

**Resisting Unlawful Arrest in Mississippi:  
Resisting the Modern Trend**

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**I. Introduction**

¶1 At common law an individual had the right to resist an unlawful arrest. This right to resist was based, in large part, on the perception that some unlawful arrests were so provocative that a person, either the subject of the arrest or an onlooker, might react to the attempted arrest without carefully contemplating the consequences of their actions, and that an individual was justified in resisting, by force if necessary, an illegal interference with his liberty.<sup>1</sup>

¶2 Virtually all American courts adopted the English common law right to resist arrest, although the justification for the right to resist changed slightly, to one based on principles of self-defense.<sup>2</sup> In general, American courts in the eighteenth and early twentieth century allowed the use of whatever force was “absolutely necessary to repel the assault constituting the attempt to arrest.”<sup>3</sup> The only major restriction on the right was that an arrest made pursuant to a warrant that was later determined to be technically defective could not be resisted by force.<sup>4</sup>

¶3 The national trend, during the past forty years, has been to do away with the common law right to resist an unlawful arrest. The right has been abrogated by judicial decree<sup>5</sup> as well as legislative enactment.<sup>6</sup> Elimination of the right is based on several factors, including the development of modern criminal procedure, the ability of criminal defendants to seek redress via other means, and the improvement of jail conditions.<sup>7</sup> Several state courts have recently eliminated the right to resist arrest, despite acknowledging the flagrant illegality and provocative actions of the police in the case at hand.<sup>8</sup> In the rush to eliminate a right perceived as against contemporary public policy,<sup>9</sup> the courts have paid little attention to the original justification for the rule--that an illegal arrest is an affront to the dignity and sense of justice of the arrestee--and instead have focused on the alternatives to forcible resistance that have been developed, such as civil suits and the writ of habeas corpus.

¶4 Mississippi is one of a dozen states that still permit a person to resist an unlawful arrest.<sup>10</sup> Almost all of these states are located in the South.<sup>11</sup> The question this geographical anomaly raises is why has the right to resist arrest survived in the South, and Mississippi in particular? This article suggests that a possible explanation may be the influence of uniquely Southern conceptions of honor and the right to use deadly force in self-defense. Historians have long acknowledged that Southern culture strongly supports the importance of personal honor and condones a “subculture of violence.”<sup>12</sup> This hypothesis, first posited in criminological literature in the 1970s, is that regional variations in rates of interpersonal violence, particularly homicide, may be based on subcultural differences.<sup>13</sup> The South has historically had a higher level of interpersonal violence than other regions,<sup>14</sup> possible explanations for this include social disorganization, economic deprivation, an adverse reaction to losing the Civil War, and unusually strong support for the right of the individual to defend their honor.<sup>15</sup> Retention of the right to resist an unlawful arrest goes hand-in-hand with the Southern support for the right to defend one’s honor and/or self.

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¶5 This article examines the development and history of the right to resist an unlawful arrest at common law and in the United States,<sup>16</sup> scholarly criticism of the common law rule,<sup>17</sup> and the current status of the rule in the United States,<sup>18</sup> the Southern “subculture of violence” and how that relates to cases involving resisting arrest in Mississippi. A review of all Mississippi cases involving claims of a right to resist unlawful arrest are examined.<sup>19</sup> Mississippi was chosen as an example of the general Southern tendency to vigorously support the right to resist unlawful arrest. There are similar cases in other Southern states. The language of the Mississippi cases, this Article argues, provides support for the argument that the right to resist arrest has remained entrenched in Southern law, and helps to explain why Southern states generally and Mississippi in particular have chosen to retain a common law rule which has fallen into disrepute in other regions of the country.

### II. Development of the Right to Resist Arrest

¶6 The right to resist an unlawful arrest has existed, in some form, at common law for over 300 years. Its origins may be traced to the Magna Charta in 1215,<sup>20</sup> but it was not until *The Queen v. Tooley*<sup>21</sup> that the right was clearly established by judicial decision. In this case a constable arrested a woman on the streets of London on the charge of being a disorderly person.<sup>22</sup> As the constable was escorting his prisoner to jail, three men armed with swords attempted a rescue, but stopped when the constable identified himself and asserted his authority to make an arrest.<sup>23</sup> The constable then took the woman to jail. Upon leaving the jail the constable was set upon by the same three men, who now demanded the release of the jailed woman.<sup>24</sup> A bystander who came to the constable’s assistance was killed by Tooley, one of the three attackers.<sup>25</sup> Tooley was arrested and charged with murder.

¶7 Under the law at the time an unprovoked killing was murder, while a killing with provocation was manslaughter.<sup>26</sup> The court determined that the initial arrest was illegal. The court held that manslaughter was the proper charge, as the illegal arrest constituted adequate provocation.<sup>27</sup> In so doing the court relied in part on a prior case, *Hopkin Huggett’s Case*.<sup>28</sup> In this case several men came to the aid of a man who was being unlawfully arrested by a constable,<sup>29</sup> and in the resulting fight the constable was killed. The court determined that a person who came to the aid of someone who was being unlawfully arrested and, in so doing killed the constable was guilty not of murder but of manslaughter. According to the court, the illegal arrest created adequate provocation for the victim, justifying resistance and reducing the charge for killing from murder (an unprovoked killing) to manslaughter (a killing upon provocation).<sup>30</sup> Additionally, the illegal arrest constituted adequate provocation for other citizens, be they friends of or strangers to the victim of the illegal arrest.<sup>31</sup>

¶8 The court did not make clear precisely why the illegal arrest constituted provocation for other citizens as well as the victim, however. This point was clarified by the court in *Tooley*. In *Tooley*, the court was faced with a situation both similar to and different from the situation in *Hopkin Huggett’s Case*. As in *Hopkin Huggett’s Case*, in *Tooley* there was an illegal arrest and a killing by a bystander. Unlike in *Hopkin Huggett’s Case*, in *Tooley* the person who came to the aid of the illegally arrested person did not observe the arrest. Additionally, the constable was killed not as he was making his arrest, but after he had made the arrest and transported his prisoner to jail. Despite these differences, in *Tooley* the court came to the same conclusion as in *Hopkin Huggett’s Case*, holding that the illegal arrest served as provocation for resistance, even by others, to the arrest.<sup>32</sup> This provocation thus reduced the charge from murder to manslaughter. The *Tooley* court justified extending the provocation to others than the actual victim of the unlawful arrest on the basis that an unlawful arrest was an offense against the Magna Charta, as well as an affront to all citizens. Said the court:

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The prisoners in this case had sufficient provocation; for if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion; much more where it is done under a colour (sic) of justice, and where the liberty of the subject is invaded, it is a provocation to all the subjects of England . . . [b]ut sure a man ought to be concerned for Magna Charta and the laws; and if anyone against the law imprison a man, he is an offender against Magna Charta.<sup>33</sup>

The court noted that the bystanders who attacked the constable in this case acted at their peril when they intervened to stop what they perceived to be an illegal arrest.<sup>34</sup> If the court had subsequently determined that the arrest was in fact legal, then the claim of provocation would fail. In other words, it was adequate provocation only if the courts later determined the arrest was illegal—it was not based on the subjective view of the intervenors at the time of the resistance of the arrest.

¶9 Both *Tooley* and *Hopkin Huggett's Case* dealt with the rights of bystanders to intervene to resist the unlawful arrest of another. Courts subsequently extended the rule of law developed in these cases to instances where the victim of an illegal arrest resisted.<sup>35</sup> This was a logical extension of the rule, for if a third person can resist the arrest of another, it stands to reason that the subject of the arrest can also resist. After all, they suffer the battery of the unlawful arrest, as well as the provocation of injustice.

¶10 The determination that an illegal arrest constituted provocation to justify resistance did not mean the resistor who killed went free, but merely that the charge was reduced from murder to manslaughter. Subsequent cases extended the rule of law to instances in which there was no killing, but merely an assault by the victim of an illegal arrest on the arresting officer.<sup>36</sup> In these cases, the provocation served not to reduce the crime charged, but to excuse the assault entirely.<sup>37</sup>

¶11 The court in *Tooley* was dealing with a situation where the constable knew or should have known that his actions were illegal. But what about situations where a police officer attempted to make an arrest which he in good faith believed was lawful, but which was later deemed unlawful, as when there was a defect in the warrant?<sup>38</sup> In cases where the officer knowingly acted illegally, the provocation seemed clear. But in those cases where the officer was unaware that the warrant was defective, courts felt the level of provocation was less. Courts determined that in situations where a warrant was valid on its face, there was no provocation.<sup>39</sup> Only those instances where warrants were clearly invalid did provocation exist. As a number of courts noted, an officer presented with an arrest warrant that was facially valid was duty bound to execute the warrant.<sup>40</sup> Failure to do so was itself a criminal act. Thus if the warrant is later determined to be invalid, thus rendering the arrest illegal, the officer should not suffer for it.

¶12 While this distinction may at first blush appear artificial, there exists ample justification. As one commentator has noted, the cases in which the common law courts held an illegal arrest created provocation excusing resistance generally involved truly outrageous conduct on the part of the police officer in his interaction with the victim of the arrest<sup>41</sup> *Hopkin Huggett's Case* involved an attempt to impress a man into the army, while *Tooley* involved an arrest without warrant and without observation of any criminal activity. The provocation in these cases came directly from the officer's actions, while in the cases involving an arrest based on a technically defective warrant, the provocation came not so much from the actions or decisions of the police officer, but from the actions of a third party. In essence, courts said that an officer acted at his peril if he chose to make an arrest and that arrest was later determined to be unlawful; if on the other hand the officer was simply following orders, he was protected to some degree.<sup>42</sup>

### III. The Right to Resist Arrest in America

¶13 American courts adopted the English rule that an unlawful arrest constituted provocation to resist. As in England, the courts struggled with whether a defect in the warrant constituted provocation.<sup>43</sup> The earlier cases tended to define any defect as provocation, while later cases attempted to differentiate between defects that were technical and those that were obvious.<sup>44</sup> Obvious defects constituted provocation, while technical defects generally did not. This led to inconsistent results as courts attempted to explain the difference between a technical violation and obvious one.

¶14 A number of state courts adopted the right to resist arrest, but in so doing changed the rationale supporting the right from a provocation theory to a self-defense theory.<sup>45</sup> By the 1960s, virtually every state has case law regarding the right to resist arrest. No state had eliminated the common law rule by judicial decision. Four states, however, had enacted statutes eliminating the common law right.<sup>46</sup>

#### Supreme Court Cases

¶15 The United States Supreme Court has only infrequently addressed the right to resist arrest, declaring in dicta in one case that “[o]ne has an undoubted right to resist an unlawful arrest,”<sup>47</sup> but failing to provide a basis for this assertion. In another case the Court implicitly adopted the common law provocation rationale for permitting the defense of resisting an unlawful arrest.<sup>48</sup>

¶16 In *John Bad Elk v. United States*, the defendant, an Indian policeman at the Pine Ridge Indian Reservation in South Dakota was convicted of murder after shooting a fellow Indian policeman who had come, with two others, to arrest him.<sup>49</sup> The three Indian policemen had received verbal orders from a Captain Gleason to bring Mr. Bad Elk to the Indian reservation office to answer some questions about an incident in which Mr. Bad Elk had been firing his gun into the air.<sup>50</sup> There was no arrest warrant or evidence that Mr. Bad Elk had committed a criminal violation. When confronted at his home by the three Indian policemen, Mr. Bad Elk refused to accompany them to the office at that time, instead saying it was too late and that he would go with them in the morning.<sup>51</sup> There was some dispute as to precisely what happened next,<sup>52</sup> but Mr. Bad Elk fired his rifle at the three police officers. He shot and killed one John Kills Back. Bad Elk was subsequently charged with murder. No evidence of a warrant for his arrest or that he had in fact committed an arrestable offense prior to the shooting of John Kills Back was ever produced.

