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The Right to Resist an Unlawful Arrest

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lead the way for expanded international use of the continental shelf. Such an amendment should be constructed to meet the test of maximum utilization of presently available uses and those to come with a minimum of friction between states. In keeping with present practice, the Secretary of the Interior should continue to be authorized to grant leases for oil, gas and sulfur production on the basis of competitive bidding. The enumeration of additional uses and the methods for administering them would be unwise as it is impossible to foresee all the projects which will be proposed for the shelf area, and such a list would unnecessarily limit the scope of the amendment. The Secretary should be authorized to grant permits for any reasonable uses which are within the national interest, but only after the developer has submitted his plans, public notice of the proposal has been made, and a public hearing has been held to consider the project and hear objections to it. In deciding what is reasonable and within the national interest, the Secretary should consider each of the following: net economic return to society, effect on the environment, proximity to and possible interference with other uses, effect on foreign relations, effect on national defense, and the financial responsibility of the promoter.

Such an amendment would make mandatory a clarification of the nature of the coastal states' rights under the Convention. That revision should itself make clear that the coastal states may make any reasonable use of the shelf with the stipulation that limitations in the Convention must be strictly adhered to.

Jean Talley Drew

THE RIGHT TO RESIST AN UNLAWFUL ARREST

Louisiana, like most of the states in this country, recognizes the right to resist an unlawful arrest.[1] The Louisiana rule is codified in both the Louisiana Criminal Code and the Louisiana

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be possible by amending the OCSLA. *See also* Z. SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF (1968).

1. City of Monroe v. Ducas, 203 La. 971, 979, 14 So.2d 781, 784 (1943). "The right of personal liberty is one of the fundamental rights guaranteed to every citizen, and any unlawful interference with it may be resisted. Every person has a right to resist an unlawful arrest; and, in preventing such illegal restraint of his liberty, he may use such force as may be necessary."

Code of Criminal Procedure. Article 108 of the Criminal Code[2] makes a crime the resistance to an individual "acting in his official capacity and *authorized by law* to make a *lawful* arrest," and article 220 of the Code of Criminal Procedure[3] requires that a "person . . . submit peaceably to a *lawful* arrest." (Emphasis added.) Recently, however, the right to resist an unlawful arrest has been challenged. Section 5 of the Uniform Arrest Act[4] abrogates the right to use "force or any weapon in resisting arrest regardless of whether there is a legal basis for the arrest." Section 3.04 (2) (a) (i) of the Model Penal Code[5] adopted by the American Law Institute in 1958, denies the right to resist an arrest which the person being arrested "knows is being made by a peace officer, although the arrest is unlawful." This Comment has a dual scope: first, to discuss the policy arguments for both the general rule and the modern changes; and secondly, to examine the constitutional questions raised by any attempt to change the rule.

Policy Aspects of the Old and New Rules

Proponents of a change in the Anglo-American rule emphasize that the right to resist an unlawful arrest came into existence many hundreds of years ago when the administration of criminal justice itself required such a rule to relieve the inhuman and oppressive procedures and conditions then operative. At that time bail was generally unattainable, and a speedy trial was the exception rather than the rule. The conditions in English jails were "such that a prisoner had an excellent chance of dying of disease before trial."[6] Since these extreme conditions are generally nonexistent today, insofar as the possibility of great physical dangers resulting from incarceration are concerned, it is argued that there is no longer a need for the right to resist an unlawful arrest. Moreover, with increased violent activity in the cities, those in favor of abolishing the right can call upon one of this country's most distinguished jurists, Judge Learned Hand, who said:

2. LA. R.S. 14:108 (1950).
3. LA. CODE CRIM. P. art. 220.
4. UNIFORM ARREST ACT § 5. New Hampshire, Delaware, and Rhode Island have adopted this Act either verbatim or in all its essential aspects. *See* N.H. Rev. Stats. ch. 594; Del. Code, Tit. 11, §§ 1901-32; and R. I. Gen. Laws Tit. 12, ch. 7.
5. MODEL PENAL CODE § 3.04(2)(a)(i) (proposed official draft, 1962).
6. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

