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# CULPABLE HOMICIDES IN RESISTING ARREST*

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The purpose of this article is to state the principles involved in determining whether a defendant who has killed in resisting arrest is guilty of manslaughter or murder. The scope of consideration will extend only to situations where the resistance was improper. If the resistance is alleged to have been proper, a question of self-defense is presented; and while, in fact, this plea is commonly made in the same cases considered here, yet very different principles and rules of law are concerned.[1]

This particular question, although important in the substantive criminal law, has received little analytical attention from either treatises or decisions. The customary treatment of it is a broad statement that: a killing in resisting legal arrest will be murder, but if the arrest or attempted arrest is illegal, it will be at most only manslaughter.[2] In an effort to evaluate such rules, and to determine their availability to meet present day needs of the administration of criminal justice, an examination will be made of their application to particular situations. This inquiry will deal both with legal and with illegal arrests. Under legal arrests, it will consider two problems. First, if the killing is otherwise murder, will hot blood occasioned by a legal arrest reduce it to manslaughter? Second, if the killing is otherwise manslaughter, will the fact that it was in resistance to a legal arrest raise it to murder? Under illegal arrests will be discussed four views as to when an illegal arrest will reduce a killing from murder to manslaughter.

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[1]For this separate problem on right of self-defense and justified killing, see article by C. Percy Wilcox, (1895) 34 AM. L. REG. 395 (N. S.), in which it is said at p. 400: "To sum the whole matter up, if the person illegally restrained of his liberty uses no more force than is necessary to obtain his freedom, and only shoots as a last resort, he will not be held accountable before the law."

[2]RUSSELL, CRIMES AND MISDEMEANORS (8th ed. 1923) 681, 695; KERR, HOMICIDE (1891 ed.) §§ 98, 150; 2 BISHOP, NEW CRIMINAL LAW (8th ed. 1892) § 652 WHARTON, HOMICIDE (2nd ed. 1875) §§ 225, 228; 1 WHARTON, CRIMINAL LA : (9th ed. 1885) § 413; GRIGSBY, CRIMINAL LAW (1922) §§ 549, 550, 551. See also: W. W. Thornton, "Homicide Committed in Making an Arrest", 13 CRIM. LAW MAG. (1891) 175–203, 343–350.

## A. Legal Arrests

### *A 1. If the Killing is Otherwise Murder Will Hot Blood Occasioned by a Legal Arrest Reduce it to Manslaughter?*

If the arrest is legal, must the homicide caused by resistance be murder? The decisions and statutes generally state that murder is a killing with malice. And here, as elsewhere in the law, the meaning of malice has not been limited by a homogeneous definition. An intent to kill has been the basic concept of "malice aforethought". To this, other situations have been added where there is said to be implied malice, such as a killing with intent to inflict serious bodily harm, a killing in the course of a felony, or a killing by means of a dangerous weapon. Where there is an intentional killing in resistance to an arrest known to be legal, all courts agree it is murder, for the law cannot afford to recognize a mitigating provocation based upon a lawful arrest, unless it is to be placed in the position of devouring itself. If the agent of the law is to be encouraged in his duty to arrest the defendant, the law cannot at the same time give indulgence to him who willfully chooses to be unlawful to the extent of deadly resistance. Anger with the law is an unworthy passion.

This refusal to recognize any adequate provocation in the case of an arrest known to be legal where the resistance was with intent to kill, is extended also to the situation of killing with so-called implied malice, and to those situations where it is not shown what the defendant believed as to the legality of the arrest. In the words of one court:[3]

> "Elliott then, possessing the right to make the arrest, it at once became defendant's duty to submit. Where such duty exists, hot blood can not be engendered by making or attempting a lawful arrest....."

The duty spoken of by the court is significantly measured by the legality of the arrest. That the defendant mistakenly believes he has no such duty will not avail him. In the instant case the defendant knew only that officers were attempting to arrest him. The state of mind of the resisting party is irrelevant and neither mistake of law[4] nor of fact as to the legality of his arrest has been recognized as a mitigating circumstance.

The mistake of fact situation is not expressly treated, as such, in

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[3]State v. Albright, 144 Mo. 638, 653, 46 S. W. 620, 624 (1898).

[4]Simpson v. State, 56 Ark. 8, 19 S. W. 99 (1892). Convict out of penitentiary on a pass from warden, kills, erroneously believing the officer had no right to arrest.

any discovered case. It might be argued that a provocation plea is recognized in the cases[5] which reduce murder to manslaughter when the killer did not know or have reasonable grounds to know the character in which the agent, legally authorized in fact, was assuming to act. However, these are more properly treated as cases of illegal arrest because the officer fails in performing his duty to make his character known if it would not otherwise have been apparent to defendant.[6] This theory has been articulated in a Texas opinion:[7]

> "In passing upon the question raised as to whether appellant was resisting a legal arrest, his knowledge of the fact that the deceased was an officer was an element."

If so handled, it is proper to allow a manslaughter provocation where the defendant killed in a passion aroused by the assault.

