to defeat claims against police officers unless it can be shown that they were "'incompetent or . . . knowingly violate[d] the law.'"[130] This standard was designed to resolve "insubstantial" claims prior to discovery and when feasible by summary judgment.[131] What remains are claims of blatant disregard for the arrestee's constitutional right to be free from unreasonable seizures.[132]

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124. *Id.* (citing SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION 451 (2d. ed. 1986)).

125. Anderson v. Creighton, 483 U.S. 635, 640 (1987). In *Anderson*, the Creightons brought suit under 42 U.S.C. § 1983 against FBI agent Russell Anderson alleging that he and other law enforcement officials violated their rights when the officials conducted a warrantless search of their home. *Id.* at 637. The officers were looking for a bank robbery suspect. *Id.* On appeal to the United States Supreme Court, the question was whether Anderson was entitled to summary judgment based upon his qualified immunity if he could demonstrate, as a matter of law, that a reasonable officer would have believed that the search was lawful. *Id.* The Court applied the "objective legal reasonableness" standard. *Id.* at 639.

126. *Id.*

127. *Id.* at 648 (Stevens, J., dissenting).

128. *Id.*

129. *Id.* at 642.

130. *Id.* at 638 (quoting Malley v. Briggs, 475 U.S. 335, 344-45 (1986)).

131. *Id.* at 640 n.2 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982)).

132. Recent trends in cases continue to require that a plaintiff demonstrate a blatant disregard for the arrestee's right in order to maintain an action under § 1983. In *Heck v. Humphrey*, 114 S. Ct. 2364 (1994), the Court held that,

b. *False Imprisonment.* In the absence of a colorable § 1983 claim, an individual unlawfully arrested must turn to an assortment of common-law actions. The most commonly employed one is false imprisonment. Although the terms "false imprisonment" and "malicious prosecution" are often used interchangeably, they are two distinct causes of action.[133] As the learned scholars on torts, Prosser and Keeton, explain:

> Malicious prosecution is the groundless institution of criminal proceedings against the plaintiff. False imprisonment fell within the action of trespass, as a direct interference with the plaintiff's person, while malicious prosecution was regarded as more indirect. . . . The weight of modern authority is that where the defendant has attempted to comply with legal requirements,

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> to recover damages for [an] allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, [or] declared invalid by a state tribunal authorized to make such determination.

Id. at 2372. In the context of a § 1983 action for an unlawful arrest, the plaintiff must be able to show that no judicial determination has validated the legality of the arrest. *Id.* at 2372 n.6. Courts will not allow § 1983 actions to attack what has already been adjudicated in the criminal prosecution. *Id.* A plaintiff, therefore, cannot bring an action under § 1983 if the court hearing the criminal case determined that the arrest was lawful. *Id.* Justice Scalia, writing for the Court in *Heck*, explained that a person convicted of resisting a lawful arrest would not be permitted to bring a § 1983 action for a violation of his Fourth Amendment right against unreasonable seizures. *Id.* To do so, Justice Scalia stated, would require the plaintiff to "negate an element of the offense of which he [had] been convicted." *Id.*

133. Compare for example, The *Restatement's* discussion of false imprisonment and confinement by asserted legal authority. Section 35 of the *Restatement (Second) of Torts* provides:

> (1) An actor is subject to liability to another for false imprisonment if
>
> (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
>
> (b) his act directly or indirectly results in such a confinement of the other, and
>
> (c) the other is conscious of the confinement or is harmed by it.
>
> (2) An act which is not done with the intention stated in Subsection (1,a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.

RESTATEMENT (SECOND) OF TORTS § 35 (1965). Section 41 of the *Restatement (Second) of Torts* states:

> (1) The confinement may be by taking a person into custody under an asserted legal authority.
>
> (2) The custody is complete if the person against whom and in whose presence the authority is asserted believes it to be valid, or is in is in doubt as to its validity, and submits to it.

Id. § 41.

> and has failed to do so through no fault of the defendant's own, false imprisonment will not lie, and the remedy is malicious prosecution.[134]

In circumstances where one would ordinarily resist arrest, but the arrestee decides instead to submit to the arrest and avail himself of his legal remedies, the most appropriate cause of action is false imprisonment.[135]

This cause of action has its roots in the common-law notion that an invasion of an individual's sanctity is a trespass against that person.[136] In this regard, the tort's origin is similar to the origins giving rise to an individual's right to resist an unlawful arrest. Thus, the principal justification for the common-law action false imprisonment is the same as that historically given for resisting an unlawful arrest.[137] Yet, while false imprisonment continues to be a viable civil tort,[138] the right to resist an illegal arrest is in its legal death throes.

