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# Homicide in Resisting Arrest

A. W. G. Kean  
*Harvard University*

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## HOMICIDE IN RESISTING ARREST

By A. W. G. KEAN\*

“Intentional killing of arresting officer is murder”, says the headline in Wharton.<sup>1</sup> “When a party who having authority to arrest or imprison uses the proper means on a proper occasion for such a purpose, and in so doing is assaulted and killed, it will be murder in all concerned *if the intent be to kill or inflict grievous bodily hurt.*” Chapter and verse, ancient and modern, are cited as authority for this statement of the law, a statement which seems to be accepted both in England and the United States with very little question.<sup>2</sup>

At the same time, Mr. Dickey, in his article in the Cornell Law Quarterly,<sup>3</sup> points out, quite accurately, that it is difficult to find a case of murder in resisting arrest where malice aforethought could not have been based on some other ground. Indeed, if we look again at Wharton’s statement of the law, it may occur to us that “if the intent be to kill or inflict grievous bodily hurt”, the killing is murder, whether the victim be a peace officer or not: so that there seems to be little point in having a special rule to cover resistance to arrest. Perhaps it may be of value if we turn aside from the whirlpool of modern American case-law and retreat to the quiet backwater of the English reports where at the end of the sixteenth century the foundations of the present rule of resisting arrest were laid.

### I

The first trace of this rule seems to be in Crompton’s enlargement of Fitzherbert’s little book on the Justice of the

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\* B. A., Cambridge University, 1935; Foundation Scholar of Queen’s College, Cambridge; Entrance Scholar of the Inner Temple; Commonwealth Fund Fellow, Harvard Law School, 1936-8. Address: Langdell Hall, Harvard Law School, Cambridge, Mass.

<sup>1</sup> Criminal Law (1932), vol. 1, p. 778. All italics used in quotations are ours.

<sup>2</sup> Doubt about the rule is expressed in the standard students’ textbook in England. Kenny, *Outlines of Criminal Law*, 14th ed., p. 141.

<sup>3</sup> “Culpable Homicide in Resisting Arrest”, 18 Cornell L. Q. 373 (1933). Kenney (1902 ed.) 139, seems to have made a similar suggestion.

Peace. In this, which appeared in 1583, we are told that if a sheriff or justice of the peace comes to suppress rioters, and one of those who come with the sheriff or justice is killed by one of the rioters, that is murder in him as well as in all the other rioters present.<sup>4</sup> No reasons or authority are given for this statement, though it seems as if Crompton is giving an account of an actual case.

Three years later, in 1586, *Yong's Case*<sup>5</sup> was decided at Sussex Assizes. Here one Garland took a sword and cut off the nose, together with part of the lips and chin, of one Butcher, who seems to have been a peace officer lawfully doing his duty. After this piece of facial surgery, Yong, the other defendant, took another sword and smote Butcher through the chest as deep as the shoulder bone. Butcher died. This was held to be murder in both, the whole court agreeing that the killing of a constable or his assistants in the execution of their duty is murder in law, "*although the murderer knew not the party that was killed, and although the affray was sudden, because the constable and his assistants came by authority of law to keep the peace and prevent the danger which might ensue by the breach of it; and therefore the law will adjudge it murder, and that the murderer had malice prepense, because he set himself against the justice of the realm*".

Similarly, in *Mackalley's Case in Killing a Serjeant of London*,<sup>6</sup> twenty-five years later, the judges resolved, where the accused deliberately killed the serjeant according to Croke's report, "That if any sheriff, under-sheriff, serjeant or officer, who hath execution of process, be slain in doing his duty, it is murder in him who kills him, *although there was not any former malice betwixt them*; for the executing of process is the life of the law: and therefore he who kills him shall lose his life; for that offence is *contra potestatem regis et legis*;<sup>7</sup> and therefore in such case there needs not any inquiry of malice."<sup>8</sup>

Exactly the same thing was said in *Pew's Case* in 1634,

<sup>4</sup> Crompton (1583 ed.), f. 15b.

<sup>5</sup> 4 Co. Rep. 40a (1586).

<sup>6</sup> 9 Co. Rep. 65b; Cro. Jac. 279 (1611).

<sup>7</sup> "Against the power of the king and the law".

<sup>8</sup> Cro. Jac. 280.

where the accused drew his sword and ran the arresting bailiff through the middle.<sup>9</sup>

## II

The reason why we have set these cases out at length is to permit the reader to notice for himself the point of Mr. Dickey's observation: every one of these early authorities, the original sources of our present rule of law, might have been decided on some other ground. In each case the killing is deliberate; why then did the judges fail to say that every deliberate killing implies malice aforethought, without going to the trouble of laying down a special rule to cover deliberate killing in resisting arrest? Does it not seem that the rule was, at any rate when it began, superfluous?