The reason why the law considers only whether the arrest was in fact legal, is not deeply buried. However, the answer to the question of why an indulgence based on provocation should be denied when the defendant makes an honest and reasonable mistake of fact as to the legality of the arrest and bases his resistance on that mistake, must be founded on something more substantial than the flimsy presumption that every man knows the law. Righteous indignation created by a supposed assault may arouse a passion in the killer quite as great as that likely to be aroused by an arrest which is in fact illegal. The defendant then kills from the same frailty of human nature which is ordinarily given indulgence by the law. The policy of the law which favors a strong deterrent against deadly resistance to lawful process, opposes the extension of the reasonable man standard to this situation. Thus the basic reason underlying the strict murder rule results from placing the focus on the officer exercising his duty

[5]Croom v. State, 85 Ga. 718, 725, 11 S. E. 1035, 1037 (1890). The court, reversing a murder conviction, said: "This [lower court charge] made it necessary in order for the homicide to be graded as manslaughter, for the officer to be found in the wrong, ignoring the fact that he might be in the right and the accused not know it." If the court has spoken precisely, it means that mistake of fact made a difference. Williford v. State, 121 Ga. 173, 48 S. E. 962 (1904), refers to Croom case as a question of illegal arrest. Also: State v. Spaulding, 34 Minn. 361, 25 N. W. 793 (1885); Cornett v. Comm., 198 Ky. 236, 248 S. W. 540 (1923); Love v. State, 15 Okla. Cr. 429, 177 Pac. 387 (1919); Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97 (1851); Tomson's Case, J. Kelyng 66, 84 Eng. Rep. 1085 (1666); L. R. A. 1918 D. at p. 975.

[6]This doubt will be resolved when some court decides the case of an officer reasonably notifying a defendant who, unknown to the officer, is blind and /or deaf. The defendant kills out of a passion aroused by the reasonably supposed assault, with no question of self-defense raised.

[7]Burkhardt v. State, 83 Tex. Cr. R. 228, 232, 202 S. W. 513, 515 (1918).

rather than on the resisting party. The usual provocation plea, based on a recognition of the frailties of human nature where there is not a "bad heart", must yield to the need for encouraging the performance of official duty, and for restraining the exercise of limited prerogatives given to such frailties where these may conflict in such direct fashion with legal process.

*A 2. If the Killing is Otherwise Manslaughter, Will the Fact that it was in Resistance to a Legal Arrest Raise it to Murder?*

So far, consideration has been directed only to those homicides which would be murder regardless of the fact that the defendant killed while resisting arrest. The only question has been whether mitigating circumstances should not be deemed adequate provocation despite the legality of arrest. A more challenging inquiry seems justified. If the rule—that a homicide in resistance to lawful arrest is murder—means anything, it should be supported by cases the facts of which include neither an intent to kill nor any of the recognized implied malice situations, *i. e.* use of dangerous weapon and so forth. The writer has not found such a case. Should further search reveal any, this much may be said now, decisions will be lacking in both sufficient numbers and quality to justify the finality with which the so-called rule is apparently accepted today.

The great majority of courts and writers, never having expressly considered the question, assume—and on eminent authority—that resistance to lawful arrest, *per se*, creates the requisite implied malice. Lord Hale stated the rule,[8] but cited no cases to support it; Blackstone adopted Hale's statement as law, and today practically every court that passes on a case of killing in resistance to a lawful arrest pays homage to this rule by adding another approving dictum.[9] This development is well illustrated by a Kentucky opinion which has been relied on in subsequent cases as establishing the rule for

[8] 1 HALE, PLEAS OF THE CROWN (1694) 457. "The second kind of malice implied is, when a minister of justice, as a bailiff, constable, or watchman, etc., is killed in the execution of his office, in such a case it is murder." FOSTER, CROWN LAW (2nd ed. 1791) 270.

[9] 4 BLACKSTONE, COMMENTARIES 201 states: "...if one kills an officer of justice ...in the execution of his duty...knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder." See Reg. v. Lockley, 4 Fost. and F. 155, 158 (1864)—officer hit on head by a brick, illegal arrest question, manslaughter verdict; Pew's Case, King's Bench, Cro. Cas. 183, 79 Eng. Rep. 760 (1630), Sayre's Cases 783—stabbing with a sword; Donehy and Prather v. Comm., 170 Ky. 474, 479, 186 S. W. 161, 163 (1916)—officer shot to death. For statement of rule in standard texts, see *supra* note 2 and CLARK & MARSHALL, CRIMES (3rd ed. 1927) 301 § 249.

that state. The defendant in resisting lawful arrest killed the officer with a "deadly bowie knife." The court in affirming a murder conviction said:[10]

> "The law did not require that they should have been told the killing must have been malicious. The officer is the minister of the law...his person is therefore clothed with a peculiar sanctity. An assault upon him, when properly engaged in the exccution of his duty, is an assault upon the law, and if he be stricken down at such time, ....by one knowing him to be an officer, it is murder, although the doer may not have any particular malice. (4 Blackstone, page 201; 1 East, page 303.)"

The establishment of a new implied malice situation is certainly not required for the decision in such cases.

On the other hand, there are at least two cases which have held that the death of the arresting party will not necessarily be murder even though the death was caused by the defendant's resistance or efforts to escape. In 1873, the case of *Regina v. Porter* presented facts which would actually put the stated rule to test.[11] The defendant was indicted for the murder of a private person who died as the result of injuries received while assisting to make a lawful arrest at an officer's command. In the course of the tussle, the deceased received a kick from the defendant which proved fatal. The law of the case is based on the charge given to the jury at *nisi prius* by Brett, J. As reported, *inter alia:*

> "He directed them distinctly that if the prisoner kicked the man, intending to inflict grievous harm, and death ensued from it, he was guilty of murder. He directed them further that if the prisoner inflicted the kick in resistance of his lawful arrest, even although he did not intend to inflict grievous injury, he was equally guilty of murder. But if, in the course of the struggle, he kicked the man, not intending to kick him, then he was only guilty of manslaughter. ...If, however, they thought that the kick was accidental, in the course of a wild struggle, then he would be guilty only of manslaughter."