D. *What Remains After the Abrogation of the Right*

Even those jurisdictions that have severely undermined the right continue to retain one remnant of the old common law right—the right to resist an arrest when police use excessive force.[139] This right is usually not dependent on the legality of the arrest.[140] Once again, the origin for this rationale is found in the law of self-defense.[141] While courts are reluctant to sanction an individual's use of force to resist an unlawful arrest in which the harm is merely a loss of liberty, courts continue to recognize a need to allow people to defend their physical well-being.[142] Yet, the resistance given to the

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134. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11, at 54 (5th ed. 1984).

135. *Id.* § 11, at 50.

136. *Id.* § 11, at 47.

137. *Id.*

138. Its efficacy as a plaintiff's weapon, however, is questionable. Prosser points out that "the action for false imprisonment has remained relatively ineffective as a remedy, particularly for the violation of individual rights by the police." *Id.* § 11, at 50.

139. *See, e.g.*, Commonwealth v. Moreira, 447 N.E.2d 1224, 1228 (Mass. 1983) (holding that if an officer uses excessive force in an attempt to subdue an arrestee, the arrestee has the right to use such force as is reasonably necessary to repel the excessive force).

140. *Id.* ("[W]here the officer uses excessive or unnecessary force to subdue the arrestee, regardless of whether the arrest is lawful or unlawful, the arrestee may defend himself by employing such force as reasonably appears to be necessary.").

141. *Id.*

142. The public policy justification for this need was stated by the court in *State v. Nunes*, 546 S.W.2d 759, 762 (Mo. Ct. App. 1977). The Missouri court stated, "The pragmatic rationale of this privilege recognizes that although liberty can be restored through legal process, life and limb cannot be repaired in a courtroom." *Id.* Another court has pointed out the procedural safeguards that protect an individual from unnecessary and prolonged detention do little to protect the arrestee from excessive force used in the arrest. Wardlaw v. Pickett, 1 F.3d 1297, 1302 n.5 (D.C. Cir. 1993).

excessive force used must be proportional to the harm.[143] Thus, an arrestee is permitted to meet excessive force with only such force as is reasonable under the circumstances.[144] This is a factual question to be decided by the trier of fact.[145]

Just as an illegal arrest may give rise to an action under § 1983, so too can the use of excessive force.[146] Courts will examine the police conduct involved using a reasonableness standard derived from the Fourth Amendment.[147] The inquiry "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment's interests' against the countervailing governmental interests at stake."[148] This balancing naturally leads to an examination of the "facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[149]

Other remnants of the right to resist an unlawful arrest remain. At least one court has held that while a person no longer enjoys the right to resist an unlawful arrest conducted in a public place, a person does enjoy a limited right to resist the arrest in his home. In *Casselman v. State*,[150] the Indiana Court of Appeals upheld an individual's right to resist an unlawful entry in his home.[151] The court found a distinction between resisting an unlawful arrest and repelling an unlawful intrusion into one's home. Repelling an unlawful intrusion into one's home was justified because:

> [S]tripping a citizen of his right to resist a peaceful arrest lies significantly in a policy of preventing the escalation of violence once resistance is first offered. However, without the initial peacefulness of the arrest, a large part of the justification for requiring the arrestee's submission is lost. . . . [A]n arrest cannot be considered peaceful when it is accomplished by forcibly preventing a person from closing the door to his house or by entering the house without permission.[152]

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143. State v. Nunes, 546 S.W.2d at 763 (relying on State v. Banks, 167 S.W. 505 (1914)).

144. *Id.* at 763-64; *see also* People v. Eisenberg, 249 N.W.2d 313, 315 (Mich. Ct. App. 1976). *But see* State v. Poinsett, 157 S.E.2d 570, 571 (S.C. 1967) ("A person has a 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.").

145. State v. Nunes, 546 S.W.2d at 762 ("The reasonableness of the force used and the right of self-defense are in each case for the trier of the fact to decide.").

146. Johnson v. Glick, 481 F.2d 1028, 1032 n.5 (2d Cir. 1973).

147. Graham v. Connor, 490 U.S. 386, 396 (1989).

148. *Id.* at 396 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

149. *Id.*

150. Casselman v. State, 472 N.E.2d 1310 (Ind. Ct. App. 1985).

151. *Id.* at 1316-17.

152. *Id.* at 1317 (citations omitted). The Indiana court relied heavily on the reasoning of the Connecticut case *State v. Gallagher*, 465 A.2d 323 (Conn. 1983).