> "The idea that you may resist peaceful arrest . . . because you are in debate about whether it is lawful or not, instead of going to the authorities . . . seems to me not a blow for liberty but, on the contrary, a blow for attempted anarchy."[7]

Another basic argument of those who would abrogate the right is as follows: violent demonstrations and mob activities are increasing at a rate equal to the decline of respect for the police and police authority. The right of resistance, where recognized, turns on the lawfulness of the arrest—a complex issue as evidenced by the fact that it is often decided by a court of last resort. From these factors emerges a dual dilemma. First, a policeman's work in the area of arrests, especially warrantless arrests, calls for an endless series of on-the-spot evaluations and decisions. The problems of the police need no further compounding. Secondly, alternative remedies to resistance exist. People should be encouraged to peacefully submit to all arrests and to refer any grievances to a court.

Protection of the citizenry is also strongly urged as a reason for abolishing the right. "In a day when police are armed with lethal and chemical weapons, and possess scientific communication and detection devices readily available for use, it has become highly unlikely that a suspect, using *reasonable* force, can . . . deter arrest."[8] Generally, all that will be accomplished is temporary evasion which increases the likelihood that both the subject of the arrest and innocent bystanders will be injured in the process of overcoming the resistance.

A final argument in favor of abolishing the right is the limited scope of the proposed change. The provisions in the model acts uniformily provide that there shall be no right to *forcibly* resist an unlawful arrest by a *peace officer* who is *identified* as such to the party arrested. Thereunder, neither passive resistance nor citizen arrests are affected.

Although a significant array of reasons exist for abolishing the right, there are numerous reasons for its retention. One such reason is that the proposed change might possibly foster conditions inherent in a police state. The new law could be an instrument of oppression. Armed with such a statute a police-

7. ALI PROCEEDINGS 254 (1958).
8. People v. Curtis, 70 Cal.2d 347, 353, 450 P.2d 33, 36, 74 Cal. Rptr. 713, 716 (1969).

man, even for reasons of prejudice or whim, could attempt to make a patently false and provocative arrest and thereby infuriate the average citizen into some form of resistance. Thereafter, the citizen could be charged with resisting arrest, which would be a crime regardless of the invalidity of the initial attempted arrest. The argument that all the citizen need do is refrain from resisting the arrest is disclaiming the realities of an oppressive and repulsive situation. Of course, the aggrieved party has two other remedies. First, he has an action in tort or an action under Section 1983 of the Civil Rights Act for money damages.[9] However, the tort remedy is generally in fact an empty one. The policeman may be judgment proof because of prior garnishments, crowded civil dockets, or a myriad of other reasons.[10] Second, there is a possibility of the institution of a criminal action against the offending officer for his unlawful action. However, the district attorney's office must work hand-in-hand with the police. Cooperation being inherent in the relationship, it would seem that an aggravated case would be necessary to stir a prosecutor to action.[11]

In short, the arguments from a policy viewpoint endlessly tip the scales of reason back and forth. But it is submitted that a more detailed analysis of other arguments and remedies begs the more pertinent question. If there is a constitutional right to be secure in one's person against unreasonable searches and seizures, it cannot be a crime to reasonably resist interference with that right.

Constitutional Questions

A person is arrested when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.[12] All arrests under authority of a warrant issued upon probable cause are lawful. In our Anglo-American system of law, in the absence of statute, a peace officer is usually authorized to arrest without a warrant where he has reasonable cause to believe that a felony has been or is being committed and that

9. 42 U.S.C. § 1983 (1964). For an excellent discussion, *see* Comment, 30 LA. L. REV. 100 (1969).