The jury returned a verdict of manslaughter. It is obvious that Brett, J., went to some length to make possible the manslaughter verdict. For that reason all that he says may not be analytically consistent. It is patent that here was a case which called for a murder conviction if the rule stated without equivocation by the dicta following Hale and Blackstone was to be applied and given meaning.

If the rule ever existed and if it continued to have meaning after

[10]Dilger v. Comm., 88 Ky. 550, 561 (1889).

[11]12 Cox Criminal Cases 444, 445, 446 (1873).

*Regina v. Porter*, it was doomed to be further disregarded in 1919 when an equally difficult set of facts was presented for decision to the supreme court of West Virginia.[12] The defendant was driving an automobile near the state boundary when an officer jumped on his car to make a lawful arrest. In attempting to get across the state boundary and thus escape arrest, as he thought, the defendant inadvertently killed the arresting officer by crashing into a bridge. The court squarely faced the problem and relying heavily on *Regina v. Porter* reversed the murder conviction.[13]

> "Unless the jury believed defendant intentionally collided with the bridge, malice, an essential element of murder, is wanting, it cannot be inferred from the mere effort to escape arrest."

In view of the fact that these decisions constitute the only judicial expression on the precise problem, it is not unlikely that they will influence future decisions and legislative action away from the logical consequences of the supposed common law rule. There is no doubt that they cross a strong and well established current of authority, but there does seem to be appreciable merit in their course. The individual will still be punished for his wrongful act and those who perform official duties will thus receive a measure of deterrent protection. Why should the deterrent protection in the form of punishment be necessarily a maximum penalty of murder, where the effect of resistance or attempt to escape is not likely to be death, and where, in all probability, society is not dealing with such an individual as the "gun-toter"—a real menace to the official?[14] If such views are accepted, it follows that the rule (fixing homicide in resistance to lawful arrest as murder) means only that a mitigating provoeation cannot be set up to reduce to manslaughter a killing which would have been murder regardless of the fact that the defendant was resisting legal

[12]State v. Weisengoff, 85 W. Va. 271, 101 S. E. 450 (1919).

[13]*Ibid.* 285, 286. These cases have not been dismissed as erroneous and without merit by able commentators. See WHARTON, HOMICIDE (2nd ed. 1875) 199 § 228 where Regina v. Porter is cited in support of an italicized rule that: "Where intent was not to kill or inflict serious bodily harm the offense is but manslaughter, though the arrest was legal." See also 2 BRILL, CYCLOPEDIA OF CRIMINAL LAW (1923) 1124 § 671.

[14]Although on no more scientific data than the reading of the bulk of the resistance to arrest cases which resulted in homicides and from several years' study of a state prison population, the writer feels strongly that such decisions most satisfactorily fit the punishment to the crime, and, with the better individualization tenets of modern criminology, the punishment to the individual. At the same time it is felt there is sufficient protective deterrence in a manslaughter conviction to satisfy the policy of the law.

arrest. And in truth, this is all the rule has meant as invoked in the vast majority of such homicide cases. Weight is added to these views by the circumstance that in a recent case the plea of misadvertent shooting during resistance was met by resting the murder conviction on a statute making such resistance a felony,[15] thus placing the murder conviction on another well recognized homicide rule. No case has been discovered in which the court held that the malice requisite for murder could be implied from the bare resistance to arrest, although this assumption has been of long standing.

### B. Illegal Arrests

Is killing in resistance to illegal arrest murder or manslaughter? The homicide cases arising from resistance to unlawful arrest have as a whole been even more bluntly handled than those where the arrest was legal. The cases here considered fall into four groups: first, those which base their decision solely on the illegality of the arrest—if the arrest is illegal the degree of homicide can be no greater than manslaughter unless "express malice" is proven; second, those depending upon a presumption that the killing was caused by the passion provoked by the illegality of the arrest; third, a group of authorities which require the defendant to show that he in fact subjectively acted from the provocation of hot blood aroused by the illegality of the arrest; and fourth, a few cases denying altogether the sufficiency of the provocation of hot blood aroused by illegal arrest to reduce murder to manslaughter. The common problem of all these cases is what proof, if any, other than the unlawfulness of the arrest is necessary to reduce the killing to manslaughter.

#### *B 1. View that Illegality of Arrest Always Reduces Murder to Manslaughter Unless There is Express Malice*

Taking up the first group, the reasoning upon which the so-called mandatory manslaughter cases rest is not to be found in the opinions. The test is the legality of the arrest. Once the illegality of the arrest

[15]People v. Arnett, 239 Mich. 123, 135, 214 N. W. 231, 235 (1927). Court said: "The law exacts duties of police officers and protects them in the performance thereof by rendering it a felony to resist or obstruct lawful arrest [3 Comp. Laws 1915, § 14994], and constitutes it murder to kill, either intentionally or even per mischance, such officer in resisting or obstructing a lawful arrest. [Defendant] did not excuse himself at all in claiming that, when the sheriff told him he must come with him, he thought of the revolver in his pocket, and, fearful it would be found on his person, took it in his hand to cast it in the back of the automobile, and, ... the sheriff seized hold of it and it was discharged." For a further treatment of statutory provision see *infra* p. 388.