Various laws designed to reinforce the public policy rationale for peacefully submitting to an arrest regardless of its legality have accompanied the abolition of the right to resist an unlawful arrest.[153] Most of these statutes now criminalize the act of resisting even an unlawful arrest,[154] which makes the legality of the arrest a moot question. In a few states, however, the illegality of the arrest continues to serve as a defense to a resisting arrest charge. In Alabama, for example, the initial draft of the statute criminalizing resisting arrest would have required an individual to submit to an arrest regardless of the arrest's legality.[155] After much debate,[156] the statute was enacted to state, "A person may not use physical force to resist a *lawful arrest* by a peace officer who is known or reasonably appears to be a peace officer."[157] Thus, not only does the common-law right survive, it provides a defense to a charge of resisting arrest.[158] At least one commentator has suggested that the elimination of the right to challenge the legality of the underlying arrest violates the arrestee's right to due process.[159]

III. *STATE V. VALENTINE*—A CAUTIONARY TALE

Recently, the issue of the abrogation of the common-law right to resist an unlawful arrest reached the Supreme Court of Washington in *State v. Valentine*.[160] Both the facts and the decision of *Valentine* illustrate one court's exploration of the justifications for the recent trend away from *The Queen Tooley*,[161] and the embrace of judicial resolution of unlawful arrests, while also addressing the policy arguments for retaining the right.

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153. Casselman v. State, 472 N.E.2d at 1316-17.

154. *See, e.g.*, CAL. PENAL CODE § 843 (West 1985) (allowing a police officer to use all means necessary to effect the arrest); FLA. STAT. ANN. § 776.051 (West 1992) (prohibiting a person from using force to resist arrest by a known law enforcement officer); TEX. PENAL CODE ANN. § 38.03 (West 1994) (providing no defense to the prosecution pursuing a resisting arrest claim when "the arrest or search is unlawful").

155. ALA. CODE § 13A-3-28 (Michie 1977).

156. *Id.*

157. *Id.* (emphasis added).

158. It is the very act of criminalizing the resistance to an unlawful arrest that is the source of much confusion as to the states' position on the retention of the common-law right. Some authorities equate the enactment of a statute outlawing resisting arrest with the abolition of the common-law right to resist an unlawful arrest. As the Alabama example illustrates, this is not always the case. *See id.*

159. Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1134-35 (1969) ("[P]rotections [afforded by alternative remedies] are realizable only if the defendant has some reliable way of showing that the police acted unconstitutionally."); *see also* Penn Lerblance, *Resisting Unlawful Arrest: A Due Process Perspective*, 35 CLEV. ST. L. REV. 261, 275 (1987) (stating that the failure to require the state to establish that the arrest was lawful eliminates the statutes duty to prove beyond a reasonable doubt that the arrestee was guilty of unjustified resistance).

160. State v. Valentine, 935 P.2d 1294 (Wash. 1997).

161. The Queen v. Tooley, 92 Eng. Rep. 349 (1709).

In *Valentine*, members of the Spokane police force observed Ronald Valentine, an African-American, acting in a suspicious manner.[162] One police officer radioed another police officer, John Moore, to ask whether the second officer was familiar with Valentine.[163] Moore came to the scene to see if he could identify the person.[164] As Valentine drove his car from the scene, Moore followed in his cruiser.[165] Moore testified that after observing a minor traffic infraction he attempted to stop the vehicle.[166] Moore indicated that despite the display of his blue light, the flashing of his headlights, and the honking of his horn, the driver would not pull over.[167] Moore was able to recognize the driver as Valentine from two previous encounters involving failure to display license plates.[168] In response to Moore's broadcast that Valentine was not pulling over, other officers came to the scene.[169] Valentine pulled over shortly before the back-up officers arrived.[170] At this point, two decidedly divergent versions of the events emerged.[171]

The police testified that Valentine refused to give them his driver's license and Valentine insisted that they were simply harassing him because he was African-American.[172] Valentine, according to the police, eventually produced his license.[173] When the police asked Valentine for his current address, he refused. Valentine, was also asked if he would be willing to sign the traffic citation he was going to be issued, but he refused to do this as well.[174] The police then arrested Valentine for failure to cooperate and refusing to sign the citation.[175]