¶17 At trial Bad Elk’s counsel requested a jury instruction that reflected the common law right to resist an unlawful arrest.<sup>53</sup> The trial judge refused to give such an instruction, and instead instructed the jury that the three police officers had the right to arrest Mr. Bad Elk and that he could use force only to protect himself from force being used beyond what was necessary to make the arrest.<sup>54</sup> Bad Elk was convicted of murder and sentenced to death.<sup>55</sup>

¶18 The United States Supreme Court took the appeal, and reversed the lower court. In so doing, the Court, in a unanimous opinion per Justice Peckham, determined that the jury instruction given by the trial judge, which indicated the police officers had a right to arrest Bad Elk and that he had no right to resist an arrest, was erroneous. Said the Court:

“At common law, if a party resisted arrest by an officer without warrant, and who had no right to arrest him, and if in the course of that resistance the officer was killed, the offence of the party resisting arrest would be reduced from what would have been murder, if the officer had the right to arrest, to manslaughter . . . [I]f the officer have no

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right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest.”<sup>56</sup>

This is a clear endorsement of the common law rule that an illegal arrest may be resisted, and that if the resistance results in the death of the police officer, the provocation inherent in the illegal arrest attempt reduces the charge from murder to manslaughter. The Court did not offer a rationale for this rule, but merely indicated that such a right was firmly established.<sup>57</sup>

¶19 In a subsequent case, *United States v. Di Re*,<sup>58</sup> the Supreme Court again endorsed the right to resist an unlawful arrest, albeit doing so in dicta. *Di Re* involved a prosecution for unlawfully possessing ration coupons during World War II. At issue was whether the police in this case possessed the requisite probable cause to arrest the defendant. When the police seized the defendant, he did not object to being arrested.<sup>59</sup> At trial and on appeal the prosecution argued that the defendant’s failure to protest could be used to create probable cause, on the theory that an innocent man would have objected to, or resisted, his arrest.<sup>60</sup>

¶20 The Court decided the case on other grounds, but made reference to the common law right to resist an illegal arrest if one so chooses, stating: “One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases.”<sup>61</sup>

### **The Modern Trend Away From the Common Law Rule**

¶21 The right to resist arrest was adopted in the common law of the majority of states prior even to the decision in *Bad Elk*. It was not until the twentieth century that the right was seriously questioned. The attack on the right to resist arrest was led by scholarly critics, and resulted in abrogation of the right in two model codes, the Uniform Arrest Act,<sup>62</sup> adopted in 1941, and the Model Penal Code,<sup>63</sup> adopted in 1961. Eventually courts took cognizance of the academic assaults on the right, and began to adopt the position of the critics of the right.

### **Scholarly Criticism**

¶22 The first reported scholarly criticism of the right to resist an unlawful arrest appeared in an unsigned 1924 law review note entitled “Resistance to Illegal Arrest.”<sup>64</sup> In this note the author briefly recounted the development of the common law rule in the United States and acknowledged that “[m]ost of the cases hold that a person may use all the force reasonably necessary to resist the illegal arrest, short of taking life.”<sup>65</sup> Nonetheless, the author concluded that the law seems to be too willing to glorify the right to personal liberty . . .<sup>66</sup> and that the common law rule should be abrogated.<sup>67</sup>

¶23 An influential academic attack on the rule appeared in a law review article written in 1942 by Harvard law professor Sam Bass Warner, entitled “The Uniform Arrest Act.”<sup>68</sup> Warner’s article was a discussion of The Uniform Arrest Act, which was promulgated by a committee comprised of police officers, prosecutors, defense attorneys, judges, attorneys general, and law professors.<sup>69</sup> Professor Warner served as the reporter for the committee,<sup>70</sup> which was formed by the Interstate Commission on Crime for the purpose of drafting a model act “to reconcile the law as written with the law in action.”<sup>71</sup>

¶24 The Uniform Arrest Act covered nine topics, including questioning and detaining suspects, searching suspects for weapons, and arresting suspects without a warrant.<sup>72</sup> Also included in Section Five<sup>73</sup> was a discussion of the right to resist an illegal arrest. “If a person has reasonable ground to

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believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest.<sup>74</sup> As the language of Section Five made clear, The Uniform Arrest Act did not provide a right to resist an unlawful arrest. While the Act imposed no specific penalty for resisting arrest, by making resistance to an arrest illegal in all instances, the Act served to prevent the person being arrested from using the illegality of the arrest as a defense to charges of assault, manslaughter, or murder of the arresting officer.<sup>75</sup>

¶25 The justification for doing away with the right to resist arrest, according to Professor Warner, was that society had changed, so that the conditions which gave rise to the rule no longer existed, thus making the rule a dangerous anachronism.<sup>76</sup> Professor Warner provided several reasons why the right to resist arrest should be abrogated. First, the act of resisting an arrest today poses far greater peril than it did at common law. According to Professor Warner,

Constables and watchmen were armed only with staves and swords, and the person to be apprehended might successfully hold them off with his own weapon and thus escape. Today, every peace officer is armed with a pistol and has orders not to desist from making an arrest though there is forceful resistance. Accordingly, successful resistance is usually possible only by shooting the officer to prevent him from shooting first.<sup>77</sup>

While it is undoubted that the killing power of modern weaponry outdistances that of earlier times, Professor Warner's argument glossed over the facts of the cases in which the right to resist was created. In both *Hopkin Huggett's Case* and *The Queen v. Tooley*, those resisting an unlawful arrest in fact killed the constable. Despite this, the English courts were willing to create the right, even though doing so obviously created a "serious danger," as Professor Warner describes the situation today.

¶26 A second justification proffered by Professor Warner in support of eliminating the right to resist an unlawful arrest is that it is a right that is exercised only by criminals:

Though at one time the innocent may have been as likely to resist illegal arrest as the guilty, this is not longer true. An innocent man will not kill to avoid a few hours, or at the most several days, in jail. Besides, he will ordinarily have no gun, and therefore will be unable to resist successfully. Thus the 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.<sup>78</sup>

This argument is similar to the claims often made against modern criminal procedure rules such as the exclusionary rule<sup>79</sup> and the requirement that suspects in custody be apprised of their constitutional rights prior to any interrogation.<sup>80</sup> While there is merit to the claim that only those who have in fact committed a crime will have the opportunity or necessity to claim the benefits of the exclusionary rule or the right to remain silent, the Court and numerous commentators have made clear that these rights and remedies for violation of these rights are held by all Americans.

¶27 Professor Warner's argument is based on two incorrect premises: that only criminals are armed in a manner to "successfully" resist arrest,<sup>81</sup> and that innocent persons will not object to the minor inconvenience of a wrongful arrest.<sup>82</sup> The first premise is wrong because he overstates what constitutes a "successful" resistance to arrest—escape. Having a right to resist arrest does not apply only to those who escape. It also serves as a defense to a charge of resisting arrest for those who resist but are in fact arrested.

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¶28 The second premise is wrong because it completely ignores the original justification for the right to resist arrest—that a person wrongfully arrested, or even a bystander who observes the wrongful arrest, has been sufficiently injured, or provoked, by the attempt that he or she resists it. Professor Warner offers no support for his conclusion that only “enemies of society”<sup>83</sup> will resist arrest.

¶29 A third justification put forth by Professor Warner in support of eliminating the right to resist arrest, and the one most often seized upon by later commentators and courts, is that the dangers inherent in being arrested have been all but eliminated in modern society.<sup>84</sup> According to Professor Warner, the creation of the right to resist arrest was in large part a product of the common law court’s recognition that being arrested subjected a person to great peril. “The rule developed when long imprisonment, often without the opportunity of bail, ‘goal [sic] fever,’ physical torture, and other great dangers were to be apprehended from arrest, whether legal or illegal.”<sup>85</sup>

¶30 Professor Warner drew heavily from several early accounts of prison conditions<sup>86</sup> to build his case that the right to resist arrest was developed in response to deplorable prison conditions rather than as an excuse for conduct that was provoked by the illegal acts of the police. At no point does he mention or explain the rationale of cases such as *The Queen v. Tooley*, in which the right to resist was premised on the provocation inherent in an unlawful arrest. Nor does he offer any examples of cases in which common law courts mentioned the deplorable prison conditions, much less used such conditions as justification for creating the right to resist arrest. Nonetheless, his bald assertions regarding the justification for creating the right to resist arrest appear to have been accepted without question by subsequent courts<sup>87</sup> and most commentators.<sup>88</sup>

¶31 Subsequent scholarly examination of the common law rule relied heavily on Warner’s article.<sup>89</sup> Most followed his lead in recommending abolition of the common law rule, while a few endorsed modification of the rule.<sup>90</sup> Like Warner, these scholars also justified abolition of the rule based on changes in society and ignored the original rationale for the rule.

¶32 However, one leading article, written by Paul Chevigny in 1969, supported retention of the rule.<sup>91</sup> Chevigny began by reciting the leading common law cases, in England<sup>92</sup> as well as the United States.<sup>93</sup> He emphasized a point generally ignored by prior commentators: that the English courts made it clear in explaining the right to resist an illegal arrest that such a right was necessitated by the provocation inherent in the unlawful arrest attempt. Chevigny noted that the common law courts treated the illegal arrest as a trespass against the person of the arrestee.<sup>94</sup> There was nothing in the courts’ opinions that justified the right to resist an unlawful arrest based on the condition of the jails at the time, or the lack of procedural safeguards, or any of the other justifications for the rule that have been offered by modern writers.<sup>95</sup> Chevigny also noted that the common law courts did not create an unlimited right to resist arrest, but instead limited the right to “arrests . . . of the most outrageous kind,” those which were “simply arbitrary assertions of authority.”<sup>96</sup>

¶33 Chevigny next examined the scholarly and judicial criticism of the common law rule.<sup>97</sup> He noted that, as of 1969, the right to resist an unlawful arrest had been eliminated by the legislature in six states<sup>98</sup> and that “[r]ecognition of the right has waned in the face of almost universal criticism . . .”<sup>99</sup> He noted that this criticism sprung from the view that the common law rule was “a vestige of a more brutal age when society could tolerate street altercations between officers and citizens and when a citizen deprived of constitutional rights had no effective redress.”<sup>100</sup> This neatly summarizes the view of the modern critics of the rule, both in academe and the judiciary.