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

11. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

12. Terry v. Ohio, 392 U.S. 1, 16 (1967).

the person to be arrested is the one who committed it.[13] As to misdemeanors, the general rule for warrantless arrests is that a peace officer can arrest only for those offenses committed in his presence which involved a breach of the peace.[14] This rule is frequently changed by statute, however, to allow warrantless arrests by a peace officer for any misdemeanor committed in his presence.[15] Louisiana's statutory provisions on arrest are found in articles 201-232 of the Code of Criminal Procedure. Article 202 provides for the issuance of arrest warrants by a magistrate, upon probable cause, supported by oath or affirmation, and describing the person to be arrested. Article 213 provides four situations in which a peace officer may make a warrantless arrest.[16]

State law alone, however, is not conclusive of the issue of the validity of an arrest. The lawfulness of an arrest is determined by state law only insofar as the arrest is not otherwise violative of the United States Constitution.[17] The constitutional validity of an arrest is dependent upon the existence of probable cause at the time the arrest was made. Probable cause exists "where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."[18]

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13. *See generally* 5 AM. JUR. 2d *Arrests* § 26 (1962).

14. *Id.*

15. *Id.*

16. LA. CODE CRIM. P. art. 213. "A peace officer may, without a warrant, arrest a person when:

(1) The person to be arrested has committed an offense in his presence, and if the arrest is for a misdemeanor it must be made immediately or on close pursuit;

(2) The person to be arrested has committed a felony, although not in the presence of the officer;

(3) The peace officer has reasonable cause to believe that the person to be arrested has committed an offense, although not in the presence of the officer; or

(4) The peace officer has received positive and reliable information that another peace officer holds a warrant for the arrest."

It should be noted that article 933 defines "offense" to include both felonies and misdemeanors, and therefore under article 213(3) a person can be arrested in Louisiana for a misdemeanor upon reasonable cause alone, with no "in presence" requirement. Article 213(2) allows for arrest without a warrant for a felony, not committed in the presence of the arresting officer, and with no requirement of probable cause. It is submitted that subsection 2 of article 213 is constitutionally inadequate.

17. Klinger v. United States, 409 F.2d 299, 302 (8th Cir. 1969), citing as authority Miller v. United States, 357 U.S. 301, 305 (1958).

18. Brinegar v. United States, 338 U.S. 160, 175 (1949), as cited in Ker v. California, 374 U.S. 23, 35 (1963). There has been much conjecture

The United States Supreme Court has said in dictum that, "one has an undoubted right to resist an unlawful arrest,"[19] but unfortunately the court failed to reveal whether this statement rested on constitutional or common law authority. In *Wainwright v. City of New Orleans*,[20] Mr. Chief Justice Warren fathered the phrase, "a Fourth Amendment right to resist," although he admitted that the constitutional issue of the right to resist an unlawful arrest was unnecessary in deciding that case. The issue of the existence of a Fourth Amendment right to reasonably resist an unlawful arrest has never been squarely raised or decided.

Any foray into the Fourth Amendment in search of a right to resist an unlawful arrest must begin with the principles implicit in the amendment itself. In *Terry v. Ohio*,[21] the Supreme Court said:

> "The Fourth amendment provides that 'the right of the people to be secure in their persons . . . shall not be violated.' This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this court has always recognized, 'no right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others. . . .' We have recently held that the Fourth amendment protects people and not places, and wherever an individual may harbor a reasonable expectation of privacy . . . he is entitled to be free from unreasonable governmental intrusion."[22]

Five years before *Terry*, the court made these pronouncements on the Fourth Amendment in *Ker v. California:*

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about what effect Terry v. Ohio, 392 U.S. 1. (1967) will have upon the probable cause requirement. While holding that a stop and frisk was a search and seizure and therefore subject to the Fourth Amendment, the court allowed a temporary, investigatory seizure of a person upon a reasonableness standard which, although objective, clearly amounted to less than the probable cause required for a full blown arrest. However, the procedure delineated in *Terry* is quite proscribed and does not allow arrests (as used in standard jargon, implying a trip to the stationhouse and booking) on less than probable cause and, therefore, should pose no problem to the areas covered herein.