Valentine, who was standing outside his vehicle, then attempted to reach into his vehicle.[176] The police ordered him to stop, and Officer Moore grabbed Valentine to keep him from getting into his car and a fight between Valentine and the police ensued.[177] During this fight, Valentine was injured so severely that when the police arrived at the jail with Valentine, a nurse supervisor would not admit Valentine without hospital care first.[178] The police took Valentine to a local hospital, and after four hours in the emergency room, hospital officials discharged Valentine.[179] Only then was he

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162. *Id.* at 1295.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 1295-96.
179. *Id.* at 1296.

presented with a citation to sign.[180] In addition to the traffic infraction, Valentine was also charged with two assault charges stemming from his skirmish with the police.[181]

At trial, Valentine's recollection of the events differed greatly from the police account, as one might expect.[182] Valentine suggested that the traffic stop was the latest in his series of encounters with the police.[183] Valentine stated that only four days before, he had been stopped and had exchanged words with one of the officers that arrived at the scene.[184] Valentine testified that the officer said, "We are going to get you."[185] Valentine maintained that his traffic stop was racially motivated and testified that the police did not give him an opportunity to sign the citation prior to his arrest.[186] According to Valentine, trouble began after the officers told him that he was under arrest, and after Valentine tried to lock up his car and his belongings.[187] Then, according to Valentine, the police began an all-out assault on him, during which the police made a series of threatening remarks.[188] Valentine claimed that he responded physically only after this initial assault.[189] Valentine was tried and convicted by a jury on one of the assault charges.[190]

On appeal, one fact was certain—Valentine was never charged with refusing to sign the citation—the basis for his arrest.[191] The legal issue before the Washington Supreme Court was a narrow one: Was Valentine entitled to a jury instruction stating that he was permitted to use reasonable force to resist an arrest, if the arrest posed only a deprivation of freedom?[192]

The court's majority ultimately ruled against Valentine, and in doing so adopted the now widely held rule that an individual may not resist even an unlawful arrest.[193] The court's reasoning mirrored, to a large extent, the reasons previously discussed in this Article:[194] jails are now more humane;[195] procedural safeguards exist to protect the pretrial detainee;[196] and alternative remedies exist for a person unlawfully arrested.[197] In concluding, the court echoed a common refrain, "[I]n our opinion, the better place to address the question of the lawfulness of an arrest that does not pose harm to the arrested

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180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 1295.
185. *Id.* at 1309 (Sanders, J., dissenting).
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 1296.
191. *Id.* at 1310 (Sanders, J., dissenting).
192. *Id.* at 1294.
193. *Id.* at 1306 (Sanders, J., dissenting).
194. *See supra* Part II.A.1.
195. State v. Valentine, 935 P.2d 1294, 1301 (Wash. 1997).
196. *Id.*
197. *Id.* at 1302 (noting civil remedies and evasion as alternatives).

person is in court and not on the street."[198] The *Valentine* decision expressly overruled a number of previous cases that at least suggested that a person did have a right to resist an unlawful arrest.[199]

The Washington Supreme Court and other courts adopting this relatively new rule apparently did so because of the public policy reasons discussed in this Article.[200] These policy reasons are difficult to quarrel with because they are framed in terms of a choice between an ordered and civilized resolution of our differences in court, or the heated "anarchism" that results from concepts of self-help. But, the issues and stakes involved are not that simple.

Decisions like the one reached by the *Valentine* court are based upon faith in the judicial system and its ability to mete out justice. Behind the logic is the assumption that lawless arrests will be quashed and we can effectively deter errant police conduct with the multitude of remedies available to unjustly arrested individuals. In the end, courts state that the public policy is driven by the concern for the individual's safety in the face of the mounting resources of the law enforcement community.[201] Courts and legislatures alike often affirm this public policy choice by criminalizing—through the use of resisting arrest statutes—conduct once privileged. As the dissent in *Valentine* notes, this choice results in an undeniable loss of personal autonomy and freedom.[202]

Justice Sanders' dissenting opinion in *Valentine* gives new voice to the age old philosophical objections to transferring the power of the governed to those charged with governing.[203] As such, Justice Sanders focuses on the abstract notions of freedom and liberty that form the basis of American ideology.[204] To dwell on our technological advances in the way we house those we imprison or to focus on procedural safeguards misconstrues what truly is at stake.[205] Justice Sanders states that the holdings justified by the reasons previously discussed,

> trivialize[] and [deny] by omission the great principle so aptly summarized in the Declaration of Independence that governments derive their just powers from the consent of the governed and that the purpose of government is to protect legal rights, not to violate them through lawless conduct. This principle remains the same whether the local jail is a damp and frigid dungeon or a country club with a fence around it. In either case the inmate has

198. *Id.* at 1304.