is established, the killing can be no greater than manslaughter.[16] Clearly these cases do not concern themselves with the mental condition of the killer; rather they continue to focus on the arresting official. Just as he must be vindicated and protected if acting lawfully; so in a vague way, he is punished and a deterrent against unlawful arrest is provided in an equally vague way by not making the taking of his life a supreme offense. The weight of English authority is committed to this view,[17] and the literalness with which able courts in this country have applied the general rule is shockingly illustrated in a Massachusetts case.[18] The defendant was indicted for the murder of a constable who had arrested him as he was leaving a railroad station into which he had previously broken. The court treated the offense as one not committed in the presence of the officer, and since breaking and entering was not a felony in Massachusetts at that date, the arrest was illegal. The defendant escaped, and when pursued, drew a gun ordering the constable to "stop and go back", or be shot. The constable stopped, but on refusing to go back was shot dead. Shaw, C. J., sitting with Fletcher and Bigelow, J. J., directed the jury that there being no felony and no warrant and no reasonable suspicion of felony, the arrest was illegal and defendant could be convicted of only manslaughter, which verdict was accordingly returned. And such a result is not unknown today.[19]

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[16]2 ARCHBOLD, CRIMINAL PRACTICE AND PLEADING 242, relied on in Rafferty v. State, 69 Ill. 111 (1873). The Court reversed a murder conviction, but when the case came up again, 72 Ill. 37, after a retrial, the court sustained the murder conviction based on an express malice finding. See cases (1905)66 L. R. A. 353; (1911) 33 L. R. A. (n. s.) 143.

[17]Ferrer's Case, Cro. Car. 371 (1634); Pew's Case, *supra* note 9; Rex v. Patience, 7 Car. and P. 775 (1837); Rex v. Thompson, 1 Moody C. C. 80, 168 Eng. Rep. 1193 (1825); R. v. Tooley, 2 Ld. Raym. 1296, 11 Mod. Rep. 242, (1709) where the majority upholding a manslaughter conviction said in reply to dissent: "They say, likewise, that in the case at bar, it could not be a provocation, because they knew not that she was illegally arrested, but surely *ignorantia facti* will excuse, but never condemn a man. Indeed he acts at his peril in such a case, but he must not lose his life for his ignorance, when he happens to be in the right." The significant thing about the English cases on this subject is that they are comparatively *de minimis*. *Cf.* Mackalley's Case, Co. 9 Report 61 (1611).

[18]Comm. v. Carey, 66 Mass. (12 Cush.) 246 (1853). This case is probably law in Massachusetts today; see Comm. v. Phelps, 209 Mass. 396, 406, 95 N. E. 868, 872 (1911).

[19]People v. White, 333 Ill. 512, 519, 165 N. E. 168, 171 (1929). Defendant was convicted of murder for shooting a police officer who questioned him about registration of car and on finding a discrepancy told defendant to come to station with him in order to check it up. Defendant shortly began shooting with a gun inside his pocket and in the affray the officer and defendant's companion, a recently escaped convict, were killed. Court reversed conviction and held that there being

Most of the jurisdictions adopting this view have recognized an exception where the killing is done with "express malice". Even though the arrest were illegal, if the defendant killed with express malice he would be guilty of murder.[20] In the words of an Oregon opinion:[21]

> "We do not think that the court had a right as a matter of law to assume that the arrest had the effect of exciting... passion,... there was some evidence which the jury had a right to consider which tended to show malice."

To this extent these courts adopted a subjective standard and looked to the motive of the defendant in deciding the degree of homicide. This so-called exception is finding increased favor in the cases and yet it is submitted that, if not utterly misconceived, it is at best a *gauche* process for reaching a proper result. Technically speaking, there is no need to establish further malice, because the intent to kill or to inflict serious injury under well accepted doctrines satisfies that requisite, and if one of these or of similar conditions is not present in a situation of illegal arrest, the homicide is clearly only manslaughter. By very definition, the "express malice exception" is only an exception when it operates to prevent the illegality of the arrest from reducing to manslaughter what would otherwise be murder. It is highly unfortunate that the same word used in a common situation should be given a wholly different meaning from the accepted technical one by the addition of a redundant adjective. In spite of an unhappy term, the fact remains that the view that a killing in resistance to an illegal arrest is at most manslaughter is now limited by whatever content the court chooses to pour into "express malice", and the courts have differed on the evidence necessary to constitute such malice. Without exception, however, in all the express malice cases the arrested party has made it clear by his deliberate resistance that he was not acting from a passion provoked by the illegality of the arrest. Most of the decisions to date which rest on the express malice exception go further and require a showing of personal hatred on the part of the defendant towards the deceased. For example, the

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no reasonable grounds for suspicion the arrest was illegal "...and it was reversible error, under the evidence, to give instructions as to the law of murder, as there was no evidence in the record showing or tending to show previous or express malice." See also People v. Scalisi, 324 Ill. 131, 154 N. E. 715 (1926).

[20]Rafferty v. People, 72 Ill. 37 (1837); Galvin v. State, 46 Tenn. (6 Cold.) 283 (1869); Roberson v. State, 43 Fla. 156, 29 So. 535 (1901); State v. Scheele, 57 Conn. 307 (1889); Reg. v. Sattler, Dearsly and Bell 539, 169 Eng. Rep. 1111 (1858).

[21]State v. Meyers, 57 Ore. 50, 56, 110 Pac. 407, 410 (1910).

Massachusetts Supreme Court has approved the following charge as an accurate statement of the law:[22]

> "Express malice means an actual state of mind existing in the heart of the defendant towards the deputy sheriff of ill will, or hatred, or dislike, or kindred feelings..."