19. United States v. DiRe, 332 U.S. 581, 594 (1948).
20. 392 U.S. 598 (1967).
21. 392 U.S. 1 (1967).
22. *Id.* at 8-9.

> "Implicit in the Fourth amendment's protection from unreasonable searches and seizures is its recognition of individual freedom. That safeguard has been declared to be 'as of the very essence of constitutional liberty . . . . The amendment is to be liberally construed and all owe the duty of viligence lest there shall be impairment of the rights for the protection of which it was adopted.' "[23]

Armed with this background knowledge, imagine this hypothetical case. A citizen following his daily routine is suddenly approached by a policeman who informs him that he is under arrest. The citizen is guilty neither of crime, or suspicious conduct: the officer has absolutely no probable cause to arrest him. The citizen pushes off and runs away. Subsequently, the citizen is arrested for both crime *A* (the one he was told he had committed) and for the crime of resisting arrest. At arraignment, the district attorney drops the crime *A* charge but not the resisting arrest charge. Although the citizen protests at the trial, he learns that his legislature, following the uniform acts, has made resisting even the most patently unlawful arrest a crime.

Under these facts there is obviously an infringement of a zealously protected constitutional right. Although the citizen has a remedy in civil damages, he is still subjected to a flagrant invasion of his rights. The invasion becomes even more obnoxious when the policeman, by his conduct in effecting the unlawful arrest, intentionally provokes the citizen to resist. If such resistance is a crime, it is within the legislative power to transform the Fourth Amendment from the bedrock of individual freedom into a mere mirage. If it is permissible to convict a citizen of reasonable resistance to an unconstitutional intrusion upon a sacred right, then there is in effect no right to be free from unreasonable seizures and no real right to individual liberty.

Although there is no jurisprudence directly concerning a constitutional right to resist an unlawful arrest, a simple explanation exists. The rule allowing resistance is well established in our Anglo-American jurisprudence, having been established at English common law in 1666.[24] Until recently all of the states recognized the right; therefore, there was no occasion to rely upon either the Fourth Amendment or due process of law.

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23. 374 U.S. 23, 32-33 (1963).
24. Hopkin Huggett's Case, 84 Eng. Rep. 1082 (K.B. 1666).

The Supreme Court has held that Fourth Amendment rights are "to be ranked as fundamental," and, as such, binding on the states through the due process clause of the Fourth Amendment.[25] The important point is that the right to resist an unlawful arrest is not a right which is realized through lengthy constitutional analysis and involved reasoning, but it is a right which is of the essence of the liberty of the person guaranteed by the Fourth Amendment and by due process of law.

The right to be free from arbitrary government restraint is a constitutional right which even the literal readers of the Constitution recognize. The Supreme Court has often recounted the reasons behind the Fourth Amendment.[26] It was a product of the memory of colonial Americans who had been subject to arbitrary governmental restraint of their personal freedoms. One of those most eloquent in the denouncement of such restraint was James Otis, who condemned all governmental devices which "placed the liberty of every man in the hands of every petty officer."[27] It is submitted that the same effect would result from abolishing the right to resist an unlawful arrest. Although the citizen has the simple solution of not resisting an unlawful arrest, this solution is contrary to all reality, as both American and English courts have recognized:

> "For most people, an illegal arrest is an outrageous affront and intrusion—the more offensive because under color of law—to be resisted as energetically as a violent assault."[28]

The situation is aggravated by the fact that the legality of the policeman's actions would not be at issue and would be no defense under the proposed changes. In effect, the legislation gives greater respect to the authority of the police than "to the right of the people to be secure in their persons." The framers of the Constitution realized that there were certain basic rights absolutely necessary to a free society which could not be limited even when a majority of the people felt that to do so would be in the best interest of the state. History records their solution

25. Ker v. California, 374 U.S. 23 (1963); Wolf v. Colorado, 338 U.S. 25 (1949).

26. *E.g.*, Frank v. Maryland, 359 U.S. 360 (1959).

27. *Id.* at 364.