199. *Id.* ("We explicitly overrule *Rousseau* and other cases that are inconsistent with our holding in this case.").

200. *See supra* Part II.A.1.

201. State v. Valentine, 935 P.2d at 1304.

202. *Id.* at 1318-19 (Sanders, J., dissenting) ("[T]he rule adopted by the majority is inconsistent with the lawful entitlement to use force to protect one's person and property.").

203. *Id.* at 1319.

204. *See id.* at 1318-19.

205. *Id.* at 1310.

> lost his liberty and the government has violated the law when it stole it from him.[206]

The bedrock upon which this country was founded is jeopardized when this freedom is compromised. This freedom depends upon the ability to resist unlawful governmental conduct. In Justice Sanders's words, "When government agents commit assault and battery against the very citizens they are sworn to protect, the government is no longer our friend: it is our dangerous enemy."[207]

The greatest perversion occurs when the law "privileges the aggressor while insulting the victim with a criminal conviction for justifiable resistance."[208] Indeed, in *Valentine* the defendant never was charged with the offense for which he was arrested.[209] Instead, he was tried and convicted for events triggered by the questionable arrest.[210] This, Justice Sanders reasons, is no better than the injustice that results when the police entrap an individual.[211] The injustice borne from misconduct is what leads to the desire to resist the illegal arrest.[212] To criminalize this "instinct" is to doubly wrong the individual.[213] Sanders, like previous supporters of the right, expresses grave reservations that the alternative remedies actually serve to deter the police misconduct involved and to address the true injury suffered.[214]

Finally, the new rule enunciated in *Valentine* distorts well-established tenets of the law of self-defense. By making the lawfulness of the arrest irrelevant, the ability to defend oneself against a trespass regardless of the actor that commits the trespass is fundamental. To forbid this inquiry is to destroy a defendant's right to present his defense. By doing so, the rule violates fundamental notions of due process.[215]

As *Valentine* demonstrates, those on both sides of the issue continue to frantically scramble to the moral high ground passing suitable middle ground along the way. The resolution of the issue need not be an all or nothing proposition.

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206. *Id.* at 1311.
207. *Id.* at 1312.
208. *Id.*
209. *Id.* at 1310.
210. *Id.* at 1321.
211. *Id.* at 1313.
212. *Id.*
213. *Id.*
214. As the *Valentine* decision discusses, police internal affairs are conducted within the police department by police officers. *Id.* This fact raises some skepticism that a thorough and impartial investigation will occur. *Id.* at 1314. Some critics have voiced doubt that the remedies available to the wrongfully arrested individual are accessible because they require the financial resources to wage a full blown lawsuit. *Id.* at 1313; Chevigny, *supra* note 159, at 1135-36.
215. State v. Valentine 935 P.2d at 1313 (citing State v. Valentine, 879 P.2d 313, 319 (Wash. Ct. App. 1994) (Schultheis, J., dissenting)); *see also supra* note 62 and accompanying text.

IV. CONCLUSION

In 1995, more than fourteen million arrests were made.[216] While undoubtedly the overwhelming number of those arrests were legal, it would be statistical folly to suggest that a large number of persons were not arrested illegally. If only one person in 100,000 were arrested illegally, this means 140 citizens were illegally arrested. Although one can question the ratio used, the point is that given the increasing focus on crime and the attendant law enforcement initiatives to address it, the number of individuals arrested increases yearly. What can be done to protect the interests of those innocent and unlawfully arrested individuals?

Perhaps the best balance that can be struck is demonstrated by states like Alabama that have criminalized the act of resisting a police officer lawfully engaged in his duties.[217] What remains for the defendant is the right to challenge the legality of the underlying arrest. The police are content in the knowledge that an individual that resists a lawful arrest will face additional sanctions. Given the loose standard provided by the probable cause requirement, logic would dictate that few individuals justified in using force to resist an arrest will feel secure enough in their convictions to do so. But should they do so, an ability to show the illegality of the arrest will not only ward off a criminal conviction but also will presumably humble any police misconduct involved.

To be sure, this compromise requires a degree of faith on both sides of the issue. The police and government, as well as the courts and legislatures, must trust the citizenry to act responsibly in the face of their law enforcement efforts. The individual subjected to arrest must be trusted to accurately gauge the need for resistance just as we give police the discretion to decide whom they should arrest. Even in this day and age, both sides continue to deserve this trust.

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216. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995 (Kathleen Maguire & Ann L. Pastore eds., 1996).

217. *See supra* note 155 and accompanying text.