Lord Campbell, C. J., in giving the opinion of the English judges in a crown case reserved expressed the same thought:[23]

> "...the jury finding that he committed the crime out of revenge and not with a view of escaping from the custody.... as he did not commit the offence with a view to his liberation, it is immaterial whether he was in lawful custody or not—he was guilty of murder."

This increased recognition and application of the so-called exception is probably a desirable development. For it is unlikely, with opinions showing greater awareness on the part of courts of the true nature of a defendant's provocation to killing in resistance of illegal arrest as ground for indulgence, that this exception will be so confined to the rare situation where the homicide is the result of personal animosity.[24]

### *B 2. View that Illegality of the Arrest is Presumed to Arouse Hot Blood and so Reduce a Killing from Murder to Manslaughter*

The second group of illegal arrest cases—those which reach a manslaughter decision for a homicide caused by resistance on the presumption that defendant killed out of passion—explicitly recognize the character of the mitigating factor of provocation as a basis for such indulgence.[25]

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[22]Comm. v. Phelps, *supra* note 18, 406, 407, 411, 95 N. E. at 872. The report gives the full charge on the express malice point and the portion of the charge apparently stating the objective standard of the provocation test.

[23]Reg. v. Sattler, *supra* note 20. The answer to the question submitted, "... supposing the custody not to have been lawful..." was: "We are all unhesitatingly of opinion that the killing under such circumstances was not necessarily only manslaughter."

[24]See Roberson v. State, *supra* note 20. The only pertinent evidence was of an attempted illegal arrest and court said "...the fact that he did not know when he shot whether his arrest was lawful or unlawful..." was a circumstance from which the jury might find malice or premeditated design. See also Brooks and Orme v. Comm., 61 Pa. 352, 357 (1869).

[25]Briggs v. Comm. 82 Va. 554, 565 (1886). See also Rex v. Chapman, Sussex Assizes, 12 Cox C. C. 4 (1871), Sayre's Cases 797. Hannen, J., directed jury: "That it is presumed he acted, not with malice, but from the excitement of the moment."

> "The true view of the law, in reason, is that when the mere fact of an illegal arrest... appears, if the one suffering it kills the officer or other arresting person, whether with a deadly weapon or by other means, he may rely on the presumption that his mind was beclouded by passion; but if actual malice is affirmatively proved, the homicide will be murder."

Yet no case has been found where this presumption was rebutted without lip service to the exception as to express or actual malice. If the presumption cannot be affected by evidence that the defendant resisted regardless of the legality of the arrest and did not kill from a proper passion, the net result is only another version of the view that killing in resisting an illegal arrest is only manslaughter. These opinions do have separate significance, however. If the scope of the express malice exception should be extended to make possible more murder convictions, it is probable that it will be brought about by diluting the strength of the present presumption that defendant necessarily killed out of righteous passion. The point will be reached where it can be shown in rebuttal either that defendant did not know of the illegality of the arrest, or that he did not kill because such illegality provoked him.

This line of development seems most likely for two reasons. The cases which talk of presumptions, are necessarily aware of the provocation basis which they presume. They will therefore be most amenable to the reasons for the extension. Also, since these courts have given so much indulgence before, it is unlikely they will make a complete change and put the burden of proving his provocation on the defendant. Rather, it seems reasonable to expect that evolution toward a stricter standard will come by way of putting the burden on the state to produce evidence which may overcome the presumption that the homicide was caused by adequate provocation. The flavor of penalizing illegal arrests will thus be retained, although more properly measured.

A concrete illustration is available. In the Virginia case quoted above, the defendant, a youth connected with an agricultural fair, was illegally arrested on the street by the deceased, a county officer. The defendant resisted and called for the officer's badge, denying his right to make the arrest. The defendant "pulled loose from the deceased, and shot him in the back of the head, and ran rapidly away, ..." The court affirmed a murder conviction, saying:[26]

> "I see nothing to suggest reason beclouded by passion; the shooting appears to have been done coolly and deliberately, and immediately flight followed.

[26]Briggs v. Comm., *supra* note 25, 564, 566.

> "It is a case in which the jury was justified in finding malice; they have ascertained the degree of the crime, and the same was neither against the evidence nor without the evidence,..."

The decision is a striking demonstration of what to expect when the skids are greased with a mixture of presumptions and express malice exceptions.

Whatever the original justification for the two views already considered, no reasons exist for their continuance. For normally today, false arrest no longer carries with it the danger of prolonged imprisonment and physical suffering it did up to the seventeenth century.[27]

*B 3. View That to Reduce a Killing from Murder to Manslaughter the Defendant's Hot Blood Must in Fact be Aroused by the Illegality of the Arrest*

There now remains for discussion the third group of illegal arrest cases. In 1869, Agnew J., speaking for the Supreme Court of Pennsylvania in *Brooks and Orme v. Comm.*, said:[28]

> "But if the arrest were illegal it does not follow that the crime was necessarily manslaughter. There remained still the question on the evidence whether the killing was without malice, and arose solely from a sudden heat and passion upon the illegal arrest. ... The indulgence which the law shows in cases of manslaughter is to the weakness of human nature, not its wickedness."

As a result of this dictum—the arrest was in fact legal—the case has become the leading one in the establishment of a subjective standard by which the manslaughter indulgence is to be measured. Today commentators,[29] courts,[30] and legislatures[31] are slowly taking cogniz-

[27]The trails of criminal justice problems cross frequently, and here it may well be that abolition of severe 3rd degree and other unconscionable practices by some police officials would make the man with a "record" less fearful of arrest and its attendant incidents. [28]61 Pa. 352, 357, 100 Am. Dec. 645, Sayre's Cases 799.