28. People v. Cherry, 307 N.Y. 308, 311, 121 N.E.2d 238, 240 (1954); language to the same effect in The Queen v. Tooley, 92 Eng. Rep. 349, 352 (K.B. 1760) these citations found in Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L. J. 1128, 1137 (1969).

as the Bill of Rights. The rights encompassed, among them the right of freedom from governmental restraint of one's person, are not subject to any tampering—not to mention total abrogation—by government in the name of public policy.

Other Fourth Amendment problems may arise if the right to resist an unlawful arrest is abolished. When a person is unlawfully arrested, all evidence taken in a search incident thereto, including all statements made by the arrested party, are inadmissible in any future criminal prosecutions.[29] All "fruits of the unlawful action" are likewise tainted with the initial illegality and are inadmissible.[30] In *Wong Sun v. United States*,[31] the Supreme Court held that evidence "come at by the exploitation of an illegality" against *T* was inadmissible against *Y*. The illegality against *T* in *Wong Sun* was an illegal arrest. If the product of an illegal arrest is inadmissible against a third party in a later prosecution, it is no less objectionable to use the product of the illegality in a later prosecution of the very person who was the subject of the original illegality. It is therefore submitted that there can never be a successful prosecution, as far as the Fourth Amendment is concerned, for resistance to an unlawful arrest because such resistance is by definition a "fruit of the poisonous tree."

Other constitutional objections may be raised. It has been asserted that in some cases a prosecution for resisting an unlawful arrest may be overturned because the police action in effecting such an arrest would be tantamount to an entrapment.[32] Furthermore, grave constitutional questions would arise whenever the arrested person was engaged in First Amendment activity at the time of the illegal arrest.[33] It is well settled that laws leaving too much discretion to enforcing officers will be invalidated if such laws can be used to prohibit the exercise of First Amendment rights.[34]

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29. Beck v. Ohio, 379 U.S. 89 (1964); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Henry v. United States, 361 U.S. 98 (1959).

30. *See* note 29 *supra*.

31. 371 U.S. 471 (1963).

32. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L. J. 1128 (1969).

33. *Id.*

34. Ashton v. Kentucky, 384 U.S. 195 (1966); Shuttlesworth v. Birmingham, 382 U.S. 87 (1965); Cox v. Louisiana, 379 U.S. 536 (1965).

Future of the Right in Louisiana

The 1970 regular session of the Louisiana legislature did not reach a vote on a bill which embodied a Louisiana Law Institute proposal[35] to amend articles 220 of the Code of Criminal Procedure and 108 of the Criminal Code. The purpose of the proposal was to abolish the right to resist an unlawful arrest by adopting the provisions of the Model Codes. However, the proposal went even further in that it made resisting an unlawful arrest a new substantive crime. Presently the crime of resisting an officer is composed of two elements: a lawful arrest, and resistance thereto. The amendment would have deleted the first element, making a crime of resistance alone.

In the discussion surrounding the Law Institute's proposal the statement was made that article 220 if amended would require submission to any arrest by a known peace officer which is the rule of the Illinois Code. This statement should be questioned. Although the Illinois Code embodies the model code provision, the corresponding Illinois criminal statutes have not been amended accordingly. The federal District Court for the Northern District of Illinois recently considered the constitutionality of the Illinois resisting arrest statute and said:

35. LA. R.S. 14:108 (1963).

Present statute: "Resisting an officer is the intentional opposition or resistance to, or obstruction of, an individual acting in his official capacity and authorized by law to make a lawful arrest or seizure of property, or to serve any lawful process or court order, when the offender knows or has reason to know that the person arresting, seizing property, or serving process is acting in his official capacity.

The phrase 'obstruction of' as used herein shall in addition to its common meaning, signification and connotation means:

(a) Flight by one sought to be arrested before the arresting officer can restrain him and after notice is given that he is under arrest.

(b) Any violence toward or any resistance or opposition to the arresting officer after the party is actually placed under arrest and before he is incarcerated.

(c) Refusal by the arrested party to give his name and make his identity known to the arresting officer.

(d) Congregating with others on a public street and refusing to move on when ordered to do so by the officer.