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¶34 Chevigny was quick to point out, however, that the critics had misinterpreted the rationale of the right: “The right does not exist to encourage citizens to resist, but rather to protect those provoked into resistance by unlawful arrests.”<sup>101</sup> Before addressing this issue in detail, however, he discussed the alternate remedies to the right to resist which have developed in modern society and which the critics argued provide sufficient means of redress for victims of unlawful arrests. These include the availability of bail,<sup>102</sup> procedural safeguards such as the probable cause hearing,<sup>103</sup> administrative controls over police misconduct,<sup>104</sup> and civil actions for injunction or money damages.<sup>105</sup>

¶35 The existence of these remedies, critics of the common law rule asserted, indicated that “constituted authority is now sufficiently civilized that citizens should deal with it peacefully.”<sup>106</sup> Chevigny argued that not only were these remedies insufficient to protect the rights of citizens unlawfully arrested, but that focusing on them avoided the central rationale for the common law rule: to protect citizens from prosecution for the crime of resisting arrest when they react in the heat of the moment to an arrest attempt they perceive to be illegal.<sup>107</sup> He considered the real question to be whether a citizen should be convicted of a crime when he or she resists an unlawful arrest.<sup>108</sup>

### The Model Penal Code

¶36 The Uniform Arrest Act was a modest attempt to provide some uniformity in one area of the criminal law, arrest procedures. In the early 1950s the American Law Institute (ALI), a private association comprised of prosecutors, defense attorneys, judges, and law professors, created an advisory committee to draft a comprehensive model criminal code, one intended to serve as “a treatise on the major problems of the penal law and their appropriate solutions.”<sup>109</sup>

¶37 Members of the ALI committee met over a period of ten years, and after thirteen drafts, completed the Model Penal Code in 1961.<sup>110</sup> Included in the code was a section dealing with self-defense. Subsumed in that section was a provision dealing with the right to resist arrest. Following the lead of the Uniform Arrest Act, the drafters of the Model Penal Code chose to eliminate the right to resist arrest.<sup>111</sup> It provides: “The use of force is not justified under this section . . . to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful.” As a noted commentator has pointed out, this provision serves to “minimize the net physical harm in an encounter even at the expense of the right that the defendant would otherwise have to use necessary and proportionate force.”<sup>112</sup>

¶38 The drafters of the Model Penal Code rationalized their decision to do away with the right to resist arrest in large part on the development of alternate remedies for an aggrieved arrestee and the fact that the use of force by the arrestee was likely to result in greater injury to the person without preventing the arrest.<sup>113</sup> According to a leading treatise on the criminal law,<sup>114</sup> the Model Penal Code Section doing away with the right to resist arrest exists because there are other remedies aside from force, and thus an arrestee should submit to “the indignity of the arrest and the inconvenience of the detention until release,”<sup>115</sup> as these are “relatively minor matters.”<sup>116</sup>

### Modern Cases

¶39 While the early criticism of the right to resist arrest did not immediately bear fruit in the form of court decisions overruling prior cases or legislation eliminating the right, during the 1960s several courts issued decisions eliminating the right.<sup>117</sup> They were followed by a number of courts in the 1970s and 1980s.<sup>118</sup> >From the language of these decisions, it appears that courts were taking notice of the

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academic groundswell opposing the right and adopting the arguments put forth for abolishing the right to resist arrest.

¶40 As of 1965 only California, Delaware, New Hampshire, New Jersey, and Rhode Island prohibited resistance of an illegal arrest.<sup>119</sup> Four of these states did so by statute,<sup>120</sup> New Jersey did so by court decree.<sup>121</sup> By 1976 there were ten states that had eliminated the common law right to resist an unlawful arrest: six by statute,<sup>122</sup> and four by case law.<sup>123</sup> By 1983 there were thirty states that had eliminated the common law rule: nineteen by statute,<sup>124</sup> and eleven by case law.<sup>125</sup> By 1998 at least thirty-eight states had abrogated the right to resist an unlawful arrest: twenty by statute,<sup>126</sup> and eighteen by case law.<sup>127</sup>

¶41 Of the twelve states that retain the common law right to resist unlawful arrest, only three, Michigan, Wyoming, and Oklahoma, are not located in the South. Of these, Oklahoma is on the border of the region, and the status of the right in Wyoming is perhaps best described as unclear.<sup>128</sup>

¶42 The other states retaining the common law right are Alabama, Georgia, Louisiana, Maryland, North Carolina, South Carolina, Tennessee, West Virginia, and Mississippi. Two of these states, Alabama<sup>129</sup> and Louisiana,<sup>130</sup> endorse the right by statute; the remaining states endorse the right by judicial decree.<sup>131</sup> Several of these states have considered the issue within the past decade and reaffirmed the common law rule.<sup>132</sup>

¶43 The geographical distribution of states retaining the common law rule strongly suggests that regional cultural forces are at work. How can one explain why courts and legislatures of states in one region of the country have resisted the clear trend towards abrogation of the right to resist unlawful arrest? In the next section I make the argument that a possible explanation for the retention of the common law rule by Southern states is that Southern culture looks upon violence, especially defensive violence, in a manner different from other regions. The Southern region's general endorsement of violence as a means of settling interpersonal disputes is known, in criminological research, as the "Southern subculture of violence hypothesis." This hypothesis, combined with the traditional Southern belief in the importance of personal honor, may help explain why Southern states in general, and Mississippi courts in particular, continue to endorse the right to resist an unlawful arrest.

### **IV. The Southern Subculture of Violence and Southern Honor**

¶44 In 1967 criminologists Marvin Wolfgang and Franco Ferracuti published an influential book entitled *The Subculture of Violence*.<sup>133</sup> In it they attempted to explain deviant and criminal behavior as the product of the interplay of a variety of factors. They argued that members of a subculture may hold some values that are different from those held by members of the wider society. Members of a subculture of violence share both a more favorable attitude towards the use of violence and a greater willingness to resort to violence than members of the wider society.<sup>134</sup> Wolfgang and Ferracuti suggested that young men and members of socially and economically disadvantaged groups were more likely to hold such subcultural beliefs.<sup>135</sup>

¶45 Later researchers found some support for the subculture of violence theory. While much of this research focused on the subcultures identified by Wolfgang and Ferracuti,<sup>136</sup> some researchers used the theory in an attempt to explain why the South had a higher homicide rate than other regions of the country. This explanation, the Southern subculture of violence hypothesis, posited that there existed in the South a regional subculture in which young men learn that it is often appropriate to use force, even deadly force, to settle conflicts. Consequently, more men are willing to use weapons to settle arguments, and more people die as a result of this greater willingness to use deadly force.

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¶46 Research on the Southern subculture of violence hypothesis has provided some support for the theory. Several researchers found support for the hypothesis,<sup>137</sup> while others were unable to validate the theory.<sup>138</sup> Researchers have also attempted to explain why this subculture of violence exists in the South.

¶47 Hackney argued that factors which may contribute to the creation of the Southern subculture of violence developed as a result of the defeat of the South in the Civil War. This defeat, and subsequent efforts by the North to exploit the South economically, created a generalized, regional feeling of bitterness and anger, which in turn led to a lower threshold for aggressive behavior. Violence was consequently seen as a more acceptable means of resolving conflict.<sup>139</sup>

¶48 Other researchers suggested the Southern subculture of violence developed in the antebellum South, and simply was magnified by the Civil War.<sup>140</sup> These researchers place a greater emphasis on the exaggerated notions of chivalry and defense of one's honor.<sup>141</sup> This research builds on earlier historical research on the antebellum South which examined the importance of honor, chivalry, and loyalty.<sup>142</sup>

¶49 Later researchers noted that a possible explanation for the higher homicide rate might be due to a greater number of available weapons, rather than an innate predisposition to violence.<sup>143</sup> Gastil points out that

“A violent tradition may be one that in a wide range of situations condones lethal violence, or it may be a tradition that more indirectly raises the murder rate. For example, the culture may put a high value on the ready availability of guns, or it may legitimize actions that lead to hostile relations.”<sup>144</sup>

Others argue that the presence of more guns in Southern homes does not necessarily negate the subculture of violence hypothesis, as it is still necessary to explain why Southerners have more guns than other regions—this fact may itself provide support for the theory that Southerners are more prone to violence.<sup>145</sup>

¶50 A later researcher argues that the Southern subculture of violence hypothesis has been misunderstood because it has been defined too broadly.<sup>146</sup> Reed argues that the Southern subculture does not condone all violence in all situations, but rather approves of violence as an acceptable response in certain, limited circumstances. These situations are largely defensive in nature, and involve a response to unwarranted aggression, threats, or affronts to personal honor.<sup>147</sup> There is empirical support for Reed's explanation of the defensive nature of the Southern subculture of violence.<sup>148</sup>

¶51 While the precise origins of the Southern subculture of violence are unclear, there is strong empirical and anecdotal evidence that Southerners possess a higher tolerance for acts of violence that is in some way defensive—either to protect property, person, or honor. For the purposes of this article, it is not important how this subculture developed. The point is that an argument can be forcefully made that it exists. And while the subculture of violence hypothesis attempts primarily to explain why Southerners are more inclined to violence as a way of settling disputes, rather than why Southern judges may be more likely to condone acts of violence, I believe it provides at least a partial explanation for why Mississippi judges have long supported the right to resist unlawful arrest, even when that right is asserted by those historically disfavored in Mississippi courts, African-Americans.

¶52 In the following section, I review the Mississippi cases dealing with resistance to unlawful arrests, in an attempt to demonstrate that this general support for violence in defense of honor and/or self has translated into a continuing commitment to the common law rule permitting resistance to an unlawful

arrest. Mississippi was chosen simply as an example of the general Southern tendency to vigorously support the right to resist unlawful arrest. There are similar cases in other Southern states.<sup>149</sup>

## V. The Right to Resist Unlawful Arrest in Mississippi, 1895-1999

¶53 There have been a dozen cases dealing with the right to resist arrest in Mississippi. These cases are spread through the twentieth century. The oldest dates from 1889,<sup>150</sup> the most recent was decided in 1997.<sup>151</sup> A review of these cases demonstrates that the courts of the state have consistently, if at times inarticulately, endorsed the common law rule that a person may resist, with reasonable force, an unlawful arrest.

¶54 The first case dealing with the right to resist arrest is *Merritt v. State*,<sup>152</sup> decided in 1889. In a five sentence opinion, the Mississippi Supreme Court reversed a conviction for “resist[ing] an officer” on the grounds that the record “fail[ed] to establish any offense.”<sup>153</sup> There was nothing in the record showing either: (1) that the person making the arrest was a lawfully commissioned police officer, or (2) that an offense had been committed, justifying the initial arrest which was resisted.<sup>154</sup> George Merritt was apparently a bystander who came to the aid of the arrestee, Lucien Williams.<sup>155</sup> The court does not discuss the common law rule. While this decision does not clearly endorse the common law rule, which the court fails to cite, the language of the opinion suggests that resistance is permissible if the arrestee has not committed any crime. Any arrest would in such a case be illegal. Additionally, the court permits a bystander to resist the arrest of another, which is part of the common law rule.

¶55 The Mississippi courts did not have occasion to consider the common law rule again for more than thirty years. In 1924, in *Deaton v. State*,<sup>156</sup> the Mississippi Supreme Court reversed Deaton’s conviction for “opposing or resisting an officer while attempting to serve or execute a legal writ or process.”<sup>157</sup> This was made a crime under Section 1297 of the Code of 1906 and Section 1030 of Hemingway’s Code.<sup>158</sup> The case arose out of an attempt by a Lee County deputy sheriff to execute a search warrant for Deaton's home. The deputy and a companion were looking for evidence of unauthorized liquor manufacture.<sup>159</sup> After searching the home, as permitted by the warrant, and finding nothing, they then expanded their search to several other buildings on Deaton’s property. Several jugs of whiskey were discovered by the deputy and his companion. Deaton attempted to prevent the deputy from carrying away the jugs, a fight ensued, and the jugs were all broken.<sup>160</sup> Deaton was subsequently charged with resisting the execution of the search warrant.

¶56 The Mississippi Supreme Court reversed, on the grounds that the deputy was conducting an illegal search at the time the scuffle took place. While the deputy had a valid search warrant, and under the common law rule resistance to process was not permitted, in this case the resistance took place only after the deputy searched the house (as permitted by the warrant) and began to search other buildings, which were not included in the search warrant. Thus the search was clearly illegal. The question presented to the court then, was “whether or not one may lawfully oppose or resist an officer who is acting without lawful authority in the search of one’s premises.”<sup>161</sup> On these facts the court stated “[w]e think there is no criminal offense under such circumstances.”<sup>162</sup> The court cites no authority for its conclusion, referring neither to *Merritt* nor to cases from other states. Clearly, however, the court is endorsing the common law rule, albeit in a conclusory manner. The court notes several times that the force used to resist in this case was “reasonable,” a requirement of the common law rule.