[29]2 BISHOP, NEW CRIMINAL LAW (8th ed. 1892) §§ 652, 699. After stating the broad rule that a homicide in resisting illegal arrest will be manslaughter, he continued: "Yet,—in reason, if in fact the outrage of this attempted illegal arrest has not excited the passions, a killing in cold blood with a deadly weapon will be murder. Perhaps this is not so plain in authority; for the books lay down the doctrine in the very broad terms that a homicide in resisting an unlawful arrest is manslaughter and not murder, even though committed by the use of a deadly weapon,—a proposition possibly admitting some qualification on the authorities."

[30]Territory v. Lynch, 18 N. M. 15, 133 Pac. 405 (1913); Williams v. Comm., 128 Va. 698, 104 S. E. 853 (1920); Sanders v. State, 181 Ala. 35, 61 So. 336 (1913); Miller v. State, 31 Tex. Crim. R. 609, 21 S. W. 925 (1893); Galvin v. State, 46 Tenn. (6 Cold.) 283 (1869).

[31]4 CANADIAN ENCYCLOPEDIC DIGEST (Western ed.) 503 § 13. CAN. CRIM. CODE (1906) § 261 (4).

ance of the nature of the defendant's provocation to kill in the course of illegal arrest. In *Williams v. Comm.*, the Supreme Court of Virginia affirmed a murder conviction squarely on the ground that the defendant's passion could have been aroused only by the arrest not by the possible illegality unknown to him. The court said:[32]

> "The question [legality of arrest] is an open one in Virginia and it is unnecessary for us in this case to decide it, for the reason that it clearly appears from the testimony of the accused that no lack of authority of the officers who attempted to arrest him influenced his conduct in any way....it was nothing more and in truth appeared nothing more to him than an orderly arrest supposed by him to be lawful..."

Thus these authorities continue to recognize an illegal arrest as adequate provocation for a mitigating passion, but they require the jury to find as a fact that the homicide was the result of passion so provoked. Assuming such a provocation to be deemed adequate in law—which is not beyond argument—the subjective test seems without doubt the proper approach.[33]

Otherwise the law, with no compensating policy, is put in the position of appearing to condone—as it often actually does—one who considers being arrested so unhealthy for him that the most effective and irretrievable resistance is preferable. Moreover, the idea that illegal arrests may be abated by automatically reducing the penalty for killings committed in such situations, is absurd. There is a complete answer. If it is more profitable for the criminal to shoot first and inquire as to the legality of the arrest when, as and if tried; equally so is it safer for the officer to become nimble on the "draw", and to shoot in self-defense, first.[34] The vicious circle is then complete.

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[32]128 Va. 698, 715, 719 (1920).

[33]For the most satisfactory discussions see: State v. Middleton, 26 N. M. 353, 192 Pac. 483 (1920); *Ex parte* Sherwood, 29 Tex. Crim. App. 334, 15 S. W. 812 (1890); Cortez v. State, 44 Tex. Crim. Rep. 169, 69 S. W. 536 (1902)—which last case is cited in (1905) 66 L. R. A. 374, note, as "overruling in effect *Ex parte* Sherwood", but in this writer's opinion the decision gives express approbation to the subjective test rule of *Ex parte* Sherwood and merely states that knowledge of illegality is not material where only such force is used "as is reasonably necessary to prevent the arrest....But if such person...uses more force than is reasonably necessary, he would be guilty at the least of manslaughter." The rule in Texas is somewhat in doubt as a result of the decision in Earles v. State, 47 Tex. Cr. 559, 566, 85 S. W. 1, 4 (1905), but the remarks of Brooks, J., writing the opinion in the same case on appeal from a new trial seem well taken, to the effect that the previous decisions establish the subjective standard in Texas. 52 Tex. Cr. 140, 148, 106 S. W. 139, 141 (1907). These remarks of Brooks were commended and relied on by the New Mexico court in State v. Middleton, *supra*. His arguments set out at further length in a dissent in the same case, 16 Tex. Ct. Rep. 223 (1905), seem unanswerable.

[34]See Boston Sunday Herald, January 24, 1932, Section B, p. 4.

Furthermore, the type of offender likely to benefit by holding that if the arrest is illegal only personal hatred of the officer can make the killing more than manslaughter, is dramatically revealed by the recent Illinois cases. In *People v. White*,[35] the defendant was apparently in possession of a stolen car and was accompanied by a recently escaped convict; while the defendants in *People v. Scalisi*,[36] when forced from their high-powered motor, waged a pitched battle using the best approved gangster weapons. The failure of such holdings to fit the punishment to either the offender or the offense could not be more strikingly illustrated.

The related question of whether a third person who kills in resisting the illegal arrest of another may set up such illegality, is not properly within the scope of this article, but the same principles should apply. However, authority is split.[37]

### *B 4. View That Hot Blood Aroused by an Illegal Arrest Will Not Reduce a Killing from Murder to Manslaughter*

A fundamental attack has been directed in several cases on the desirability of recognizing the adequacy of the provocation of an illegal arrest. An American court in the middle of the last century,[38] relying on the authority of an early English decision,[39] affirmed a murder conviction where the officer was killed while seeking to arrest a defendant on an illegal warrant. The Georgia court said:

> "In Mackalley's case. . . it was *resolved*. . . that if there be error in awarding process, or in mistake of one process for another, and an officer be slain in the execution thereof, the offender shall not have the advantage of such error; but that the resisting of the officer, when he comes to make an arrest in the King's name, is murder."