Coke and Croke and the other English judges who decided these early cases were not the kind to invent a new rule where an old rule would do just as well. A short examination of the condition of the law of malice aforethought at the time when these cases were decided will, it is hoped, show that Mr. Dickey is wrong in thinking that *Yong's Case* and *Mackalley's Case* and the other early authorities could have been decided on grounds other than malice aforethought in resisting arrest, and that Coke, Croke and the judges in these cases were meeting a want of the time when they invented this new rule.

## III

Malice aforethought to-day is a technical term, with various technical meanings: one of these is intent to kill; another is intent to do a serious injury; another is intent to resist arrest. In earlier times, however, when malice aforethought first became the distinction between murder and other felonious homicides, the expression had no technical construction but meant exactly what it said. There had to be malice and there had to be forethought; in other words there had to be a plot against the life of the deceased, resulting from some previous grudge or grievance.<sup>10</sup>

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<sup>9</sup> Cro. Car. 183 (1634).

<sup>10</sup> Cf. Hale, 1 P. C. 451: "The evidence of such a[n] express] malice must arise from external circumstances discovering that inward intention, as lying in wait, menacings antecedents, former grudges, deliberate compassings, and the like. . . ."

There are one or two early cases to be found in which the prosecution had to go to the trouble of proving this grudge and this scheming. In one case<sup>11</sup> A and B meet and B kills A; this was murder because A had previously brought an appeal of felony against B. Therefore, says, Crompton, it will be understood that B had malice against A because A was seeking his life by that appeal. Similarly, when a gaoler killed his prisoner, it was held to be murder, because the gaoler suspected that the prisoner had been too familiar with his wife.<sup>12</sup>

Later, it came to be said that if a man killed another without any provocation or other apparent sudden cause, scheming of the killing must be implied, otherwise the killing would not have happened at all. In a case in 1610,<sup>13</sup> Yelverton, J., said:

“ . . . the law is clear that this is murder, *and it is no excuse for him to say that he bore no malice to him before*; for if one stab another, this shall be murder, for the Law in such cases doth presume malice to be in him, *otherwise this would not have so hapned* (sic), and this the Law calls malice apparent; and though the same cannot be proved it is not material.”

#### IV

Why is it, then, that deliberate killing of a peace officer making an arrest is not covered by the rule that deliberate killing implies both malice and forethought, “otherwise this would not have so hapned”? Why was there any need for the invention of a new rule? The answer seems to be that the implication of malice from deliberate killing could only be made when there was no explanation for the killing other than a previous plot. Hot blood caused by provocation, even though the provocation took the form of a lawful attempt to arrest, was clearly a very good reason for a sudden desire to kill, so that the argument that without some kind of previous malice the killing would not have occurred was not applicable to this case. Moreover, it was felt that, since the killer was not previously acquainted with the deceased, it was difficult to imply a plot to

<sup>11</sup> Crompton (1583 ed.), f. 15b.

<sup>12</sup> Crompton (1593 ed.), f. 20a; heard before Serjeant Shuttleworth at Chester Assizes in 1589.

<sup>13</sup> Morgan's Case, 1 Bulstrode 86 (1610).

take his life, so that there was every reason to classify the killing in the scuffle following an attempt to arrest as homicide in a sudden affray.

At the same time it was realized that unless killing of this kind were somehow made into murder, the law's executive force would be seriously diminished, for manslaughter at that time was an offence for which the first offender could escape serious punishment by means of benefit of clergy. It was necessary to prove some kind of malice aforethought, "although the murderer knew not the party that was killed, and although the affray was sudden." In *Yong's Case*,<sup>14</sup> which seems to be the first reported case in which the new rule is found, the judges said that "the law will adjudge it murder, and that the murderer had malice prepense, because he set himself against the justice of the realm". Perhaps it is dangerous ex post facto reasoning to argue from these words that a plot against the justice of the realm was substituted for a plot against the individual officer, so that the offence could be made into murder although there was provocation in the sudden affray and although the officer was previously unknown to the offender.

However that may be, reasoning to explain the extension of malice aforethought soon disappeared, and it is not long before we find the judges saying that where a peace officer is killed in this way, no malice aforethought need be proved at all. In *Mackalley's Case*, in 1611, the judges said that "there need be no inquiry of malice".<sup>15</sup>

#### V

Our conclusion then is that although the rule that killing a peace officer while resisting arrest is murder may be, as Mr. Dickey implies, superfluous to-day, it was not superfluous when the rule first began: it filled an inconvenient lacuna caused by the difficulty of presuming a previous plot where there was patently a sudden affray and where the killer and killed were previously unknown to each other. It is perhaps worth while to point out in conclusion that the rule, when it began, was meant to deal only with the *deliberate* killing of the officer, and not with causing his death by accident of some kind.<sup>16</sup>

<sup>14</sup> 4 Co. Rep. 40a (1586).

<sup>15</sup> 9 Co. Rep. 65b; Cro. Jac. 279 (1611).

<sup>16</sup> I am grateful to Professor Livingston Hall, of the Harvard Law School, and Professor Roy Moreland, of the Kentucky Law School, for their criticism and advice.

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