¶57 Two years later, in *Wilkinson v. State*,<sup>163</sup> the Mississippi Supreme Court reversed Wilkinson’s manslaughter conviction. Wilkinson was a police officer in Vicksburg who shot and killed a young man<sup>164</sup> named Leonard Cherry. Cherry had responded to a call from Cherry’s older sister and her

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husband, who requested the police convince Cherry to leave the home of a woman; if they did not do so his sister feared Cherry “would remain there the greater part of the night.”<sup>165</sup> Wilkinson and his partner explained they could not lawfully force Cherry to return home, but that they would accompany Cherry’s sister and her husband when they went to speak to Cherry. Once at the woman’s house, Wilkinson attempted to force Cherry to leave, dragging him to the police car and attempting to handcuff him. Cherry resisted by force. While there was conflicting testimony as to precisely what happened next, Cherry was shot and killed by Wilkinson.<sup>166</sup> Wilkinson was charged with murder.

¶58 At trial the judge gave a jury instruction that if the jury found that Wilkinson was attempting to unlawfully arrest Cherry, then Cherry was entitled to use “whatever force was necessary to avoid the arrest, even to the extent of taking the life of [the] defendant.”<sup>167</sup> Wilkinson was subsequently convicted of manslaughter. He appealed, alleging the jury instruction was in error, as it had the effect of removing the defense of self-defense, raised by Wilkinson at trial.

¶59 The Supreme Court held that while Wilkinson was attempting an illegal arrest, he still retained a right to have the jury consider his argument that he had acted in self-defense. As the jury instruction prevented the jury from considering self-defense, the conviction was reversed and the case remanded. In so holding the court stated “an officer attempting to make an unlawful arrest is not cut off from the right of self-defense . . . he is only the aggressor in the difficulty and is in no worse attitude than any other aggressor.”<sup>168</sup>

¶60 While the majority opinion in this case deals primarily with the rights of police officers who are making illegal arrests, the court does acknowledge that there is a general right to resist unlawful arrest. The court cites no Mississippi authority for this proposition, merely stating: “[t]he courts generally hold that the right to resist an unlawful arrest is a phase of the right of self-defense.”<sup>169</sup> No mention is made of Deaton, decided just two years previous. Nor is any justification for the right to resist unlawful arrest provided.

¶61 The Mississippi Supreme Court provided a glimmer of a rationale for the right to resist an unlawful arrest in the next case it decided dealing with the issue – Hinton et al. v. Sims et al.<sup>170</sup> Johnston Hinton was shot and killed by J. E. Sims, a deputy sheriff of Perry County, who was attempting to arrest him without giving the required warning that he was placing the suspect under arrest. Sims and another deputy were in hiding near a still they had discovered in the Leaf River swamp. Possession and/or operation of a still was a felony offense at the time. Hinton was walking down the path towards the still at 11 o’clock on a Sunday morning when Sims stood up from the underbrush, pointed a shotgun at Hinton, and told him to put up his hands. He failed to identify himself as a law enforcement officer.<sup>171</sup> Hinton moved his hand toward his hip pocket, at which time Sims shot and killed him. It turned out Hinton’s pocket was empty. Hinton’s widow brought suit for damages, alleging Sims had no right to arrest her husband and thus was not justified in shooting her husband, but lost at trial.

¶62 The Mississippi Supreme Court reversed the trial court judgement and remanded the case. The court agreed with the plaintiff that Sims had no right to arrest Hinton. The court also stated that Sims had a duty to identify himself as a police officer, and make it clear that he was attempting an arrest. Failure to do so, the court held, was negligent and the killing wrongful.

¶63 While the court focuses primarily on the wrongful death issue, it does address the right to resist arrest, if somewhat obliquely. The court takes issue with Sims’ use of the phrase “put up your hands,” unaccompanied as it was with an explanation of his authority and purpose:

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“Must every man, innocent or guilty, put up his hands whenever commanded to do so by an officer, whether in the day-time or nighttime, and regardless of the situation and surroundings, without being informed by the officer of the reason for the command? We think not.”<sup>172</sup>

This sort of language suggests a strong preference for the rights of individuals to defend themselves, and provides a further indication of how the Mississippi state courts feel about the right to resist an unlawful arrest.

¶64 So strong is this preference that the Supreme Court applied the same right to defend oneself to African-Americans a then much disfavored group in Mississippi.<sup>173</sup> This was demonstrated in *Craft v. State*,<sup>174</sup> decided in 1947. In this case the Smith County sheriff and several deputies went to Albert Craft’s house to investigate a report that criminal activity was taking place. They had no warrant, nor any individualized suspicion. When they approached the Craft residence, a group of men and boys fled. The officers fired upon them. Craft fired back at the officers, and was subsequently convicted of assault. The Supreme Court reversed the assault conviction, noting that the law enforcement officers had no right to arrest Craft or anyone else at his residence.<sup>175</sup> Craft’s shooting back at the officers, furthermore, was justified as self-defense.<sup>176</sup> No citation to precedent was provided by the court.

¶65 Finally, in 1950 the Mississippi Supreme Court utilized precedent to overturn a conviction for resisting an unlawful police investigation. In *Pettis v. State*<sup>177</sup> the appellant was convicted of resisting when she attempted to stop Sheriff Green of Greene County from entering her home to search for a man suspected of committing a misdemeanor liquor violation. The sheriff was without a warrant, and state law forbade the arrest for a misdemeanor not committed in the presence of the officer. Thus the court held that the sheriff was acting unlawfully when he searched the Pettis residence.<sup>178</sup> Citing *Deaton*, the court held that Pettis was therefore justified in resisting the entry of the sheriff.<sup>179</sup>

¶66 The next case involving a claim of a right to resist an unlawful arrest was decided in 1963. In *King v. State*<sup>180</sup> the Mississippi Supreme Court reversed the obstruction of justice conviction of the appellant.<sup>181</sup> In this case, two Hinds County patrolmen chased a car onto Samuel King’s property. The driver exited his car and ran into King’s house. King came out of his house and ordered the officers off his property. He was then arrested and charged with obstruction of justice. The officers did not have a warrant for the unknown driver of the car, nor was any evidence offered at trial that they had observed the person commit any crime.<sup>182</sup>

¶67 On appeal, the Supreme Court determined that as the officers had neither a warrant nor probable cause to arrest the driver of the car, they had no authority to arrest. Thus when they entered Samuel King’s property they were mere trespassers, and King had the right to ask them to leave. The court cited both *Merritt v. State*<sup>183</sup> and *Deaton v. State*<sup>184</sup> for the proposition that resistance to an illegal arrest is permitted in Mississippi. The court also cited a passage from a legal treatise that stated:

“[t]he right of personal liberty is one of the fundamental rights guaranteed to every citizen, and any unlawful interference 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.”<sup>185</sup>

This passage clearly states the common law rule, and the Mississippi Supreme Court was unequivocal in its endorsement of the rule.

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¶68 Where King involved a charge of obstruction of justice based on a bystander's interference with the effecting of an unlawful arrest, the next case, dealing with the right to resist unlawful police activity, dealt with resistance by an arrestee. In *Smith v. State*<sup>186</sup> the Mississippi Supreme Court reversed the conviction for resisting arrest of Bill Smith. A Claiborne County sheriff's deputy went to Smith's home to arrest him for reckless driving, a misdemeanor. An arrest warrant had been sworn out, but the deputy did not have it with him. Smith demanded to see the warrant, and when none was produced, he resisted the attempts of the deputy to place him under arrest. Smith was eventually subdued by the deputy and the sheriff, and charged and convicted of resisting arrest.<sup>187</sup>

¶69 The Supreme Court reversed the conviction, noting that a law enforcement officer may not make a lawful arrest for a misdemeanor in Mississippi unless he observes the act or has an arrest warrant with him.<sup>188</sup> As the deputy in this case had not observed the reckless driving and did not have the arrest warrant, the arrest was unlawful. And as the court noted, "[t]he offense of resisting arrest presupposes a lawful arrest. A person has a right to use reasonable force to resist an unlawful arrest."<sup>189</sup> Consequently, Smith was within his rights in resisting arrest. The court noted the prior decisions *Pettis v. State*<sup>190</sup> and *Craft v. State*<sup>191</sup> but did not cite earlier authority.

¶70 In *Joliff v. State*,<sup>192</sup> also decided in 1968, the Mississippi Supreme Court reversed a conviction for impeding a law enforcement officer<sup>193</sup> without discussing precedent. It simply stated that the appellant did not use unreasonable force in blocking agents from the Alcoholic Beverage Control Division of the State Tax Commission from conducting an unauthorized search of the premises of a café in Wilkinson County. The issue in this case was whether these agents could conduct a routine inspection for potential violations of the liquor laws without a search warrant.<sup>194</sup> The court determined a warrant was required, and since the agents did not have one, their search was unlawful, and Joliff was justified in preventing them from searching the café.<sup>195</sup>

¶71 After deciding two cases involving charges of resisting arrest in 1968, the Mississippi Supreme Court did not address the resisting arrest issue again until 1977. During this time period, a number of state courts considered the issue and renounced the common law rule.<sup>196</sup> When next faced with a challenge to a conviction for resisting arrest, the Mississippi Supreme Court brushed aside the opportunity to reconsider the rule and restated its preference for the common law rule while endorsing the common law limitation on the amount of force an arrestee is permitted to use to resist arrest. In *Watkins v. State*,<sup>197</sup> a Kosciusko police officer, Officer Mitchell, stopped a car without probable cause, "just mainly to check out the driver to see who he was and check his license."<sup>198</sup> Officer Steed, assisting in the car stop, approached Watkins, sitting in the passenger seat of the car. He observed Watkins attempting to swallow a "leafy green substance"<sup>199</sup> and noticed that Watkins smelled of alcohol. He then arrested Watkins for public drunkenness and placed him in his patrol car. On the way to the station, Watkins managed to obtain the shotgun mounted in the gun rack of the squad car, and pointed it at officer Steed's head. He ordered Steed to pull over to the side of the road. When Officer Steed did so, Watkins pulled the trigger of the shotgun. Fortunately, the gun was unloaded. Watkins was eventually subdued and convicted of aggravated assault on a law enforcement officer.<sup>200</sup>

¶72 On appeal, Watkins contended that he was justified in attempting to fire the shotgun at Officer Steed, because his arrest was unlawful, and he had the right to resist an unlawful arrest. The Mississippi Supreme Court acknowledged that while Watkins' arrest was unlawful, as it was the product of an unjustified traffic stop, and Watkins was therefore justified in resisting arrest, Watkins did not use reasonable force in resisting arrest. Instead, he used, or attempted to use, deadly force. Therefore, his conviction for aggravated assault was affirmed.<sup>201</sup>

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¶73 The Court engaged in a fairly comprehensive examination of prior precedent in coming to its determination in this case.<sup>202</sup> The court paid particular attention to *King v. State*,<sup>203</sup> in which the court cited, with approval, the rule that a person may resist unlawful arrest by “such force as may be necessary.”<sup>204</sup> The court then noted that such force involved either nonviolent resistance or at most unarmed resistance to arrest.<sup>205</sup> Thus the right to resist unlawful arrest is a “limited privilege.” This holding is in accord with the common law rule. The court notes that “[t]here is no judicial way that Watkins’ resistance can be classified as privileged or condoned by a court in modern society.”