Other American courts using language in the opinions which exceeds that of either the express malice or subjective standard cases, have subsequently reached a like result.[40] In the farthest reaching of these

[35]333 Ill. 512, 165 N. E. 168 (1929). [36]324 Ill. 131, 154 N. E. 715 (1926).

[37]R. v. Tooley, *supra*, allowed it, but the case is said to be overruled in this respect, see Warner's Case, 1 Mood. C. C. 380, 385 (1833). Also see Huggett's Case, J. Kelyng 59 (1666) where it was held the provocation of unlawful arrest could not avail third persons killing in attempting rescue. *Contra:* Alford v. State, 8 Tex. App. 566 (1880)—killing of officers unlawfully arresting brother, manslaughter; subjective test applied. [38]Boyd v. State, 17 Ga. 194 (1855).

[39]Mackalley's Case, Co. 9 Report 61 (1611).

[40]Alsop v. Comm., 4 Ky. Law Rep. 547 (1882). The court said, in a rare opinion emphasizing the social interests involved: "known officer of law, armed with a warrant, though defective. . . makes known his purpose, and in good faith attempts to execute it, it is the duty of person about to be arrested to submit to his authority, when exercised in a proper manner."

cases, the illegal arrest was made by an officer not in uniform and without any warrant giving "color of authority".[41] If these cases are confined to their particular facts, there is good reason for upholding their results. On the other hand, it is doubtful whether they should be followed as precedents for rejecting the factor of illegality of arrest as a basis for a mitigating provocation to a killing. The great majority of jurisdictions are definitely committed otherwise, and it seems desirable to the writer that established bases for mitigation be retained in order that there may be available a suitable means for properly fitting the punishment to the crime and the individual. An able judiciary, sensitive to the social interests concerned, will be able with the aid of honest juries to apply the subjective test as to provocation in order to prevent unworthy passions from becoming the source of an indulgence to a vicious character. The manslaughter sentence will remain available for a truly "accidental offender".

Whether the fact that the defendant was actually guilty of the crime for which he was being illegally arrested should make a difference in the degree of homicide, is more properly treated under the subject of arrests.[42] Where such a circumstance makes an otherwise illegal arrest legal, the homicide will of course be murder. But if the illegality of the arrest is not affected, no authority has been found, aside from the sweeping dictum in *Brooks and Orme v. Comm.*,[43] which gives the fact of actual guilt of the resisting party any more weight than that of strong evidence that the killing was the result of other motives than hot blood aroused by illegality of arrest.

## Conclusion

Homicide in resisting lawful arrest will be murder if the killing is done with malice, which includes the accepted implied malice situ-

[41]People v. Bradley, 23 Cal. App. R. 44, 46, 136 Pac. 955, 956 (1913). Court said: "The mere fact that the deceased failed to reveal his identity as a peace officer, and the further fact that the arrest was apparently unauthorized and not made in strict accord with the forms required by law, may have justified the defendant in breaking the arrest, but such facts alone were wholly inadequate... to reduce such killing from murder to manslaughter." See also People v. Gilman, 47 Cal. App. R. 118, 190 Pac. 205 (1920).

[42]See J. B. Waite, *Some Inadequacies in the Law of Arrest*, 29 Mich. L. Rev. 448, 455 (1930–31). In advocating that actual guilt should be a factor in determining lawfulness of arrest, he says: "This is a wholly rational proposition and conformable to the necessities both of social self-protection and the desiderata of individualism." See State v. Phillips, 118 Iowa 660, 92 N. W. 876 (1902).—Dicta to effect that "unlawful" arrest of the guilty party would be no wrong and therefore a basis for murder if resistance was fatal.

[43]61 Pa. 352 (1869). Opinion points out the unlikelihood of a guilty party killing from a passion caused by illegality of arrest.

ations, but no case has been found where the decision had to rest on malice implied from the mere resistance to arrest. The few decisions in point indicate a refusal on the part of courts actually to apply the oft-stated dictum that homicide in resisting a lawful arrest must be murder. If the defendant can reasonably be charged with knowledge of the character in which the arresting party acts, then probably neither mistake of fact nor of law as to the legality of the arrest can be the basis for an adequate provocation.

No statutory provisions altering the common law rule have been found except those which might indirectly do so by making resistance to arrest a felony.[44] Most statutes, however, make resistance to arrest a misdemeanor only.[45]

It is submitted that the time has come to cease perpetuating the "rule" that malice will be implied from the mere resistance to lawful arrest. Resistance to arrest was only a misdemeanor at common law, and it has not generally been regarded more seriously by our legislatures. The fortuitous circumstance that the officer should be killed, where this result was neither intended nor likely to happen, should not enhance the seriousness of the offense nor the viciousness of the offender. A manslaughter conviction will supply a full measure of deterrence. The escaping "speedster" or other minor automobile law offender is just one type of case likely to create two equally unattractive alternatives: (1) to continue apologizing for a

[44]ARIZ. REV. CODE (1928) § 4516; 4 FLA. GEN. LAWS (Skillman, 1927) § 7524; 3 MICH. COMP. LAWS (1929) § 16585; 4 MO. STAT. ANN. (Permanent ed.) § 3897; VT. GEN. LAWS (1917) § 7070. See also: KAN. REV. STAT. ANN. (1923) § 21-717; ME. REV. STAT. (1930) § 21; 2 N. H. PUB. LAWS (1926) c. 394 § 8. See People v. Arnett, 239 Mich. 123, 125, 214 N. W. 231, 232 (1927); State v. Green, 66 Mo. 631 (1877).

