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Criminal Law--Assault and Battery--Resisting Illegal Arrest

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attorney in lieu of her verification to permit a furtherance of this action.[16] At the same time, it could have stated that in the future verification should be by one versed in the facts.

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CRIMINAL LAW—ASSAULT AND BATTERY—RESISTING ILLEGAL ARREST.—The defendant, Kurt Koonce, was a bartender in New Jersey in May of 1964 when police attempted to arrest him on the charge that he had sold liquor to a minor. The bartender resisted and his mother helped him in his brief struggle with the police, but they were rather quickly subdued and Koonce was jailed. When he appeared in court, however, the charge of selling liquor to a minor was dismissed on the grounds that a peace officer in New Jersey may not arrest without a warrant for a misdemeanor which is not committed in his presence. Still, Koonce drew a 90-day sentence on another charge of assault and battery upon a peace officer. His mother was fined $50 for having come to her son's assistance. *Held*: Judgment reversed as to the defendants, but hereafter it shall not be lawful in New Jersey to resist a police officer undertaking an arrest, notwithstanding the illegality of the arrest. *State v. Koonce*, 89 N.J. Super. 169, 214 A.2d 428 (1965).

The doctrine of man's inalienable right to resist with all necessary force an unlawful attempt to arrest dates so far back as to defy pinpointing. Historically, the Englishman has never minimized the unpleasant circumstances attendant upon even a short confinement in prison, and English common law early found that resistance to false arrest is a natural extension of the right of self-defense.[1] The doctrine has been so completely accepted in American criminal law that, until now, it has needed no qualification.[2]

> A private person has the right to resist an illegal arrest. He can repel force with force. t does not have to be pat-a-cake force; the one making the illegal arrest is in the wrong and may be repelled. In the end, the arrestee may take the life of the arrester in such a case if it becomes necessary to do so in self-defense.[3]

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[16] 383 U.S. 363, 374.

[1] 5 AM. JUR. 2d *Arrest* § 94 (1962); 6 AM. JUR. 2d *Assault & Battery* § 79 (1962); 6 C.J.S. *Arrest* § 13 (1937); Annot., 48 A.L.R. 746 (1927) (elements of resisting officer).

[2] MORELAND, MODERN CRIMINAL PROCEDURE (1959); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 27 (1947); 6 C.J.S. *Arrest* § 92(d) (1937); see State v. Robinson, 145 Me. 77, 72 A.2d 260 (1950); People v. Cherry, 307 N.Y. 308, 121 N.E.2d 238 (1954); Robison v. U.S., 4 Okla. Crim. 336, 111 Pac. 984 (1910); State v. Rousseau, 40 Wash. 2d 92, 241 P.2d 447 (1954).

[3] MORELAND, *op. cit. supra* note 2, at 44.

Thus the *Koonce* case comes as the first judicial reversal of established common-law doctrine. However, it is not the first attack upon the rule itself. As early as 1939, the Interstate Commission on Crime decided to make a study of the law of arrest and appointed a committee with Professor Sam Bass Warner of the Harvard Law School as its reporter. The Uniform Arrest Act[4] was the result of the labors of that committee, led by Professor Warner. In 1941, substantial sections of the Act, including the provision relating to resisting false arrest were adopted by the legislatures of New Hampshire and Rhode Island.[5] Specifically, the pertinent section denies the right to resist illegal arrest in circumstances where the victim knows or should know that the arrester is a peace officer. Although the Uniform Arrest Act has been accepted in very few states,[6] this particular provision is included in the *Model Penal Code* and defended by the American Law Institute, which recognizes it as a reversal of present policy but upholds the need.[7]

One may or may not choose to question the wisdom of establishing such a policy by judicial fiat, as in *Koonce,* rather than by legislative action and statute. However, the decision may well be the harbinger of other similar rulings.[8] It contains a sound discussion of the arguments favoring the limitation of a citizen's right to resist. The opinion of Judge Conford reads: "The concept of self-help is in decline. It is antisocial in an urbanized society. It is potentially dangerous to all involved. It is no longer necessary because of the legal remedies available."[9]

The court's reasoning is based on two premises: first, that the fate of the arrestee is usually no worse than a few hours in a reasonably clean place of detention; and second, that since the police today are armed, successful resistance means that the victim either risks being killed himself or is forced to risk killing the officer. In effect, the court says to the future victim of attempted lawless arrest: "Tell it to the

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[4] Warner, *The Uniform Arrest Act,* 28 VA. L. REV. 315 (1942).

[5] N.H. REV. STAT. § 594:5 (1941); R.I. GEN. LAWS § 12-7-10 (1941).

[6] Only California, Delaware and Illinois have since accepted the provision. See CAL. PENAL CODE, pt. 2, Title 3, ch. 5 § 834a (1957); DEL. CODE ANN. Title II, § 1905 (1951); ILL. CRIM. CODE § 7-7(a) (1961).

[7] MODEL PENAL CODE § 3.04(2)(a)(i) (Tent. Draft No. 8, 1958).

[8] Kentucky law presents no cases directly in point on this question, although the courts apparently follow the majority rule, upholding resistance to unlawful arrest. See Commonwealth v. Remley, 257 Ky. 209, 77 S.W.2d 784 (1935). However, a remarkably similar case arose in New York, where the court cited, but refused to follow, the judicial route established by *Koonce;* it upheld the common-law rule, saying: "In the final analysis, despite compelling reasons to the contrary, we are constrained to hold that the resistance here involved did not constitute [assault]. . . ." People v. Briggs, 25 App. Div. 2d 50, 266 N.Y.S.2d 546, 549 (1965).

[9] 214 A.2d 428, 436.

Judge"! Lying just below the surface of this judicial reasoning is the unspoken assertion that the innocent man has nothing to fear from the forces of law and order.