¶74 Interestingly, however, the court does not use this case as a vehicle for abrogating the common law rule. If ever a perfect case for eliminating the rule existed, this is it, involving as it does an attempt by an arrestee to kill a police officer who has made a nonviolent arrest for a relatively minor offense. Instead, the court actually reaffirmed the common law rule.<sup>206</sup> Again, the court chose not to discuss the modern trend toward abrogation of the right to resist unlawful arrest.<sup>207</sup>

¶75 The next case involving resisting arrest was *Taylor v. State*.<sup>208</sup> In this case, James Taylor was visiting his mother’s house in Montgomery County on the evening of May 14, 1979, when the sheriff and a deputy came to the house to investigate a complaint filed by a neighbor that she heard profanity and several gunshots coming from the Taylor residence. When the officers entered the Taylor home and asked Mr. Taylor if there was a disturbance going on, he responded by cursing them. They then arrested him and charged him with disturbing the peace and resisting arrest. He was convicted on both counts and appealed.<sup>209</sup>

¶76 The Supreme Court reversed both convictions. As for the disturbing the peace charge, the court noted that the only evidence presented as a basis for the charge was that Taylor was intoxicated and cursed the officers. As this occurred while Taylor was in a private residence, however, a charge for disturbing the peace was inappropriate, as the charge requires that the activity occur in a public place.<sup>210</sup>

¶77 Since the basis for the resisting arrest charge was Taylor’s resistance when the officers attempted to arrest him for disturbing the peace, under the common law rule, he was entitled to resist since the arrest was unlawful. The court did not discuss the recent trend away from allowing resistance to illegal arrests but simply cited *State v. Smith*,<sup>211</sup> for the proposition that a person may use reasonable force to resist an unlawful arrest. This is interesting, as one of the primary justifications for abrogating the common law rule is that resistance to an arrest is likely to be futile, and the public peace is better served by complying with the police and challenging the arrest at a later date.<sup>212</sup> In this case the appellant was drunk and outnumbered by the two, armed police officers. Resistance was clearly futile. Nonetheless, the Mississippi court gave no consideration to the idea that resistance was inappropriate. Indeed, the court made clear that Taylor was unlawfully arrested in his home, and the state was without any justification for the initial arrest or the subsequent trial and prosecution. Either the court was unaware of the modern trend or felt it was so clearly out of step with the law in Mississippi that any mention of it was pointless.

¶78 In another case decided in 1981, the Mississippi Supreme Court went even further and explicitly stated its continuing approval of the common law rule, even where resistance leads to injury of the police officer attempting an arrest.<sup>213</sup> Again, however, the court neglected to discuss the modern trend towards elimination of the common law right.

¶79 The facts in *Boyd v. State* were as follows: Neshoba County Constable Bennie Lee Adkins attempted to arrest Charles McBeath at McBeath’s home. Adkins told McBeath there was a misdemeanor arrest warrant outstanding, although he did not have it with him at the time.<sup>214</sup> McBeath

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said he would go with Adkins after using the bathroom, at which time, Adkins struck him with a blackjack. Billy Ray Boyd, McBeath's brother-in-law, observed these actions and attempted to intervene. When Adkins struck him with the blackjack, Boyd responded by stabbing Adkins with a pocket knife.<sup>215</sup> Boyd was subsequently charged and convicted of aggravated assault and sentenced to twenty-five years in prison. At trial, Boyd sought to have a jury instruction on self-defense and the right to resist an unlawful arrest read to the jury, but it was refused by the trial judge.<sup>216</sup>

¶80 On appeal, the Supreme Court reversed Boyd's assault conviction and remanded the case for a new trial. The court first noted that while the arrest of McBeath was not made unlawful simply because Adkins did not have a warrant on his person at the time of the arrest, the arrest was unlawful because Adkins failed to inform McBeath of the reason for the arrest.<sup>217</sup> As the arrest was unlawful, McBeath had the right to use reasonable force to resist the arrest. Likewise, a bystander shares this right. The Supreme Court cited several prior cases in support of these propositions,<sup>218</sup> as well as two legal treatises.<sup>219</sup> Again, however, the court chose not to engage in a discussion of the modern trend away from this common law rule. The court did not discharge the appellant, however, but remanded the case for a new trial to determine whether Boyd used only reasonable force when he stabbed Adkins.<sup>220</sup>

¶81 The Mississippi Supreme Court did not have occasion to address the issue of the right to resist unlawful arrest again until 1995. In *Murrell v. Jackson*,<sup>221</sup> the court affirmed the common law rule that there is no right to resist arrest when the officer has an arrest warrant and the arrestee lacks a good faith belief that the warrant is invalid.<sup>222</sup> At common law, there was no right to resist arrest when the officer had an arrest warrant; the right was created largely to allow persons subject to police abuse of power to resist.<sup>223</sup> When an officer is merely executing a warrant, there is an absence of the flagrant police misconduct, which justifies a reaction on the part of the arrestee.<sup>224</sup>

¶82 In this case, Raymond Murrell was convicted of simple assault after he resisted the attempts of several police officers to arrest him for failing to appear in court. At trial, Murrell requested a jury instruction on resisting arrest as a lesser included offense of assault on a law enforcement officer, as well as a jury instruction on the right to resist an unlawful arrest. He contended his arrest was unlawful because he had not been provided a hearing on the contempt of court charge before the arrest warrant for failure to appear was issued, as required under state law.

¶83 The Supreme Court acknowledged that the arrest was unlawful, but held that the officers were engaged in a good-faith effort to arrest Murrell, unaware that the warrant was invalid.<sup>225</sup> The court noted for the first time that many jurisdictions had completely eliminated the right to resist arrest, but it declined to apply the modern rule in Mississippi.<sup>226</sup> The court stated instead “[w]hile we do not abandon the concept of self-help, we too are compelled to recognize that the concept should be limited to those situations where the arrest is in fact illegal and the arrestor and arrestee have reason to know that it is or where the arrest is accompanied by excessive force.”<sup>227</sup> While the court couches this statement in the form of a modification of its prior rulings, it is in fact entirely consistent with the common law rule that the right to resist unlawful arrest is not unlimited.

¶84 The most recent Mississippi case dealing with the right to resist arrest comes from the Court of Appeals. In *Bovan v. State*,<sup>228</sup> decided in 1997, the Court of Appeals refused to extend the right to resist an illegal seizure to a third party. Prior cases granted the right to resist an unlawful arrest to third parties observing the arrest.<sup>229</sup> Prior cases also granted the right of third persons to resist the search of their own home for someone.<sup>230</sup> The Court of Appeals drew the line here, however, holding that third persons could not object to an illegal search on the premises of another. To do so, the court asserted, brought with it “the specter of significant breaches of the peace.”<sup>231</sup> Such language sounds very similar

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to the language courts have used in other jurisdictions to completely eliminate the right to resist arrest. The court declined to take such a radical step here, however, simply limiting the right somewhat.

### VI. Conclusion

¶85 The Mississippi Supreme Court has been unequivocal in its support of the common law right to resist an unlawful arrest. It has adopted and endorsed the general rule, as well as its limitations. The rule was adopted by the court without explanation, and with rare exception, its continued endorsement has also been unexplained. Furthermore, the court has consistently refused to discuss the modern trend towards abrogation of the rule, or to explain the rule when so many other states that have considered it have chosen to discard it.

¶86 Since the court has chosen not to explain its adoption and retention of the common law rule, observers are left to speculate as to why it remains vital. I would suggest that a possible explanation is the court's unstated acceptance of the subcultural value of the rightness of violence in the face of an unprovoked attack, or in the words of the common law, a trespass upon the person. The Southern subculture of violence and the Southern tradition of honor and the validity of resorting to violence as a means of defending one's honor and/or self form a natural foundation for the legal doctrine involving the right to resist an unlawful arrest. An unlawful arrest is a form of and the tort of false imprisonment: unwanted touching, deprivation of liberty. The seizure of a person by an officer without legal justification is a serious affront to personal liberty and the right of privacy. The original justification for the rule, that a person subject to an unlawful arrest is provoked by the attempt, fits smoothly with notions of individual liberty and honor.

¶87 The right to resist an unlawful arrest does not give carte blanche to individuals being arrested to resist or to use any degree of force they choose. There are clear limits on the right. The rule simply permits the citizen to act at their peril in challenging authority and protects them from punishment for challenging unwarranted authority. The Mississippi courts have endorsed the right to resist an unlawful arrest without exception, in the face of a clear modern trend towards elimination of the common law right to resist an unlawful arrest. This steadfast adherence to a doctrine that condones violence in defense of one's honor is in line with Southern conceptions of the validity of the use of violence, both in defense of self and in defense of one's honor.

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

2 James Engel, *Criminal Law—The Right to Resist an Unlawful Arrest in Modern Society—Commonwealth v. Moreira*, 388 Mass. 596, 447 N.E.2d 1224 (1983), 18 SUFFOLK L. REV. 107 (1984).

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

4 Annot., 44 ALR3d 1078, Modern Status of Rules as to Right to Resist Illegal Arrest. See also, Note, Criminal Procedure—Protection Accorded the Officer Who Arrests Under A Defective Warrant, 42 KY. L. J. 120 (1953).

5 See, e.g., *State v. Koonce*, 214 A.2d 428 (1965).

6 See, e.g., Del. Code Ann. Tit. 11, 464(d).

7 See, e.g., Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

8 See, e.g., *State v. Valentine*, 935 P.2d 1294 (Wash. 1997); *State v. Hobson*, 577 N.W.2d 285 (Wis. 1998)

9 See notes 96-109 and text, *infra*.

10 The Mississippi courts first addressed the right to resist unlawful arrest in *Merritt v. State*, 5 So. 386 (1889), and most recently addressed the right in *Bovan v. State*, 706 So.2d 254 (Miss App. 1997). For a discussion of all Mississippi cases dealing with the right to resist arrest, see notes 125-205 and text, *infra*.

11 See notes 106-110 and text, *infra*.

12 See notes 111-125 and text, *infra*.

13 See, e.g., Raymond D. Gastil, *Homicide and A Regional Culture of Violence*, 36 AMER. SOCIOLOGICAL REV. 412 (1971); John Shelton Reed, *The Enduring South: Subcultural Persistence in Mass Society* (1972);

14 M. Dwayne Smith and Robert Nash Parker, *Types of Homicide and Variation in Regional Rates*, 59 SOCIAL FORCES 136 (1980);

15 See notes 111-125 and text, *infra*.

16 See notes 15-43 and text, *infra*. It bears mentioning that this article is concerned only with the right to resist an unlawful arrest. Related issues include the right to resist a lawful arrest and the right to resist an arrest, lawful or unlawful, that is attempted with excessive force. For a discussion of the right to resist excessive force used to effect an arrest, see generally, Dag E. Ytreberg, Annot., *Right to Resist Excessive Force Used in Accomplishing Lawful Arrest*, 77 A.L.R.3d 281. There exists a substantial body of case law on the right to resist an arrest involving excessive force. Additionally, this article does not address the related issue of obstruction of a police officer or obstruction of justice. These are charges which in some jurisdictions may be levied against one who resists arrest, but in general these offenses are intended to penalize different conduct. For a discussion of obstruction of justice, see Note, *Types of Activity Encompassed by the Offense of Obstructing a Public Officer*, 108 PENN. L. REV. 388 (1960). For a discussion of obstruction of justice, see Annot., *Criminal Liability for Obstructing Process As Affected By Invalidity or Irregularity of the Process*, 10 A.L.R.3d 1146.

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17 See notes 44-96 and text, *infra*.

18 See notes 97-110 and text, *infra*.

19 See notes 126-206 and text, *infra*.

20 “No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgement of his peers or by the law of the land.” Magna Charta Sec. 39 (1215).

21 93 Eng. Rep. 349 (K. B. 1710).