Whoever commits the crime of resisting an officer shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both."

Proposed change: "Resisting an officer is the intentional opposition or resistance to, or obstruction of, a peace officer acting in his official capacity in making an arrest, detaining an arrested person after arrest, seizing property, or serving any process or order of court. When the officer is identified or has identified himself as a peace officer, the opposition, resistance, or obstruction shall be an offense regardless of whether or not the arrest, detention, seizure of property, or service of process was lawful." (No change in the remainder of the section).

> "It does not proscribe resisting or obstructing an *unlawful act* of a peace officer. The guilt or innocence of the defendant specfically *depends on the validity of the officer's act.* Therefore, if a policeman erroneously, capriciously, or arbitrarily orders peaceful demonstrators to disperse, acts of resistance or obstruction by the demonstrators would not subject them to criminal liability under this provision."[36] (Emphasis added.)

When the model code provisions were adopted in California, their supreme court remarked:

> ". . . it is clear that . . . [the new provision] was meant at most to eliminate the common law defense of resistance to unlawful arrest, and not to make such resistance a new substantive crime."[37]

The court concluded that:

> ". . . if section 834a [the new provision], by eliminating the remedy of self-help, facilitates or sanctions arrests which are by definition unlawful, it could be urged with considerable persuasion that the defendant's constitutional rights would be violated by the statute."[38]

These objections are made to the general scheme of statutes abolishing the right to resist an unlawful arrest. More specific faults should be mentioned. For instance, if the Law Institute proposals had passed, subsection "d" of La. R.S. 14:108 would have made "congregating with others on a public street and refusing to move on when ordered to do so by an officer" a crime even when the order to move on was unlawful and unauthorized.[39] In *Shuttlesworth v. Birmingham*[40] the United States Supreme Court called a similar provision "government by the moment-to-moment opinions of a policeman on his beat,"[41] and therefore constitutionally impermissible. As for criminal conviction for refusing to heed a policeman's unlawful orders, the Supreme Court has said:

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36. Landry v. Daley, 280 F. Supp. 938, 960 (N.D. Ill. 1968).
37. People v. Curtis, 70 Cal.2d 347, 354-55, 450 P.2d 33, 37, 74 Cal. Rptr. 713, 717 (1969).
38. *Id.* at 353, 450 P.2d at 36, 74 Cal. Rptr. at 716.
39. *See* note 37 *supra.*
40. 382 U.S. 87 (1965).
41. *Id.* at 90.

"Obviously, however, one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution."[42]

Conclusion

In conclusion, no one should ever be counseled to resist an arrest. The possible danger to the person should always be considered, and the civil damages recoverable should be weighed against the inconvenience and indignity of the illegal arrest. However, although there is yet no direct jurisprudence on the issue of the existence of a constitutional right to resist an unlawful arrest, this writer firmly believes that such a right is necessarily implicit in both the Fourth Amendment and in the concept of due process of law. To those who believe that resistance to *any* arrest has the disasterous effect of condoning disrespect for law and proper legal authority, it should be emphasized:

"The purpose of the right is not to encourage violent attacks on policemen, but to preserve the sense of personal liberty inherent in the right to reject arbitrary orders. To permit the police to provoke individuals into committing the crime of resisting arrest, creates a trap for citizens which must, in the long run, injure the integrity of the legal system."[43]

Allan L. Durand

USE OF DEADLY FORCE IN THE ARREST PROCESS

In recent years, police officers and police departments have been recipients of an ever-increasing barrage of accusations and denunciations concerning alleged police brutality. This fact is especially true with regard to the use of deadly force in effecting arrests. Positions, both pro and con, have been supported with equal vehemence, leaving the individual police forces, to a large degree, occupying a rather undesirable middle-ground between the extremes. A large portion of the difficulty in this area has stemmed from confusion and misconception, on the part of both police officers and society, as to the exact extent of an officer's

42. Wright v. Georgia, 373 U.S. 284, 291-92 (1962).
43. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L. J. 1128, 1150 (1969).