Is it true that the civilizing process of the 20th century has brought society to the point where arrest is no more than a brief, sometimes inopportune, interruption of the day's activities? Probably not. Far too many cases have come through the judicial process during this century which clearly illustrate police abuse of investigative power. Many reveal extended interrogation processes too often reinforced by techniques which stress holding the suspect incommunicado or applying subtle or not-so-subtle physical coercion.[10] It would be naive indeed to believe that these more celebrated cases define the extent of the problem.

Plaguing both lawyer and police investigator alike is the problem of ensuring the prompt appearance of the suspect before a magistrate. Delays in taking this essential step may range from hours to days. Might not the reasonable man, faced with the prospect of a weekend in a grimy cell, be excused for feeling such "heat of passion" as would provoke his attempt to escape the trespassing officer?

Proponents of the restrictive measure naturally include many spokesmen for the police departments[11] of the nation, who assert with conviction: "[T]he right to resist illegal arrest by a peace officer is a right that can be exercised effectively only by the gun-toting hoodlum or gangster."[12] They argue, along with Professor Warner, that the innocent man will feel no fear and will not risk injury simply to avoid a few hours or days in jail. And if resistance is defined only as deadly assault, this may well be true. It is undoubtedly true that the average citizen, regardless of his guilt or innocence, will not struggle when picked up by the police. However, resistance may take the form of a quick decision to risk a shove and speedy flight. Or an exchange of blows may seem safer to a civil-rights worker than trusting himself to the care of a rural Southern deputy. Clearly, the court should ask if fear of abuse by the hoodlum is sufficient reason to deny to the innocent the right to flee an unpromising situation.

The court should consider also if the hoodlum with a gun in his pocket is today deterred from resisting by his consideration of the legality of resisting arrest. Is his decision to fight or not to fight in any way fashioned by a court's holding on the subject? The New Jersey holding seems to bind the wrong party. The guilty man has never had

[10] Kamisar, *What Is An "Involuntary" Confession?*, 17 RUTGERS L. REV. 728 (1963).

[11] See 51 J. CRIM. L., C. & P.S. 395 (1960).

[12] Warner, *supra* note 4, at 330.

the right to resist, yet he has done so when he chose—and far more frequently than the innocent.

The New Jersey court, in deciding as it did, took valid notice of the dangers of escalation inherent in encouraging a citizen to resist false imprisonment. The daily newspapers force us to recognize the explosive potential of attempted resistance to police authority when it occurs in an area such as Watts, Harlem, or Chicago's West Side, where poverty and deprivation have created bitter undercurrents of antagonism to police figures. It is in such a situation that the danger is most clear. But here again the distinction between legal and illegal arrest is lost in the anger of the moment. The incident which is credited with precipitating the Watts riots of 1965 began with an attempted lawful arrest of a drunken driver, but neither the driver nor the mob were influenced by a consideration of the legal nuances of his position. And it should be clearly noted that existing court standards as to what constitutes lawful resistance to illegal arrest exclude resistance not taken in genuine motivation of self-defense.[13]

The very recent decision of the Supreme Court in *City of Greenwood v. Peacock*,[14] which sharply limits the kind of case which may be removed from state to federal court, also raises the spectre of deliberate abuse of the powers of arrest to harass and threaten supporters of a locally unpopular cause. The victim of such tactics might prefer with good reason to place his faith in quick flight rather than to trust to redress of his grievances by the local courts.

A major problem of another nature is presented by the policy recommended in the Uniform Arrest Act and followed in the *Koonce* holding: the compensation of the victim who has submitted to illegal arrest. He is advised to take his trouble to the judge and seek remedy, if he wishes, in a civil suit for false arrest. But until very recent years, a municipal corporation could not under any circumstances be held liable for the acts of its officers while attempting to enforce regulations. This general rule is under attack now in many jurisdictions, and an almost universal judicial dissatisfaction with its results is leading to more liberal interpretation of the liability of a municipality for the torts of its agents. But the question is still unsettled, and in many jurisdictions the sins of the judgment-proof policeman will not be visited upon the community.[15] Even should it be possible to find solid financial res-

[13] 67 C.J.S. *Obstructing Justice* § 2, at 49 (1950). Generally the offense of resisting execution of process is not committed by resisting an arrest being unlawfully made.

[14] 384 U.S. 808 (1966).

[15] For general discussion of the liability of a city for the torts of its police officers see Annot., 60 A.L.R2d 1198 (1958); 63 C.J.S. *Municipal Coroprations*

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ponsibility against which to launch a civil suit in false arrest, the victim might confront a public sentiment unlikely to produce a verdict against a police officer.

It is possible that the police departments would, as their spokesmen claim, find work a bit easier if this policy were adopted. However, the number of people who actually resort to forceful resistance of false arrest is apparently small, and there is no reason to foresee any increase. One may question whether an easing of the restrictions on police arrest adds anything to the legitimate powers of investigation. Yet, on the other hand, there is basis for speculation about the use of police arrest and the ensuing slow processes of release and recompense as a subtle mode of harassment and coercion.

There is no gainsaying the upsurge of crime in the United States today. However, more is involved in the repeal of this ancient right of the citizen than the confrontation of police and gangster. In fact, more is involved than the issue of guilt or innocence. The availability of repressive powers in no way increases police effectiveness in preventing crime. The right of a citizen to protect his personal privacy and to defend his individual liberty is not one to be lightly abrogated. The New Jersey court has ruled with those who hold that the simplest tools for coping with crime are the tools of repression.

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(Footnote continued from preceding page)
§ 775 (1950). See also Annot., 88 A.L.R.2d 1330 (1963) (municipality's liability for police force in arrest); Annot., 3 A.L.R. 1623 (1919) (liability on official bond for illegal arrest).