22 The constable apparently arrested the woman on the basis of a warrant issued pursuant to a statute allowing certain officials to “hear and punish incontinencies.” *Id.* Among the activities included under the phrase incontinencies was lewd or unchaste behavior.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 84 Eng. Rep. 1082 (K. B. 1666).

29 The constable was actually not arresting the man for having committed a crime, but instead was attempting to impress the man into the army. *Id.*

30 *Id.*

31 *Id.*

32 93 Eng. Rep. 349.

33 93 Eng. Rep., at 352-353.

34 *Id.*

35 See, e.g., *The King v. Thompson*, 168 Eng. Rep. 1193 (K. B. 1825) (excusing an assault on a constable by a journeyman wrongfully arrested on suspicion of stealing his master’s tools); *The King v. Curvan*, 168 Eng. Rep. 1213 (K. B. 1826) (excusing an assault on a constable by a man wrongfully arrested on suspicion of insulting another).

36 See, e.g., *The King v. Mead*, 2 Stark. 205 (1817); *The King v. Thompson*, 168 Eng. Rep. 1193 (K. B. 1825).

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37 *See, e.g.*, *The King v. Thompson*, 168 Eng. Rep. 1193 (K. B. 1825) (excusing an assault on a constable by a journeyman wrongfully arrested on suspicion of stealing his master's tools); *The King v. Curvan*, 168 Eng. Rep. 1213 (K. B. 1826) (excusing an assault on a constable by a man wrongfully arrested on suspicion of insulting another).

38 *See, e.g.*, *The King v. Mead*, 2 Stark. 205 (1817) (excusing an assault on a bailiff because the arrest was unlawful on the grounds that the bailiff had displayed the proper warrant, but not the underlying writ).

39 *See, e.g.*, *The Queen v. Davis*, 1 Leigh and Crave's C.C. Res. 64 (Camarthen Assizes, 1861) (holding that resisting an arrest when the constable had a warrant which contained only some minor, technical defects, was not excused).

40 *See, e.g.*, *The Queen v. Davis*, 1 Leigh and Crave's C.C. Res. 64 (Camarthen Assizes, 1861) (“[f]or the officer must at his peril pay obedience to [the warrant]”).

41 Chevigny, *supra* note 1, at 1131.

42 *The Queen v. Davis*, 1 Leigh 8 C.C.C. 64 (Carmarthen Assizes 1861). Davis was charged with killing a constable who was attempting to execute an arrest warrant which contained some technical defects. The court held that the killing of a constable attempting to make an arrest pursuant to a facially valid warrant was murder, and no provocation existed. *See also*, *The King v. Thompson*, 168 Eng. Rep. 1193 (K. B. 1825) (arrest for refusal to finish work); *the King v. Curvan*, 168 Eng. Rep. 1213 (K. B. 1826) (arrest on suspicion of having insulted someone). *See also*, Annot. 10 A.L.R.3d 1146 (1966) (discussing American cases involving arrest based on a technically void warrant). *See Chevigny, supra* note 1, at 1131.

43 *Id.*

44 *Id.* at 1131-1132. *See also*, Annot., 10 A.L.R.3d 1146 (1966).

45 Engel, *supra* note 2.

46 These states were California, Delaware, New Hampshire, and Rhode Island. *See* Cal. Penal Code Sec. 834a (West 1970); Del. Code Ann. Tit. 11, Sec. 1905 (1969); Ill. Rev. Stat. Ch. 38, Sec. 7-7(1971); N. H. Rev. Stat. Ann. Sec. 594.5 (1974); N.Y. Penal Law Sec. 35.27 (McKinney Supp. 1975); R. I. Gen. Laws Sec. 12-7-10 (1956).

47 *United States v. Di Re*, 332 U.S. 581, 594 (1948).

48 *Bad Elk, supra*, note 3.

49 *Id.* at 530-531.

50 *Id.*

51 *Id.*

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52 The police officers claimed that Bad Elk fired on them without provocation, while Bad Elk claimed the deceased made a movement as if he was going for his weapon about to shoot him. *Id.* at 532-533.

53 The proffered instruction was: “From the evidence as it appears in this action, none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them.” *Id.* at 533.

54 The trial judge charged the jury as follows: “The deceased, John Kills Back, had been ordered to arrest the defendant; hence he had a right to go and make the attempt to arrest the defendant. The defendant had no right to resist him . . . the deceased, being an officer off the law, had a right to be armed, and for the purpose of arresting the defendant he would have had the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, and the fact that he was using no more force than was necessary to take his prisoner would not be sufficient justification for the defendant to shoot him and kill him. The defendant would only be justified in killing the deceased when you should find that the circumstances showed that the deceased had so far forgotten his duties as an officer and had gone beyond the force necessary to arrest defendant, and was about to kill him or inflict great bodily injury upon him, which was not necessary for the purpose of making the arrest.” *Id.* at 533-534.

55 *Id.* at 534.

56 *Id.* at 534-535.

57 Some commentators have incorrectly asserted that the Court endorsed the provocation rationale for the common law rule, but this overstates what the Court actually did. See, e.g. Penn Lerblance, *Impeding an Unlawful Arrest*, 61 DEN. L. R. 655, 664 (1984).

58 *Di Re*, *supra*, note 47

59 *Id.* at 583.

60 *Id.*

61 *Id.*

62 The Uniform Arrest Act (1941).

63 The Model Penal Code (1961).

64 Note, *Resistance to Illegal Arrest*, 29 MICHIGAN L. REV. 62 (1924).

65 *Id.*

66 *Id.* at 65.

67 *Id.* at 64.

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68 Warner, *supra* note 7.

69 *Id.* at 316.

70 *Id.*

71 *Id.* According to Warner, at the time of the writing of the Uniform Arrest Act, “The law of arrest by peace officers illustrates the discrepancy between law in the books and the law in action.” *Id.* at 315.

72 *Id.* at 317. The Uniform Arrest Act is included in the Warner article, on pages 343-347. Its full title is “*An Act Concerning Arrests by Peace Officers, Providing for the Questioning and Detention of Suspects, Searching Suspects for Weapons, the Force Permissible in Making and Resisting Arrest, Arrests without a Warrant, the Use of Summons instead of Arrest, the Release and Detention of Persons Arrested and the Identification of Witnesses, Prescribing Penalties, and Making Uniform the Law Relating Thereto.*” *Id.* at 343-344. In composing the title, the authors of the Act apparently opted for comprehensiveness of coverage over brevity, as the full title sets forth the nine topics included in the Act.

73 Professor Warner notes in the text of the article that the right to resist arrest is covered in Section Six of the Act. *Id.* at 331. The Act as printed in the article covers the right in Section Five. *Id.* at 345. This error has been repeated by later commentators.

74 *Id.* at 345.

75 *Id.* at 331.

76 *Id.* at 330.

77 *Id.*

78 *Id.*

79 The exclusionary rule is a judge-created remedy for violations of the Fourth Amendment by police officers or their agents. Under this rule, first applied to the federal government in *Weeks v. United States*, 232 U.S. 383 (1914), and applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), any evidence seized by police officers in violation of the Fourth Amendment will be excluded from trial.

80 This requirement was first announced by the Court in *Miranda v. Arizona*, 384 U.S. 436 (1966).

81 Warner, *supra* note 7, at 330.

82 *Id.*

83 *Id.* at 331.

84 *Id.* at 330.

85 *Id.*

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86 *See, e.g.*, JOHN HOWARD, *THE STATE OF PRISONS* (1929). A later commentator, examining the same sources noted that “gaol fever” was such a problem that in 1730 several officers of the court, including the lord chief baron, at the Lent Assize at Taunton contracted the disease from prisoners brought before the bar and died. Ralph D. Smith, *Comment, Criminal Law—Arrest—The Right to Resist Unlawful Arrest*, 7 NAT. RESOURCES J. 119, 122 n. 16 (1967).

87 *See, e.g.*, Valentine, *supra* note 8 (“One can understand why, as the Tooley court said, an unlawful arrest was a great provocation affecting all people out of compassion.”) (internal quotation marks omitted).

88 *See, e.g.*, Smith, *supra* note 86, at 123 (“Where imprisonment was often the equivalent of a death sentence, or at least, a living death, one can understand why men resisted arrest.”). *But see* Chevigny, *supra* note 27.

89 *See, e.g.*, Robert H. K. Walter, *Comment—Taking Away Right to Resist Illegal Arrest*, 39 CAL. L. REV. 96 (1951); Max Hochandale and Harry W. Stege, *Note—Criminal Law: The Right to Resist Arrest: An Outdated Concept?*, 3 TULSA L.J. 40 (1966); Smith, *supra* note 65; James Lindsey, *Comment: The Right to Resist Unlawful Arrest*, 10 AKRON L. REV. 171 (1976); Thomas H. Hearne, *Comment, Self-defense and the Right to Resist Unlawful Arrest*, 43 MO. L. REV. 744 (1978); Jefferson D. Hughes III, *Note, The Right to Resist Unlawful Arrest*, 38 LA. L. REV. 840 (1978); Lerblance, *supra* note 39; Engel, *supra* note 1; James Moskal, *Note, Justification, Excuse, and Resisting Unlawful Arrest*, 33 WAYNE L. REV. 1471 (1987); F. Todd Lowell, *Comment—When Should Force Directed Against A Police Officer Be Justified Under the Maine Criminal Code?—Toward A Coherent Theory of Law Enforcement Under the Code’s Justification Provision*, 55 ME. L. REV. 385 (1993); Alexandra W. Tauson, *Recent Decision--Criminal Law—Resisting Arrest—Unlawful Arrest—The Pennsylvania Supreme Court Held That Resistance to an Arrest Found to be Unlawful Cannot Result in A Conviction for Resisting Arrest But Can Result in Conviction for Aggravated Assault*, 55 DUQ. L. REV. 755 (1996).

90 *See, e.g.*, Lindsey, *supra* note 89 (arguing for modification of the rule to allow resistance when it is an “uncalculated reaction”); Hearne, *supra* note 68 (arguing for modification of the rule to allow resistance when there is “reasonable provocation”); Hughes, *supra* note 68 (arguing for retention of the common law rule). In general these articles repeated the arguments already presented by prior critics. Interestingly, these articles opposed the trend towards elimination of the common law rule. Somewhat removed from the violence and turmoil of the civil rights movement and anti-war protests of the 1960s, these authors seemed more receptive to arguments that the common law rule remained vital, if in modified form.

91 Chevigny, *supra* note 1.

92 *Id.* at 1129-1131.

93 *Id.* at 1131-1132.

94 *Id.* at 1129.

95 *Id.* at 1130-1131.

96 *Id.* at 1131.

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97 *Id.* at 1132-1138. Chevigny notes that “[t]he decline of the common law rule dates at least from Professor Warner’s attack in the forties.” *Id.* at 1132-1133. He also notes that the American Law Institute rejected the common law rule “after a spirited debate.” *Id.* at 1132.

98 The states are cited as follows: Cal. Penal Code § 834(a) (West Supp. 1968); Del. Code Ann. tit. 11, § 1905 (1951); N. H. Rev. Stat. Ann. § 594:5 (1955); Ill. Comp. Stat. Ann. 38/7-7 (West 1961); N.Y. Penal Law § 35.27 (McKinney 1971); R. I. Gen. Laws § 12-7-10 (1941). *Id.* at 1133, n. 30.

99 Chevigny, *supra* note 1, at 1133.

100 *Id.*

101 *Id.* at 1133-1134.

102 *Id.* at 1134. Chevigny notes that while bail is available to many more individuals than it was at common law, it is still not universal, and many defendants cannot afford even the lowest bail amount.