[45]ALA. CRIM. CODE (1923) § 5419; CAL. PEN. CODE (Deering, 1931) § 148; 2 COLO. ANN. STAT. (Mills, 1927) § 1856; 2 CONN. GEN. STAT. (1930) § 6183; 4 FLA. GEN. LAWS (Skillman, 1927) § 7525; 6 GA. ANN. CODE (Park, 1914) § 311; 2 IDAHO COMP. STAT. (1919) § 8183; ILL. REV. STAT. (Cahill, 1931) § 513; IOWA CODE (1931) § 13331; KAN. REV. STAT. ANN. (1923) §§ 21-718, 719; 2 MINN. STAT. (Mason, 1927) § 9995; MISS. CODE (1930) § 1061; 4 MO. STAT. ANN. (Permanent Ed.) § 3898; 4 MONT. REV. CODES (Choate, 1921) § 10928; NEB. COMP. STAT. (1929) § 28-729; 5 NEV. COMP. LAWS (1929) § 10046; 2 N. H. PUB. LAWS (1926) c. 394 §§ 5, 6, 7; N. M. STAT. ANN. COMP. (1929) § 35-2706; N. Y. CRIM. CODE AND PEN. LAW (Gilbert, 1930) §§ 600, 1787, 1825; 39 N. Y. CONS. LAWS (McKinney) § 1851; N. C. CRIM. CODE (Jerome, 4th ed.) § 1002; 2 N. D. COMP. LAWS ANN. (1913) §§ 9306, 9398; OHIO GEN. CODE (Page, 1931) § 12858; PA. STAT. (Purdon, Permanent Ed.) Title 34 § 1107, Title 75, § 743; 2 S. C. CODE OF LAWS (1922) 104 (313) § 4; 1 S. D. COMP. LAWS (1929) § 3775; 3 TENN. CODE (1932) § 11044; 2 UTAH LAWS (1921) § 8002; W. VA. CODE (1931) 1481 § 61-5-17; 2 WASH. CODE (Pierce, 1919) § 9070; WIS. STAT. (1929) § 346.39; 4 U. S. S. A. (1916) 192, Crim. Code § 140, 35 STAT. 1114, 18 U. S. C. A. (West, 1927) § 245.

high percentage of our "lifers" as the best men in our penal institutions, or (2) to create another group of jury-made law cases. A restatement of the law in harmony with all decisions is possible and is desirable in the interests of more accurately fitting the penalty to both the offense and the offender. Precisely stated, the rule is not that a homicide in resisting lawful arrest will be murder, but rather that a murder committed in resisting lawful arrest cannot be reduced to manslaughter.

Whether a homicide growing out of a resistance to unlawful arrest will be murder or manslaughter is dependent on whether an indulgence is to be granted the offender. In the light of human experience it is not an unlikely fact that a known illegal arrest may create hot blood. This is especially true if the arrest were illegal because of improper tactics used in its execution, or if the arrested party were innocent. Hence it seems neither feasible nor desirable to alter the common law recognition of an adequate provocation in this situation. So reduced, the problem is one of whether a defendant has established his provocation by showing that the arrest was in fact illegal or whether he must go further and prove that he killed out of hot blood aroused by the illegality of the arrest.

The circumstances under which the law can afford to recognize provocation are succinctly stated in *Ex parte Sherwood:*[46]

> "The attempt must be to make an unlawful arrest; the prisoner must know of the attempt, and he must know that the attempt is to make an unlawful arrest. Why? Because without such knowledge the provocation could have no effect upon him whatever, and hence without such knowledge it is absolutely certain that his passions, if any, were not caused by this provocation."

It should not be an undue hardship on a defendant to require him to prove that he killed from severe provocation. The law requires this much of him in other situations where he seeks the protection of a provocation or justification claim. Certainly, it should be no more bountiful in a situation where the highest public interest is involved. If a defendant cannot affirmatively establish this mitigating circumstance, "the inference is irresistible that it was an arrest which he feared and which he resisted—the more legal it was, the more he feared it."[47]

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[46]29 Tex. App. 334, 335 (1890). Such a statement of the subjective standard is ordinarily sufficient. However, further difficulties may be imagined in deciding what subjective knowledge is to be required; for example, is it sufficient that the defendant erroneously thought the arrest was illegal for one reason where it was in fact illegal for another? Logically it would be murder, but *quaere?*

[47]Williams v. Comm., *supra* note 30, 722.

The *Canadian Criminal Code* § *261* (*4*) states the rule in its most satisfactory form:[48]

> "The illegality of an arrest does not necessarily reduce an offense of culpable homicide from murder to manslaughter, but if the illegality was known to the offender it may be evidence of provocation."

A restatement of the law in the United States might well adopt such a provision as a model.[49] Thus indulgence will be denied to one who acts not from a weakness common to human beings, but rather from the strength of anti-social attitudes.

In short, the difference between the majority rule and that of the *Canadian Criminal Code* is this: by the latter, the defendant recognizes his provocation; while by the former, it is *ex post facto* discovered for him by counsel's research.

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[48]4 CANADIAN ENCYCLOPEDIC DIGEST (Western ed.) 503 § 13.

[49]Cases arising under the following Mississippi statute apply the objective standard. MISS. CODE (Hemingway, 1927) § 1016, (1930) § 995: "Every person who shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any unlawful act, or after such attempt shall have failed, shall be guilty of manslaughter." See Williams v. State, 122 Miss. 151, 84 So. 8 (1919); Bergman v. State, 133 So. 208 (1931).