103 *Id.* at 1134-1135. Chevigny notes that such safeguards may exist in name only, as defendants often lack the proof necessary to establish a constitutional violation, and police officers may not testify truthfully.

104 *Id.* at 1135. Chevigny notes that administrative remedies have not proven adequate in controlling police abuses.

105 *Id.* at 1135-1136. Chevigny notes that injunctions are rarely granted against the police, and that money damages are difficult to obtain.

106 *Id.* at 1136.

107 “The decision to resist is the work of the moment rather than the result of carefully considered alternatives. The real question is whether for this act of resistance the citizen ought to be convicted of a crime.” *Id.* at 1137. Chevigny points out that the common law rule provides no protection for those who resist a lawful arrest, and no protection for those who resist what they incorrectly perceive to be an unlawful arrest. A citizen who chooses to resist acts at their peril in this regard. *Id.*

108 *Id.* at 1147.

109 Model Penal Code (Tentative Draft No. 8 1958).

110 JOEL SAMAHA, CRIMINAL LAW (6th edition, 1999). For a discussion of the writing and adoption of the Model Penal Code and a discussion of its contents, *see* Herbert Wechsler, *The Model Penal Code and the Codification of American Criminal Law*, in CRIME, CRIMINOLOGY, & PUBLIC POLICY 419 (Roger Hood, ed., 1974).

111 Model Penal Code §3.04(2)(a)(i)(1985).

112 PAUL ROBINSON, 2 CRIMINAL LAW DEFENSES 142(f)(5)(1984), note 53.

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113 Model Penal Code §3.04(2)(a)(I) commentary at 19 (Tentative Draft No. 8 1958).

114 WAYNE R. LAFAVE & AUSTIN W. SCOTT, *CRIMINAL LAW* (2d ed. 1986).

115 *Id.* at 46.

116 *Id.*

117 See, e.g., *People v. Curtis*, 450 P.2d 33 (Cal. 1969); *Miller v. State*, 462 P.2d 421 (Alaska, 1969).

118 See, e.g., *State v. Hatton*, 568 P.2d 1040, 1046 (Ariz. 1977); *State v. Richardson*, 511 P.2d 263, 268 (Idaho 1973); *State v. Thomas*, 262 N.W.2d 607, 610-611 (Iowa 1978); *State v. Austin*, 381 A.2d 652, 654-55 (Me. 1978); *Commonwealth v. Moreira*, 447 N.E.2d 1224, 1227 (Mass. 1983); *State v. Nunes*, 546 S.W.2d 759, 762 (Mo. Ct. App. 1977); *State v. Koonce*, 214 A.2d at 433; *State v. Doe*, 583 P.2d 464, 467 (N.M. 1978); *City of Columbus v. Fraley*, 324 N.E.2d 735, 740 (Ohio 1975);

119 *Id.*

120 *Id.* at 46-47. These four states had statutory language which closely tracked the language of Section Five of the Uniform Arrest Act. The authors describe the Act as “an attempt, on the part of educated, informed persons to provide a compromise between unbounded liberty and an ordered society.” *Id.* at 47. For a discussion of the Uniform Arrest Act, see Warner, *supra* note 6.

121 Hochandale and Stege, *supra* note 68, at 47 (quoting from a New Jersey court of appeals decision: “We declare it to be the law of this state that a private citizen may not use force to resist arrest by one he knows or has good reason to believe is an authorized peace officer, whether or not the arrest is illegal.” The case citation is not provided, but it appears to come from *State v. Koonce*, 214 A.2d 428, 436 (N. J. 1965).

122 Cal. Penal Code § 834a (West 1970); Del. Code Ann. tit. 11, § 1905 (1999); Il. St. Ch. 720 §5/7-7 (West 2000); N. H. Rev. Stat. Ann. § 594.5 (1999); N.Y. Penal Law § 35.27 (McKinney 1999); R. I. Gen. Laws § 12-7-10 (2000).

123 *Miller v. State*, 462 P.2d 421, 427 (Alaska 1969); *State v. Richardson*, 511 P.2d 263, 268 (Idaho 1973); *State v. Mulvihill*, 270 A.2d 277, 279 (N. J. 1970) (affirming the decision in *State v. Koonce*, 214 A.2d 428, 436 (N. J. 1965)); *City of Columbus v. Fraley*, 324 N.E.2d 735, 740 (Ohio 1975).

124 Ark. Code Ann. § 5-2-612 (Michie 1999); Cal. Penal Code § 834a (West 1999); Colo. Rev. Stat. § 18-8-103(2) (1999); Conn. Gen. Stat. § 53a-23 (1999); Del. Code Ann. tit. 11, § 1905 (1999); Fla. Stat. Ch. 776.051(1) (1999); Il. St. Ch. 720 §5/7-7 (West 2000); Iowa Code § 804.12 (1999); Mont. Code Ann. § 45-3-108 (1999); Neb. Rev. Stat. § 28-1409(2) (2000); N. H. Rev. Stat. Ann. § 594.5 (1999); N.Y. Penal Law § 35.27 (McKinney 1999); Or. Rev. Stat. § 161-260 (1997); 18 Pa. Cons. Stat. § 505(b)(1)(i) (1999); R. I. Gen. Laws § 12-7-10 (2000); S.D. Codified Laws § 22-11-4 (Michie 2000); Tex. Penal Code Ann. §§ 9.31(b)(2), 38.03(b) (West 2000); Va. Code Ann. § 18.2-460 (Michie 1999).

125 *Miller v. State*, 462 P.2d 421, 427 (Alaska 1969); *State v. Hatton*, 568 P.2d 1040, 1046 (Ariz. 1977); *State v. Richardson*, 511 P.2d 263, 268 (Idaho 1973); *State v. Austin*, 381 A.2d 652, 654-55 (Me. 1978); *Commonwealth v. Moreira*, 447 N.E.2d 1224, 1227 (Mass. 1983); *In the Matter of the Welfare of Burns*, 284 N.W.2d 359, 360 (Minn. 1979); *State v. Nunes*, 546 S.W.2d 759, 762 (Mo. Ct.

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App. 1977); *State v. Koonce*, 214 A.2d at 433; *State v. Doe*, 583 P.2d 464, 467 (N.M. 1978); *City of Columbus v. Fraley*, 324 N.E.2d 735, 740 (Ohio 1975); *State v. Peters*, 450 A.2d 332, 335 (Vt. 1982).

126 Ark. Code Ann. § 5-2-612 (Michie 1999); Cal. Penal Code § 834a (West 1999); Colo. Rev. Stat. § 18-8-103(2) (1999); Conn. Gen. Stat. § 53a-23 (1999); Del. Code Ann. tit. 11, § 1905 (1999); Fla. Stat. Ch. 776.051(1) (1999); Il. St. Ch. 720 §5/7-7 (West 2000); Iowa Code § 804.12 (1999); Mont. Code Ann. § 45-3-108 (1999); Neb. Rev. Stat. § 28-1409(2) (2000); N. H. Rev. Stat. Ann. § 594.5 (1999); N.Y. Penal Law § 35.27 (McKinney 1999); Or. Rev. Stat. § 161-260 (1997); 18 Pa. Cons. Stat. § 505(b)(1)(i) (1999); R. I. Gen. Laws § 12-7-10 (2000); S.D. Codified Laws § 22-11-4 (Michie 2000); Tex. Penal Code Ann. §§ 9.31(b)(2), 38.03(b) (West 2000); Va. Code Ann. § 18.2-460 (Michie 1999); Haw. Rev. Stat. Ann. § 710-1026 (Michie 1999); Kan. Stat. Ann. § 21-3217 (1999); Ky. Rev. Stat. Ann. § 520.090 (Michie 1998); N.D. Cent. Code 12.1-08-02 (2000);.

127 *Miller v. State*, 462 P.2d 421, 427 (Alaska 1969); *State v. Hatton*, 568 P.2d 1040, 1046 (Ariz. 1977); *State v. Richardson*, 511 P.2d 263, 268 (Idaho 1973); *Casselman v. State*, 472 N.E.2d 1310, 1317 (Ind. Ct. App. 1985); *State v. Austin*, 381 A.2d 652, 654-55 (Me. 1978); *Commonwealth v. Moreira*, 447 N.E.2d 1224, 1227 (Mass. 1983); *State v. Wick*, 331 N.W.2d 769, 771 (Minn. 1983); *State v. Nunes*, 546 S.W.2d 759, 762 (Mo. Ct. App. 1977); *State v. Koonce*, 214 A.2d 428, 433 (N.J. 1965); *State v. Doe*, 583 P.2d 464, 467 (N.M. 1978); *City of Columbus v. Fraley*, 324 N.E.2d 735, 740 (Ohio 1975); *State v. Gardiner*, 814 P.2d 568, 576 (Utah 1991); *State v. Peters*, 450 A.2d 332, 335 (Vt. 1982); *State v. Valentine*, 935 P.2d 1294, 1304 (Wash. 1997).

128 *See, e.g.*, Wy. Code Ann. § 6-5-204(a) (Michie 2000); *see also*, *Roberts v. State*, 711 P.2d 1131, 1134 (Wyo. 1985).

129 Ala. Code § 13A-3-28 (1999); *Brown v. State*, 20 S. 103 (1895).

130 La. Rev. Stat. Ann. § 14:108 (West 2000); *State v. Lewis*, 386 So.2d 1079, 1083 (1980).

131 *See, e.g.*, *Smith v. Holeman*, 441 S.E.2d 487, 491 (Ga. 1994); *Rogers v. State*, 373 A.2d 944, 952 (Md. 1977); *Smith v. State*, 208 So.2d 746, 747 (Miss. 1968); *State v. Swift*, 414 S.E.2d 65, 67-8 (N. C. 1992); *Sandersfield v. State*, 568 P.2d 313, 315 (Ok. 1977); *State v. DeBerry*, 157 S.E.2d 637, 640 (S. C. 1967); *Long v. State*, 443 S.W.2d 476, 478-79 (Tenn. 1969); *State v. Gum*, 69 S.E. 463, 464 (W. Va. 1910)

132 *See, e.g.*, *State v. Swift*, 414 S.E.2d 65, 67-8 (N. C. 1992); *Smith v. Holeman*, 441 S.E.2d 487, 491 (Ga. 1994).

133 Marvin E. Wolfgang and Franco R. Ferracuti, *The Subculture of Violence* (1967).

134 *See id.*

135 *See id.*

136 *See, e.g.*, Claude S. Fischer, *Toward A Subcultural Theory of Urbanism*, 80 AMER. J. SOC. 1309 (1975); Donald Shoemaker and J. Sherwood Williams, *The Subculture of Violence and Ethnicity*, 15 J. CRIM. JUST. 461 (1987).

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137 See, e.g., Sheldon Hackney, *Southern Violence*, in THE HISTORY OF VIOLENCE IN AMERICA (Hugh D. Graham and Ted R. Gurr, eds.), (1969).; Raymond D. Gastil, *Homicide and A Regional Culture of Violence*, 36 AMER. SOCIOLOGICAL REV. 412 (1971); John Shelton Reed, *The Enduring South: Subcultural Persistence in MASS SOCIETY* (1972); DICKSON D. BRUCE, *VIOLENCE AND THE CULTURE OF THE ANTEBELLUM SOUTH* (1979); Steven F. Messner, *Regional and Racial Effects on the Urban Homicide Rate: The Subculture of Violence Revisited*, 88 AMER. J. SOC. 997 (1983); Steven F. Messner, *Regional Differences in the Economic Correlates of the Urban Homicide Rate*, 21 CRIM. 477 (1983); Lin Huff-Corzine, et al., *Southern Exposure: Deciphering the South's Influence on Homicide Rates*, 64 SOCIAL FORCES 906 (1986).

138 See, e.g., Howard S. Erlanger, *Is There A Subculture of Violence in the South?*, 66 J. CRIM. L. & CRIMINOLOGY 483 (1975) ; Colin Loftin and Robert Hill, *Regional Subculture and Homicide: An Examination of the Gastil-Hackney Thesis*, 39 AMER. SOCIOLOGICAL REV. 714 (1974); James F. O'Connor and Alan Lizotte, *The Southern Subculture of Violence Thesis and Patterns of Gun Ownership*, 24 SOCIAL PROBLEMS 420 (1978); M. Dwayne Smith and Robert Nash Parker, *Types of Homicide and Variation in Regional Rates*, 59 SOCIAL FORCES 136 (1980); Robert J. Sampson, *Crime in Cities: The Effects of Formal and Informal Social Control*, in COMMUNITIES AND CRIME (Albert J. Reiss and Michael Tonry, eds., 1986).

139 See Hackney, *supra* note 114.

140 See, e.g., Reed, *supra* note 114; Erlanger, *supra* note 115; Hackney, *supra* note 114.

141 See Christopher G. Ellison, *An Eye For An Eye? A Note on the Southern Subculture of Violence Thesis*, 69 SOCIAL FORCES 1223 (1991).

142 See, e.g., Huntington C. Brearly, *The Pattern of Violence*, in CULTURE IN THE SOUTH (W. T. Couch, ed., 1935).

143 See, e.g., Jo Dixon and Alan J. Lizotte, *Gun Ownership and the Southern Subculture of Violence*, 93 AMER. J. SOC. 383 (1987); Franklin E. Zimring, *Is Gun Control Likely to Reduce Violent Killings?* 35 U. CHI. L. REV. 721 (1968).

144 Gastil, *supra* note 114, at 420-421.

145 See Reed, *supra* note 114, at 47.

146 See JOHN SHELTON REED, *ONE SOUTH: AN ETHNIC APPROACH TO REGIONAL CULTURE* (1982).

147 See *id.*

148 See, e.g., Ellison, *supra* note 118.

149 See, e.g., *Smith v. Holeman*, 441 S.E.2d 487, 491 (Ga. 1994); *State v. Swift*, 414 S.E.2d 65, 678 (N. C. 1992); *State v. DeBerry*, 157 S.E.2d 637, 640 (S. C. 1967); *Long v. State*, 443 S.W.2d 476, 478-79 (Tenn. 1969).

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150 *Merritt v. State*, 5 So. 386 (1889).

151 *Bovan v. State*, 706 So.2d 254 (Miss App. 1997).

152 5 So. 386 (1889).

153 *Id.*

154 *Id.*

155 *Id.* The court does not clearly explain this, but as Williams was the person arrested by the erstwhile officer Green and Merritt was the person convicted of resisting the arrest of Williams, it appears to be the case.

156 102 So. 175, 175 (1924).

157 *See id.* at 175.

158 *See id.*

159 *See id.*

160 *Id.* at 175. “Fight” may be too strong a term. The deputy testified at trial that he and the defendant “went into a tight little scuffle” but “[w]e was all in a good humor.” *Id.* at 175-76.

161 *Id.* at 176. Immediately after stating the question thusly, the court rephrased it in a manner suggesting the outcome: “[I]s it lawful for the occupant of the premises to use reasonable force to repel the invasion of a trespasser . . . ?” *Id.*

162 *Id.*

163 108 So. 711 (1926).

164 *See generally, id.* The precise age of Cherry is not reported. The court describes him as “a boy about grown.” *Id.* at 711.

165 *Id.*

166 *Id.* at 712. Wilkinson testified he shot Cherry while they were struggling for control of appellant’s pistol; other eyewitnesses testified Cherry was standing some eight to ten feet from Wilkinson when the fatal shot was fired.

167 *Id.* (internal quotation marks omitted).

168 *Id.* at 713.

169 *Id.* at 712. It should be noted that the court does mention that it is aligning itself with the majority rule, as expressed in the cases collected in *Corpus Juris Secundum. Id.*

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170 *See* Hinton et al. v. Sims et al., 158 So. 141 (1934).

171 *See id* at 142. Interestingly, the court makes much of the failure to identify, explaining that it, coupled with the phrase “put up your hands,” might have suggested to Hinton that Sims was not a police officer, but a criminal, or as the court put it in language more appropriate to the time, a “highwayman.” *Id.* at 143. Yet the court acknowledges that Hinton in fact knew both Sims and his fellow deputy. Thus it might seem unlikely that Hinton would have mistaken Sims for a robber. The court also notes, however, that “by the way, during these times it is well known that some officers of the law have turned bandits.” *Id.*

172 *Id.* at 143.

173 *See, e.g.,* Nichols v., State, 24 So.2d 14, at 15 (1945) (stating “we will not permit it to be held that a white man has the right to respond to and combat aggression and that an equal right under the same or equivalent circumstances shall be denied to a negro”).

174 30 So.2d 414 (1947).

175 *See id.* at 415-16.

176 *See id.* at 416.

177 48 So.2d 355 (1950).

178 *See id.* at 356-357.

179 *See id.* at 357.

180 149 So.2d 482 (1963).

181 The appellant was charged with violating Section 2294 of the Code of 1942, which prohibited the impeding of officers in the discharge of their duties. *See id.* at 483.

182 *See id.* at 483-484.

183 5 So. 386 (1889).

184 102 So. 175 (1924).

185 149 So.2d at 484 (*citing* 4 Am. Jur., Arrests, Sec. 92, at 63).

186 208 So.2d 746 (1968).

187 *Id.* at 746-747.

188 *Id.* at 747. The court based this not on prior case law or state statute, as there was none on point, but rather adopted the rule endorsed by “the overwhelming weight of authority.” *Id.*

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189 *Id.*

190 48 So.2d 355 (1955).

191 30 So.2d 414 (1947).

192 215 So.2d 234 (1968).

193 *Id.* at 239. The court also ordered the appellant reinstated in his office as a Supervisor for Wilkinson County. *Id.* Joliff had won election to the position between the time he was charged with a violation of the law and his trial. *Id.* at 235. After Joliff was convicted, the circuit court removed him from office. The Supreme Court determined that reinstatement was a proper remedy in this case.

194 *Id.* at 237.

195 *Id.* at 238.

196 At least thirty states eliminated the common law rule between 1965 and 1981. See notes 97-103 and text, *supra*.

197 350 So.2d 1384 (1977).

198 *Id.* at 1385.

199 *Id.*

200 *Id.*

201 *Id.* at 1386-1387.

202 *Id.* at 1386 (listing cases). The court went back as far as the first case to discuss the right to resist arrest in Mississippi, *Merritt v. State*, 5 So. 386 (1989).

203 246 So. 86 (1963).

204 *Id.* at 484.

205 The court cited as support for this assertion *Smith v. State*, 208 So.2d 746 (1968) and *Joliff v. State*, 215 So.2d 234 (1968), as well as *Craft v. State*, 30 So.2d 414 (1947), and *Hinton v. Sims*, 158 So. 141 (1934).

206 Clarified might be a more accurate description, as the court for the first time provided a discussion of the limitations on the common law right. Previously, the court had simply asserted that persons had a right to resist, so long as their resistance was reasonable. Exactly what constituted a reasonable degree of resistance was never explained. *See, e.g., King v. State*, 2149 So.2d 482 (1963); *Joliff v. State*, 215 So.2d 234 (1968).

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207 *Id.* It appears the court is familiar with the trend, however, as it notes that Watkins had other means of redress available to him and would not be unduly harmed by a short stay in jail. *Id.* at 1387. Such rationalizations are commonly provided in support of elimination of the common law rule. *See, e.g., Warner, supra* note 6; *Smith, supra* note 66.

208 396 So.2d 39

209 *Id.* at 40-41.

210 *Id.* at 41. The court noted its displeasure with the state's prosecution of the disturbing the peace charge when it was clearly inappropriate: "[I]t is incredible, under the facts and law of this case, that the State would contend the alleged violation occurred in a public place . . ." *Id.* at 42.

211 298 So.2d 746 (1968).

212 *See, e.g., Warner, supra* note 6.

213 *Boyd v. State*, 406 So.2d 824 (1981).

214 Adkin's failure to produce the misdemeanor arrest warrant did not necessarily invalidate the arrest, however. While the court in *Pettis v. State*, 48 So.2d 355 (1950), had stated the then-prevailing rule in Mississippi, that an arrest for a misdemeanor could occur only if the offense occurred in the presence of the officer or if the officer had the arrest warrant with him, the Mississippi legislature modified the common law rule in 1972. The modification allowed an arrest for a misdemeanor even in the absence of a warrant, so long as a warrant existed, and the officer showed it to the offender "as soon as practicable." Miss. Code. Ann. 99-3-7 (1972).

215 406 So.2d at 825. It should be noted that this version of the encounter is based on the testimony of Boyd. Adkins, not surprisingly, presented a somewhat different account. According to his version, McBeath and Adkins attacked him from different directions, and the "pocket knife" had a blade six to seven inches in length. Lending credence to at least the last part of Adkins' account is the fact that the cut he received from the knife required a hospital stay of eight days. *Id.*

216 The instruction read as follows: "[a] person has a right to use reasonable force to resist an unlaw[ful] arrest, or to aid another in resisting an unlawful arrest." This instruction closely tracks the common law rule. *Id.* at 826.

217 *Id.* Additionally, the court noted that the arrest warrant was never shown to McBeath, nor produced at trial. Thus, on the record, there was no proof offered by the state that the arrest was lawful. And, since the state has the burden of demonstrating the lawfulness of a misdemeanor arrest without a warrant, (*Clay v. State*, 184 So.2d 403 (1966); *Upshaw v. State*, 350 So.2d 1358 (1977)), a failure to meet the burden created an irrebuttable presumption that the arrest was unlawful.

218 In support of the proposition that the subject of an unlawful arrest may resist, the court cited *Wilkinson v. State*, 108 So. 711 (1926); *Smith v. State*, 208 So.2d 746 (1968); and *Ferguson v. State*, 242 So.2d 448 (1970). In support of the proposition that a bystander may also interfere to resist an unlawful arrest, the court cited *Rogers v. Huber*, 239 So.2d 333 (1970) (a civil case permitting a bystander to use force to resist an unlawful arrest).

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219 In support of the proposition that the subject of an unlawful arrest may resist, the court cited 6 Am. Jur.2d Assault and Battery Sec. 79, pp. 71-72 (2nd ed. 1963); and C. J. S. 6A Assault and Battery Sec. 92 at 481 (1975). In support of the proposition that a third party may lawfully intervene, the court cited C. J. S. 6A Assault and Battery Sec. 93 at 484-485 (1975); E. Fisher, *Laws of Arrests* 374-375 (1967); and W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW*, Sec. 54 (1972).

220 406 So.2d at 827.

221 655 So.2d 881 (1995).

222 *Id.* at 886-887.

223 *See, e.g.,* Chevigny, *supra* note 6.

224 *Id.*

225 655 So.2d at 887.

226 *Id.* The Court cited with general approval the rationale of the court in *People v. Hess*, 687 P.2d 443 (Colo. 1984), in which the court outlines the modern approach eliminating the right to resist arrest. The Mississippi declined to go so far, however.

227 655 So.2d at 888.

228 706 So.2d 254 (Miss App. 1997).

229 *See, e.g.,* Merritt v. State, 5 So. 386 (1889).

230 *See, e.g.,* Pettis v. State, 48 So.2d 355 (1950).

231 706 So.2d at 256.